MAINE REPORTS

90

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

1897

CHARLES HAMLIN

REPORTER

PORTLAND, MAINE

WILLIAM W. ROBERTS

1897

PRESS OF THOMAS W. BURR,
BANGOR, MAINE.

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.
HON. ALBERT R. SAVAGE. †

*Term expired May 15, 1897.
†Appointed May 15, 1897.

Justices of the Superior Courts.

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

ATTORNEY GENERAL.

HON. WILLIAM T. HAINES.

CHARLES HAMLIN, REPORTER OF DECISIONS.

ASSIGNMENT OF JUSTICES

FOR THE JUDICIAL YEAR, 1897.

LAW TERMS.

MIDDLE DISTRICT, at Augusta, Fourth Tuesday of May.
SITTING: PETERS, C. J., EMERY, FOSTER, WHITEHOUSE, STROUT and SAVAGE, JJ.

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

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

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CASES

IN THE

SUPREME JUDICIAL COURT,

OF THE

STATE OF MAINE.

BENJAMIN F. WOODBURY, in equity,

vs.

PORTLAND MARINE SOCIETY, and others.

Cumberland. Opinion February 24, 1897.

Corporation. Charitable Relief. Injunction.

The Portland Marine Society, a corporation of ancient origin, was created for the purpose of extending relief as occasion might require, to "decayed and disabled seamen, and to the poor widows and orphan children of deceased seamen, and for the promotion of seamanship and navigation." It has accumulated considerable property and funds from the entrance fees paid by members and annual dues. Lately, in order to keep up a social interest in the society and promote its welfare, it has been accustomed to give to its members an annual dinner. The complainant, one of its members, sought by a bill in equity to suppress the practice by inhibiting such an entertainment after it was contracted for and virtually in readiness to be partaken, and failing to obtain an injunction in the court below, now, upon appeal to this court, insists that the cost of the banquet, already long ago paid for out of the plentiful funds of the society, shall be collected from those members of the society who participated therein. *Held;* that while the court is unwilling to declare the practice to be legal, or to authorize or encourage its continuance, it does not deem it expedient to sustain the bill under the circumstances now existing.

The bill also sought to enjoin the payment of fifteen dollars which the society voted that its treasurer pay to a poor and worthy person, the bill alleging that such person does not belong to that class of beneficiaries of the society

entitled to relief from its charitable funds. But the defendants claimed that the person belongs in fact to the class to whom the society may extend charitable aid.

Held; that the officers of the society, acting in good faith, may decide such questions for themselves, when trivial amounts only are involved. Equity does not stoop to pick up pins.

IN EQUITY. ON APPEAL BY PLAINTIFF.

The case is stated in the opinion.

Eben Winthrop Freeman, for plaintiff.

Here is a private corporation with defined powers. An ultra vires act is threatened. Bill is brought, with prayer for injunction and general relief. The act is done. Injunction now would not meet the exigency of this case. Restitution will. What then is the duty of this court? Clearly, a decree for restitution with costs.

The plaintiff as a proper party brought this bill. He had a right to ask this court to restrain these acts. Pending the suit, a defendant by an act, which amounts to fraud, cannot constitute a proper plaintiff an improper plaintiff. Pending the suit he can no more change the existing status of the plaintiff than he can impair the power of a court to grant justice for his fraudulent act.

The State by its attorney general can intervene only when the corporation or the charitable fund is a public one. In the principal case it is private. The fund was established for disabled seamen and their families. It is a restricted and private fund. The State is not interested.

H. and W. J. Knowlton, for defendants.

This cause has been twice heard: first upon the prayer for temporary injunction, and later fully upon bill, answer and proof and judgment and decree for respondents at each hearing.

The appellant must show the decree appealed from to be clearly wrong, otherwise it will be affirmed. *Paul* v. *Frye*, 80 Maine, 26; *Gilpatrick* v. *Glidden*, 81 Maine, 137.

Complainant should set out the vote appropriating or authorizing the payment of three hundred dollars, also the fifteen dollars as alleged, instead of stating its purport.

Complainant states only his fears or apprehension which is not sufficient to authorize the injunction prayed for. High on Injunction, 3d edition, § 1184.

Courts of equity rarely interfere with the exercise of discretionary powers by corporate bodies or their officers. Ib. § 1186.

Complainant individually cannot have an injunction of a practice in which he has participated for several years without complaint, as the testimony shows in this case.

Complainant cannot have his co-trustees, acting in their corporate capacity, enjoined from carrying out any vote of a majority. Trustees are only required to conduct themselves faithfully and exercise sound discretion. *Lovell* v. *Minot*, 20 Mass. 119; *Harvard College* v. *Amory*, 9 Mass. 489.

Complainant has sustained no injury personally, and cannot have judgment in his favor. He is not a stockholder, but a member of the corporation which he seeks to have enjoined.

The fund of the society is a public fund and injunction is not authorized, except by proper process in behalf of the State. The application of Mrs. Annie C. Bowen for aid was passed upon by the society and allowed. The right to its benefits was settled finally by the vote of the corporation, it being the only body authorized to pass upon applications for aid.

The action of the society in holding banquets is fully justified by the result.

The fund has not been diminished, but has been largely increased by the holding of banquets.

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

PETERS, C. J. This bill in equity, instituted by a single complainant, as a member of the Portland Marine Society, against that corporation and its president and treasurer, to restrain the society from contracting for a banquet for its members on a certain public occasion, or to prevent payment for the same from the funds of the society if already contracted for, was heard below and

comes to this court by appeal from a decree by the sitting justice refusing to sustain the bill.

The decree recites the more material facts and states the reasons for refusing the equitable aid asked for; and is as follows:—"This case came on for hearing on bill, answer and proofs and has been argued by counsel, and it appeared:

"That in 1796 the defendant society was created by the Commonwealth of Massachusetts for 'the promotion of the knowledge of navigation and seamanship, the relief of decayed and disabled seamen and the poor widows and orphans of deceased seamen,' and empowered to hold property to the amount yielding an annual income of six thousand dollars for such purpose.

"The by-laws limit two-thirds of its members to persons who are or have been masters of vessels, and restrict aid to such persons, their widows and children. The society has accumulated a fund of over $27,000, and its annual income is about $1700. In 1889 the membership had decreased to twenty, and an effort was then made to renew interest in the society and increase its membership, resulting in raising the same to about sixty—now fifty-six. To this end annual dinners were inaugurated, to be paid for by the society at a cost of from $101.10 in 1889 to $136.95 in 1894. In 1895 the society paid nothing for the purpose. In December, 1895, the society appropriated three hundred dollars for a dinner, it being its centennial anniversary. To this use of the funds, the plaintiff objected and filed his bill to restrain payment. A preliminary injunction was moved, but denied by a justice of this court, and the funds were applied to this purpose, viz: $282.30.

"It is considered by the court that while such expenditure may not come within the scope and purpose of the charity created by the founders of the society, and is of questionable propriety, still, inasmuch as done in good faith and with honest motives, and the scope of the plaintiff's bill is so narrow as to embarrass the granting of adequate relief, and the other ground has no merit: It is therefore ordered, adjudged and decreed that the plaintiff's bill be dismissed, but without costs."

The decree rather understates than overstates the case, and a few other facts may be added. There were only two members of the society voting against the appropriation complained of, and no part of the principal funds of the society were encroached upon for the expenses of the entertainment, the necessary amount having been taken from certain unexpended interest money remaining at the time on hand.

Much is said in behalf of the complainant concerning the society as an institution strictly for charitable purposes. It was not altogether or even principally a charitable association. The act creating the society declares, "that the end and design of the institution of said society is the promotion of the knowledge of navigation and seamanship, the relief of decayed and disabled seamen, and the poor widows and orphans of deceased seamen."

Quite onerous duties are imposed on members of the society. Article nine of the by-laws provides as follows:—"It is enjoined on every maritime member of this Society, on his arrival from sea, to communicate to the President his observations, respecting the variation of the needle, the soundings, courses and distances; and all other things remarkable about this coast, as well as any particular observations promotive of nautical knowledge, in writing, to be examined and digested by the committee appointed by the Society for that purpose, and lodged with the Secretary to be recorded in the books of the Society."

The marine or regular members are required upon their admission to pay the sum of twenty dollars each and pay an annual assessment afterwards of ten cents a month for at least twenty-five years, and honorary members may be admitted in consideration of donations to the society of not less than twelve dollars each; and the latter are not eligible to office in the society and are not entitled to any benefits from its funds. And certain social duties and obligations are also imposed upon all the members alike.

The language of the decree hardly describes fully the stimulating influence of the efforts made in 1889 to increase the membership of the society and awaken an interest in its general welfare by converting it into a more social organization, the new feature

being an annual entertainment and dinner for its members. The by-laws were revised by which the admission fee of regular members was raised from twelve to twenty dollars, and more new members were added in two years after that time than had been admitted for the thirty years before, and there is every reason to believe that the new social feature of the society caused such increase of its prosperity. It was a means of bringing all the members together at least once each year, and the movement was decidedly a popular one. A participation in the annual banquet was the only compensation received or that was ever expected to be received by the members for all their contributions and services in behalf of the society. Who ever heard of an objection to our colleges providing a dinner for their graduates on commencement day?—and still it is to be presumed that there is no clause in any college charter permitting it. The college receives its compensation for the outlay in the promotion which the occasion invites for its welfare. Municipal corporations are constantly appropriating small sums for different sorts of public though not technically legal purposes, and a court of equity is rarely called upon to restrain them by injunction although such municipal practice may not be in all cases even a commendable one. The question is not without some authority. In Grant on Corporations, an old English work, it is said at page 80:—"A by-law involving an expenditure of the funds of the corporation, without an adequate advantage accruing to the corporation, is bad, as being unreasonable; and, therefore, a by-law to compel the giving of a dinner must show that it is for a beneficial purpose, or that an interest of the corporation is in some way promoted by it, or it will be invalid." To this text the author cites quite a number of old decisions.

The extraordinary remedy of injunction should be applied, so the leading authors say, only in very clear cases; and whether the remedy shall be granted or withheld must depend, they also say, upon which course may be required upon the grounds of expediency and sound public policy; especially where public rather than private rights are involved. In the present case an injunction was refused, the money for the entertainment has been expended, and

it does not impress us as expedient or feasible to attempt to reclaim it. Whilst we do not decide, and there is no occasion for our so deciding, that the practice of the society in providing annual entertainments to be paid for out of its ordinary funds, is strictly legal or justifiable, we feel that this particular bill under the circumstances better not at this stage of the proceedings be sustained. Future entertainments of the kind better perhaps be paid for by a fund to be contributed by the members of the society for such special purpose.

There is another claim presented by the bill not specifically mentioned in the decree. The bill claims that the society voted to pay fifteen dollars as a charitable contribution to a certain poor woman named, and that she did not belong to the class of persons entitled to receive a benefit as a beneficiary of the society. But the defendants claim that, as a matter of fact, she does come within the description of persons to whom the society may extend charitable aid. The officers of the society must be entitled, acting in good faith, to decide such questions for themselves when trivial amounts only are involved. Equity does not stoop to pick up pins.

Bill dismissed without costs.

CHARLES H. GOODWIN *vs.* FREDERICK O. GOODWIN.

Penobscot. Opinion February 24, 1897.

Sale. Delivery. Possession. Fraud.

While it is necessary, in order that an absolute sale of chattels shall be effectual as against second purchasers or creditors, that such sale be accompanied by an actual delivery, consisting of a complete relinquishment of the property by the vendor and as complete an acceptance of it by the vendee; still those acts may be considered as consummated where, after a formal delivery of the property, its possession is retained by the vendor by a contemporaneous agreement with the vendee as his agent or bailee; providing the contract of sale be a bona fide transaction.

A vendor sold five cows to a vendee by a bill of sale in which this agreement occurs:—"I agree to keep said cows for what milk they give without further

expense to said Goodwin [vendee] until the 20th day of March unless Goodwin disposes of them or takes them home before that time." The testimony shows that the cows were either partially or wholly paid for when the bill of sale was made, Feby. 20, 1895, and that on that day, the parties being present at the vendor's barn where the cows then were in their stalls, the vendor pointed out the cows to the vendee and said to him in the presence of a witness, "I deliver you this stock free of all encumbrances." *Held;* that if the jury believed this testimony, and that the transaction was not fraudulent, they were authorized to find that a sale was made accompanied by an actual delivery sufficient as against creditors of the vendor, who attached the cows before they were removed from his possession.

On Exceptions by Plaintiff.

This was an action of replevin for four cows, and in which the jury returned a verdict for the defendant. The title was in issue, and both parties claimed under Alphonso S. Rand.

The plaintiff claimed title under a bill of sale dated January 20th, 1896. This bill of sale was not delivered on the day of its date, but within a week thereafter, the payment for the cows being made at the time of the delivery of the bill of sale. At the time of the delivery of the bill of sale, the cows were in Rand's barn, on his farm in Stetson. The plaintiff did not at that time take away the cows, but claimed to have left them in the care of Rand under the arrangement stated in the bill of sale.

The defendant was an execution creditor of Rand, and placed his execution in the hands of a deputy sheriff who, under the defendant's direction, proceeded on the 6th day of February, 1896, to the barn of Rand; and there on execution seized the same cows, put a keeper over them and then advertised them for sale upon execution, and afterward, upon the 13th day of February, sold the same upon execution to the defendant.

The defendant contended that the sale to the plaintiff was fraudulent as to Rand's creditor's, but this contention was negatived by the jury in a special finding.

The defendant further contended that there had been no sufficient delivery of the cows from Rand to the plaintiff, as against him, the defendant; and also contended that he had no notice of any such sale prior to the time of the seizure on execution, and prior to the day of the sale on execution, but admitted that on

the day of the sale, and before the sale on execution, he was apprised of the sale to the plaintiff by being shown the bill of sale. The plaintiff, in turn, contended that there was a delivery, good as against creditors and innocent purchasers, and that the defendant did have notice prior to the seizure, and also contended that notice after seizure and before sale was sufficient.

The presiding justice instructed the jury that, if the defendant's contention was true, the sale to the plaintiff was not valid as against him, the defendant. To this ruling the plaintiff seasonably excepted.

The presiding justice, upon the question of delivery, further instructed the jury as follows:—

"The second point is that, whether this was genuine or not, he was an innocent creditor, having no knowledge of this transaction at the time; that the property was in the possession of Mr. Rand and he thereupon seized it, and that whatever may be Mr. Charles Goodwin's good faith, that it is a case between two innocent parties, and he having first got the possession is entitled to keep it. Well, to repeat: that is the rule of law. If one man purchases a piece of property and leaves it with his vendor, does not take it away or take delivery of it, and then another man, a creditor, finding it there with his debtor, and not knowing of the prior sale, has it seized, then both parties being innocent, the second one is protected because he was the first one who made the blunder by leaving the property where it might be seized by his vendor's creditors. If there be a delivery made, which I will explain a little later, then the purchaser is protected against all parties. If he takes delivery as I shall explain to you, that protects him; or, if the subsequent party creditor or other purchaser had notice of the first sale, the first purchaser is protected. The second purchaser can only protect himself by showing that he had no notice, and that there was not a delivery. Now the defendant says both. He says here there was no delivery and that he had no notice, and if both of these things appear, then no matter how bona fide the sale was, it won't avail the plaintiff because of his neglect to take over the property, or his neglect to give notice of

it. As between parties, when they are concerned themselves, gentlemen, there is no need of delivery. Mr. Foreman, I may have heard of your horse or know about your horse, and I ask you what you will take for him and you say one hundred dollars; and he is down in Bangor House stable now, and I say I will give it, and you say it is a trade. Is it my horse? And I say yes, it is my horse and your money. Now if we both understand that the whole title passes from you to me as between us two, the horse is mine, and if the stable burns up and the horse burns up, it is my loss and not yours. But if, after this talk with me, and after I pay you the one hundred dollars, you meet another man and he says, "I will give you one hundred and twenty-five dollars," and you say, "All right, I will take it," and sell it to him; but now I have bought it once and he has bought it; now if I have left that property there in that stable, there being no signs of its ever being transferred from you to me, and the second man comes and gets it first, he holds it. He was honest. He paid his money as well as I paid my money, and he got the property first and the law assists the most vigilant always. Or, if a creditor of yours, finding the horse there and not knowing of my purchase of it, levies upon it, he will hold it; and if I complain, he will say: "Why didn't you go and get your horse? What did you leave it for?" So you see that while as between the parties there need be no delivery, yet if a purchaser wants to hold the property against other purchasers, or against creditors of his vendor, he must take delivery or else give notice. [So Mr. Foreman, in the case I suppose, while I was safe so far as you were concerned to hold the property against you, if I desired to perfect my title and make it good against other parties, whether your creditors or your subsequent vendees, I was bound to go and get that horse into my own hands,—get it out of your possession into mine in some way;] so that when other parties came to take it, I should say, "Not only did I buy it, but I took delivery." And here the question is not so much about a delivery between the two, as whether or not as against Mr. F. O. Goodwin, Mr. Charles Goodwin had acquired the possession of these cows by the delivery to him by Mr. Rand.

What is a delivery? It must be a transfer from the dominion of one to the dominion of the other. You have a horse in your possession; you control it. Now to deliver it, you must turn it over so that the other man has the control and dominion over it. The ordinary way, of course, is the turning the article over. If I sell my watch to one of the counsel and deliver it to him, the natural way is to take it off and hand it to him. If it is a ship at sea, it is done in some other way by transfer, by bill of sale. If a drive of logs, it is done symbolically, going on to the drive,—on to the lumber pile, and turning it over to the other man for him to take charge of.

Now the plaintiff says even as against other parties and against this defendant, that there was a delivery. And the defendant says, "No." He says that the possession ran right along with Mr. Rand and there was no delivery. And right here, although out of order, I should, I think, recur again to the matter of fraud, the defendant claims that the very fact that the cows were allowed to remain in Rand's stable is evidence of fraud, going so far almost as to say that it was almost conclusive evidence of fraud. But it is not conclusive evidence of fraud; it is a circumstance. The fact that a man claiming under a sale did not take the property, did leave it with his vendor, while it would appear to all the world as belonging to the vendor, is evidence of fraud,—how weighty evidence, how good evidence of fraud, is for the jury to say,—how it affects your minds. It is regarded by the courts always as a little indication of a bogus transaction, but it may be explained satisfactorily, and in this case the plaintiff says he has explained it by showing you the reason of leaving it there,—that it might be cared for by Mr. Rand. [Now, is there in this case sufficient evidence to convince you of a delivery? There must be such evidence, arising from the conduct of the parties, as shows a relinquishment of ownership and possession of the property by the vendor and an assumption of these by the vendee. By the vendor we mean the man who sells, and by the vendee the man who buys. The doctrine of delivery rests upon the ground that the vendee, that is, the purchaser, should have the entire control of the

property, and that there should be some notoriety attending the act of sale, and hence proof of delivery will not be dispensed with on account of the relation of the parties with respect to the property at the time of the sale.] Now was there such turning over of the possession and control of this property from Mr. Rand to Charles Goodwin, as constitutes a delivery as against other parties? Now what did take place? You heard the story of Mr. Goodwin himself who says he took delivery. He does not say how. And you have heard the story of the young man Goodwin. Does the evidence convince you? Is it true, in the first place? Is what they say true? And secondly, if true, does it explain all satisfactorily,—that there was a relinquishment on the part of Mr. Rand of the control and possession on the one hand, and the assumption on the other by Mr. Charles Goodwin? Well, if there was a delivery and Charles Goodwin did all he ought to have done to protect himself against subsequent purchasers and creditors, as I have detailed to you, then the defendant fails on that part of his case; because, if there was a delivery, an actual turning over, with some degree of publicity, then the defendant, Mr. F. O. Goodwin, must suffer from it. But the want of delivery is not enough to protect Mr. Goodwin, the defendant, from this sale. It must also appear that he had no notice of the sale and for the purposes of this trial, I will rule to you that it must appear that he had no notice before the actual seizure, which was on the sixth day of February. If after he caused it to be seized, he took it into his possession, even though then he was notified, before the day of the sale, it did not matter; but if when he seized it, it had not been delivered and he had no notice of the sale, he is protected. It is too late, after that, for the purchaser to come and notify him of its having been sold."

To those rulings in the above charge of the presiding justice that are enclosed in brackets and also the following statement by the presiding justice in his charge to the jury (not included in the part of the charge above given) viz:—"If, however, even if it was bona fide, if there was no delivery, and F. O. Goodwin had no notice before the moment of the seizure, then he is protected," the plaintiff seasonably excepted.

The evidence for the plaintiff upon the question of delivery was from the plaintiff himself who testified as follows:—

"Q. Now you say this bill of sale was signed at night?

"A. No, sir, that bill of sale was made at my house and carried down to Mr. Rand's and signed down there."

Q. When?

A. The next day, or a day or two after, when he delivered me the stock.

Q. What I want to know is just the date of that. Was it the twenty-second or twenty-third that Rand signed this?

A. I could not say exactly; I know it was within a day or two."

"Q. If you paid him a part at your house, and a part in Bangor, how can you state to the jury that you had paid him all when he signed this bill of sale?

A. I do state and say that it is so, and he delivered me the stock that day. I paid him every dollar that I owed him when he signed that."

And from the plaintiff's son, Heman Goodwin, who testified as follows:—

"Q. You speak about delivery. I want to find out what they did about that.

A. I went into the south part of the barn—into the north part of the barn on the south side of the road, and he pointed the cows out—Mr. Rand did, and he says, "I deliver you this stock free from all incumbrance."

F. J. Martin and W. S. Townsend, for plaintiff.

Where the seller relinquishes his rights, possession and control as owner of the property, and assumes possession and control as agent, bailee or keeper for the purchaser, in submission to the title, will and control of the purchaser, that is in itself sufficient evidence of delivery as against attaching creditor and bona fide purchasers. The seller need do nothing more.

Counsel cited:—*Hotchkiss* v. *Hunt*, 49 Maine, 213; *Bethel Steam Mill Co.* v. *Brown*, 57 Maine, 9, 22; *Thorndike* v. *Bath*, 114 Mass. 116; *Tuxworth* v. *Moore*, 9 Pick. 347; *Bullard* v. *Wait*,

10 Gray, 55; *Elmore* v. *Stone*, 1 Taunton, 458; *Brooks* v. *Powers*, 15 Mass. 243, 244; *Hardy* v. *Potter*, 10 Gray, 89; Benjamin on Sales, Bennett's ed. (1888) 658; *Ropes* v. *Lane*, 11 Allen, 591; *Stinson* v. *Clark*, 6 Allen, 340; *Green* v. *Rowland*, 16 Gray, 58; *Ingalls* v. *Herrick*, 108 Mass. 351; *Calkins* v. *Lockwood*, 17 Conn. 154; *Meade* v. *Smith*, 16 Conn. 346, 360–367; *Dempsey* v. *Gardner*, 127 Mass. 381.

Notice:—*Haskell* v. *Greely*, 3 Maine, 425; *Ferguson* v. *Rafferty*, 6 L. R. A. 34, 46–47; *Shumway* v. *Rutter*, 8 Pick. 443.

P. H. Gillin, for defendant.

Counsel cited:—*Phillips* v. *Hunnewell*, 4 Maine, 376; *Vining* v. *Gilbreth*, 39 Maine, 496; *McKee* v. *Garcelon*, 60 Maine, 165.

The retention of personal property by the vendor raises a prima facie presumption of fraud:—Tiedman, Sales; 1 Benj. Sales 4th Am. Ed. p. 641; Twyne's Case, 3 Coke, 80; *Edwards* v. *Harben*, 2 Term Rep. 587.

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

PETERS, C. J. One Rand, by a bill of sale with an agreement included, January 20th, 1896, sold five cows to the plaintiff at Rand's barn in Stetson, the bill of sale and agreement being as follows:—

"Stetson, Jan. 20th, 1896.

Sold and delivered to C. H. Goodwin. Five cows Standing in my New Barn in the North end of the Barn meaning No-3-5-6-7-8- Three Five Six Seven and Eight all grade Houlstein Color Four Black and white and one Black. I have received One Hundred and Twenty-five Dollars in full payment for the same and I agree to Keep Said Cows for what milk they give without further expense to Goodwin until the twentieth day of March unless Goodwin disposes of them or takes them home before that time.

Wit. H. G. Goodwin.

A. S. RAND."

The evidence of delivery came from the plaintiff himself and from his son who witnessed the bill of sale. The father testified,

that the bill of sale was made at his own house and carried down to Rand's house and signed there; that the signing was done on the next day or within a day or two after the bill was made out and on the day when he took a delivery of the stock; and that he paid Rand every dollar due as the consideration for the sale when the bill of sale was signed.

The son testified to what took place between the parties as follows:—"Q. You speak about delivery. I want to find out what they did about that. A. I went into the south part of the barn—into the north part of the barn on the south side of the road, and he pointed the cows out—Mr. Rand did, and he says, 'I deliver you this stock free from all incumbrance.'"

The cows had not been taken from the barn of Rand at his farm on the sixth day of February, 1896, on which day they were seized upon an execution in favor of the defendant against Rand as Rand's property, and at a later date were sold by the officer to the defendant who took them away. Thereupon the plaintiff replevied the cows from the defendant.

Two questions were submitted to the jury upon which special findings were returned. The jury found that the transaction of sale was not fraudulent as against the vendor's creditors, and also that there was not a valid delivery. The general verdict was therefore necessarily for the defendant. It is contended by the plaintiff that, if the testimony on the subject of delivery was believed by the jury, and there is no sign in the case to the contrary, the two verdicts cannot logically stand together, and that the finding as to delivery was erroneous. The plaintiff further contends that the jury committed the mistake in consequence of a partially erroneous interpretation of the law of the case by the justice presiding. Whether that be so or not is the question presented.

It is not denied by the plaintiff that an actual, and not merely a constructive, delivery was necessary, but he contends that the delivery was actual, although perhaps not a strictly manual delivery.

The reason of the rule requiring delivery throws some light upon the question as to what may constitute a sufficient delivery. In the old case of *Ludwig* v. *Fuller*, 17 Maine, 162, SHEPLEY, J., comments on the subject as follows:—"The reason why a sale, when the price is paid, is not good as respects other parties without a delivery is, that the law regards the purchaser as in fault, and as acting unfairly and fraudulently in allowing the seller, by retaining the possession, to hold out the apparent evidence of ownership, and thereby induce others to purchase or to credit him to their injury." We apprehend that another reason for the rule may be that contracts of sale without delivery are more likely to be uncertain and indefinite as to the property really sold, and that a formal act of delivery would ensure a better identity of the articles intended to be covered by the sale. But the learned judge was speaking of the rule as it formerly stood by the old common law, and, while deprecating a change of the rule, remarks further upon it as follows:—"It must be admitted that the strength of the reasoning upon which the rule rests, that there must be a delivery as respects other parties, has been greatly impaired in this and other states, where the common law has been so modified as to allow the purchaser to prove, that the sale was not fraudulent, where possession did not accompany and follow it. What will amount to proof of delivery, has been the subject of much discussion; and it is rendered more difficult, and would probably be found impracticable to state any general rule applicable to all cases, especially in those states, where the law has been so modified as not to require an actual and permanent change of possession; and where delivery is therefore rather nominal and symbolical than actual. But because the reasoning upon which the rule of law was established does not operate as formerly, and the rule itself is less convenient in practice, that does not authorize a court of law, contrary to a uniform course of decisions, to declare that the rule no longer exists. However one may regret, that a modification of one rule of law should be found to impair the reason upon which another rule was established, it may afford a lesson, that when one is dealing with the common law, stare decicis is judicial wisdom.

And if experience has taught that this modification has been productive of litigation, and afforded greater facilities for the commission of frauds, it would lead to a like conclusion."

So far as the likelihood of fraud existing in cases where the articles sold are not taken away by the purchaser, that objection does not lie here; nor could there be any uncertainty of the property intended to be sold, inasmuch as its description is in writing. And there was no after purchaser to be misled by the seller's having an apparent ownership of the property although there was a creditor to attach it. There certainly was evidence enough to authorize a jury to find an actual delivery. The parties were present with the cows, the sale was expressly made in the presence of a witness, the price was paid, and the seller for a consideration became the bailee of the property for the purchaser. The possession of the cows was no longer in the seller as owner. His possession was thereafterwards the purchaser's possession and not his own. We do not see how any more formal or particular act of delivery would have been of any consequence. It was a natural mode of consummating the bargain, and anything more demonstrative might well excite a suspicion that the sale was merely pretended and fictitious.

We think the jury may have been led by the tenor of some portions of the charge of the judge to believe that all these acts were not of themselves sufficient to constitute a legal delivery. The illustrations which were given of a watch sold and delivered by going out of the seller's into the purchaser's pocket, and of the delivery of a horse made effectual by the buyer's act of taking the horse and leading him away, would tend to incline the jury to suppose that the purchaser in this case should have taken the cows away in order to constitute an actual delivery. The learned judge emphasized to the jury that, in order to constitute sale and delivery, there must be a "relinquishment of the ownership and possession of the property by the vendor, and an assumption of these by the vendee." It was further said that the vendee must have the entire control of the property. But it was not explained to the jury that there might be a relinquishment by the vendor

and an assumption by the vendee of the ownership, control and possession of the property without any removal of the property away, and that the purchaser could have the legal control and possession of the property while in the seller's hands as his agent or bailee, if there be no fraudulent purpose meditated by the parties. Although the doctrine found in the charge, as an abstract proposition, was technically correct, still it was an imperfect and rather inadequate presentation of the rules respecting delivery as applicable to the facts of the case before us; especially when we take in view the position taken in behalf of the plaintiff at the trial. The instructions were absolutely sound as applicable to a case of sale where no explanation is given or attempted to be given for the possession remaining in the seller's hands, indicating an apparent ownership in him. But the bill of sale and the agreement incorporated therein give sufficient explanation of that fact if the transaction was not fraudulent. Numerous authorities maintain the doctrine that when such a transaction is not fraudulent slight acts are sufficient to prove delivery.

In *Stinson* v. *Clark*, 6 Allen, 340, it is said by Metcalf, J., "that when a contract of sale is bona fide, and payment is made, in full or in part, of the price, slight acts are sufficient to show a delivery that will avail the buyer against the claims of third persons;" and certain pertinent cases are cited in the opinion of the court. The acts in that case showing delivery were not more significant than were the acts here. The statement in that case was that a blacksmith sold to a purchaser sixty horse-shoes for forty dollars, and holding up one of the shoes said:—"Take them; there are the shoes; I deliver them to you." The shoes by agreement were allowed to remain in the shop for some time, and were attached afterwards while remaining there by a creditor of the seller. It was held that the delivery was sufficient as against the creditor.

The doctrine of the case just cited is maintained in many cases, a few of which only need be examined in corroboration of our view of the pending question. In *Calkins* v. *Lockwood*, 17 Conn. 154, the parties to a sale of iron met at the place where the iron

was, and agreed upon the price and the mode of payment, and thereupon the seller said to the buyer:—"I deliver you the iron at that price." The iron remaining a while unmoved a creditor of the seller attached it, but the court held the delivery to be sufficient. In *Cutter* v. *Copeland*, 18 Maine, 127, the court, upon facts not unlike the present, announced the statement that there was no legal objection in a mortgagee's making the mortgagor his agent to hold possession of the goods mortgaged, the court in effect remarking that in such case the apparent possession of the one would be the real possession of the other. And this principle was adopted in the subsequent case of *Hotchkiss* v. *Hunt*, 49 Maine, 218, where the question was exhaustively examined, and the following rule as to delivery enunciated: "When, by the term of an agreement of sale, the article sold is to remain in the possession of the vendor, for a specific time, or for a specific purpose, as a part of the consideration, and the sale is otherwise complete, the possession of the vendor will be considered the possession of the vendee, and the delivery will be sufficient to pass the title even as against subsequent purchasers." That case was approvingly cited by the Massachusetts court in *Thorndike* v. *Bath*, 114 Mass. 116, the court quoting from the opinion in that case and relying on that and quite a number of other pointed and relevant decisions in support of the rule thus enunciated. In the case last cited it was held that evidence, that a person seeing an unfinished piano in the maker's shop, offered to purchase it of him if he would finish it, that the offer was then and there accepted, that a bill of sale was then and there made and that the price was paid at a subsequent day, the piano being left to be finished, will authorize a jury in finding a delivery of the piano sufficient to pass the title as against a subsequent purchaser. The case of *Barrett* v. *Goddard*, 3 Mason, 107, is apropos. In that case goods lying in a warehouse were sold by marks and numbers, and paid for, it being a part of the bargain that the goods should remain at the option and for the benefit of the buyer at the seller's warehouse, rent free, for the time being; and it was held by Judge Story that on these facts the delivery was sufficient as against subsequent

purchasers. To the same effect in *Beecher* v. *Mayall*, 16 Gray, 376, where steam boilers were purchased and left in the seller's possession for the accommodation of the purchaser. And many other significant cases might be added. But we deem these cited to be sufficient.

Exceptions sustained.

SAMUEL D. WYMAN, Assignee in Insolvency,

vs.

GILBERT E. GAY.

Lincoln. Opinion February 25, 1897.

Insolvency. Preference. Exempted Property. Waiver. Life Insurance. R. S., c. 49, § 94; c. 70.

Exempted property is a personal privilege of the debtor. He may waive it and does waive it when he conveys the property to another, and if the conveyance works a fraudulent preference under the insolvent law the assignee may recover the property or its value.

This doctrine applies to policies of life insurance where the annual premium on each is less than $150

ON REPORT.

This was an action of trover for the conversion of certain personal assets, viz: a horse, calf, sleigh, robe, blanket, cow, harness, pung, etc., sold by Alfred W. Huston, an insolvent debtor, to Gilbert E. Gay, on January 26, 1894, in fraud of the provisions of the insolvency law.

It was admitted that the articles enumerated in the writ, excepting the sleigh, were sold by the insolvent to the defendant; and that the policies of life insurance described in the writ were assigned by the debtor to the defendant on the day alleged. The following question was submitted to the jury and by them answered as a special verdict:—

Did the defendant have reasonable cause to believe that Alfred W. Huston was insolvent when he took the bill of sale and the

assignments from him in partial payment of preceding debts on the 26th of January, 1894?

Answer. Yes.

A question arose at the trial whether such articles in the sale and assignments, as are exempt from attachment or seizure on execution, could be the subjects of fraudulent preference under the insolvency law, it being admitted that the insolvent did not have at the time of the transfer duplicates of any such articles of property.

It was admitted that said Huston went into voluntary insolvency on the 24th of March, 1894, and that the proceedings are still pending.

One of the policies, dated January 1st, 1894, was a paid up policy at the time of the assignment. The value of the different policies is $153.06 on paid up policy, and the other $192.46, making $345.52, the total value.

The annual premium on each of said policies was $100.36.

The case was reported to the full court upon the finding and admissions to say whether the plaintiff can recover, and if so for how much.

W. H. Hilton, for plaintiff.

If a third party may invoke the law of exemption, then a dishonest debtor, possessing two thousand dollars in cash, may, in contemplation of insolvency, purchase five hundred dollars worth of property of the exempted class and make it over to some favored creditor, or perhaps a member of his own family, and then out of the remaining fifteen hundred dollars make another purchase of like amount and kind and make it over to a second favored creditor, and so continue to purchase and make over until his $2000 have been expended and he finds himself penniless, and thereupon file his petition in insolvency, and when other creditors seek redress for the fraudulent acts of the insolvent and the wrongs done them, the favored creditors may offer as a defense that the property so made over to them was at the time of transfer wholly exempted by statute.

A debtor may waive this privilege of exemption and consent that exempted property may be attached or applied to the payment of his debts. This waiver may be evidenced by acts or neglect to act. *Smith* v. *Chadwick*, 51 Maine, 515.

T. P. Pierce, for defendant.

There is no provision by which creditors can deprive the assured of the benefit of such insurance as had been paid for up to a date two years previous to the filing of his petition; and, in addition to that, so much insurance as $150 per annum would pay for after that date and up to the time of filing his petition. Plaintiff seeks to recover the value of these policies, or a certain part of their value, in trover, and to have his money now. This cannot be done, while our statute provision relating to life insurance remains what it now is. It provides for only the usual action in rem.

The only suit which can be maintained is a lien suit, and the only judgment that can be recovered is one in rem; and that conditioned to the provisions of the policies, as to date and manner of payment.

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

HASKELL, J. Trover, by the assignee of an insolvent debtor, against a creditor to recover the value of chattels conveyed to him by the debtor in fraud of the insolvent law.

The case found the conveyance to have been fraudulent, but the defendant claims that the chattels, when conveyed to him, were exempt from attachment and therefore do not belong to the assignee. This defense is groundless. Exempted property is a personal privilege of the debtor. He may waive it, and certainly does waive it when he conveys it to another. His interest in the property is then gone. He cannot reclaim it or recover it. If it serves a fraud, his assignee may do so and thereby prevent an unequal distribution of his assets among his creditors. *Nason* v. *Hobbs*, 75 Maine, 396, is directly in point. There, the assignee sued to recover the value of a yoke of oxen, sold by the debtor

before his insolvency in fraud of creditors. Exemption of the oxen from attachment was set up as a defense. The court says, at the date of the insolvent proceedings the debtor "did not then own the oxen, for he had sold them the day before to the defendant, and he could not legally claim sold oxen as exempt." The jury found the value of the chattels on the day of their conveyance to the defendant to have been $147.35, which sum the plaintiff may recover with interest from the date of conversion.

The plaintiff also sues to recover $345.52, the agreed value of two policies of insurance on the insolvent's life, conveyed by him to the defendant in fraud of the insolvent law, and thereby converted to his own use. The same defense as to the chattels is interposed. Revised Statutes, c. 49, § 94, is invoked. That section exempts all such policies where the annual premium is less than $150, meaning on each one, from "attachment and from all claims of creditors, during the life of the assured." This statute means to allow the assured such property, while he holds it, free from the claims of creditors, but when he sells it for cash, he will have received its equivalent, and the purchaser will hold an investment, a security that is just as much a part of his estate as a bond or promissory note would be.

So when the insured assigns his policy in payment of a debt, the policy becomes assets in the hands of a creditor, and he should not thereby be permitted to gain a fraudulent preference in his own favor over other creditors of the same debtor. When the assured parts with his policy, he places it without the protection of the statute. It then becomes the same as any chattel, and the title goes to the assignee in insolvency, rather than to work a fraud. Any other doctrine might be made to thwart the equality of creditors and make it possible for a dishonest debtor to give his property to a single creditor. He might take his entire assets and procure numerous policies of insurance, with annual premiums of not over $150 on each as in this case, and appropriate the whole of them to a favored creditor.

We think the defense of exemption does not apply to the policies any more than to the chattels, and that the plaintiff may

recover for their conversion the agreed value of $345.52; but as the case does not show when that value attached, it must be presumed as of the date of the verdict, from which time interest should be added.

Judgment for plaintiff.

HARRY S. JONES

vs.

GRANITE STATE FIRE INSURANCE COMPANY.

Hancock. Opinion February 25, 1897.

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

The decision in the case of *White* v. *Phœnix Ins. Co.*, 83 Maine, 279, again reported in 85 Maine, 97, does not deny that the general burden of proof lies on an insurance company to prove that an insurance risk is increased by the vacancy or non-occupancy of dwelling-houses, but only that such burden may be aided by the common and natural presumption to that effect; and that, in a case utterly devoid of any evidence as to the situation or circumstances, such presumption would be sufficient to sustain the burden which the statutory provision casts upon the company.

The presumption belongs to the class of mixed presumptions of law and fact, or of presumptions of fact which are sanctioned by the law, because they are in consonance with reason and experience, and because from their importance and frequency of occurrence they have attracted the attention of the law and received its commendation; in principle like the presumption that all bills and notes are given or indorsed for value, or the presumption which prevails in favor of innocence, or sanity, or against fraud, and other presumptions that might be enumerated.

While this presumption has the effect of prima facie proof,—until counteracted by evidence,—when any evidence is adduced on either or both sides, then the burden of proof is upon the insurance company, aided as it may or may not be by the presumption, to make out the proposition it undertakes to maintain; and if the proofs stand in equilibrio on the proposition, then the company fails.

In this case the house destroyed by fire had been both vacant and unoccupied for more than a year, was situated in the outskirts of Ellsworth in a secluded and isolated location back from the road without any near neighbors, at a distance so great from the center of the city as not likely to receive any

protection from its fire department, and there was quite a tempting opportunity for evil-minded persons to visit the premises without being seen either coming or going. The fire broke out at midnight in the ell where laborers had been working during the day. Had the house been occupied at the time the fire might not have occurred or might have in its early inception been prevented.

Held; That on these facts, and such others as the evidence discloses, an action against the insurance company cannot be maintained.

On Report.

The facts are stated in the opinion.

This was an action of assumpsit on an insurance policy issued by the defendant company on Dec. 9, 1892, on a two-story frame dwelling-house and addition and other buildings owned by plaintiff and situated on his farm in Ellsworth. The policy covers the dwelling-house and addition, which was insured for $500, and other out-buildings which were insured for $1250, making a total of $1750.

A fire occurred on the 4th day of May, 1895, causing the loss of the dwelling-house and addition, and this action was brought to recover the sum of $500, the amount of insurance thereon.

The writ is dated September 4th, 1895. The plea was the general issue with the brief statement:—"That the entire policy of insurance declared on by the plaintiff in this action had been rendered void because of the buildings therein described becoming vacant or unoccupied in March, 1894, and so remaining until the time of the fire, a space of about fourteen months, without the written consent or agreement of the defendant indorsed on said policy or added thereto, as was required by its terms and conditions, and that by reason of said vacancy and non-occupancy the risk on said buildings was materially increased."

The statute, R. S., c. 49, § 20, invoked by the defendant, is as follows:—"a change in the property insured, or in its use or occupation, or a breach of any of the terms of the policy by the insured, do not affect the policy unless they materially increase the risk."

A. W. King, for plaintiff.

It was the intention of the legislature in passing the statute to

prevent an insurance company from shaking off its liability under the claim that the property was unoccupied, unless that company proved that the risk of fire to the property was actually and in fact increased by the change of occupation. The legislature by using the words "materially increase the risk" meant that it should not be a mere theoretical or fanciful increase of the risk, but something actual and susceptible of demonstration.

That statute means that, taking everything into account, the dangers of fires that are removed by non-occupancy, as well as those risks which may attend occupied buildings, it must appear that the risk was materially increased. Here the risk was decreased.

L. C. Cornish, for defendant.

The plaintiff cannot recover because the risk was materially increased by reason of the vacancy and non-occupancy of the premises. *Lancy* v. *Home Ins. Co.*, 82 Maine, 492; *White* v. *Phœnix Ins. Co.*, 83 Maine, 279; *Same* v. *Same*, 85 Maine, 97.

Vacancy and non-occupancy:—May, Insurance § 249, a; *Bonnefant* v. *Ins. Co.*, 76 Mich. 654; *Hermann* v. *Adriatic Fire Ins. Co.*, 85 N. Y. 162; *Fehse* v. *Ins. Co.*, 74 Iowa 676; *Sexton* v. *Ins. Co.*, 69 Iowa, 99; *Weidert* v. *Ins. Co.*, 19 Ore. 261; (S. C. 20 Am. St. Rep. 809 and note p. 826); *Cook* v. *Continental Ins. Co.*, 70 Mo. 610 (S. C. 35 Am. Rep. 438); *Keith* v. *Quincy Mutual Fire Ins. Co.*, 10 Allen, 228; *Ashworth* v. *Ins. Co.*, 112 Mass. 422; *Corrigan* v. *Commercial Ins. Co.*, 122 Mass. 298; *Harrington* v. *Ins. Co.*, 124 Mass. 126; *Poor* v. *Ins. Co.*, 125 Mass. 274; *Litch* v. *Ins. Co.*, 136 Mass. 491; *Stone* v. *Ins. Co.*, 153 Mass. 475.

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

PETERS, C. J. The contention in this case is whether the risks of an insurance on the house in question were or not materially increased by its non-occupancy, the terms of the policy, which must have been well understood by the insured, declaring the

policy to be void for such cause when not consented to by the insurance company. The facts are not in dispute.

An insurance of five hundred dollars was obtained by the plaintiff, December 7, 1892, on his two-story frame building and ell, the property having been estimated at the time as worth seventeen hundred and fifty dollars. The insurance came within the denomination of a farm risk. The buildings became vacant and unoccupied in March, 1894, and continued so, without the consent or knowledge of the company, for fourteen months, when, May 4, 1895, the same were totally destroyed by fire.

The house was situated on a large and finely cultivated farm, having a frontage of nearly half a mile on a county road, being Main street extended, running past it in a northerly and southerly direction. The farm extends easterly two miles to the easterly boundary of the city of Ellsworth, the easterly section of the same consisting variously of field, pasture and woodland. The uncultivated portion of it is traversed by the Maine Central railroad which runs northerly and southerly across it. The house, sixty years old and more, and in rather an indifferent state of repair, was located about twenty rods back from the road, and two barns that were not burned, nor insured that we are aware of, are still standing on the premises about twenty rods east of the location of the house. The farm on which the house stood is really in the outskirts of the city of Ellsworth in quite a secluded and isolated situation, being four-fifths of a mile from the Maine Central railroad station which is itself quite out of the central part of the city. There were at the time of the fire a few neighbors scattered along the road on both the north and south sides of the plaintiff's land, living in small, ordinary houses but not in close proximity to it; the nearest on the other side being eighty-five rods distant from the house. The city had an imperfect and inadequate fire system, but unavailable for the protection of such buildings as these situated two-thirds of a mile away. The fire department attempted to offer relief but failed to do so. The counsel for the plaintiff regards the fact as important that there is a running brook not far distant from the buildings, but neither firemen nor neighbors

had any means by which its waters could be used to extinguish the fire.

The fire was first discovered in the ell and shed attached to the main house at two o'clock in the night and soon resulted in a total loss. The premises were well cared for by the owner and his hired man in the day time, on account of his barns of hay and stock of cattle kept there, but neither owner nor laborer stayed on or near the premises during the night. It was customary for some one at work on the farm to visit the buildings daily or oftener, and on the afternoon preceding the fire the owner was about the house overseeing the work of his men who were engaged in repairing the stone foundation under the ell. He closed the house at about seven o'clock and went home, seeing no signs of fire or of anything unusual about the premises.

We feel constrained to declare, in view of all the facts respecting the condition and situation of the property, that its exposure to the risks of fire was seriously increased because of the vacancy of the unoccupied buildings. Whether the fire was caused either by accident or design, had there been some person living in the house at the time, the chances are that it might have been discovered in season to control it, or that it never would have occurred. The reasoning of the court in *Lancy* v. *Home Insurance Co.*, 82 Maine, 492, is applicable in this case, although of more forcible application in that case than in this.

It is doubtful if the meaning of the court in their interpretation of the statute which casts the burden of proof on insurance companies to show in case of loss of unoccupied houses that the non-occupancy materially increased the risk, as enunciated by the court in *White* v. *Phœnix Insurance Co.*, 83 Maine, 279,—the case again reported in 85 Maine, 97,—was correctly understood in the present case at the argument. The court does not deny that the burden of proving that fact rests on the insurance company, but decides that such burden, in a case devoid of any proof of the attendant circumstances, may be sufficiently sustained in the first instance by the natural presumption to that effect which is based upon the observation and experience of intelligent men generally.

In most courts the opinions of witnesses or the experience of companies on this point cannot be testified to, for the reason, that it is the common knowledge of mankind generally rather than the peculiar knowledge of specialists and experts. The court does not suppose that the legislature intended to deprive the insurance company of the aid of this common and natural presumption in support of the burden of proof which perhaps rather illogically rests upon it.

It is not pretended that the general burden of proof shifts from the insurer to the insured; and if, after all the facts on both sides are presented, the case in its proofs stands in equilibrio then the company does not prevail and the issue must be determined against the company. The principle is illustrated in the case of a suit on a piece of commercial paper where the general burden is on the plaintiff to prove value for the defendant's promise, and that burden does not change in any stage of the evidence in the case, although it is sustained, until weakened by other evidence, by the presumption of value which attaches to commercial paper. *Small* v. *Clewley*, 62 Maine, 135.

Mr. Best, in his valuable work on evidence, says that presumptions or presumptive evidence is as original as is direct evidence; and that the presumption of a fact is as good as any other proof of such fact when the presumption is legitimate. As illustrations of the principle that presumptions stand for proof until rebutted by evidence, the author remarks in this way:—"Although the law presumes all bills of exchange and promissory notes to have been given and endorsed for good consideration, it is competent for certain parties affected by these presumptions to falsify them by evidence. . . . . To this class also belongs the well known presumptions in favor of innocence, and sanity, and against fraud, etc.; the presumption that legal acts have been performed with the solemnities required by law, and that every person performs the duties or obligations which the law casts upon him." Best, Evidence *426.

The presumption which in this case is strong enough to stand as prima facie proof, until contradicted by evidence, is denominated a

presumption of fact sanctioned by the law, or a mixed presumption of law and fact. The law authorizes its adoption because it is in consonance with reason and experience, and because from its importance and frequency of occurrence it has attracted the attention of the law and received its commendation.

The fact that any property is not in the possession or under the close supervision of its owner naturally produces a belief that it is exposed to more than usual risks, such risks being more or less according to circumstances. Insurance companies invoke the benefit of this sort of presumption, and we think they are entitled to it in aid of the burden of proof which the statute imposes on them. At the same time any construction of the statute has but little, if any, pertinency in a consideration of the facts disclosed in the present case.

Judgment for defendants.

ELBRIDGE BACON

vs.

CASCO BAY STEAMBOAT COMPANY.

Cumberland. Opinion February 26, 1897.

Negligence. Common Carrier. Exceptions. Evidence.

The degree of care which the law requires shall be exercised, for the protection and safety of its passengers, by a steamboat company plying the waters of Casco Bay with its boats, after it ceases to be acting as a common carrier, and becomes merely a tenant or occupier of a wharf at which it makes landings, and over which its passengers pass in going to or departing from its boats, is that of reasonable diligence, or of common care and prudence; and what is reasonable care must depend on the circumstances. It is to be measured by the conditions and situations to which it is to be applied.

Exceptions do not lie to the admission of testimony which is either slightly corroborated of other proper testimony, or else immaterial.

ON EXCEPTIONS BY PLAINTIFF.

This was an action on the case for negligence. The case is stated in the opinion.

Edward Woodman, for plaintiff.

Degree of care:—*Tobin* v. *R. R.*, 59 Maine, 183; *Knight* v. *R. R.* 56 Maine, 234; *Quimby* v. *R. R.* 69 Maine, 340; *Keefe* v. *R. R.* 142 Mass. 251; *McDonald* v. *R. R.* 26 Iowa, 124; *Weston* v. *R. R.* 73 N. Y. 595; *Hoffman* v. *R. R.* 75 N. Y. 605; *R. R.* v. *Fillmore*, 57 Ill. 265; *R. R.* v. *Scates*, 90 Ill. 586; *Seymour* v. *R. R.* 3 Biss. 43; *R. R.* v. *Harmon*, 147 U. S. 571.

Admission of evidence:—*Ellis* v. *Short*, 21 Pick. 142; *Farnum* v. *Farnum*, 13 Gray, 508; *Maguire* v. *R. R.* 115 Mass. 239; *Brown* v. *Cummings*, 7 Allen, 507; *Branch* v. *Libbey*, 78 Maine, 321; *Parker* v. *Port. Pub. Co.*, 69 Maine, 173.

Clarence Hale and Stephen C. Perry, for defendant.

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

PETERS, C. J. This is an action on the case for negligence. The verdict was for the defendants. The principal facts and the rulings of the judge are embodied in the bill of exceptions as follows:—

"It appeared in evidence that the defendant was a common carrier of passengers for hire, operating a line of steamboats between the City of Portland and the Islands in Casco Bay, and that it had acquired the exclusive right to land passengers at a wharf on Cushing's Island to which its steamboats made regular trips for the accommodation of travelers both day and evening; that one of its employees lived upon said wharf and was charged with the duty of taking the steamer's lines, setting lights in the night time, and handling baggage and freight upon the wharf.

It also appeared that the plaintiff, on the sixteenth day of August, 1894, purchased a ticket of defendant, entitling him to passage upon said steamboats from Portland to Cushing's Island, and thence back again to Portland; that he was carried to Cushing's Island on one of the defendant's steamboats, on the afternoon of that day, and returned to their wharf on Cushing's Island after nightfall, at about eight o'clock, and that, while waiting upon the

wharf for a steamer, he fell into a rectangular opening in the planking of said wharf, used as a driveway, and broke his leg.

Plaintiff declared upon the negligence of the defendant in failing to provide said opening with a suitable guard rail, and also for failing to properly light the same after nightfall.

Both plaintiff and defendant introduced plans and photographs of the wharf, in evidence, which are to accompany this bill of exceptions. There was also a view of the premises by the jury.

The evidence tended to show that the customary path for the ingress and egress of passengers to and from defendant's steamboats, was by a gangway passing along the easterly side of the opening in which defendant fell, which gangway is denominated the 'passenger platform' on defendant's plan of the premises, and that plaintiff fell into the opening from a similar gangway passing along the westerly side of said opening, which gangway is denominated the 'freight platform' upon defendant's plan.

The latter gangway or 'freight platform' led to the door of a room called on said plan the 'baggage room', which room contained a closet, above the door of which was the sign 'Men's Toilet.'

Plaintiff testified that after passing over the usual gangway or 'passenger platform,' to the outer portion of the wharf and remaining there a short time, he felt cold, and seeing a light in the 'baggage room' he sought shelter in that room, remained there a few minutes and that thinking that he heard some one say that the boat was coming, he came out and turned to walk toward the outer end of the wharf, and while walking along the so-called 'freight platform' he stepped off the edge of it and fell.

Defendant introduced evidence tending to show that the plaintiff, while waiting for the steamer, was wandering about upon the wharf in a rather idle and aimless manner, and that in passing to the 'baggage room' he necessarily passed directly by the open door of another room called upon the plan the 'waiting room', which room was the one provided for passengers to resort to for shelter, and that when returning from the 'baggage room' toward the outer end of the wharf, where he was to go on board the steamer, he 'swayed about', lost his balance, and fell into the opening in

question; that there was no light placed within the 'waiting room' which was lighted only by a lantern standing outside upon the westerly corner of the wharf, in such position that a portion of its light came in through a window in the front of the 'waiting room'. As to the position of the lights on the wharf and their sufficiency, the evidence was conflicting.

Upon the question of the duty of the defendant to maintain a safe and convenient landing place for its passengers, the presiding justice charged the jury as follows:—

As the defendant attempted to provide a landing place in the shape of a wharf at Cushing's Island, the law required of it reasonable diligence in making that place of exit, of ingress and egress from their steamers, that is, an opportunity to go ashore and to come on board, safe. It required of them reasonable diligence to make that chance to go ashore and to come on board safe; and that diligence must be measured under the particular time and circumstances and place and occasion when their passengers desire the opportunity to exercise it. For instance, in midday reasonable diligence might require of them to provide a different opportunity to go ashore and to come on board than would be required in the evening or after dark. In midday no lights would be required; after dark, lights might be required. Now at this time it appears that the defendant company maintained a wharf, or were in use of a wharf for passengers to go upon, to remain and take passage upon their steamers; and for them to do that, both by day and by night, they were required to use reasonable diligence to make that chance to go on board their boats safe for their passengers.

Counsel for the plaintiff at the close of the charge requested the following instruction to the jury:—

'It was the duty of this Steamboat Company to keep in safe condition all parts of this platform, as well as its approaches thereto, to which its passengers were expressly or impliedly invited, and to which they would be likely to resort while waiting for the arrival or departure of its boats.' This request was refused excepting as already given in the judge's charge."

We think that the exception to the rule given by the judge as to the degree of care required of the company cannot prevail, nor can the exception to the refusal to give the instruction requested.

The rule given was that of ordinary and reasonable care, while the rule asked for would virtually amount to insurance. Reasonable care, caution and prudence were to be necessarily exercised by the company. The expression used by the judge was "reasonable diligence," meaning of course that diligence which would be deemed reasonable by reasonable and prudent men under the circumstances. The more the risks the more is the diligence required in order to be regarded as reasonable. A diligence more than reasonable, an unreasonable diligence, was not required.

There are a great number of definitions of negligence and diligence, correlative terms, given by authors and judges, to be found in the law dictionaries, all of which mean about the same thing although differently expressed. Perhaps a definition of negligence approved by the Pennsylvania court is the most comprehensive of any, "The absence of care according to circumstances." A definition favored by the United States Supreme court is this: "The failure to do what a reasonable and prudent person would do under the circumstances of the situation, or the doing what such a person under the existing circumstances would not have done." Mr. Bigelow, in his book on Torts, p. 261, says: "It is conceded by all the authorities that the standard by which to determine whether a person has been guilty of negligence is the conduct of the prudent, or careful, or diligent man." The standard of care required by the judge in the present case embodies a definition tantamount to those above quoted, although it might have been more expanded or intensified in its terms, but that was by no means necessary.

We are not aware, however, that the plaintiff contends that the ordinary standard of care was not correctly and sufficiently defined by the court, but the contention is that more than ordinary care, really extraordinary care, should have been exercised by the company, in order to insure absolute safety for the plaintiff in his going and coming, and the able counsel for the plaintiff relies on scattered cases in the reports where may be found expressions, like

that contained in the requested instruction to the effect that the company was bound to keep his wharf and its approaches safe and convenient. Such language is not altogether inappropriate, but it is not exact enough, when applied to the present case, and only means, in most cases, that carefulness and prudence must be exercised to effect security or safety, but not that such a result shall positively and absolutely be secured. The latter rule is the doctrine of this state, at least as settled in the late case of *Lasky* v. *The Can. Pac. Railway Co.*, 83 Maine, 461. See authorities there cited.

Furthermore, the force of the distinction between common or ordinary care and extraordinary care, the highest degree of care, a distinction found in the civil law and adopted by English and American courts principally as applicable to the law of bailments, has been greatly diminished in modern times for the reason that extraordinary diligence is no more than an ordinary requirement in extreme situations and conditions. The tendency with many courts is to call all cases of the kind simply cases of negligence, ignoring the ancient classification. In all cases the amount of care bestowed must be equal to the emergency, however the standard be denominated. We do not mean to say that the distinction between ordinary and gross negligence, or between ordinary and extraordinary care does not still exist, but, in reply to the suggestion made by the plaintiff's counsel that the same extreme degree of care should be exercised by the defendants when wharfingers, or tenants of a wharf used in conjunction with their boats, as is imposed on them while common carriers of passengers, we do mean to say that we perceive no reason for imposing so extreme an obligation upon the defendants when they have completed their trip and ceased to be longer performing the duties of common carriers; and the authorities do not support any such application of the rule of extraordinary care as is contended for. In fact, the tendency of decision is, as before intimated, more likely to be the other way, if there be any solid difference between negligence of one degree and negligence of another degree, or between reasonable care and extraordinary care.

Another question arose during the trial, where an exception was taken to the admission of certain, as it is claimed, inadmissible testimony. The question is presented by a portion of the reported case, reading as follows: "The plaintiff introduced evidence tending to show that, at the time of the accident and injury complained of, the place where the accident occurred was dark, and that there was no light at or near that place. The defendant introduced evidence tending to show that there was, at that time, a light hanging on the wall between the doors of the 'baggage room' and the 'waiting room,' in such a position that the whole scene of the accident was brightly and sufficiently lighted, and that the wharf was otherwise sufficiently lighted. The plaintiff called a witness who testified, in substance, that after the accident and before the boat arrived, he went to the place where the plaintiff fell, and that it was dark, that there were no lights there. Thereupon the defendant called the wharfinger, who testified that said light was, within a brief time after the accident, discovered by him upon the floor just within the door of the 'waiting room,' and that he again, and before the arrival of the steamboat, hung it upon the wall between the doors of said two rooms, and then the captain of the boat, that arrived some five or ten minutes after the accident, was allowed to testify in behalf of the defendant, that at the time of the arrival of the boat, a light hung on the wall between the two doors of said rooms."

Whilst this does not appear to be at all an important question, we are of opinion that the admitted testimony had a tendency to slightly corroborate the employees of the company, who had previously testified, in a part of his statement, or else had no effect whatever and was therefore entirely immaterial. It had some force to repel any argument that the employee's story was an entire fabrication.

Exceptions overruled.

STATE *vs.* CHARLES WHITTEN.

Kennebec. Opinion February 1, 1897.

Pleading. Indictment. Fish and Game. Constitutional Law. R. S., c. 40, § 54; Stat. 1895, c. 31, § 1.

The offense of transporting trout except in the possession of the owner, is sufficiently set out in a complaint which avers that the respondent at a place and on a day certain "was guilty of catching, killing, netting, and having in his possession for the purpose of transportation, and did send the same marked to C. V. Whitten, 6 Winthrop Sqr., Boston, Mass., one trout of the weight of four and one-half, not being in the possession of the said respondent, &c. &c."

The averment that the trout weighed four and one-half is not an averment of any weight, and the penalty recoverable must be that for the transportation of one trout without any additional penalty to be assessed according to its weight.

Held; that the statute is constitutional.

ON EXCEPTIONS BY DEFENDANT.

This was a complaint for violating the fish and game law, tried before the Superior Court, Kennebec County, on appeal.

The case appears in the opinion.

Geo. W. Heselton, County Attorney, for State.

Complaint sufficient:—Bish. Crim. Proced. 4th ed., § 232, and notes; *State* v. *Corson* 10 Maine, 473.

The object of this statute is manifestly to prevent the supply of markets and individuals by fishermen in the State of landlocked salmon and trout. It permits the individual in season to catch for himself, and to take with him anywhere a certain amount, and prohibits the transportation of the same unless in his possession.

The act charged in this complaint is the very thing which the act seeks to prevent.

Constitutional law:—*Geer* v. *Connecticut*, 161 U. S. 519, citing *McReady* v. *Virginia*, 94 U. S. 395; *Manchester* v. *Massachusetts*, 139 U. S. 240; *Phelps* v. *Racey*, 60 N. Y. 10, (19 Am. Rep. 140); *Magner* v. *People*, 97 Ill. 320; *American Express Co.* v.

People, 133 Ill. 649, (9 L. R. A. 138); *State* v. *Northern P. Exp. Co.* 58 Minn. 403; *State* v. *Rodman*, 58 Minn. 393; *Ex parte Maier*, 103 Cal. 476; *Organ* v. *State*, 56 Ark. 270; *Allen* v. *Wyckoff*, 48 N. J. L. 93; *Roth* v. *State*, 51 Ohio St. 209; *Gentile* v. *State*, 29 Ind. 415; *State* v. *Farrell*, 23 Mo. App. 176, and cases there cited; *State* v. *Saunders*, 19 Kan. 127, (27 Am. Rep. 98); *Territory* v. *Evans*, 2 Idaho, 634, (7 L. R. A. 288); *Moulton* v. *Libbey*, 37 Maine, 494.

Edmund F. and Appleton Webb, for defendant.

Counsel cited:—*Allen* v. *Young*, 76 Maine, 80; *Bennett* v. *Am. Exp. Co.*, 83 Maine, 240; *State* v. *Beal*, 75 Maine, 291. Statute is unconstitutional.

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

PETERS, C. J. The complaint against the respondent runs as follows:—"C. B. Bunker of Belgrade in the county of Kennebec, State of Maine.

On the twentieth day of May, A. D. 1895, in behalf of said State, on oath complains, that Charlie Whitten of Belgrade in said County, on the 20th day of May, A. D. 1895, at said Belgrade was guilty of catching, killing, neting and having in his possession for the purpose of transportation, and did send the same marked to C. V. Whitten, 6 Winthrop Sqr., Boston, Mass., one trout of the weight of four and one half not being in the possession of the said Charlie Whitten against the peace of said State and contrary to the form of the Statute in such case made and provided."

Upon his arraignment the respondent pleaded that he was guilty of "shipping" the trout as alleged, was found guilty, and fined in the sum of seventy-two dollars and fifty cents for the offense. From this sentence he appealed. In the court above, without withdrawing his plea of guilty and without leave of court, he demurred to the complaint, these steps constituting rather an irregular proceeding, but possibly permissible inasmuch as the demurrer was duly joined by the prosecuting officer.

The complaint alleges a violation of R. S., c. 40, § 54, as amended by c. 31 of the Laws of 1895 which is as follows:—"No person shall take, catch, kill or have in possession, at any one time, for the purpose of transportation, more than twenty-five pounds of land-locked salmon or trout, in all, nor shall any such be transported except in the possession of the owner thereof, under a penalty of fifty dollars for the offense, and five dollars for every pound of land-locked salmon or trout, in all, so taken, caught, killed, in possession, or transportation in excess of twenty-five pounds, and all such fish transported in violation of this section, may be seized, on complaint, and shall be forfeited to the prosecutor. Whoever has in his possession more than twenty-five pounds in all of such fish, shall be deemed to have taken them in violation of this section. Provided, however, that the taking of one fish additional, when having less than twenty-five pounds shall not be regarded as a violation of the law."

It would be ignoring the indisputable meaning of words to declare that here is not a clear allegation that the respondent had in his possession a trout for the purpose of illegal transportation, and transported it while not in his possession, and that is the offense which the government is prosecuting, although the same offense is also variously and perhaps literally set forth in several ways. If the respondent "sent" the trout, he transported it without accompanying it personally. For this offense the penalty is fifty dollars.

But as the words "four and a-half" may have meant either pounds or ounces, they mean nothing at all and must be rejected. Therefore, the penalty to be imposed must be a fine for the sum named, without any sum in addition "according to the weight of the trout."

Any objection to the complaint for the alleged unconstitutionality of the statute cannot avail. That question has been settled adversely to the objection in many states, and similar enactments have been for many years accepted in this state without any such question. Numerous cases in behalf of the validity of the law are cited on the exhaustive brief filed in behalf of the prosecution.

Demurrer overruled.

DAVID M. PARKS *vs.* OREN E. LIBBY.

Somerset. Opinion March 1, 1897.

Judgment. Estoppel. Different Issues.

Whenever an issue of fact is once judicially settled between parties, it is forever settled between such parties and their privies, and the result inures in favor of the winning party in any other litigation between such parties where the same issue is involved.

In order, however, that a judgment shall have such potential effect, it must appear that the facts in question are the same in each case; the issues must be identical.

The defendant contracted to drive certain logs on Sebasticook river to Clinton for the plaintiff, who sold the same logs to McNally to be delivered at Clinton. McNally sued the plaintiff for a shortage in the logs delivered, and recovered against him, of which suit this defendant was notified and requested to defend, and he did assist in defending it. The plaintiff sues the defendant for negligence in driving the logs, claiming that the defendant is bound by the judgment, which McNally recovered against him. It is *held* by the court that the issues do not appear to be exactly the same for the following reasons:—

First—Because the case finds that the "main" question in the prior suit was whether the logs were all driven down and delivered according to plaintiff's contract with McNally.

Secondly—Because by plaintiff's contract of sale the logs were to be driven to McNally's boom, while by the defendant's contract for driving they were to be driven to boom or booms in Clinton. Non constat, that the places for delivery were the same.

Thirdly—Because the plaintiff was to deliver the logs "before summer," while no time was specified within which the defendant should drive the logs.

Fourthly—Because the rule for recovery of damages would not be the same. In one case the amount recoverable being damages, if any, for waste by negligent driving, and in the other damages for logs bargained and sold, but not delivered.

ON REPORT.

This was an action of assumpsit on account annexed, with also a special count.

The facts are stated in the opinion.

S. S. Brown, for plaintiff.

Prior judgment is binding on this defendant, although he was not a party of record to the McNally action. The doctrine of the courts seems to be that where the question in issue has been once fairly investigated in court with the knowledge of all the parties, in any way involved or responsible over to the defendant in the case, and a judgment has been obtained in the matter, that judgment is binding on all such persons, although they did not appear as parties of record in the case. *Thurston* v. *Spratt*, 52 Maine, 202; *Veazie* v. *Railroad*, 49 Maine, 119; *Portland* v. *Richardson*, 54 Maine, 46; *Grand Trunk Railway* v. *Latham*, 63 Maine, 177; *Boston* v. *Worthington*, 10 Gray, 496.

F. W. Hovey and F. J. Martin, for defendant.

Counsel cited:—*Sawyer* v. *Woodbury*, 7 Gray, 499; *Morgan* v. *Burr*, 58 N. H. 470; *Burlen* v. *Shannon*, 99 Mass. 202; *Foster* v. *Busteed*, 100 Mass. 409; *Burlen* v. *Shannon*, 3 Gray, 387; *Watts* v. *Watts*, 160 Mass. 164; *Seddon* v. *Tutop*, 6 T. R. 607; *Nashua, etc., R. R.* v. *Boston, etc., R. R.* 164 Mass. 225; *Russell* v. *Place*, 94 U. S. 606; *Foye* v. *Patch*, 132 Mass. 102; *Hooker* v. *Hubbard*, 102 Mass. 239; *Dunlap* v. *Glidden*, 34 Maine, 517; *Sturtevant* v. *Randall*, 53 Maine, 149; *Young* v. *Pritchard*, 75 Maine, 513; *Hill* v. *Morse*, 61 Maine, 541; *Smith* v. *Brunswick*, 80 Maine, 189; *Chicago, etc., R. R. Co.* v. *Northern Line Packet Co.*, 70 Ill. 217.

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

PETERS, C. J. It is a well-settled doctrine in this state that if any issue be judicially established between parties to a litigation, the benefit of the finding will inure in favor of the winning party whenever such issue again arises between the same persons or their privies in any other suit. This is upon the principle of estoppel which declares that an issue or fact once judicially proved is forever proved. But it must clearly appear, in order that a judgment shall have such a potential effect, that the facts in question are the same in each case. The issues must be identical.

The plaintiff here invokes this principle of estoppel, and claims that its application is complete.

The facts bearing on the question presented in the present suit are reported to us as follows:—"February 1st, 1893, the defendant made a written contract with the plaintiff to drive the plaintiff's logs and cedar to the booms in Clinton. Afterward, the same winter or spring, the plaintiff sold the logs and cedar named in the contract to one McNally, to be delivered before the next summer of 1893 at the booms in Clinton. In the early part of the summer McNally complained to the plaintiff, Parks, of shortage, and, on October 6, 1894, McNally began an action against the plaintiff, Parks, returnable to the Superior Court for Kennebec county at the November term, 1894, to recover damages for breach of the said contract between McNally and Parks in not delivering the logs and cedar as agreed. The plaintiff, Parks, thereupon notified the defendant Libby, of the beginning and pendency of the said action, and requested him to assume and provide for the defense thereof, informing him that he should hold him responsible for all costs, expenses and damage. The action, McNally and Parks, was tried in the Superior Court for Kennebec county at the April term, 1895. In the preparation of the case for trial, and at the trial, Mr. Libby, the defendant was consulted and advised to some extent, and was present and testified at the trial. In that trial the main question at issue was, whether the logs and cedar had been driven down and delivered at the booms in Clinton, and the said logs and cedar were the same referred to in the written contract between the plaintiff and defendant. The verdict was for McNally in said action, and judgment was rendered for McNally against Parks, the plaintiff, for the sum of four hundred and two dollars and sixty-seven cents ($402.67) damages and costs of suit taxed at ninety-one dollars and sixty-seven cents ($91.67). The date of the judgment was the twenty-eighth day of May, eighteen hundred and ninety-five. This judgment the plaintiff, Parks, paid. The plaintiff, Parks, in the preparation and defense of said action of McNally, disbursed in counsel fees, witness fees and incidental expenses, the sum of one hundred and fifteen dollars and eighty-

one cents ($115.81). The plaintiff, Parks, also spent some time in preparing the case for trial and in attendance upon the trial, for which he makes a charge of one hundred (100) dollars, he testifying that he spent twenty-five (25) days, himself and teams, and calling four (4) dollars per day a reasonable compensation.

"The defendant, not contesting any of the foregoing propositions except the charge for personal services in preparing and trying said case, offers in defense of this action evidence tending to show that he did in fact drive the logs and lumber named in his written contract to the booms in Clinton within the time specified.

"To this evidence the plaintiff objects, on the ground that the defendant, Libby, having been notified to defend the former action, had had his day in court upon that question and it is not now open to him."

We think the facts disclosed by the report do not clearly show of themselves, without the aid of any other evidence, that the issues in both cases were alike. A want of complete identity is easily discoverable upon close examination.

In the first place it is stated that the "main" question at the first trial was whether the logs had been driven down and delivered as the defendant in that suit had agreed to do. That is not exact enough for such certainty as is required to allow the doctrine of strict estoppel to defeat a claim.

And this criticism is the more apropos when we notice from a recital of the two contracts in the writ, and the contracts are not otherwise copied, that the defendant in the former suit was required to deliver the logs to the purchaser "before summer," while the time within which this defendant was bound to drive the logs to some boom is not specified in his contract. Non constat that the defendant in this suit was compelled by his contract to drive the logs within the same period of time, or that he could do so. Sometimes the early freshets do not furnish sufficient water for successful log-driving.

Another discrepancy between the two contracts appears to be that the driving contract of the defendant was to deliver the logs in boom at Clinton, but the contract of sale by the plaintiff was to

deliver the logs into McNally's boom; and it no where appears that the two destinations or places of delivery are the same.

McNally's boom may not be the same as Clinton boom or booms.

Finally, another objection to subjecting the defendant to the judgment against the plaintiff with the same effect as if found against himself is, that the rule of damages in the two actions are not the same. This defendant may be liable for such damages as might arise from his negligence, while the plaintiff in the other action against him was liable for damages arising for not delivering a certain quantity of logs according to an agreement of sale. One stands in the position of a bailee and the other in that of seller of the logs. The damages for negligent driving might be, and ordinarily would be, widely different from damages for not delivering logs bargained and sold. The one might be no more than amounting to a part of the value of the missing logs. The other might be the total value of the missing logs themselves.

The evidence offered by the plaintiff should be excluded, and according to the terms of the report the action is to stand for trial.

Action to stand for trial.

UNION WATER POWER COMPANY, Appellants,

vs.

CITY OF AUBURN.

Androscoggin. Opinion March 2, 1897.

Tax. Water Power. Dam. Stat. 1895, c. 122.

Water as an element is not property, any more than air; but when used, its potential power becomes actual by operating upon real property, thereby giving it value and that value is the basis for the purposes of taxation.

Held; that the plaintiff's dam and the land upon which it stands within the city of Auburn,—the established place of business of the plaintiff corporation being in the city of Lewiston and where the power from the dam is applied,—may be properly taxed in Auburn at a reasonable valuation, exclusive of the

water power created thereby. Such water power is potential and not taxable, except indirectly in the valuation of mills with which it is used.

See *City of Auburn* v. *Union Water Power Company*, post, p 71.

ON EXCEPTIONS BY DEFENDANTS.

This was a petition of the Union Water Power Company, of Lewiston, filed in this court sitting below, praying for an abatement of city, county and state taxes assessed by the assessors of the city of Auburn upon a portion of its real estate and property rights in that city. The proceeding in this case was under the statute of 1895, c. 122, and after the assessors of the city of Auburn had refused to make an abatement upon the plaintiff's petition and application.

The grounds upon which the abatement was claimed and set out in the petition were as follows:—

First. Because the assessment and valuation of the property of said company as above set forth is greatly in excess of its value.

Second. Because the property of said company is not rated and valued equitably and proportionally as compared with other property of like nature and kind in said Auburn.

Third. Because the assessors have included in said assessment and valuation, property and property rights for which the said corporation is not liable to be taxed in said city.

Fourth. Because it did not have, possess or own the water power and water rights in the city of Auburn upon which said tax was assessed to it, as hereinbefore set forth.

Fifth. Because said tax is illegally and improperly assessed.

The plaintiff introduced evidence to show the following facts:—

That there is a dam across the river at Lewiston Falls composed of four granite structures called Dams No. 1, 2, 3, and 4, for convenience; that the river is the dividing line between the cities of Lewiston and Auburn; that dam No. 1 adjoins the Auburn shore; that the length of these dams is as follows: No. 1, 136 feet; No. 2, 269 feet; No. 3, 147 feet; No. 4, 159 feet; the heights varying from 8.70 to 16 feet; that the structures are all built with a cut granite face on the down-river side, and the top of the same material, while the backs are made of rough stone; that

these dams flow back some two or two and one-half miles, and that the Union Water Power Company owns the right for such flowage; that dam No. 1 makes its connection with the Auburn shore at and against the Auburn abutment of the Maine Central Railroad bridge, and that the company owns no land in Auburn at the end of the dam, nor below it, nor in its vicinity, other than the ice house lot referred to in the case and taxed as a separate item; that the town line between Lewiston and Auburn intersects the dam at the extreme westerly end of dam No. 2, so that it may be said in general terms that dam No. 1 only is in Auburn; that these dams were built in 1863 and 1864; that the total cost of the four dam structures at the time they were built was $86,977.33; that dam No. 1 represents less than twenty per cent of the original total cost, which would make the cost of this dam about $18,000; that this dam No. 1 could now be reproduced for some $10,000 to $11,000; that the total available constant power which can be created by these dams is about 13,000 horse-power; that all but 600 to 1,000 horse-power of this total is owned by various mills in Lewiston under a contract giving them a perpetual right to draw the same in accordance with the terms of the leases; that the 600 to 1,000 horse-power not covered by the leases is used and paid for by the mills in Lewiston in addition to that owned by them by permission of the Union Water Power Company without any contract for its permanent use, and is excess water.

The Union Water Power Company are the owners of this whole dam system and flowage rights, with the canals, gates, and water ways which make the water power available for power in Lewiston and subject to the contracts or leases above referred to, held by the various mills and other parties using the water for power in Lewiston. It also owns mill sites and other lands in Lewiston. There are no gates, canals, or water ways in Auburn by which any part of this water could be used for power there, nor does the company own any land in Auburn upon which this power could be used.

The assessors of Auburn assessed a tax for the year 1894 upon the dam and water rights on a valuation of $500,000 and upon the

ice house lot on a valuation of $5,000. This tax was levied by a supplemental assessment under date of February 4, 1895. The Union Water Power Company seasonably filed its petition for an abatement of this tax, which was refused by the assessors, and the company took its appeal to this court as before stated.

This appeal was heard by the presiding justice, who reduced the valuation upon the dam and rights connected therewith to $20,000 and upon the ice house lot to $2,000. No exception was taken to the latter, but to the former the defendant took exception.

Upon the hearing in the court below the defendant moved the presiding justice to make the following findings:—

First:—To find as matter of fact upon the evidence introduced at the hearing, that the water power, created by the granite dam of the Union Water Power Company mentioned in said supplementary assessment, is appurtenant to said dam and to the real estate of said Union Water Power Company flowed thereby, and that, so far as the same is situate within the limits of the city of Auburn, it was properly taxable therein and legally subject to the supplementary assessment aforesaid.

Second:—All that is asked in the foregoing request, as a finding of fact, is also hereby respectfully requested of the presiding justice to be made as a ruling of law upon all the evidence in the case, or upon such findings of fact as the presiding justice shall make therefrom.

These requests were refused by the presiding justice except as appears in the following findings and rulings:

I find as a matter of fact, and rule as a matter of law, upon all the evidence introduced, that the water power created by the granite dam of the Union Water Power Company named in the said supplementary assessment, is appurtenant to said dam and to the real estate of said company flowed thereby, in the sense that the capacity of such dam and real estate for valuable use is fully considered in fixing their valuation in the city of Auburn; but find and rule that it is not appurtenant to such dam and real estate in the sense that the water power, which is taxed in connection with the mills in the city of Lewiston, can be a distinct subject of taxation in the city of Auburn.

To these rulings and findings the defendant took exceptions. A full report of the evidence introduced at the trial was made a part of the exceptions.

W. H. White, *S. M. Carter*, *and J. A. Morrill*, for plaintiff.

N. W. Harris, *J. A. Pulsifer*, *W. W. Bolster*, *A. R. Savage*, *J. W. Symonds*, *D. W. Snow and C. S. Cook*, for defendant.

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

HASKELL, J. This is an appeal from the action of the assessors of Auburn in refusing an abatement of taxes. It comes up on exceptions to the rule for valuation applied below to a dam from the centre of the river to the Auburn shore holding back water that is taken by canal on the opposite shore in Lewiston and there used for mill power.

It is contended that Auburn may assess the power created by the dam within its own limits although applied elsewhere. This contention seems to have been partially sustained by the court below, and we think it erroneous. Water power until applied to mills is potential, not actual, in the sense that it is property subject to taxation. When applied to the mills it becomes a part of the property, thereby giving them value, the proper subject of taxation. It then becomes the main element of value, not as water, not as power, but as an integral part of the mills themselves. Without it, what value could a water mill have? If the rule should be held otherwise, it would overturn the present method of taxation throughout the state. We have three principal rivers, taking their rise in lakes in the northern wilderness. At the outlet of these lakes immense dams hold back and store water for the use of mills below. If the rule of taxing the potential use of water should be adopted, it would send the principal part of the power of these rivers for taxation into unorganized and remote districts, and deprive cities and towns of that element to be considered as estimating the value of water mills for purposes of taxation. Under that rule, their value might be almost nominal,

because their power is the controlling agency that makes value. But it is said that the owner of the dam may not be the owner of mills. That he simply stores up water for sale to the mill owner. That should make no difference. The water itself is not property, although he alone may use it. When he does so, the power it produces attaches to the mill and becomes an element in the value of the mill. When he sells it, the same result follows as if he applied it to his own mill. The mill where it is applied becomes the more valuable thereby. It there, indirectly, becomes the subject of taxation as a part of the mill property. The water in a mill pond cannot be regarded as property apart from the mill that uses it, and separate ownership makes no difference. Water as an element is not property any more than air. When used, its potential power becomes actual by operating upon real property and thereby giving it value, and that value is the basis for the purposes of taxation.

The first case brought to our notice is *Boston Mfg. Co.* v. *Newton*, 22 Pick. 22, (1839), the facts of which were precisely like the facts in the case at bar in all material particulars. The plaintiff owned a dam across Charles river, one-half in Newton and the other half in Waltham. The mills were wholly in Waltham. Newton assessed one-half the dam and one-half the water power. The tax was paid under protest, and suit brought to recover it back as an unlawful assessment upon the water power. Mr. B. R. Curtis was of counsel for the plaintiffs, and Mr. Rufus Choate counsel for the defendants. The opinion of the court was by Chief Justice Shaw, and the court says: "Water power for mill purposes is not a distinct subject of taxation. It is a capacity of land for a certain mode of improvement, which cannot be taxed independently of the land.

"But the objection to this mode of taxation is not the only or the principal objection to the tax in question. The court are of opinion that the water power had been annexed to the mills, that it went to enhance the value of the mills, and could only be taxed together with the mills, as contributing to increase their value. As the mills were wholly situated in Waltham, and were taxable

there, they were not liable to be taxed in Newton." That doctrine has been recognized in Massachusetts ever since.

In *Lowell* v. *Co. Commissioners*, 6 Allen, 131, a corporation owned certain canals with appurtenances whereby it was enabled to furnish certain mills, owned by its stockholders, water for power. For nine months in the year it had a surplus of water for sale to other takers, and the court held that the canals were assessed in the valuation of the mills to the proportion of the power furnished to them, and that their value for retaining the surplus of water, if any, might be directly assessed to the corporation, but does not authorize the assessment of water power per se. In this state, very likely the canals would be assessed wholly to the owner, and the power included in the assessment of the mills only.

In *Pingree* v. *Co. Commissioners*, 102 Mass. 76, it was held that a dam and structures were taxable independent of the water power which they had created. The court says: "They are capable of being estimated by a reasonable valuation, not dependent upon nor including the worth of the water power with which they are connected." It explains *Lowell* v. *Co. Commissioners*, supra, by saying: "There was no diversity of right or jurisdiction in that case, which made it necessary to determine whether the canals and land adjoining them could be taxed to the mill-owners as water power against a conflicting interest."

Fall River v. *Co. Commissioners*, 125 Mass. 567, holds that right of flowage is an easement in land that cannot be taxed independently, and the court say, that it forms part of the water power which is taxed in connection with the mills, as enhancing their value.

Flax Pond Water Co. v. *Lynn*, 147 Mass. 31, holds that one, who owns the right to maintain a dam and sluiceways upon the land of another, and is in the enjoyment thereof, may be deemed as in possession of real estate for the purposes of taxation, and that the soil may properly be taxed to him. This is the doctrine of *Paris* v. *Norway Water Co.*, 85 Maine, 330.

Lowell v. *Co. Commissioners*, 152 Mass. 381, holds that land enhanced by the ownership and use of the water power appur-

tenant thereto may be so taxed, notwithstanding existing statutes.

The plaintiff's dam and the land upon which it stands within the city of Auburn may be properly there taxed at a reasonable valuation, exclusive of the water power created thereby. That is potential and not taxable, except indirectly in the valuation of mills with which it is used. The doctrine held in *Paris* v. *Norway Water Co.*, supra, is analogous.

We are aware that a different doctrine prevails in New Hampshire, but do not think it so well comports with our state polity, and would give so just and equal basis for taxation as the one we are constrained to adopt. *Cocheco Co.* v *Strafford*, 51 N. H. 455; *Winnipiseogee Lake, etc.*, v. *Gilford*, 64 N. H. 337; *Amoskeag Co.* v. *Concord*, 66 N. H. 562.

Although the ruling below seems to be incorrect, yet, as it is more strongly in the defendant's favor than it is entitled to have, the exceptions must be overruled.

Exceptions overruled.

EMERY, J. I find myself unable to fully acquiesce in the reasoning of the learned opinion, though it seems to have support in the cases cited from Massachusetts. The case bears to me a different aspect, and in view of the great importance of the question in a state like Maine, a consideration of the case in this aspect may not be useless. I venture therefore to express my views in a separate opinion.

I do not see the necessity and I doubt the expediency of undertaking to determine whether what is called "the water power" is wholly appurtenant to the dam, or wholly appurtenant to the mill, or partly appurtenant to each, or whether it is incorporated into either.

If by the term "water power" is meant the "water fall," or the "mill privilege," then it is simply a parcel of land over which a stream of water flows and falls, and is to be taxed in the town in which it is situated. So far as the land is more valuable by reason of the stream and fall upon it, so far are these to be considered in the valuation of the land, and no farther. This consequent increase of

value is a question in commercial economics and requires for its determination the consideration of possible revenues to be drawn from the land and the possible price to be obtained for it.

If by the term "water power" is meant the force, energy, or to quote from the opinion, the "potentiality" of falling water, then it is not appurtenant to, nor annexed to, nor an integral part of any particular parcel of real estate. It is just force, as gravitation is force. It may be exerted by or upon some material object, but it is no part of that object, either as an appurtenance or otherwise. Gravitation affects all matter but it is not in nor appurtenant to matter.

The intensity of the force exerted by falling water is according to the height from which it falls. While this force is exerted to some extent throughout the whole length of a river, it is usually only at comparatively few places that the fall is sufficiently sharp to develop intensity enough to be made practically serviceable as a mechanical power. It is only at these places, these "falls" thus formed by nature, that successful efforts have so far been made to utilize this force.

But under our law such utilization can be made only by leave of the owner of the land under and abutting the falls on either side. However great the intensity of the force exerted by the water at the particular falls in question,—however easy its utilization,—however great the demand and imperative the need for its utilization,—the owner of the land holds the indispensable key. He can impose his own terms for its use. This rule of law may often give a monopoly of great value. The falls upon his land may be the only one on a large river and within a wide territory. He has in such case, not a monopoly of the force exerted by the water of the river, but a monopoly of the only practical means or opportunity for its utilization.

This monopoly, thus valuable, is an incident of the ownership of the land and may often be the principal element in the value of the land. Large revenues may often accrue to the land owner solely from this monopoly. This monopoly, this revenue or chance of revenue from it, should be included in an estimate of the value

of the land. The whole value of the land with all these incidents is to be assessed and taxed in the town in which the land is situated.

The Union Water Power Company owns land in Auburn under and abutting the falls on the Androscoggin river known as the "Lewiston Falls." Upon this land it has erected dams for the utilization of the force exerted by the water in plunging over the falls. The force thus utilized is of immense power and is in great demand in that neighborhood for the propulsion of the machinery of numerous large factories. The force is great enough to furnish power for much additional machinery, if ever needed. The Union Water Power Company has the monopoly not strictly of the force, the power, but of the land upon which must be placed the essential appliances to utilize it. The company owns, not strictly the power, but the gateway through which alone the power can be captured and led out. It can thus impose such toll as it will upon all use of the power. It can make every mill and machine using the power a tributary to its exchequer. This monopoly, this power of exacting tribute from the increasing needs of the community, may be of much more value than the cost of the dam and the value of all the other incidents of the land. This monopoly value is an incident of the land and should be included in an estimate of the value of the land for taxation in Auburn. If only part of the land is in Auburn, there should be a proportional division of the whole value. The determination of this monopoly value is likewise a question in commercial economics.

I do not see, therefore, the need or expediency of declaring whether "water power" thus made available through the company's land is appurtenant wholly or partly to that land, or whether it passes on down the canals and becomes annexed to or incorporated in the mills below. As well try, it seems to me, to determine whether the force of the electric current is appurtenant to the dynamo, or to the lamp, or motor; whether the force that propels a cannon ball is appurtenant to the cannon or to the target; whether the wind is a part of the bellows or of the fire. The force is being continually expended, if continually renewed.

As to the mills, all that can be annexed to or incorporated in them as to water power is the somehow acquired right against the owner of the dam to have the water power transmitted to them. If such a right has been acquired by the mill owners, either personally or as an incident of the ownership of the mill, the value of such right is to be estimated in assessing the owner or the mill. The existence of a contract or covenant between the owner of the mill and the owner of the dam, which contract runs with the mill and the dam, may add to the value of each instead of subtracting from the value of either. It should not be assumed that taxing in Lewiston the right of the mill to have water power from the dam in Auburn should reduce the tax in Auburn upon the corresponding right of the dam to receive compensation therefor. The water power is not to be taxed in either town. The increased value of the real estate by reason of the incident natural monopoly, or incident acquired rights, is to be taxed in the town in which the real estate is situated.

The request of the City of Auburn was that the presiding justice consider the water power as appurtenant to the dam, and as properly taxable in the same municipality. The presiding justice declined to do this in terms, but I infer from the language of his finding that, in fixing the valuation of the real estate of the Union Water Power Company in Auburn, he did fully consider and include its capacity for valuable use as indicated in this note. I think this was all the city could require of him. His estimate of that value after considering and including all the proper elements is conclusive. There is no provision for an appeal therefrom.

Exceptions overruled.

CITY OF AUBURN *vs.* UNION WATER POWER COMPANY.

Androscoggin. Opinion March 2, 1897.

Tax. Meetings. Notice. Officer. Election. Exceptions. R. S., c. 6, § 175.

In action of debt to recover a tax, the defendant objected to the validity of its assessment because the meeting of the city council at which the tax was levied had not been legally called. The record showed that "the city council met pursuant to the call of the mayor."

Held; sufficient, it appearing that the city charter empowers the mayor to call meetings of the city council, although it does not provide who shall serve the notification to be given or that any return shall be made or preserved; also, that at an adjourned meeting the records of previous meetings were read and accepted.

Whether an assessor and collector have been duly elected by the city clerk casting the vote of the convention,—there being but one candidate for each office,—the court does not decide, because it appeared that the assessor assumed thereby that he had been elected, and if not so, held over from a regular election of the previous year; also, *held;* that whether the collector was legally elected, is immaterial in this case.

Exceptions do not lie for refusing a requested ruling that is equivalent to asking a nonsuit.

See *Union Water Power Co., Applt.* v. *City of Auburn*, ante, p 60.

ON EXCEPTIONS BY DEFENDANT.

This action was brought under the provisions of R. S., c. 6, § 175, to recover a tax of ten thousand one hundred dollars assessed against the defendant in the city of Auburn, by supplemental assessment made in the year 1894. The sum of one hundred dollars was a tax assessed upon a lot of land known as the Ice House Lot, valued at five thousand dollars, and the sum of ten thousand dollars was a tax asssessed upon the granite dam, located in the Androscoggin River, between the cities of Lewiston and Auburn, with the appurtenances and the flowage rights connected therewith, valued at $500,000.

The writ is dated April 11, 1895, and was returnable at the September term, 1895, of this court sitting below. At the same term, the defendant entered an appeal, under the provisions of the

statute of 1895, c. 122, from the adjudication of the assessors of the city of Auburn, refusing to abate any portion of the tax for which this action was brought. See preceding case. Both proceedings were heard by the justice presiding at the September term, 1895.

The case is stated in the opinion.

N. W. Harris, J. A. Pulsifer, W. W. Bolster, A. R. Savage, J. W. Symonds, D. W. Snow and C. S. Cook, for plaintiff.

(1.) Any mode by which the vote of each member is clearly and definitely ascertained for the purpose of record is sufficient. 15 Am. and Eng. Ency. p. 1038; *Brophy* v. *Hyatt*, 10 Colo. 223; Beach, Priv. Corp. § 298; Cook, Stock, etc., § 606.

The ballot cast by the hand of the clerk was the ballot of each member of the council. The clerk did not cast it as his own ballot, but in the presence and under the direction of the council as and for the ballot of each member present and participating in the proceedings. Paine, Law of Elections, § 457, citing *Clark* v. *Robinson*, 88 Ill. 498.

(2.) Acts of officers de facto are valid as to third parties.

Hooper v. *Goodwin*, 48 Maine, 79; *Belfast* v. *Morrill*, 65 Maine, 580; *Hutchings* v. *Van Bokkelen*, 34 Maine, 126; *Bliss* v. *Day*, 68 Maine, 201; *Hathaway* v. *Addison*, 48 Maine, 440; *Mussey* v. *White*, 3 Maine, 290; Black on Tax Titles, 341, and cases cited: *Fitchburg R. R.* v. *Grand Junc. R. R.* 1 Allen, 552; *Sudbury* v. *Heard*, 103 Mass. 543; *Elliot* v. *Willis*, 1 Allen, 461, and cases cited; *Sprague* v. *Bailey*, 19 Pick. 436.

(3.) The annual appropriation resolve was passed at an adjourned meeting. The court will presume on certiorari, that the meeting and adjournment were regularly made. *Freeholders of Hudson County* v. *State*, 24 N. J. L. 718. In absence of evidence to contrary, meeting presumed to be legally convened. *Rutherford* v. *Hamilton*, 97 Mo. 543; *Tierney* v. *Brown*, 65 Miss. 563, (7 Am. St. Rep., p. 679); *Corburn* v. *Crittenden*, 62 Miss. 125; *Brigins* v. *Chandler*, 60 Miss. 862.

There is no pretense that the records of the meeting of July 6 are not fair on their face. Vol. 2, Am. & Eng. Corp. Cases, p. 39;

Ex parte Wolf, 14 Nebr. Reports, 24, reported in Vol. 6, Am. & Eng. Corp. Cases, p. 153.

The presumption was and still is that the meeting was legally convened. Cooley, Taxation, 2d Ed. p. 259, says: "And where a majority have acted, the legal intendment in favor of the correctness of official action requires us to conclude that such action is the result of due meeting and consultation, or at least of a meeting duly called, at which all had an opportunity to attend, and a majority did attend. It is therefore prima facie valid, though the legal presumption in its favor may be overcome by evidence that no such meeting was called or had."

A. & E. Ency. of Law, p. 1034, says:—"And where it appears that a meeting of the body was held at which business was transacted which it only had a right to do at a legal meeting, it will be presumed, if necessary, and nothing to the contrary being shown, that all its members were present and acted," citing *State* v. *Smith*, 22 Minn. 218; *Freeholders of Hudson Co.* v. *State*, 24 N. J. L. 718.

If the mayor called the meeting, the presumption is that he has done so in the manner pointed out by the statute. The presumption is in favor of every public officer, that he performs his duty properly. *Dubuc* v. *Voss*, 19 La. 210, (92 Am. Dec. p. 526).

Court will presume that an officer has performed his duty: so held, when the record is silent as to whether a constable gave due notice of a sale by advertising it as required or not. *Culbertson* v. *Milhollin*, 22 Ind. 362, (85 Am. Dec. p. 428).

The burden is on the defendant to show that the meeting was illegal. The record of the city clerk, so far as the defense is concerned, did not necessarily settle the matter.

It is not necessary for the plaintiffs to prove the passage of the appropriation resolve by introducing the record of meeting at which it was passed. No allegation in the writ demands it. *York* v. *Goodwin*, 67 Maine, 260. In *Howe* v. *Moulton*, 87 Maine, 120, no evidence of the assessment of taxes was offered except the warrant of commitment as set forth in the case, and it was held that that was sufficient evidence. And in *Bath* v. *Whitmore*, 79 Maine,

182, the papers in collector's hands were held to be sufficient proof of legal assessment. The same thing was decided in *Norridgewock* v. *Walker*, 71 Maine, 181.

W. H. White, S. M. Carter and J. A. Morrill, for defendant.

(1.) Was Mr. Heath legally elected an assessor of taxes in the city of Auburn for the year 1894, and was Mr. Kinsley legally elected collector of taxes of said city for that year?

This question is an important one. Two assessors are not authorized to assess a tax or issue a warrant where a third assessor has not been qualified. *Williamsburg* v. *Lord*, 51 Maine, 599; *Machiasport* v. *Small*, 77 Maine, 109.

Assessors de facto cannot make an assessment which will sustain an action for taxes. *Dresden* v. *Goud*, 75 Maine, 298; *Orneville* v. *Palmer*, 79 Maine, 472.

If Mr. Heath was not legally elected an assessor for that year, his participation in the assessment and commitment of the taxes vitiates the assessment, and an action for the collection of the taxes cannot be maintained. *Jordan* v. *Hopkins*, 85 Maine, 159.

Was this a legal election? The members of the convention did not in any manner authorize the city clerk to cast "the vote of the convention," or any vote, for these gentlemen. We, therefore, are not called upon to discuss the question whether such action, if taken, would be the basis of a legal election. That they were respectively candidates for these offices is wholly a matter of inference. The record does show clearly, however, that not a single member of the joint convention voted for collector or for assessor; it shows that the city clerk, who was not a member of the joint convention, but simply its recording officer, cast a vote for Mr. Kinsley as collector and Mr. Heath as assessor, and the record further shows that each was declared duly elected. Under such charter provisions, this cannot be considered a legal election of such officers by the joint convention of the city council. Counsel cited:—*Foster* v. *Scarff*, 15 Ohio St. 532; Brightley, L. C. Elections, 679, 681; *Crowell* v. *Whittier*, 39 Maine, 530; 1 Dillon Mun. Corp. 4th Ed. § 282.

In *Lawrence* v. *Ingersoll*, 88 Tenn. 52, (17 Am. St. Rep. 870,) it is said: "It appears by a concurrence of text-book, judicial, senatorial, congressional and legislative authority, that the rule is settled that a majority of a definite body present and acting must vote for a candidate in order to elect him." In the case at bar, not a single vote was cast by any member of the convention for Mr. Heath or Mr. Kinsley. It is said that the city clerk cast "the vote of the convention." This statement seems an absurdity.

In public and municipal corporations and in all other elections of a public nature, every vote must be personally given. 2 Kent, 294, 295, 8th Ed. p. 344.

Where authority over a matter of personal judgment and discretion is committed to a city council, the law seems to be well settled that such authority cannot be delegated. 1 Dillon Mun. Corp., 4th Ed. § 96, and notes; *Coffin* v. *Nantucket*, 5 Cush. 269; *Day* v. *Green*, 4 Cush. 433; *Ruggles* v. *Nantucket*, 11 Cush. 433.

"When discretionary power of any kind is delegated to men by statute, the common law requires of them the personal exercise of that discretion, and will not permit them to delegate it to another to be exercised by proxy." *Taylor* v. *Griswold*, 14 N. J. L., 222, 249. Cooley, Cons. Lim. 6th Ed. 248.

(2.) Assessment invalid, meeting of city council not legally called.

"No assessment of taxes by a town or parish is legal, unless the sum assessed is raised by a vote of the voters at a meeting legally called and notified." This statute is as applicable to cities as to towns. R. S., c. 1, § 6, par. xvii; *Rockland* v. *Rockland Water Power Co.*, 82 Maine, 188.

Record should show that meeting was called in strict conformity with charter. 1 Dillon Mun. Corp. 4th Ed. § 263.

After the passage of R. S. of 1841, c. 5, §§ 6 and 7, prescribing the manner of warning town meetings and what the return on the warrant should contain, it has been uniformly held that the return must show how the meeting was warned, and that it was warned in the manner prescribed by law. *State* v. *Williams*, 25 Maine, 561; *Christ Church* v. *Woodward*, 26 Maine, 172; *Fossett* v.

Bearce, 29 Maine, 523; *Clark* v. *Wardwell*, 55 Maine, 66; *Brown* v. *Witham*, 51 Maine, 29. Unless the records of a town meeting show that the notices calling it were posted in public and conspicuous places, the proceedings are void. *Allen* v. *Archer*, 49 Maine, 346–351; *Hamilton* v. *Phipsburg*, 55 Maine, 193.

There must be in the case some record of the summons or notification which the mayor caused to be issued in calling the special meeting. Otherwise, no authority whatever would appear for holding the meeting. R. S., c. 6, § 91; *Rideout* v. *School Dist.*, 1 Allen, 232; *Sherwin* v. *Bugbee*, 17 Vt. 337; Cooley, Taxation, p. 247, citing *Moser* v. *White*, 29 Mich. 59, 60. Where the requirements of the charter or of the statute are explicit as to the manner in which a meeting shall be called or notified, the record must show a compliance with these requirements, in order to make the meeting legal and its doings valid. The statute is explicit. It says that the sum assessed must be raised by a vote of the voters at a meeting legally called and notified.

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

HASKELL, J. This is an action of debt by the City of Auburn and city treasurer to recover a tax assessed, in 1894, duly authorized by the mayor. The whole evidence is reported, and it therein appears, from the assessment lists and commitment thereof by warrant to the collector, that the tax sued for was due. No question is made as to the regularity and sufficiency of these documents. They, therefore, make a prima facie case, sufficient to sustain the action. *Norridgewock* v. *Walker*, 71 Maine, 181; *Howe* v. *Moulton*, 87 Maine, 120; *Bath* v. *Whitmore*, 79 Maine, 182. To overcome the apparent validity of these documents, it is necessary to show the illegality of the tax. The plaintiff introduced in evidence,—that might well have been omitted,—a copy of the records of the meeting of the city council and adjournment thereof, at which the taxes were levied. This record runs, "The City Council met pursuant to call of the Mayor," and then

specifies the business transacted, including the levy of the tax in question.

I. Exception is taken to the refusal of the presiding justice to rule that the meeting was not legally called, and that therefore the tax was levied without authority of law. This was not error, for it appears prima facie that the charter requirements as to the calling of the meeting had been complied with. The record states: "Met pursuant to call of the Mayor." The charter empowered the mayor to call the meeting by causing a "notification to be given in hand, or left at the usual dwelling-place of each member." It does not provide who shall do it; nor that any return of the fact shall be written, made or preserved anywhere. Neither did the act relating to town meetings prior to R. S., 1841, c. 5, § 6, mention the mode of service of a town meeting warrant, and up to that time our statute was the same as the Massachusetts statute of 1787.

In Massachusetts: "That he had warned all the inhabitants of the district as the law directs" was held sufficient prima facie. *Saxton* v. *Nimms*, 14 Mass. 320. "That he had warned the inhabitants by posting up copies" was held good. *Thayer* v. *Stearns*, 1 Pick. 109. "Pursuant to the warrant I have notified," "Agreeable to the within warrant," &c., "That he had notified as the law directs," were held sufficient. *Briggs* v. *Murdock*, 13 Pick. 305. "That he had warned the inhabitants," was held sufficient in a suit for taxes. *Houghton* v. *Davenport*, 23 Pick. 235; *Commonwealth* v. *Shaw*, 7 Met. 52; *Rand* v. *Wilder*, 11 Cush. 294; *Commonwealth* v. *Brown*, 147 Mass. 592. The doctrine of these cases seems to be that the notice is presumed to comply with the requirements of law from the general language of the return saying: That the officer had warned the inhabitants agreeable to the warrant; Pursuant to the warrant; As the law directs, etc. In *Gilmore* v. *Holt*, 4 Pick. 257, it was held that the notice of an annual town meeting was presumed to have been legal until the contrary be shown. So in *Ford* v. *Clough*, 8 Greenl. 343, where the statute required such notice "as the town shall agree upon," it was presumed to have been such as the town agreed to.

The court distinguishes the case of *Tuttle* v. *Cary*, 7 Greenl. 426, where, under the parish act, seven days' notice was required to be posted on the outer door of the meeting house. So in *Bucksport* v. *Spofford*, 12 Maine, 490, where the return did not show the meeting had been warned, the court presumed it to have been legally done, and distinguished *Tuttle* v. *Cary* as controlled by statute.

In *State* v. *Williams*, 25 Maine, 561, considered after the act of 1841 requiring town meetings to be warned in a particular way and a return showing how the same had been done, the court held a strict compliance with the statute necessary, and that the return of the officer was the only competent evidence upon the question; and so have all the later cases. *Christ's Church* v. *Woodward*, 26 Maine, 172; *Fossett* v. *Bearce*, 29 Maine, 523; *Allen* v. *Archer*, 49 Maine, 346; *Brown* v. *Witham*, 51 Maine, 29; *Clark* v. *Wardwell*, 55 Maine, 66; *Hamilton* v. *Phipsburg*, 55 Maine, 193.

It should be noticed that the Massachusetts cases, and the Maine cases, prior to the act of 1841, recognize a presumption in favor of regularity to arise from the most general language contained in the return of the officer who served the warrant, although that seems to have been the only proper evidence to be considered on the question.

In this case the charter empowers the mayor to call special meetings by causing notifications to be given in hand, or left at the usual dwelling-place of each member. No length of notice is required. No particular person or officer is named who shall leave the notices. The mayor is to cause the notices to be given. Most likely a city clerk would be charged with the duty. He would probably make and sign the notices and either deliver them himself or see that some person, perhaps the city messenger, did so. It is his duty to keep a true record of meetings of the council. His record recites in this case, "Met pursuant to call of the Mayor." That recital may as well be held to raise a presumption of legal notice as the general language of the officers' returns in the cases above noticed, and we think it does. If he performed the service as city clerk, by direction of the mayor, it may be said that

he acted within the scope of duty, and the records of such officers are always competent evidence and presumed to be correct. *Bruce* v. *Holden*, 21 Pick. 187. Moreover, at an adjournment of the meeting the record recites, "Records of previous meetings read and accepted," a direct indorsement by the body of the statement in the previous record that the council "met pursuant to the call of the mayor," meaning on his call properly served upon each member of the city government. Precaution would recommend a written call, signed by the mayor, bearing a return showing what notification had been given, which should be recorded as a part of the records of the meeting. This method has recently been adopted by some cities, and might well be by all. But the old method that preserves no particular evidence of the call and service beside the mere recital "Met pursuant to call of the Mayor" at the head of the record of the meeting, which has very generally prevailed, we cannot say raises no presumption of legality. To hold otherwise would overturn an established usage and work irreparable mischief.

II. Exception is taken to the refusal of the presiding justice to rule that one of the assessors and the collector had not been legally elected. The evidence of their election is the city record, "The following officers, there being but one candidate, were each elected by the city clerk casting the vote of the convention, and each was declared elected." This is an irregular method of electing officers required by statute to be elected by ballot, and whether valid or not it is unnecessary to now decide, inasmuch as the assessor thereby assumed to have been elected, and if not so, held over from a regular election of the previous year. *Bath* v. *Reed*, 78 Maine, 276. Whether the collector was legally elected is immaterial here.

III. Exception is taken to the refusal of the presiding justice to rule that the action was not maintainable upon the evidence submitted, thereby showing that all the evidence reported was intended to be made a part of the exceptions. The ruling excepted to was equivalent to denying a nonsuit, to which no exception can

be taken. The remedy is by motion. *Bunker* v. *Gouldsboro*, 81 Maine, 195; *McKown* v. *Powers*, 86 Maine, 291.

Exceptions overruled.
Damages to be assessed below.

GEORGE A. LOWELL, and others, in equity,

vs.

WASHINGTON COUNTY RAILROAD COMPANY, and others.

Washington. Opinion March 8, 1897.

Railroads. Location. Statutes. Guaranty. Alteration of Contract. R. S., c. 51, § 6; Stat. 1893, c. 193; Spec. Laws, 1895, c. 90, 91.

The statute of 1893, c. 193, confers the same authority upon chartered roads to make changes in their location that was previously conferred upon roads organized under the general railroad law. *Held;* that the change of location in this case was authorized by law.

When a later act, extending the time for the location and construction of a railroad, identifies the corporation, eo nomine, but through error recites a wrong chapter as being the act of incorporation, *held;* that the later act applies to the railroad therein named, notwithstanding the mistaken number of the chapter.

By special act of 1895, c. 91, the county commissioners were authorized to pass upon the sufficiency of the guaranty given by contractors for the faithful performance of their contract to build a railroad. *Held;* that the commissioners acted judicially in approving the bond, and that their decision is final; also, that the court has no authority in the absence of fraud to revise their judgment.

By an act of the Legislature the county of Washington was authorized to subscribe for and take preferred stock in the Washington County Railroad. The charter of the railroad gave its termini as "some point on the Saint Croix river in the city of Calais or vicinity" and "some point on the Maine Central Railroad in Hancock county." There was no other direction or limitation upon its location, other than it must "pass through the counties of Washington and Hancock by such route as the directors may select." When the vote to take the preferred stock was had, no location of the railroad had been made. *Held;* that the location might be anywhere, between the two termini, through the two counties; and that the directors had full and absolute control as to the line of location.

Held; that the change in the location in this case, as approved by the railroad commissioners, did not release the county from its liability under its original subscription for stock; and that a second subscription for stock was unnecessary.

Also; while a radical, fundamental change in the character of an original enterprise releases the subscriber for stock who does not consent to it, it does not have that effect if consented to. In this case it appears that the county consented to the changed location, as shown by their re-subscription for stock; and there being nothing in the vote of the county to the contrary, the county commissioners had authority to give consent.

Upon an objection that work done in grading before January 1, 1896, was done before location of the line which might be located elsewhere, and therefore cannot be treated as work done upon the road within the terms of the special act of 1895, c. 91, *held;* that it was known from preliminary surveys where the line would be at that point, and the actual location subsequently made coincides identically with the grading done. These facts must be regarded as a substantial compliance with the statute limitation of time within which the work of construction should be commenced.

ON REPORT.

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

The case appears in the opinion.

C. P. Stetson, G. M. Hanson and F. B. Livingston, for plaintiffs.

Jurisdiction:—R. S., c. 77, § 6; 2 Dillon, Mun. Corp. §§ 916–919; 1 Wood, R. R., 131; Adams, Eq. 212; *Crampton* v. *Zabriskie*, 101 U. S. 601; *English* v. *Smock*, 34 Ind. 36, (7 Am. Rep. 215).

Municipal Aid:—1 Dillon, Mun. Corp. § 153; 23 Am. & Eng. Ency. 396; *Bucksport* v. *Brewer*, 67 Maine, 295; *Daveiss County* v. *Dickinson*, 117 U. S., 657–663, 665; *People* v. *Smith*, 75 N. Y. 772, 781.

Second subscription of no effect:—*State* v. *Kinnon*, 7 Ohio St. 562; *Sheboygan County* v. *Parker*, 3 Wall. 93, 96; *Machias River Co.* v. *Pope*, 35 Maine, 17; *Young* v. *Clarendon Township*, 132 U. S. 347, 348; *Danville* v. *R. R. Co.*, 43 Vt. p. 155; 1 Wood, Railroads, 339.

Section 6, act of 1895, a condition precedent:—Entire line to be under contract, with a satisfactory guarantee, and second subscription beyond authority. *Keyes* v. *Westford*, 17 Pick. 273, 279.

Change of location avoids subscription:—*Middlesex, etc., Co.* v. *Locke*, 8 Mass. 268; *Same* v. *Swan*, 10 Mass. 384; *Manning* v. *Matthews*, 66 Iowa, 675; 1 Wood, R. R. § 119; 2 Id. § 271; *Ashtabula, etc., Co.* v. *Smith*, 15 Ohio St. 328.

Change in the line was a violation of the contract, and that courts have uniformly interfered to give relief, is well sustained. *Wullenwaher* v. *Dunnigan*, Neb. 47 N. W. R. 420; *Virginia, etc., R. R. Co.* v. *Lyon Co.*, 6 Nev. 68; *Aurora* v. *West*, 22 Ind. 88; *Purdy* v. *Lansing*, 128 U. S. 557; *State* v. *City of Morristown*, 24 S. W. R. 13; *Platteville* v. *Galena*, 43 Wis. 493.

No power of R. R. Comrs. to change location: *State* v. *Cleland*, 68 Maine, 258.

Extension:—Act of 1895, c. 90 is without sense.

Charter subject to R. S., c. 51, § 6: Compliance a condition precedent. *Verona's Appeal*, 108 Pa. St. 83; *Hoyt* v. *Ea. Saginaw*, 19 Mich. 39; 23 Am. & Eng. Ency. p. 454, 467, 468, and cases; *Mizell* v. *Burnett*, 4 Jones' Law, 249, (69 Am. Dec. 744); *Com.* v. *E. & N. E. R. R. Co.*, 27 Pa. St. 339, (62 Am. Dec. 372); *Brewster* v. *Hartley*, 37 Cal. 15; *Martin* v. *Pens. etc., R. R. Co.*, 8 Fla. 370, (73 Am. Dec. 713); *Cent. Transp. Co.*, v. *Pull. Pal. Car Co.*, 139 U. S. 24; *Dugan* v. *Bridge Co.*, 27 Pa. St. 303, (67 Am. Dec. 464.) Bond given not a sufficient guarantee.

C. E. and A. S. Littlefield; B. D. and H. M. Verrill, for defendants.

Rules for construing the acts of the legislature: The end sought was the completion of the proposed railroad. *Donnell* v. *Joy*, 85 Maine, 118; *Chamberlain* v. *Painesville, etc. R. R. Co.*, 15 Ohio St. 244, cited by plaintiffs and approved by the court in *Ashtabula, etc., R. R. Co.* v. *Smith*, 15 Ohio St. 328, also cited by the plaintiffs; 1 Wood, Railroads, p. 14, how to build a railroad, or to accomplish the purposes of the legislature, and not how to defeat the building of a railroad; *Collins* v. *Chase*, 71 Maine, 434.

In *Danville* v. *R. R. Co.*, 43 Vt. 155, there was clearly a radical change in the original subscription, upon different terms and conditions. In *State* v. *Kennon*, 7 Ohio St. 562, the court

held that the officers were officials, and that they were to exercise political functions, and were not in any sense agents for a single specific purpose. In *Sheboygan Co.* v. *Parker*, 3 Wall. 93, 96, the court held that the legislature had the power to constitute persons agent for a specific purpose. In *Young* v. *Clarendon Township*, 132 U. S. 347, 348, the governor refused his certificate, and the court held that, under such circumstances, the bonds never became the valid obligation of the town. In *Machias River Co.* v. *Pope*, 35 Maine 17, the court merely held that the fact that the county commissioners had not made their decisions as auditors a matter of record did not invalidate their action as auditors. What their rights and powers would have been when acting for the county as officials for the county, is not raised or suggested by that case. If the Vermont authorities are to govern, the commissioners were acting officially and did not exhaust their authority, by making the first subscription. *First National Bank* v. *Town of Concord*, 50 Vt. 258, approved in *First National Bank* v. *Arlington*, 15 Blatch. 57; 1 Wood, Railroads, 339; *Keyes* v. *Westford*, 17 Pick. 279, is in no sense parallel. Two of the committee agreed with a third member to construct the road in a more expensive manner than that provided for in the laying out. The court say: "The act of the committee, therefore, in making provision for a more complete and expensive road, was, so far, an excess of authority; and it follows as a necessary consequence, that the contract with Bunker to make the deficiency of the first contract was founded in a like excess of authority, and therefore imposed no obligation on the town."

The statute defines the duties of the county commissioners, and among other things it requires them to "represent it; have the care of its property and management of its business; by an order recorded, appoint an agent to convey real estate; lay out, alter or discontinue ways, and perform all other legal duties." R. S., c. 78, § 12.

Change of location:—*Middlesex Turn. Corp.* v. *Locke*, 8 Mass. 268, is overruled in *Agricultural Branch R. R. Co.* v. *Winchester*, 13 Allen, 32, sustained by *Meadow Dam Co.* v. *Gray*, 30 Maine,

547. It must appear that the change in location was made without the assent of the subscriber. 2, Wood, Railroads, p. 1108, recognizes the right to change the location before construction. The subscribers are presumed to have known the law which authorized a change in the location and to have contracted in view of it. *Meadow Dam Co.* v. *Gray*, supra.

Railroad commissioners authorized to approve change of location: —*State* v. *Chadbourne*, 74 Maine, 506; *Me. Cent. R. R. Co.* v. *Waterville, etc., Co.*, 89 Maine, 328.

Actual construction before January 1, 1896:—*Manchester, etc., R. R.* v. *Keene*, 62 N. H. 81. A substantial compliance with the conditions of the resolution is sufficient. *People* v. *Holden*, 82 Ill. 93; *Courtright* v. *Deeds*, 37 Iowa, 503; *Ogden* v. *Kirby*, 79 Ill. 555; *Ashtabula, etc., R. R. Co.* v. *Smith*, supra; *C. M. & St. P. Ry. Co.* v. *Shea*, 67 Iowa, 728; *Cantillon* v. *Dubuque & N. W. Ry. Co.*, 78 Iowa, 48; *Smith* v. *Allison*, 23 Ind. 366.

There must be a fair and substantial compliance with the terms of the contract, and this is all that is required. *Missouri Pacific Ry. Co.* v. *Tygard*, 84 Missouri, 263, (54 Am. Rep. 97); 1 Wood, Railroads, p. 352; *Wemple* v. *St. Louis J. & S. R. Co.*, 120 Ill. 196.

Bond a sufficient guarantee:—*Andrews* v. *King*, 77 Maine, 238; *State* v. *Dunnington*, 12 Md. 340; *Noble* v. *Union River Logging R. Co.*, 147 U. S. 125; *Brewer* v. *Boston, etc., R. R. Co.*, 113 Mass. 57; High, Legal Remedies, §§ 150 and 154.

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

STROUT, J. Fifteen tax payers, in the county of Washington, seek by this bill to restrain the county commissioners and county treasurer of Washington county from any further payment to the Washington County Railroad Company, upon the county's subscription for $500,000 of the preferred stock of the railroad company. The complainants claim upon several grounds that the county has been released from all liability.

The Washington County Railroad Company was incorporated by the legislature in 1893. Chap. 454 of special laws. The second section of the charter provided that "said corporation shall have the right to locate, construct, equip, maintain and operate, or lease a railroad from some point on the Saint Croix River, in the city of Calais, or vicinity, through the counties of Washington and Hancock, by such route as the directors of said corporation may select, subject however to all provisions of the revised statutes, chapter fifty-one, section six, to some point on the Maine Central Railroad in Hancock county, including a branch to Eastport, and to consolidate with any railroad company in the State of Maine, or in the Province of New Brunswick, with which it may connect." Section 7 of the charter provided that the charter should become void, "unless the railroad between Calais and some point on the Maine Central Railroad as aforesaid, shall have been located and the construction thereof commenced by the first day of February," 1895, "and the railroad completed for travel between said termini by the first day of February," 1899, "except as to such part thereof as may then have been completed." By Chap. 90 of the special laws of 1895 "the time for the location and construction of the Washington County Railroad Company, incorporated under chapter fifty-four of the private acts of eighteen hundred and ninety-three, is hereby extended to four years from the date of the approval of this act, and all the provisions of said chapter shall be and remain in force during said four years." This act was approved February 28, 1895.

It will be noticed that the act of 1895 refers to the original charter, as chapter 54—when it should have been 454. Chapter 54 was an act in regard to larceny. But the act extends the time for the construction of the "Washington County Railroad Company" incorporated in 1893. The only act of incorporation of the Washington County Railroad Company in that year was by chapter 454. The latter act identifies the railroad, eo nomine, and it would be puerile to hold, that, because of the mistaken number of the chapter, the later act did not apply to the original charter of 1893. *Woodworth* v. *Grenier*, 70 Maine, 242. By chapter 91 of

the special laws of 1895 the county of Washington was authorized to aid in the construction of the railroad "by subscribing for and purchasing preferred stock of the Washington County Railroad Company to an amount not to exceed five hundred thousand dollars in all." Full provision was made in the act for submitting to the voters of the county the question whether the county should so subscribe. It is admitted that all the provisions of this act were complied with to validate a favorable vote—and that by an overwhelming vote, on the 29th of July, 1895, the voters of Washington county authorized a subscription of $500,000 to the preferred stock of the railroad. Section 6 of the act provided that if the county authorized the subscription, then "when the entire line shall be under contract and a satisfactory guarantee is given to the county commissioners, that the line shall be completed under said contract, then said commissioners shall cause subscription to be made in behalf of said county for preferred stock" to the amount authorized. The act also provided, section 7, that unless the location of the railroad "through Washington county from the west line thereof to the Saint Croix River" should be filed with the county commissioners on or before October first, 1899, "accompanied by the affidavit of the majority of the directors of said company, that they intend in good faith to proceed" with construction, "and shall have begun the work of actual construction of said line within said county on or before the first day of January, eighteen hundred and ninety-six, then if either of said conditions fail," all the provisions of the act relating to the railroad "shall become null and void, and said company shall thereby forfeit all rights herein conferred or granted" by the county of Washington.

It will be noticed that the charter of the railroad gives its termini as "some point on the Saint Croix River in the city of Calais or vicinity" and "some point on the Maine Central Railroad in Hancock county." There is no other direction or limitation upon its location, other than it must "pass through the counties of Washington and Hancock by such route as the directors may select."

When the vote to take preferred stock was had, no location of

the railroad had been made. It might be anywhere, between the termini, through the two counties. The directors had full and absolute control as to the line of location. The length of the road exceeds one hundred miles. It is evident from the latitude given in the charter, that the legislature contemplated a road which should afford to Washington county an outlet to the Maine Cenral, and by it to the sea, shorter and more convenient than any existing land communication, and thus largely develop the resources of Washington county in particular and the state generally. It designedly left to the practical judgment of the directors the selection of the most feasible route, reference being had to the expense of construction, the possibility of obtaining the necessary funds; and all other considerations that would affect or control the choice of route. When the question was submitted to the voters of the county, they knew that no location had been made, and that the directors of the road alone were authorized to make such selection of route as they might deem wise—limited only to the two termini—and between them to pass through Washington and Hancock counties. It is claimed by complainants that when the matter was submitted to the people, it was understood or represented, that the location would be from Calais, down the margin of the Saint Croix to Red Beach, and thence on to Dennysville. It is sufficient to say that the case fails to disclose any evidence of such representation or understanding. And if it had it would have made no difference, as the place of location was intrusted to the discretion of the directors as necessity might require, and they might judge expedient.

The vote of the county having been canvassed and declared by the county commissioners and properly recorded on August 15, 1895, the railroad company on September 5, 1895, made a contract with George P. Wescott and James Mitchell by which the entire line was to be constructed by the contractors for a price stipulated therein. Although the line had not then been located, the contract bound the contractors to build between the termini, through Washington and Hancock counties, wherever it might be located by the directors. They also bound themselves to conform

to the charter and the act authorizing the county of Washington to aid the road. The contractors on the thirteenth day of September, 1895, gave a bond with sureties to the county commissioners of Washington county in the sum of one hundred thousand dollars, for the faithful performance of their contract to build the railroad. This bond was approved by the county commissioners, in accordance with section 6 of chapter 91, special laws of 1895. The statute conferred upon the county commissioners authority to pass upon the sufficiency of the guarantee. In doing this they acted judicially, and their decision was final. We have no authority in the absence of fraud to revise their judgment. *Walton* v. *Greenwood*, 60 Maine, 356–368; R. S., c. 78, § 10; *Brewer* v. *Railroad*, 113 Mass. 56; *English* v. *Smock*, 34 Ind. 36, (7 Am. Rep. 215); *State* v. *Dunnington*, 12 Md., 340. These acts constituted a full compliance with the conditions precedent, required by § 6 of c. 91, special laws of 1895, and the county commissioners were then authorized to subscribe for $500,000 of the preferred stock of the railroad company, which they did on September 21, 1895.

To hold their rights under this subscription, as provided in § 7 of ch. 91, special laws of 1895, it was necessary that the work of actual construction of the road within the county of Washington should have been begun on or before January 1st, 1896. The bill alleges "that work was begun on said railroad about October 1st, 1895, and continued by said contractors (Wescott and Mitchell) in the towns of Machias and Jonesboro" upon which the county commissioners paid to the railroad company over twenty-two thousand dollars, in accordance with § 6 of c. 91, which required a pro rata payment by the county upon its stock, when the company "shall have graded any section of five miles of its line." At this time the line had not been actually and finally located, but it was known where the line would be, at the place of this work, and the subsequent location in fact is identical with it. The evidence shows that about seven miles of the road had been graded by Wescott and Mitchell under their contract prior to January 1st, 1896—and that prior to that time the contractors had expended in the grading and right of way over forty-five thousand dollars and

incurred liabilities in addition of over three thousand dollars—these sums included twenty-five thousand dollars paid J. N. Greene in accordance with § 4 of c. 90, special laws of 1895. It is in evidence that about fifteen miles of road in all within the county of Washington had been graded at the time of filing this bill.

The rights of the parties had now become fixed, and if the contractors had proceeded with the construction of the road, the corporation would have been entitled to receive and the county bound to pay under its subscription, for every section of five miles graded, the pro rata amount provided for in § 6 of c. 91. The contract of Wescott and Mitchell described the line, as running through Robbinston, Perry and Pembroke to Dennysville, although no actual location had then been made by the directors. They undoubtedly contemplated locating it through those towns, and in March, 1896, the directors did regularly locate the line through those towns to Dennysville, and from thence to the Maine Central, which location was duly approved by the railroad commissioners.

Meantime Wescott, one of the contractors to construct the road, becoming sick, utterly refused to proceed under the contract. The railroad company then had the right, by suit to recover damages for breach of the contract, and the county commissioners could have resorted to a suit upon their bond. But all parties desired the road to be built. These suits would not have accomplished that result. In this dilemma, the railroad company made a new contract for the construction with James Mitchell for the same cost, and practically upon the same terms and conditions; who gave a bond to the county commissioners, with sureties satisfactory to and approved by them, for the performance of his contract; and this substituted contract and guarantee was accepted by the county commissioners in lieu of the first contract and guarantee. Under the new contract and guarantee the county commissioners and the railroad company had reason to believe that the actual building of the road was assured. It could make no difference to the county by whom the work of construction was done if the cost was not increased. The important and greatly desired object was to have the road built.

It was not necessary, nor could it be expected, in a great enterprise like this, involving a cost of over two millions of dollars, that the railroad company, when commencing work, should be in possession or have in control, the entire amount of funds, necessary to complete the work, as claimed by complainants. If such had been the rule, few railroads would have been built. With the five hundred thousand dollars from the county, and such subscriptions as could be obtained along the line of the road, it might well be assumed that sufficient bonds of the road could be floated, as the funds were needed, to complete it.

Complainants earnestly contend that this change of contract and guarantee was unauthorized, and released the county from its subscription. The objection does not impress us as valid. On the contrary, under the circumstances of the case, the directors acted wisely in making a new contract to insure the construction of the road instead of resorting to a suit for damages, under the contract. The commissioners would have encountered the same practical difficulty in a suit upon the original bond.

Before any work was done upon that portion of the line between Calais and Dennysville, the directors found that the great cost of grading this road through Robbinston and Perry, endangered the success of the enterprise, and that a route from the Saint Croix in Calais through Baring and Charlotte to Dennysville could be graded at a saving of at least one hundred thousand dollars, without increasing the distance, or lessening the usefulness of the road as a through line to the Maine Central. They therefore deemed it wise, for the interest of the railroad, the county and the state to change the location through Robbinston to one through Baring and thence to Dennysville,—a distance of about twenty miles,—no change of location from Dennysville to the Maine Central, a distance of about eighty miles was contemplated or made. Accordingly the directors abandoned the former location from Calais to Dennysville, and located a new line to Dennysville, through Baring and Charlotte. This location commenced at the Saint Croix and Penobscot Railroad in Calais, on the bank of the Saint Croix River at a point about five miles westerly of the eastern

terminus of the Saint Croix and Penobscot Railroad, thence through Baring and Charlotte to Dennysville. From the point begun at it was proposed to pass over the Saint Croix and Penobscot Railroad to a station in the populous part of Calais almost identical with that established by the original location. The first location begun at or near the southern terminus of the Saint Croix road. Mitchell, the contractor, controls the Saint Croix and Penobscot, and the charter of the Washington County Railroad authorized consolidation with other railroads. The utilizing of the Saint Croix road saved the building of about three miles of new road. This location was duly approved by the railroad commissioners on July 11, 1896, and by the county commissioners on July 28, 1896. This was a substantial compliance with the charter. *People* v. *Holden*, 82 Ill. 93. Since which time about eight miles had been graded upon this new location, before the filing of the bill.

It is strenuously urged by the complainants that the change was unauthorized—that when the first location had been made and approved, that the delegation to the railroad company of the right of eminent domain, under the charter, had been exhausted; and that if the railroad shall be constructed upon this line under purchase of the right of way, it is such a deviation as absolves the county from liability under its subscription to stock.

It is true, that in many cases, the exercise of a granted power is once for all. But aside from statute, the better opinion now is, as to railroads, that the exercise of the right of eminent domain is not exhausted by the first location. Railroads are of great utility to the business of a community. They generally attract population and new industries along their line, and to meet the necessities thus produced, and to afford greater service to the people, it becomes necessary, from time to time to have enlarged terminal facilities, new stations, sidings, etc. These needs cannot always be foreseen —and if they could, it might be difficult or impossible to raise sufficient funds to provide for these future demands at the inception of the enterprise; and accordingly it is now held that the right of eminent domain continues in the corporation, unless

limited in its charter, to meet these necessities. Elliot on Railroads, § 962. Randolph on Eminent Domain, § 116. *Railroad* v. *Williams*, 54 Pa. St. 107; *Hagner* v. *Railroad*, 154 Pa. St. 478; *Railroad* v. *Daniels*, 16 Ohio State 396; *Prather* v. *Railroad*, 52 Ind. 42; *Chicago Railroad* v. *Wilson*, 17 Ill. 123; *Peck* v. *Railroad*, 101 Ind. 366.

This court has held that a railroad company cannot condemn land *for an extension of its road*, after the time limited in its charter for completing the road. *Peavey* v. *Calais R.* 30 Maine, 501. But this doctrine is not inconsistent with the right of a railroad company to condemn land for necessary stations and sidings as the necessity therefor may arise. But the matter is regulated in this state by statute. Revised Statutes, c. 51, § 6, relating to railroad corporations created under the general law, provide that the location of the route shall be presented to the railroad commissioners, and also filed with the county commissioners, and if the railroad commissioners approve the location, and determine that public convenience requires it, the corporation may proceed with the construction, "but the location so filed shall not vary, except to avoid expense of construction, from the route first presented to said board of commissioners unless said variation is approved by them." This section is made a part of the charter of the Washington County Railroad. Under it, it is obvious that a variation from the original location, to avoid expense of construction, which is this case, could be made, subject to the approval of the railroad commissioners. As this section applied only to corporations created under the general law, unless specially referred to in the charter, and as many if not most of the large roads existed under special charter, the legislature in 1893, by c. 193, authorized any railroad corporation, under the direction of the railroad commissioners, to make any changes in the location deemed necessary or expedient, and for this purpose they were authorized to purchase, or condemn lands under the right of eminent domain. While this statute is not in terms an amendment of § 6 of c. 51, it relates to the same subject matter, and being in pari materia should be construed with it. *Collins* v. *Chase*, 71 Maine, 434. It confers

the same authority upon chartered roads that was previously conferred upon roads organized under the general law. It was intended to cure a defect in the statute. It enlarges the rights of railroads existing by charter. No reason is perceived why its benefits should not be shared by the Washington County Railroad. The reference to section 6 in the charter should not be construed to exclude this general law. *State* v. *Chadbourne*, 74 Maine, 508. The case of *State* v. *Cleland*, 68 Maine, 258, was of a specific grant, acting upon a particular thing, inuring to the benefit of a single individual. A subsequent general act upon the same subject matter, and affecting the right of persons generally, was properly held not to repeal or modify the first act. But this principle does not apply in this case. The same may be said of *County of Cass* v. *Gillett*, 100 U. S. 585.

It follows that the change in the location, as approved by the railroad commissioners, was authorized by law. All the provisions of law were complied with which were necessary to render it valid.

Such change did not release the county from its liability under its original subscription for stock. The second subscription was unnecessary. It was made from abundant caution, but it did not change or invalidate the first and original subscription. At most, it was a substitution of a subscription for one already in force, upon which the county commissioners took a guarantee to secure the building of the road under the new contract, and was within the power of the county commissioners, and binding upon the county. It neither enlarged nor changed the liability which the county by its votes authorized its commissioners to assume for it. It was not a new execution of a power once completely executed, but a re-affirmance of a former act, done by consent of parties, with full authority from the county.

It must be remembered that the charter was for a road from the Saint Croix, at or near Calais, through Washington and Hancock counties, to a junction with the Maine Central upon such line as the directors should determine. The vote of the county was to take stock in a road to be built under this general charter. No condi-

tions were affixed to the vote, and none can be implied, except as stated in the charter. The subscription by the county commissioners was without condition. No route had then been determined upon. The fact that the directors afterward located one route did not have the effect of a condition subsequent that the road should be built on that route, so far as the subscriber for stock was concerned; and the change to another location within the chartered limits was one the directors had a right to make, subject to approval by the railroad commissioners.

This was known to the voters, when they cast their ballots, and to the county commissioners when they subscribed for stock. If the vote or subscription had been upon a condition, the subscriber would not be held if the condition had not been performed. *Railroad* v. *Brewer*, 67 Maine, 295. But here there was no condition. In such case a change in the charter does not relieve the subscriber; *South Bay Meadow Dam Co.* v. *Gray*, 30 Maine, 547; nor does a change or extension in the route. *Agricultural Branch R. R.* v. *Winchester*, 13 Allen, 32; *Nugent* v *Supervisors*, 19 Wall. 242; *Cantillon* v. *Dubuque R.*, 78 Iowa, 56; *Bank* v. *Concord*, 50 Vt. 279; *Martin* v. *Railroad*, 8 Fla. 370, (73 Am. Dec. 720.)

A radical, fundamental change in the character of the original enterprise releases the subscriber for stock who does not consent to it; it does not have that effect if consented to. In this case, the county, through its county commissioners, have consented to the changed location, as shown by their re-subscription for stock. There being nothing in the vote of the county to the contrary, the county commissioners had authority to give consent. But we hold the change was not of that radical and fundamental character which would relieve a non-consenting stock subscriber. *Moesen* v. *Port Washington*, 37 Wis. 174.

It is claimed that the work done in grading before January 1st, 1896, was done before location of the line, which might be located elsewhere, and therefore it cannot be treated as work upon the road within chap. 91, of Special Laws of 1895. But it was evidently known from preliminary surveys where the line would be

at that point, and the actual location subsequently made coincides identically with the grading done. These facts must be regarded as a substantial compliance with the statute limitation of time within which the work of construction should be commenced. A great public enterprise like this, of manifest importance to Washington county specially, and the state generally, should not be thwarted or overthrown by the court upon technical and unimportant grounds. A substantial compliance with the requirements of the charter and the laws applicable is sufficient. Such is the doctrine of the courts.

Bill dismissed, with costs.

INHABITANTS OF CUMBERLAND COUNTY

vs.

CENTRAL WHARF STEAM TOW-BOAT COMPANY.

Sagadahoc. Opinion March 8, 1897.

Negligence. Tow-Boat. Proximate Cause. Abatement.

The owner of a tow-boat towing a vessel, whether astern by a hawser or lashed alongside, is, as to third parties, the active, directing and responsible agent controlling the movements of the vessel it is undertaking to tow.

A third party injured through the fault of the master of such tow-boat may recover of the owner therefor, even though those upon the vessel being towed were also in fault.

The pendency of an action against the owner of the vessel for such fault does not bar, nor abate, an action against the owner of the tow-boat for the fault of the latter.

The fact that the owner of a bridge across tide water has not in all respects complied with the requirements of the license granted him to build and maintain such bridge will not prevent his recovering damages for an injury thereto, if it appears that such omission was not one of the real and proximate causes of the injury.

A verdict will not be set aside when it does not appear to the court that upon the issues of fact raised it is unmistakably wrong.

ON MOTION AND EXCEPTIONS BY DEFENDANT.

This was an action brought by the plaintiffs against the Central Wharf Steam Tow-Boat Company for injuries to Portland Bridge,

caused by the three-masted schooner "Viator" striking the western corner of the bridge seat on the forenoon of November 1, 1895, while in tow of the defendant's steam tug "Salem."

The day following the accident the county commenced an action against the owners of the schooner, which is now pending in the Supreme Judicial Court for Sagadahoc county. On the 15th day of the same month the present action was brought against the defendant for the same injury.

This case was tried at the December term in Sagadahoc county, and a verdict rendered for the plaintiff for the full cost of restoring the bridge,—the suit against the owners of the schooner still pending.

The defendant filed a motion to have the verdict set aside as against the evidence, and also filed exceptions to the rulings of the presiding justice.

The case is stated in the opinion.

Chas. A. True and Richard Webb, for plaintiff.

Benj. Thompson, for defendant.

Counsel cited: *John C. Sweeney*, 55 F. R. 536; *The Express*, Olcott, 258; *The Doris Eckhoff*, 32 F. R. 555, 557; *Penn. Ry. Co.* v. *Baltimore & N. Y. Ry. Co.*, 37 F. R. 129, 130; *Texarkano & F. S. Ry.* v. *Parsons*, 74 F. R. 408; *Missouri River Packet Co.* v. *Hannibal & St. Jo. R. Co.*, 2 F. R. 285, 290; *Atlee* v. *Pack. Co.*, 21 Wall. 389, 395; *Assantee* v. *Charleston Bridge Co.*, 41 F. R. 365; *Garey* v. *Ellis*, 1 Cush. 306, 307; *Silver* v. *Mo. Pac. Ry. Co.*, 13 S. W. 410, 412; *Dyer* v. *Depui*, 5 Whar. (Penn.) 583, 596; *Corthell* v. *Holmes*, 87 Maine, 24, 27; *Brown* v. *Perkins*, 12 Gray, 89, 101; *Arundel* v. *McCulloch*, 10 Mass. 70, 71; *State* v. *Anthoine*, 40 Maine, 435; *Dyer* v. *Curtis*, 72 Maine, 181, 186.

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

EMERY, J. The undisputed facts are these:—The Schooner "Viator" was lying at the Eastern Railroad dock in Portland Harbor, up Fore River above the second bridge. She was in

charge of the mate, but had a full crew on board. The defendant company, a corporation engaged in the business of towing vessels for hire, sent one of its servants Capt. Howe in the steam tug "Warren," accompanied by the steam tug "Salem," to tow the "Viator" from its dock down through the bridges to the outer harbor, preparatory to her going to sea. Arriving at the dock, the "Warren" made fast to the schooner's starboard quarter, while the "Salem" took a line from her starboard bow. The two tugs thus towed the schooner off from the pier and took her down to the upper or railroad bridge. The draw of this upper bridge being too narrow for the tug and schooner to pass through abreast, the "Warren" cast off and fell behind while the "Salem" went on ahead towing the schooner behind with a twenty-fathom hawser. After passing through the upper draw in this manner, the draw of the lower bridge, the Portland bridge, was in plain sight about 1700 feet distant. The "Salem" after a momentary stop kept on towing the schooner by the hawser, while the "Warren" followed behind the schooner, but disconnected. The wind was blowing rather across the river from the Portland or left hand side.

As they thus approached the Portland Bridge draw, Capt. Griffin of the "Salem" called back to the schooner that he would go through the Portland side of the centre pier of the draw and for the schooner to follow him. Capt. Howe of the "Warren," then astern, called out for the schooner to keep up to the windward, i. e. toward the Portland shore. To do this required a somewhat starboard helm. The "Salem" passed midway through the draw all right, but when very near the draw the helm of the schooner was put farther to starboard and she suddenly sheered to port in toward the abutment on the Portland side.

When this sheer was seen orders were at once shouted from the tugs for the schooner to put her helm to port, but before these orders could take effect she struck the abutment of the bridge on that side with her port bow, inflicting damage to the bridge.

There was some contention as to whether the manner of towing through the draw (i. e. by the "Salem" going ahead and towing with a twenty-fathom hawser, while the "Warren" cast off and

merely followed behind) was decided upon by the master of the schooner or the master of the tugs. This question we think is practically immaterial, as will appear further on.

The real cause of the starboard helm of the schooner and her consequent sudden sheer to port at the critical moment of entering the draw was also much in dispute. This question is essentially material, for unless this cause was in some fault of the defendant's servant, the master of the tugs, the defendant cannot be held liable, since no other sufficient ground appears in the evidence. The plaintiff contended, and there was evidence tending to show, that this movement of the helm and consequent sheer of the schooner was in obedience to orders from Capt. Howe of the "Warren" who was in charge of the operation. The defendant contended, and there was evidence tending to show, that no such orders were given from the tugs and that if the helmsman had any such order it came solely from those on the schooner. Whatever be our own belief, the jury have found for the plaintiff on this issue and we are constrained to say that their finding is not so unmistakably wrong as to justify us in disregarding it. Captain Howe admittedly gave a general direction to the schooner to keep to windward, and hence it is not very improbable that he may have enforced this general direction by a special one of the same tenor. It must be assumed, therefore, that Capt. Howe of the "Warren" did give the order which brought about the disaster. The jury further found that the giving such an order at that time under those circumstances was a negligent act, and hence an actual fault on the part of the defendant. This finding also must be assumed to be correct.

The legal propositions applicable to the above state of facts can be briefly stated.

I. The defendant company was engaged in a regular, well-known, distinctive business—in a recognized separate branch of the business of navigation—the towing of sailing vessels from sea to dock and from dock to sea, and from place to place and in rivers and harbors. In such towing it was, as to third parties, the active,

directing agent controlling the movements of the vessel it was undertaking to tow. As such active agent it was liable to third parties for any injury caused them by its negligence in managing a tow. *Sproul* v. *Hemmingway*, 14 Pick. 1; *N. Y. & B. Trans. Co.* v. *Phila. & Savannah S. Co.*, 22 How. 461. That it adopted suggestions from the vessel in tow would not relieve it from liability to third parties.

The fact that those upon the sailing vessel were also in fault in managing the vessel, and by their fault contributed to such injury to third parties, does not exempt the defendant, the owner of the tugs. The third party thus injured can recover compensation from either the vessel or the tug, if each has been guilty of a fault causing the injury. The fact that the plaintiff has a separate suit pending against the owners of the schooner "Viator" for the same injury, in which suit the fault of the vessel is alleged as the cause of the injury, does not bar this suit against the owner of the tug. *The Mabey and The Cooper*, 14 Wall 204; *The Atlas*, 93 U. S. 303; *The Civilta* v. *Perry*, 103 U. S. 599; *Lake* v. *Milliken*, 62 Maine, 240.

Applying these principles to this case, if the plaintiff was not also guilty of a contributing fault, it is clearly entitled to recover of the tow-boat company by reason of the proven fault of the latter in misdirecting the helm of the schooner.

II. The defendant, however, insists that the plaintiff was guilty of a contributing fault in that it did not provide in its bridge a draw of the full width of seventy feet from pier to abutment. There was evidence tending to show that the plaintiff's authority to build or, at least, maintain this bridge across tide-water was accompanied by the requirement that the width of the draw between pier and abutment should be full seventy feet. There was also evidence tending to show, that at the time of the accident at least, the actual width was from fifteen to twenty inches less than seventy feet. As the contention of the defendant and the rulings of the presiding justice were based on this evidence we must for the present assume its truth.

The defendant contended that this failure to comply with the requirements and conditions of the authority given the plaintiff to maintain this bridge left the bridge an illegal structure as to the defendant, so that no action could be maintained for the defendant's injury to it. The defendant further contended that if the main part of the bridge was not an illegal structure, such part of it as was within the seventy feet limit was illegal and without legal protection, and if such part contributed to the collision the plaintiff could not recover. Upon these points, the presiding justice instructed the jury that upon the evidence as to the width of the draw there was "an unlawful obstruction, but that would not necessarily deprive the plaintiff of his right to recover as against a stranger who had inflicted this damage, if it appeared that this mere variation from the seventy feet was not one of the real and proximate causes of the injury." Under this instruction the jury must have found that the variation in the width of the draw from the required seventy feet down to sixty-eight feet and some inches was not one of the real and proximate causes of the injury.

The instruction was in accordance with the principle stated by the United States Circuit Court in *Missouri River Packet Co.* v. *Hannibal & St. Joseph R. R. Co.*, 2 Fed. Rep. 285. In that case the defendant was authorized to maintain a railroad bridge across the Missouri River but with a clear distance of one hundred and sixty feet between piers. The actual distance between the piers was a few feet less than one hundred and sixty feet. The plaintiff's boat, while passing under the bridge, was driven by the current against one of the piers and was damaged. The plaintiff contended that the mere fact of the distance between the piers being less than the required one hundred and sixty feet rendered the bridge an unlawful structure, and deprived its owner of any defense against the consequences of such a collision. The jury however were instructed as follows: "Though you may find from the testimony that the width between the piers as constructed is less than the act of Congress requires, yet this violation of the law by the defendant in this construction of its bridge is not available to the plaintiff in recovering damages, unless it caused or contributed to the injury by the plaintiff complained of."

A motion for a new trial was heard before the full circuit bench, which declared through McCrary, Circuit Judge, that the above instruction stated the true rule upon the subject. In *Dimes* v. *Petley*, 15 Q. B. 276, the owner of a wharf claimed damages, as here, from the owner of a vessel for his negligence in running his vessel against the wharf. The defendant claimed, as here, that the wharf as against him was an illegal structure. It was held by the court that the offered defense was not sufficient,—that he would still be liable if by the exercise of reasonable care and with reasonable convenience, he could have avoided the collision.

The principle is also exemplified in *Damon* v. *Scituate*, 119 Mass. 67, where it was held that the mere fact that the plaintiff was traveling on the wrong side of the road in violation of the statute did not defeat his action for injuries from a collision with the defendant's team, if that fault did not contribute to the injury. So in *Steele* v. *Burkhardt*, 104 Mass. 59, it appeared that plaintiff, a drayman, had backed his team against the curb and across the street, in violation of the city ordinance, and was thus illegally partially obstructing the street. The defendant, in driving past on the other side, ran his wagon over the fore feet of the plaintiff's horse. It was held that the mere fact that the plaintiff's team at the time was an unlawful obstruction did not bar the plaintiff's action, if that circumstance did not contribute to the injury.

When carefully studied, the cases cited by the defendant (except perhaps the case cited from 79 Missouri, 478,) will be found not to conflict with the principle as applied here by the presiding justice. They mainly go to the conceded proposition that a plaintiff cannot recover damages for a disaster that his own illegal or wrongful conduct helped bring about.

The exception to this instruction must be overruled. The other exceptions upon the same subject matter naturally fall with this one, including that in relation to damages. That part of the bridge within the required space of seventy feet was the plaintiff's property. The jury have found that it did the defendant no harm and was not a factor in the legal cause of the disaster. Hence it is not without the pale of the law.

III. The request for a ruling that the "dolphins" at the ends of the draw pier tended to justify the mode of towing by hawser is not urged in argument. The question seems to have become immaterial.

Motion and exceptions overruled.

ELBRIDGE G. BENNETT *vs.* CHARLES C. DAVIS.

Cumberland. Opinion March 8, 1897.

Taxes. Constitutional Law. Declaration of Rights, §§ 6, 19; R. S., c. 6, § 205; Stat. 1895, c. 70, § 11.

The revised statutes, c. 6, § 205, as amended by statute of 1895, c. 70, § 11, requiring the owner of land sold for non-payment of taxes to deposit with the clerk of courts the amount of all taxes, interest and costs accrued up to that time, before he can be admitted to contest the validity of the tax or sale, is unconstitutional.

It infringes upon the constitutional right of the citizen. (1)—Not to be deprived of his property, but by the judgment of his peers or by the law of the land; (2)—To have remedy by due course of law for any injury done his property; and (3)—to have right and justice administered to him freely and without sale.

ON EXCEPTIONS BY PLAINTIFF.

This was a petition for partition of real estate, situated in Cape Elizabeth, brought under R. S., c. 88, the petitioner claiming one-half interest therein, and admitting that the respondent was the owner of the remaining one-half interest.

The respondent pleaded that he was the owner and seized of the whole of the real estate described in the petition, and that the petitioner had no interest therein.

Under these pleadings the presiding justice ordered, under § 9 of said chapter, that there first be a separate trial of the claim of title of the respondent to the whole property as pleaded by him.

In support of his claim of title to the whole of said real estate the respondent introduced in evidence certain tax deeds of said real estate from the treasurer of the town of Cape Elizabeth for taxes assessed in 1883, 1884 and 1891, also certain quitclaim

deeds, claiming by said tax deeds and quitclaims to him to make a prima facie case of title to said real estate sufficient to require the petitioner to make the deposit required by § 205, c. 6, R. S.

The petitioner claimed that the tax deeds were defective and void, making specific objections thereto, and that the same together with the quitclaims did not make a prima facie case of title requiring him to make said deposit.

The presiding judge overruled pro forma the objections of the petitioner, and ruled pro forma that the tax deeds and quitclaims made a prima facie case of title.

To all these rulings the petitioner excepted.

M. P. Frank and P. J. Larrabee, for plaintiff.

Carroll W. Morrill and Geo. Libby, for defendant.

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

EMERY, J. The petitioner at one time owned in fee one undivided half of the land sought to be divided. The respondent undertakes to show that the petitioner's estate has been transferred to him. To show this transfer he introduces deeds of the petitioner's interest in the land from the treasurer of the town of Cape Elizabeth, in which the land is situated, to the town, and then traces title by mesne conveyances from the town to himself. These deeds from the treasurer of the town purport to be official deeds of the land as sold for non-payment of taxes thereon and are regularly executed and recorded. The respondent offered no other evidence of any transfer of the petitioner's title.

The court has repeatedly held, however, and consonant with reason as well as authority, that such deeds alone are not even prima facie evidence of a lawful assessment of a tax upon the land, nor of legal proceedings for a sale of the land for non-payment of such tax, and hence are no evidence that a land owner has been deprived of his property according to "the law of the land." *Phillips* v. *Sherman*, 61 Maine, 548; *Rackliff* v. *Look*, 69 Maine, 516; *Libby* v. *Mayberry*, 80 Maine, 137; *Ladd* v. *Dickey*, 84

Maine, 190 ; *Skowhegan Savings Bank* v. *Parsons*, 86 Maine, 514 ; *Maddocks* v. *Stevens*, 89 Maine, 336.

The respondent cites against these decisions the statute, R. S. c. 6, § 205, as amended by § 11 of chapter 70 of the laws of 1895, which declares, in effect, that such a deed shall be sufficient and conclusive evidence of the lawful alienation of the original owner's property though against his will, unless he shall have deposited with the clerk of the court the amount of all taxes, interest and costs accrued up to the time. The petitioner did not make this required deposit, and the respondent contends that, by force of the statute cited, the deeds are now to be taken as conclusive evidence of his own title.

The form of the pro forma ruling was that the treasurer's deeds were sufficient in form and execution to make them prima facie evidence under the statute. In effect, however, the ruling was that the petitioner must make the deposit named before he could be heard to question the prima facie evidence ; or in other words, that the deeds were conclusive evidence of title if the petitioner did not make the deposit. The question, therefore, is whether the petitioner can be lawfully required to make the deposit named in the statute, before contesting the validity of the assessment and sale of his land for taxes.

In *Dunn* v. *Snell*, 74 Maine, 22, the court strongly suggested, though without expressly deciding, that the owner of property is protected by the constitution against the statute cited. Finding the statute again invoked, and this time in such a way that it can not fairly be avoided, we have again carefully considered the question of its constitutionality. In our consideration we have given, as we should, great weight to the legislative opinion, and have kept in view the rule that no statute is to be declared unconstitutional unless it appears to be unmistakably so. In this case, however, we are constrained to declare it our unhesitating opinion that this statute is against the plain letter and spirit of the constitution of this State and that of the United States.

Among the rights constitutionally guaranteed to the citizen against governmental action are—(1) to have remedy by due

course of law for any injury done his property;—(2) to have right and justice administered to him freely and without sale (Maine Declaration of Rights, § 19);—(3) not to be deprived of his property but by the judgment of his peers, or by the law of the land (Maine Declaration of Rights, § 6). This last named guarantee is enforced by § 1 of Art. XIV of the Constitution of the United States, which declares that no state shall deprive any person of life, liberty or property without due process of law.

While the legislature may regulate the use of legal remedies, may require the payment of various fees, and may require security to be given for fees and costs, the requirement of this statute is not within either category. This requirement practically is that before he "begins" his action, or his defense, he shall pay into court the whole sum claimed against him including interest and costs. With such an obstacle placed in his way by the legislature, the citizen can not be truly said to have remedy by due course of law, or to have right and justice administered to him freely and without sale. As well might the legislature undertake to enact that no defendant shall begin his defense until he pays into court the whole sum demanded of him. It is not what has been done, or ordinarily would be done under a statute, but what might be done under it that determines whether it infringes upon the constitutional right of the citizen. The constitution guards against the chances of infringement. It is evident that under this statute the citizen might in some cases be practically deprived of all remedy.

Again, the statute in effect undertakes to deprive the citizen of his property without his consent, and without procedure according to the "law of the land," or "without due process of law." The phrases "law of the land" and "due process of law" as used in constitutions are similar in meaning. They both imply a judgment by an authorized tribunal after an opportunity for a hearing. There must be some sort of a tribunal, some opportunity for a hearing, and some sort of an adjudication. These requirements at least are ingrain in the fundamental law. The legislature can not make that "due process of law" or the "law of the land" which

is not that in the constitutional sense. *Saco* v. *Wentworth*, 37 Maine, 165; *Dunn* v. *Burleigh*, 62 Maine, 24; *Portland* v. *Bangor*, 65 Maine, 120. While the legislature may impose a specific tax on specific kinds of property, a tax which shall be self-assessing, without providing any tribunal to hear and assess, yet, when the amount of the tax is to depend on the value of the property, the property owner is constitutionally entitled to some kind of a tribunal to judicially determine that value, and is also entitled to an opportunity to be heard before that tribunal. *Hagar* v. *Reclamation Dist.* 111 U. S. 701.

In violation of this constitutional guarantee this statute undertakes to make the ex-parte act of a mere ministerial officer deprive the owner of his property. A town collector of taxes, or a town treasurer, is a mere ministerial officer. He has no power to hear and determine, but only to act. His executing and delivering a tax deed of the land of one citizen to another citizen is a pure ministerial act. The statute assumes to say that the property owner in the first instance shall not question the authority of the ministerial officer nor the conclusiveness of the ministerial act to transfer his property. This is clearly undertaking to deprive him of his property "without due process of law" and otherwise than "by the law of the land."

It is true, and should not be forgotten, that under this statute the property owner may question the authority of the officer and the conclusiveness of his deed by paying into court the amount of the taxes, interest and costs claimed. It is not stated how this amount to be deposited shall be ascertained, whether from the recitals in the deed, or from evidence adduced by the parties, but since the deed is made evidence of title its recitals are evidently intended to be taken as true in the first instance. No mode is pointed out for the owner to question the amount to be deposited. He can not "begin" to question anything until he has made the deposit. He must deposit enough at his peril. His only safety is to deposit the amount claimed by the grantee to have been paid, or at least the amount recited in the deed as having accrued. This enables the adverse party by his claims, or the officer by his

recitals, to sequester any amount of the citizen's property and deprive him of its use, or to completely shut him out from asserting his title. As said above, not what probably would happen, but what might or could happen under a statute, is the true test of its character, and this statute might put the citizen at the mercy of his adversary, or at least of a ministerial officer,—a result abhorrent to the very nature of constitutional government. As well might the legislature undertake to enact that a sheriff's deed alone should be conclusive evidence as against the owner of the land that his land had been transferred to the sheriff's grantee, unless the owner should first pay into court whatever sum was claimed, or recited to be due from the owner to the grantee.

In addition to the authorities cited in *Dunn* v. *Snell*, supra, others may be adduced. In New York, the legislature undertook to enact that if a judgment debtor or his assigns desired to effectually enforce his own title against that of the purchaser of his land at execution sale he must pay to such purchaser, or his assigns, the amount paid by him upon the sale with interest and the costs of defending the execution title. The court held the statute to be in contravention of the constitutional guarantee to the citizen of his legal remedy. *Gilman* v. *Tucker*, 128 N. Y. 190. In *Cromwell* v. *MacLean*, 123 N. Y. 475, it was held that the legislature could not validate a void tax or a void tax sale. In *Marx* v. *Hanthorn*, 148 U. S. 172, it was declared that the legislature of a state could not make a tax deed conclusive evidence of the validity of the tax assessment and tax sale. See also *Craig* v. *Flanigan*, 21 Ark. 319; *Pope* v. *Macon*, 23 Ark. 644.

It is to be noted that we do not decide that the legislature can not make a tax deed prima facie evidence of title, leaving the original owner free to contest it,—nor do we decide whether that is the effect of this statute. We express no opinion on that point. We only decide that the legislature can not impose the condition named in this statute upon the owner's right to assert or defend his title or claim. The pro forma ruling practically enforced that condition and hence must be overruled.

Exceptions sustained.

STATE *vs.* GILMAN H. WEBBER.

Sagadahoc. Opinion March 17, 1897.

Verdict. Jury. Practice.

In the case of a misdemeanor the jury agreed during the recess of the court, and were allowed to separate after sealing up their verdict. At the next session of the court their verdict was presented indorsed on the indictment in a sealed wrapper, as follows:—"Guilty, as charged in the indictment. Samuel Strout, Foreman." In response to the usual inquiry and request from the clerk, the jury rendered their verdict of guilty, orally in open court, and the sealed verdict was also affirmed in the usual manner.

Held; that the written verdict, though abbreviated in form, being indorsed on the indictment, could only refer to the respondent therein named.

It is unnecessary to determine, however, whether this form should be deemed "substantially equivalent" to the form prescribed in the "*Anonymous*" case, 63 Maine, 590. It was sufficient to prove beyond a doubt that before separating, the jury arrived at the same result which they afterwards announced in open court, and aided by the oral delivery, it was properly accepted by the court.

ON EXCEPTIONS BY DEFENDANT.

The case is stated in the opinion.

Grant Rogers, County Attorney, for State.

C. D. Newell, for defendant.

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

WHITEHOUSE, J. This was an indictment for maintaining a liquor nuisance. At the usual hour of adjournment in the afternoon the jury were deliberating upon their verdict, and were directed by the court to seal it up when they had agreed, suitable blanks being furnished to the officer in attendance for that purpose. The jury agreed and separated in the evening. The next morning they came into court and in response to the usual inquiry and request from the clerk, stated "that they had no sealed verdict

other than what appeared on the indictment, which was in a sealed wrapper with the following written at the bottom of the indictment, to wit: "Guilty as charged in the indictment. Samuel Strout, Foreman."

Thereupon the jury rendered their verdict of guilty orally in open court, and the verdict of "guilty as charged in the indictment," sealed up by the jury before separating, was affirmed in the usual manner by direction of the court. To this direction that the verdict be affirmed, the respondent took exception.

In the view of this question which has uniformly prevailed in the courts of Massachusetts, the only purpose or effect of the written verdict, signed and sealed up by the jury, is to afford conclusive evidence that the oral verdict delivered in open court is substantially the same as the result recorded in the written form, and that the jury were not influenced in arriving at their oral verdict by anything that occurred after their separation. It is accordingly settled in that state that the delivery of the verdict by the foreman of the jury by word of mouth in the presence of the court, is an indispensable safeguard in all criminal cases. *Commonwealth* v. *Tobin*, 125 Mass. 203.

But a different view has been adopted by our court. In the "*Anonymous*" case reported in 63 Maine, 590, the conclusion is reached after careful advisement that in any criminal case, where the offense is not punishable by imprisonment for life, the presiding judge may authorize the jury to seal up their verdict and separate during an adjournment of the court, and have it opened, read and affirmed at the coming in of the court with the same effect as if pronounced orally; and for this purpose a verdict signed by the foreman in the form there prescribed or in any other substantially equivalent form is declared to be sufficient. In *State* v. *McCormick*, 84 Maine, 566, this conclusion is reaffirmed, and the practice of requiring an oral verdict in addition to the sealed one declared to be a matter of form rather than of substance. Either course is there said to be legal.

In the case at bar both methods appear to have been observed. The written verdict was not the simple word "guilty" on a

separate paper bearing no signature, as in *State* v. *McCormick*, supra. It was indorsed on the indictment itself and duly authenticated by the signature of the foreman of the jury. It was returned in a sealed wrapper and evidently brought to the attention of the court before the oral verdict was delivered. By direction of the court the written verdict was then affirmed. A double safeguard against mistake was thus secured. The written verdict though abbreviated in form, being indorsed on the indictment, could only refer to the respondent therein named. No other party to that proceeding could be found "guilty as charged in the indictment." It is unnecessary to determine, however, whether this form should be deemed "substantially equivalent" to the form prescribed by our court in 63 Maine, supra, and be held sufficient as a written verdict without the aid of the oral delivery. It was sufficient to prove beyond a doubt that, before separating, the jury arrived at the same result which they afterwards orally announced in open court; and it is more regular and satisfactory than the form sustained under like circumstances in the case of a misdemeanor, in *Commonwealth* v. *Carrington*, 116 Mass. 37.

Exceptions overruled.

MICHAEL DONNELLY

vs.

BOOTH BROTHERS AND HURRICANE ISLE GRANITE COMPANY.

Knox. Opinion March 23, 1897.

Negligence. Fellow-Servant. Vice-Principal. Defective Machinery. Exceptions. Verdict.

An employer, whose duty it is to provide reasonably safe appliances, cannot escape liability for his negligence, by employing incompetent or unsuitable persons to discharge it.

The servant is not required to take the risks of carelessness of those who undertake to discharge, under the master's directions, the master's duty towards him, even if they are also servants of the same master.

Held; in this case, that the plaintiff's injury resulted from the breaking of a defective rope that sustained a platform on which he was at work, which should have been discovered before it was used and would have been, if reasonable care had been exercised in the selection of the tackle; and that the neglect in this respect was not that of a fellow-servant, but was a failure on the part of the defendants to use the necessary precautions which the law requires of the master towards his servant.

Whether a particular case falls within the duty of the master, or that of the servants, as such, is a mixed question of law and fact, to be submitted to the jury, as to the fact, under legal rules; and its determination depends upon the circumstances of the case.

Held; in this case, that it was the duty of the defendants to use reasonable diligence to furnish a safe platform with safe appliances for its support. They, through their vice-principal selected the men to do this work, men not shown to be suitable,—and from their own testimony as to the faulty appearance of the rope which broke, observed by them when they applied it,—evidently unsuitable men to be intrusted with it. There was, therefore, both negligence in the selection of agents and also in the failure to inspect the gear to be used.

Where a large number of exceptions to a charge consists of extracts, detached from their context, *held;* that to judge of the instructions excepted to, the whole charge must be examined.

The court will not disturb a verdict upon the ground of excessive damages unless it very clearly appears to be excessive upon any view of the facts which the jury are authorized to adopt.

ON MOTION AND EXCEPTIONS BY DEFENDANTS.

This was an action in which the plaintiff claimed to recover for injuries sustained through the negligence of the defendants. At the time of the injury the plaintiff was in the employment of the defendants and was assisting in loading a schooner with paving at the defendants' wharf. In this work a platform or staging was used, one end resting upon the wharf and the other extended out over the hatchway of the vessel, this end being supported by the fore and main throat halyards of the vessel. While the last carload of paving rested upon this platform the fore throat halyard gave way, and the plaintiff fell to the deck, receiving the injuries complained of. The defendants contended that they were not responsible for the injuries; denied that there was any negligence; and claimed that if there was any negligence it was the negligence of a co-servant of the plaintiff; that the platform or staging was

rigged and secured, and the materials used therefor were selected by the men engaged in loading the vessel, fellow-servants of the plaintiff; that everything connected with securing it in place was invariably intrusted to them, and that on this, as on all other occasions, these fellow-servants made their own selection of gear with which to secure the platform or staging, there being all the gear of a three-masted schooner from which to make the selection; and that if they negligently used unsafe halyards, that such negligence was the negligence of a fellow-servant of the plaintiff; and for that reason the plaintiff was not entitled to recover.

The jury returned a verdict of $1,218.30 for the plaintiff.

The case appears in the opinion.

W. H. Fogler and A. A. Beaton, for plaintiff.

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

The great controversy in this case, upon the legal proposition, is whether the completed and secured appliance invariably used for the loading of paving was put together and secured by the workmen in their own way, and from ample materials furnished by the defendants from which to make their selection; or whether it was the legal duty of the defendants to see that the run, when put in place and secured, was in all respects safe and sufficient.

Counsel cited: *Arkerson* v. *Dennison*, 117 Mass. 407; *Kelley* v. *Norcross*, 121 Mass. 508; *Killea* v. *Faxon*, 125 Mass. 485; *Kennedy* v. *Spring*, 160 Mass. 203; *Burns* v. *Washburn*, 160 Mass. 457; *O'Connor* v. *Rich*, 164 Mass. 560; *McKinnon* v. *Norcross*, 148 Mass. 533; *McGinty* v. *Athol Reservoir Co.*, 155 Mass. 183; *Beeseley* v. *Wheeler*, 27 L. R. A. 266, (1894), Mich.

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

STROUT, J. Defendants operated a granite quarry at Long Cove. They were shipping granite paving blocks by a schooner lying at a wharf. The mode of loading the blocks on board was over a run or platform, sixteen to eighteen feet long, one end rest-

ing upon the wharf, and the other supported by rigging attached to the vessel's throat halyards. This end extended to the forward hatch and was elevated about seven feet above the deck. The paving blocks were placed in a car and pushed over rails upon this run or platform, and dumped into the hold of the vessel. The plaintiff was in the employ of the defendants, as a common laborer, doing such various kinds of work as he was directed to do. On September 29, 1894, he was injured, while engaged in loading paving blocks upon the schooner, by the falling of the run or platform upon which he then was with a car of blocks, near to the end of the platform, at the forward hatch. The fall was caused by the breaking of the fore throat halyard which supported the right end of the platform at the hatch. The platform and loaded car weighed about two tons. The platform had been put in position in the afternoon of the preceding day and fell at about two o'clock on the day of the accident. While in position some thousands of paving blocks had been loaded into the vessel, having passed over this platform. It fell with the last load on the car. James M. Smith was superintendent of defendants' works at Long Cove, had the general supervision for defendants of loading vessels and hired and discharged the men. The platform belonged to defendants, and in suspending it, the vessel's halyards were used. It was put up on this occasion by direction of Smith. The work was done by some laborers of defendants, called from their work of stowing stone posts in the schooner, aided by some of the crew of the vessel. These men selected the ropes used, from a quantity of ropes on board. Plaintiff had nothing to do with this, but after the platform was rigged in place, he was directed by Smith to help load the blocks on board and was so engaged when the accident occurred. He had no knowledge of the condition of the ropes which suspended the platform. That Mr. Smith in all matters connected with the loading of the vessel, stood in the place of defendants and represented them as a vice-principal is abundantly proved. Any negligence of his therefore in regard to duties resting upon defendants, is in law their negligence. There is no claim that any want of care on the part of plaintiff contributed to

the accident. *Dube* v. *Lewiston*, 83 Maine, 217; *Mayhew* v. *Sullivan Mining Co.*, 76 Maine, 108–109. The only issue presented was whether the defendants were guilty of negligence in securing the platform and the selection of gear; or whether, if there was any negligence, it was that of a fellow-servant of the plaintiff, for which defendants were not responsible.

The defendants made six requests of the presiding judge for instructions, which were not given in terms, and have taken twenty-two exceptions to the charge consisting of detached extracts therefrom. The whole charge is reported as part of the exceptions.

The duty of a master to his servant, in furnishing machinery or appliances for the work, has been repeatedly stated by this court. In *Buzzell* v. *Laconia Company*, 48 Maine, 116, it is said "it is the duty of every employer to use all reasonable precautions for the safety of those in his service. He should provide them with suitable machinery, and see that it is kept in a condition which shall not endanger the safety of the employed. If the employer knowingly makes use of defective and unsafe machinery, when an injury is done to a servant ignorant of its conditions, and in the exercise of ordinary care, he should compensate the person thus injured." . . . . "The superior intelligence and determining will of the master demand vigilance on his part, that his servants shall neither wantonly nor negligently be exposed to needless and unnecessary peril." . . . . "The same reasoning which shows that the machinery and other instruments of labor should be safe, would demand that the bridges used in passing from one part of the premises to another, or the ladders used in ascending to or descending from labor, and that the passage ways in the premises of the employer and within the precincts of the place where the labor is to be done should be safe and convenient." In *Dixon* v. *Rankin*, 14 Court of Session Cases, 420, cited with approval by this court, in same case, supra, it is said "the master of men in dangerous occupations is bound to provide for their safety. This obligation extends to furnishing good and sufficient apparatus and keeping the same in good condition." And in *Hull* v. *Hall*, 78 Maine, 118, the court said, "to render the master liable, it must

appear that he knew, or from the nature of the case ought to have known of the unfitness of the means of labor furnished to the servant, and that the servant did not know or could not reasonably be held to have known of the defect."

And in *Shanny* v. *Androscoggin Mills*, 66 Maine, 425, it is said that "the employer provides the means of carrying on the business; and as a matter of course he assumes the responsibility that his work shall be done with due care; and, as the responsibility continues so long as the means are used, so must the same care be exercised in keeping the required means in the same safe condition as at first."

In a late case in New Jersey, *Comben* v. *Belleville Stone Co. of New Jersey*, (N. J. 1897,) reported in the Atlantic Reporter, Vol. 36, p. 473, after stating the general principle, the court says "the master is responsible for the negligence of any agent whom he may select to perform this duty for him if the agent fails to exercise reasonable care and skill in its performance." See also *Chicago M. & St. P. R. Co.* v. *Ross*, 112 U. S. 390.

And in cases like *Kelley* v. *Norcross*, 121 Mass. 508, where it was held that if "the master does not undertake the duty of furnishing or adapting the appliances by which the work is to be performed, but this duty is intrusted to or assumed by the workmen themselves, within the scope of their employment, he is exempt from responsibility, if suitable materials are furnished and suitable workmen are employed by him, even if they negligently do that which they then undertake." The exemption fails if "*suitable workmen*" are not employed. Here, common laborers, engaged in stowing stone posts in the schooner, were charged with the duty of securing the platform, and allowed to select the gear, without instruction, and there is no evidence that they possessed the requisite skill, intelligence or care, a fact to be shown by the defendants, if they would escape responsibility. The law will not allow an employer, whose duty it is to provide reasonably safe appliances, to escape liability, by employing incompetent or unsuitable persons to discharge it. But in the case last cited the court say, "the servant is not required to take the risks of the careless-

ness of those who undertake to discharge, under the master's direction, the master's duty towards him, even if they are also servants of the same master." *Ford* v. *Fitchburg Railroad*, 110 Mass. 260. See also *McKinnon* v. *Norcross*, 148 Mass. 536. When the selection of materials or construction of the appliances to the business is such that it may properly be left to the workmen, in their capacity as workmen, and within the scope of their employment, and it is so left by the master, he is relieved from responsibility for their negligence, as in the case of a mason or carpenter, building a house, where in the progress of the work, a staging is being frequently changed or enlarged. Whether a particular case falls within the duty of the master, or that of the servants as such, is a mixed question of law and fact, to be submitted to the jury, as to the fact under legal rules, and its determination depends upon the circumstances of the case. *Arkerson* v. *Dennison*, 117 Mass. 412; *McGinty* v. *Athol Reservoir Co.*, 155 Mass. 187.

This question was submitted to the jury under suitable instructions and they found that the rigging of the platform and selection of gear was within the duty of the master and not within that of the servants, in their capacity as servants.

Upon this finding of fact, it was the duty of defendants to use reasonable diligence to furnish a safe platform with safe appliances for its support. They, through their vice-principal Smith, selected the men to do this work, men not shown to be suitable, and from their own testimony as to the faulty appearance of the rope which broke, observed by them when they applied it, evidently unsuitable men to be intrusted with it. There was, therefore, both negligence in the selection of agents and also in the failure to inspect the gear to be used.

It is claimed that the rigging of the platform was ordinarily done by the fellow-servants of the plaintiff. If that be true, the duty to furnish safe appliances resting upon defendants, it will not relieve them from liability. They must discharge their duty in the premises. Negligence, however often repeated, will not ripen into an excuse for a neglect from which injury results.

An application of these principles shows that all the requested instructions were properly refused.

It will serve no useful purpose to consider specifically the exceptions to the charge. They consist of extracts, detached from their context, and nearly all of them relate to the question whether it was the duty of defendants to furnish the run and gear, in a reasonably safe condition; or whether the workmen, as such, had rightful authority to select from materials furnished by defendants and thus exempt the defendants from responsibility for their negligence.

To judge of the instructions excepted to, the whole charge must be examined.

James M. Smith stated fully his duties and authority at Long Cove, under his employment by the defendants. It was a question of law, whether he occupied, as to the plaintiff, the position of vice-principal, or was a fellow-servant with plaintiff. The court instructed the jury that he was a vice-principal, and stood in place of the defendants, and his acts or omissions were those of the principal. There can be no doubt that upon the evidence in the case this instruction was correct. The argument of defendants that the question was submitted to the jury is not well taken; but if it was submitted to them, the defendants cannot complain, as the jury decided it correctly. The important question, whether the erecting and support of the run, including the selection of the gear, was within the duty of the principal, or that of the workmen, as a part of their work as servants or workmen, was suitably presented to the jury, coupled with the correct rule of law, that in the former case, any negligence would be that of defendants, and in the latter it would be that of a fellow-servant, for which the principal would not be responsible. This instruction was as favorable to defendants as could be required. *Arkerson* v. *Dennison*, 117 Mass. 412.

We have carefully examined the charge and find that it presented the legal questions involved, clearly and appropriately and fully preserved all the rights of the defendants. The exceptions must be overruled.

Upon the Motion: The jury found that the duty of placing and securing the run, including the selection of suitable gear, rested upon the defendants, and was not within the ordinary duty of the

workmen, as workmen, and that when the plaintiff was directed by James M. Smith, the defendants' alter ego, to work upon that stage, it was held out to him by the defendants as a reasonably safe structure for him to labor upon, and that he had the right to so regard it; that it was in fact unsafe and that the defendants were negligent in the selection of gear which they ought to have known, and with the exercise of reasonable diligence would have known was insufficient, and that in consequence the plaintiff was injured. We think the evidence justified these findings. *Atkins* v. *Field*, 89 Maine, 288.

That the rope which broke was insufficient, is undoubted. Res ipsa loquitur. That it appeared to be old, weather-beaten, and of doubtful strength, was seen by Peter Smith, one of the men who helped rig the run. He says: "I see the rope was kind of poor and so I took a piece of warp and went up and made it so safe that it was safe for anybody to go up. They appeared to be old, old rope, or part of it." After it broke he examined it, and he says: "I should think by the looks of it the rope had been poor. I didn't open the rope to see, but I should judge it was poor." Jones, a witness for defendants, says he untwisted the rope, and "it was weather beaten some," did not look new. Dwyer, another of defendants' witnesses, says he examined the rope after the accident and "found the rope looking very weather beaten on the outside. I unlaid it and found it was all bright inside." "Probably two-thirds of the rope was good rope." He says he should judge "it would hold up a ton easy enough." He says the run and car and load of paving "didn't weigh over two tons" in his opinion. He also says: "When a car has got a hundred paving in it, it is pretty heavy and running it out on the end of the stage, brings a heavy strain on the tackle of course, and when it is dumped it rises about, well six or eight inches, that of course would cause a chafing in the upper block." He also says that the rope would not chafe if the block was in good running order. It is apparent that to sustain such a strain as was put upon this tackle, required the use of thoroughly sound rope of sufficient size, and it cannot be doubted that a reasonably careful examination of this rope, before

it was attached to the run, would have shown its insufficiency. The fact that it sustained the strain till the last load, is immaterial. No unusual strain is shown at this time. It was evidently a weak rope at the beginning, gradually growing weaker with each load upon it, until its tensile strength for the load upon it utterly failed.

We are satisfied with the finding that the defendants' duty required them to use reasonable care in the erection and maintenance of the run and the selection of suitable gear for that purpose, and that this duty was not properly discharged by them; and for the consequences of this neglect, they are legally responsible to the plaintiff.

While the damages are large, we cannot say that they are so excessive as to require us to disturb the verdict. At the plaintiff's age, entire recovery cannot be as certainly predicated as it might be in a younger person. His pain and suffering, which was an element of damage, it is difficult to compensate for in money by any definite rule of computation. Much is left to the good judgment of the jury. There is a conflict in the testimony as to the extent of plaintiff's recovery and his ability to labor. The jury saw and heard the witnesses and were in a better position to determine the exact facts than the court can be; and we are reluctant to disturb a verdict upon this question unless it very clearly appears to be excessive upon any view of the facts which the jury were authorized to adopt. Such is not the case here and the entry must be,

Motions and exceptions overruled.

HIRAM P. JONES, and another,

vs.

THE VINAL HAVEN STEAMBOAT COMPANY.

Knox. Opinion March 30, 1897.

Set-Off. Recoupment. Payment. R. S., c. 82, § 57.

It is well-settled law that, in an action by a firm for a partnership claim, a demand against one of the partners individually is not a legal or proper set-off; and conversely in an action by one of a firm for his individual claim, a demand against the firm cannot be offset.

A member of the plaintiff firm was treasurer of the defendant corporation, and had in his hands, as treasurer, money of the corporation; and it did not appear that he ever held this money in any other capacity than that of treasurer; or received it or held it as a partner in the plaintiff firm; or appropriated it or attempted to appropriate it to the payment of a partnership debt; nor was there any agreement that it should be so appropriated. In an action to recover a debt from the defendant, *held;* that the defendant's claim cannot be allowed either by way of set-off or recoupment or on the ground of payment.

ON REPORT.

The case is stated in the opinion.

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

W. H. Fogler, for defendant.

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

WHITEHOUSE, J. This action is brought by H. P. Jones and George T. Rogers, co-partners, to recover the sum of $1972.16 for coal sold and delivered by the plaintiff firm to the defendant corporation between June, 1893, and February, 1895. During all that time and until April, 1895, the plaintiff Jones was treasurer of the defendant company; and it was claimed in behalf of the defense that, as treasurer, Jones had money in his hands belonging to the defendant company, and that this money should be applied in

reduction of the amount due from the defendant company to the partnership of which he was a member. The plea was the general issue, no account in set-off being filed. The case was reported for the law court to determine whether any money thus held by Jones as treasurer, can be legally applied in this action in reduction of the plaintiff's co-partnership claim.

It is clear that the defendant's claim cannot be allowed upon the facts and pleadings stated, either by way of set-off, or recoupment, or on the ground of payment.

It is not contended that in the exercise of his right or the discharge of his duty as treasurer of the defendant company, Jones had in fact appropriated the money in his hands, as treasurer to the payment of the debt. It is not claimed that there had ever been any agreement between all the parties that it should be so appropriated. It is not suggested that Jones was the only ostensible and active member of the firm and that Rogers was only a dormant partner, or that there was any uniform practice or usage on the part of the plaintiff firm in receiving accounts against the individual partners in payment of partnership demands, which would have justified the defendant company in assuming that this claim would be so received. Under these circumstances the law is well settled that, in an action by a firm for a partnership claim, a demand against one of the partners individually is not a legal or proper offset, and conversely that in an action by one of a firm for his individual claim a demand against the firm cannot be set-off. *Stevens* v. *Lunt*, 19 Maine, 70; *Williams* v. *Brimhall*, 13 Gray, 462; Waterman on Set-Off, 226–238. "The demand must be due from all the plaintiffs to all the defendants jointly." R. S., c. 82, § 57.

It cannot be sustained by way of recoupment because the defendant's claim is not against both plaintiffs, and had no connection whatever with the purchase of the coal from the plaintiff firm. The two claims do not arise from the same transaction or the same subject matter. Waterman, Set-Off, 464.

Indeed, the learned counsel for the defendant expressly states in his argument that the company does not rely upon set-off or

recoupment; but he insists that the money in the hands of Jones should be regarded as payment, for the reason that it was his duty as treasurer to pay for the coal, and if the amount now in his hands as treasurer had been charged by him on the defendant's books as having been paid to his firm in liquidation of this account, it would undoubtedly have been deemed payment pro tanto. And it is argued that it is none the less so because he failed to charge the amount on the books of the company.

But unfortunately for the defendant, the case only shows that "said Jones as treasurer of said company had in April 1895, and still has, money of the defendant company in his hands *as treasurer*." It fails to appear that he ever had this money in his hands in any other capacity than that of treasurer. He never received the money as a partner in the plaintiff firm, and never held it as a partner. There is no evidence whatever of any attempt to appropriate it to the payment of this partnership debt, or of any pretense on his part that he had so appropriated it. He still holds it as the money of the defendant company. The plaintiff Rogers cannot be affected by it. It cannot be offset against the claim in suit.

Judgment for the plaintiff.

SILAS W. NILES *vs.* ALFRED L. PHINNEY.

Franklin. Opinion March 30, 1897.

Action. Contract. Waiver. Forfeiture. Rescission.

The defendant took a bond of the plaintiff in which it was agreed that the plaintiff should convey to the defendant certain land described in the bond, upon condition that he pay his notes mentioned in the bond. The defendant took and retained possession of the land with the plaintiff's consent four years, the notes having become due and remaining unpaid. The defendant voluntarily abandoned the premises and the plaintiff, resuming the possession and the ownership, brought an action to recover upon the notes.

Held; that neither the defendant's neglect or refusal to pay his notes, nor his voluntary abandonment of the premises could terminate or rescind the contract without the plaintiff's consent.

Also; that the plaintiff may waive a forfeiture for the defendant's breach of the conditions of the bond, and enforce payment of the notes.

Also; that the plaintiff having the right of possession until the notes were paid, his act of resuming possession after the defendant's voluntary abandonment, had no tendency to show an intention to waive a forfeiture of the bond.

ON EXCEPTIONS BY DEFENDANT.

The case appears in the opinion.

Frank W. Butler, for plaintiff.

J. W. Warren, for defendant.

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

WHITEHOUSE, J. This is an action of assumpsit on four promissory notes.

It appears from the statement of facts accompanying the exceptions that three of the notes declared upon were received by the plaintiff as part consideration for a bond of certain real estate given by him to the defendant September 13, 1890; that after the bond was given the defendant entered into occupation of the property, with the consent of the plaintiff and remained in possession until September, 1894, when he voluntarily abandoned the premises, and the plaintiff resumed possession, the notes being then due and unpaid.

Thereupon it was contended that this act of the plaintiff in taking possession of the real estate described in the bond after the maturity of the notes, but before the commencement of this action, should be deemed an election on his part to insist upon a forfeiture of the bond rather than a compliance with its conditions, and that as to the notes in question, the action could not be maintained. But the presiding justice ruled otherwise and ordered a verdict for the plaintiff. To this ruling the defendant excepted.

It is the opinion of the court that this ruling was correct. No other conclusion would be justified by the facts stated. The plaintiff's obligation to convey the real estate to the defendant upon payment of the price agreed, was a valuable consideration for

the notes given therefor. *Todd* v. *Whitney*, 27 Maine, 480. There is no evidence to warrant the inference that this consideration was ever impaired or modified by any act of the plaintiff.

The bond for the conveyance of the real estate was the plaintiff's personal contract, which conveyed to the defendant no estate in the land. It apparently contained no stipulation respecting the occupancy of the premises, and hence was ineffectual to give the defendant the right of possession, either before or after the maturity of the notes. Neither the defendant's neglect or refusal to pay his notes at maturity, nor his voluntary abandonment of the premises, could have the effect to terminate or rescind the contract without the plaintiff's consent. The plaintiff had the right, indeed, to request a strict compliance with the conditions of the bond and to enforce a forfeiture for breach of such conditions. He also had the right to waive a forfeiture of the bond, and enforce payment of the notes. He manifestly elected to pursue the latter course. He performed no act from which a contrary intention can be inferred. He had a legal right to the possession of the property until the notes were paid, but only exercised that right by resuming possession after the defendant's voluntary abandonment of the premises. The act of taking possession of his property under such circumstances has no tendency whatever to show an intention to waive the forfeiture. He still retained the title and was presumably ready and willing to perform the obligations of the bond on his part by conveying the land to the defendant upon payment of the notes. He has clearly not intended to avail himself of the forfeiture of the bond, but by seeking to enforce payment of the notes has waived it. *Manning* v. *Brown*, 10 Maine, 49; *Shaw* v. *Wise*, Id. 113; *Little* v. *Thurston*, 58 Maine, 86; *Cook* v. *Walker*, 70 Maine, 235; *Newhall* v. *Ins. Co.*, 52 Maine, 180.

Exceptions overruled.

WILLIAM C. HOLWAY, and others,

vs.

PROPRIETORS OF MACHIAS BOOM.

SAME *vs.* SAME.

Washington. Opinion March 30, 1897.

Negligence. Boom.

In an action to recover damages by loss of the plaintiffs' logs by reason of a defective boom belonging to the defendant, it is incumbent on the plaintiffs to prove that the defendant corporation did not exercise reasonable precaution or due care and diligence either in the construction and repair, or in the management, of the boom.

Where the evidence satisfactorily shows that the defendant company failed to perform this reasonable obligation by reason of a radical defect in the method of constructing the boom and for want of proper inspection and repair of its chain, *held;* that it is the opinion of the court that the verdict should stand.

ON MOTION BY DEFENDANT.

The case appears in the opinion.

H. M. Heath and C. L. Andrews, for plaintiffs.

Charles Sargent, for defendant.

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

WHITEHOUSE, J. A large number of logs owned by the plaintiffs in these two cases were swept away and lost by reason of the breaking of the boom maintained by the defendant corporation across Machias river. The jury found that the aggregate damage thus sustained, including the expense of recovering a portion of the logs that escaped, was $2197.50 and by agreement between the plaintiffs in the two cases, this sum was equally divided between them and a verdict rendered for $1098.75 in each case. The defendant moves to have these verdicts set aside as against law and evidence.

After a careful and patient examination of all the evidence reported it is the opinion of the court that this motion must be overruled. It not only fails to appear that the verdicts were unmistakably wrong, but it affirmatively appears that they were clearly right.

The boom in question extended from shore to shore of Machias river, a distance of three hundred and twenty-five feet, and was hung by chains below the piers, instead of being buttressed against them. On the 10th of April, 1895, the chain stretched across the southern, or Dublin-gap, was broken by the pressure of the logs and ice, and the boom carried away.

As originally built this gap appears to have been constructed according to an approved design and upon correct mechanical principles. On the northerly side of the gap the boom-stick was fastened to the pier, and both the boom-stick and the gap-piece held in position by means of three chains running diagonally from the corner of the pier to the boom-stick. On the southerly side of this gap the shore end of the boom-stick was buttressed against a substantial pier, and by the aid of a second pier farther up the river and three chains extending diagonally therefrom to the boom-stick, the gap-piece and boom-stick on the southerly side were securely held in a fixed position. A chain was also drawn over the platform of the gap itself and attached to the gap-pieces on either side. Thus the boom was held in a rigid condition its entire length, with the pressure distributed among eight or more bearings, and the gap-chain subjected to comparatively little strain.

But at the time of the breaking in question the conditions on the southerly side were entirely different. The lower pier to which the shore end of the boom-stick had formerly been fastened had rotted down and been abandoned, and in readjusting the boom on this side of the gap a fatal change was made in the method of construction. The boom-stick was used as a guy extending diagonally from the only remaining pier on the shore, up river, to the southerly gap-piece and three chains ran from the upper corner of that pier to the gap-piece. Thus the southerly gap-piece and the outer end of the boom-stick attached to it were only held in

position by means of the chain drawn over the platform of the gap, and this gap-chain was obviously the only power, at that time, to resist the constant pressure shoreward of the logs and ice against the southerly gap-piece and boom-stick. With such a structure several chains of extraordinary size and strength would have been required to withstand the pressure which might reasonably have been expected to result from the action of logs and ice at ordinary spring freshets. Instead of such means, however, only one gap-chain was stretched over the platform and this chain, composed in part of an old ship's cable, had been in use so long that its strength was nearly gone. A section of it was exhibited for the inspection of the court and it was manifestly unsuitable and insufficient for the purpose.

Under these circumstances that happened on the tenth of April, 1895, which might reasonably have been expected to happen under the existing conditions which do not appear to have been extraordinary in a spring freshet. The old gap-chain of greatly impaired strength broke and parted under the pressure of logs and ice; the other chains then gave away in rapid succession, the boom-sticks swung around and the logs escaped.

The learned counsel for the defendant insists, however, that there is no evidence that the gap-chain parted first.

In answer to the question by the court: "Where did the boom part?" Daniel McLaughlin testified unequivocally: "Parted in the middle of the gap;" and in cross-examination the fact is repeated and emphasized that the gap covered by the chain broke and separated, and that this was the first part to break. He was an eye witness to the disaster, having a plain view of the boom and of Dublin-gap. His testimony is corroborated by Hannah Reynolds, who also witnessed the occurrence, and there is no evidence to contradict the direct testimony of these two witnesses. On the contrary all of the circumstances and results tend to confirm their evidence.

It was incumbent on the plaintiffs to prove that the defendant corporation did not exercise reasonable precaution or due care and diligence either in the construction and repair or in the manage-

ment of the boom. The evidence satisfactorily shows that the defendant failed to perform this reasonable obligation by reason of a radical defect in the method of constructing the boom and for want of proper inspection and repair of the gap-chain as already shown.

No question is made respecting the amount of damages awarded and there seems to be sufficient evidence on that branch of the case also to justify the verdict of the jury.

Motion overruled.

ALFRED W. HUSTON, Appellant, *vs.* ENOCH H. GOUDY.

Lincoln. Opinion April 1, 1897.

Insolvency. Discharge. Preference. Trader. R. S., c. 70, § 46.

By the statutes of this State, an insolvent debtor will be denied a discharge from his debts when guilty of a fraudulent preference.

An insolvent debtor who is a trader will not be discharged when he has failed to keep proper books of account.

Held; in this case, that the insolvent was a trader within the meaning of the insolvent law. He bought and sold lumber; bought clay and made and sold bricks; and received and sold mowing machines on commission.

See *Wyman* v. *Gay*, ante, p. 36.

ON REPORT AND MOTION.

This was an appeal by an insolvent debtor from a decree of the insolvent court denying his petition for a discharge. The case was tried to a jury in the court below who returned special verdicts on issues submitted to them as follows:

1. Did Alfred W. Huston, the appellant, on the twenty-sixth day of January, A. D. 1894, having reasonable cause to believe himself insolvent, pay or secure in whole or in part a pre-existing debt due from him to one Gilbert E. Gay by assigning to said Gay the two life insurance policies, and by conveying and delivering to said Gay by bill of sale or otherwise the other personal property named in the first objection to said Huston's discharge, with intent

to defraud his creditors or to give a preference contrary to chapter seventy of the revised statutes of Maine?

Answer: Yes.

2. Whether about December, 1893, said Huston having reasonable cause to believe himself insolvent, sold and delivered to said Gilbert E. Gay in part payment of a pre-existing debt, due from him to said Gay, the sleigh named in the first objection, with intent to defraud his creditors or to give a preference contrary to chapter seventy of the revised statutes of Maine?

Answer: No.

The appellant seasonably moved to set aside the first special finding because it was against the law and evidence and the manifest weight of evidence.

The case, with the motion, was thereupon reported by the presiding justice to the law court to decide whether the petitioner was entitled to a discharge or not, and to order judgment accordingly.

The material portions of the report are as follows:

It is admitted that the petitioner went into voluntary insolvency on the 24th day of March, 1894, and that the proceedings are still pending. He moved for his discharge at a term of the insolvency court of Lincoln County on the 4th of September, 1894, and his petition was denied by the judge of that court, he taking an appeal to this court on that question.

No question is made about the regularity of the papers leading up to the hearing of that question in this court. The creditor who opposes his discharge does so upon two grounds; first, that the petitioner, being alleged to have been a trader, kept no proper books of account since March 23, 1878; and, secondly, for fraudulent preferences.

"Under the first objection, the examination of the insolvent debtor, made in the insolvent court on the 2nd day of October, 1894, and also the deposition of Gilbert E. Gay is made a part of the case; one full copy of each is to be made, and the original books of account, all of them, such as the insolvent debtor kept, should be furnished for the examination of the full court; and in addition

to which, the parties may submit copies of any portions of them as they see fit.

"Upon the objection of fraudulent preferences, two questions were submitted to the jury, which are to be copied as a part of the case, on the first of which an affirmative answer was given; and upon the second of which a negative answer was given, and the answers were affirmed as special verdicts. The petitioner seasonably filed a motion to set aside the first of said special findings as being against law and the evidence; which motion the court may consider as a part of the case. And the said deposition and examination may be used on this issue as well as the other."

Geo. B. Sawyer, for appellant.

W. H. Hilton, for objecting creditor.

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

WALTON, J. Appeal from the court of insolvency.

The question is whether the insolvent debtor is entitled to a discharge. We are forced to the conclusion that he is not. A jury has found that he was guilty of a fraudulent preference, and a careful examination of the evidence fails to satisfy us that the verdict was wrong. This alone is sufficient to defeat his right to a discharge.

But there is another ground equally fatal to his right to a discharge. There is no doubt that he was a trader within the meaning of the law. He bought and sold lumber; he bought clay and made and sold bricks; and he received and sold mowing machines for a commission. And yet he kept no proper books of account.

We can not doubt that the decree in the court below refusing his discharge was correct, and must be affirmed. *Groves* v. *Kilgore*, 72 Maine, 489; *In re Tolman*, 83 Maine, 553; *In re Patten*, 85 Maine, 154.

Decree in court below affirmed.

NANCY C. HUTCHINGS *vs.* INHABITANTS OF SULLIVAN.

Hancock. Opinion April 2, 1897.

Way. Boundaries. Defect. Notice. Sidewalk. R. S., c. 18, §§ 80, 95.

The Revised Statutes, c. 18, § 95, declare that when buildings or fences have existed more than twenty years fronting upon any way, street, lane, or land appropriated to public use, the bounds of which can not be made certain by records or monuments, such buildings or fences shall be deemed the true bounds thereof. In an action to recover damages caused by a defect in the highway, *held;* that the plaintiff can establish the limits of the way in the manner referred to in this statute.

When private parties construct a sidewalk within the limits of a highway, which has the character and general apppearance of a public walk, so that thereby the public is justified in believing that they are invited to walk upon it as a part of the public way, and it is thus used for a series of years by the public, the town will be liable for defects in it the same as if the town had constructed it in the first place.

Held; that the following location of the defect in a highway, in the statutory notice to the selectmen of the town, is stated with reasonable certainty: "A hole in the sidewalk situated between Hotel Cleaves and Dunbar Brothers' store upon town way in said town of Sullivan."

A verdict against a town for personal injuries caused by a defective highway, will not be set aside as against evidence and for excessive damages, when it appears that the evidence was sufficient to justify the jury in finding that the municipal officers of the town had the statutory notice of the defect; that the sidewalk was clearly defective; and that the verdict for a broken arm and other serious injuries is only three hundred dollars.

ON MOTION AND EXCEPTIONS BY DEFENDANT.

This was an action to recover damages from the defendant town alleged to have been received on account of a defect in a certain sidewalk within the town.

For the purpose of showing that the sidewalk was within the limits of some way in the defendant town, the plaintiff introduced a record of a location of a way made in 1818 by the county commissioners court, and then, claiming that the bounds of the way could not be made certain by records or monuments, the plaintiff sought to establish the limits of the way, under the provisions of R. S., c. 18, § 95, by introducing evidence tending to show that

certain fences had existed for more than twenty years fronting on said way, and that the sidewalk was between the fences and the wrought or traveled part of the way.

The defendants claimed that the statute did not apply to this class of cases; and that so far as this case is concerned, the plaintiff could not establish the limits of the way in the manner above referred to even by sufficient proof to satisfy all the requirements of said statute. There was no other evidence offered to show that the sidewalk was within the limits of any way in the defendant town.

Upon this question the presiding justice instructed the jury as follows: "Well, gentlemen, I can only say to you in relation to that, that if you find that this fence which is admitted to have been in existence for a period of more than twenty years, was erected as and for a boundary line of the abutting proprietor's lot, the boundary line between him and the highway, and has been there more than twenty years, it is to be deemed the true boundary line to-day."

Touching this point the judge further instructed the jury:—

"I can only submit that to you as a question of fact, whether that fence was built there for a boundary line fence. If so, you will be authorized to act upon it as a true boundary line at the present time; otherwise not. If you find that it was a boundary line, it is not in controversy that this sidewalk was within the limits of the highway."

To the giving of the foregoing instructions the defendants seasonably excepted.

It was not in controversy that the sidewalk in question was constructed by private persons and that the town had never made any repairs on it or assumed any responsibility for the repairs on it.

The defendants asked the court to rule that, under these circumstances, the town was not liable on account of any defect in said sidewalk. The presiding justice declined so to rule, but upon this point instructed the jury as follows: "But another important question arises here, and that is, that it is not in controversy that the sidewalk was not constructed by the officers of the town at the

expense of the town. It is not in evidence here that the town officers ever made any repairs on it, or assumed any responsibility for the repairs on this sidewalk; and thereupon the defendants ask that the rule of law should be laid down that the town ought not to be held liable under such circumstances, that they can only be held liable for sidewalks which they themselves construct, maintain and assume to keep in repair. Undoubtedly, as I have already said, the town would not be liable for any walk built by private parties just outside of the limits of the highway. But they have the control of the limits of the highway. The town authorities have it in their power to say to any parties who construct a sidewalk in the limits of the highway: 'Unless you keep this in a reasonably safe and convenient condition, you cannot maintain it here; we shall remove it as an unlawful obstruction.' They have control over it. Therefore I say to you, for the purposes of this trial, as a matter of law, that when private parties, with the knowledge and acquiescence of the municipal authorities, thus construct a sidewalk within the limits of the highway, which has the character and general appearance of a public walk, so that thereby the public are justified in believing that they are invited to walk upon it as a part of the public way—and it is thus used for a series of years by the public, by all who have lawful occasion to travel on the highway—you have a right to regard that as such an adoption of it, on the part of the town, as would render them liable for any defects in that sidewalk precisely the same as if they had themselves constructed it in the first place. If you find that the sidewalk was not of that character, or that there was anything to indicate that it was a private walk, it would of course deprive the plaintiff of the benefit of this rule. There is no evidence here, as far as I am aware, tending to show that there was any notice that this was a private walk. If you find those facts to exist, you will be justified in finding that the town was liable to keep it in repair upon the same terms and conditions specified in the statute as though they themselves had constructed it."

To the giving of the foregoing instructions the defendants seasonably excepted.

The plaintiff offered the following paper, as evidence that the fourteen days' notice, required by the statute to be given to one of the municipal officers, highway surveyor or road commissioner, had been given:—

"To Henry Boynton, one of the Selectmen of the town of Sullivan, in the County of Hancock, State of Maine:

"You are hereby notified that the undersigned, Nancy E. Hutchings, of Steuben, Maine, sustained the following injuries by falling through a defect, being a hole in the sidewalk situated between Hotel Cleaves and Dunbar Brothers' store, upon town way in said town of Sullivan, on the evening of October 8th, 1895, viz.: right wrist broken, right arm and hip badly bruised, left wrist crushed and both knees badly bruised, and for which injuries she claims a damage of eight hundred dollars ($800).

NANCY E. HUTCHINGS,
By her Attorney, B. E. TRACY."

The defendants objected to the admission of this paper on the ground that it was insufficient under the statute, because it did not sufficiently describe the location of the defect. The same was admitted subject to objection, to the admission of which the defendants seasonably excepted.

L. B. Deasy and B. E. Tracy, for plaintiff.

1. Primarily the purpose of the statute, R. S., c. 18, § 19, is to provide a method of establishing the bounds of a way as against the adjoining proprietor. Incidentally, it also operates to establish the line as against the public. *Holbrook* v. *McBride*, 4 Gray, 215; *Morton* v. *Moore*, 15 Gray, 573; *Pillsbury* v. *Rockland*, 85 Maine, 419. Where a public way is proved to exist within certain limits, the rights and obligations of the town and of the traveler therein are not in any way affected by the manner of the establishment of the way, or the mode of proving its limits and boundaries.

2. A town is responsible for the safety of such part of its ways as are fitted for public travel and it cannot escape this responsibility by showing that it has been relieved of some of the cost of

original construction. *Aston* v. *Newton*, 134 Mass. 507; *Estelle* v. *Lake Crystal*, 27 Minn. 243; *Oliver* v. *Kansas*, 69 Mo. 79.

3. Location of the defect: *Rogers* v. *Shirley*, 74 Maine, 144; *Larkin* v. *Boston*, 128 Mass. 521; *Chapman* v. *Nobleboro*, 76 Maine, 427.

Henry Boynton, *A. W. King* (with him), for defendants.

The condition of the sidewalk as shown by the plaintiff's witnesses does not in legal effect constitute a defect or want of repair within the meaning of the statute. In *Witham* v. *Portland*, 72 Maine, 539, it is said: "Generally, such an issue is a pure question of fact depending upon the special circumstances of the particular case; but when the facts bearing upon the subject are unquestioned or are sustained by uncontroverted testimony, their legal effect is a matter of law."

There is no evidence in the case of the twenty-four hours' actual notice of the identical defect or want of repair which is alleged to have caused the injury.

There is no evidence in the case that properly shows that the place of the alleged accident was within a town way in the defendant town.

The town had performed its duty when it had prepared a well-wrought road of sufficient width running parallel with the sidewalk. *Farrell* v. *Old Town*, 69 Maine, 72; *Perkins* v. *Fayette*, 68 Maine, 152. The sidewalk was used for a special purpose—for foot-passengers alone and not for general travel, and was what it obviously appeared to be and contained nothing calculated to allure, deceive or entrap the traveler into concealed dangers. Under these circumstances the town is not liable. *Hall* v. *Unity*, 57 Maine, 529.

Relative to the adoption of ways by towns in cases where such roads were not originally legally laid out, the general rule is that, in order to hold a town liable for injuries occurring thereon, there must have been a user by the public for the prescriptive period of twenty years or a dedication and acceptance by the town; and in all our cases the town had apparently treated it in many ways as one of its highways. *Estes* v. *Troy*, 5 Maine, 368; *Burns* v.

Annas, 60 Maine, 288; *Mayberry* v. *Standish*, 56 Maine, 342. Where the alleged adoption by the town is that of a sidewalk built by private parties, as in this case, we see no good reason why the period necessary for a full adoption of such walk should be less than twenty years (unless there is some act of dedication, and of acceptance by the town) and we contend that to make such adoption perfect there must be upon the part of the municipal officers, something more than a mere user for less than twenty years or passive knowledge and acquiescence in the building of the walk. There is no evidence in this case that the walk existed for twenty years, or that the town did any act tending to show that it regarded the walk as part of its public way.

The word hole indicates a breaking or perforation of the surface which does not, according to the evidence, exist in this case; a depression is a sinking of the surface without perforation. Hence the notice does not describe the defect which, according to evidence produced by the plaintiff, caused the injury. It describes another and different kind of defect and is not sufficient. See *Kaherl* v. *Rockport*, 87 Maine, 527.

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

WALTON, J. This is an action to recover damages for injuries claimed to have been received through a defect in a concrete sidewalk in the town of Sullivan. There was a depression in the sidewalk about three feet long, two feet wide, and five and a quarter inches deep in the lowest place. The plaintiff says that as she was walking along on this sidewalk on a dark, foggy evening, she stepped into this depression and was thereby thrown down, breaking her arm and otherwise injuring herself. She has obtained a verdict for three hundred dollars; and the case is before the law court on motions and exceptions by the defendants. We will first consider the exceptions.

I. The Revised Statutes, c. 18, § 95, declare that when buildings or fences have existed more than twenty years fronting upon

any way, street, lane, or land appropriated to public use, the bounds of which can not be made certain by records or monuments, such buildings or fences shall be deemed the true bounds thereof. The defendants claimed at the trial in the court below that this statute does not apply to this class of cases, and that the plaintiff could not establish the limits of the way in question in the manner referred to, even by proof sufficient to satisfy all the requirements of the statute. The court ruled otherwise. We think the ruling was correct.

II. The defendants claimed that the sidewalk in question was built by private persons, and that the town had never made any repairs on it, or assumed any responsibility for repairs on it; and the defendants requested the court to rule that under these circumstances the town would not be liable for defects in it. The court declined to so rule, and instructed the jury that when private parties construct a sidewalk within the limits of a highway, which has the character and general appearance of a public walk, so that thereby the public is justified in believing that they are invited to walk upon it as a part of the public way, and it is thus used for a series of years by the public, the town will be liable for defects in it the same as if the town had constructed it in the first place.

We think this ruling was correct. We are not aware that this precise question has before been presented to this court; but it has been presented to other courts, and they have held that when a sidewalk has been built, no matter by whom or by what authority, and the municipal authorities have notice that it has become defective and dangerous to public travel, the municipality will be liable as though the sidewalk had been built by its express authority. *Village of Ponca* v. *Crawford*, 23 Neb. 662 (8 Am. St. Rep. 144); *Hill* v. *City of Sedalia*, 2 Mo. App. Rep'r. 1019. Am. Dig. July, 1896, p. 3829. And in the fourth edition of Shearman and Redfield on Negligence, § 366, the law is said to be that, where towns or other municipal corporations are declared by statute to be liable for defects in their highways, it is of no consequence that such defects were caused by third persons, so long as

the highway is thereby rendered defective within the meaning of the statute; that the mere fact that they were created by third persons without its consent is no defense to the corporation. We think the ruling upon this point was correct, and well supported by authority.

III. The defendants excepted to the admission of the plaintiff's notice to the selectmen of the town, on the ground that it did not sufficiently describe the location of the defect. The notice described the location of the defect as "a hole in the sidewalk situated between Hotel Cleaves and Dunbar Brothers' store upon town way in said town of Sullivan." The evidence shows that the distance between the hotel and the store was three hundred and fifteen feet,—a fraction over nineteen rods,—and it is urged in defense that while this might be sufficient if the defect were described in such a way that it might be readily identified, it is not sufficient where the defect is described as a "hole," with no other description; and *Chapman* v. *Nobleboro*, 76 Maine, 427, is cited in support of this position. The notice in the case cited was substantially like the notice in this case; and the objection to it was substantially the same; and if the notice in that case had been held to be insufficient, we think the same result must have followed in this case. But the notice was not held insufficient in that case. It was held to be sufficient. And on the authority of that case, and the reasoning by which the decision in that case was sustained, we think the same result must follow in this case. The fact must not be overlooked that the objection to the notice made at the trial in the court below was not to a want of accuracy in describing the defect or its location, but to a want of definiteness in stating its location. We think the location of the defect was stated with reasonable certainty, and that the objection to the admission of the paper to prove the statutory notice to the selectmen of the town of Sullivan was properly overruled.

IV. Motion. The defendants ask for a new trial on the ground that the verdict is against evidence and the damages exces-

sive. We do not think the request can be granted. The sidewalk was clearly defective. It was made of concrete; and there was a sunken place in it, the bottom of which was five and a quarter inches lower than the surrounding surface. The plaintiff calls it a hole. The defendants call it a depression. It is immaterial whether we call it a hole, a hollow, a sag, or a depression. It was a place dangerous to travelers using the walk during a dark and foggy evening. And we think the evidence was sufficient to justify the jury in finding that the municipal officers of the town had the statutory notice of the defect. The plaintiff was a comparative stranger. She had not passed over the walk for more than two years. The evening was dark and foggy. And there were no lights. And as she passed along on the walk, she stepped into this sunken place and was thrown down. Her arm was broken, and she claims to have been otherwise seriously injured. The jury assessed her damages at three hundred dollars.

Surely, such a verdict can not be regarded as excessive in amount. And we do not think it is so clearly against the weight of evidence in other particulars as to require the court to set it aside and grant a new trial.

Motions and Exceptions overruled.

CHARLES A. MUNROE *vs.* GEORGE I. WHITEHOUSE.

Androscoggin. Opinion April 3, 1897.

Exceptions. Set-Off.

It is incumbent on an excepting party to show affirmatively, from the facts reported, that the ruling complained of is erroneous.

An excepting party must present enough of the case to enable the court to determine not only that the ruling may be erroneous, but that it is so.

When a person intrusted with goods as agent, sells them to one who has no knowledge that he is agent, but is led to believe from the manner in which he has been allowed to deal with the goods that they are his, the other party may offset against the principal a debt of the agent. But, *it is otherwise*, when the defendant appears to have hired the property of one who was not

the plaintiff's general agent, who, for aught that appears, not only had neither possession nor ownership of the property, nor any authority whatever to deal with it, but one who had never in any manner been held out by the plaintiff as having any interest in or control over the property or any right to make contracts in relation to it.

ON EXCEPTIONS BY DEFENDANT.

The case appears in the opinion.

Geo. C. Wing, for plaintiff.

Tascus Atwood, for defendant.

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

WHITEHOUSE, J. The plaintiff recovered a verdict for ninety dollars for the use of a boiler and engine owned by him.

At the trial the defendant offered testimony tending to prove that in hiring the boiler and engine in question he dealt with one E. Y. Turner supposing him to be the principal, and that he had no dealings whatever with the plaintiff. He also proposed to introduce evidence to show that Turner was indebted to him in a sum larger than the amount due for the use of the boiler and engine, and claimed the right to offset this indebtedness from Turner against the plaintiff's claim in suit.

The presiding justice excluded the evidence, the reason for the ruling being stated as follows: "He cannot avail himself of the right of a set-off here when there is no set-off to defeat the rights of the owner of the article. My ruling goes no further than this, that it is no defense to this suit to show that there is an unsettled account between Mr. Whitehouse and Mr. Turner."

To this ruling the plaintiff excepted.

It is incumbent on the excepting party to show affirmatively from the facts reported that the ruling complained of was erroneous.

He must present enough of the case to enable the court to determine not only that the ruling may have been erroneous but that it was so. *Harvey* v. *Dodge*, 73 Maine, 316; *Bradstreet* v. *Rich*, 74 Maine, 303.

In the case at bar there is no evidence whatever that E. Y.

Turner, with whom the defendant claims to have dealt, in hiring the boiler and engine had either the possession or any other indicia of ownership of the property at the time of the hiring. There is no suggestion that the defendant's misapprehension in regard to the ownership was induced in the slightest degree by any act or declaration of the plaintiff; nor is there any pretense that Turner assumed to make any agreement that the use of the boiler and engine should be appropriated in satisfaction of the defendant's account against him. It is expressly stated, however, that "there was no evidence offered to show that Turner was acting as the agent of the plaintiff."

Here then is a case where the defendant in some way obtained possession of the plaintiff's property and used it as charged in the writ, under an alleged contract with one who was not the plaintiff's general agent, who for aught that appears, not only had neither possession nor ownership of the property, nor any authority whatever in fact to deal with it, but one who had never in any manner been held out by the plaintiff as having any interest in, or control over, the property, or any right to make contracts in relation to it.

The authorities are undoubtedly agreed that "when a person intrusted with goods as agent, sells them to one who has no knowledge that he is agent, but is led to believe from the manner in which he has been allowed to deal with the goods, that they are his, the other party may set off against the principal a debt of the agent." *Locke* v. *Lewis*, 124 Mass. 1; *Dean* v. *Plunkett*, 136 Mass. 195; *Traub* v. *Milliken*, 57 Maine, 63, and cases cited.

But it is manifest that the case at bar discloses no facts to which this principle can be safely or equitably applied. It is not affirmatively made to appear that the ruling was erroneous, but upon the facts stated it satisfactorily appears that the ruling was correct.

Exceptions overruled.

STATE *vs.* FRANK E. CARKIN.

Knox. Opinion April 3, 1897.

Pleading. Indictment. Embezzlement. R. S., c. 120, § 7.

An indictment for embezzlement is insufficient which simply charges that the defendant did by virtue of his office and employment have, receive and take into his possession certain money to a large amount; and does not charge that the defendant embezzled or fraudulently converted such money, or any money, to his own use. Such a material omission in an indictment that fails to express the gravamen of the crime of embezzlement can not be supplied by intendment.

ON EXCEPTIONS BY DEFENDANT.

An indictment for embezzlement, to which the defendant demurred. The demurrer was overruled and the defendant excepted.

INDICTMENT.

STATE OF MAINE.

KNOX SS.

At the Supreme Judicial Court, begun and holden at Rockland within and for the County of Knox, on the second Tuesday of March in the year of our Lord one thousand eight hundred and ninety-two.

The Grand Jurors for said State upon their oath present, that Frank E Carkin of Appleton in the said County of Knox, on the first day of December in the year of our Lord one thousand eight hundred and eighty-seven at Appleton in said County of Knox, being then and there an officer to wit: the treasurer and collector of the town of Appleton, aforesaid, the said town of Appleton being then and there a municipal corporation duly and legally organized and established, under and by virtue of the laws of the State of Maine, the said Frank E. Carkin not being then and there an apprentice to the said town of Appleton, a municipal corporation organized and established as aforesaid, nor a person under the age of sixteen years, did then and there by virtue of his said office and employment, have, receive and take into his possession certain money, to a large amount, to wit, to the amount of thirteen hun-

dred and sixty-five dollars and of the value of thirteen hundred and sixty-five dollars of the property and money of the said town of Appleton, a municipal corporation organized and established as aforesaid, the said Frank E. Carkin's said employer; whereby and by force of the statute in such case made and provided the said Frank E. Carkin is deemed to have committed the crime of larceny.

And so the jurors aforesaid upon their oath aforesaid, do present and say, that the said Frank E. Carkin then and there in manner and form aforesaid, the said money of the property of the said town of Appleton, a municipal corporation organized as aforesaid, the said Frank E. Carkin's said employer, from the said town of Appleton a municipal corporation organized as aforesaid, feloniously did steal, take and carry away, against the peace of said State and contrary to the form of the statute in such case made and provided.

The jurors for said State upon their oath do further present, that Frank E. Carkin of Appleton in said County of Knox, on the first day of December in the year of our Lord one thousand eight hundred and eighty-seven, at Appleton in said County of Knox, was then and there an officer, to wit: the treasurer and collector of the town of Appleton, said town of Appleton then and there being a municipal corporation incorporated and duly and legally established and organized and existing as a municipal corporation under and by virtue of the laws of the State of Maine, he the said Frank E. Carkin not being then and there an apprentice to the said town of Appleton, nor a person under the age of sixteen years, did then and there by virtue of his said office as treasurer as aforesaid, and while he continued and was employed in his said office as treasurer as aforesaid, have receive and take into his possession certain money to a large amount, to wit, to the amount of thirteen hundred and seventy-five dollars, and of the value of thirteen hundred and seventy-five dollars, of the goods, property and money of the said town of Appleton, then and there unlawfully, fraudulently and feloniously did embezzle and convert to his own use, without the consent of the said town of Appleton,

Whereby and by force of the statute in such case made and provided, the said Frank E. Carkin is deemed to have committed the crime of larceny.

And so the jurors aforesaid upon their oath aforesaid do present and say that the said Frank E. Carkin on said first day of December in the year of our Lord one thousand eight hundred and eighty-seven, at Appleton aforesaid in the County of Knox aforesaid, in manner and form aforesaid, the said money the property of the said town of Appleton, from the said town of Appleton, feloniously did steal, take and carry away, against the peace of said state and contrary to the form of the statute in such case made and provided.

W. R. Prescott, County Attorney, for State.

W. H. Fogler, for defendant.

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

WHITEHOUSE, J. This is an indictment against the respondent as "treasurer and collector" of the town of Appleton in which there is an apparent attempt to charge him with the crime of embezzlement. The defendant filed a general demurrer which was overruled by the presiding justice, and the case comes to this court on exceptions to this ruling.

This indictment is based on section seven of chapter 120 of the revised statutes, and contains two counts.

In the first count it is alleged that the defendant was "an officer, to wit, the treasurer and collector of the town of Appleton" and that by "virtue of his said office and employment he did then and there have, receive and take into his possession certain money to a large amount, to wit, to the amount of $1365, of the property and money of said town." It will be observed, however, that here there is not only an omission to specify whether he received this money in his capacity as treasurer, or by virtue of his office as collector, but there is an entire absence of any averment whatever that he embezzled or fraudulently converted to his own use either this money or any other.

This count, therefore, wholly fails to charge him with a crime by embezzling money, but only credits him with the performance of an official duty in receiving it.

The second count like the first, avers that he "was then and there an officer, to wit, the treasurer and collector of the town of Appleton," but avers that he "did then and there by virtue of his said office as treasurer . . . . have receive and take into his possession certain money to a large amount, to wit, to the amount of $1375 . . . . of the goods and money of the said town of Appleton, then and there unlawfully, fraudulently and feloniously did embezzle and convert to his own use, without the consent of the said town of Appleton." Here was an evident attempt on the part of the pleader to introduce the indispensable averment of a fraudulent conversion, but by an inadvertent change in the order of the several clauses of the sentence above quoted, and the omission to state the object of the verb "embezzle and convert," he again failed to charge that the respondent fraudulently converted the money which he had taken into his possession by virtue of his office as treasurer, or any other money or thing whatsoever.

While it is undoubtedly true, as observed by Mr. Bishop, (1 Crim. Proc. § 356) that "sound sense" should be consulted to the "disregard of captious objections, in looking for the meaning of the allegations in the indictment," it is the opinion of the court that such a material omission, as is found in this case, in the language employed to express the gravamen of the crime of embezzlement, ought not to be supplied by intendment.

Exceptions sustained.
Indictment adjudged bad.

HANNAH C. MERRITT, Executrix,

vs.

GILBERT L. BUCKNAM, and another, Executors.

Washington. Opinion April 9, 1897.

Assignment. Release. Joint Debtors. Fraud.

Two, of several joint makers of a promissory note, by an instrument under seal, conveyed, transferred and assigned to trustees all of their property of every description, except such as was by law exempt from attachment, in trust, to sell, dispose of and convert into money and to make a proportional distribution of the net proceeds thereof among such creditors of the assignors as became parties to the assignment within the time limited.

The indenture of assignment contained this clause: "And the creditors whose names are hereto subscribed, agree to said assignment and to receive their proportional shares of said property in full of all their claims against said parties of the first part, and upon payment thereof they hereby release and forever discharge said parties of the first part from their respective claims."

In a suit against the executors of another joint maker of this note, *held;* that whether the language of the indenture, applicable to creditors who became parties thereto, should be regarded merely as an executory agreement to release the assignor upon the subsequent proportional distribution of the property conveyed in trust for this purpose, or as a then present release of the assignors from all further liability, depends upon the intention of the parties, to be obtained if possible by construing the instrument as a whole and by taking into consideration the circumstances and relations of the parties.

That in this case the payee of the note, by becoming a party to this indenture, intended a then present release of the assignors from all further liability.

That as this was a technical release under seal of some of the joint promisors, it must be regarded as a discharge of all.

A release may be given to one of several joint debtors and all rights be reserved against the others, but this was not done in the indenture under consideration, nor does the instrument show any intention upon the part of creditors to reserve rights against other joint debtors or promisors.

A secret agreement between assignors and a creditor, made to induce the creditor to assent to the assignment, without the knowledge of the other creditors, and repugnant to the terms of the indenture of assignment, is a fraud upon the other creditors and is void.

ON EXCEPTIONS BY DEFENDANTS.

This was an action of assumpsit against the executors of Isaac Carleton, tried to a jury in the court below for Washington County, upon the following promissory note:

"$3,000. Columbia Falls, Oct. 29, 1892.

One year after date we promise to pay to the order of Abraham Merritt three thousand dollars, with interest at 7 per cent, until paid, value received.

L. Leighton & Son."

Indorsed as follows: L. Leighton, H. M. Leighton, Isaac Carleton, A. Merritt.

Plea, the general issue with a brief statement that the defendants have been discharged from all liability upon the note sued, by reason of Levi Leighton and Horace M. Leighton, co-promisors, having been released by the plaintiff's testator in his lifetime, by his release under seal of the following tenor, to wit, release dated September 15, 1893.

Defendants offered as evidence of the release an assignment from L. Leighton & Son to William R. Pattangall and John L. Dalot, dated September 15, 1893, as follows, viz:

"Know all men by these presents that we, Levi Leighton and Horace M. Leighton of Columbia Falls, in the County of Washington and State of Maine, both as individuals and as co-partners under the firm name of Levi Leighton & Son, as parties of the first part, in consideration of one dollar paid by Wm. R. Pattangall of Columbia Falls aforesaid and John L. Dalot of Addison in said county, parties of the second part, and of the trust herein expressed, do grant and assign to said parties of the second part all our property, estate, rights and credits of every description, both individual property and property of said firm of Levi Leighton & Son, except such as is by law exempt from attachment and execution, to have and to hold the same to the said Wm. R. Pattangall and John L. Dalot, in trust to sell and dispose of said property to the best advantage, and collect and convert into money said debts and demands and to proceed with said property according to the

provisions of the law, and make a proportional distribution of the net proceeds thereof among such creditors of said parties of the first part as shall become parties to this assignment, as parties of the third part, within sixty days of the date hereof, and after the payments above provided, before and hereinafter stated, are made, to pay the surplus to the parties of the first part.

"And the parties of the first part agree and covenant with the parties of the second part that they will at all times promote and forward the speedy receipt and recovery of the debts and property aforesaid and will aid and assist said trustees in managing the concerns of the trust estate, if requested so to do, upon being allowed a reasonable compensation for their time and services, and will on request of said trustees execute all such further papers and writings, and do all such other and further acts and things for the better carrying out of said trust, as may be convenient, expedient or necessary. And it is further agreed between all the parties hereto, that the said trustees shall out of said trust estate pay all the costs and expenses of carrying out the trusts herein declared, including a reasonable compensation to the trustees herein named, and for the services of an attorney where such services become necessary, and a reasonable compensation to the parties of the first part for their time and services as above mentioned, and to pay all claims entitled to priority under the insolvent laws of Maine.

"And whereas said property consists in part of a retail store and stock of goods which can be sold to best advantage by replenishing from time to time such lines of goods as may be diminished by sales, said parties of the second part are authorized to purchase for cash out of the trust funds, goods to be placed for sale in said store and to pay the expenses of carrying on said store if in their judgment they deem it expedient so to do.

"And said Wm. R. Pattangall and John L. Dalot, parties of the second part, agree to accept said trust and execute the same according to the provisions of this instrument and agreeably to law. And the creditors whose names are hereunto subscribed, agree to said assignment and to receive their proportional shares of said property in full of all their claims against said parties of the first

part and upon payment thereof they hereby relieve and forever discharge said parties of the first part from their respective claims.

"To the covenants and agreement hereof the respective parties bind themselves and their legal representatives.

"In testimony whereof we the said parties of the first, second and third parts hereunto set our hands and seals on this fifteenth day of September, A. D. 1893, the said parties of the third part using and adopting one common seal.

"The signature to any duplicate copy hereof of the same tenor to be of like effect as if signed hereto.

L. LEIGHTON. [Seal.]
HORACE M. LEIGHTON. [Seal.]

(Certificate of acknowledgment, dated September 15, 1893).

WM. R. PATTANGALL [Seal]. JOHN L. DALOT [Seal].
A. MERRITT [Seal]." Names of other creditors omitted.

Plaintiff then offered in evidence, subject to objection, the following agreement:

"Columbia Falls, Oct. 14, 1893.

It is agreed by the undersigned that by A. Merritt signing the assignment of L. Leighton & Son this day that it shall not debar or prevent Merritt from collecting on his notes full amount due.

H. M. LEIGHTON.
JOHN L. DALOT, Assignee."

It was admitted by the defendants that the plaintiff's intestate has received nothing under the assignment.

It was admitted that Abraham Merritt did not become a party to the assignment until some day subsequent to its date.

The court directed the jury to return a verdict for the plaintiff for the amount due upon the note. Thereupon the jury returned a verdict for plaintiffs for the sum of $3,678.42, and to this direction the defendants were allowed exceptions.

H. H. Gray, for plaintiff.

The contract was executory; it gave the principals no delay.

This was only an offer on condition, which condition never was

complied with by the principals. The contract was no present discharge of the plaintiff's rights.

It was no bar to an instantaneous suit had one been brought.

It was never executed. Nothing was ever paid. It was not a discharge under seal. *Miller* v. *Hatch*, 72 Maine, 481; *Cushing* v. *Wyman*, 44 Maine, 131.

The agreement to accept a part in satisfaction of the whole, so long as it remains executory, will not operate either as payment, satisfaction or discharge. *Blake* v. *Blake*, 110 Mass. 302.

By a written agreement executed at the same time, though not under seal, the parties were to be holden in full for the note.

John F. Lynch and W. R. Pattangall, for defendants.

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

WISWELL, J. This is an action against the executors of one of the joint makers of a promissory note. The note was signed by L. Leighton & Son, and indorsed, at the inception of the note and before its negotiation, by L. Leighton, H. M. Leighton and Isaac Carleton, the defendants' testator. They were therefore co-promisors.

The defense was, that the payee of the note, by an instrument under seal, had released and discharged from all liability two of the co-promisors, Levi Leighton and Horace M. Leighton, and that thereby the defendants' testator had been released.

The note in suit was dated October 29, 1892. On September 15, 1893, by an instrument under seal, Levi Leighton and Horace M. Leighton, both individually and as members of the firm of L. Leighton & Son, conveyed, transferred and assigned to the persons therein named all of their property of every description, except such as was by law exempt from attachment, in trust, to sell, dispose of and convert into money and to make a proportional distribution of the net proceeds thereof among such creditors of the assignors as became parties to the assignment, within the time limited.

The indenture of assignment contained this clause: "And the creditors whose names are hereunto subscribed, agree to said assignment and to receive their proportional shares of said property in full of all their claims against said parties of the first part and upon payment thereof they hereby relieve and forever discharge said parties of the first part from their respective claims."

The main question presented is as to the proper construction of this language in the indenture applicable to creditors who became parties thereto; whether it should be regarded merely as an executory agreement to release the assignors upon the subsequent proportional distribution of the property conveyed in trust for this purpose, a covenant not to sue, or as a then present release of the assignors from all further liability.

It is undoubtedly true that the tendency of authority is towards a more liberal construction of such instruments than formerly prevailed, and that the intention of the parties is to be obtained if possible by construing the instrument as a whole and by taking into consideration the circumstances and relations of the parties. It is not always an easy question to decide, but it is the opinion of the court that by the indenture under consideration the parties intended a present release.

The assignors conveyed all of their property without limitation or restriction, except as to that exempt by law from attachment, for the benefit of such creditors as became parties. This creditor, together with others who assented to the assignment, immediately acquired thereby something of value, and an advantage over other creditors who did not become parties. The consideration of the conveyance was the release of liability, and the consideration of the release, the immediate and unconditional acquirement by the creditors, who became parties, of all the property of the debtors.

The language adopted by the creditors shows, we think, an intention to then and there discharge and release the assignors from further liability. They assent to the assignment, they agree to receive their proportional shares of the property in full of their claims, and upon payment thereof they "*hereby* relieve and forever discharge said parties of the first part from their respective claims."

In *Tuckerman* v. *Newhall*, 17 Mass. 581, it was held that this language in an assignment for the benefit of creditors, "that the said creditors do severally agree and covenant . . . that they will receive their respective proportions of the moneys arising, etc., in full satisfaction of their several and respective demands, and will further release and discharge the said J. & I. Newhall from all further claims and demands upon them by reason thereof," should be construed as a present release.

In *Dickinson* v. *Metacomet National Bank*, 130 Mass. 132, in which there was an assignment for the benefit of creditors, it was held that the language used by the creditors, "we do hereby accept," and "we do hereby absolutely release," should not operate as a present release because other portions of the instrument clearly showed that the use of the present tense in the words quoted was incorrect and inaccurate and that this was not the intention of the parties. But in the case under consideration no other portion of the instrument shows a contrary intent from that to be obtained from the language adopted by the creditors.

This then being a technical release under seal of some of the joint promisors must be regarded as a discharge of all. *Hale* v. *Spaulding*, 145 Mass. 482, and cases cited; *Bradford* v. *Prescott*, 85 Maine, 482, and cases cited.

A release may be given to one of several joint debtors and all rights be reserved against the others, but that was not done in this indenture; nor does the instrument show any intention upon the part of creditors to reserve rights against other joint debtors or promisors.

The plaintiff offered in rebuttal the following agreement upon a separate paper:

"Columbia Falls, October 14, 1893.

It is agreed by the undersigned that by A. Merritt signing the assignment of L. Leighton & Son this day that it shall not debar or prevent Merritt from collecting on his notes full amount due.

H. M. LEIGHTON.
JOHN L. DALOT, Assignee."

Merritt was the payee and holder of the note at the time of the assignment and at the date of this agreement. This case does not

show how or under what circumstances this agreement was signed and given to Merritt, but we think that it may be fairly inferred that it was a secret agreement, made to induce him to assent to the assignment and without the knowledge of the other creditors. It was repugnant to the terms of the indenture of assignment and was a fraud upon the other creditors. It is therefore void. *Ramsdell* v. *Edgartown*, 8 Met. 227.

The direction of the court to return a verdict for the plaintiff for the amount due upon the note was, therefore, erroneous.

Exceptions sustained.

ELSIE G. LEAVITT *vs.* CANADIAN PACIFIC RAILWAY COMPANY.

Penobscot. Opinion April 9, 1897.

Railroads. Insurance. Subrogation. Constitutional Law. Obligation of Contracts. 14th Amend. U. S. Const. R. S., c. 51, § 64; Stat. 1895, c. 79.

The Act of the Legislature of 1895, (c. 79, Stat. of 1895,) whereby R. S., c. 51, § 64, was so amended that the liability of railroad corporations in case of injury to property by fire communicated from a locomotive engine in the use of the corporation, was limited to the excess of the injury suffered by the property owner over the net amount of insurance recovered, if received before the damages are assessed, and which provides that if the insurance is not recovered before the damages are assessed, the policy shall be assigned to the railroad corporation, which may maintain an action thereon, or prosecute an action already commenced by the insured, with all the rights which the insured originally had, is not in violation of the clause of the Fourteenth Amendment of the Federal Constitution which declares: "Nor shall any State deny any person within its jurisdiction the equal protection of the laws." This clause merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions both in the privileges conferred and in the liabilities imposed.

Held; that the amended statute operates alike upon all persons and property similarly situated. It is general in its terms and applies to all cases falling within its provisions. All persons and property subject to it are treated alike. There is no unjust discrimination in the protection given by the statute between different persons or classes of persons.

The right which an insurer has, who has paid a loss, to prosecute for his own benefit any person primarily liable to the insured for the injury is not based

upon a vested interest or any ownership in the property insured, but rather upon the doctrine of subrogation, which is founded, not upon contract, but upon the relationship of the parties and upon equitable principles for the purpose of accomplishing the substantial ends of justice.

Subrogation is the substitution of one person in place of another whether as a creditor, or as the possessor of any other rightful claim, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim and its rights, remedies or securities. But one cannot thereby succeed to, or acquire any claim, or right which the party for whom he is substituted did not have.

In accordance with these equitable principles, a surety who has been compelled to pay a debt for which another is primarily liable, succeeds to all rights which the creditor had of enforcing the liability of the original debtor; or an insurer who has paid a loss, for which another is responsible, either by statute or at common law, is subrogated to any claim that the insured had against the person whose tortious act caused the injury, or who for any reason is liable to the owner therefor.

Where the plaintiff's property was injured by fire communicated by a locomotive engine in the use of the defendant corporation, on July 26, 1895, some months after the act of 1895 became effective, and the property was insured by policies dated in March, some time before the act went into effect, *held;* that the amended statute was intended to apply and does apply to such a case.

This statute, although applicable to any case where the injury occurred after it went into effect, even if the contract of insurance was made before, in no way affects or impairs the obligation of a contract. It very materially affects the rights of the insurer, but not his contractual rights. This was entirely within the province and power of the legislature. The liability of the railroad corporation was created by the legislature; it was not based upon negligence, but was placed rather as a condition upon its franchise. The same power that created this unconditional liability could either limit or entirely take it away.

Two persons cannot by contract continue the statutory liability of a third person, not a party to the contract, beyond such a time as the legislature may see fit, by a subsequent enactment to the contract, to limit or repeal the liability.

Held; that an insurance company, after as well as before the time that this statute went into effect, had the right to be subrogated to all the right of recovery that the insured had. What this right of recovery was, for a fire communicated from one of the defendant's locomotives, without fault or negligence upon the part of the defendant, depended upon the law as it was at the time of the fire. This right did not depend upon any interest or ownership of the insurer in the property insured, but rested entirely upon the equitable rule, that one, who has been obliged to indemnify another against loss, should succeed to all rights that other had, to the extent of the

amount paid, to recover of the person who for any reason was primarily liable therefor, but to no other nor greater right than he had.

Held; in this case, that judgment should be entered for the plaintiff for the amount of damages assessed by the referee, after deducting the insurance received by the plaintiff, less the premium paid and the expense, if any, of the recovery of the insurance, together with interest on such balance as provided by law.

AGREED STATEMENT.

The case is stated in the opinion.

Chas. P. Stetson, for plaintiff.

The statute of 1895 is intended to deprive the insurance companies of all right to indemnity, which they had under the law, before the amendment, and under the uniform line of decisions.

It is contrary to § 1 Art. XIV of the constitution of the United States which provides that no state shall deny to any person within its jurisdiction the equal protection of the laws.

Private corporations are persons within the meaning of that clause of the constitution. *Charlotte C. & A. R. Ry. Co.* v. *Gibbes*, 142 U. S. 386.

The amendment of 1895 provides in substance that the owner of the property shall be paid the amount of his loss, over and above the amount of the insurance and that the insurance companies shall receive nothing. The insurance companies have an interest in the property insured—a vested interest—to a certain extent an ownership. "Equality of rights, privileges, and capacities unquestionably should be the aim of the law." Cooley's Const. Lim. 391 and notes, 393.

On principle it can never be within the bounds of legitimate legislation to enact a special law, or pass a resolve dispensing with the general law in a particular case and granting a privilege and indulgence to one man, by way of exemption from the operation and effect of such general law, leaving all other persons under its operation. Such a law is neither just nor reasonable in its consequences. It is our boast that we live under a government of laws and not of men; but this can hardly be deemed a blessing, unless these laws have for their immovable basis the great principle of

constitutional equality. Can it be supposed for a moment that, if the legislature should pass a general law, and added a section by way of proviso, that it never should be construed to have any operation or effect upon the persons, rights or property of Archelaus Lewis or John Gordon, such a proviso would receive the sanction or even the countenance of a court of law? *Lewis* v. *Webb*, 3 Greenl. 326.

The rights of every individual must stand or fall by the same rule that governs every other member of the body politic or land, under similar circumstances; and every partial or private law, which directly proposes to destroy or affect individual rights or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. *Walley's heirs* v. *Kennedy*, 2 Yerg. 554.

The clause above named in the policy of insurance—giving to the insurance companies the amount recovered of the railroad company, to the extent of its payment to the assured, was a contract between the parties to the policy. The act of 1895 is open to the objection that it impairs the obligation of that contract. It is not and was not intended to be retrospective, and does not apply in case of insurance effected before the act took effect, as are the policies in this case. *Drake, Appellant*, 86 Maine, 50, 55; *Peabody* v. *Stetson*, 88 Maine, 243.

Chas. F. Woodard, for defendant.

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

WISWELL, J. On July 26th, 1895, the plaintiff's property, both real and personal, was injured by fire communicated by a locomotive engine in use by the defendant corporation, but, as is admitted, without fault or negligence on the part of the defendant. The plaintiff had insurance upon her property against fire under policies dated in March, 1895.

Revised Statutes, c. 51, § 64, prior to the amendment of 1895, was as follows: "When a building or other property is injured

by fire communicated by a locomotive engine, the corporation using it is responsible for such injury, and it has an insurable interest in the property along the route, for which it is responsible, and may procure insurance thereon." Under this statute it was well settled that, in accordance with the doctrine of subrogation, an insurance company which had paid a loss upon property injured by fire communicated by a locomotive engine, could maintain an action in the name of the assured against the railroad corporation using the locomotive and recover the amount which it had been obliged to pay by reason of the contract of insurance.

But the legislature of 1895 amended this statute by adding thereto the following provision: "But such corporation shall be entitled to the benefit of any insurance upon such property effected by the owner thereof less the premium and expense of recovery. The insurance shall be deducted from the damages, if recovered before the damages are assessed, or, if not, the policy shall be assigned to such corporation, which may maintain an action thereon, or prosecute, at its own expense, any action already commenced by the insured, in either case with all the rights which the insured originally had." Chap. 79, Laws of 1895.

In this case the insurance had been recovered prior to the assessment of damages by a referee,—the question as to whether the amount of insurance received by the plaintiff should be deducted from the damages being expressly reserved in the reference, and presented to this court upon an agreed statement of facts. The action is prosecuted for the benefit of the insurance companies, who had paid a portion of the loss, as well as for the plaintiff.

There can be no question as to the meaning of the amendment. It is expressly provided that the corporation liable for the injury by reason of fire communicated from its locomotive engine "shall be entitled to the benefit of any insurance upon such property effected by the owner thereof," and that the insurance "shall be deducted from the damages, if recovered before the damages are assessed." The effect of the statute as it now stands is to make railroad companies liable in such cases for the difference only between the net amount of insurance recovered and the amount of

the injury suffered by the property owner. Before the amendment, by reason of the statute liability, the railroad company was responsible to the owner of the property thus injured, notwithstanding that the property was fully insured, and notwithstanding that the owner had received full indemnity from the insurance company. But in the latter case, upon the equitable principles of the doctrine of subrogation, this responsibility of the railroad company to the owner inured to the benefit of the insurer. Since the amendment the liability is limited to the difference, as we have already seen.

But it is contended upon the part of the counsel for the plaintiff, representing the interests of the insurers, that this amendment of 1895 is invalid because in violation of the last clause of the Fourteenth Amendment to the Federal Constitution: "Nor shall any State . . . . . deny to any person within its jurisdiction the equal protection of the laws."

This clause has very frequently been before the Federal Supreme Court in attempts by unsuccessful litigants in the state courts to have legislative acts of almost every kind and unfavorable decisions of the state courts, held to be within the inhibition of this clause, and it has received so frequent judicial construction by that court that its meaning has become pretty well settled.

In *Barbier* v. *Connolly*, 113 U. S. 27, Mr. Justice Field, in delivering the judgment of the court, said: "The Fourteenth Amendment, in declaring that no state shall deprive any person of life, liberty or property without a due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their person and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the

pursuits of any one, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition. . . . . Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

Legislation which is special in its character is not obnoxious to the last clause of the Fourteenth Amendment, if all persons subject to it are treated alike, under similar circumstances and conditions, in respect both of the privileges conferred and the liabilities imposed. *Missouri Pacific Railway Co.* v. *Mackey*, 127 U. S. 205.

Whenever the law operates alike upon all persons and property, similarly situated, equal protection cannot be said to be denied. *Walston* v. *Nevin*, 128 U. S. 578.

"It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." *Marchant* v. *Penn. R. R. Co.* 153 U. S. 380.

"There is no evasion of the rule of equality where all companies are subjected to the same duties and liabilities under similar circumstances." *Missouri Pacific R. Co.* v. *Humes*, 115 U. S. 512.

In view of the construction which has so frequently been placed upon this clause by the U. S. Supreme Court, is the act of 1895 within the inhibition of the clause? We think not. The law operates alike upon all persons and property similarly situated. The act is general in its terms and applies to all cases falling within its provisions. All persons and property subject to it are treated alike. The liability of the railroad corporation is the same, whatever the property injured or by whomsoever it may be owned. There is no unjust discrimination in the protection given by the statute between different persons or classes of persons.

It is argued, however, by the counsel for the plaintiff that an insurer has a vested interest in the property insured, "to a certain

extent an ownership," and that while the statute as amended furnishes full and absolute protection to the actual owner, it affords none whatever to the insurer, that therefore there is an unjust discrimination against a class of persons, viz, insurance companies,—corporations being undoubtedly persons within the meaning of the constitutional amendment.

But we think that the right which an insurer, who has paid the loss, has to prosecute for his own benefit any person, primarily liable to the assured for the injury, is not based at all upon the idea that he has a vested interest or any ownership whatever in the property insured, but rather upon the doctrine of subrogation, which is founded, not upon contract, but upon the relationship of the parties and upon equitable principles for the purpose of accomplishing the substantial ends of justice.

In accordance with these equitable principles, a surety who has been compelled to pay a debt for which another is primarily liable, succeeds to all the rights which the creditor had of enforcing the liability of the original debtor; or an insurer who has paid a loss for which another is responsible, either by statute or at common law, is subrogated to any claim that the insured had against the person whose tortious act caused the injury, or who for any other reason is liable to the owner therefor. If this were not so the very inequitable result would follow that an insured owner of property, for an injury for which another is liable would recover, for one and the same loss, full indemnity from the insurer and compensation from the person liable therefor.

"Subrogation is the substitution of one person in place of another, whether as a creditor or as the possessor of any other rightful claim, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim and its rights, remedies or securities." *Jackson Company* v. *Boylston Mutual Insurance Co.*, 139 Mass. 508.

It necessarily follows from the very principles of this doctrine of subrogation that one cannot thereby succeed to or acquire any claim or right which the party for whom he is substituted did not have. A mere statement of this proposition is such that the cita-

tion of authority in support of it is not necessary, but ample authority is not wanting.

"The party subrogated acquires no greater rights than those of the party for whom he is substituted." *Jackson Company* v. *Insurance Co.*, supra.

"In any form of remedy, the insurer can take nothing by subrogation but the rights of the assured." *Phoenix Ins. Co.* v. *Erie Tran. Co.*, 117 U. S. 312.

"The right of the insurance company is a mere equity to be put in the place of the insurer . . . . whatever his rights may be." *Kernochan* v. *N. Y. Bowery Fire Ins. Co.*, 17 N. Y. 428.

The following cases are excellent illustrations of the doctrine of subrogation and of the proposition that the insurer by subrogation succeeds to such claims and rights as the person indemnified had, and to none other.

In the case of *Simpson* v. *Thomson*, Law Reports, 3 Appeal Cases, 279, decided by the House of Lords in 1877, an insured steamship was run down and destroyed by another steamship; both vessels belonged to the same owner. The underwriters paid as for a total loss upon the steamship destroyed and sought to share with the owners of the cargo in a fund which the vessel owner had paid into court under an act limiting the liability of the ship owners. The Law Peers, who delivered opinions, all agreed that the question must be considered just as if the underwriters had brought an action against the owner of both vessels; and the House of Lords decided that, although the underwriters had paid for a total loss, and were entitled to all the rights in the injured ship which belonged to its owner, yet if that owner could not assert a claim for damages against the wrongdoers, neither could the underwriters; that the underwriters' claim must be asserted in the name of the insured and that any right of action that he had must be a right of action against himself, which is an absurdity, and thing unknown to law.

The Lord Chancellor, in delivering his opinion, said: "I know of no foundation for the right of underwriters, except the well-known principle of law, that where one person has agreed to

indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss. It is on this principle that the underwriters of a ship that has been lost are entitled to the ship in specie if they can find and recover it; and it is on the same principle that they can assert any right which the owner of the ship might have asserted against a wrongdoer for damage for the act that has caused the loss. But this right of action for damages they must assert, not in their own name but in the name of the person insured, and if the person insured be the person who has caused the damage, I am unable to see how the right can be asserted at all."

In *Jackson Company* v. *Boylston Mutual Ins. Co.*, 139 Mass. 508, supra, the defendant insured the plaintiff on cotton in transit between different places in the United States and the plaintiff's mills in New Hampshire. The contract for transportation with a carrier contained a stipulation, that "the company [carrier] incurring such liability shall have the benefit of any insurance which may have been effected upon or on account of said cotton." It was held, that it was no defense to an action on the policy for a loss insured against, that the insured had, by contract with the carrier, given him the benefit of any insurance effected, if there was no fraud or concealment on the part of the insured in effecting the insurance, and if the policy of insurance contained no clause specifically subrogating the insurer to the rights of the insured in case of a loss through the fault of a carrier.

In *Phoenix Ins. Co.* v. *Erie & Western Trans. Co.*, 117 U. S. 312, supra, goods in transit were insured by the plaintiff; a stipulation in the bill of lading allowed the carrier the benefit of any insurance procured by the owner. It was held that this stipulation was valid, although the loss was occasioned by the negligence of the carrier or his agents; and that in the absence of fraudulent concealment or misrepresentation, the insurer could maintain no action against the carrier upon any terms inconsistent with the stipulation. Mr. Justice Gray, in delivering the judgment of the court, used language that has a special significance with reference

to the plaintiff's contention in this case. "That the right of the assured to recover damages against a third person is not incident to the property in the thing insured, but only a personal right of the assured, is clearly shown by the fact that the insurer acquires a beneficial interest in that right of action, in proportion to the sum paid by him, not only in the case of a total loss, but likewise in the case of a partial loss, and when no interest in the property is abandoned or accrues to him."

These cases and many others which might be cited, many of which are collected in the last two cases referred to, clearly illustrate the principles of the doctrine of subrogation, and show that the rights of an insurer in no sense depends upon any vested interest or ownership in the property insured, but entirely upon the equitable rule that one who has indemnified a property owner against loss, should in case of loss and payment, either in full or in part, be allowed to succeed to whatever rights the owner had to the extent of such payment, against the person primarily liable therefor.

This clause in the insurance policies: "If this company shall claim that the fire was caused by the act or neglect of any person or corporation private or municipal, this company shall, on payment of the loss be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom," gives the insurers no greater right, in a case of this kind, than they would have had without it. Its only effect was to prevent the assured from releasing any claim that she had against any one responsible for the injury.

It is further urged that the Act of 1895 can not affect the plaintiff's right of recovery in this case, because otherwise it would impair the obligation of a contract; that it is not and was not intended to be retrospective. The plaintiff's property was injured by fire on July 26th, 1895, some months after the Act of 1895 became effective by the expiration of thirty days after the recess of the legislature passing it. The insurance policies were dated in March, some time before the Act went into effect.

It is certainly true that the Act was not intended to be and is

not retrospective. The limitation of liability does not apply to any case where fire was communicated by a locomotive prior to the time that the law went into effect. But was it not intended, and does it not apply to any injury thus caused afterwards? We think that such was the intention and that the Act does apply to this case. Nor can we see how it in any way affects or impairs the obligation of a contract. It undoubtedly very materially affects the rights of the insurer, but not his contractual rights. This was entirely within the province and power of the legislature. The liability of the railroad corporation was created by the legislature; it was not based upon negligence, but was placed rather as a condition upon its franchise. We have no doubt that the same power which created this unconditional liability could either limit or entirely take it away.

In *Ewell* v. *Daggs*, 108 U. S. 143, in which it was decided that a statute which repealed usury laws and destroyed defenses to existing contracts on the ground of usury, did not deprive parties of vested rights, nor impair the obligation of contracts, Mr. Justice Matthews in the opinion says, "that the right of a defendant to avoid his contract is given to him by statute for purposes of its own, and not because it affects the merits of his obligation; and that, whatever the statute gives, under such circumstances, as long as it remains in fieri, and not realized, by having passed into a completed transaction, may by a subsequent statute be taken away."

It would hardly be claimed for a moment that a property owner along the route of a railroad has a vested right in this statutory liability, however much he might be injured by its repeal, nor do we think that an insurer has any more reason to complain of the unconstitutionality of the law. Certainly the state can not be said to have assumed any obligation, by the enactment of the original statute, to continue this liability of a railroad corporation without change beyond its pleasure.

It is said, however, that the clause in the policies, already quoted, gives to the insurer the right to be subrogated to this claim against a railroad corporation, as it existed at the time that the contract of insurance was made. If this were the object of the

clause, we are unable to see how two persons can by contract continue the statutory liability of a third person, not a party to the contract, beyond such a time as the legislature may see fit, by enactment subsequent to the contract, to limit or repeal the liability. While the legislature cannot impair the obligation of the contract between the insurer and the insured, the parties to the contract cannot prolong the statutory liability of a third and independent person, when the legislature has seen fit to limit or repeal it.

But the clause relied upon does not go to the extent claimed by the counsel; it simply provides that if the insurance company shall claim that the fire was caused by the act or neglect of any other person, the company "shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom." This cannot refer to any right of recovery by the insured before the loss; it is a right of recovery, "by the insured for the loss,"—necessarily such right as the insured had at the time of the loss and afterward. This amendment in no way affected that provision in the policy. The insurance company after, as well as before the time when this law went into effect, had the right to be subrogated to all the right of recovery that the insured had, and this independently of the contract, as we have already seen.

What this right of recovery was, that the insured had for a fire communicated from one of the defendant's locomotives, but without fault or negligence upon the part of the defendant, depended upon the law as it was at the time of the fire. We have already seen that this right did not depend upon any interest or ownership of the insurer in the property insured, but rested entirely upon the equitable rule that one, who by reason of a contract, has been obliged to indemnify another against loss should succeed to all the rights that other had, to the extent of the amount paid, to recover of the person who for any reason was primarily liable therefor, but to no other nor greater rights than he had.

In this connection we again quote from the opinion of Mr. Justice Gray in *Phoenix Ins. Co.* v. *Erie & Western Trans. Co.*,

supra: "But the insurer stands in no relation of contract or of privity with such person. His title arises out of the contract of insurance, and is derived from the assured alone and can only be enforced in the right of the latter."

This right of subrogation remained in the insurer precisely the same after the act of 1895 went into effect as before. But in the meantime, between the making of the contract of insurance and the time of the fire, the plaintiff's right had been limited to a recovery of the difference between the amount of the injury and the amount of the insurance received, thus indirectly affecting the insurer's rights but not its contractual rights.

Our conclusion is that the Act of 1895 is not in violation of any provision of the Federal Constitution, and that it does apply to this case. From the amount of damages assessed by the referee there will, therefore, be deducted the insurance received by the plaintiff, less the premium paid and the expense, if any, of the recovery of insurance. The plaintiff will be entitled to judgment for this difference, together with interest thereon as provided by law.

Judgment accordingly.

WEBSTER C. PERKINS *vs.* FREMONT PENDLETON, and others.

Waldo. Opinion April 9, 1897.

Action. Master and Servant. Labor Union. Pleading.

For a person to wrongfully, that is by the employment of unlawful or improper means, induce a third party to break a contract with the plaintiff, whereby injury will naturally and probably, and does in fact, ensue to the plaintiff, is actionable; and the rule applies both upon principle and authority as well to cases where the employer breaks his contract as where it is broken by the employee,—in fact it is not confined to contracts of employment.

Whenever a person, by means of fraud or intimidation, procures, either the breach of a contract or the discharge of a plaintiff from an employment, which but for such wrongful interference would have continued, he is liable in damages for such injuries as naturally result therefrom; and the rule is

the same whether by these wrongful means a contract of employment, definite as to time is broken, or an employer is induced, solely by reason of such procurement to discharge an employee whom he would otherwise have retained, even if the terms of the contract of service are such that the employer may do this at his pleasure, without violating any legal right of the employee.

Merely to induce another to leave an employment or to discharge an employee, by persuasion or argument, however whimsical, unreasonable or absurd, is not in and of itself unlawful, and the court does not decide that such interference may become unlawful by reason of the defendant's malicious motives, but simply, that to intimidate an employer by threats, if the threats are of such a character as to produce this result, and thereby cause him to discharge an employee, whom he desired to retain and would have retained, except for such unlawful threats, is an actionable wrong.

Held; that a cause of action in this case is sufficiently stated in the declaration.

On Exceptions by Defendants.

This was an action on the case for wrongfully causing the plaintiff to be discharged while an employee of the Mount Waldo Granite Company.

The defendants took exceptions to overruling a demurrer to the declaration.

Declaration.

In a plea of the case, for that the plaintiff on the last day of May, A. D. 1895, and for twenty-two years prior to that time, had been at work for and employed by the Mount Waldo Granite Company, a corporation duly existing according to law and having an established place of business at said Frankfort, in the business of cutting stone for said Mount Waldo Granite Company, and was making large profits out of his said employment as a stone cutter, working by the piece, cutting stone for said company, to wit, making the sum of two dollars and seventy cents per day; and the plaintiff alleges that he would have continued to work for said Mount Waldo Granite Company in the business of stone cutting, making large profits as aforesaid, in his said employment as a stone cutter for said Mount Waldo Granite Company, from the last day of May, A. D. 1895, to the twenty-sixth day of November, A. D. 1895, but for the wrongful acts, inducements, threats, persuasions and grievances committed by said defendants against the said plaintiff as hereinafter set forth. And the plaintiff avers that the said

defendants, on the said last day of May, A. D. 1895, and at divers times thereafter until the date of the plaintiff's writ, with divers other persons whose names are unknown to the plaintiff, all as members of the Mt. Waldo branch of the Granite Cutters' National Union, did unlawfully and without justifiable cause, molest, obstruct and hinder the plaintiff from carrying on his said trade, occupation or business as a stone cutter for the said Mount Waldo Granite Company, and wrongfully, unlawfully, and unjustly had him discharged without any justifiable cause from the employment of the said Mount Waldo Granite Company by wilfully threatening, persuading, inducing and by other overt acts, compelling the said Mount Waldo Granite Company, against its will and without any desire on its part so to do, to discharge the said plaintiff from its employ for the sole reason that the plaintiff would not become a member in the order of the Mount Waldo Branch of the Granite Cutters' National Union; whereby and by reason of the unlawful acts, threats, inducements and persuasions of the said defendants and divers other persons to the plaintiff unknown, acting as members of said Mount Waldo Branch of the Granite Cutters' National Union, the said plaintiff lost his said employment and the compensation which he would have received therefor as aforesaid, to wit, the sum of two dollars and seventy cents per day from said last day of May, A. D. 1895, amounting to the sum of four hundred and twenty-three dollars and ninety cents, all of which injury the plaintiff has suffered through the wrongful acts, inducements, persuasions and threats of the said defendants and divers other persons whose names are unknown to the plaintiff, acting as members of the Mount Waldo Branch of the Granite Cutters' National Union, and through no fault of his and through no fault of the said Mount Waldo Granite Company, but solely through the unlawful acts, persuasions, threats, inducements, molestations and hindrances of the said defendants as aforesaid, whereby and by reason of which the said plaintiff lost his employment as aforesaid, and all the advantages and profits that he would otherwise have made and received from the service and employment in which he was.

And the plaintiff alleges that from the said last day of May, A.

D. 1895, to the said twenty-sixth day of November, A. D. 1895, he has been unable to procure work as a stone cutter from the Mount Waldo Granite Company, although said Mount Waldo Granite Company has ever been ready and willing to employ him were it not for the aforesaid acts, inducements, persuasions, threats, molestations, and hindrances of the said defendants; whereby and by reason of which said plaintiff has been greatly damaged by the wrongful acts of the said defendants, all of which is to the damage of the plaintiff, as he says, in the sum of one thousand dollars.

P. H. Gillin and R. F. Dunton, for plaintiff.

W. H. Fogler and W. P. Thompson, for defendants.

As the Granite Company was under no obligation to continue the plaintiff in its employment, but had the right to discharge him at will, no action is maintainable against the defendants for inducing the company, even by threats, to discharge him from its employment.

The allegation that the plaintiff "would have continued to work for" said Company is not equivalent to an allegation of an obligation on the part of the company to employ him. At most it avers an expectation merely of employment. The plaintiff had no legal rights which could be affected adversely or otherwise by any acts of the defendants.

The declaration does not allege that the defendants made any threat to the plaintiff, or did any overt act against him, or addressed or directed to him any persuasions or inducements, which caused or contributed to his discharge or employment.

It is not averred in the declaration that the defendants made any threat of injury or used intimidation or force. The civil rights and remedies of employers and of employees are unaffected by the terms of the statute of 1896, c. 127.

The declaration does not charge conspiracy on the part of the defendants nor any unlawful combination, but merely joint acts.

Counsel cited: *Heywood* v. *Tillson*, 75 Maine, 225, and cases cited; *Boston Glass Manufactory* v. *Binney*, 4 Pick. 425; *Com* v. *Hunt*, 4 Met. 111; *Bowen* v. *Matheson*, 14 Allen, 499.

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

WISWELL, J. To the plaintiff's declaration, which appears in full in the statement of the case, the defendants filed a general demurrer, which was overruled by the justice presiding at nisi prius, and the declaration adjudged good. The case comes to the law court upon exceptions to this ruling.

The plaintiff alleges that upon a certain day he was, and for twenty-two years prior to that time had been, in the employ of the Mount Waldo Granite Company as a stone cutter, working by the piece; that he was making large profits out of his employment; that he would have continued in such employment from the day named until the date of his writ, "but for the wrongful acts, inducements, threats, persuasions and grievances committed by said defendants against the said plaintiff as hereinafter set forth;" that on the day named, and "at divers other times thereafter until the date of the plaintiff's writ," the defendants "did unlawfully and without justifiable cause, molest, obstruct and hinder the plaintiff from carrying on his said trade, occupation or business as a stone cutter for the said Mount Waldo Granite Company, and wrongfully, unlawfully and unjustly had him discharged without any justifiable cause from the employment of the said Mount Waldo Granite Company by wilfully threatening, persuading, inducing and by other overt acts, compelling the said Mount Waldo Granite Company, against its will and without any desire on its part so to do, to discharge the said plaintiff from its employ for the sole reason that the plaintiff would not become a member in the order of the Mount Waldo Branch of the Granite Cutters' National Union;" whereby he suffered the injury specially set out in his declaration. Does this statement of facts sufficiently set out an actionable wrong upon the part of the defendants?

That an action lies under certain circumstances for procuring a third person to break his contract with the plaintiff, has been frequently decided by the courts of England and of this country.

In *Lumley* v. *Gye*, 2 E. & B. 216, decided in 1853, the action

was for knowingly and maliciously inducing an opera singer to break her contract with the plaintiff to perform exclusively for a certain time in his theatre. The right of action was sustained by a majority of the court.

In *Bowen* v. *Hall*, 6 Q. B. D. 333, decided in 1881, a person had contracted to manufacture glazed bricks for the plaintiff and not to engage himself to any one else for a term of five years, the English Court of Appeals held that an action could be maintained against the defendant for maliciously procuring a breach of this contract, provided damage accrued; and that to sustain the action it was not necessary that the employer and employee should stand in the strict relation of master and servant. It was said by the court in this case: "That wherever a man does an act which in law and in fact is a wrongful act and such an act as may, as a natural and probable consequence of it produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie. . . . . If these conditions are satisfied, the action does not the less lie because the natural and probable consequence of the act complained of is an act done by a third person; or because such act so done by the third person is a breach of duty or contract by him, or an act illegal on his part, or an act otherwise imposing an actionable liability on him. . . . Merely to persuade a person to break his contract may not be wrongful in law or fact, ... but if the persuasion be used for the indirect purpose of injuring the plaintiff or of benefiting the defendant at the expense of the plaintiff, it is a malicious act which is in law and in fact a wrong act and therefore an actionable act if injury ensued from it."

The doctrine of these cases has been very generally adopted, and the cases themselves very frequently cited by the courts of this country. *Walker* v. *Cronin*, 107 Mass. 555; *Bixby* v. *Dunlap*, 56 N. H. 456 (22 Am. Rep. 475); *Noice* v. *Brown*, 39 N. J. Law, 569; *Haskins* v. *Royster*, 70 N. C. 601, (16 Am. R. 780); *Daniel* v. *Swearengen*, 6 S. C. 297 (24 Am. R. 471).

In view of these authorities and others which it is not necessary to refer to, it must be conceded that for a person to wrongfully,

that is by the employment of unlawful or improper means, induce a third party to break a contract with the plaintiff, whereby injury will naturally and probably, and does in fact, ensue to the plaintiff, is actionable; and the rule applies both upon principle and authority as well to cases where the employer breaks his contract as where it is broken by the employee,—in fact it is not confined to contracts of employment.

But in this case the plaintiff does not allege that the Mount Waldo Granite Company was induced by the wrongful means adopted by the defendants to break a contract, nor that there was any contract between the plaintiff and the employer for any definite time. We must therefore assume that there was none, that either party had the right to terminate the employment at any time, and that the act of the Mount Waldo Company in discharging the plaintiff was lawful, and one which the company had a perfect right to do at any time. The question presented then is whether a person can be liable in damages for inducing and persuading, by threats or other unlawful means, an employer to discharge his employee when the terms of the contract of service are such that the employer may do this at his pleasure, without violating any legal right of the employee. The question is a novel one in this state, but it has already arisen and been passed upon by the courts of some other states.

In *Walker* v. *Cronin*, 107 Mass. 555, the plaintiffs alleged that the defendant did "unlawfully and without justifiable cause, molest, obstruct and hinder the plaintiffs from carrying on" their business of manufacture and sale of boots and shoes, "with the unlawful purpose of preventing the plaintiffs from carrying on their said business, and wilfully persuaded and induced a large number of persons who were in the employment of the plaintiff," and others "who were about to enter into" their employment, "to leave and abandon the employment of the plaintiff, without their consent and against their will," and alleged that the plaintiffs lost the services of said person and the profits and advantages they would otherwise have made, and suffered losses in their business. It will be noticed that there is no allegation here of any definite contract as to time

between the plaintiffs and their employees who were induced to leave their employment, and one ground of action was that certain persons who were about to enter into their employment, but who had not commenced at the time, were induced to leave and abandon the employment of the plaintiffs. But the court held in an exhaustive opinion which has been frequently cited by other courts in this country and which was cited by counsel in the argument in *Bowen* v. *Hall*, supra, that the action could be maintained. It is said in the opinion: "This (declaration) sets forth sufficiently (1) intentional and wilful acts (2) calculated to cause damage to the plaintiffs in their lawful business, (3) done with the unlawful purpose to cause such damages and loss, without right or justifiable cause on the part of the defendant, (which constitutes malice), and (4) actual damage and loss resulting." The court quotes the general principles as announced in Comyns' Digest, Action upon the Case: "In all cases where a man has a temporal loss or damage by the wrong of another he may have an action upon the case to be repaired in damages." And goes on to say that "the intentional causing of such loss to another, without justifiable cause, and with a malicious purpose to inflict it, is of itself a wrong." Later in the opinion the court uses this language: "Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance or annoyance. If disturbance or loss come as a result of competition or the exercise of like rights by others, it is damnum absque injuria, unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing, and falls within the principle of the authorities first referred to."

This case was not decided upon the ground that the plaintiffs could recover for the loss of the value of actual contracts, by reason of their non-fulfillment, because so far as the case shows there was no breach of contract, but the gravamen of the action was, as

expressed by the court, "the loss of advantages, either of property or of personal benefit, which, but for such interference, the plaintiff would have been able to attain or enjoy."

In *Chipley* v. *Atkinson*, 23 Fla. 206, (11 Am. St. R. 367) the court decided that although no contract existed between the master and servant and no legal right as between them was violated, still the servant may maintain an action for damages against a third person who has maliciously procured his discharge. The court in its opinion, after quoting freely from *Walker* v. *Cronin*, supra, and after referring to numerous other authorities, says: "From the authorities referred to in the last preceding paragraph, and upon principle, it is apparent that neither the fact that the term of service interrupted is not for a fixed period, nor the fact that there is not a right of action against the person who is induced or influenced to terminate the service or to refuse to perform his agreement, is of itself a bar to an action against the third person maliciously and wantonly procuring the termination of or a refusal to perform the agreement. It is the legal right of the party to such agreement to terminate it or refuse to perform it, and in doing so he violates no right of the other party to it; but so long as the former is willing and ready to perform, it is not the legal right, but is a wrong on the part of a third party to maliciously and wantonly procure the former to terminate or refuse to perform it."

In *Lucke* v. *Clothing Cutters and Trimmers Assembly*, 77 Md. 396, decided in 1893, the action was to recover damages for the wrongful and malicious interference of the defendant, by means of which the plaintiff was discharged from his employment and thereby deprived of his means of livelihood. The defendant, a labor organization, gave notice to the plaintiff's employers that in case the plaintiff, a non-union man, was longer retained, it would be compelled to notify all labor organizations of the city that their house was a non-union house. The work of the plaintiff was entirely satisfactory to his employers, who intended to retain him permanently, but who in their contract reserved the right to discharge him at the end of any week. The court decided that the action could be maintained and damages recovered from the defen-

dant for maliciously and wantonly procuring his discharge. In that case the declaration alleged the procurement of a breach of contract by the wrongful acts of the defendant; the court held that the evidence did not sustain the declaration but allowed an amendment, saying: "If there was no agreement for any particular period of time, but the employment was one in which the agreement was that plaintiff should be given employment as long as he performed his work satisfactorily, and he has been discharged from it solely through the malicious and wrongful procurement of the defendant, and injury has resulted, he should have laid his case accordingly." We also quote from the same opinion, the following: "The appellant by the action of the appellee, lost his place in the month of February, and, although persistently in quest of a position, he did not succeed in obtaining work until the following April, when he secured employment with a merchant tailor at five dollars less per week than he was receiving when he was discharged. It would be strange, indeed, if the law, under such a state of facts as this record exhibits, provided no remedy." In this latter case *Chipley* v. *Atkinson*, supra, is quoted and expressly approved.

In *Raycroft* v. *Tayntor*, 68 Vt. 219, decided in 1896, it was held, that one who procures the discharge of an employee, not engaged for any definite time, by threatening to terminate a contract between himself and the employer, which he had a right to terminate at any time, is not subject to an action by the employee for damages, whatever may have been his motive in procuring the discharge. But the doctrine of the latter cases cited in this opinion was expressly recognized and approved by the court in this language: "The authorities cited for the plaintiff clearly establish that if the defendant, without having any lawful right, or by an act or threat aliunde the exercise of a lawful right, had broken up the contract relation between the plaintiff and Libersont, maliciously or unlawfully, although such relation could be terminated at the pleasure of either, and damage had thereby been occasioned, the party damaged could have maintained an action against the defendant therefor."

In *Harvester Co.* v. *Meinhardt*, 24 Hun, 489, the court said: "A distinction has been sought to be made between the cases where there has been an unexpired time-contract and cases where the services were by the day, or by the piece, but I do not think such distinction rests upon any sound reason. . . . . In such case the injury to the property and business of the employer would not consist so much in breaking the contract which existed as in the loss of profits derived from the work of the laborer if he continued in the employment, and the probability or certainty of such loss would be, in each case a question of fact."

The same principle has been applied to the procurement, by wrongful means, of the breach of contracts of sale. For instance, in the case of *Benton* v. *Pratt*, 2 Wend. 385, the plaintiff had made an oral contract for the sale of chattels; the contract was not enforceable because within the statute of frauds; the defendant fraudulently represented that the plaintiff did not intend to carry out the contract and deliver the chattels and thereby procured a breach of the contract by the other party to it. It was said by the court: "It is not material whether the contract of the plaintiff with Seagraves & Wilson was binding on them or not; the evidence established beyond all question that they would have fulfilled it but for the false and fraudulent representations of the defendant."

And in *Rice* v. *Manley*, 66 N. Y. 82, (23 Am. Rep. 30), one S had contracted by parol to sell and deliver to the plaintiff a quantity of cheese, but being made to believe, by the fraud of the defendant, that the plaintiff did not want the cheese, sold it to the defendant. The contract was not binding because within the statute of frauds, but it would have been performed by S, had it not been for the fraud of the defendant. The court held that an action was maintainable against the defendant therefor.

Our conclusion is, that wherever a person, by means of fraud or intimidation, procures, either the breach of a contract or the discharge of a plaintiff, from an employment, which but for such wrongful interference would have continued, he is liable in damages for such injuries as naturally result therefrom; and that the rule is the same whether by these wrongful means a contract

of employment definite as to time is broken, or an employer is induced, solely by reason of such procurement, to discharge an employee whom he would otherwise have retained.

The case of *Heywood* v. *Tillson*, 75 Maine, 225, in no way conflicts with this result. There the court simply decided that the defendant was not liable for doing what he had a perfect and absolute right to do, even if in doing this he was actuated by a malicious motive against the plaintiff. Many cases were cited to the effect that "malicious motives make a bad act worse, but they cannot make that wrong which in its own essence is lawful."

We think that the important question in an action of this kind is as to the nature of the defendant's act and the means adopted by him to accomplish his purpose. Merely to induce another to leave an employment or to discharge an employee, by persuasion or argument, however whimsical, unreasonable or absurd, is not in and of itself unlawful, and we do not decide that such interference may become unlawful by reason of the defendant's malicious motives, but simply that to intimidate an employer, by threats, if the threats are of such a character as to produce this result, and thereby cause him to discharge an employee, whom he desired to retain and would have retained, except for such unlawful threats, is an actionable wrong. Nor do we differ from the recent decision of the Vermont court, in the case above referred to, which holds that a threat to do what the defendant had a right to do, would not be such a one as to make a defendant liable in an action of this kind.

It is the opinion of the court, that the plaintiff's declaration fairly sets out a cause of action in accordance with these principles; that the question is one of proof rather than of pleading; and that if the plaintiff can prove the essential allegations contained in his declaration, he is entitled to recover.

Exceptions overruled.

SIMEON LAROCHE *vs.* OREN T. DESPEAUX.

Cumberland. Opinion April 9, 1897.

Exceptions. Practice.

Exceptions lie to rulings upon questions of law only, and not to findings upon questions of fact.

A bill of exceptions, to be available, must show clearly and distinctly that the ruling excepted to was upon a point of law, and not upon a question of fact; nor upon a question in which law and fact are so blended as to render it impossible to tell on which the adverse ruling was based.

ON EXCEPTIONS BY DEFENDANT.

This was an action of replevin tried in the Superior Court, for the county of Cumberland, without the intervention of a jury.

The case appears in the opinion.

Barrett Potter for plaintiff.

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

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

WALTON, J. Exceptions lie to rulings upon questions of law only, and not to findings upon questions of fact. And a bill of exceptions, to be available, must show clearly and distinctly that the ruling excepted to was upon a point of law, and not upon a question of fact; nor upon a question in which law and fact were so blended as to render it impossible to tell on which the adverse ruling was based. And requests for rulings must be free from this ambiguity, or the withholding of them will not be error. In trials by juries these rules are generally observed. But in trials by the court, without a jury, they are often disregarded; and we have bills of exceptions in which there is no just or proper discrimination between questions of law and questions of fact.

In the present case, we are informed by the bill of exceptions that the action is replevin for a soda fountain; and that the question submitted to the court was whether the soda fountain was covered by a mortgage given by the plaintiff to one Nelson Gagne;

and the court was asked to rule, *as a matter of law*, that the mortgage covered the soda fountain. The court had already found, *as a matter of fact*, that the soda fountain at the date of the mortgage was the property of a third party, and was not intended to be covered by the mortgage, and declined to rule as requested; and decided the case in favor of the plaintiff. The exceptions then state that "to the foregoing rulings *in matters of law*," the defendant excepted.

We search this bill of exceptions in vain for "rulings in matters of law." Of course, the decision of the cause involved questions of law as well as questions of fact. Every cause does. But we look in vain for any such distinct ruling on a question of law as could furnish a basis for a valid bill of exceptions. The able and learned counsel for the defendant concede that the "pivotal point of inquiry" was the intention of the parties. But this was a question of fact, and was so regarded by the court.

"I find as a matter of fact," said the judge, "that the soda fountain in question was the property of A. D. Puffer & Sons Manufacturing Company on the 6th day of April, 1892, the date of the mortgage, and was not intended to be covered by the mortgage; and that, on the date of the writ, the soda fountain was the property of the plaintiff."

Here was no distinct ruling on a question of law. And the material facts having been found against the defendant, a refusal to rule that the mortgage did cover the soda fountain was inevitable. Practically, it was no more than a refusal to decide the case in favor of the defendant after having decided all of the material facts against him. The findings were affirmative. The refusal was negative. Both related to substantially the same proposition, and the one was no more a ruling on a matter of law than the other. In fact, the bill of exceptions contains no distinct ruling on any question of law. In this particular it is fatally defective. It is substantially like the bill of exceptions in *Curtis* v. *Downes*, 56 Maine, 24, which the court held to be insufficient.

Exceptions overruled.

INHABITANTS OF DOVER *vs.* MAINE WATER COMPANY.

Piscataquis. Opinion April 10, 1897.

Taxes. Water Company. Costs. Stat. 1885, c. 350.

The aqueducts, pipes and conduits of water companies are subject to municipal taxation unless the town takes water therefrom for the extinguishment of fires without charge.

They are real estate, and not personal property, and are liable to taxation in the town where they are laid.

The omission to tax the town poor-farm, the hall where town meetings are held, a small parcel of land on which an engine house stands, and the land on which the county court house stands, does not vitiate and make invalid an entire assessment of taxes.

The municipal officers may direct in writing an action of debt to be brought for the recovery of taxes; and the defendant is liable in costs when payment of the tax has been duly demanded.

Held; that the demand is sufficient when made by the collector of taxes upon the company's agent or superintendent who has charge of the water works in the town, and the agent of the town, duly authorized to commence the action, first demanded in writing payment of the tax of the president and directors of the company.

Paris v. *Norway Water Co.*, 85 Maine, 330, affirmed.

ON REPORT.

This was an action of debt under the statute to recover a tax.

The defendant company owns by purchase from the Dover and Foxcroft Water Company, its predecessor in title, a plant in the villages of Dover and Foxcroft. At the time of the purchase the first named corporation had a contract with the Dover and Foxcroft Village Fire Corporation under which the latter paid the former for hydrant rentals fifteen hundred dollars per annum, and in addition thereto, all taxes assessed upon the property of the water company by the towns of Dover, Foxcroft and Sangerville. Prior to 1892 the valuation of the plant in Dover, where the reservoir is, was fixed at five hundred dollars; and the same valuation was placed in Foxcroft where the pumping station is located.

In 1892 the valuation was raised to ten thousand dollars in each town. When this tax was assessed, the Dover and Foxcroft Water Company objected to paying it, and after this action was brought the defendant corporation served notices upon the village fire corporation requiring it to either pay the tax or assume the defense of the action; but the village fire corporation did neither.

The grounds of defense to the action are stated in the opinion.

H. Hudson, for plaintiff.

J. B. Peaks, for defendant.

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

WALTON, J. This is an action against a water company to recover a town tax. Payment of the tax is resisted on several grounds.

I. Exemption. The aqueducts, pipes and conduits of water companies are exempt from taxation when the town takes water therefrom for the extinguishment of fires without charge. R. S., c. 6, § 6, cl. 10. The defendants claim exemption under this provision of the statute. The claim can not be sustained. The evidence fails to show that water is so taken by the town. The water company furnishes water to a village corporation for such a purpose. But not without charge. It is paid for all the water so furnished.

II. Illegality. It appears that the assessors omitted to tax the town poor-farm and a small parcel of land on which an engine house stands. They also omitted to tax the land on which the county court house stands and the hall in which the town meetings are held. And the court is asked to determine if these omissions did not render the entire assessment illegal and void. We think not. If such omissions should be held to vitiate and render invalid the entire assessment, we doubt if there is one in the state that could be sustained. The consequences of such a doctrine are enough to condemn it. No case is cited in support of such a doc-

trine. The contrary has been held. *Williams* v. *School District in Lunenburg*, 21 Pick. 75; *Watson* v. *Princeton*, 4 Met. 599.

III. Non-residence. It is claimed that the defendant corporation is not an inhabitant of the town of Dover; that its principal place of business is in Gardiner; and, consequently, that its personal property is not taxable in Dover; and it is insisted that its reservoirs, pipes and hydrants should be regarded as personal property. It is conceded that the court held otherwise in *Paris* v. *Norway Water Company*, 85 Maine, 330. But it is claimed that that decision is of doubtful authority, and should be disregarded. It was there held that the pipes, hydrants and conduits of a water company are, under the tax laws of this state, real estate, and taxable in the town or city where they are situated. That case was ably argued and carefully considered, and we think the question must be regarded as res judicata.

It is possible that some articles of personal property were included in the tax sued for; but of this there is no proof. Nothing appearing to the contrary, it is to be presumed that the assessors did not exceed their authority, and that they included no property in their assessment except what was legally taxable.

IV. Costs. It is claimed that, in any event, the plaintiffs can not recover costs. Act 1885, c. 350. This statute provides that the defendant shall not be liable for costs unless the tax sued for was first duly demanded. It is insisted that such a demand is not proved. We think the proof is sufficient. It appears that the collector of taxes demanded payment of the tax of the company's agent or superintendent who had charge of its works in Dover, and that the agent of the town, who was duly authorized to commence the action, first demanded payment of the tax of the president and directors of the company in writing. We think the proof sufficient to entitle the plaintiffs to costs.

The case is before the law court on report. Upon the proofs presented, it is the opinion of the court that the plaintiffs are entitled to judgment for the amount of the taxes sued for and costs.

Judgment for plaintiffs.

GEORGE E. KIMBALL

vs.

MASON'S FRATERNAL ACCIDENT ASSOCIATION.

Somerset. Opinion April 15, 1897.

Insurance. Accident. Company. Notice of Injury. Waiver. Retroactive Statute. Stats. 1893, c. 223; 1895, c. 46.

An accident insurance policy, dated October 11th, 1892, contained a provision to the effect that written notice should be given to the defendant within ten days of the accident and injury for which claim to indemnity is made; and that unless such notice was received within the specified time, all claim to indemnity under the contract of insurance should be forfeited to the defendant.

Held; that the condition in the contract, at the time that it was made, was a valid one.

The act of the legislature, approved March 17th, 1893, to the effect that no such stipulation in an accident insurance policy which limits the time within which notice shall be given to a period less than sixty days (amended in 1895 to thirty days) after the accident, shall be valid, does not apply to a contract previously made. No legislative act can make invalid a provision in an existing contract otherwise valid.

Held; in this case, that the plaintiff cannot recover, he having failed to perform his condition of the contract, as to notice of the injury, and there being no sufficient evidence of a waiver by the defendant of this provision.

ON REPORT.

The case is stated in the opinion.

F. W. Hovey, for plaintiff.

Plaintiff on March 6, 1893, by letter notified company at home office, also shortly afterward, March 28, 1895, proved his claim against the company. This proof seems all that need be required, but if not, it is waived by company's letter in which the secretary says: "There will be no question either way so far as proof of accident is concerned. Your case hinges in the other direction." And in subsequent letters the company says and admits the injury, but claims that the whole matter hinges upon matter of notice; and that this is the only question in the case. This amounts to a waiver of any informality or defect in proof of claim. See *Works*

v. *Farmer's M. F. Ins. Co.*, 57 Maine, 281; *Blake* v. *Ins. Co.*, 12 Gray, 265; *Butterworth* v. *Western Assur. Co.*, 132 Mass. 489.

Even not objecting to the absence of proof of claim estops defendant from objecting at this point. Vol. II Amer. Ency. of Law, p. 340.

The act of the agent insuring Kimball, he being an authorized agent of the company, in directing Kimball to notify the local agent amounts to a waiver of the terms of the policy, although contrary to an express stipulation in the policy. Vol. II Ency. of Law, p. 338-340 and notes; *Carson* v. *Jersey City F. Ins. Co.*, 43 N. J. L. 300, (39 Am. Rep. 584).

Counsel also cited: R. S., c. 49, §§ 21, 90; *Day* v. *Dwelling-House Ins. Co.*, 81 Maine, 244; *Berry* v. *Clary*, 77 Maine, 482.

J. W. Manson and G. H. Morse, for defendant.

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

WISWELL, J. The plaintiff was insured by the defendant corporation against bodily injury sustained through external, violent and accidental means, by a written contract of insurance dated October 11th, 1892.

The contract contained this provision: "Written notice shall be given the said association at Westfield, Mass., within ten days of the date of the accident and injury for which claim to indemnity or benefit is made, with full particulars thereof, including a statement of the time, place and cause of the accident, the nature of the injury and the full name and address of the insured and beneficiary, and unless such notice and statement is received as aforesaid, all claim to indemnity or benefit under this certificate shall be forfeited to the association."

On November 24th, 1893, the plaintiff claims to have sustained bodily injury through accidental means so as to be entitled to the indemnity provided in the contract. The first written notice of any kind given to the association was a letter dated March 6th, 1894.

The defendant, relying upon the terms of its contract, claims that the plaintiff failed to perform one of the conditions of the contract and is not entitled to recover. We can see no answer to the defendant's position. The condition in the contract, at the time that it was made, was a valid one. "It was competent for the parties to make the agreement, and they are bound by it." *Heywood* v. *Accident Association*, 85 Maine, 289. The accident is alleged to have occurred upon November 24th, 1893; no written notice of any kind was given until March 6, following.

The act of the legislature, approved March 17th, 1893, to the effect that no such stipulation in an accident insurance policy which limits the time within which notice shall be given to a period less than sixty days (amended in 1895 to thirty days) after the accident, shall be valid, does not apply to a contract previously made. No legislative act can make invalid a provision in an existing contract otherwise valid.

Nor did the defendant in any way waive this provision in the contract. In his reply to the plaintiff's letter of March 6th, the defendant's secretary says, "replying to same, beg to say that notice should have been sent to this office within ten days of the happening of accident, in accordance with the contract, in order to receive recognition by the board of directors." And in almost every subsequent communication from the secretary he calls attention to the fact that this condition had not been complied with. The whole correspondence shows that the association, instead of waiving this stipulation in the contract, intended to rely and insist upon it and distinctly said so.

But the plaintiff testified, that at the time of making this application he made this inquiry of the agent taking it: "What shall I do in the case of an accident?" And that the agent replied: "Employ your family physician and notify the local agent, Mr. Haskell." He further testifies that he did verbally notify Mr. Haskell.

It is difficult to believe that the agent intended or that the plaintiff supposed that this reply was a part of the contract between the assured and the association, which should have a

controlling effect upon the plain provisions of the written contract subsequently made.

The plaintiff is bound by the contract. He has failed to perform one of its requirements, and according to its terms has forfeited all claim under it.

Judgment for defendant.

KATIE A. EKSTROM *vs.* CYRUS J. HALL, and others.

Hancock. Opinion April 15, 1897.

Mortgage. Fixtures. Trover. Damages.

Fixtures actually or constructively annexed to the realty after the execution of a mortgage of the real estate become a part of the mortgage security, and while the mortgage is in force cannot be removed or otherwise disposed of by the mortgagor, or by one claiming under him, without the consent of the mortgagee.

A mortgagor of real estate in possession cannot, without consent of the mortgagee, give a third party authority to erect buildings on the mortgaged property, so that such third party can hold the buildings against the mortgagee or his assignee.

In an action of trover the question is not, who has the better title as between the plaintiff and defendant. It is incumbent upon the plaintiff to prove property in the articles sued for. This is because the measure of damages in an action of trover is the value of the article at the time of the conversion, and also because the recovery of a judgment and its satisfaction transfers the title to the defendant.

When by reason of erroneous intructions, made for the purpose of giving progress to the case, the plaintiff recovers a verdict covering several items which he is not entitled to, but the amounts are made certain in special findings by the jury, exceptions will be overruled, if the plaintiff will remit the aggregate of such amounts.

ON EXCEPTIONS BY DEFENDANTS.

This was an action of trover, with a verdict for the plaintiff as against defendants, Standard Granite Company and Cyrus J. Hall for the sum of $607.65. Included in the verdict, according to the jurors' answers to special questions framed by the presiding justice,

were the following items: "Carr Boarding House," valued at $300. "Small house on quarry," valued at $50. "House on land of Mrs. O'Dell," valued at $102.

The plaintiff claimed title to these three houses as her personal property and that they had been converted by defendants to their own use. Defendants claimed that the houses were real estate (that is, the "Carr Boarding House" and "Small House on quarry") and that title to these two houses was in defendant, Standard Granite Company, by virtue of a deed of the land upon which they stood from one Carr and an assignment and foreclosure of a mortgage upon the same land, which mortgage has also been given by Carr.

These two houses were built upon the land by the plaintiff with Carr's consent after the mortgage by Carr to Newman and with the understanding, between the plaintiff and Carr, that they were to be and remain the property of the plaintiff.

The other facts appear in the opinion.

H. E. Hamlin, for plaintiff.

If the structure be of a temporary character; if it be placed upon the land for a temporary purpose and in such manner that it can be easily removed without injury to the freehold; and if it be placed there by a third party under permission of a mortgagor in possession with the express understanding and intention that it shall remain personal property and be removable at the pleasure of the builder, then, as between said third party and a mortgagee who had taken his mortgage before the building was erected, it remains personal property and cannot be held by the mortgagee.

While as between mortgagor and mortgagee some authorities favor the mortgagor's right to remove, it seems that the weight of authority is the other way. But, as between a tenant of the mortgagor and the mortgagee, the rule is not applied with the same strictness, and the rights of the tenant are more certain and absolute.

In the case at bar, the buildings were mere shells placed upon the land for the mere temporary convenience of the plaintiff to

enable her to carry on the business in which she was engaged. The character of plaintiff's business (that of carrying on a small quarry business under a tenancy at will and providing a boarding place for the men in her service) indicates that she placed these buildings upon the land only for the purpose of conducting her business advantageously and with no intention of making them a part of the realty. The mortgagor understood this intention and expressly assented to it. The buildings were erected with the express idea of making them easily removable and were not affixed to the soil in such manner as to give them the appearance of substantial and permanent structures.

Counsel cited: *Kelly* v. *Austin*, 46 Ill., 156 (92 Am. Dec. 243); *Globe Marble Mills Co.* v. *Quinn*, 76 N. Y. 23 (32 Am. Rep. 259); *Tifft* v. *Horton*, 53 N. Y. 477 (13 Am. Rep. 537); 1 Jones on Mortgages, 3d Ed., §§ 341, 432, 433.

In the case of *Wight* v. *Gray*, 73 Maine, 297, it was probably assumed that the building was put upon the land for its permanent improvement, for the benefit of the wife as well as the husband, and with the purpose at the time it was so placed to redeem the mortgage. Our case is that of an entire stranger to both mortgagor and mortgagee, with no inducement to make any permanent erections upon the land.

So, in *Meagher* v. *Hayes*, 152 Mass. 228, the building was permanent in its character.

A. W. King and O. F. Fellows, for defendants.

Counsel cited: *Butler* v. *Page*, 7 Met. 42; *Cole* v. *Stewart*, 11 Cush. 182; *Meagher* v. *Hayes*, 152 Mass. 228; *Clary* v. *Owen*, 15 Gray, 525; *Guernsey* v. *Wilson*, 134 Mass. 482; *Childs* v. *Dolan*, 5 Allen, 319; *Hunt* v. *Hunt*, 14 Pick. 374; 1 Jones on Mortgages, p. 552, § 681; Boone's Law of Mortgages, p. 139, § 103; *Humphreys* v. *Newman*, 51 Maine, 40; *Lapham* v. *Norton*, 71 Maine, 83; *Wight* v. *Gray*, 73 Maine, 297; *Phinney* v. *Day*, 76 Maine, 85.

The action of trover is not applicable to real estate. Vol. 26 Am. & Eng. Enc. Law, p. 774; *Morrison* v. *Berry*, 42 Mich. 389; *Woodruff Iron Works* v. *Adams*, 37 Conn. 233.

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

WISWELL, J. The plaintiff sued for the conversion of, among other things, "one house known as the Carr boarding-house," and "one small house on the quarry." The plaintiff claimed and introduced evidence tending to show that these houses were built by her upon the land of one Carr, with the permission of the land-owner and under an arrangement with him that the houses were to be hers.

But the land upon which these houses were built was subject to a mortgage to one Newman, of whom Carr had bought, given upon the same day as the conveyance to Carr. Newman commenced a foreclosure of the mortgage, and before the time of redemption had expired, assigned it to the defendants, Hall, Warren and Mixer, who subsequently conveyed the same property to the defendant corporation, the Standard Granite Company. The defendants were in possession of the real estate under a deed from Carr and under the assignment of the mortgage from Newman.

The houses were both built after the execution of the mortgage to Newman and while it was held by him. There was no evidence introduced in the case of any agreement, arrangement or understanding of any kind between the plaintiff and the mortgagee in regard to the building of these houses, nor was it claimed by the plaintiff that there was any such arrangement.

Counsel for defendants requested this instruction: "That these defendants are not liable in this action for the buildings, described in the writ as the Carr boarding-house, nor for the little house described in the writ as on the Carr quarry, because the title to those houses is in the defendants by virtue of the mortgage from Carr to Newman, given before the buildings were built, there being no evidence in this case that those buildings were built upon the land covered by the mortgage by the consent of the mortagee."

The presiding justice refused to give this instruction, but, in order to give progress to the case, instructed the jury as follows: "It is enough if Mr. Carr, who was the mortgagor and in posses-

sion, agreed to it, the building having been put on after the mortgage. . . . . Therefore, I wish you to understand distinctly that I rule that Mrs. Ekstrom is not bound to show that the mortgagee consented to this arrangement. It is enough for her to show that Mr. Carr, the mortgagor in possession, did consent to it, if he did."

The effect of this instruction was that a mortgagor in possession can give a third party authority to erect buildings on the mortgaged property, without the consent of the mortgagee, so that such third party can hold the buildings against the mortgagee or his assignee. This is not the law.

Fixtures actually or constructively annexed to the realty after the execution of a mortgage of the real estate become a part of the mortgage security, and while the mortgage is in force, can not be removed or otherwise disposed of by the mortgagor or by one claiming under him without the consent of the mortgagee. *Wight* v. *Gray*, 73 Maine, 297. The precise question here involved was decided in the case cited. In that case the building in controversy was erected upon mortgaged premises, by the husband of the mortgagor, with her consent, but without the consent of the mortgagee. The court held that, as to the mortgagee, the building was a part of the realty.

In *Meagher* v. *Hayes*, 152 Mass. 228, it was decided that a building put upon mortgaged land by the consent of the mortgagor, but without the consent of the mortgagee, was clearly, as to the mortgagee, a part of the realty. Numerous other cases to the same effect might be cited.

In such cases the question must be determined by the rule which prevails between mortgagor and mortgagee and not by that which prevails between landlord and tenant. *Wright* v. *Gray*, supra.

It is contended by the counsel for the plaintiff that the rule does not apply to the present case, because of the temporary character of the buildings and the manner in which they were annexed to the soil. Of this the case discloses nothing, but it was the evident intention of the court in giving these explicit instructions, to reserve the precise question which we have discussed, as to whether

buildings erected by third persons upon mortgaged premises, with the consent of the mortgagor, but without the consent of the mortgagee, remain the personal property of the builder, without regard to the character of the buildings or the manner in which they are annexed to the soil.

Another of the articles sued for in the plaintiff's writ, was a house described as, "one house on land of Mrs. O'Dell." The land on which this house was built was owned by one Mrs. O'Dell. The plaintiff claimed that she bought the house of two men who were living in it. There was no evidence introduced that it was built on this land by the permission or with the consent of the landowner. The defendants did not claim this house as belonging to any real estate of theirs. Counsel for defendants requested these instructions: "That the plaintiff cannot recover in this action for the house described in the writ as on the O'Dell land because said house is real estate; that if the O'Dell house was built without the consent of the owner of the land it became real estate."

The presiding justice declined to give these instructions, but did instruct the jury as follows: "Therefore, I rule that it does not matter to them (the defendants) whether or not Mrs. Ekstrom had any agreement with Mrs. O'Dell or not, inasmuch as they (the defendants) claim it as personal property and do not own the land on which it stands, and do not claim that they do. It is not for them to ask Mrs. Ekstrom to show the separation of the house from the land, because they themselves have taken it as personal property. Therefore, the simple question for you is, as between these parties, which owns the house on the O'Dell land. Is Mrs. Ekstrom's title to the house on the O'Dell land better than the title of these defendants? Did she acquire a title first? If she got the title first and has not parted with it, of course it is a better title than theirs."

We think that this instruction was also erroneous. In an action of trover the question is not, who has the better title as between the plaintiff and defendant. It is incumbent upon the plaintiff to prove property in the articles sued for. This is because the

measure of damages in an action of trover is the value of the article at the time of the conversion, and also because the recovery of a judgment and its satisfaction transfers the title to the defendant. If this were not so, the unjust and inequitable result would follow that a defendant after he had satisfied a judgment for the full value of personal property converted by him, in favor of a plaintiff who merely had a better right to the property than the defendant had, would still be liable to the actual owner for the same conversion and according to the same measure of damages.

To maintain the action of trover it is necessary that the plaintiff should appear to be the legal owner of the goods and entitled to the possession of them. *Haskell* v. *Jones*, 24 Maine, 222.

"The cases cited in argument for the defendants establish the position, that the defendant in an action of trover may prove that the title to the property claimed was, when the suit was commenced, in a third person, and thus defeat the action. If he could not, he might subsequently be compelled to pay for the same property again to such third person, he being a stranger to the first suit." *Clapp* v. *Glidden*, 39 Maine, 448.

This house was on the land of another. Unless it was built with the landowner's permission, it was a part of the realty and the property of the owner of the land. The plaintiff failed to show such permission, or that the house was built under any circumstances, which would make it a personal chattel. The plaintiff, therefore, cannot recover for its conversion for two reasons. She was not the owner of it; trover only lies for the conversion of chattels.

The amounts allowed by the jury for these three buildings, and included in their general verdict, are made certain by the jury's answers to special questions submitted by the court. These amounts aggregate $452. If the plaintiff will remit this sum, the exceptions will be overruled, otherwise they will be sustained. The entry will be,

Exceptions overruled, if the plaintiff, within thirty days after the receipt of the rescript by the clerk, will remit the sum of $452. as of the date of the verdict; otherwise, exceptions sustained.

CHARLES F. PALMER,

vs

PENOBSCOT LUMBERING ASSOCIATION.

Penobscot. Opinion April 15, 1897.

Negligence. Logs. Damages. Evidence.

A jury found that the plaintiff sustained damages in the sum of $2899.02 by reason of the defendant's failure to exercise reasonable diligence in rafting and delivering his logs in the spring and summer of 1893. *Held;* that it was the duty of the defendant corporation to exercise that care, diligence and foresight which persons of reasonable and ordinary prudence, capacity and discretion usually exercise under like circumstances, having due regard to the rights and interests of all persons likely to be affected by their acts.

Actual notice of the existing conditions, given by the letter of a director to the president of the company, is obviously a relevant fact and one of the tests of diligence; and therefore admissible in evidence.

The difference between the "real market prices" at the time the plaintiff actually received his logs and the time when he should have received them is the measure of damages which the plaintiff is entitled to recover. The rule is based on the principle of just compensation, and is designed to give the aggrieved party an exact equivalent for the damages sustained. *Held;* in this case, that the rights of the defendant were carefully guarded by adequate instructions respecting any temporary or special prices which might be occasioned by the sale of small lots or other peculiar circumstances.

Where there is no indication of prejudice or misapprehension on the part of the jury, and no valid reason is apparent for disturbing the verdict, it will not be set aside.

ON MOTION AND EXCEPTIONS BY DEFENDANTS.

This was an action to recover damages for negligence in the management of the plaintiff's logs which came into the Penobscot Boom in the spring of 1893.

The plaintiff in his writ set out four separate claims, in substance, as follows:

First,—That the defendant company neglected to have its booms in proper condition and neglected to care for his logs so that the logs escaped, went down the river and were lost; he claims the loss of about 460,000 feet of logs of value of about $4,000.

Second,—That by reason of such negligence about 72,000 feet escaped, and he was put to the expense of $400 in picking them up and securing them.

Third,—That the defendant wrongfully rafted the plaintiff's logs with logs of other persons, and plaintiff was put to the expense of $264 in separating his logs from logs of other persons.

Fourth,—That the defendant did not seasonably raft the plaintiff's logs out of the booms, especially those which came into the boom in the early part of the season and he suffered great loss, to wit: $10,000, there having been a falling off in the price of logs from the early season's price to the prices of the later part of the season and the next year.

The presiding judge instructed the jury to render special findings on each of these claims—and they returned a verdict of $2899.02—as the damages from defendant's negligence in the rafting of logs as set out in the last claim of plaintiff's writ.

Upon the question of damages the presiding justice instructed the jury as follows: "It is claimed on the part of the plaintiff that there has been evidence sufficient to satisfy you that up to July 6th a fair market price for logs of that character was $11.50 to $11.75, varying a little. But the defense says that this was a special price by reason of special and peculiar circumstances; that it was because of the fact that only a few logs were coming and many logs were wanted, but that if the great mass of the logs had been turned out suddenly or with great rapidity at that time, the price would have dropped; that it was a temporary price affected by peculiar and temporary reasons, and was not the market price on which you should base your computations. If it is true, gentlemen, that that was only a special price by reason of the peculiar situation at that particular time, although the plaintiff might have sold a large quantity of his logs if he could have had them all at that time,—still he was not entitled to his logs any faster than anybody else was entitled to their logs, without partiality, taking them as they came, driving them to the gap, through the gap, and rafting them. So then, if you come to this

question of damages, it is for you to say how much was this special price of $11.50 to $11.75 prior to July 6th affected,—because, so far as it was affected, you should consider it in your computations.

"Now, next, did the market drop then, and, if so, how much? You see it is a matter requiring the carefullest consideration and computation to get an accurate result. How much did the market drop? How long was this plaintiff delayed longer than he should have been? You appreciate, of course, that if there had been but one mark of logs on the river, and this of course had been Mr. Palmer's or anybody's else, that person could have gotten them there so fast as the river would have brought them, and there would have been no conflict between him and anybody else; but inasmuch as numerous others had numerous marks of logs in the river, they were all entitled to equal and concurrent rights, and each must give way to the other so that they could all exercise them to the extent possible under the circumstances.

"[Well, gentlemen, I give you this general rule, that if by reason of the neglect of this corporation to exercise reasonable diligence, in view of the whole situation, in obtaining, rafting and delivering logs, this plaintiff's logs were unreasonably delayed, and that during the period of that unreasonable delay there was a drop in the real market price so that between the time when Mr. Palmer ought to have had his logs and the time when he did have them, there was a drop of one cent, or one dollar, or two dollars a thousand, in the difference between the real market price at the time when he should have had them and when he did have them,—that difference would be the measure of damages that he would be entitled to in that respect, upon such logs as he should have had but did not have. That is all there is to it.]"

To so much of the foregoing charge as is embraced in brackets the defendant took exceptions.

The defendant also took exceptions to the admission of the following letter written by one of the directors of the defendant company to its president:

"Bangor, Me., May 25, 1893.

"John Cassidy, Esq. Dear Sir:

"I am continually being importuned by different interests, log owners as well as manufacturers; it seems to be the universal opinion that the logs were never rafted so slowly at the boom before, and that the only way out of it is to hoist Nebraska, advertise for men, and get men there. I tell them as you do, that it would be of no use, that the class of men who do that kind of work are satisfied with their wages, and that a proffered advance would bring out no more than the present scale of prices, but am told that this may all be true, but that an advance has brought an influx of laborers far in excess of the demand, and men had to be sent away who applied for work at this advance.

"At the same time this is a serious matter, Mr. Cassidy, for the interests on the river, the way the rafting is being conducted, and I herewith, Mr. President, hand in my resignation as director, as I am tired and sick of being talked to by so many people.

Yours very truly,

F. W. AYER."

P. H. Gillin and C. J. Hutchings, for plaintiff.

Evidence: 1 Greenl. Ev. 14th Ed. § 108.

C. P. Stetson, for defendant.

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

WHITEHOUSE, J. In this case the jury returned special findings that the defendant corporation failed to exercise reasonable diligence in rafting and delivering the plaintiff's logs in the spring and summer of 1893, and that by reason of the defendant's negligence in that respect, the plaintiff sustained damages in the sum of $2899.02. The case comes to this court on exceptions and a motion to set aside the verdict as against evidence.

In the first place, the defendant excepts to the ruling of the presiding justice admitting in evidence the letter of F. W. Ayer, one of the directors of the defendant corporation, to John Cassidy, its

president, dated May 25, 1893, in which it was declared "to be the universal opinion that the logs were never rafted so slowly at the boom before, and that the only way out of it is to hoist Nebraska, advertise for men, and get men there." The case shows that the letter was admitted "for the purpose of showing notice to the president of the corporation and so stated at the time."

The ruling was undoubtedly correct. The letter was clearly admissible for the purpose stated. It was incumbent on the plaintiff to prove that, under the circumstances and conditions existing during the period in question, the defendant corporation did not exercise that care, diligence and foresight which persons of reasonable and ordinary prudence, capacity and discretion usually exercise under like circumstances, having due regard to the rights and interests of all persons likely to be affected by their acts;—to show that the defendant either performed some act which ordinarily careful and prudent persons in the same relation would not have done, or omitted some duty which ordinarily prudent and careful persons would have performed under the same circumstances and conditions. The care and diligence must vary according to the exigencies which require vigilance and attention and conform in amount and degree to the particular circumstances under which they are to be exerted. *Topsham* v. *Lisbon*, 65 Maine, 455. Ordinary care or due diligence is a relative term, and the question must be determined with reference to the peculiar conditions existing in each case, and the degree of knowledge which the defendant has of these conditions. Actual notice from one of the directors of the corporation was obviously a relevant fact and one of the tests of diligence in the case at bar.

Exceptions were also taken to the following instruction to the jury upon the question of damages: "If by reason of neglect of this corporation to exercise reasonable diligence in view of the whole situation in obtaining, rafting and delivering logs, this plaintiff's logs were unreasonably delayed and that during that period of unreasonable delay there was a drop in the real market price so that between the time when Mr. Palmer ought to have had his logs and the time when he did have them, there was a drop of one

cent, or one dollar or two dollars in the difference between the real market prices at the time when he should have had them, that difference would be the measure of damages that he would be entitled to in that respect upon such logs as he should have had but did not have. That is all there is to it." And such is the opinion of the court. The rule is based on the principle of just compensation. It is designed and adapted to give the aggrieved party an exact equivalent for the damages sustained. It is the rule established by the previous decisions of this court in similar cases. *Weston* v. *Grand Trunk Railway Co.*, 54 Maine, 376; *Grindle* v. *Eastern Express Co.*, 67 Maine, 322; see also *Cutting* v. *G. T. Railway Co.*, 13 Allen, 386; *Ingledew* v. *Northern Railroad*, 7 Gray, 88; *Smith* v. *New Haven & N. R. R. Co.*, 12 Allen, 531.

The term "market value" or "market price" is not limited to the price which an article might realize at a forced sale. It means the fair value of the property as between one who desires to purchase and one who desires to sell. It is not what could be obtained for it under peculiar circumstances, when by reason of the necessities of another more than a fair price could be realized. *Chase* v. *Portland*, 86 Maine, 367, and cases cited. As stated in the rule given, it is the "real market price" and not the speculative value. The objection made by the learned counsel for the defendant, that the rule in question is "too broad," because in the spring of 1893 the high price paid was only for small lots of logs purchased for a temporary supply, does not affect the soundness of the rule to which the exceptions were taken; and it appears from another part of the charge of the presiding justice that the rights of the defendant were carefully guarded by adequate instructions respecting any "special or temporary price which might be occasioned by such special and peculiar circumstances" as those suggested by the counsel for the defendant. The amount of the verdict sufficiently indicates that the jury were not misled by the subsequent statement of the general rule.

After a careful scrutiny of the evidence reported, bearing upon the question of the defendant's liability, it is the opinion of the

court that the motion to set aside the verdict as against evidence must also be overruled. The issue of fact involved in this special finding was not intricate or difficult to be understood. A plain business proposition was presented to the jury in a charge that was full, clear and discriminating, and they could hardly fail to apprehend the true relation of the facts to the issue. There is no indication of prejudice, misapprehension or mistake on their part, and no valid reason is apparent for disturbing the verdict.

Exceptions and motion overruled.

LOTTIE CONWAY

vs.

LEWISTON AND AUBURN HORSE RAILROAD COMPANY.

Androscoggin. Opinion April 15, 1897.

Negligence. Cause. Street Railway. Passenger.

No action for negligence will lie when the defendant's negligence has no causal connection with the plaintiff's injury.

When the defendant's act or omission is not the real or proximate cause of the injury, but only affords the occasion for a purely accidental occurrence causing damage without legal fault on the part of any one, no action can be maintained.

The plaintiff, in alighting from one of the defendant's open cars of a horse street railway, accidentally stepped on a rolling stone lying in the street between the car and the sidewalk, and received an injury to her ankle.

Held; that in determining the question of the defendant's negligence, it is proper to consider that the company could not select the places in the streets where its track should be laid or its cars run. It could not construct nor control any places at which passengers were to stop on or off its cars. It had to locate its track and run its cars where the public authority directed. It had to leave the centre, sides and surface of the streets to the same authority. Passengers entering or leaving the cars had to use the streets in the condition in which they were left by the authority in control of them. Such passengers were not in the care of the company till they got on the car. They were no longer in its care when they stepped off the car. And, in this

case, the defendant's cars were drawn by horses and operated without regular stations or established places for passengers to get on and off the cars.

In alighting from one of the defendant's cars in the evening a short distance from a street-crossing, the plaintiff stepped on a rolling-stone lying in the street between the car and the sidewalk and sustained a fracture of the ankle. She recovered a verdict of $1183.33 for negligence imputed to the defendant company by reason of the failure of the conductor to stop the car at the crossing, and his invitation and proffered assistance for her to alight at a point described as a ditch and a dangerous and unsuitable place.

Held; that the evidence wholly fails to establish any liability on the part of the defendant company. Under the existing circumstances and conditions, the failure of the conductor to stop the car precisely at the crossing cannot be deemed legally culpable; nor was the place of alighting so difficult and unsuitable as to render it actionable negligence to permit a vigorous young woman to step down from the side board of the car, either with or without assistance.

Also; it was undoubtedly the duty of the conductor to exercise all reasonable care, diligence and prudence to ascertain the conditions existing at all points where the car was required to stop and otherwise to promote the convenience and guard the safety of passengers at all times when entering or leaving the car. But he had no reason to apprehend danger at the point where the plaintiff alighted, and had no information to give her which she did not already possess.

See *Conway* v. *L. & A. Horse R. R. Co.*, 87 Maine, 283.

ON MOTION BY DEFENDANT.

The case appears in the opinion.

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

Degree of care: Counsel cited, in addition to the cases on their brief to be found in 87 Maine, 283, *Edwards* v. *Lord*, 49 Maine, 279; *Knight* v. *Portland, etc., R. R. Co.*, 56 Maine, 234.

Proximate cause: *Willey* v. *Belfast*, 61 Maine, 569.

The conductor chose his own place to stop. If, under the existing circumstances, the locality, condition of the street and darkness, it was dangerous, it was his duty to take suitable precautions to guard passengers from the danger. Or, laying aside any claim to disputed territory in this case, we insist that he was certainly bound not to invite and assist the passenger into danger; and that if he did so, the defendant was liable. Wood, Railway Law, 1113 Note and 1121-1130; *Filer* v. *N. Y. Central R. R. Co.*, 59 N. Y.

351; *Burns* v. *R. R. Co.*, 50 Mo. 139; *Warren* v. *Fitchburg R. R. Co.*, 8 Allen, 227; *Clark* v. *R. R. Co.*, 36 N. Y. 135; *Nashville R. R. Co.* v. *Erwin*, 3 Am. & Eng. R. R. Cases, 465; *Pittsburg R. R. Co.* v. *Krouse*, 30 Ohio St. 222; *Jeffersonville R. R. Co.* v. *Swift*, 26 Ind. 459; *Indianapolis R. R. Co.* v. *Farrell*, 31 Ind. 408; *Prager* v. *The Bristol & Exeter R. Co.*, 24 L. T. Rep. (N. S.) 105, (Ch. J. Cochburn.); *Sweeny* v. *Old Colony, etc., R. R. Co.*, 10 Allen, 368; *Gaynor* v. *Old Colony, etc., R. R. Co.*, 100 Mass. 208.

Wallace H. White, Seth M. Carter, and W. F. Estey, for defendant.

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

WHITEHOUSE, J. On the evening of August 21, 1892, the plaintiff was a passenger on one of the defendant's open cars, going up College Street in Lewiston, and in alighting from the car near the corner of College and Skinner streets, she accidentally stepped on a rolling stone lying in the street between the car and the sidewalk and received a sprain or fracture of the ankle.

At the former trial of this case the jury returned a verdict for the plaintiff for $347.17. At that time the precise nature and extent of the injury or the question of complete and permanent recovery had not been determined. But at the second trial Dr. Garcelon, one of the attending surgeons, testified as follows in relation to the recovery: "I think it is as perfect as anything could possibly be. The limb speaks for itself. The appearance of the limb is very normal. There is no deformity." Yet the jury at this trial rendered a verdict for $1183.33; and in presenting the motion for a new trial the counsel for the defendant calls attention to this fact as an indication of the probable influence of sympathy, or of bias and prejudice, in the deliberations of the jury respecting the question of liability as well as the amount of damages.

The plaintiff claims that when the car reached the corner of Vale Street, a point quite distant from Skinner Street, she asked

the conductor to stop for her to get off at the corner of College and Skinner streets; that she made no further request and gave no signal to the conductor as the car approached her destination; that the conductor did not heed her request to stop the car at the corner, but went beyond the crossing, and that she was aware of the fact that the car was "round the corner" or "beyond the crossing" before it stopped. Her manner of alighting is thus described in her testimony: "When the car stopped, the conductor stood by the side of the seat where I was sitting and I got up to get out of the car and he took hold of my hand to help me, and as I got out I stepped on a rock on which I suppose my ankle turned and broke."

It is charged in the plaintiff's writ that the failure of the conductor to stop the car for the plaintiff to get off at the crossing, and his invitation and proffered assistance for her to alight a short distance therefrom at a point on Skinner Street, described as a ditch and a dangerous and unsuitable place, constituted actionable negligence on the part of the defendant company.

It will be observed, however, that in her account of the accident above quoted, the plaintiff makes no reference to the existence of a ditch at the point where she stepped from the car, and no complaint of an unexpectedly long or difficult step from the car to the ground; but in another part of her testimony, she compared it in length to the step from the floor of the court room to the platform on which she stood when testifying. It appears, also, that in describing the accident to the surgeon, she stated in substance that in going from the car to the sidewalk, after she alighted, she stepped on a stone and turned her ankle; and again that she "got out from the car and stepped on a rock and turned her ankle." It is true that, in answer to further and specific inquiries, she testifies that she stepped into the ditch, but there is no claim or suggestion in her testimony that the length of the step from the car to the ground was the cause of the accident.

It also appears from her testimony that the car had only passed beyond the crossing or "over the corner" about the "length of the judge's desk" before it stopped.

It is provided by the city ordinance, in force at that time, that when a car is required to be stopped at the intersection of two streets, it shall be "stopped so as to leave the rear platform slightly over the further crossing." The plaintiff was sitting at the end of one of the transverse seats "about the middle" of the open car and would be expected to alight, as she did, from the side of the car at the point opposite her seat. Thus, if the car had been stopped immediately after the rear platform had passed the crossing, she would not have alighted precisely on the crossing, but probably fifteen feet beyond it and seven or eight feet beyond the point where the ditch commenced. Indeed, it is not insisted in argument that the mere failure to stop the car, so that the passenger could alight on the crossing, was improper. Nor is it claimed that the existence of a small rolling stone by the side of the track would necessarily render the street at that point a dangerous place to alight. It is still contended, however, that the point in question was not a suitable place for the plaintiff to alight in the evening, that the conductor selected it as the place for her to get off, and that the defendant company should be held liable for the act of the conductor in thus inviting and assisting the plaintiff into danger.

But aside from the omission of the plaintiff, in her account of the accident to ascribe her injury to the depth of the ditch, as noted above, it appears from the testimony of the civil engineer that the easterly rail of the track was seven and one-half feet from the centre of the ditch, that the ground sloped gradually from the rail to the bottom of the ditch and that at no point was the ditch more than a foot in depth. It is not claimed that there was any dangerous excavation or any special depression at the particular point where the plaintiff stepped from the running board of the car to the ground. It was a well wrought street with a smooth surface and a regular slope from the rail to the sidewalk.

In determining the question of the defendant's negligence, it is proper to consider that the company "could not select the places in the street where its track should be laid or its cars run. It could not construct nor control any places at which passengers

were to step on or off its cars. It had to locate its track and run its cars where the public authority directed. It had to leave the centre, sides and surface of the streets to the same authority. Passengers entering or leaving the cars had to use the streets in the condition they were left by the authority in control of them. Such passengers were not in the care of the company till they got on the car. They were no longer in its care when they stepped off the car." *Conway* v. *Horse R. R. Co.*, 87 Maine, 283. It should also be remembered that the defendant's cars were drawn by horses and operated without regular stations or established places for passengers to get on or off the cars. They were not run from station to station only, but upon signal or request stopped as near the point desired as practicable either to take on or to discharge passengers. It was undoubtedly the duty of the conductor to exercise all reasonable care, diligence and prudence to ascertain the conditions existing at all points where the car was required to stop and otherwise to promote the convenience and guard the safety of passengers at all times when entering or leaving the car. But in this case the conductor had no special information to give the plaintiff in relation to the condition of Skinner Street which she did not already possess. He denies that she informed him at Vale Street that she wished to get off at the corner of Skinner Street, and states that the only signal she gave to stop the car was given just as the car was rounding the curve at Skinner Street, and that the car was thereupon stopped as soon as it reasonably could be. He also testifies that she promptly stepped off the car into the street without any suggestion or assistance from him, and that she did not fall to the ground as she stated, but walked to the sidewalk and he had no knowledge that she met with an accident until a day or two afterward. Daniel McIntire, a passenger on the car at the same time, and a disinterested witness, fully corroborates the conductor's testimony that the plaintiff gave a signal to stop at the corner of Skinner Street, that she stepped off the car without assistance from the conductor and started to walk off toward the rear of the car and that he did not see her fall.

But assuming the plaintiff's description of the accident to be

correct, it is the opinion of the court that the evidence wholly fails to establish any liability on the part of the defendant. As already seen, the failure of the conductor to stop the car precisely at the crossing, cannot be deemed legally culpable. Nor was the place of alighting so difficult and unsuitable as to render it actionable negligence for the conductor to permit a vigorous young woman to step down from the car either with or without his assistance.

But even if any act or omission of the conductor respecting the place or manner of alighting could be deemed culpable negligence, the defendant is not chargeable with it in this action, for the reason that it had no causal connection with the plaintiff's injury. There was no greater probability that she would step upon a rolling stone at that point than at the crossing or at any other point on the street. Her injury was not the ordinary or probable result of stopping at that particular point, but was due to an unexpected event which could not reasonably have been anticipated. The negligence imputed to the conductor was not the real or proximate cause of the injury. It simply presented an opportunity for the operation of the true cause, the movement of a rolling stone upon which the plaintiff unfortunately stepped. It only afforded the occasion for a purely accidental occurrence causing damage without legal fault on the part of any one. *Conley* v. *Express Co.*, 87 Maine, 352.

Motion sustained.

JOHN F. WHITCOMB, and others, *vs.* AMY EDDY HARRIS.

Hancock. Opinion April 15, 1897.

Interest. Mortgage. Redemption. Costs. R. S., c. 90, § 22.

In this State the law does not allow a creditor to recover interest upon interest that becomes due after the maturity of the principal. And if compound interest is required by a mortgagee, and paid under protest by one claiming under the mortgagor in order to prevent the expiration of the right of redemption, the mortgage having been foreclosed, it may be recovered by the person who paid it under such circumstances.

The fact that a demand is made for the interest when it becomes due does not affect the question. Upon an indebtedness without interest, payable at no particular time but upon demand, a demand is necessary to make the indebtedness due, and interest only begins to run from the time of maturity; but a demand does not affect the matter of interest where the debt is payable at a definite time.

The general rule is, that whenever the debtor knows what he is to pay and when he is to pay it, he shall be charged with interest if he neglects to pay. The only reason why this rule does not apply in the case of interest due at a stipulated time and unpaid, is because the law regards it as against public policy to allow a creditor to recover compound interest.

When a mortgage is foreclosed by publication, one who is entitled to redeem must, before he can do so, pay the necessary expense of such foreclosure. This includes the amount paid for publishing the notice of foreclosure in a newspaper, and the recorder's fee for recording the same.

But the amount paid an attorney for professional services in such matters, however wise such employment may be and sometimes almost absolutely necessary, is not legally a necessary expenditure; therefore the person entitled to redeem is not obliged to pay it.

AGREED STATEMENT.

This was an action of assumpsit brought in the Western Hancock Municipal Court to recover money claimed to have been paid by the plaintiffs to redeem from a certain mortgage, held by the defendant, in excess of the amount actually due upon said mortgage. The case was certified by the presiding justice to the law court for decision upon the following agreed statement.

The defendant in this action was the owner and holder of a certain mortgage upon real estate in Bar Harbor, Eden, Maine, given by Lucy A. Barron and George A. Barron to James Eddy, to secure a negotiable promissory note for the principal sum of $3000.00, as follows:

"3000. Bar Harbor, Aug. 3, 1886.

Four years from date for value received we promise to pay James Eddy, or order, the sum of three thousand dollars with interest at six per cent per annum, payable annually.

Lucy A. Barron,
Geo. A. Barron."

Interest on this note had been paid in full to August 3rd, 1890. The defendant, as legal owner of the note and mortgage, foreclosed said mortgage for breach of its condition, by publication, and the right of redemption of said mortgaged premises would have been barred upon the 7th day of January, A. D. 1893. The plaintiffs, legal owners and holders of a subsequent or second mortgage upon the same property covered by said mortgage of the defendant, demanded of the defendant, through her attorneys, Messrs. Deasy & Higgins, a true account of the sum due upon her said mortgage, which statement the defendant rendered to the plaintiffs claiming as due on her said mortgage January 3rd, 1893, the sum of $3469.30, as follows:—Principal, $3000; interest, $454.80; costs of foreclosure, $14.50. The plaintiffs, to save a forfeiture, paid said sum of $3469.30, as of said January 3rd, 1893, under protest in writing, claiming that it was in excess of the real amount due under the mortgage and notifying the defendant that an action would be instituted to recover such excess. The defendant took said sum of $3469.30, insisting that she would not discharge the mortgage for any less amount, and thereupon executed and delivered to the plaintiffs a discharge of the mortgage, and also delivered to the plaintiffs the mortgage note.

It was admitted that the defendant in fixing the amount due upon said mortgage computed interest upon all overdue interest at the rate of six per cent per annum. The item of $14.50, costs of foreclosure aforesaid, was made up as follows:—

Paid attorneys for legal services, consisting of drafting foreclosure notice and attending to publication and recording of same, ten dollars. Paid for publishing and recording at regular rates, four dollars and fifty cents.

It was also agreed that when the interest fell due, the mortgagee wrote and mailed, postpaid to the mortgagors, a letter demanding payment of the interest, which letter was directed to the mortgagors at their regular post office address. Such letter was mailed when the interest fell due both in 1891 and 1892. But the plaintiffs at the time of paying the mortgage had no knowledge of such demand having been made.

H. E. Hamlin, for plaintiffs.

Counsel cited: *Stone* v. *Locke*, 46 Maine, 445; *Parkhurst* v. *Cummings*, 56 Maine, 155; *Howe* v. *Bradley*, 19 Maine, 31; *Hastings* v. *Wiswall*, 8 Mass. 455; *Wilcox* v. *Howland*, 23 Pick. 167; *Henry* v. *Flagg*, 13 Met. 64; *Ferry* v. *Ferry* 2 Cush. 92; *Shaw* v. *Norfolk Co. R. R.*, 16 Gray, 416; *Conners* v. *Holland*, 113 Mass. 50.

L. B. Deasy, for defendant.

In estimating the amount to be paid to redeem a mortgage, interest may properly be reckoned on installments of interest due. *Farwell* v. *Sturdivant*, 37 Maine, 312.

But annual interest due is a sufficient consideration for a new contract to pay the same with interest upon it. Moreover by beginning suit the creditor may recover interest on the installments of interest due and sued for. *Bannister* v. *Roberts*, 35 Maine, 75.

When annual interest is due and demanded, a contract to pay interest on the same is implied. A new express promise is not necessary. Where any sum due for interest, or for anything else is due and demanded, the debtor should be held without a new express contract to pay as damages, interest on the sum so wrongfully withheld. If *Bannister* v. *Roberts*, (35 Maine, 76) contains a doctrine to the contrary it is but a dictum entitled to no great commendation.

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

WISWELL, J. The defendant was the owner of a mortgage upon certain real estate to secure a note for $3000, dated August 3rd, 1886, payable in four years from date, with interest at six per cent per annum, payable annually. Interest upon this note had been paid in full to August 3rd, 1890, the time of its maturity, but had been unpaid since that time. The defendant had commenced a foreclosure of the mortgage for breach of its condition, and the right to redeem would have expired upon January 7th, 1893. Shortly before that time the plaintiffs, owners of a subsequent mortgage upon the same premises, demanded of the defendant a true account of the amount due upon the mortgage. She rendered an account, claiming that there was due on January 3rd, 1893, the sum of $3469.30, which sum included, in addition to principal and interest thereon, interest upon the overdue interest at six per cent, from the time that the same had become due, and the costs of foreclosure, consisting of four dollars and fifty cents, paid for publishing and recording notice of foreclosure, and ten dollars paid for counsel fees.

The defendant refusing to accept less than the above sum, the plaintiffs paid it under protest to prevent the mortgage from becoming fully foreclosed, and in this action seek to recover the amount which they claim is in excess of the sum that the defendant was entitled to.

That the action may be maintained, if the defendant has received more than she is entitled to retain, is conceded. R. S., c. 90, § 22.

The first question raised is, whether the defendant was entitled to interest upon the overdue annual interest which became due after the maturity of the note, a demand having been made for the same when it became due.

There has been much diversity of opinion in the courts of this country upon the question as to when and under what circumstances, if at all, compound interest can be recovered. Some courts

holding that interest upon interest can never be recovered, and that an express promise, made at the time of the original contract, to pay interest upon any interest that may not be paid in accordance with the terms of the contract, is invalid because iniquitous and against public policy; while others have laid down the rule, that overdue interest will carry interest from the time of default, without any promise or demand therefor.

However much force there may be in the argument, that a debtor who has agreed to pay at stipulated times interest upon money loaned, should, in case of his default to pay in accordance with his contract, be liable to pay interest, at the rate fixed by law, as damages, upon the sums which he ought to have paid, we think that so far as interest becoming due after the maturity of the principal sum is concerned, at least, the question is not an open one in this state. As to whether there is any difference in the rule, when interest is sought upon annual or semi-annual interest that became due before the maturity of the principal, need not be here considered.

The first case upon the subject in this state, and one which has been very frequently cited with approval here and elsewhere, is that of *Doe* v. *Warren*, 7 Greenl. 48, in which it was decided that the law does not allow interest upon interest; not even where a promissory note is made payable with interest annually. In that case, speaking of interest, it is said: "It is an accessory or incident to principal. The principal is a fixed sum; the accessory is a constantly accruing one. The former is the basis or substratum from which the latter arises, and upon which it rests. It can never, by implication of law, sustain the double character of principal and accessory."

In *Bannister* v. *Roberts*, 35 Maine, 75, it is said: "When a note is made payable with interest annually, whether by installments or not, the interest accruing before the whole of the principal becomes payable may be collected, if a suit be commenced to recover it before the whole of the principal becomes payable. If no suit be commenced for that purpose until after that time, interest upon interest not paid, from the time when it should have been

paid, can not be recovered in a suit for the principal and interest due upon the note."

In *Kittredge* v. *McLaughlin*, 38 Maine, 513, it was decided that compound interest can not be reckoned upon proceedings in equity to redeem a mortgage to secure notes on annual interest, in estimating the amount due. See also to the same effect, *Lewis* v. *Small*, 75 Maine, 323.

But it is true, as urged in argument, that in none of these cases had there been a demand for the interest. We do not think that this affects the question. Upon an indebtedness without interest, payable at no particular time but upon demand, a demand is necessary to make the indebtedness due and interest only begins to run from the time of maturity; but we do not think that a demand affects the matter of interest where the debt is payable at a definite time. The general rule is, "that whenever the debtor knows what he is to pay and when he is to pay it, he shall be charged with interest if he neglects to pay." *People* v. *New York*, 5 Cowen, 331, quoted with approval in *Swett* v. *Hooper*, 62 Maine, 54. And the only reason why this rule does not apply in the case of interest due at a stipulated time and unpaid, is that the law regards it as against public policy to allow a creditor to recover compound interest.

In the case of *Parkhurst* v. *Cummings*, 56 Maine, 155, this court adopted a much more stringent rule than is necessary to sustain in this case. A mortgage was given to secure a note with interest annually. After the note had been running many years the mortgagor gave a new note for the accumulated interest upon the first note, and made that with interest annually. In a bill in equity to redeem brought by the holder of a junior mortgage, the holder of the first mortgage claimed interest upon the interest note as well as the unpaid interest upon the original principal; but the court held that the holder of the second mortgage was entitled to redeem upon payment of the original note and simple interest thereon, nothwithstanding the fact that the mortgagor had given a second interest bearing note for the accumulated interest on the first note.

In view of these authorities the court is of opinion that the defendant was not entitled to retain the interest upon interest which was paid by the plaintiffs.

This mortgage was foreclosed by publication, one of the methods provided by law. The statute is silent as to whether one who is entitled to redeem must pay the costs of a foreclosure in this method before he shall be allowed to redeem; but we have no question that the necessary expense of such a foreclosure must be paid by the mortgagor, whose default has made the expenditure necessary, or by another who has obtained from the mortgagor the right to redeem. This applies to the amount paid for publishing the notice of foreclosure in a newspaper and the recorder's fee for recording the same. But the amount paid an attorney for professional services, however wise, and sometimes almost absolutely necessary it may be to employ an attorney for such service, is not legally a necessary expenditure; therefore the person entitled to redeem should not be obliged to pay it.

The plaintiffs are therefore entitled to recover the sum of $19.80, excessive interest paid by them, and the further sum of $10, the attorney's fee for services in forelosing the mortgage, together with interest from January 3rd, 1893.

Judgment accordingly.

CLARENCE R. LITTLEFIELD *vs.* INHABITANTS OF WEBSTER.

Androscoggin. Opinion April 15, 1897.

Way. Towns. Notice. R. S., c. 18, § 80.

It is settled law in this State that the twenty-four hours actual notice by the municipal officers of a town or road commissioner of defect in the highway, whereby a traveler may recover damages for an injury received, must be of the identical injury itself. Notice of another defect, or of the existence of a cause likely to produce a defect, is not sufficient.

The words "actual notice" in the statute (R. S., c. 18, § 80,) signify something more than an opportunity to obtain notice by the exercise of due care and diligence. The facts and circumstances in a given case may justify the conclusion that the officers must have had actual notice unless grossly inattentive; but proof of gross inattention is not proof of actual notice.

The plaintiff obtained a verdict against the defendant town for a personal injury sustained by reason of a defective plank in the sidewalk. The written notice served on the town, after the injury, stated that the "defect and want of repair consisted of a board or plank in a sidewalk which had become rotten and decayed on the under side thereof, and unsafe for public travel." *Held;* that the verdict must be set aside, there being no evidence to show that the municipal officers or road commissioner of the town had twenty-four hours actual notice of such defect.

Hurley v. *Bowdoinham*, 88 Maine, 293, affirmed.

ON MOTION BY DEFENDANT.

The case appears in the opinion.

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

The municipal officers passed and repassed over the identical place of this defect day in and day out, and say themselves that they noticed the condition of the walk, that they saw it and had knowledge of it, but considered it safe and not defective. In *Hurley* v. *Bowdoinham*, 88 Maine, 293, the planks of the culvert were covered with two inches of dirt, and the selectmen might easily have gone over them and not been able to see the defective condition. Here the defect was plainly visible, so much so that the neighbors from across the street saw and observed it, as well as those passing and repassing on the sidewalk.

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

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

WHITEHOUSE, J. The plaintiff obtained a verdict of $616.66 as compensation for a personal injury alleged to have been sustained by him on the 29th day of May, 1895, by reason of a defective plank in the sidewalk at Sabattus village.

The defendants ask to have the verdict set aside on the ground that there is no evidence to show that the municipal officers or road commissioner of the town had twenty-four hours actual notice of such defect.

It is alleged in the plaintiff's declaration that, at a point in the sidewalk about thirty-five feet north of Margaret Moody's house and opposite Charles Meres, was a plank or board that had become rotten and incapable of sustaining the weight of a person, and that when the plaintiff stepped on this plank it broke, letting a portion of his body through the hole thus made, nearly three feet to the ground, the end of the plank so broken striking him in the side. The written notice served on the defendants by the plaintiff within fourteen days after the injury stated that "said defect and want of repair consisted of a board or plank in a sidewalk which had become rotten and decayed on the under side thereof and unsafe for public travel, and said sidewalk at that point was two and one-half or three feet above the ground." The plaintiff's evidence tended to support these allegations in the writ and notice.

The sidewalk in question was constructed of spruce and hemlock planks four feet long laid crosswise on stringers. It was examined in June, 1894, and all visible defects repaired. The plaintiff testified that prior to the accident he had been in the habit of passing over the sidewalk, where the defective plank was alleged to be, sometimes every day or every night and sometimes twice or three times a week; that he never discovered anything on the upper side to indicate that there was anything wrong there, that it looked to be reasonably safe at that point and that he never saw anything to suggest that it was defective.

Webb Hall, a witness, called by the plaintiff, testified that he

found a plank out of the sidewalk and lying in the street, but that this was north of the Meres house and not in front of it. When the plank that caused the accident was exhibited for his inspection, he stated unequivocally that it was not the plank found by him in the street, in regard to which he spoke to the road commissioner. He was afterward recalled and more definitely located the place in the sidewalk where the latter plank belonged. He had notified the commissioner once before that there was a plank out of the sidewalk; the second one was about two rods above the place of the accident and the first one still farther up.

This is the only direct evidence in the case tending to show actual notice to the selectmen or road commissioners of a defective condition of the sidewalk at any point, and this is found to have no relevancy to the question in issue, for the reason that neither of the notices from Hall to the road commissioner referred to the defective plank in question, but both related to other and different defects located at a distance of two rods and one hundred feet respectively from the point of the accident.

It appears from the testimony of three other witnesses, called by the plaintiff, that in the spring of 1895, prior to the accident, some of the planks in the vicinity of the Meres house had become loose and been seen to tip up on several occasions; that one of the stringers near there appeared to be too unsound to hold nails, and that pieces of slabs had been nailed over the holes in some places. But there is no direct evidence that the plank in question had ever tipped up, or was known to be loose or that a slab had ever been nailed over any part of it. There is no testimony that either of these witnesses gave the road commissioner or selectmen any notice of the defects discovered by him, or ever had any interview with either of them in regard to the condition of the sidewalk. It does not appear that either of them ever gave any information in regard to the plank in question, or that either of them had any such information to give. It is clear that neither the road commissioner nor the selectmen ever received from these sources any actual notice of the particular defect which caused the injury.

It does appear, however, that the selectmen and road commis-

sioner had frequently passed over this sidewalk in the spring of 1895 prior to the accident; and inasmuch as actual notice is a conclusion of fact which may be established by circumstantial as well as direct evidence, it is strongly insisted by the learned counsel for the plaintiff, that if these officers had not been guilty of negligence in the discharge of their duties they would have derived actual notice of the defect in question and that they ought to be deemed to have had actual notice of it, from their personal observation of the walk in passing over it.

But it will be remembered that the defect complained of is described in the plaintiff's notice as a "plank rotten and decayed on the under side thereof and unsafe for public travel," and that it is expressly admitted in the testimony of the plaintiff, who lived within two rods of one of the termini of the sidewalk, that there was nothing in the appearance of the upper side of the planking at the point in question to indicate the existence of a defect there. Twelve credible witnesses for the defendants state, in substance, that they had occasion to pass over the walk before the accident, and that it had the appearance of a sound and smooth sidewalk, with nothing to suggest the concealed defect at the point of the accident. The selectmen and road commissioners expressly deny that they ever in fact had any personal knowledge of the rotten condition of the plank which the plaintiff broke through, and there is no direct evidence that either of them ever did have any such knowledge. It only appears that, in view of the elevation of the sidewalk above the ground, the road commissioner without extraordinary exertion might have made a thorough examination of the stringers and of the under side of the walk, and thus discovered the actual condition of the planking at the place of the accident. But as stated in the case of *Hurley* v. *Bowdoinham*, 88 Maine, 293, which this case closely resembles, "the words actual notice in this statute signify something more than an opportunity to obtain notice by the exercise of due care and diligence. The facts and circumstances in a given case may justify the conclusion that the officer must have had actual notice unless grossly inattentive; but proof of gross inattention is not proof of actual notice."

As stated in *Smyth* v. *Bangor*, 72 Maine, 249, "the notice must be of the defect itself, of the identical defect which caused the injury. Notice of another defect, or of the existence of a cause likely to produce a defect, is not sufficient."

Motion sustained.

CITY OF BANGOR *vs.* INHABITANTS OF ORNEVILLE.

Penobscot. Opinion April 24, 1897.

Insane Paupers. Towns. Record. Amendment.

R. S., c. 143, §§ 13, 19, 21, 34.

In an action of assumpsit, under R. S., c. 143, to recover for sums paid by plaintiff town for the support of an insane pauper at the insane hospital, it was admitted that the insane person had a pauper settlement in the defendant town. Two points were urged in defense, viz: want of proper notice, and failure to keep a proper record of the proceedings respecting the examination and commitment of the pauper.

Held; that a notice sent to the overseers of the poor of the defendant town containing proper facts, from the "office of the overseers of the poor" of Bangor, by "L. C. Davis, overseer of the poor and secretary," is sufficient; and thereby the defendant town becomes charged for all sums paid by the plaintiff town within three months prior, and two years after, the cause of action accrued.

The record of the proceedings, attending the examination and commitment, will be held valid, although not extended for nearly two years after the commitment, it appearing that it was made during the municipal year immediately succeeding the commitment and by the clerk, who continued to hold his office by re-election.

It is established in New England that a clerk, who has made an erroneous or incomplete record while in office or after re-election, may complete such records; and where he continues in office for several years, he may amend former records notwithstanding intervening re-elections.

A record of such proceedings that omits to state, according to the statute, that the two practicing physicians who made the medical examination were also "respectable" will be held sufficient when it appears to contain a statement of all facts requisite to establish the regularity of the proceedings and a legal commitment,—no evidence being adduced that the two physicians, who signed the certificate, were not in fact respectable. In such cases the

court is aided by the presumption in regard to public officers, expressed by the maxim, "omnia presumuntur rite esse acta."

ON REPORT.

The case appears in the opinion.

E. C. Ryder, City Solicitor, for plaintiff.

J. B. Peaks, for defendant.

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

WHITEHOUSE, J. This is an action of assumpsit to recover the sums paid by the plaintiff city for the support of Maurice Foley in the insane hospital, including the expenses of his examination and commitment, amounting in the aggregate to $101.02.

It is admitted that Foley had a legal settlement in the defendant town, that he was adjudged insane by the "board of examiners" of Bangor, and by their authority committed to the insane hospital, and that the expenses sued for were incurred and paid by the plaintiff city. But it is strongly urged that the city is precluded from recovering in this action by reason of its failure to give the requisite notice of the facts to the overseers of the defendant town; and, secondly, by its omission to keep a proper record of the proceedings of the municipal officers respecting the examination and commitment of the insane person.

It is provided by section thirteen of chapter 143, R. S., that "the municipal officers of towns shall constitute a board of examiners, and on complaint in writing of any relative, or of any justice of the peace in their town, they shall immediately inquire into the condition of any person in said town alleged to be insane; shall call before them all testimony necessary for a full understanding of the case; and if they think such person insane, and that his comfort and safety, or that of others interested, will thereby be promoted, they shall forthwith send him to the hospital, with a certificate stating the facts of his insanity, and the town in which he resided or was found at the time of examination;" and that "they shall keep a record of their doings and furnish a copy to any interested person requesting and paying for it."

It is further provided by section nineteen of the same chapter that "the certificate of commitment to the hospital after a legal examination is sufficient evidence, in the first instance, to charge the town where the insane resided, or was found at the time of his arrest, for the expenses of his examination, commitment and support in the hospital;" and by section twenty-one that "any town thus made chargeable, in the first instance, and paying for the commitment and support of the insane at the hospital may recover the amount paid from the insane, if able, ... or from the town where his legal settlement is, as if incurred for the expense of a pauper." Section thirty-four declares that "in all cases of preliminary proceedings for the commitment of any person to the hospital, the evidence and certificate of at least two respectable physicians, based upon due inquiry and personal examination . . . shall be required to establish the fact of insanity, and a certified copy of the physicians' certificate shall accompany the person to be committed."

The evidence reported discloses a copy of the certificate of commitment, issued by the municipal officers of Bangor, April 7, 1894, duly attested by the city clerk, stating the facts according to the directions of the statutes, with an attested copy of the certificate of two "practicing" physicians, reciting the facts required by the statute; and it is not in controversy that on the seventh day of April, 1894, Maurice Foley was committed to the insane hospital. The report also discloses a copy of what purports to be a true "record of the commitment" of Maurice Foley to the hospital, dated April 7, 1894, duly attested by the city clerk of Bangor. And it is not questioned that barring the omission of this record to state that the two practicing physicians were also "respectable" physicians, it contains a statement of all the facts requisite to establish the regularity of the proceedings and a legal commitment of Foley to the hospital.

But it appears from the testimony of the city clerk of Bangor that this record in its present form was not extended on the book entitled "record of commitments to the insane hospital," intro-

duced at the trial, for nearly two years after the commitment of Foley.

It is therefore contended by the learned counsel for the defendant that it is not a valid and authentic record which can be accepted as evidence legally importing the verity of the statements therein contained.

It appears, however, from the testimony of the city clerk, that he made the extended record in question during the municipal year immediately succeeding that when the warrant for Foley's commitment was issued, and he continued to hold the office of city clerk by re-election at the time the extended record was made.

It is an established rule in New England, respecting the amendment of the records of a city or town, that the clerk who has made an erroneous or incomplete record, may, while in office or after a re-election to the same office, amend or complete such record according to the truth, being liable like a sheriff who amends his return for any abuse of the right. 1 Dillon's M. C. § 294; *Chamberlain* v. *Dover*, 13 Maine, 466; *Hartwell* v. *Littleton*, 13 Pick. 229; *Welles* v. *Battelle*, 11 Mass. 477. In the last named case it was distinctly determined that when a clerk continues in office several years by repeated annual elections he may amend the record of a former year, notwithstanding an election has intervened and though he does not hold the office under the same appointment; and this case was cited with approbation in *Chamberlain* v. *Dover*, 13 Maine, supra. In *Hartwell* v. *Littleton*, supra, Chief Justice Shaw, speaking of an amendment by a clerk after a re-election says: "The clerk not only knows the fact in relation to which the amendment is to be made . . . . but he still enjoys the confidence of the town, is by their vote entrusted with the custody of their records, and is held responsible for their purity and correctness under the sanction of an official oath and all such other guards as the law has thought it necessary to prescribe in the case of a clerk actually in office. The intervening election is substantially a continuance of the clerk in the same office." So in *Mott* v. *Reynolds*, 27 Vt. 206, Redfield, C. J., says: "We think in general it must be regarded as the right of the clerk of a town or

other municipal corporation, while having the custody of the records, to make any record according to the facts. His having been out of office and restored again, could not deprive him of that right." Again in *Boston Turnpike Co.* v. *Pomfret*, 20 Conn. 590, it was held that the clerk, still continuing in office, was competent to amend the record of a town-meeting six years after it was held; that this power is derived solely from his official character and does not depend on the permission of the court in which the record is offered as an instrument of evidence, nor on inquiry into the truth of it as originally made or as amended, and that such a record is in such an action conclusive evidence of its own truth. See also *Gibson* v. *Bailey*, 9 N. H. 168.

In the case pending before us, it appears from the certificate of commitment that the city clerk was himself the justice of the peace who made the complaint to the municipal officers upon which the adjudication was made respecting Maurice Foley; and the city clerk testifies that he preserved a copy of the certificate of commitment and the original certificate of the two physicians, as data from which to make a permanent record; that the delay in making this record was occasioned by the adoption about that time of a different book for a new form of record and that the "record of the commitment" of Maurice Foley, introduced in this case, was the official record of the facts made by him as city clerk.

It thus appearing that in extending this record, the city clerk acted in entire good faith, in the discharge of an official duty, it is the opinion of the court that this "record of commitments" is a valid record which should be received as conclusive evidence of the facts therein stated.

The statute requires the evidence and certificate of at least two "respectable" physicians to establish the fact of insanity, and it is objected that the record only shows that the evidence and certificate of two "practicing" physicians were before the board. But both the certificate of commitment signed by the municipal officers and the record signed by the city clerk state that the board had before them "all testimony necessary for a full understanding of the case," as required by the provision of section 13, ch. 143,

R. S.; and it has been seen that the evidence and certificate of two "respectable" physicians are declared by section 34, to be "necessary." It is not suggested that either the city physician, who signed the certificate, or the other eminent physician whose name appears on that instrument was not in fact "respectable;" and it is the opinion of the court that, aided by the presumption in regard to public officers, expressed by the maxim "omnia presumuntur rite esse acta," the evidence is sufficient to justify the conclusion that there was a full compliance with the requirements of the statute in this respect.

The notice sent to the overseers of the poor of the defendant town from the "office of the overseers of the poor" of Bangor by "L. C. Davis, overseer of the poor and sec'y", appears to be the inartificial result of an attempt to adapt the established formula employed in ordinary pauper cases to the modified conditions existing in this case; and while it is not to be commended as a precedent, it states with reasonable clearness and precision all the essential facts involved in the case, and leaves no opportunity for a misunderstanding respecting its purpose and object. It must therefore be deemed a substantial compliance with the requirements of the statute. It bears date April 9, 1894, and appears to have been sent after the expense of commitment, amounting to $13.05, had been actually paid by the city of Bangor, and being the first and only notice sent, it was obviously received before any payments had been made by the defendant town on account of the expenses therein said to have been incurred. The notice is therefore sufficient to charge the defendant town for all sums paid by the plaintiff within three months prior to such notice, and all expenses subsequently accruing and paid by the plaintiff within two years after the cause of action accrued. R. S., c. 24, § 35; *Veazie* v. *Howland*, 53 Maine, 39; *Jay* v. *Carthage*, 48 Maine, 357; *Bowdoinham* v. *Phippsburg*, 63 Maine, 497.

The plaintiff's right to reimbursement for all the items of expense specified in the account annexed to the writ having been established, the entry must be,

Judgment for plaintiff.

STATE *vs.* JOHN F. THOMAS.

Waldo. Opinion April 24, 1897.

Pleading. Indictment. Game. Stat. 1893, c. 288.

A complaint charging that the defendant "did have in his possession seventeen dead ruffed-grouse, commonly called partridge, which said grouse were then and there intended by said John F. Thomas for consumption outside the limits of this state and the said John F. Thomas on said 6th day of November aforesaid unlawfully carried said grouse from said Morrill to said Belfast, and there delivered the same to the Boston & Bangor Steamship Co., to be by said company transported to Boston," etc., adequately sets out but one offense under chapter 288, Stat. 1893; that is, of having in his possession not alive, ruffed-grouse, commonly called partridge, not intended for consumption within this state.

This section also imposes the same penalty for several other distinct offenses, as follows: "Nor shall any person or corporation carry or transport from place to place in open season any of the above mentioned birds, unless open to view, tagged and plainly labeled with the owner's name and accompanied by him . . . nor shall any person or corporation carry or transport at any one time more than fifteen of any one variety of birds above named, as the property of one man."

Held; that this complaint does not set out either of these offenses in adequate terms; not the first, because it does not allege that they were not "open to view, tagged and plainly labeled with the owner's name;" and not the second, because it does not allege that they were transported "as the property of one man."

ON REPORT.

COMPLAINT.

Waldo ss. State of Maine.

To the Judge of the Police Court of the City of Belfast in the County of Waldo:

George W. Frisbee of Belfast in said County, on the 7th day of November in the year of our Lord one thousand eight hundred and ninety-three, in behalf of said State, on oath complains that John F. Thomas of Morrill in said County of Waldo, laborer, on the 6th day of November in the year of our Lord one thousand eight hundred and ninety-three, with force and arms at Morrill aforesaid, in

the County of Waldo aforesaid, did have in his possession seventeen dead ruffed-grouse, commonly called partridge, which said grouse were then and there intended by said John F. Thomas for consumption outside the limits of this State and the said John F. Thomas on said 6th day of November aforesaid unlawfully carried said grouse from said Morrill to said Belfast, and there delivered the same to the Boston & Bangor Steamship Co., to be by said company transported to Boston, in the Commonwealth of Massachusetts, there to be delivered to Adams, Chapman & Co., against the peace of said State and contrary to the form of the statute in such case made and provided.

Wherefore, the said George W. Frisbee prays that the said John F. Thomas may be apprehended and held to answer to this complaint, and dealt with relative to the same as law and justice may require.

Dated at Belfast aforesaid, this 7th day of November in the year of our Lord one thousand eight hundred and ninety-three.

GEORGE W. FRISBEE.

On the 7th day of November aforesaid, the said George W. Frisbee makes oath that the above complaint by him signed is true. Before me,

RUEL W. ROGERS,
Judge of the Police Court of the City of Belfast.

The respondent was duly arrested and tried before the magistrate on the general issue, and was found guilty and fined. Whereupon the defendant appealed to this court, and, by consent of parties, was allowed to demur to the complaint for duplicity, with leave to plead over if the demurrer be overruled.

The case was reported to the full court to determine the questions presented.

Ellery Bowden, County Attorney, for State.

W. H. McLellan, for defendant.

Duplicity: *State* v. *Smith*, 61 Maine, 386.

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

WHITEHOUSE, J. It is alleged in this complaint that the respondent on the sixth day of November, 1893, "did have in his possession seventeen dead ruffed-grouse commonly called partridge, which said grouse were then and there intended by said John F. Thomas for consumption outside the limits of this state, and the said John F. Thomas on said sixth day of November unlawfully carried said grouse from said Morrill to said Belfast and then delivered the same to the Boston and Bangor Steamship Co., to be by said company transported to Boston," etc.

By virtue of the warrant issued on this complaint the respondent was arrested and tried before a magistrate on the general issue, and was found guilty and sentenced. Thereupon the respondent took an appeal to this court and "by consent of parties" as the case shows, "was allowed to demur to the complaint for duplicity, with leave to plead over if the demurrer be overruled." The case was then reported to the full court to determine the question presented.

It is a satisfaction to observe, in the first place, that the State would have been justified in withholding its consent to the respondent's proposal to demur and plead over after a trial on the general issue before the magistrate; for if the complaint were amenable to the objection of duplicity, on the ground that two distinct offenses are sufficiently charged in the same count, the demurrer must be sustained, the complaint adjudged bad and the respondent discharged. On the other hand, if the State had declined to waive its right to proceed on the plea of not guilty entered before the magistrate, the objection which the respondent proposed to raise by his demurrer might properly have been obviated by entering a nol pros as to the allegations constituting one of the offenses set out in the complaint, even though both were sufficiently and properly charged. 1 Bish. Crim. Proc. § 443; *State* v. *Merrill*, 44 N. H. 624; *State* v. *Haskell*, 76 Maine, 399; *State* v. *Bean*, 77 Maine, 486.

Fortunately for the State in this instance, however, only one substantive offense is adequately set out in the complaint, that of having grouse in possession not alive and not intended for consumption in this State. Chapter 288, Stat. of 1893. As to this offense the complaint sufficiently states the fact that the respondent had seventeen grouse in his possession and properly negatives the exceptions found in the enacting clause of the section on which the complaint is based.

But this section of the statute named imposes the same penalty for several other distinct offenses, as follows: "Nor shall any person or corporation carry or transport from place to place in open season any of the above mentioned birds, unless open to view, tagged and plainly labeled with the owner's name and accompanied by him . . . . nor shall any person or corporation carry or transport at any one time more than fifteen of any one variety of birds above named, as the property of one man." The allegation in the complaint, however, that the respondent "unlawfully carried said grouse from said Morrill to said Belfast," etc., does not set out either of these offenses in adequate terms. With respect to the former, the allegation is insufficient because it fails to negative the exceptions in the enacting clause by stating that they were not "open to view, tagged and plainly labeled with the owner's name," this negative being clearly descriptive of the offense. 1 Bish. Cr. Pr. § 636; *State* v. *Boyington*, 56 Maine, 512; *State* v. *Gurney*, 37 Maine, 149. With respect to the latter offense described in the statute the allegation in question is insufficient to constitute the charge, because it lacks the necessary averment that the respondent carried the seventeen grouse "as the property of one man."

This allegation of carrying was evidently not designed to charge a separate offense, but was incautiously introduced as a statement of the evidence tending to substantiate the previous charge by showing that the grouse were not intended for consumption in this state. It may be rejected as surplusage.

Demurrer overruled.
Case to stand for trial.

CHARLES E. RICHARDSON *vs.* DANIEL F. HOXIE, and another.

Piscataquis. Opinion April 24, 1897.

Lien. Logs. R. S., c. 91, § 38.

The defendant contracted to haul certain logs, and in making up his team he hired of the plaintiff a horse, double harness and double sled at an agreed price per month; during part of the time the horse was used alone and part of the time with another horse of the defendant. During all the time the horse was driven by an employee of defendant and was under defendant's control, but the plaintiff was not engaged to drive the horse or perform any labor in connection with these logs. *Held;* that the plaintiff is not entitled to a lien on the logs. He did not within the meaning of the statute labor "at cutting, hauling, rafting or driving," said logs or lumber and therefore is not entitled to "a lien thereon for the amount due for his personal services and for the services performed by his team."

ON REPORT.

G. W. Howe, for plaintiff.

F. E. Guernsey, for log owner.

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

WHITEHOUSE, J. This is an action of assumpsit brought by the plaintiff to enforce a lien claimed by him for the service performed by his horse in hauling certain poplar logs.

It is provided by section thirty-eight of chapter ninety-one of the Revised Statutes, 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 for the services performed by his team."

It appears from the testimony reported that the defendants contracted to haul a quantity of poplar from a tract of land in Willimantic to Ship Pond Stream, and employed five teams in the execution of the work. To make up one of these teams the defendants hired of the plaintiff the horse in question together with a set of double harnesses and a set of double sleds, and agreed

to pay him therefor the sum of ten dollars a month. During a part of the time the plaintiff's horse was harnessed to these sleds by the defendants with another horse of their own and used in this double team, and a part of the time he was used alone, in hauling the logs out of the woods. During the entire period of the service for which the lien is claimed, the plaintiff's horse was driven by an employee of the defendants and was under their superintendence and control. The plaintiff himself was not engaged to drive the horse, or to perform any labor for the defendants, and did not perform any labor whatever for them in connection with these logs, or otherwise, during the time his horse was thus used by them. He did none of the things prescribed by the statute as the basis of a lien in his favor on the logs.

As already seen, the only thing he did having any relation whatever to the performance of the defendants' contract to haul the logs, was to let them his horse, harnesses and sleds for ten dollars a month and to place the property in their possession and under their dominion and control while it continued in their service under this contract.

Upon this state of facts, it is manifest that the services for which the lien is claimed were not performed by the plaintiff's team, but by the defendants' team. It is immaterial that the defendants did not have title to one of the horses in this team. *Kelley* v. *Kelley*, 77 Maine, 135. They were entitled to the possession and control of the horse during the time in which this labor was performed and had a right to receive the fruits of his labor under their contract. The lien is not given and attached by the statute to any horse, harness or sled that may be used in hauling logs, but is acquired by the person who "labors at cutting and hauling logs, etc.," "for the amount due for his personal services and the services performed by his team." The plaintiff neither performed any such labor himself nor in contemplation of law was any labor performed by *his* team.

It is, therefore, considered by the court that the plaintiff has no lien on the logs described in the plaintiff's writ; but it is not con-

troverted that against the defendants, the Hoxie Brothers, there should be entered,

Judgment for plaintiff for $35 with interest from the date of the writ.

RICHARD D. BENNETT *vs.* SARAH E. TALBOT.

Waldo. Opinion April 24, 1897.

Agency. Evidence. Jury. Practice.

The declarations of an agent are admissible only when the existence of the agency has been satisfactorily established by other competent evidence.

Though such declarations become evidence as parts of the res gestæ, if made in the conduct of the business intrusted to the agent, they cannot bind the principal without other evidence of the agency. And if such declarations are received de bene esse upon a promise that other proof of the agency shall be forthcoming, they will be disregarded if the promise is not fulfilled.

It is a well-established rule of procedure, in this State, that the court may properly instruct the jury to return a verdict for either party when it is apparent that a contrary verdict would not be allowed to stand on the evidence introduced.

Held; in this case, that the plaintiff was not employed by the defendant; nor was her son acting as her agent.

ON EXCEPTIONS BY PLAINTIFF.

The case appears in the opinion.

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

O. F. Fellows, for defendant.

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

WHITEHOUSE, J. This is an action of assumpsit brought by the plaintiff to recover a balance alleged to be due for labor performed by him in June and July, 1893, in the construction of a wharf on land owned by the defendant in Stockton Springs. The

evidence is reported to this court on exceptions taken by the plaintiff to the ruling of the court below directing the jury to return a verdict for the defendant.

It is a well-established rule of procedure in this State that the court may properly instruct the jury to return a verdict for either party when it is apparent that a contrary verdict would not be allowed to stand on the evidence introduced. *Bank* v. *Sargent*, 85 Maine, 349, and cases cited.

After a careful examination of all the evidence reported in this case, it is the opinion of the court that the ruling of the presiding justice ordering a verdict for the defendant was undoubtedly correct, on the ground that there was no evidence presented which would authorize a verdict for the plaintiff.

It is not in controversy that the plaintiff performed the labor in question in building a wharf on the defendant's land and that he was employed by Francis T. Sargent, the defendant's son, who had charge of the work. But it is confidently urged in behalf of the defendant that she was not engaged in the granite business and had not assumed any responsibility for the construction of the wharf, and that her son Francis T. Sargent, in superintending the building of it and employing laborers for that purpose, was acting as the agent of the Penobscot Bay Granite Company and not as the agent of the defendant.

The defendant's two sons, Francis T. and W. O. Sargent, for some time prior to the transaction in question, had been engaged in conducting operations upon different granite quarries in Waldo County, and the defendant appears to have furnished the money to purchase the tracts of land in question at Stockton Springs, containing granite suitable for quarrying, and to have taken the conveyances in her own name. Subsequently she executed a lease of a part of this property to Patrick Gallagher, and a second lease of another part of it to the Penobscot Bay Granite Company. It is admitted that Francis T. Sargent was employed by Gallagher and the Penobscot Company successively, to superintend their respective operations in cutting and hauling granite, and that he was so acting as the authorized agent of the latter at the time the

plaintiff performed his labor in building the wharf, but it is denied by that company that Sargent was acting as their agent in the construction of the wharf. The oral evidence introduced by the plaintiff only tends to show that Sargent personally employed the men to build the wharf and agreed to pay them; and the depositions of Wheeler and Edgar of the Penobscot Bay Granite Company tend to show that, "Sargent on behalf of Mrs. Talbot agreed to furnish the quarry and equip it with a road leading directly to the river in front of it, and a wharf at the end of the road on the river." But nowhere in any of the evidence is a single word, oral or written, imputed to the defendant tending to show that she had authorized Francis Sargent to build a wharf on her credit and responsibility, or that she had any knowledge whatever of the building of the wharf. Nor can any provision be found in either of the conveyances accepted by her, or in the leases signed by her, referring in any manner to the construction of a wharf.

It is an elementary rule of evidence that the declarations of an agent are only admissible when the existence of the agency has been satisfactorily established by other competent evidence. "To permit the proving of the agency by proving the declarations of the agent would be assuming without proof that which is a prerequisite to the admissibility of the declaration." 2 *Wharton's Ev.* § 1183; *Hazeltine* v. *Miller*, 44 Maine, 177; *Eaton* v. *Granite State Prov. Ass'n*, 89 Maine, 58. Though such declarations become evidence as parts of the res gestæ, if made in the conduct of the business intrusted to the agent, they cannot bind the principal without other evidence of the agency. The court must have proof of the agent's authority to speak, before it will listen to what he has said. And if in a report of evidence such declarations are received de bene esse upon a promise that other proof of the agency shall be forthcoming, they will be disregarded if the promise is not fulfilled.

In the case at bar such proof of agency is entirely wanting. There is no evidence that Francis T. Sargent had been accustomed to perform acts of the same general character and effect with the knowledge and assent of the defendant. There is no evidence of

acts of prior adoption and ratification on her part, from which an authority for Sargent to build a wharf on her credit and responsibility, can be implied. The fact that she paid the purchase money for the land affords no ground for such an inference. The fact that she was willing to aid her son by purchasing the land for cash, has no tendency to prove that she gave him unlimited authority to contract debts on her account.

But while an agent's declaration in pais are not proof of his authority to speak, he is a competent witness in court to prove or disprove the agency alleged. Accordingly Francis T. Sargent appears as a witness for the defendant. He testifies positively that he was not employed by the defendant and was not acting as her agent in the construction of the wharf, and "was never her agent in any way, shape or manner;" that he was in the employment of the Penobscot Bay Granite Company at the time of the construction of the wharf, and was expressly directed by them to build it, and was paid by them for all services rendered in that behalf.

In corroboration of this, it appears that the plaintiff and other workmen brought suit against the Penobscot Company to recover for their labor on the wharf, and that the amount due for the labor in June was thereupon paid by that company. The defendant's position is further strengthened by the letter of July 28, 1893, written by Wm. S. Edgar, treasurer and one of the directors of the company, to Geo. Carleton Comstock, its president. This distinctly impeaches Edgar's testimony given in his deposition, and appears to recognize the construction of the wharf as the undertaking of his company. It furnishes the president of the company with a statement of the "June time for the men on the wharf," and asks him to forward his share of the amount due them. Against these facts, the able and ingenious argument of the counsel for the plaintiff fails to convince us that any other conclusion than that announced in the court below would be justified by the evidence.

Exceptions overruled.

ALDEN BRADFORD *vs.* CHARLES W. HUME, and another.

Washington. Opinion April 24, 1897.

Way. Boundary. Fence. R. S., c. 18, § 95.

When the bounds of a street cannot be made certain by either records or monuments, and a fence has existed in the same place for more than forty years, it is to be deemed the true bounds of the street. R. S., c. 18, § 95.

In an action of trespass against the mayor and one of the aldermen, of the city of Eastport, for removing a fence in front of the plaintiff's house, the defendants justified its removal on the ground that the fence was within the limits of the street. The plaintiff denied that the fence was within the limits of the street and claimed that it had existed in the same place for more than forty years ; and was therefore, under the statute, to be deemed the true bounds of the street. The jury returned a verdict for the plaintiff. *Held;* that the verdict ought not to be disturbed, it appearing to the court, among other reasons, that the fence had existed in front of the plaintiff's house for more than forty years ; and although a new fence was built in 1876, it seems that if a fence fronting on one of the public streets of the city was moved three or four feet into the street, the fact was open to the observation of all passing by it and must be known to hundreds of persons. The street, as laid out in 1807, was only thirty feet wide ; and an encroachment upon so narrow a street could not escape the notice of any one passing upon the street.

ON MOTIONS BY DEFENDANTS.

The case is stated in the opinion.

J. F. Lynch, L. H. Newcomb, and G. R. Gardner, for plaintiff.

J. H. McFaul, G. M. Hanson, G. A. Curran, and I. G. McLarren, for defendants.

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

WALTON, J. This is an action of trespass against the mayor and one of the aldermen of the city of Eastport for causing the removal of a fence in front of the plaintiff's house. The defendants justify the removal on the ground that the fence was within the limits of the street. The plaintiff denies that the fence was

within the limits of the street. He says that the bounds of the street cannot be made certain by either records or monuments, and that a fence had existed in the same place for more than forty years, and was therefore to be deemed the true bounds of the street, as provided by R. S., c. 18, § 95.

There seems to be no doubt that a fence had existed in front of the plaintiff's house for more than forty years. But the plaintiff admits that a new fence was built in 1876, and the real controversy was whether the new fence was built on the same place on which the old fence stood, or was built some three or four feet nearer the centre line of the street.

The fence fronted on one of the public streets of the city, and if it was moved three or four feet into the street, the fact was open to the observation of all passing by it; and it would seem as if it must have been known to hundreds and perhaps thousands of persons. The street, as laid out in 1807, was only thirty feet wide; and it seems incredible that such an encroachment upon a street so narrow should have escaped the notice of any one passing upon the street. The carpenter who built the new fence swears positively that he placed it on the same spot occupied by the old fence. The plaintiff swears that it was so placed. Other witnesses so testify. The number of witnesses who testify to the contrary are comparatively few. The parties called as many witnessess as they thought proper and then rested. The case was then submitted to the jury, and they returned a verdict for the plaintiff. No exceptions were taken to the charge, and presumably it was satisfactory to both parties.

The defendants move for a new trial, first, on the ground that the verdict was contrary to the weight of the evidence produced at the trial; and, secondly, on the ground that since the trial, they have discovered some new evidence,—that is, some more witnesses who are willing to swear that the fence was moved.

We have examined the evidence, the old and the new, with great care. In fact, we have spent an unusual amount of time in the examination of the evidence. And we are surprised that there should be such a conflict in relation to such a fact; a fact that

must have been open to the observation of hundreds, and perhaps thousands of persons if it really existed. We think it was fortunate for the parties that the jury was able to agree; and we are profoundly impressed with the belief that it would be a misfortune to the defendants, as well as the plaintiff, to protract the litigation. We do not feel entirely satisfied that the verdict was right; nor do we feel entirely satisfied that it was wrong. In such a case, the verdict must stand. The evidence claimed to be newly discovered is not such, in the opinion of the court, as to justify protracting the litigation.

Motions overruled.

INHABITANTS OF WINTHROP, Petitioners,

vs.

INHABITANTS OF READFIELD.

Kennebec. Opinion April 27, 1897.

Town-Lines. Commissioners. Qualification. Waiver. R. S., c. 3, § 67.

The power of commissioners appointed under R. S., c. 3, § 67, to ascertain and determine the location of a line in dispute between adjoining towns, is analogous to that of referees under an unrestricted rule of reference, who are judges of the law as well as of the facts involved, and whose conclusion, as shown by their direct and unconditional award, in the absence of any improper motive, will not be inquired into.

All findings of such commissioners upon questions of fact and conclusions upon matters of law involved are final.

Although the power of the court has not been exhausted when the commissioners have been appointed, but continues until their report is offered and passed upon, the court has no power to review the conclusions of the commissioners upon questions of law or fact involved, but only to inquire into the conduct and motives of the commissioners, when anything improper in that respect is alleged, and as to whether the proceedings have been in accordance with the statute and their report legally correct as to form.

It is not necessary that such commissioners should be sworn; it is neither required by the statute providing for their appointment nor by any general rule or statute.

But even if it were otherwise, the objection comes too late. If the commissioners were not sworn it must be presumed that the party now objecting had knowledge of that fact, unless the contrary is shown. A party who has knowledge of a purely technical objection will not be allowed to take the chance of a decision in his favor, and be given the opportunity of first raising the objection after the decision, if it should be against him.

That one of the commissioners had previously been employed by one of the towns, to run the line as a surveyor, does not disqualify him from acting as one of the commissioners appointed under this statute.

ON EXCEPTIONS BY DEFENDANT.

This was a proceeding under R. S., c. 3, § 67, to determine the location of a line in dispute between the towns of Winthrop and Readfield. The defendant filed the following motion to dismiss the commissioners' report:

Supreme Judicial Court, Kennebec County.
October Term, 1895.

And now the respondent objects to the acceptance of the return and report of the commissioners, appointed under said petition, and filed at the present term of said court, and moves its dismissal for the following reasons, or its recommitment to the commissioners with instruction as to the legal construction of the Act of 1810.

1. Because said commissioners were not sworn before entering upon the discharge of their duties under said petition as is required by law.

2. Because Wm. B. Getchell, one of the commissioners appointed by the court to run said line in dispute, had been employed by the town of Winthrop as a surveyor to run such line in company with the selectmen of Winthrop on an ex-parte perambulation of the same; and he did run said line a short time before his appointment by the court, which employment and running were unknown to the town of Readfield at the time said commissioners were appointed; and that said Getchell was suggested to the court for appointment on said commission by the attorney for said Winthrop.

3. Because their report goes beyond and outside of their commission and the provisions and requirements of the statute.

4. Because the commissioners in their attempt to sustain and maintain their position and action, have stated a part of the facts only, and not all the evidence before them, and if any of the facts upon which their decision is based are to be reported to the court, justice and right require that they all be so reported.

5. Because it appears by the facts reported by them, that their construction of the Act of February 24, 1810, passed by the legislature of Massachusetts, as set forth in their report, was not in accordance with the law and evidence in the case.

6. Because there can be no transfer or set-off of territory from one town to another, where there is no dispute as to the dividing line, except by some clear, affirmative, legislative declaration, showing an intention on the part of the legislature to transfer land or inhabitants from one incorporated town to another.

7. Because the line as reported by the commissioners sets off and transfers from the town of Readfield to the town of Winthrop some fifty acres of territory with eight valuable cottages, an expensive hotel, with land improvements of the aggregate value of twenty-five thousand dollars, thereby making the owners and occupants of such property and territory citizens of the town of Winthrop for all practical and municipal purposes, without any legislative enactment.

8. Because their determination of the line in dispute is not legally correct.

The presiding justice overruled the objections and ordered the report to be accepted. The defendant excepted to these rulings and order.

L. T. Carleton, for plaintiff.

Commissioners not required to be sworn: R. S., c. 3, § 67; same being the case as to referees, and auditors. Report itself need not state whether or not an oath is administered, when required. *Somerset* v. *Glastonbury*, 61 Vt. 449. The fact of not being sworn must be proved in court in order to sustain the objection; and exceptions to the ruling of the court upon such objections must

show that the facts alleged were proved. No evidence was offered upon this point. *Nutter* v. *Taylor*, 78 Maine, 424.

Getchell not disqualified and objection is not proved. *Nutter* v. *Taylor*, supra.

Authority of commissioners same as a referee: *Brown* v. *Clay*, 31 Maine, 518; *Hall* v. *Decker*, 51 Maine, 31; *Mitchell* v. *Dockray*, 63 Maine, 82; *Hagar* v. *Ins. Co.*, 63 Maine, 71; *Morse* v. *Morse*, 62 Maine, 443; *Frison* v. *DePeiffer*, 83 Maine, 71.

E. O. and F. E. Beane, for defendant.

Getchell not disinterested, and report not made under oath; the tribunal acted in a judicial capacity and should have been sworn. The determination of the Act of 1810 was a judicial question and its decision, as well as the discharge of all their duties, should have been under oath. *Bradstreet* v. *Erskine*, 50 Maine, 407.

The facts of taxation and descriptions in deeds have probative force as showing the practical construction of the Act of 1810 by the contemporaneous acts of those living under it and affected by it. Much weight is given by courts to such interpretation of a statute at the time, and since by those whose duty it has been to construe, execute and apply. *Packard* v. *Richardson*, 17 Mass. 143, 144; *French* v. *Cowan*, 79 Maine, 426; *Chestnut* v. *Shane's Lessee*, 16 Ohio, 603, (47 Am. Dec. 387.)

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

WISWELL, J. Various objections were made at nisi prius, by counsel for the town of Readfield, to the acceptance of the report of commissioners appointed by the court under R. S., c. 3, § 67, to ascertain and determine the location of a line in dispute between these towns. The court overruled the objections and ordered the report accepted and confirmed, to which ruling and order exceptions were taken by the town of Readfield.

It becomes important to clearly understand exactly what power and discretion the court has in regard to the acceptance of a report of such commissioners.

It was formerly held in this state that, in proceedings under the statute referred to, the court had no further duty nor power than to appoint the commissioners; that the report need not be accepted, and that its acceptance was not authorized; that the report itself, if in accordance with law, was final and conclusive. *Monmouth* v. *Leeds*, 76 Maine, 28.

But later, when the same proceeding came before the court upon a question of costs, this court, in an opinion by the Chief Justice, took occasion to express quite a different view upon this question and referred to the fact that the earlier statutes expressly required that the report of the commissioners should be passed upon by the court, and that this provision had been omitted in the different revisions of the statutes with no legislative change and simply for the sake of brevity. In that case, it is said: "We do not see why the court should not so far control the proceeding that it may, as in cases before referees, prevent a report being final until satisfied of its freedom from fraud and of its legal correctness." *Monmouth* v. *Leeds*, 79 Maine, 171.

But it was not meant, by the expression, "satisfied . . . of its legal correctness," that the court might review the conclusion of the commissioners upon any legal question that might arise. All findings of the commissioners, upon questions of fact and conclusions upon matters of law involved, are final. The only power and discretion of the court, in this respect, is to ascertain and determine if the report is legally correct in form and if all the proceedings have been in compliance with the statute. The power of such commissioners is analogous to that of referees under an unrestricted rule of reference, who are judges of the law as well as of the facts involved, and whose conclusion, as shown by their direct and unconditional award, in the absence of any improper motive, will not be inquired into. So, in a matter of this kind, although the power of the court has not been exhausted when the commissioners have been appointed, but continues until their report is offered and passed upon, the court has not the power to review the conclusions of the commissioners upon questions of law or fact involved, but only to inquire into the conduct and motives

of the commissioners, if anything improper in that respect is alleged, and as to whether the proceedings have been in accordance with the statute and their report legally correct as to form.

This view disposes of many of the objections made to the acceptance of the report. The one most relied upon is as to the construction by the commissioners of an act of the legislature of Massachusetts, passed in 1810, whereby that portion of the line in controversy was established. But the construction of this act was one of the matters necessarily committed to the commissioners; and, although we have examined the act and think that the construction placed thereon by the commissioners was correct, the result would be the same if we should differ with them as to the meaning of this act, their determination being conclusive.

Several of the other objections are involved in the one just considered. It is certainly true that the territorial limits of towns must be established by legislative action; without it no portion of the territory of one municipality can be set off to another. The act of the Massachusetts legislature of 1810 established the line in controversy between these adjoining towns, but as to what is meant by that act, and as to where upon the face of the earth the line thus established is, must be determined by some tribunal with jurisdiction in the premises. As we have already seen, the statute provides for the appointment of a tribunal in matters of this kind, whose conclusions upon all questions properly arising are final.

Other objections made go more to the correctness and legality of the proceedings. It is said that the commissioners were not sworn and their report does not show that they were. We do not think it necessary that the commissioners should have been sworn. The statute providing for their appointment does not require it and we know of no general rule or requirement which makes it necessary. *Lewis* v. *Foster*, 65 Maine, 555. But even if it were otherwise the objection comes too late. If the commissioners were not sworn, it must be presumed that the party now objecting had knowledge of that fact, unless the contrary is shown. A party who has knowledge of a purely technical objection will not be allowed to take the chance of a decision in his favor, and be given the oppor-

tunity of first raising the objection after the decision, if it should be against him. *Raymond* v. *County Commissioners*, 63 Maine, 110.

Objection is also made that one of the commissioners had been previously employed by the town of Winthrop, as a surveyor, to run the line in dispute, and that in company with the selectmen of Winthrop he had run this line, which employment, it is said, was unknown to the town of Readfield at the time of the appointment of the commissioners. We think there is nothing in this objection; that the fact that one of the commissioners had previously been employed by one of the towns to run the line as a surveyor in no way disqualified him from acting as one of the commissioners appointed under this statute.

Exceptions overruled.

JOHN W. ROWE *vs.* JOSEPH E. FRIEND, and others.

Penobscot. Opinion April 27, 1897.

Taxes. Assessment. Collection. R. S., c. 6, §§ 36, 39, 142. Priv. and Spec. Laws, 1895, c. 301.

The defendants, as assessors of the town of Etna, completed their assessment of the tax for the year 1895, including the town's proportion of the state tax for the same year and committed the same to the tax collector, two days before the state treasurer issued his warrant as provided by R. S., c. 6, § 36, and as required by the act of the legislature making the assessment of a state tax for the year 1895.

The state tax for the year 1895, was laid by the legislature, the only competent authority, by an act approved March 26, 1895. The proportion of the whole tax that was to be paid by each city, town and plantation in the state was fixed by that act. The amount apportioned thereby to the town of Etna was $340.14, the precise amount included by the assessors, as the town's proportion of the state tax, in their assessment and commitment.

In an action against the assessors for the arrest of the plaintiff by the tax collector for the non-payment of his tax, *held;* that the assessors' authority to assess and commit this tax did not depend upon the state treasurer's warrant.

The issuance of that warrant was a ministerial act, and such warrant was not the only nor the best evidence of the amount of the state tax that was to be assessed upon the polls and estates in the town of Etna. And that if the assessors saw fit to complete the assessment, including the state tax for the current year and commit the same to the collector before the issuance of the state treasurer's warrant, the tax-payer, at least, can find no fault.

The tax on the plaintiff's real estate in the record of assessment was assessed at $2.33, while in the lists committed to the collector it was stated to be $3.33. The latter amount is the correct assessment upon the real estate at the valuation placed thereon by the assessors.

Held; that this clerical error does not even make the assessment void, much less render the assessors liable for the plaintiff's arrest by the tax collector.

If the arrest of the plaintiff was unlawful because he offered to show the collector sufficient goods and chattels to pay the tax, still the defendants are not liable. The collector is not the servant of the assessors and they are not responsible for his illegal act, if any be shown.

ON REPORT.

The case appears in the opinion.

G. W. Howe, for plaintiff.

C. A. Bailey, for defendants.

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

WISWELL, J. The plaintiff, having been arrested and committed to jail by the tax-collector of the town of Etna, for the non-payment of his tax in that town for the year 1895, and claiming that his arrest was illegal, brings this action therefor against the defendants, who were the assessors of the town, and, as such, assessed the tax and issued the warrant to the collector by virtue of which the plaintiff was arrested.

No question is raised as to the plaintiff's residence in Etna, and his consequent liability to taxation in that town. And the records introduced show the due election and qualification of the defendants as assessors. But it is claimed, in behalf of the plaintiff, that there were certain errors and mistakes in the assessment and commitment of the tax, and that the assessment and commitment were wholly unauthorized and void, because, although it included the town's proportional part of the state tax, the assessment was com-

pleted and committed to the collector on the thirteenth day of April, while the state treasurer's warrant was not issued until two days later.

Revised Statutes, c. 6, § 36, provide that: "When a state tax is ordered by the legislature, the treasurer of state shall forthwith send his warrants directed to municipal officers of each town or other place, requiring them to assess upon the polls and estates of each, its proportion of such tax for the current year." And one of the sections of the Act of the Legislature, making the assessment of a state tax for the year 1895, contains similar provisions, requiring the state treasurer to issue his warrant during the month of April of that year.

By R. S., c. 6, § 39: "Assessors of towns . . . . are not responsible for the assessment of any tax, which they are by law required to assess; but the liability shall rest solely with the corporations for whose benefit the tax was assessed, and the assessors shall be responsible only for their own personal faithfulness and integrity."

It is not denied that the assessors of Etna were required to assess the tax committed to the collector on the thirteenth of April, 1895; the only question is, whether they were authorized to complete the assessment, including the town's proportion of the state tax for the current year, and commit the same to the collector before the state treasurer had issued his warrant in accordance with the provisions of the general statute and of the special act above referred to.

We have no doubt that this question must be answered in the affirmative. The state tax for the year 1895 was laid by the legislature, the only competent authority, by an act approved March 26th, 1895. Chap. 301 Private and Special Laws of 1895. The proportion of the whole tax that was to be paid by each city, town and plantation in the state was fixed by that act. The amount apportioned thereby to the town of Etna was $340.14, the precise amount included by the assessors, as the town's proportion of the state tax, in their assessment and commitment.

We think that the assessors' authority to assess and commit this

tax did not depend upon the state treasurer's warrant. The issuance of that warrant was a ministerial act, and such warrant was not the only nor the best evidence of the amount of the state tax that was to be assessed upon the polls and estates in the town of Etna. If the assessors saw fit to complete the assessment, including the state tax for the current year, and commit the same to the collector before the issuance of the state treasurer's warrant, the tax payer, at least, and this is the only question considered, can find no fault.

This was the decision of the court in *Alvord* v. *Collin*, 20 Pick. 418, under statutes similar in purpose and effect. In that case it was said by the court: "The legislature, the only power competent to such an act, made a regular grant of a state tax for the year 1819, and duly made an apportionment of it among the several towns in the Commonwealth. Of this the evidence is unexceptionable. This authorized the assessors of Washington to assess the amount imposed upon that town. This authority did not depend upon the treasurer's warrant; and can not be defeated or annulled by any act or omission of any ministerial or other officer of the government. An assessment in pursuance of the grant and apportionment of a state tax would be valid, although made by the assessors, without any warrant from the treasurer. Such warrant may be competent authority for the assessors to act upon, but is not the only nor the highest evidence of the grant. The treasurer's authority to issue this precept depends upon the grant of the legislature, and the warrant is obligatory, only so far as it is in pursuance with the legislative act. The treasurer's warrant is a mandate to the assessors, binding upon them, for the disobedience to which they are subjected to the penalty prescribed by statute. Although they could not be compelled to act without this mandate, yet if they chose to act without it and did act in conformity with the statute, they would be justified and all others would be bound by their proceedings."

The assessors, then, being required by law to assess this tax, and being authorized to commit it when they did, they are only liable for their own personal faithfulness and integrity. No evidence has

been introduced showing any want of personal faithfulness or integrity upon the part of the assessors.

The plaintiff also complains of certain errors and mistakes in the assessment and commitment. For instance, the tax on the plaintiff's real estate in the record of the assessment is assessed at $2.33, while in the lists committed to the collector it is stated to be $3.33, making the plaintiff's whole tax as committed to the collector one dollar more than it appears to be in the assessors' records. The latter amount is the correct assessment upon the real estate at the valuation placed thereon by the assessors. This clerical error does not even make the assessment void, much less render the assessors liable for the plaintiff's arrest by the tax-collector, by reason of R. S., c. 6, § 142, which provides that no error, mistake or omission by the assessors, collector or treasurer, shall render the assessment void, and which gives a right of action against the town in favor of any one who has sustained damages by reason of such mistakes.

It is said in the brief of the plaintiff's counsel, that the statement of the whole tax in the record of the assessment and in the commitment is ten dollars greater than the aggregate of the several items thereof. If this were so, it would not invalidate the tax, by reason of the statute referred to, but an examination of the copies furnished the court discloses no such error.

Nor is there anything in the further claim, that the arrest was unlawful because the plaintiff offered to show the collector sufficient goods and chattels to pay the tax. The collector was not the servant of the assessors, and they are not responsible for his illegal act, if any such be shown. Although it is contended that two of the assessors personally directed the plaintiff's arrest, the evidence fails to substantiate this contention.

The entry will be,

Judgment for defendants.

CHARLES A. ROBINSON *vs.* ELIZABETH J. PALMER, and others.

Penobscot. Opinion April 27, 1897.

Will. Contingent Remainder.

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. It is contingent if it depends upon the happening of a contingent event whether the estate limited as a remainder shall ever take effect at all.

While courts have generally adopted the rule of construction that no remainder will be construed to be contingent, which may, consistently with the intention of the testator, be deemed vested, it is equally well settled that in the interpretation of wills the intention of the testator must control.

The will which the court is asked to construe contained this clause: "I give and bequeath to my beloved wife, Elizabeth J. Leavitt, all my estate, both real and personal, of which I may be possessed at the time of my decease, for her use and benefit during her life, and at her decease, whatever there may be left of said estate or the effect of the same, I hereby order and direct that it shall be apportioned equally among my children, to wit, Elizabeth J. Palmer, Wm. C. Leavitt, Samuel K. Leavitt and Caroline M. Goddard, if they shall be living, but if they or any of them shall (die) previous to the fulfillment of this or the death of my wife, Elizabeth J. Leavitt, then his or her portion or share in said estate shall descend to his or her children for their use and benefit forever."

Held; that the devise to the testator's four children after the death of a life-tenant was of a contingent remainder.

Also, that the persons who were to take this remainder upon the termination of the life estate were not ascertained. They were the four children named, *if living*. Until the termination of the precedent estate, by the death of the life-tenant, it was impossible to tell who would take under this devise.

Three of the testator's children named in the clause above quoted died during the continuation of the life estate; two of them left children, and one, Samuel K. Leavitt, left a widow, his sole legatee, but no children.

Held; that the testator created a contingency but did not provide for it. He did not dispose of one-fourth of the remainder, in the event of the death of Samuel K. without children. And that this one-fourth part of whatever of his estate was left by the life-tenant at her death must be distributed as intestate estate of Thomas C. Leavitt.

And that although Samuel K. took no interest under the will of his father, as an heir of his father, he took one-fourth of the one-fourth of the remainder

that was undisposed of; and his widow, as his sole devisee and legatee, will be entitled to his share.

ON REPORT.

The case is stated in the opinion.

D. F. Davis and C. A. Bailey, for plaintiff.

F. H. Appleton and H. R. Chaplin; C. J. Hutchings and M. Laughlin and D. E. Gould, for defendants.

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

WISWELL, J. By a bill in equity, submitted upon bill and answers, to which all of the persons interested are parties, the court is asked to construe the will of Thomas C. Leavitt. The clause of the will about which the doubt and controversy exists, is as follows:

"Second. I give and bequeath to my beloved wife, Elizabeth J. Leavitt, all my estate, both real and personal of which I may be possessed at the time of my decease, for her use and benefit during her life, and at her decease, whatever there may be left of said estate or the effects of the same, I hereby order and direct that it shall be apportioned equally among my children, to wit, Elizabeth J. Palmer, William C. Leavitt, Samuel K. Leavitt and Caroline M. Goddard, if they shall be living, but if they or any of them shall (die) previous to the fulfilment of this or the death of my wife, Elizabeth J. Leavitt, then his or her portion or share in said estate shall descend to his or her children for their use and benefit forever."

The testator died February 1, 1869, and his will was duly probated. Elizabeth J. Leavitt, the widow and life-tenant, died March 27, 1895. During the continuation of the life estate, three of the testator's children, named in the quoted clause, died; two of them left children, and one, Samuel K. Leavitt, left a widow, his sole legatee, but no children.

The question submitted is, whether the remainder after the death of the life-tenant, devised to the four children, was vested or

contingent. The question is not free from difficulty; it undoubtedly comes very close to the dividing line, and many authorities may be, and are, cited upon each side of the contention; but we are inclined to the opinion that, in accordance with the rule which has been laid down by the authorities in this state, the devise must be construed to be a contingent rather than a vested remainder. For while it is true, that courts have very generally adopted the rule of construction that no remainder will be construed to be contingent, which may, consistently with the intention of the testator, be deemed vested, it is equally well settled that in the interpretation of wills the intention of the testator must control.

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. It is contingent if it depends upon the happening of a contingent event whether the estate limited as a remainder shall ever take effect at all. *Woodman* v. *Woodman*, 89 Maine, 123.

The persons who were to take this remainder upon the termination of the life estate were not ascertained. They were the four children named, *if living*. Until the termination of the precedent estate, by the death of the life-tenant, it was impossible to tell who would take under this devise. The estate was so limited that its vesting depended upon a contingency. The testator used language commonly employed for the purpose of expressing an intention that the vesting of the remainder was to depend upon the contingency.

It is true, that when it is doubtful whether the words of contingency applied to the gift itself, or to the time of enjoyment, they will be construed as applying to the latter. But we think that no such doubt exists as to this will. The phraseology of the will, "and at her decease whatever there may be left of said estate," shows that the apportionment therein provided for was to take place at the death of the life-tenant among the children then living and the issue of deceased children. Although the word "then" referring to the time of the death of the life-tenant, and to which

word considerable weight has been given in many of the decided cases, was not used, the whole language is certainly equivalent thereto.

The case is almost identical with that of *Hunt* v. *Hall*, 37 Maine, 363. In that case the language of the devise was: "After the decease of my dear wife, my will is that my executor hereafter named cause an equal division to be made among all my children and the heirs of such as may then be deceased." This was held to create a contingent remainder, because the persons who were to take were not those living at the death of the testator, but such of the children as should be living, and the heirs of deceased children, at the time of the termination of the precedent estate, and that until that time there was a contingency and uncertainty as to the persons who would take the estate. The reasons are equally applicable to the case under consideration; the persons who were to take were left uncertain; they might be or they might not be in existence during the continuation of the life estate; and, so far as this uncertainty is concerned, the word "heirs" in the case of *Hunt* v. *Hall* is identical in meaning with the word "children" in this case. This case has been frequently cited and affirmed in later opinions of the court.

In *Leighton* v. *Leighton*, 58 Maine, 53, where a different conclusion was reached, the court in referring to *Hunt* v. *Hall*, supra, and to *Olney* v. *Hull*, 21 Pick. 311, said: "In both these cases the remainder was limited to dubious and uncertain persons, and was held to be contingent. Not so in the case at bar."

In *Read* v. *Fogg*, 60 Maine, 479, where a conveyance was to a daughter, "for her use and benefit during her lifetime, and after her decease, to her legal heirs," the remainder was held to be contingent, because those who would take the remainder were the heirs of the life-tenant at her decease and they might be different individuals at different periods of time during the continuance of the life estate. The cases of *Hunt* v. *Hall* and *Read* v. *Fogg* are cited with approval in *Spear* v. *Fogg*, 87 Maine, 132.

There are cases of high authority which hold, that an estate limited upon a contingency, to which the effect of a condition sub-

sequent is given, vests at once, subject to be divested upon the happening of the contingency. Thus in *Blanchard* v. *Blanchard*, 1 Allen, 223, where a testator devised to his wife all the income of his real and personal property during her natural life and to five of his children all the property that might be left at the death of his wife, to be divided equally among them, and in a subsequent clause provided that if any of the five children died before his wife, then the property should be divided equally between the survivors, the court held that the remainder was vested, laying stress upon the fact that there were no words of contingency such as, "if they shall be living at her death," or "to such of them as shall be living," the usual language used for the purpose of showing that a contingency was intended. The court held that this could be regarded as a devise in fee to the five children, subject to be divested upon a condition subsequent.

Generally, in the cases where this doctrine has been upheld, it will be noticed that the condition is added as a separate clause after words which have already given a vested interest. In *Ducker* v. *Burnham*, 146 Ill. 9, (37 Am. St. R. 135) it is said: "Whether the condition is really precedent or subsequent will depend upon whether it is incorporated into the gift to, or description of, the remainder-man, or is added as a separate clause afterwards, which words have already given a vested interest.

In *Blanchard* v. *Blanchard*, supra, the gift and the description of the remainder-men was sufficient to make the remainder vested, and the condition was added in a separate clause after the words which had already given a vested interest.

And so also in *Lenz* v. *Prescott*, 144 Mass. 505, the devise was unqualified; the condition was not incorporated into the gift or the description of the remainder-men, but was added in a later clause.

And this is also true in *McArthur* v. *Scott*, 113 U. S. 340. The language of the testator in this case was: "It is my further will and direction that after the decease of all of my children now living, and when and as soon as the youngest or last grandchild, in the next preceding clause but one of this will designated and described, shall arrive at the age of twenty-one years, all my

lands" in question "shall be inherited and equally divided between my grandchildren per capita, the lawful issue of my said sons and daughters." And later in the same paragraph it is provided, "but it is to be understood to be my will and direction that if any grandchild aforesaid shall have died before said final division is made, leaving a child or children lawfully begotten, such child or children shall take and receive per stirpes (to be equally divided between them) the share of my said estate, both real and personal, which the parent of such deceased child or children would have been entitled to have and receive if living at the time of such final distribution." It is said in the opinion of the court: "This gift is not to such grandchildren only as shall be living at the expiration of the particular estate, but it is to my 'grandchildren per capita, the lawful issue of my said sons and daughters;' words of description appropriate to designate all such grandchildren. . . . . The remainder, being vested according to the legal meaning of the words of gift, is not to be held contingent by virtue of subsequent provisions of the will, unless those provisions necessarily require it. The subsequent provisions of this will had other objects."

In *Moore* v. *Lyons*, 25 Wend. 119, a case frequently cited, and relied upon by counsel in this case in support of the contention that the remainder was vested, the court held that a devise to one for life and from and after his death to three others or to the survivors or survivor of them, gave a vested interest to the remaindermen at the time of the testator's death, construing the words of survivorship to refer to the death of the testator, and not to the death of the tenant for life.

But this case must be distinguished from these last referred to. Here the condition is a part of the description of the remaindermen; and the very phrases, the absence of which are commented upon in *Blanchard* v. *Blanchard*, supra, were used in the will under consideration. Nor, as we have seen, can the words of contingency in this will be construed as referring to the time of the death of the testator. This being a contingent remainder did not vest in Samuel K. Leavitt, and he, having died before the termina-

tion of the life estate, took no interest, under the will, which he could devise.

The testator created a contingency but did not provide for it. He did not dispose of one-fourth of the remainder, in the event of the death of Samuel K. without children. This one-fourth part then of whatever of his estate was left by his widow, the life-tenant, at her death must be distributed as intestate estate of Thomas C. Leavitt. *Spear* v. *Fogg*, supra.

But, although Samuel K. took no interest under the will of his father, as an heir of his father, he took one-fourth of the one-fourth of the remainder that was undisposed of; and his widow, as his sole devisee and legatee, will be entitled to his share.

The bill alleges that certain property and property rights were left by the said Elizabeth J. Leavitt, standing in her own name, without any qualification or designation as to the nature of her holdings or the source from which the same was derived; the complainant alleges upon information and belief that the property left as aforesaid was the estate of Thomas C. Leavitt or the proceeds thereof held by Elizabeth J. Leavitt as life-tenant. And the complainant, who is administrator of the estates both of Elizabeth J. and Thomas C. Leavitt, asks the court whether the property shall be administered and distributed as intestate property of Elizabeth J. Leavitt, or under the will of Thomas C. Leavitt.

Although these allegations are admitted in the answers, upon information and belief, we do not think that they are sufficiently definite for the court to authoritatively determine this question. It may be sufficient, however, to say, if the property mentioned in the bill was the estate of Thomas C., or the proceeds thereof and held by Elizabeth J. as life-tenant, that it must be administered and distributed as the property and estate of Thomas C. Leavitt, three-fourths in accordance with the will, and one-fourth as intestate property.

Decree accordingly.

JOHN H. WOLF *vs.* WILLIAM S. B. RUNNELS.

Kennebec. Opinion April 27, 1897.

License. Itinerant Vendor. Stat. 1893, c. 259; 1895, c. 97.

An itinerant vendor, who has obtained the local town license required by Chap. 259 Laws of 1893, as amended by Ch. 97 Laws of 1895, is authorized to do business in such town "so long as such licensee shall in good faith continuously keep, offer and expose for sale the same kind or line of goods specified in his application, except that such license and authority shall in any event terminate and expire on the first day of April next following the date of application."

But if he packs and removes his entire stock of goods from the town, and closes his store, he abandons all rights under his local license, and if later, during the same municipal year, he again desires to do business in the same town, it is necessary for him to procure a new license in the manner required by statute.

AGREED STATEMENT.

The case appears in the opinion.

W. T. Haines, for plaintiff.

F. A. Waldron, City Solicitor, *and F. W. Clair*, for defendant.

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

WISWELL, J. Chapter 259 Laws of 1893, as amended by Chapter 97 Laws of 1895, requires of every itinerant vendor, who desires to do business in this state, to first procure a state license from the secretary of state, and when he intends to do business in any particular town in the state, he shall file his state license and an application for a local license with the collector of taxes for such town. The amount of the local license is a percentage upon the full value of his stock of goods equal to the tax rate of the last preceding taxation in the town, which amount is ascertained by the town assessors.

Having filed his state license and applied for his local license,

and having obtained and paid for the same, an itinerant vendor is authorized to do business in such town "so long as such licensee shall in good faith continuously keep, offer and expose for sale the same kind or line of goods specified in his application, except that such license and authority shall in any event terminate and expire on the first day of April next following the date of application."

The plaintiff, an itinerant vendor who had obtained a state license, came to Waterville in the spring of 1895, after April first, with a stock of goods. He procured a store, obtained a local license in the manner provided by the statute, and commenced offering for sale and selling his goods. After about two weeks he closed his store, packed and removed from the store and from Waterville all of his goods and remained away for a period of about two weeks, when he came back to Waterville with the same stock, except so much as he had sold while away, and with other goods of a like kind which he had added to his stock, and again commenced selling them in the same store previously occupied by him.

The municipal officers demanded as a new license fee a percentage upon the full value of his stock of goods equal to the last preceding tax rate. The plaintiff resisted this claim on the ground that he had a right to continue to expose for sale and to sell his goods under the local license previously obtained. But being compelled to pay the new license fee, he did so under protest and brings this action to recover the same of the collector of taxes, who still held the amount paid by the plaintiff at the commencement of the suit.

We think that the plaintiff's position is untenable, and that the action cannot be maintained. The local license first obtained continued in force so long as he in good faith "continuously" kept, offered and exposed for sale the same kind or line of goods specified in his application, but not longer than the first day of April following. When the plaintiff closed his store and packed and removed his entire stock of goods from the city, he abandoned all rights under his local license, and when later, during the same municipal year, he again desired to do business in the same place it

was necessary for him to again procure a new license in the manner required by statute.

In accordance with the stipulation of the report the entry will be,

Plaintiff nonsuit.

AUGUSTA NATIONAL BANK

vs.

GEORGIE E. HEWINS, and others, Exors.

Kennebec. Opinion May 1, 1897.

Bills and Notes. Interest.

A promissory note payable on a certain time after date with interest at the rate of nine per cent, until paid, carries interest at that rate after the maturity of the note as well as before.

ON EXCEPTIONS BY DEFENDANTS.

This was an action of assumpsit upon a promissory note. The only question raised was whether the note bore interest at nine per cent from date to the time of judgment or only up to the maturity of the note. The presiding justice ruled that the note bore interest at nine per cent beyond maturity and until time of judgment. To this ruling the defendants excepted.

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

The note in question expressly states that it shall be with interest at rate of nine per cent per annum until paid; thus bringing the case entirely within the rule referred to by the court in *Capen* v. *Crowell*, 66 Maine, 282; *Eaton* v. *Boissonnault*, 67 Maine, 540; *Paine* v. *Caswell*, 68 Maine, 80.

The language of R. S., c. 45, is in itself conclusive of this case: "In the absence of an agreement in writing the legal rate of interest is six per cent."

S. and L. Titcomb, for defendants.

The note having located a place for its payment until paid and

there being not a word in the written contract (the note) showing that it was the intention of the parties that the note was to run a longer time than six months, the words "until paid" must be held to mean that the maker until the date of its payment could find the note at the office of E. W. Whitehouse, Augusta, Maine. The words "until paid" must have the same power as applied to "principal" as applied to "interest," for the note says "principal and interest payable at the office of E. W. Whitehouse, Augusta, Maine, until paid."

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

WALTON, J. This is an action upon a promissory note of the following tenor:

$2300. Augusta, Maine, June 2, 1893.

Six months after date, for value received, I promise to pay to the order of E. A. Getchell, the sum of twenty-three hundred dollars, with interest at rate of nine per centum per annum, principal and interest payable at office of E. W. Whitehouse, Augusta, Maine, until paid. E. A. Getchell.

It will be noticed that at the end of the note are the words, "until paid." The only question is whether these words carry interest at the stipulated rate (nine per cent) after the maturity of the note as well as before.

We think they do. They were written into the note for some purpose, and we think there can be no reasonable doubt what that purpose was. We think it must have been for the purpose of guarding against that very construction of the note for which the defendants now contend. It had already been decided that without these words, such a note would draw the stipulated interest till maturity, and only the legal rate of interest (six per cent) thereafter. *Eaton* v. *Boissonnault*, 67 Maine, 540. We think it was to guard against this result that the words, "until paid," were inserted in the note now under consideration. True, the words,

"until paid," are separated from the interest clause by a clause naming the place of payment of the note; but we do not think this separation destroys the effect of the words, or leaves their meaning at all doubtful.

Such in effect was the ruling in the court below; and it is the opinion of the law court that the ruling was correct.

Exceptions overruled.

ANSEL DUDLEY *vs.* POLAND PAPER COMPANY.

Oxford. Opinion May 8, 1897.

Sales. Pleading. Exceptions. Non-suit. Evidence.

When goods are sold to be delivered at a place named at a future time and before delivery they are accidentally lost or destroyed, the loss falls upon the buyer if at the time of the loss the title had passed to him; otherwise the seller must bear the loss.

When the writ contains a count on an account annexed in which the various kinds of goods sued for are accurately specified, *held;* that such a form of declaring is sufficient when the goods sold have been delivered, and by the terms of the sale the price of the goods was to be paid in money. When the price of goods sold is to be paid otherwise than in money, a special count is necessary.

When the defendant's request for an instruction is equivalent to a non-suit, the court may properly withhold the instruction.

A postponement of the admission of evidence during a trial, by order of the court, is not an exclusion, when its admissibility is reserved for further consideration. If such testimony is not offered again, and the attention of the court is not called again to it, an exception will not be sustained on the grounds that it was excluded.

ON MOTION AND EXCEPTIONS BY DEFENDANT.

This was an action of assumpsit to recover the value of certain poplar pulp wood which the plaintiff agreed to sell to the defendant and deliver in the Androscoggin river. The declaration contained an account annexed, the money counts, and a count for goods bargained and sold.

A principal question in controversy was as to the precise time

when the title to the pulp wood passed from the plaintiff to the defendant. The court submitted this question to the jury with full instructions and stated to the jury in the beginning the following: "If it passed when it was surveyed on the banks of the tributaries of the Androscoggin, then a very important balance would be found due the plaintiff. If, on the other hand, that title did not pass, under the mutual understanding and intention of the parties, until the wood was delivered in the Androscoggin river, then a very different balance would be found due, if anything, to the plaintiff. So one of the principal questions, perhaps the principal question, involved here is what was the real intention of the parties in relation to the passing of the title from the plaintiff to the defendant company of that pulp wood in the spring of 1895."

The plaintiff claimed that the title to the poplar wood passed to the defendant at the time of survey on the banks of the streams tributary to the Androscoggin river. The defendant claimed that the title did not pass until the poplar wood was delivered in the Androscoggin river.

The defendant requested the following instructions, among others, which the presiding justice declined to give: (1) In this action plaintiff can recover no part of the contract price; (2) plaintiff can recover none of the advance money mentioned in the contract; (3) plaintiff can recover for only the exact number of cords of poplar actually received by the defendant during the spring and fall of 1895; (4) plaintiff cannot recover from the defendant the price of the value of the poplar left in the tributaries on the Androscoggin river in 1895; (5) plaintiff cannot recover of the defendant for the poplar that was not driven into the Androscoggin river before the fall of 1895; (6) to constitute a delivery of the poplar, mentioned in the contract within the terms thereof, it must have been delivered in the Androscoggin river in the spring of 1895, etc.

The instructions touching these questions given to the jury by the presiding justice, and to which no exception was taken, were full and elaborate.

J. S. Wright and J. P. Swasey, for plaintiff.

W. H. Payson and H. R. Virgin; *and O. H. Hersey*, for defendant.

It is well settled, that while a special contract remains open, i. e., unperformed, the party whose part of it is unperformed can not sue in indebitatus assumpsit to recover a compensation for what he has done, until the whole is completed. This principle is affirmed and acted on in *Cutter* v. *Powell*, 6 T. R. 320; it was also the ground of the decision in *Hulle* v. *Heightman*, 2 East, 145, which principle, the American authors of Smith's Leading Cases say, has never since been questioned.

Counsel also cited: 2 Greenl. Ev. § 104; *Holden Steam Mill* v. *Westervelt*, 67 Maine, 447, and cases; *Slayton* v. *McDonald*, 73 Maine, 50; Broom's Leg. Max. 7 Am. Ed. 651; 1 Chit. Pl. 16 Am. Ed. *350, note (g) and cases; *Charles* v. *Dana*, 14 Maine, 387; *Mitchell* v. *Gile*, 12 N. H. 390.

"The effect of an agreement in the contract of sale, that the seller shall deliver the property sold at some particular place, is sometimes to postpone the vesting of title in the buyer until such delivery is made; . . . . the general rule is that if it is a part of the contract of sale that the seller shall deliver the property sold at some place specified, and receive payment on delivery, title will not pass until such delivery." Benjamin on Sales, p. 325. This is always a question of intention. *Penley* v. *Bessey*, 87 Maine, 532.

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

WALTON, J. When goods are sold to be delivered at a place named at a future time, and, before delivery, they are accidentally lost or destroyed, it often becomes a difficult question to determine whether the buyer or the seller must bear the loss. If at the time of the loss the title had passed to the buyer, he must bear the loss; otherwise the seller must bear the loss. But in many cases it is extremely difficult to determine whether or not the title had passed to the buyer.

This is such a case. The plaintiff agreed to furnish the defend-

ant with a large quantity of pulp wood, to be delivered into the Androscoggin river during the spring of 1895. And a large quantity was so delivered. But some of the logs which had been surveyed remained upon the banks of streams leading into the Androscoggin river, and the next fall or winter were carried out to sea by a freshet and were lost. The question is whether, under the circumstances disclosed by the evidence, the plaintiff or the defendant must bear this loss. The plaintiff claimed in his writ that there was due him a balance of $2,095.25. He obtained a verdict for $969.38. How the jury reached this result we do not know. Perhaps they thought it would be equitable to apportion the loss. One of the questions is whether this verdict is so clearly wrong as to require us to set it aside and grant a new trial. We do not think it is.

The defendant insists that the form of the action is such that the plaintiff should not be allowed to recover. We think the form of the action is well enough. The writ contains a count on an account annexed in which the various lots of logs sued for are accurately specified. Such a form of declaring is sufficient when the goods sold have been delivered, and by the terms of the sale the price of the goods was to be paid in money. When the price of the goods sold was to be paid otherwise than in money, then a special count is necessary. But when, as in this case, the plaintiff claims that the goods have been delivered, and the price is payable in money, a count on an account annexed is sufficient. This mode of declaring has long been sanctioned in this and other states, and its sufficiency in a case like this can not now be questioned. *Cape Elizabeth* v. *Lombard*, 70 Maine, 396.

We think the defendant's requested instructions were properly withheld. If they had been given, the effect would have been equivalent to a nonsuit. We think the evidence was such as to justify submitting the case to the jury; and, as already stated, we do not think their verdict is so clearly wrong as to require us to set it aside.

The defendant claims that evidence was improperly excluded. The record fails to show that the evidence referred to was

excluded. Its admissibility was only reserved for further consideration, and it was not again offered. What took place was this: John Reed, a witness for the plaintiff, was asked on cross-examination to state whether it was the custom on Swift river, and wherever he had driven, before putting wood into the streams to drive, to know whether the booms at the place of destination were out or not. The plaintiff's counsel objected, and the court said, "Omit that for the present." The defendant's counsel then put substantially the same question in another form, and the court said, "If that becomes material you may recall him; I will save your rights in the matter." And later in the trial the court allowed the defendant to introduce evidence of the custom referred to. And Mr. Reed was again put upon the stand, but the question was not again asked him. The right to again offer the testimony of Mr. Reed upon the point was reserved to the defendant, and Mr. Reed was again upon the stand, and the defendant had an opportunity to again offer his testimony in relation to the custom; and if the defendant had again offered it, we can not entertain a doubt that it would have been received.

But we rest our decision upon the ground that a postponement is not an exclusion; that when the admissibility of evidence is reserved for further consideration, and it is not again offered, and the attention of the court is not again called to it, an exception can not be sustained on the ground that it was excluded. We hold that in such cases postponement is not exclusion, and can not be so treated.

Motion and Exceptions overruled.

MOSES M. LIBBY *vs.* GEORGE W. TOWLE.

Oxford. Opinion May 8, 1897.

Slander. Damage.

An excessive verdict in a slander suit set aside and a new trial granted, it appearing that the conduct of the plaintiff had contributed in part to the injury of his business, and for which he claimed special damages.

Held; that verdicts are subject to revision of the court; and it is as much the duty of the court to protect parties against unconscionable verdicts as it is to sustain just ones.

ON MOTION BY DEFENDANT.

This was an action on the case for slander, in which there were ten distinct and separate utterances declared on and set out in the plaintiff's declaration, as follows, viz: (1) "That he took the note and that Libby had destroyed the note." (2) "That Libby signed the note but took it." (3) "That Libby knows where that note is." (4) "You took that note and have got it, or know where it is, or have destroyed it." (5) "Moses, there is a hard report around town about you. They say you took that note and have got it, or know where it is, or have destroyed it." (6) "I think Moses stole, or took, or knows where it is." (7) "Libby took; I know it." (8) "Dod darn it all, I can't produce the note, you stole the note and know where it is or destroyed it." (9) "He knew Mose Libby stole that note, dod darn him." (10) "That said plaintiff knew where the note was or had made way with it."

The jury rendered a verdict for $3000 in favor of the plaintiff.

The case appears in the opinion.

J. P. Swasey, for plaintiff.

In actions of slander, evidence of words of similar import to those charged in the declaration spoken by the defendant, both before and after the commencement of the action, is admissible to show malice. *Smith* v. *Wyman*, 16 Maine, 13.

From words, in themselves actionable, the law implies malice and that some damages arise therefrom. In addition to the implication of malice, a plaintiff may prove express malice for the purpose of increasing the amount of damages. For this purpose he may prove that the defendant repeated the slander after action was brought. The repetition is not to be viewed as a substantive ground of recovery, but only to illustrate the motive of the former speaking. *True* v. *Plumley*, 36 Maine, 466.

A repetition of slander is admissible to show malice. *Hastings* v. *Stetson*, 130 Mass. 293.

The plaintiff is not only entitled to damages, but exemplary damages are allowable in an action of slander. *Harmon* v. *Harmon*, 61 Maine, 233.

When the slanderous words charged were spoken wantonly and maliciously, the plaintiff is entitled to recover punitive or exemplary damages, and the assessment thereof is almost entirely in the discretion of the jury. *Cahill* v. *Murphy*, 94 Cal. 29.

Exemplary damages may be recovered in an action for slander when defamatory words are spoken with implied malice, as well as when they are spoken with express malice, and malice is implied from the wilful utterances of falsehoods concerning another, whereby injury is done to his character; and whether such damages should be given in any case is a matter within the discretion of the jury. *Callahan* v. *Ingram*, 122 Mo. 355.

In actions for slander, libel and other personal torts, the court will not grant a new trial on the ground of excessive damages unless the amount be so flagrantly extravagant as to show that the jury must have been actuated by passion, partiality, prejudice or corruption. *Coleman* v. *Southwick*, 9 Johns. 45, and cases cited; *Rand* v. *Reddington*, 13 N. H. 72.

In cases of tort, the court will not set aside a verdict on the ground of excessive damages, unless, from their magnitude, compared with the circumstances of the case, it be manifest that the jury acted intemperately or were influenced by passion, partiality, prejudice or corruption. *Tompson* v. *Mussey*, 3 Maine, 305; *Williams* v. *Gilman*, 3 Maine, 276; *Jacobs* v. *Bangor*, 16 Maine, 187;

Gilbert v. *Woodbury*, 22 Maine, 246; *Kimball* v. *Bath*, 38 Maine, 219.

When a verdict is not so clearly excessive as to create a belief that the jury was influenced by improper motives, or fell into some mistake in making their computation, the court has no right to set the verdict aside. *Field* v. *Plaisted*, 75 Maine, 476, and cases cited.

In actions of slander, we regard the law as well settled that the defendant's wealth is an element which goes to make up his rank and influence in society and therefore his power to injure the plaintiff by his speech, and it is a fact not to be overlooked by the jury in estimating damages. *Humphries* v. *Parker*, 52 Maine, 502.

Geo. F. Clifford and E. F. Gentleman, for defendant.

All of these utterances complained of, with the exception of the sixth, eighth and ninth set of words, are not actionable in themselves. There is no distinct averment, in the pleadings, that these words in themselves bear a specific meaning which is in itself actionable. *Nye* v. *Otis*, 8 Mass. 122; *Snell* v. *Snow*, 13 Met. 278; *Edgerley* v. *Swain*, 32 N. H. 478; *Brown* v. *Brown*, 14 Maine, 317; *Bullock* v. *Koon*, 9 Cow. (N. Y.) 30.

They are only actionable by reason of special damages laid in the declaration.

Where words not actionable per se, but actionable because of special damages alleged, such damages must be explicitly claimed on the pleadings, and strictly proved at the trial. Special damages will not be supplied nor inferred argumentatively. *Barnes* v. *Trundy*, 31 Maine, 321; *Cook* v. *Cook*, 100 Mass. 194; *Bloss* v. *Tobey*, 2 Pick. 326; *Snell* v. *Snow*, 13 Met. 278; *Swan* v. *Tappan*, 5 Cush. 104.

The testimony of persons to whom the words were spoken is alone admissible to prove such special damages. *Dicken* v. *Shepherd*, 22 Md. 399.

Special damages alleged in the declaration of plaintiff's writ are severed from any relationship to defendant's word or act. Plaintiff was scarcely susceptible of damage in his business standing or

credit. His business was small; credit limited to the sum of $250 with the house of Milliken, Tomlison Company, who were his principal creditors; he had twice compromised with his creditors; his stock of goods was decreasing; he was not meeting his payments to his wholesalers; in short, his business condition and standing invited and provoked his final disaster, to which, as the case shows, this defendant in no wise contributed.

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

WALTON, J. This is an action of slander and the plaintiff has obtained a verdict for $3000. It is the opinion of the court that this amount is clearly excessive.

Briefly stated, the case is this:—The plaintiff and his wife, after living together about nine years, concluded to separate. The title to their property, real and personal, was held by the wife. But she agreed that if her husband would pay her $650 for the furniture, she would give him a deed of the real estate. She did so, and took from him what she supposed was a note for that sum, payable in one year, and a mortgage of the furniture to secure it. She left these papers with the defendant, who was her uncle, for safe keeping. Her uncle soon afterwards discovered that the note was not signed, and he called the attention of the plaintiff to that fact. The latter said it was an oversight, and offered to sign the note then; and the papers were handed to him to enable him to do so. The defendant left the plaintiff for a few minutes to attend to some other business, and he says that when he returned he put the envelope, which he supposed contained the note and the mortgage, into a pigeon-hole in a desk in his store. But afterwards, when the year had expired, and the plaintiff and his wife came to him and called for the papers, the note was missing; and that, after a most diligent search, he could not find it. And so far as appears it never has been found. Vexed at the loss of a paper which had been left with him for safe keeping, and provoked by what seemed to him to be the obstinate and unreasonable refusal

of the plaintiff to accept a receipt on an indemnifying bond, or in any way to settle with his wife without the production of the note, the defendant finally expressed his opinion or belief that the plaintiff knew what had become of the note. And one witness (Nancy Towle) testifies that on one occasion, when she was at the defendant's house, she asked him about the note, and he said the plaintiff stole it.

This charge is the basis of the present suit; and, as already stated, the plaintiff has obtained a verdict for $3000.

The plaintiff says that he was much hurt and prejudiced in his good name and credit as a merchant. His credit does appear to have been somewhat impaired. But he had recently, and while the title to his property, real and personal, was held by his wife, obtained a discharge from his debts by proceedings in the court of insolvency; and he states, and, if we understand him correctly, somewhat boastfully, that while he paid some of his creditors in full, he left others to wait till he was more able to pay. Such a proceeding may be very gratifying to one's desire to reward friends and punish enemies; but we think all will agree that its tendency is to leave one's credit as a merchant somewhat impaired. And we think the evidence shows very clearly that it was this treatment of his creditors, and not what the defendant said, which weakened and ultimately wrecked the plaintiff's credit as a merchant.

It is undoubtedly true, as said by the able and learned counsel for the plaintiff, that much must be left to the sound judgment and discretion of the jury in this class of cases, and that they are allowed, in proper cases, to add punitive damages to the actual damages. But it is also true that their verdicts are always subject to the revision of the court, and that it is as much the duty of the court to protect parties against unconscionable verdicts as it is to sustain just ones. And the court feels that in this case the verdict is monstrously disproportionate, and that it is clearly their duty to set it aside and grant a new trial.

Motion sustained.

STATE *vs.* MAINE CENTRAL RAILROAD COMPANY.

Sagadahoc. Opinion May 11, 1897.

Railroads. Death. Remedy. Civil Action. Stat. 1891, c. 124.

An indictment against a railroad corporation for negligently causing the death of a person is no longer maintainable; the remedy is now by a civil suit for damages.

Held; that the Statute of 1891, c. 124, supersedes and abrogates the remedy by indictment in all cases for which it provides a remedy by a civil action.

ON EXCEPTIONS BY DEFENDANT.

This was an indictment against the Maine Central Railroad for the death of one Brown, killed October 13, 1893. The indictment was brought under R. S., c. 51, § 68. To this indictment the defendant demurred specially on the ground that the indictment statute was repealed by implication by the Stat. of 1891, c. 124.

By agreement of parties and leave of the court, this demurrer was filed with the right to plead over. The presiding justice overruled the demurrer pro forma, and the defendant excepted.

Grant Rogers, County Attorney, *H. M. Heath and C. L. Andrews*, for State.

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

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

WALTON, J. The question is whether the Act of 1891, c. 124, giving a remedy by civil action for an injury causing death superseded the previously existing remedy by indictment.

We think it did. The remedy by indictment was always regarded as anomalous and incongruous. It was essentially a civil suit, prosecuted for the benefit of private parties; but criminal in form, and prosecuted at the public expense. In some particulars it was subject to the rules of the criminal law, and in others it was governed by rules applicable only to civil suits. It was applicable

to only a small class of cases, leaving other injuries of a similar character unprovided for. We think the Act of 1891, c. 124, was intended to remedy these evils; that the purpose of the legislature was to provide a more appropriate remedy and extend its application.

The Act of 1891, c. 124, after describing the nature of the injuries for which redress is to be had, then declares that in "every such case" the remedy shall be by an action for damages. This language clearly includes the cases in which indictments had before been maintainable; and if the new remedy does not supersede the old one, two conflicting remedies will exist for one and the same class of injuries. It is impossible to believe that the legislature intended such a result. And our conclusion is that the Act of 1891, c. 124, supersedes and abrogates the remedy by indictment in all cases for which it provides a remedy by a civil action; and that an indictment against a railroad corporation for negligently causing the death of a person is no longer maintainable; that the remedy is now by a civil suit for damages; and, consequently, that the indictment in this case can not be sustained.

Exceptions sustained.

JOHN S. GLIDDEN, in equity,

vs.

LIZZETT KORTER AND ETTA GLIDDEN.

Knox. Opinion May 12, 1897.

Equity. Specific Performance.

To justify the court sitting in equity to compel specific performance and compel a defendant to make a conveyance, the plaintiff must show that he has a clear title to the conveyance prayed for. A doubtful or contingent title is not sufficient; it must be a complete and perfected title.

Held; that the plaintiff does not have such a title. His right to the conveyance prayed for depended upon the happening of a future event, and the event has not happened.

The language of the bond for a deed held by the plaintiff was this: "The deed, at the end of one year from date, to be given at the request of the said John S. Glidden, (the obligee) provided the said Jones and Glidden agree." The obligor Jones died within the year; and the agreement and the demand for a deed were never made. *Held;* that the right to the deed was contingent. It depended upon the happening of a future event, an event which might or might not happen; and such a right is contingent. If the event happened, the right is perfected. If it does not happen, the right remains imperfect.

ON REPORT.

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

This was a bill in equity to compel the heirs of Sarah J. Jones, deceased, to make a conveyance of the real estate described in a bond given by her to the plaintiff, bearing date August 11, 1893, and of the following tenor:

"Know all men by these presents, that I, Sarah J. Jones of Washington in the County of Knox, stand firmly bound and obliged unto John S. Glidden, his heirs and assigns, in the sum of one thousand dollars to the payment of which I bind myself and my heirs firmly by these presents.

"Sealed with my seal and dated the eleventh day of August, A. D. 1893.

"The condition of this obligation is such that whereas the said

Sarah J. Jones has this eleventh day of August, A. D., 1893, agreed to deed in one year from date the land deeded to her by Nancy Tribou, May 19, 1888, and recorded in Knox Registry of Deeds, Book 75, Page 580, to which reference may be had for a more particular description. Also at her death that all personal property which she may die possessed to be the sole property of the said John S. Glidden. The deed at the end of one year from date to be given at the request of said John S. Glidden, provided the said Jones and Glidden agree. The said Glidden or his heirs shall well and truly support the said Sarah J. Jones at her house in Washington, meaning the Jones house, provide her with suitable clothing and food, care in sickness, medicine and medical attendance. The said Glidden to pay all taxes legally assessed upon said property. The said Jones to have the use of the front room in the chamber and front room below fronting the hotel. The main travel in and out of said house by said inmates to be from the back or rear door.

"The said Glidden to keep said buildings in good repair. The said Glidden to furnish said Jones a suitable team to ride on suitable occasions.

"Now, if the said John S. Glidden shall well and truly perform all the conditions set forth in the foregoing, then this bond shall be void, otherwise to remain in full force and virtue.

Sarah J. Jones. [Seal.]

Signed, sealed and delivered
in presence of
L. M. Staples."

Other facts appear in the opinion.

T. P. Pierce, for plaintiff.

Construction and effect of bond: Counsel cited *Linscott* v. *Buck*, 33 Maine, 534.

Plaintiff and wife competent witnesses: *Woodbury* v. *Gardner*, 77 Maine, 68; *Pierce* v. *Rollins*, 83 Maine, 117.

Death of Mrs. Jones: *Paine v. Miller*, 6 Ves. 349; *Coles* v. *Trecothic*, 9 Ves. 244; 1 Beach, Mod. Eq. § 31; *Thompson* v.

Gould, 20 Pick. 134; 3 Pom. Eq. § 1400; *Miller* v. *Nicholas*, 1 Bailey, (So. Car.) 226; *Woodbury* v. *Gardner*, supra.

C. E. and A. S. Littlefield, for Mrs. Korter.

Plaintiff and wife not competent witnesses: *Jones* v. *Simpson*, 59 Maine, 180; *Hinckley* v. *Hinckley*, 79 Maine, 320.

Contract not binding: *Buckmaster* v. *Consumers Ice Co.*, 5 Daly, 316; *Huff* v. *Shedard*, 58 Missouri, 247; 2 Addison on Contracts, ed. 1883, Abbott's notes, p. 1147 and notes.

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

WALTON, J. This is a suit in equity. The plaintiff says that in consideration of an agreement on his part to support one Sarah J. Jones, she agreed to convey to him her real estate, and that, at her death, he should have all of her personal property, and that she died without having conveyed her real estate to him; and he prays that her two daughters, who are her only heirs, and one of whom is his own wife, may be compelled to make the conveyance. His wife does not resist; but the other daughter (Mrs. Korter) does.

There is no doubt of the power of the court to make such a decree; but to justify its exercise, the plaintiff must show that he has a clear title to the conveyance prayed for. A doubtful or a contingent title is not sufficient. It must be a complete and perfected title.

We do not think the plaintiff has or ever had such a title. His right to the conveyance prayed for was contingent at the beginning, and it has never been perfected. His right to the conveyance prayed for depended upon the happening of a future event, and the event has not happened.

The contract on which the plaintiff relies is found in the conditions of a bond given by Mrs. Jones to him. The contract is very imperfectly stated, and it is not free from ambiguity. But we infer from the language used that Mrs. Jones, at least, and perhaps the plaintiff, were apprehensive that they might not be able to live

together pleasantly; for it was stipulated that the deed to the plaintiff should not be given till the expiration of a year, and that it should not then be given, unless they should be able to agree. The language of the bond is this: "The deed, at the end of one year from date, to be given at the request of the said John S. Glidden, provided the said Jones and Glidden agree."

It is plain therefore that the right to a deed was contingent. It depended upon the happening of a future event, an event which might or might not happen. Such a right is contingent. If the event happens, the right is perfected. If it does not happen, the right remains imperfect.

In this case the event did not happen. Mrs. Jones died within the year. She lived with the plaintiff only three months, at the end of which time she died of pneumonia, having been sick only eight days. The year's test was cut short, and the agreement, and the demand for a deed, which were necessary to complete the plaintiff's right to a conveyance, were never made. No obligation rested upon Mrs. Jones at the time of her death to make the conveyance prayed for, and of course no such obligation descended to her heirs.

The support furnished Mrs. Jones was in her own house. She did not go to the plaintiff's house; he moved into her house. And the plaintiff concedes that the entire expense incurred by him for her support, including her doctor's bill, in addition to her seat at his table, would not exceed forty or fifty dollars. He had the use of her furniture and her carriages; and since her death, he has retained the possession of her furniture; and his wife has claimed the right to dispose of her mother's clothing; and she has sold one article of it (a fur-lined cape) for twenty-two dollars. Mrs. Jones left about two hundred and fifty dollars in a savings bank, and the plaintiff has kept the savings bank book. Surely, the balance due the plaintiff, if anything, upon a quantum meruit, must be very small. His own wife is one of the two heirs of the deceased; and, of course, inherits one-half of her estate. And it seems to the court that it would be very harsh indeed to compel the other daughter (Mrs. Korter) to convey her interest in her mother's real

estate to the plaintiff upon a claim so weak. And the court declines to do it.

Bill dismissed, with costs for Mrs. Korter.

STATE *vs.* JOHN HERSOM.

Kennebec. Opinion May 13, 1897.

Assault. Presumption. Evidence. Practice. R. S., c. 75, § 77.

The Superior Court for Kennebec County has authority, by section 77 of Chapter 75 R. S., to order that a certified copy of a bill of exceptions taken in a criminal case in that court, together with the written argument of counsel, be transmitted within thirty days from the date of the order to the Chief Justice for a decision of the same by the law court; there being no ruling that the exceptions are frivolous or intended for delay.

A photograph, like a plan or other picture, if its correctness be proved, may be used in a trial before a jury to illustrate the evidence in the case.

The statutory term of assault with intent to commit manslaughter, means an assault with an intent to commit an act which, if committed, would constitute the offense of manslaughter.

The presumption that a person intends the natural consequences of his act does not apply in a case where the circumstances show that a respondent threw a rock at a complainant and missed hitting him; in such case he intended one act and accidentally committed another, the presumption being thereby negatived.

ON EXCEPTIONS BY DEFENDANT.

The defendant having been convicted of an assault, before the Superior Court for Kennebec County, took exceptions which are stated in the opinion of the court.

G. W. Heselton, County Attorney, for State.

S. S. Brown, Jos. Williamson, Jr., and L. A. Burleigh, for defendant.

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

PETERS, C. J. The counsel for the respondent energetically protest against the order of the Superior Court of Kennebec county

that these exceptions be argued in writing, and that the arguments be transmitted to the Chief Justice of this court within thirty days after the date of such order. There being no ruling or suggestion that the exceptions are frivolous or intended for delay, we do not perceive why the judge of that court may not make such an order by virtue of the power conferred on him by section seventy-five of chapter seventy-seven of the revised statutes, relating to procedure in the superior courts of the state. That section provides that "all exceptions arising within the exclusive jurisdiction of either of said superior courts may be certified at once to the chief justice of the supreme judicial court, and shall, when so certified, be argued in writing on both sides within thirty days thereafter, unless the time for good cause be extended by the judge of said court." This seems to be a general provision applicable to civil and criminal cases alike. We think, however, that this discretionary power of the judge should be sparingly exercised in important criminal cases, for the reason that the order deprives a respondent of the privilege, which he may consider very valuable, of discussing his case before the court of last resort in open session. Anciently, personal presence of the accused was considered an indispensable necessity in all the stages of a trial until the final result.

Complaint is made by the respondent that a photograph of the room, and fixtures therein, in which the assault was alleged to have been committed by the respondent, was admitted in evidence. The correctness of the photograph was certified to by witnesses, and the jury visited and inspected the room for themselves. The defense had the same opportunity that the government had to ascertain how closely and correctly the picture represented the appearance of the room. It seems to us the criticisms by the defense are not well founded. Any plan or picture may be admitted in the discretion of the court in illustration or explanation of the testimony introduced at a trial, and many courts have so decided the question.

The accusation against the respondent is that he assaulted the complainant by throwing a rock at his head while the latter was standing behind the counter of a hotel office, and that the rock missed his head, striking against a key-rack or board just out of

range with his head. A specious contention was set up at the trial by the defense that, on the principle that a person is presumed to intend the probable consequences of his act, the respondent should be presumed as intending to miss the complainant and not to hit him. The judge correctly ruled, we think, that the principle invoked by the defense does not apply where a criminal act was intended but not accomplished. The maxim appealed to is not of universal application. A person does not intend to do an act unintentionally. It would lead to the absurd proposition of saying that if a man intended to hurt another but accidentally hurt himself instead of the other person, he consequently intended to hurt himself. Anything done accidentally cannot be done intentionally. Had the respondent hit a person standing where the key-board was, although he aimed his rock at the head of the complainant, and there were an indictment against him for an assault on such other person, then the presumption invoked here would be applicable. *State* v. *Gilman*, 69 Maine, 163. In fact there is no such legal presumption. It is merely a presumption of fact which the law sometimes sanctions, or approves, or allows a jury to act upon. And the admission that it is an inference of fact and not of law proves that its application depends on varying circumstances. Whar. Crim. Ev. (8th ed.) sec. 734, and following sections.

It is urged that the terms, an assault with intent to commit murder, or to commit manslaughter, are illogical and not intelligible to common minds. But we think the difficulty disappears when accompanied with the explanation that an assault of that kind means with the intention to commit such criminal acts as would, when committed, amount to the one crime or the other. It is not to be supposed that any criminal really appreciates in his own mind, when meditating the commission of crime, the exact degree of the offense he may be guilty of, whether murder in the first or second degree or manslaughter, and that can only be determined by the result of his criminal act. And here it is where the presumption before discussed has an application, and where a jury would be authorized to say that he intended to do the particular act actually done by him.

Exceptions overruled.

MARY H. FOREN *vs.* FOUNTAIN RODICK, and another.

Hancock. Opinion May 21, 1897.

Negligence. Landlord. Entrance to Cellar.

The plaintiff sustained severe personal injuries by falling into the cellar of Rodick Block in Bar Harbor. The first floor of the block is divided into stores, and the second floor into rooms which are leased for offices. The main entrance to the stairway leading to the second floor is about midway of the length of the building, and is closed by double doors opening inward to a short landing at the foot of the staircase. Twenty-two and one-half inches from these doors, and at the same height from the sidewalk, is a single door opening from the sidewalk inward to the cellar. There is no staircase by which to enter the cellar and no other landing than the top of the cellar wall. A crude ladder, leading from the doorway to the bottom of the cellar, afforded the means of descent. This cellar door was unfastened on the evening of the accident, and when the door was open there was no railing or other safeguard to prevent a person from stepping over the cellar wall and falling into the cellar.

One set of offices on the second floor was occupied at the time in question by a practicing physician, and his sign was affixed to the outside of the building between the cellar door and the main entrance. On the evening of the accident the plaintiff was passing along on the sidewalk intending to go up to the physician's office. She was not familiar with the premises, but seeing the doctor's sign and supposing that it indicated the cellar door as the place of entrance, she opened the door, stepped over the wall and fell to the bottom of the cellar.

Held; that the conditions connected with the approach to the main entrance of the building were misleading and dangerous; that in this respect the building was improperly constructed and negligently maintained; and that the plaintiff was on the premises by the implied invitation of the defendants, on legitimate business, in the exercise of such care and caution as persons of reasonable prudence and discretion usually exercise under such circumstances.

ON REPORT.

The case appears in the opinion.

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

John A. Peters Jr., and Chas. H. Wood, for defendants.

Counsel cited: *Gallagher* v. *Proctor*, 84 Maine, 41; *Murphy* v. *Deane*, 101 Mass. 455; *Lee* v. *McLaughlin*, 86 Maine, 410;

Clifford v. *Atlantic Cotton Mills*, 146 Mass. 47; *Lowell* v. *Spaulding*, 4 Cush. 277; *McCarthy* v. *York County Savings Bank*, 74 Maine, 315; *Reardon* v. *Thompson*, 149 Mass. 267; *Metcalfe* v. *Cunard Steamship Co.*, 147 Mass. 66; *Walker* v. *Winstanley*, 155 Mass. 301; *Mellen* v. *Morrill*, 126 Mass. 545; *Howland* v. *Vincent*, 10 Met. 371.

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

WHITEHOUSE, J. On the fifteenth day of August, 1895, the plaintiff sustained severe personal injuries by falling into the cellar of "Rodick Block" owned by the defendants and situated at the corner of Main and Cottage Streets in Bar Harbor. It is claimed in this action that the defendants are liable in damages by reason of the improper construction and careless management of the cellar door adjacent to the passage way leading to the second story of the building. The evidence is reported for the consideration of the law court, and by virtue of an agreement between the parties, if judgment is rendered for the plaintiff, it shall be for the sum of $800.

On Cottage Street, Rodick Block stands substantially on the line of the street, the wall of the building being flush with the sidewalk. The block is devoted entirely to business purposes. The first floor is divided into stores, and the second floor into rooms which are leased for offices. The main entrance to the stairway leading to the second floor is from Cottage Street, about midway of the length of the building. It is about four feet in width, and is closed by double doors opening inward to a short landing at the foot of the staircase. Twenty-two and one-half inches at the left of these doors, as one faces the building, and at the same height from the sidewalk, is a single door opening from the sidewalk inward to the cellar. There is no staircase by which to enter the cellar and no other landing than the top of the cellar wall. The cellar was eight feet and four inches deep and the descent was ordinarily made by a crude ladder leading from the doorway to the

bottom of the cellar. This cellar door appears to have been unfastened a greater portion of the time, and frequently ajar, during the summer of 1895. It was unfastened on the evening of the fifteenth of August when the accident happened. When this door was open there was no railing or other safeguard, and no warning sign of any kind to prevent a person from stepping over the cellar wall and falling to the bottom of the cellar.

The block was built under the personal direction and supervision of the defendants. At the time of the accident all the stores on the first floor, and all the offices on the second floor with a single exception, were occupied by the defendants' tenants to whom they had been leased. It is not controverted that the defendants retained the control, which the landlord usually has and exercises, over the building and its appurtenances, and had charge of the general approaches, entrances, stairways and halls. The cellar had not been leased to any tenant exclusively, but the defendants themselves occasionally used it; and it satisfactorily appears that they had the same control over the cellar door and the entrance to the cellar as over the main entrance and stairway leading to the second floor. By a reservation in one of the leases, the defendants also had the exclusive use of a fireproof vault in one of the stores on the first floor, and one of them went there nearly every day.

One set of offices on the second floor was occupied at the time in question by Geo. R. Hagerty, a practicing physician, and the sign bearing the name "G. R. Hagerty, M. D.," was affixed to the outside of the building, a few feet above the sidewalk, one end being fastened to the casing on the right hand side of the cellar door and the other end to the casing on the left hand of the main entrance door.

About nine o'clock, on the evening in question, the plaintiff and a lady friend were returning from a "Mission meeting," and walked along on Cottage Street by the side of Rodick block, the plaintiff intending to visit Dr. Hagerty's office to consult him professionally. Being engaged in conversation they passed beyond the main entrance and turned to retrace their steps. What then happened is thus described in the plaintiff's testimony: "I was

looking for the doctor's sign—Doctor George Hagerty. I saw that sign on the right side of the cellar door, on the casing. I said to Mrs. Lewis 'Here's the door now.' I opened the door with my right hand. I took hold of the knob of the door. I stepped with my left foot forward and fell. Then I remember of hearing as it were in the distance a rumbling noise. Then everything was a blank. . . . . When I opened the door, I did not look for anything, because I was so sure of a footing. I opened the door and went right in. . . . . I had never been to Dr. Hagerty's office before. I had never been on the second floor of the Rodick block before. . . . . Before opening the door leading into the cellar I did not see the other door, the entrance into the hallway that goes up. The door that I opened was not fastened in any way. When I saw the doctor's sign on the door I did not think I had to look after any further door than that one. . . . . I supposed that the door led to the entry way that went to the doctor's office as the doctor's sign was on the door."

Under these circumstances, upon well-settled and familiar rules of law, all persons having occasion to visit any of the offices on the second floor on legitimate business with any of the defendants' tenants, had an implied invitation from the defendants to use the common entrance and passage way for that purpose; and the defendants owed a duty to all such persons which carried with it an obligation to exercise reasonable care and prudence to provide a safe and suitable entrance to such offices, and to have the approaches thereto so constructed and maintained that visitors would not be liable to step into dangerous pitfalls by reason of misleading doors and deceptive landings. *Stratton* v. *Staples*, 59 Maine, 94; *Campbell* v. *Portland Sugar Co.*, 62 Maine, 552; *Sawyer* v. *McGillicuddy*, 81 Maine, 318; *Shipley* v. *Fifty Associates*, 101 Mass. 251; *Readman* v. *Conway*, 126 Mass. 374; *Looney* v. *McLean*, 129 Mass. 33; *Learoyd* v. *Godfrey*, 138 Mass. 315; *Gordon* v. *Cummings*, 152 Mass. 513; *Hayward* v. *Miller*, 94 Ill. 349, (S. C. 34 Am. Rep. 229); *Camp* v. *Wood*, 76 N. Y. 92; *Gilloon* v. *Reilly*, 50 N. J. L. 26.

In *Sawyer* v. *McGillicuddy*, 81 Maine, 318, the defendant was

the owner of the building in question including a common stairway provided for the accommodation of the different tenants in the upper part of the building. The plaintiff was injured by reason of a defect in the landing at the foot of the stairway, and the court say: "The defendant preferred to make one passageway for all, rather than one for each. This was an invitation, and inducement, for all who needed such accommodation to come and pass over this passage way. It was a way provided for them to pass over precisely as a man provides a way for his customers to get to his place of business, and the same implied covenant to keep in safe and convenient repair must exist as much in the one case as in the other."

In *Stratton* v. *Staples*, 59 Maine, 94, the facts bear an instructive analogy to the present case. The defendant was the owner of the block of four stores nearly opposite the Court House in Augusta. The entrance to the south store occupied by the defendant's tenant as a drug store was up four narrow steps, immediately north of which was a descending rollway leading to the basement of the block. In front of the stores north of the rollway was a continuous platform extending from the rollway of the block to the north end of the block. The rollway was unprovided with railing or other safeguard except a buttress rising nine inches above the level of the platform. The plaintiff went upon the premises in the evening for the purpose of having a business interview with the defendant, and not knowing which one of the stores was occupied by him she went upon the platform near the north end of the building and looked at the doors as she walked along to ascertain. Seeing a light in the drug store at the south end, she decided to go in there and inquire for him, and not knowing of the existence of the rollway but supposing that the platform continued past the entrance to the drug store at the south end, she walked directly on, stumbled over the northerly buttress and fell into the rollway. Mr. Justice CUTTING presiding instructed the jury that, "for all persons who had occasion to go upon the platform in order to enter either of the stores on legitimate business, he would be liable for all damages occasioned by these erections provided they were unsafe or dangerous."

In *Gordon* v. *Cummings*, 152 Mass. 513, which more closely resembles the case at bar, the plaintiff was injured by falling into an elevator-well which communicated directly with the street by an opening provided with a sliding door and a chain to guard it. Separated from the opening by a granite post a foot wide was an open doorway of about the same size and construction and on the same level from the street, which led to the common entry of the building. At the time of the accident the elevator opening was not protected by the chain, and the plaintiff mistook it for the open doorway. In the opinion the court say: "He had a right to suppose that, when seeking to enter where he had a right to go, he would not be exposed to this danger, and that an entrance by its side, easily to be mistaken for it, would not be left open and unenclosed by any barrier at a time when it was not in use. . . . If the defendants had induced, or invited through their tenants, the plaintiff to enter at Number 619 Albany Street, so far as the access thereto was under their own control, it was their duty to see that this access was not endangered by their negligence in the management of the other parts of their building, in order that a person rightfully seeking to enter should not be exposed to the liability of a fall into an opening so constructed that it might well be mistaken for the proper entrance."

So in *Hayward* v. *Miller*, 94 Ill. 349, the plaintiff was a guest at a hotel kept by the defendant, and was assigned to room thirty-eight on the second floor. Adjoining that room on the same side of the hall was a door resembling the door of the room, only two and a half feet distant communicating with an elevator-well.

The door of the plaintiff's room and of the elevator-well were numbered 38 and 40 respectively, and had knobs exactly alike. The plaintiff proceeded as he supposed to room thirty-eight, but by mistake opened the door numbered forty and stepping in fell to the basement through the opening. The court say: "The proprietor of a hotel to which he invites the public to come that he may gain thereby, has no right to permit the existence of such an opening as this one was unless suitably guarded, that the slightest mistake on the part of the guest might not prove fatal. Had the plaintiff

been intent on observing the numbers on the door, he might have discovered the room he wished to enter, but by merest accident he opened the next door and this slight inattention was the cause of his severe injuries. The opening ought to have been better protected than it was and the omission to do so under the circumstances proven, may well be attributed to the defendant as gross negligence."

The conclusion is irresistible in the case at bar that the maintenance of the unfastened door and unguarded entrance to the cellar, in close proximity to the main entrance to the second floor of the building, without any sign or warning to distinguish the one from the other, and the attachment of the professional sign of a tenant to the building in such a position between the two doors as to leave it uncertain to which entrance it was designed to give direction, rendered the conditions connected with the approach to the main entrance of the building, misleading and dangerous. In this respect the building was improperly constructed and negligently maintained. There is testimony in behalf of the defendants, it is true, that Dr. Hagerty's sign was put up without their knowledge, but one of them made daily visits to the premises, and if he was not aware of the position of the sign, he might have become so by the exercise of reasonable and ordinary care and attention.

But it is earnestly contended by the learned counsel for the defendants that even if they failed to discharge the obligations resting upon them respecting the construction and management of the building and its approaches, the plaintiff is not entitled to recover by reason of her own contributory negligence at the time of the accident.

Whether the plaintiff was in the exercise of due care and caution is a question involving more difficulty than that of the defendants' negligence. She had lived in Bar Harbor for more than three years, and there is evidence tending to show that she had visited Dr. Hagerty's office before. She had frequently passed the block, and had visited some of the stores several times. The double doors of the main entrance were open, the street and side-

walk and to some extent the landing at the entrance were lighted by electric lights, and the cellar was well provided with windows. If she had observed the situation more attentively, and exercised greater caution, she undoubtedly might have discovered, on opening the cellar door, that there was no stairway there leading to the second floor, and that there was a cellarway without stairs below. In answer to the question by defendants' counsel: "Did you take pains to know where you were stepping" the plaintiff herself says: "No, sir! If I had, I should not have gone down there." In other words, if she had not felt satisfied that the door she opened led to the second floor, she would not have opened it; being so satisfied she did not feel the necessity of further examination. She was confident that she would step onto the landing at the foot of the main stairway. Even if she had been up stairs before she was not familiar with the premises or its approaches. She was not aware that the doors of the main entrance were usually open.

She saw a door having the outward indication of a safe and regular entrance, opening directly from the sidewalk, with the doctor's sign on the casing apparently inviting her to enter. She turned the knob, and the door readily yielded "about the same as any door." She says it was dark when she opened the door. There was nothing to suggest a "yawning abyss." The existing condition was not instantly manifest, but suspecting no danger she naturally stepped over the threshold simultaneously with the inward swing of the door. She was seeking to enter the building by the implied invitation of the defendants. She had a right to expect reasonable safety and convenience in the approaches. She was not required to use extraordinary precaution, but only such ordinary care and caution as persons of reasonable prudence, care and discretion usually and ordinarily exercise under such circumstances. And while the question is not free from doubt, it is the opinion of the court, after carefully weighing all of the evidence, that there is a preponderance in support of the proposition that the plaintiff was not guilty of contributory negligence, but may fairly be deemed to have been in the exercise of ordinary care.

Judgment for plaintiff.

FRED S. SAUNDERS *vs.* LYDIA S. SAUNDERS, Admx.

Hancock. Opinion May 27, 1897.

Contracts. Presumptions. Evidence.

When valuable services are rendered by one person at the request, or with the knowledge and consent of another, under circumstances not inconsistent with the relation of debtor and creditor between the parties, a promise to pay for such services is ordinarily implied on the part of him who knowingly receives the benefit of them, and such promise is enforced on grounds of justice in order to compel the performance of a legal and moral duty.

A son rendered services after he became of age, upon his father's farm. *Held;* that the defendant, the father's administratrix, in a suit brought by the son to recover for these services, is not entitled to an instruction, "that the plaintiff cannot recover unless an express promise can be shown on the part of the father to pay the son, or to give him certain property therefor which he failed to do."

All true contracts grow out of the mutual intention of the parties; and if in a particular instance there is evidence arising from the situation, conduct or family relationship of the parties tending to show that the service was rendered without expectation of any payment or without other payment than such as was received as the service progressed, it cannot be said as a matter of law that a contract is implied on the part of the defendant to pay for such services.

In such cases, as neither the justice of the plaintiff's claim, nor the moral obligation or duty of the defendant is at once apparent, the law creates no contract in favor of the plaintiff and, aside from the ordinary burden of proof, raises no presumption against him. It simply leaves it as a question of fact to be determined by the jury upon the peculiar circumstances and conditions existing in each case.

If it can properly be said that there is any presumption in a given case that the services rendered to a father by a son after he becomes of age, are gratuitous, it is clearly a presumption of fact and not of law. It rests on probability and is the effect of evidence, the result of inferences to be drawn from the facts in the case, at the discretion of the jury,—the force of it varying according to circumstances.

A contract which, as a question of fact, not of law, is implied, does not differ from an express one except in form of proof.

Upon a motion for a new trial, the court held that the jury undoubtedly found as a fact that there was a mutual understanding that the plaintiff was to have the property at the decease of the father; and that the services in question were rendered by the plaintiff in the expectation and belief that he was to

receive compensation in that form; and that the conduct of the father, the situation of the family and all the circumstances existing in the case justified such expectation and belief. *Held;* that this conclusion of the jury is not so unmistakably wrong as to justify the court in setting the verdict aside.

ON MOTION AND EXCEPTIONS BY DEFENDANT.

The case is stated in the opinion.

A. W. King and G. M. Warren, for plaintiff.

H. E. Hamlin, for defendant.

Counsel argued:

1. That there is no evidence in this case to show any express contract to pay for services rendered by plaintiff after majority.

2. That there is not sufficient evidence to overcome the presumption of law that the services were gratuitous or to warrant the implication that plaintiff was to be compensated for his services; nor is there any evidence showing any mutual understanding or agreement between himself and his father that he was to be compensated.

3. That the first instruction asked for by defendant's counsel should have been given to the jury.

4. That the instruction to the effect that the presumption is weaker after majority than before was erroneous and should not have been given.

Where a party renders services for another in the hope of a legacy and in sole reliance upon a person's generosity without any contract, express or implied, that compensation should be provided for him by will or otherwise, and the party to whom the services were rendered dies without making such provision, no action lies. But where, from the circumstances of the case, it is manifest that it was understood by both parties that compensation should be made by will, and none is made, an action lies to recover the value of such services. Wood on Master and Servant, 2nd Ed. § 71; *Martin* v. *Wright*, 13 Wend. (N. Y.) 460; *Campbell* v. *Campbell*, 65 Barb. (N. Y.) 645; *Eaton* v. *Benton*, 2 Hill (N. Y.) 576; *Patterson* v. *Patterson*, 13 Johns. (N. Y.) 379; *Shakespeare* v. *Markham*, 10 Hun, (N. Y.) 311; *Woodward* v. *Bugsbee*, 4 Thomp.

etc., (N. Y.) 393; *Robinson* v. *Raynor*, 28 N. Y. 494; *Lee* v. *Lee*, 6 Gill. & J. (Md.) 316.

The declarations of a parent may admit the filial devotion and real worth of his child, and the profit he may derive from her services. They may reach farther and disclose his own sense of obligation and his settled purpose to compensate. But all this is insufficient to raise a promise. *Leidig* v. *Coover*, 47 Pa. St. 534.

But when a son seeks to recover compensation for such services as his filial duty and common humanity require him to render his aged parent, he must come here with some better proof than loose declarations of gratitude and of an intention to compensate, made by an old man in the extremity of his last sickness. *Zimmerman* v. *Zimmerman*, 129 Pa. St. 229.

The law approves and encourages the assumption of such a relation, as promotive of the best interests of all parties by uniting them in an orderly family life. If nothing more appears than helpfulness in such relations, it will not permit an implication of a contract to make compensation in money on either side. It will presume, also, that what was done proceeded from a higher attribute of human nature than the desire to bargain and get gain, namely, an unselfish love of a parent for his children and of the children for their parent. *Livingston* v. *Hammond*, 162 Mass. 377.

The presumption continues as against services rendered after a child arrives at majority and can only be overcome by proof of an express contract to pay or by facts strong enough to clearly establish a mutual understanding and agreement between the father and son that the relation of debtor and creditor existed between them.

The presumption is as strong after majority as before.

"It is well settled by repeated decisions in this state (Vermont) that when a child after becoming of age remains at home, continuing a member of the family, receiving support and performing services, the law implies no contract by which the relation of debtor and creditor arises between the parent and the child; and in order to create any right of recovery either way, for support or for services, an express contract must be shown." *Sprague* v. *Waldo*, 38 Vt. 141; *Davis* v. *Goodenow*, 27 Vt. 715; *Cobb* v. *Bishop*, 27 Vt. 624; *Lunay* v. *Vantyne*, 40 Vt. 501.

Where parties sustain the relation of parent and child either by nature or adoption, the former in the absence of an express agreement cannot be legally required to pay for services rendered by the child nor the latter to pay for maintenance. *Otis* v. *Hall*, 117 N. Y. 131; *Beardsley* v. *Hotchkiss*, 96 N. Y. 201, 221.

When a daughter after arriving at the age of 21 years continues to live, labor and render service in her father's family, with his knowledge and consent, but without any agreement or understanding that she is to be paid for her services, the law raises no presumption of a promise by the father so as to enable her to maintain an action to recover compensation for her services. *Munger* v. *Munger*, 33 N. H. 581; *Concord* v. *Rumney*, 37 N. H. 125; *Bundy* v. *Hyde*, 50 N. H. 116, 123; *Heywood* v. *Brooks*, 47 N. H. 231, 234.

Contracts between parents and children must be proved by direct, positive, express and unambiguous evidence. The terms must be clearly defined and all the acts necessary to a contract's validity must have especial reference to it and nothing else.

When children work for parents after arriving at age the law implies no contract on the part of the parent to pay for the services. *Poorman* v. *Kilgore*, 26 Pa. St. 365, (67 Am. Dec. 425 and note); *Williams* v. *Hutchinson*, 3 N. Y., 3 Comstock, 312, (53 Am. Dec. 301 and note); *Murphy* v. *Corrigan*, Penna. 28 Atl. Rep. 947; *Bixler* v. *Sellman*, (Md.) 27 Atl. Rep. 137; *Zimmerman* v. *Zimmerman*, (Pa.) 18 Atl. Rep. 129; *Appeal of Barhite*, (Pa.) 17 Atl. Rep. 617; *Holmes* v. *Waldron*, 85 Maine, 312.

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

WHITEHOUSE, J. The plaintiff recovered a verdict of $988.30 for services rendered by him on his father's farm, after he became of age, and the case comes to this court on exceptions, and a motion for a new trial as against evidence.

At the trial the defendant requested the presiding judge to

instruct the jury "that the plaintiff cannot recover unless an express promise can be shown on the part of the father to pay the son or to give him certain property therefor which he failed to do." The presiding justice declined to give this instruction except as shown in the charge, and it appears from the colloquy at the close of the charge, though not in the formal bill of exceptions, that the defendant excepted to the refusal to give this instruction.

In the charge the presiding judge instructed the jury as follows, inter alia:

"There is no express promise shown or undertaken to be shown. Mr. Saunders does not claim that he and his father sat down together and made a trade that he was to work for his father for a certain sum per month,—a specific agreement made about it; but he says that he rendered these services under such circumstances as would justify him in believing that he was to be paid for them. . . . . So in every case where there is not an express agreement testified to, ... we have to investigate the circumstances of the service rendered, if any, and see whether or not under all these circumstances it was expected that pay should be given for it. . . . . Now what is shown here? And whether or not under all the circumstances it seems to you that whatever work was done by this young man was done under such circumstances as justifies you in believing that the old gentleman was to pay him for it in some way, not necessarily in money; that may not have been the understanding, it may have been in some other way; that he has failed to pay, and failing to do that, that his estate must now pay the money. . . . . Now under all the circumstances and if you believe Mr. Eaton, the last witness, as to the talk with the old gentleman, do you believe that it was understood between the son and the father that the son was to be paid for those services? If he was, then he is entitled to his pay and the question is, was the work done with that expectation? . . . . It has been suggested by the testimony of Mr. Eaton that he expected, perhaps, a deed of the place, or to have it willed to him by the old gentleman and that that may have been the understanding. If that was the understanding, then it would fol-

low that it was understood that there was to be some compensation, which was to be the farm itself . . . . and if it did not go to him, if he did not get the pay he expected, all he is entitled to is fair pay in money."

At the close of the charge the judge added: "I am requested to give you this instruction and the plaintiff consents: 'That the presumption is that between father and son, services rendered by the latter for the former are gratuitous, and this rule applied to a son who has attained his majority as well as a minor.' At the request of the plaintiff I will add this, that the presumption is weaker after majority than before." To this qualification, thus added the defendant excepted.

It is the opinion of the court that the instructions given were sufficiently favorable to the defendant, and that he was not aggrieved by the refusal to give the instruction first requested calling for proof of an express promise.

It is an elementary principle that when valuable services are rendered by one person at the request, or with the knowledge and consent of another, under circumstances not inconsistent with the relation of debtor and creditor between the parties, a promise to pay is ordinarily said to be implied by law on the part of him who knowingly receives the benefit of them, and is enforced on grounds of justice in order to compel the performance of a legal and moral duty. As observed by Chief Justice Marshall in *Ogden* v. *Saunders*, 12 Wheat. 214, "a great mass of human transactions depends upon implied contracts, which grow out of the acts of the parties. In such cases the parties are supposed to have made those stipulations which as honest, fair and just men they ought to have made." But the word "contract" is almost universally employed "to denote an undertaking voluntarily entered into between the parties, not drawing into contemplation any creation of the law." Bishop Cont. § 191. All true contracts grow out of the mutual intention of the parties; and if, in a particular instance there is evidence arising from the situation, conduct or family relationship of the parties tending to show that the service was rendered without expectation of any payment or without other payment than

such as was received as the service progressed, it cannot be said as a matter of law that a contract is implied on the part of the defendant to pay for such services. *Cole* v. *Clark*, 85 Maine, 338, and authorities cited.

In such cases, as neither the justice of the plaintiff's claim, nor the moral obligation or duty of the defendant, is at once apparent, the law creates no contract in favor of the plaintiff, and aside from the ordinary burden of proof raises no presumption against him. It simply leaves it as a question of fact to be determined by the jury upon the peculiar circumstances and conditions existing in each case. It is then incumbent upon the plaintiff to satisfy the jury that the services were rendered under circumstances consistent with contract relations between the parties, and that the defendant either expressly agreed to pay for the services, or to give certain property therefor, or that they were rendered by the plaintiff in pursuance of a mutual understanding between the parties that he was to receive payment, or in the expectation and belief that he was to receive payment, and that the circumstances of the case and the conduct of the defendant justified such expectation and belief. If it can properly be said that there is any presumption in a given case that the services rendered to a father by a son after he becomes of age, are gratuitous, it is clearly a presumption of fact and not of law. It is not a uniform and constant rule attached to fixed conditions, and applicable only generically. It is a conclusion from a process of reasoning which the mind of any intelligent person would apply under like circumstances, and it is applicable only specifically. It rests on probability and is the effect of evidence, the result of inferences to be drawn from the facts in the case at the discretion of the jury,—the force of it varying according to circumstances. 2 Wharton Ev. §§ 1226-1237; Best on Ev. §§ 303-326. As said by Chief Justice PETERS in *Belmont* v. *Vinalhaven*, 82 Maine, p. 531: "Most presumptions are mixed of law and fact, or are presumptions of fact which the law may allow the jury to find."

In accordance with this view were the remarks of Chief Justice Shaw in *Guild* v. *Guild*, 15 Pick. 130: "Those who think that

the law raises no implied promise of pecuniary compensation from the mere performance of useful and valuable services, under the circumstances supposed, are nevertheless of opinion that it would be quite competent for the jury to infer a promise from all the circumstances of the case; and that although the burden of proof is upon the plaintiff, as in other cases, to show an implied promise, the jury ought to be instructed that, if under all the circumstances, the services were of such a nature as to lead to a reasonable belief that it was the understanding of the parties that pecuniary compensation should be made for them, then the jury should find an implied promise. . . . . The conclusion, that the question is of less practical importance than might at first appear, is founded upon the obvious consideration, that it is scarcely possible that a case can be left to stand upon the mere naked presumption. . . . . There must of necessity be a great diversity of circumstances distinguishing one case essentially from another."

So in *Spring* v. *Hulett*, 104 Mass. 591, the court say: "The law implies a promise to pay for reasonable value of benefits received, only when there is no evidence that they were conferred upon other grounds than that of contract. When the relations between the parties are such as to warrant the inference that the benefit was bestowed gratuitously, by way of hospitality, or by reason of any obligation, legal or moral, it becomes a question of fact to be submitted to the jury, to determine whether it was in reality gratuitous or upon the basis of contract." Substantially the same doctrine is laid down in *Fitch* v. *Peckham*, 16 Vt. 151, where the court say, "it is incumbent on the plaintiff to show that she performed the services which were the foundation of her claim, expecting at the time to be paid therefor, and that the testator so understood it, or that he had sufficient reason to believe that she expected to make him her debtor for such services." And this language is quoted with approval in *Andrews* v. *Foster*, 17 Vt. 556. Yet the two last named cases were cited in *Lunay* v. *Vantyne*, 40 Vt. 501, in support of the statement that an "express promise must be proved" under such circumstances. It is evident that this apparent contrariety of expression has arisen from a

failure to distinguish between a contract which is created by law, and is said to be "implied by law," or implied "as a matter of law" on the ground of justice and legal obligation, and a contract which is implied as a matter of fact, that is to say, a contract which is found to have an existence in fact by inference from the circumstances and conditions proved. But in order to compel the discharge of a legal and moral duty, as has been seen, a contract is often "implied by law," which never had an existence in fact. It is doubtless true that in the latter class of cases "it is only by a fiction that a contract or promise is implied." . . But "in the present state of the law, it is necessary for the sake of legal conformity to adopt this phraseology." Metc. on Cont. 9. "A contract," says Mr. Bishop, "which as a question of fact, not of law, is implied, does not differ from an express one except in form of proof." Bishop on Cont. §257.

With the exception of the requested instruction in regard to the presumption of gratuity as between father and son, which was too favorable to the defendant, the instructions given to the jury in the case at bar were in entire harmony with the principles above stated.

It is also well-settled law that when a person renders service to another under an agreement within the statute of frauds which the other party refuses to perform, an action will lie against the party so refusing to recover the fair value of the services rendered. *Dix* v. *Marcy*, 116 Mass. 416, and cases cited.

With reference to the motion the evidence before the court has been carefully examined. It is not questioned that the plaintiff rendered laborious service on his father's farm during the four years and a half from the time he attained his majority until his father's death; that during a large part of the time when his father was absent attending to other business, the plaintiff practically had sole charge of the farm, laboring with more than ordinary diligence and fidelity. There is also credible testimony that in reply to an intimation from one of the neighbors that "he was working Fred too hard," the father said he intended for Fred to have what he had. The plaintiff himself was excluded by the

statute from giving testimony in relation to what took place before his father's death, and as usually happens in this class of cases the evidence in support of the plaintiff's contention is not as definite and complete as could be desired. It is not shown that the plaintiff ever presented or asserted any claim for compensation from the time of his father's death, in 1881, until the formal demand on the administratrix in 1894; and it is strongly urgued in the argument of the learned counsel for the defense that this fact, together with his silence respecting his claim at the time he left the place in 1892, should be deemed a strong circumstance tending to show that he did not then consider himself entitled to any compensation. But it appears that the plaintiff, after the death of his father, continued to carry on the farm, living there with his mother during all that time; and it might readily be suggested in explanation of his silence and delay that he was unwilling to deprive his mother of a home, and that he continued to cherish the hope that the arrangement with his father would be recognized by the voluntary action of the heirs. The jury undoubtedly found as a fact that there was a mutual understanding that the plaintiff was to have the property at the decease of the father; and that the services in question were rendered by the plaintiff in the expectation and belief that he was to receive compensation in that form; and that the conduct of the father, the situation of the family and all the circumstances existing in the case, justified such expectation and belief; and it is the opinion of the court that this conclusion of the jury is not so unmistakably wrong as to justify the court in setting the verdict aside.

Exceptions and motion overruled.

CHARLES G. KNIGHT *vs.* ALBION H. BURNHAM.

Oxford. Opinion May 27, 1897.

Sales. Lumber. Surveyor. R. S., c. 41, § 15. Stat. 1895, c. 59.

On a sale of boards by the thousand, the statute requires a survey by a legally appointed and sworn surveyor. Without such survey, the seller cannot recover the purchase price. The owner and seller of the lumber, although a legal surveyor, is not authorized to survey his own lumber, sold by him, in the absence of an express agreement. It must be done by a disinterested surveyor.

Held; in this case, that no survey of the lumber sued for was made by any one except the owner. This does not meet the requirements of the statute.

ON MOTION AND EXCEPTIONS BY DEFENDANT.

The case appears in the opinion.

J. P. Swasey, and C. E. Holt, for plaintiff.

The statute does not preclude the owner of lumber, who is otherwise qualified, from surveying his own lumber, as is the case under the statute of Massachusetts. *Whitman* v. *Freese*, 23 Maine, 185. If the defendant would avoid his contract, the burden of proof is upon him to establish the fact that there was no legal survey. The only evidence presented by the case is the survey made by the plaintiff which stands unquestioned and undisputed, and having been submitted to the jury, upon the question of legal survey, we submit that the verdict is conclusive.

A. H. and C. E. Walker, for defendant.

Counsel cited: *Durgin* v. *Dyer*, 68 Maine, 143; *Richmond* v. *Foss*, 77 Maine, 590; *Beaman* v. *Whitney*, 20 Maine, 413; *Sebor* v. *Armstrong*, 4 Mass. 206; 23 Am. & Eng. Ency. of Law, p. 311, 315 and note.

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

STROUT, J. Plaintiff claims to recover the price of boards sold by him to defendant by the thousand feet. Defense that the boards were not surveyed by a sworn surveyor, before delivery as

required by R. S., c. 41, § 15. If not so surveyed no recovery can be had. *Richmond* v. *Foss*, 77 Maine, 590. Plaintiff replies that he surveyed the boards, and that he was a legal surveyor of lumber.

If he was a legally qualified surveyor of lumber, did a survey by him meet the requirements of the statute? The presiding justice instructed the jury that if they became satisfied from the evidence that the plaintiff "was a qualified sworn surveyor of lumber for the town of Waterford at the time when this lumber was sold, and had measured it in accordance with the terms of the statute before delivery, then I instruct you notwithstanding he may have been the party selling the lumber, that fact of itself would not be sufficient to prevent his recovery upon that ground." . . . "If Mr. Knight, although he is the party plaintiff, the party who made delivery of the lumber as his own, was a qualified sworn surveyor, and had surveyed the lumber . . . . the mere fact that he was a party, the party who sold the lumber, would not destroy his official capacity so as to prevent his recovery, if he is entitled to recover in other respects."

Exception is taken to this instruction. The statute requires surveyors of lumber "to measure the same, and mark the contents thereof, making reasonable allowance for rots, knots and splits, drying and shrinking." R. S., c. 41, § 15. These provisions are for the protection of the purchaser. To discharge such duty, honest, unbiased judgment is imperative. Disinterestedness is essential to that. The law does not allow a man to be judge in his own case. The infirmities of human nature are such, that a party whose interest is involved can seldom judge or act indifferently. If honest, he is liable to be unconsciously warped, and if dishonest his opportunities for gain are largely increased. The statute contemplates a survey by a disinterested party. A survey by the plaintiff, the owner and seller of the lumber, even if he was a duly qualified surveyor of lumber is not a compliance with the statute according to its intent, scope and meaning. Chapter 59 of the Laws of 1895 applies only to actions thereafter brought. This suit was commenced October 27, 1893.

The instruction given was erroneous.

Exceptions sustained.

HARRIET F. HUSSEY, and others, in Equity,

vs.

CHARLES H. T. SOUTHARD, and others.

Sagadahoc. Announced May 29, 1897.

Probate Judge. Void Appointment.

PER CURIAM. A judge of probate who is appointed by a testator executor of a will is not qualified or authorized, even before probate of such will, to appoint a special administrator on another estate to which the estate represented by him as executor is largely indebted; and such appointment of a special administrator is void, and the person assuming to act thereunder may be enjoined from so doing by this court sitting as the court of equity.

Bill sustained. Injunction ordered.

O. D. Baker and S. L. Larrabee, for plaintiffs.

L. C. Cornish, for defendants.

HANOVER S. NICKERSON *vs.* MAGGIE CHASE.

Somerset. Opinion May 28, 1897.

Mortgage. Foreclosure. Waiver. R. S., c. 66, § 7.

In an action of replevin, the plaintiff held a chattel mortgage given to him by the defendant's intestate, whose estate has been adjudged insolvent. He could have adopted either of three methods of procedure; first, by foreclosure; second, by proving the balance of his debt before the commissioners, after deducting the value of his security; and third, by a surrender or waiver of his security and proving his whole debt before the commissioners. The plaintiff chose the third method. He presented his whole claim to the commissioners on oath, declaring that it was justly due him, and that he had no security therefor.

Held; that by this procedure the plaintiff has waived and surrendered all his security. A creditor cannot receive a dividend or his whole claim and hold his security at the same time. By voluntarily proving his whole debt, the creditor necessarily waives his security.

Held; that in this case the proof of the whole debt was deliberate, and on oath that the creditor held no security. In such cases the court proceeds upon equitable principles long since established.

ON REPORT.

The case appears in the opinion.

E. F. Webb, for plaintiff.

F. W. Hovey, for defendant.

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

HASKELL, J. Assuming that the plaintiff in replevin held a mortgage, either legal or equitable, upon the chattels of the intestate to secure liabilities incurred for him in his lifetime, three methods of procedure were open to the mortgagee when the estate was adjudged insolvent.

I. He might foreclose his mortgage and look to his security.

II. He might prove the balance of his debt before the commissioners, after deducting the value of his security to be ascertained by the methods provided by statute. R. S., c. 66, § 7.

III. He might surrender or waive his security and prove his whole debt before the commissioners.

In this case the third method was chosen. The plaintiff in replevin presented his whole claim to the commissioners on oath, declaring that it was justly due him, and that he had no security therefor. The commissioners allowed and reported his whole claim to the probate court and their report was there accepted. By this procedure all security was waived and surrendered, for the creditor could not receive a dividend on his whole claim and hold his security as well. So long as he retains the security he cannot prove his whole debt. If he voluntarily proves his whole debt, he thereby necessarily waives his security; but waiver arises from the voluntary act of the creditor. The commissioners, of their own motion, could not allow the whole debt and thereby work a waiver of the security in favor of all the creditors. In such case the error

could be corrected. But, in the case at bar, the proof of the whole debt was deliberate, and on oath that the creditor held no security. In these cases "the court proceeds upon equitable principles long since established." *Amory* v. *Francis*, 16 Mass. 308; *Hooker* v. *Olmstead*, 6 Pick. 480; *Towle* v. *Bannister*, 16 Pick. 255; *Trustee, etc.*, v. *Cronin*, 4 Allen, 141; *Farnum* v. *Boutelle*, 13 Met. 159; *Franklin County Nat. Bk.* v. *First Nat. Bank of Greenfield*, 138 Mass. 515–522; *Nichols* v. *Smith*, 143 Mass. 455.

The plaintiff's title having failed, his action of replevin must fail and a return should be ordered.

Judgment for defendant in replevin with return.

GEORGE F. BRADFORD

vs.

WILLIAM M. CLARK AND AUSTIN S. THOMPSON.

Lincoln. Opinion May 29, 1897.

Slander. Privileged Communications. Pleading.

No action for slander will lie when the words alleged to be defamatory are privileged communications.

The plaintiff, a supervisor of schools, was present at the annual town meeting when a proposition was pending for an appropriation of money for the purchase of more school books and the defendants, who were voters and taxpayers, declared that "the school books had been burned" by him—one of them adding: "I can prove it," and the other, addressing the plaintiff stated: "You, the superintendent of schools, have thrown the text books into the stove in presence of children."

It appearing that in making the imputed statements, the defendants had reasonable grounds for believing they were true; that they made them in good faith in an honest belief that they were true; that they desired definite information in regard to the charges against the plaintiff, when an explanation from him might have been entirely satisfactory; and that they were speaking to the fellow citizens who had a corresponding interest with themselves:

Held; That the occasion was privileged.

Whether a joint action will lie in this case, quere.

ON MOTION AND EXCEPTIONS BY DEFENDANTS.

This was an action for slander in which the jury returned a verdict for the plaintiff, and the defendants filed a general motion for a new trial, and took exceptions to the charge of the presiding justice. The view taken by the court of the motion renders a report of the exceptions unnecessary.

T. P. Pierce and J. W. Brackett, for plaintiff.

W. H. Hilton, for defendants.

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

WHITEHOUSE, J. In an action for slander brought against the two defendants jointly, the plaintiff recovered a verdict for $31.47. The case comes to the law court on exceptions and motion for a new trial.

It is alleged in the declaration that the plaintiff was supervisor of schools in the town of Bristol in March 1896, and in that capacity had the care and custody of the school books belonging to the town; that in pursuance of a conspiracy between the defendants to "defame and injure the plaintiff and especially to deprive him of service in his said office," they declared: "That the school books had been burned" (by said Clark spoken of and concerning said complainant) . . . . adding "I can prove it;" thereupon the said Austin S. Thompson replied, personally addressing complainant: "You the superintendent of schools have thrown the text books into the stove in presence of children."

In the brief statement of defense it is claimed that the slanderous words imputed to the defendants respectively "were privileged and uttered without malice and in good faith in the exercise of their respective rights as citizens of the town of Bristol, at the annual meeting of said town held on the second day of March, 1896, while article 7 of the warrant for said meeting, to wit: 'To see what sum of money the town would vote to raise for the purchase of school text books' was being considered in said meeting."

It appears from the plaintiff's testimony and other evidence,

which is substantially uncontroverted, that when in the course of the deliberations at this meeting, article 7 in the warrant was reached, the defendant Clark said: "Mr. Moderator, I move that the article be dismissed; the town cannot afford to raise money to buy books to be used for kindling wood. The town books have been burned during the last year, and I can prove it."

Thereupon the plaintiff who was sitting on the platform touched the moderator, and said: "Mr. Moderator, I understand the gentleman to say the books had been burned in town." The moderator replied: "Yes, that is his statement." The plaintiff then said: "I demand proof of the statement that the guilty party may be brought to justice, as I am the supervisor and custodian of the books." After a short speech by Mr. Brackett in favor of an appropriation under the article in question, the moderator stated in substance that if there was any person in the hall who knew anything in regard to the destruction of school books, he wished he would make it known. In response to this request the defendant Thompson came forward and said: "Mr. Moderator, I suppose I am the man. During the year in district No. 5, where my children have attended school, the supervisor, Mr. Bradford, threw school books into the stove, and I can prove it by them." In his testimony Mr. Thompson says: "I had three children that was attending that school and they said there had been books put into that stove; I was a taxpayer of the town of Bristol, and, if I was paying taxes to buy books to be used as kindling, I wanted an explanation then and there." Mr. Clark testifies that he had been informed by his son a "reputable citizen," thirty years of age, that school books had been put into the stove. It also appears in evidence that missing books had been advertised in a newspaper, and that the "air was full of rumors" in regard to the loss and destruction of the school books of the town.

The plaintiff himself admits in his testimony that in clearing out the closets in the school house on some occasions he had found school books that were torn and soiled and worn and had thrown such "remnants" into the stove.

These are the principal facts and circumstances upon which the plaintiff's action is founded.

In defense the counsel first sets up the legal objection that a joint action cannot be maintained against two persons for oral defamation or slander. Such was formerly the law in England. 1 Chitty on Plead. (16 Ed.) 97; Gould on Plead. 195, and cases cited. But under the rules of practice now established in England a joint action can be maintained against two or more persons for slander. Odgers on Libel and Slander 371. The old English rule, that a joint action could not be maintained, has generally been assumed to be the law in this country. In Cooley on Torts. (2nd Ed.) 142, speaking of wrongs which are in their nature necessarily individual, the author says: "The case of the oral utterance of defamatory words is an instance. This is an individual act because there can be no joint utterance. He alone can be liable who spoke the words; and if two or more utter the same slander at the same time, still the utterance of each is individual, and must be the subject of a separate proceeding for redress."

But whether under conceivable circumstances there might be such a conspiracy between two or more to defame another, or such a union of thought and purpose and concert of action between them, in the utterance of the same slander, as to render a joint action against them maintainable, it is unnecessary to determine in this case, for it is entirely clear from the evidence that the defamatory words alleged to have been uttered by the defendants on the occasion in question were privileged communications.

It was a New England town meeting, held for the annual election of officers, for the necessary appropriation of money, and to consult upon the common good. The plaintiff was a public officer. His fidelity or efficiency in the discharge of his trust had been brought in question with reference to the preservation of school books. A proposition was pending for the appropriation of money for the purchase of more books. The defendants were voters and taxpayers in the town, having an interest in the subject matter. They had a right to know how the money raised by taxation was being expended. In making the statements imputed to them, they were speaking to their fellow citizens who had a

corresponding interest with themselves. It was a privileged occasion. They had reasonable grounds to believe their statements to be true. They made them in good faith, in the honest belief that they were true. They had no actual malice against the plaintiff. They desired definite information in regard to the charges against him. An explanation from the plaintiff himself might have been entirely satisfactory. He seems to have preferred a law suit to an explanation, and he must abide the result. The statements made by the defendants were privileged.

Smith v. *Higgins*, 16 Gray, 251; *Gott* v. *Pulsifer*, 122 Mass. 235; *Bearce* v. *Bass*, 88 Maine, 521; Odgers on Libel and Slander, 234.

Motion sustained.

ALBERT S. WOODMAN *vs.* DANIEL CARTER, and others; PORTLAND COOPERAGE COMPANY, Trustee.

Cumberland. Opinion May 26, 1897.

Trustee Process. Negotiable Note. R. S., c. 86, § 55.

The provision of R. S., c. 86, § 55, that no person shall be adjudged trustee by reason of any negotiable note made by him, does not apply to a case where the note is effectually controlled by its maker and is divested of its negotiability by depositing it in the hands of a third party under a written agreement of the parties and to be thus held until notified that a contract for the sale of lumber between the parties has been complied with; and it further appears from the facts and circumstances that the note was not intended, and did not operate, as payment of any definite amount of lumber.

ON REPORT.

This was a trustee suit tried before the justice of the Superior Court, Cumberland county, and by agreement of parties the liability of the trustee was reported for the determination of the law court.

The case appears in the opinion.

A. S. Woodman and John H. Hill, for plaintiff.

A. F. Moulton; F. C. Payson and H. R. Virgin, for trustee.

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

WHITEHOUSE, J. This is an action on certain promissory notes aggregating $825, brought by the plaintiff against Daniel Carter, James L. Carter, W. A. Carter and O. H. Carter, of Scarboro, as principal defendants, and the Portland Cooperage Company, trustee. The writ was served on the trustee June 21, 1895. October 18, 1895, Daniel Carter and James L. Carter filed their petition in insolvency, and John Howard Hill, assignee of James L. and W. F. Dresser, assignee of Daniel, duly appeared to prosecute by leave of court.

The case comes to the law court on report from the Superior Court, and the only question to be determined is whether the Cooperage Company shall be held as trustee of Daniel and James L. Carter, by reason of the purchase of a quantity of lumber from them prior to the service of the writ. It is stipulated in the report, however, that the alleged trustee shall not in any event be chargeable for more than 50,318 feet of boards at nine dollars per thousand.

The principal facts essential to the decision of this question are found in the statement contained in the amended disclosure of the trustee as follows:

"On May 3rd, 1895, we agreed to take of said Daniel Carter and James L. Carter an indefinite quantity of white pine boards, sawed or to be sawed by them during the season of 1894–5, if the quality was suitable for our business, the amount to be not less than fifty thousand (50,000) feet in any case, and if the boards were satisfactory and the needs of our business required it, perhaps the entire quantity which they would cut at their mill during said season of 1894–5; the boards were, when suitably dried, to be delivered by said Carters during the summer of 1895, at our mill in Portland, and payment was to be made upon or after said delivery. On May 10, 1895, upon the statement of said Carters that they needed money with which to pay their help, we advanced them one hundred ($100) dollars on account of said agreement.

"On June 17, A. D. 1895, believing from statements made to us by the attorney for said Carters, that said Carters were neither insolvent, nor in contemplation of insolvency, in pursuance of said agreement, and to protect ourselves on said advancement, we purchased of said Daniel Carter and James L. Carter about one hundred thousand (100,000) feet of said boards, and in addition to said sum of one hundred ($100.) dollars, gave them in payment therefor, our negotiable promissory note for one thousand ($1000.) dollars, payable to their order on demand. At the time of this purchase, the boards bought by us were a part of a large lot of boards said to contain about two hundred and fifty thousand (250,000) feet then being at and about the mill of said Carters at Scarboro, and in order to get the boards purchased by us, we took from said Carters a bill of sale of the entire lot and sent our foreman to take possession of the same.

"At the time of this purchase the treasurer and manager of our company was absent in Philadelphia, and from the best knowledge we had of the needs of our business without his advice, we expected to require about one hundred thousand (100,000) feet of the boards; but it was agreed between said Carters and ourselves that, if we should find that our business required a less amount, we could return to said Carters whatever of the one hundred thousand (100,000) feet, above fifty thousand (50,000) feet of the boards; we did not require having credit therefor upon said note. Said foreman went to Scarboro on June 17, viewed and walked over the entire lot of boards, and told the Carters he took possession of them under the bill of sale, and then came away leaving the boards where they were, putting no keeper in charge of them, and doing nothing further to retain possession of them.

"The said Carters were, by the terms of the purchase, to deliver at our mill in Portland the one hundred thousand (100,000) feet of boards more or less, paid for by us and as security for this agreement on their part the note given by us to said Carters in payment for said boards, was, by agreement between said Carters and ourselves, deposited with Charles O. Bancroft, cashier of the Merchants' National Bank of this city, to be held by him until we had

notified him that said Carters had delivered the boards at our mill as aforesaid.

"After said Carters had, in pursuance of said agreement, delivered at our mill fifty thousand three hundred and eighteen (50,318) feet of said boards, we found that we did not need the balance of the one hundred thousand (100,000) feet more or less, bought by us, and by agreement with said Carters, surrendered said balance to them and said Carters gave us an order on Mr. Bancroft for the note which had been fully settled, and the same was delivered to us by him and destroyed. Payment of the note was partly by money payments made to said Carters by us, and partly by boards surrendered to said Carters as aforesaid. Prior to the service of the writ in this case, we notified A. S. Woodman, then attorney for the plaintiffs, that we had purchased of said Carters a certain portion of boards at and about their mill at Scarboro, but had not purchased and did not claim the entire lot."

It appears, however, from the testimony of the president of the Cooperage Company, that the manager of that company was in the habit of making a record of agreements for the purchase of lumber, and that the memorandum of the transaction with the Carters dated May 3, 1895, is as follows: "Bo't of J. L. Carter 50,000 pine boards, 25% to be hard pine and 75% white pine, all good quality, at $9 per thousand, delivered on our wharf." He also testifies explicitly that he was advised by the manager of his company on or before June 17, "that the boards in controversy were to be attached by a creditor of the Carters," and states that it was the absolute and clear intention of the parties that the title to the boards to the amount of the 100,000 mentioned in the agreement, should pass to the Cooperage Company.

The practical result of these elaborate transactions was that immediately after the service of the writ on the trustee, the Carters actually delivered at the mill of the Cooperage Company, in Portland, 50,318 feet of the boards in question, and received in payment the sum of $100 advanced May 10 before the service of the writ and three other sums paid after the service on the trustee, viz: $200, June 22; $100 September 26, and $19.28 October 4, 1895.

Under the circumstances it is not questioned that the boards in controversy must be regarded as "entrusted" to the Cooperage Company, so as to render the company chargeable for the price of the 50,318 feet less the advance payment of $100; but it is claimed that the contract of June 17 was a completed sale of a definite number of boards at an agreed price, and that payment in full was made before the service of the writ by the negotiable promissory note of the trustee.

It is the opinion of the court, however, that this contention of payment by virtue of the note for $1000 cannot be sustained.

It is provided by R. S., chap. 86, § 55, that no person shall be adjudged trustee by reason of any negotiable note made by him. But it is confidently replied by the assignees that although negotiable in form, the note for $1000 in question was effectually controlled, and practically divested of all negotiability by the agreement in writing which accompanied its deposit with Mr. Bancroft; and furthermore that all the facts and circumstances attending the transaction satisfactorily show that the note was never intended as payment and never operated as payment of the price of any definite amount of lumber purchased.

It has been seen that at the time of the service of the writ, June 21st, the only absolute and unconditional contract subsisting between the parties was for the purchase of 50,000 feet of boards. The Cooperage Company was under no legal obligations to accept more than that. The amount which would be required in its business was then undetermined and uncertain; but it seems never to have been anticipated that more than 100,000 would be needed. Yet the note for $1000, together with the $100 advanced May 10, would be sufficient to pay for 122,000 feet at $9 per thousand. Under these circumstances the company obviously deemed it hazardous to give to persons in the financial condition of the Carters, a negotiable note for $1000, which could be put into circulation. It was, therefore, prudently arranged as a part of the same transaction to have the note deposited with a third person; and a formal written agreement signed by the parties declared that they "will and do deposit the said note of the said Cooperage Company in the hands

of Charles O. Bancroft of said Portland to be held by him, said Bancroft in trust, to be delivered to them, the said Carters when he, said Bancroft, shall be notified by C. D. Merrill or other proper officer of said company that the contract of said Carters in respect to hauling said lumber and otherwise, has been complied with." Thus the note was effectually retained within the control of the company. The fact that the note was passed into the hands of one of the Carters and by him delivered to Mr. Bancroft is immaterial. The law has regard to the substance rather than the form of such a transaction. It is manifest that by the formal act of passing the note to Mr. Carter the Cooperage Company did not intend to relinquish all control over it, for Carter immediately deposited it with Bancroft, and this was obviously done as a part of the same transaction, in pursuance of the written agreement which was executed before the delivery to Mr. Carter and deposited with the note.

It is a familiar rule that, as between parties and those having actual notice, a negotiable instrument may be construed with reference to a contemporaneous written agreement between the same parties relating to the same matter; and it is immaterial that such agreement is written on a separate paper, provided the two appear to be connected by the terms of the agreement. *Rogers* v. *Smith*, 47 N. Y. 324; *Davlin* v. *Hill*, 11 Maine, 434; 1 Daniel on Neg. Inst. 81 (a).

In *Stone* v. *Dean*, 5 N. H. 502, it was recognized as an established rule in that state, prior to the enactment of a statute on the subject, that the maker of a negotiable note could not be charged as trustee of the payee while the note was still current. But while announcing this general doctrine, the court charged the trustee in that case and say: "When the process was served upon the trustee, he had the notes he had given in his own hands, and under his own control, and those notes could not be transferred to any other person in the ordinary course of business while he thus held them, nor can he be held to pay them again if he shall be charged in this suit on that account. The reasons on which the rule is founded do not appear to exist in this case."

Again, it is plain that the note for $1000 in question was not intended by the maker or accepted by the payee as payment and satisfaction of any known debt. The amount did not correspond with the price of any definite quantity of boards that had been mentioned in the agreement of the parties. The payments actually made by the Cooperage Company for the lumber purchased appear to have been made without any regard to this note, or the depositary, Mr. Bancroft. No mention of any indorsements of such payments on this note, can be found either in the disclosure of the trustee or the testimony of the president of the company. It was rigorously excluded from circulation, and was never intended to be used in the ordinary course of business.

It is the opinion of the court that this transaction did not relieve the trustee from liability to be charged for the amount due for the 50,318 feet of boards actually received by the company, less the advance payment of $100. The trustee is not charged "by reason of a negotiable note made by the company," but by reason of an indebtedness for lumber existing at the date of the service of the trustee process.

Trustee charged.

DENNIS HARE, and another, *vs.* MARY A. DEAN.

Knox. Opinion May 29, 1897.

Minors. Custody. Enticement. Pleading. Amendment. Costs. R. S., c. 82, §§ 10, 25; Stat. 1895. c. 43.

By the statute of this State, Stat. of 1895, c. 43, it is provided that "fathers and mothers shall jointly have the care and custody of the person of their minor children." *Held;* that both parents of a minor are properly joined as plaintiffs in an action for enticing and persuading a minor child from their custody.

The criterion of the parents' right of action for a wrongful enticing and persuading their minor child from their custody is not the will of the child, but the will of its parents; and it is immaterial that, at the time of the wrongful act, the child was not actually a member of the parents' household, provided they had a right to recall her to their custody and service.

The defendant filed a general demurrer at the first term to the plaintiffs' writ and declaration which was duly joined and the demurrer was sustained. The plaintiffs then moved to amend their writ by inserting an ad damnum of one thousand dollars, none having been stated before, which amendment was allowed. The defendant excepted to the allowance of the amendment. After this amendment the defendant again filed a general demurrer to the declaration, which demurrer was joined and overruled. To this ruling the defendant excepted.

Held; that the proposed amendment by inserting the ad damnum, which had been inadvertently omitted, was clearly allowable.

The statute requiring payment of costs as a condition to the amendment of defective declarations (R. S., c. 82, § 25) does not apply to this case until after a decision of the defendant's exceptions by the law court. In contemplation of law, the plaintiffs have not amended their writ, and cannot do so until the exceptions are overruled, and it has been finally decided that the proposed amendment is allowable.

The right of the defendant to the costs named in the statute is postponed until the action comes on for trial, when they will be fully protected.

Held; that the objection that there is no definite averment of the time when, as the plaintiffs allege, the "defendant enticed and persuaded their said daughter to disobey her parents and remain with said defendant" is not open to the defendant on general demurrer. Such omission, it being matter of form, can only be taken advantage of on special demurrer.

ON EXCEPTIONS BY DEFENDANT.

T. P. Pierce, for plaintiffs.

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

Costs on demurrer: Counsel cited: *Colton* v. *Stanwood*, 67 Maine, 27; *State* v. *Peck*, 60 Maine, 498; *Maine Central Institute* v. *Haskell*, 71 Maine, 491; *Shorey* v. *Chandler*, 80 Maine, 409.

Right of action: *Gilley* v. *Gilley*, 79 Maine, 294; *Emery* v. *Gowen*, 4 Maine, 33.

Allegation of time: *Gilmore* v. *Mathews*, 67 Maine, 517; *Platt* v. *Jones*, 59 Maine, 232; *Cole* v. *Babcock*, 78 Maine, 41; *Gray* v. *Sidelinger*, 72 Maine, 114.

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

WHITEHOUSE, J. This is an action on the case for enticing the plaintiff's daughter to leave their home and service. The case

comes to the law court on exceptions based on the following record, viz: "At the return term the defendant filed a general demurrer to the writ and declaration which was duly joined and the demurrer was sustained. Plaintiffs then moved to amend their writ by inserting an ad damnum of one thousand dollars at the end of their declaration where none had been inserted before, which amendment was allowed. To this allowance of the amendment the defendant excepted. After the amendment was made the defendant again filed a general demurrer to the declaration, which demurrer was joined and overruled. To this ruling the defendant excepts."

The proposed amendment of the writ by inserting the ad damnum, which had been inadvertently omitted, was clearly allowable. Rev. Stat. Ch. 82, § 10. In *McLellan* v. *Crofton*, 6 Maine, 307, such an amendment was allowed after verdict, and MELLEN, C. J., said "it would be a matter of regret if not reproach to our laws and to the administration of them if such a motion could not be sustained. We entertain no doubt on the point." So in *Cragin* v. *Warfield*, 13 Met. 215, a similar amendment was held allowable, the case of *McLellan* v. *Crofton*, supra, being cited as authority. The ruling of the presiding judge upon this point was undoubtedly correct.

The learned counsel for the defendant, however, interposes the further objection, in support of his exceptions, that there was no compliance with the statute requiring the payment of costs as the condition of an amendment when the declaration is adjudged defective on demurrer. R. S., Ch. 82, § 25. But the defendant took exceptions to the ruling of the court that the amendment was allowable, and it has not been determined, and will not be until this opinion is announced, that that ruling was correct. Pending the decision of that question, the amendment which may have been filed, and which is declared to have been "allowed," could not legally become a part of the writ and declaration. The statute says "the plaintiff may amend upon the payment of costs from the time when the demurrer was filed." But in contemplation of law, the plaintiffs in this case have not yet amended their writ. They

could not legally amend it until the exceptions were overruled, and it was finally declared that the amendment proposed was allowable. When that question has been determined in favor of the plaintiffs in this case, the declaration as amended has been adjudged sufficient and the case remanded for trial, the plaintiffs can then avail themselves of the benefit of the amendment which they have finally been allowed to make, upon payment of the costs named in the statute, and not otherwise. They could not reasonably be required to pay the costs until the amendment had been legally made; when so made the statute is imperative that the costs shall be paid. In such a case the recovery of costs by the defendant necessarily follows, whether specified in the order allowing the amendment or not, precisely as costs would follow the entry of a judgment for damages by the presiding justice in any civil action, though costs were not specified. Indeed, it is not probable that the defendant insisted upon the payment of costs pending the exceptions, and it does not appear that the question of costs was considered or suggested in any manner whatever. But the rights of the defendant will be fully protected when the action comes on for trial.

In support of the second general demurrer to the declaration as amended, the defendant insists that the declaration should still be adjudged defective, first because there is no definite averment of the time when, as the plaintiffs allege, the "defendant enticed and persuaded their said daughter to disobey her parents and remain with said defendant;" second, because the service of the daughter was not due to the plaintiffs jointly, but to the father alone; and finally because, if it was the intention of the pleader to charge that the defendant enticed and persuaded the plaintiffs' daughter and servant away from their service and employment, he has failed to set out in unambiguous terms, and in a precise and orderly manner, the facts requisite to constitute such a cause of action.

It is undoubtedly a general rule of pleading in personal actions that every traversable fact must be alleged to have taken place on some particular day. *Cole* v. *Babcock*, 78 Maine, 41. In the case at bar it is definitely alleged that the plaintiffs moved from the

defendant's house "on March 7, A. D. 1895," and inasmuch as the subsequent allegation that defendant "enticed and persuaded" the daughter to remain with her, has no necessary or logical connection with the intermediate clause, the specific date of March 7, might by relation be held applicable to the allegation of enticing and persuading. If not, it is alleged beyond question to have occurred after that date and within the statute of limitations. As the precise date would not be an essential element in the cause of action, it would not be a traversable fact in this case but a matter of form only, and, as such, the omission can only be taken advantage of on *special* demurrer. It is not open to the defendant on general demurrer. *Wellington* v. *Small*, 89 Maine, 154.

It is also the opinion of the court that the parents of the minor were properly joined as plaintiffs in the action. It is provided by section 1, of Chap. 43 of the public laws of 1895, that "fathers and mothers shall jointly have the care and custody of the person of their minor children." The act of "enticing and persuading" a child from the joint custody of its parents, is therefore an infringement of a joint right.

For the apparent purpose of giving a connected history of the relations of the parties to the minor in question, the pleader introduced several immaterial averments of what transpired between them after March 1895; but the principal allegation that "said defendant enticed and persuaded their said daughter to disobey her parents, and remain with said defendant, using every means in her power to so entice and persuade," construed in the light of the circumstances alleged to have existed at the time, would seem to state a cause of action. In Cooley on Torts (2d Ed.) page 270, the author says: "Whatever induces the child to leave the parent, or, after leaving to remain away from him, may in law constitute enticement; but to receive and shelter a child from parental abuse, may sometimes be a moral duty, and therefore justifiable. In New Hampshire it has been said that if one give protection and shelter to a child, with a view or intent of enabling or encouraging him to keep away from his father, ... this would be wrongful and actionable conduct;" citing *Sargent* v.

Mathewson, 38 N. H. 54. To same effect see also *Butterfield* v. *Ashley*, 6 Cush. 249, and *Martin* v. *Payne*, 9 Johnson, 387. The criterion of the parents' right of action is not the will of the child, but the will of the parents; and it is immaterial that at the time of the alleged wrongful act of the defendant the child was not actually a member of the parents' household, provided they had a right to recall her to their custody and service. Cooley page 271–272 and cases cited; Bigelow on Torts, 291.

Exceptions overruled.

JOSEPH BOOTHBY, Administrator,

vs.

BOSTON AND MAINE RAILROAD.

York. Opinion May 29, 1897.

Railroad. Negligence. Issues of Fact. Noise of Locomotive. Crossing.

The plaintiff recovered a verdict upon the following undisputed facts: At the time of the accident the defendant railroad company had a train consisting of a locomotive and several flat cars standing on its track near a crossing. The locomotive was headed toward the crossing and was distant therefrom about forty feet. The train was stationed there to load the flat cars with logs. The locomotive had steam up as was necessary in order to quickly move the train from time to time, but no steam was escaping. Neither the engineer nor the fireman was on the locomotive, but both were seated on the bank some thirty feet distant. The plaintiff's intestate, riding with her husband in a wagon behind a horse along a traveled road, came to this crossing and stopped before passing over. At this moment steam suddenly escaped from some part of the locomotive, making a noise that frightened the horse which ran away, throwing out the plaintiff and inflicting injuries upon her from which she afterwards died.

Held; that whether the steam escaped from through the safety valve on top of the locomotive, with a sudden, sharp and loud noise that would frighten an ordinarily well-broken horse; or it escaped through the cylinder cocks, making only a slight hissing noise, insufficient to frighten an ordinary horse, were questions of fact for the jury, who have found for the plaintiff under instructions not complained of. The court considers that the evidence is not untrue.

Under the instructions of the court, the jury rendered a special finding that the defendant was in fault in not sufficiently guarding against such an escape of steam at that time.

Upon this issue, the jury found that the defendant's servants, the engineer and fireman, by the exercise of reasonable care, could have kept the steam up to the necessary working point while the locomotive was stationary, and yet prevented its sudden escape. The court considers that there is practically no evidence that this was impossible or improbable. It seems probable and the engineer practically admits it.

Held; that the defendant was bound to anticipate that travelers with teams might, at any time, approach this crossing; and was bound to be mindful of the danger to them of steam suddenly escaping at high pressure,—although the fee in the crossing was in the defendant who had been unable to prevent or limit travel over it, but finally gave it up, removed all bars and other obstructions, put up the usual sign of a railroad crossing, and suffered people to pass freely across the track without objection.

ON MOTION BY DEFENDANT.

This was an action on the case in which the jury returned a verdict of $3000 in favor of the plaintiff, as administrator of his wife's estate, for causing the death of his wife at a railroad crossing of the defendant corporation at a place called Warren's crossing in the town of Wells, York County. The defendant filed a general motion for a new trial.

The case is stated in the opinion.

H. Fairfield and L. R. Moore; *and J. M. Stone*, for plaintiff.

G. C. Yeaton, for defendant.

Way not public: Counsel cited: *Mayberry* v. *Standish*, 56 Maine, 342, 355; *Cyr* v. *Madore*, 73 Maine, 53; *Harriman* v. *Howe*, 28 N. Y. S. 855 (78 Hun, 250); *Spear* v. *Utrecht*, 121 N. Y. 420; *Sprow* v. *B. & A. R. R. Co.*, 163 Mass. 330.

Defendant not negligent: If the noise did come from the safety valve, then the safety valve was in good condition, and fulfilled the function which alone it is adapted to and placed upon a locomotive for. In *Scaggs* v. *Prest. Man. & Co. Del. & Hud. Canal Co.*, 145 N. Y. 201, 209, it is said that, "of course," the use of a mechanical device "to prevent dangerous accumulations of steam" is not negligence. To like effect, among the late cases may be cited *Omaha & Rep. Val. Ry. Co.* v. *Brady*, 39 Neb. 27, 39-42; *Omaha & Rep. Val. Ry. Co.* v. *Clark*, 39 Neb. 65; *Abbot et al.* v.

Kalbus, 74 Wis. 504; *Cahor* v. *Chic. & N. W. R. R. Co.*, 85 Wis. 570; *Bittle* v. *Camden & Amboy Railway Co.* (Court of Err. 4 App. N. J. Jan. 1894) 9 Am. R. R. & Corp. Reps. 472, and citations in note.

There can be no higher standard of duty toward a mere licensee (if not a trespasser) on a private way than on a public way. *Louisville & N. R. Co.* v. *Survant*, 27 S. W. Rep. 999, and *Burk* v. *Del. & Hud. Canal Co.*, 33 N. Y. S. 986 (89 Hun, 519) support our contention here. In the case last cited it was said, page 989, to be "settled law in this state [New York] that a railroad company at a private crossing is not required to give any warning of the approach of its train, and that the only duty it owes the licensee at that crossing is to do him no intentional wrong or injury."

SITTING: EMERY, FOSTER, WHITEHOUSE, WISWELL, STROUT, JJ.

EMERY, J. The undisputed facts are these:—At the time of the accident the defendant railroad company had a train, consisting of a locomotive and several flat cars, standing on its track near a crossing. The locomotive was headed toward the crossing and was distant therefrom about forty feet. The train was stationed there to load the flat cars with logs. The locomotive had steam up as was necessary in order to quickly move the train from time to time, but no steam was escaping. Neither the engineer nor the fireman was on the locomotive, but both were seated on the bank some thirty feet distant.

The plaintiff's intestate, riding with her husband in a wagon behind a horse along a traveled road, came to this crossing, and stopped before passing over. At this moment steam suddenly escaped from some part of the locomotive, making a noise that frightened the horse which ran away throwing out the plaintiff, and inflicting injuries upon her from which she afterwards died.

The plaintiff contended, and there was evidence tending to show, that the steam escaped through the safety valve on the top of the

locomotive, and that the noise was sudden, sharp and loud, and calculated to frighten ordinarily well-broken horses. The defendant stoutly contended that the steam escaped through the cylinder cocks and made only a slight, hissing noise, insufficient to frighten an ordinary horse. These are pure questions of fact. As the jury found for the plaintiff under instructions not complained of, we may assume the facts to be as contended by him in this respect. The evidence for the plaintiff, if true, furnishes a sufficient basis for the verdict on these issues, and we do not feel clear that the evidence is untrue.

The jury further found (the plaintiff's intestate being in the exercise of due care) that the defendant was in fault in not sufficiently guarding against such an escape of steam at that time.

This finding is specially assailed and is to be reviewed.

The defendant's locomotive, with all its machinery and appliances, was rightfully there. The steam necessary for its quick working under its load was rightfully kept up to an efficient working point. All noises occasioned by the necessary and efficient management of the locomotive and the train at that time and place, such as pumping water, emptying cylinders, maintaining pressure, etc., were rightfully made. People driving horses in that vicinity were obliged to take the risk of all such noises. *Whitney* v. *Port. & Rochester R. R. Co.*, 69 Maine, 208.

On the other hand, in the care of its locomotive, whether stationary with steam up, or running, the railroad company must bear in mind the danger to others from the noises caused by escaping steam, and must exercise reasonable care to prevent the steam escaping with such suddenness and force as to injure others. While it may for various purposes rightfully sound the steam whistle, no matter who is frightened, it should not do so unnecessarily in the vicinity of travelers with horses. *Hill* v. *Maine Central R. R. Co.*, 55 Maine, 438.

Could the defendant's servants, the engineer and fireman of this locomotive, by the exercise of reasonable care, have kept the steam up to the necessary working point with the locomotive stationary, and yet have prevented its sudden escape through the safety valve at

the time the plaintiff's horse was at the crossing, some forty feet distant? The jury have found that they could, but did not. Is there any good reason for such a finding which could properly influence reasoning men, or is the finding without reason?

It appears that the safety valve was set at one hundred and fifty pounds pressure, while one hundred pounds pressure was sufficient working pressure. It is urged by the plaintiff that, had the engineer or fireman been watchful of the steam gauge, he could have seen the rising pressure and easily lowered it before the extreme limit was reached, there being at the time no immediate need of more than the ordinary pressure. This seems to us very probable. The engineer practically admits it. There is practically no evidence of its impossibility or improbability.

The defendant earnestly contends, however, that it had no reason to expect the plaintiff's intestate to be in that vicinity with a horse,—that she had no right to be there,—and hence it was not bound, as to her, to guard against the sudden and noisy escape of steam through the safety valve. The defendant owned the fee of its location, including the crossing and the spot where the horse took fright. There was no regularly located road over the crossing. But there has been a path or road, more or less traveled with teams, before the location of the railroad across it many years ago. After locating its railroad and purchasing the fee of the land, the defendant tried for a while to prevent or limit the travel over the crossing, but finally gave it up, removed all the bars and other obstructions, put up the usual sign of a railroad crossing, and suffered people to use the crossing for passing the track without objection. The road was freely, if not frequently, used by all having occasion.

The plaintiff's intestate, in undertaking to pass over the track at this place under these circumstances, was not such an offender against the law, or the defendant, as to relieve the defendant from the duty of due care. The defendant was bound to anticipate that travelers with teams might at any time be approaching that crossing, and was bound to be mindful of the danger to them of steam suddenly escaping at high pressure.

We must defer to the judgment of the jury on all the various issues of fact.

Motion overruled.

JOHN G. BROOKS, and others, Exors. in Equity,

vs.

CITY OF BELFAST, and others.

Waldo. Opinion May 29, 1897.

Will. Perpetuities. Trust. Public Charity. School District. Doctrine of Cy Pres. Stat. 1893, c. 216.

The residuary clause of the will of Mary E. Simpson Southworth requiring a judicial construction is as follows: "All the rest, residue and remainder of my estate and of which I may die possessed, I give, bequeath and devise to the Central School District of said Belfast, for the purpose following: 1st, The amount of this bequest shall be invested or put at interest so that an income may accrue and so kept until a sufficient sum shall be accumulated by increase from interest or profit, by subsequent bequests or gifts, or in some other way, to provide for the erection of a schoolhouse within said district suitable to accommodate at least four of the schools. 2nd, When the sum becomes sufficient for the above purpose, the money shall be used for the building such a schoolhouse as is indicated above."

The testatrix executed this will December 17, 1889, and died July 21, 1895. At the date of the will there were sixteen school districts in the city of Belfast, including the one named in the will, and which comprised the city proper. Each of these districts was then a body corporate capable to take and hold property by bequest or devise; but before the death of the testatrix the school districts in all towns in the State were abolished by the statute of 1893, c. 216, and on March 1, 1894, Central School District ceased to have a corporate existence for the purpose of taking property by bequest or devise.

Held; That the Central School District having ceased to exist, there is neither trustee nor beneficiary capable of taking the fund; and by the abolition of the district the residuary bequest to that corporation lapsed to the estate of the testatrix and descended to her heirs as intestate property.

Also; that this bequest was not an unqualified and unrestricted gift of a fund to be used for any and all purposes to which the district might appropriate

it. It was limited to the specific purpose of erecting a schoolhouse within said district, suitable to accommodate at least four of the schools. The school district was at once the trustee and the beneficiary.

Also; that the Central District having ceased to exist, there is neither trustee nor beneficiary capable of taking the fund; and if the tax payers and scholars within the limits of that district should be deemed the true beneficiaries, and it were practicable or possible by substitution of other trustees to secure and restrict the benefit of the fund to the tax payers of that district alone, such beneficiaries would not be a body corporate capable of receiving and holding the fund, but the title would be held and continued in the hands of the trustees; and the objection arising from the rule against perpetuities thus be obviated.

Also; that the case is not one in which the intention of the testatrix may be effectuated by an application of the doctrine of cy pres and the gift applied "as nearly as possible" in conformity with the presumed intention of the donor, although the particular form or manner specified in the bequest cannot be followed.

On Report.

This was a bill in equity brought by the executors of the will of Mary E. S. Southworth, late of Belfast, deceased, for the purpose of obtaining the construction of the residuary clause of her will, and which will be found in the opinion of the court. The case was heard upon bill, answer and the additional fact that, at the date of the will, there were sixteen school districts in the city of Belfast inclusive of the Central District, so-called, and named in the will as one of the objects of the testatrix's bounty.

W. P. Thompson, for plaintiffs.

N. Wardwell, City Solicitor, for Belfast.

Will creates a good charitable bequest: Perry on Trusts, § 700. Stat. 43 Eliz. c. 4 in force in this State. *Tappan* v. *Deblois*, 45 Maine, 122; *Howard* v. *Amer. Peace Society*, 49 Maine, 288; *Swasey* v. *Amer. Bible Society*, 57 Maine, 526.

If the founder describes the general nature of a charitable trust, he may leave the details of its administration to be settled by trustees under the superintendence of a court of chancery; and an omission to name the trustees, or the death or declination of the trustees named, will not defeat the trust, but the court will appoint new trustees in their stead. *Russell* v. *Allen*, 107 U. S. 182; *Fuller* v. *Griffin*, 3 U. S. 400.

While the Central School District in its corporate capacity is by said act abolished, yet the school itself, the object for which the legacy was intended, still exists. The act itself distinctly says that its passage shall not abolish or change the location of any school legally abolished.

The words Central School District, as used by the testatrix, are words descriptive only of the place where her bounty is to be bestowed.

Rule of cy pres is applicable: Bishop Eq. 130; *Howard* v. *Amer. Peace Society*, 49 Maine, 302; *Dascomb* v. *Marston*, 80 Maine, 223; *Atty Genl.* v. *Briggs*, 164 Mass. 561.

R. F. Dunton, for heirs of Mrs. Southworth.

Counsel argued: (1) That said bequest is to Central School District absolutely, and lapsed by the abolition of said district before the death of said testatrix. (2) If not an absolute gift to Central School District, it violates the rule against perpetuities, and, for that reason, is void. (3) That this is not a proper case for the application of the doctrine of cy pres.

Bequest offends the rule against perpetuities: Gray on Perpet. §§ 201, 214, 591, 600, 605, 606, 671, 674; 18 Am. & Eng. Ency. p. 362, 365, 369, 382, 388; *Chamberlayne* v. *Brockett*, L. R. 8 Ch. 206, 211; *Merritt* v. *Bucknam*, 77 Maine, 259; *Jocelyn* v. *Nott*, 44 Conn. 59; Jarman on Wills, 6th Ed. p. 262, note; *Hillyard* v. *Miller*, 10 Pa. St. 326.

Doctrine of cy pres not applicable: Jarman on Wills, 6th Ed. pp. 209, 210, and cases cited; Perry on Trusts, 4th Ed. §§ 726–728.

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

WHITEHOUSE, J. In this bill in equity the plaintiffs seek to obtain a judicial construction of the residuary clause of the last will and testament of Mary E. Simpson Southworth. The will is as follows:

"I, Mary Emeline Simpson of Belfast, in the County of Waldo and State of Maine, make this my last will and testament.

"I give and bequeath to Dana B. Southworth of said Belfast the sum of thirty thousand dollars.

"I give and bequeath to Elizabeth Chapman, daughter of Mrs. Mary E. Merrill of Toledo, Ohio, the sum of one thousand dollars.

"I give and bequeath to the First Parish (Unitarian) Society of said Belfast the sum of three thousand dollars.

"I give and bequeath to the City of Belfast in trust forever the sum of five hundred dollars for the purpose following: the income and accrued interest thereon to be used to keep the Josiah Simpson lot in Grove Cemetery in good order and condition by having the grass properly cut in the summer, the monument and stones kept upright and free from moss, and by doing such other things as are necessary to be done for accomplishing the purpose specified above.

"All the rest, residue and remainder of my estate and of which I may die possessed, I give, bequeath and devise to the Central School District of said Belfast for the purpose following:

"1st. The amount of this bequest shall be invested, or put at interest, so that an income may accrue and so kept, until a sufficient sum shall be accumulated by increase from interest or profit, by subsequent bequests or gifts or in some other way, to provide for the erection of a school house within said district suitable to accommodate, at least, four of the schools.

"2d. When the sum becomes sufficient for the above purpose, the money shall be used for the building such a schoolhouse as is indicated above.

"I hereby appoint Dana B. Southworth and John G. Brooks executors of this my last will and testament."

The testatrix executed this will on the 17th of December 1889, subsequently married Dana B. Southworth, and died on the 21st day of July, 1895. At the date of the will, there were sixteen school districts in the city of Belfast, including Central School District named in the will, which comprised the city proper. Each of these districts was then a body corporate competent to take and hold property by bequest or devise. But before the decease of the testatrix, by section 1 of Chap. 216 of the public laws of 1893, the

school districts in all towns in this state were abolished, and on the first day of March, 1894, when the act took effect, Central School District in Belfast ceased to have a corporate existence for the purpose of taking property by bequest or devise.

It is provided in section 2 of the same act that: "Immediately after this act shall become a law, towns shall take possession of all schoolhouses, lands, apparatus and other property owned and used by the school districts hereby abolished, which districts may lawfully sell and convey. The property so taken shall forthwith be appraised by the assessors of said towns, and at the first annual assessment thereafter a tax shall be levied upon the whole town, or such part thereof as is included within the districts abolished, equal to the whole of said appraisal, and there shall be remitted to the tax payers of each said districts the said appraisal value of its property so taken." Section 4 declares that: "The corporate powers of every school district shall continue under this act so far as the same may be necessary for the meeting of its liabilities and the enforcing of its rights; and any property held in trust by any school district, shall continue to be held and used "according to the terms thereof."

The heirs of Mrs. Southworth claim that the bequest to Central School District, in the residuary clause of the will, was an absolute gift to that body corporate; and inasmuch as the district was abolished and ceased to have a corporate existence before the death of the testatrix, the legacy must be held to have lapsed, and the residue of her estate should now be distributed among her heirs as intestate property. On the other hand, it is contended that the clause of the will in question evinces a charitable purpose on the part of the testatrix to aid in the erection of a schoolhouse on the territory comprised within the limits of Central District, that the district was only named as the instrument, a trustee for the carrying out that intention, and that the City of Belfast, which under the act of 1893, succeeded to the rights and obligations of the district respecting the erection of schoolhouses and the maintenance of schools, should now become the beneficial recipient of the bequest.

I. Whether the bequest be denominated an "absolute gift," or a gift in trust for a definite purpose, is of little or no practical importance with respect to the decision of the question here presented. It has been seen, however, from the language of the residuary clause, that the bequest to the Central District was not an unqualified and unrestricted gift of a fund to be used for any and all purposes to which the district might elect to appropriate it. The purposes of the gift were clearly specified by the terms of the will, and were not coextensive with the general purposes and full authority of the district. The fund could in no event be made available for the payment of teachers' salaries or other ordinary expenses involved in the support of the public schools in the district. It was limited to the specific purpose of "erecting a schoolhouse within said district, suitable to accommodate, at least, four of the schools." And it would seem to be entirely appropriate to say that it was left to the district in trust for that purpose. The school district was at once the trustee and the beneficiary.

Thereupon it is contended, in behalf of the heirs, that it is manifest from the terms of the trust directing an accumulation of the fund for an uncertain and indefinite time, that the bequest might not become available for the purpose designed within a life or lives in being and twenty-one years, and hence would become obnoxious to the rule against perpetuities.

II. The general rule against perpetuities is undoubtedly "imperative and perfectly well established. . . . . 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 Sq. Church* v. *Grant*, 3 Gray, 142. But the rule against perpetuities concerns itself only with the vesting or the commencements of estates, and not at all with their termination. It makes no difference when such an estate terminates. *Pulitzer* v. *Livingston*, 89 Maine, 359.

It is suggested in reply, however, that trusts for public charitable purposes are upheld under circumstances under which private

trusts would fail, (*Russell* v. *Allen*, 107 U. S. 163); and the statement is often found in the books that the law against perpetuities does not apply to public charities. But the statement is misleading. It is undoubtedly true that the principle of public policy, which declares that estates shall not be *indefinitely inalienable* in the hands of individuals, is held inapplicable to public charities. *Odell* v. *Odell*, 10 Allen, 1. But it must be remembered that the rule against perpetuities, in its proper legal sense, has relation only to the time of the vesting of an estate, and in no way affects its continuance after it is once vested. The perpetual duration of a charitable trust, after it has become vested, is one of its distinctive characteristics. It is the possibility that the estate left in trust for a charitable purpose, may not vest or begin within the limits of a life or lives in being and twenty-one years, that offends against the rule of "perpetuity" or "remoteness." In this respect a gift in trust for charity is "subject to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent. If the condition . . . . is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities, the gift fails ab initio." *Chamberlayne* v. *Brockett*, L. R. 8 Ch. 206. It is well settled, for instance, that if a gift is made in the first place to an individual and then over to a charity upon a contingency which may not happen within the prescribed limit, the gift to the charity is void. *Merritt* v. *Bucknam*, 77 Maine, 253. Perry on Trusts, § 736, and cases cited.

But in the case at bar, it is conceded by the learned counsel for the heirs that if Central School District had been in existence as a corporate body, at the death of the testatrix, the legacy would have vested in the district for a charitable purpose, and thus been removed from the operation of the rule against perpetuities and sustained as a valid gift, even if the directions in the bequest for an indefinite accumulation could not be allowed. *Odell* v. *Odell*, 10 Allen, supra.

In the case cited, the will contained the following bequest: "I give to the trustees of the Salem Savings Bank in trust, one hun-

dred dollars annually for fifty years, to be paid to them by my executors, to be safely invested by said trustees, the interest to be added to the principal by them semi-annually. At the expiration of fifty years the sum, which shall have accumulated, shall be appropriated by a society of ladies from all the Protestant religious societies in Salem, to provide and sustain a home for respectable, destitute, aged native-born American men and women. The above annual payment shall be made from the income of my real estate, which shall be held in trust by my executors until the last payment shall have been made to the trustees of the Salem Savings Bank; then my real estate shall be divided equally among the grandchildren of my late brother James." After an exhaustive examination of the authorities and a critical analysis of the principles relating to questions of accumulations and the rule against perpetuities, the court say with reference to the claim in the will above quoted, and the contention that no title, legal or equitable, would vest in the charity until the expiration of fifty years: "We think such is not the true construction of the will. . . . Here are no words of transfer of title, and the ladies mentioned are not a corporation capable of taking the legal estate. The more reasonable interpretation is that the testator intended to continue the title of the fund in the hands of the trustees to whom he gave it in the first instance, and to clothe the proposed society of ladies with visitatorial powers as managers of the charity." The bequest was accordingly held valid.

So in the case before us. The Central School District having ceased to exist, there is neither trustee nor beneficiary capable of taking the fund; and if the taxpayers and scholars within the limits of that district should be deemed the true beneficiaries, and it were practicable or possible by the substitution of other trustees to secure and restrict the benefit of the fund to the tax-payers of that district alone, such beneficiaries would not be a body corporate capable of receiving and holding the fund, but the title would be held and continued in the hands of the trustees, and the objection arising from the rule against perpetuities thus be obviated.

III. It is finally contended, in behalf of the city, that there was a general charitable purpose on the part of the testatrix to provide for the health and comfort of the scholars in that district, and that this intention may be effectuated by an application of the doctrine of cy pres, and the gift applied as "nearly as possible" in conformity with the presumed intention of the donor, although the particular form or manner specified in the bequest cannot be followed.

It will be seen, however, that in one aspect the bequest under consideration was not for general charitable purposes, but was to one designated corporation and clearly described and limited purpose. It was bequeathed to the Central School District in trust for the erection of a "schoolhouse within said district suitable to accommodate, at least, four of the schools," and the practical result was to benefit the taxpayers of a particular district.

In 2 Pom. Eq. Jur. § 1027 the author says: "The true doctrine of cy pres should not be confounded, as is sometimes done, with the more general principle which leads courts of equity to sustain and enforce charitable gifts where the trustee, object and beneficiaries are simply uncertain. . . . . In the great majority of the American states the courts have utterly rejected the peculiar doctrine of cy pres as inconsistent with our institutions and modes of public administration. A few of the states have accepted it in a partial and modified form." And in reviewing the decisions in this country relating to this question and the subject of charitable trusts, Mr. Pomeroy arranged the different states according to three general types. "The second class," he says "includes the larger portion of the states, in which charitable trusts exist under a somewhat modified form. . . . Such trusts are upheld when the property is given to a person sufficiently certain and for an object sufficiently definite. . . . The doctrine of cy pres is generally rejected." In this group he places the state of Maine. The third class "includes a very few states which have accepted the doctrine in its full extent. The states composing this group have not even totally rejected the doctrine of cy pres, although they do not apply it so fully and under such circumstances as would be done in England." In this group the author places the two states of Massachusetts and Kentucky. Ib. § 1029.

In section 1027, Mr. Pomeroy makes this further important statement respecting the doctrine of cy pres: "A limitation upon the generality of the doctrine seems to be settled by the recent decisions, that where the donor has not expressed his charitable intention generally, but only by providing for one specific particular object, and this object cannot be carried out, or the charity provided for ceases to exist before the gift takes effect, then the court will not execute the trust; it wholly fails." Among the English cases cited in support of this statement is *Fisk* v. *Atty. Gen'l*, L. R. 4 Eq. 521. In that case a legacy was given "to the Ladies Benevolent Society at L. as part of its ordinary funds, and before the testator's death the Society ceased to exist. The Vice-Chancellor said: "It has been expressly decided by *Clark* v. *Taylor*, 1 Drew. 642, and *Russell* v. *Kellett*, 3 Sm. & Gif. 264, that when a gift was made by will to a charity which has expired, it was as much a lapse as a gift to an individual who had expired."

In 2 Perry on Trusts, § 726, the author says: "So if it appears, from the construction of the whole instrument, that the gift was for a particular purpose only, and that there was no general charitable intention, the court cannot by construction apply the gift cy pres the original purpose. If, therefore, it appears that the testator had but one particular object in mind, as to build a church at W., and his purpose cannot be carried out, the gift must go to the next of kin. And if the gift cannot vest in the first instance in the donees, for the reason that no such donees can be found, or because a corporation is dissolved, the court cannot appoint other donees cy pres." See also *In Re Ovey*, *Broadbent* v. *Barrow*, 20 Ch. Div. 676; 8 App. Cas. 812; *White's Trusts*, 33 Ch. Div. 449; *Langford* v. *Gowland*, 3 Giff. 617.

In *Doyle* v. *Whalen*, 87 Maine, 426, the court say: "If it appears that the gift was for a particular purpose only and that there was no general charitable intention, the court cannot by construction apply it cy pres the original purpose."

The "limitations upon the generality of the doctrine," mentioned by Mr. Pomeroy, are also distinctly recognized in the leading case of *Jackson* v. *Phillips*, 14 Allen, 539, in which the

whole subject is exhaustively treated. In reviewing the decisions the court say: "In all the cases cited at the argument, in which a charitable bequest, which might have been lawfully carried out under the circumstances existing at the death of the testator, has been held, upon a change of circumstances, to result to the heirs at law or residuary legatees, the gift was distinctly limited to particular persons or establishments."

So in Jarman on Wills, 6th ed. 209, the author says: "The general test at the present day, seems accordingly to be whether the scope and terms of the will, or that part of it which relates to charitable disposition indicates an intention to benefit charities, or a class of charities, generally, treating the particular named objects of gift as mere instruments for carrying out such general intention; or to benefit the particular institution specified which the testator has singled out on their own merits as worthy of encouragement. If then the gift fails, by reason of a named institution coming to an end in the testator's lifetime or otherwise, in the former case, the charity will be executed according to the doctrine of cy pres; but in the latter case the gift will lapse, unless the particular charity existed at the testator's death, in which case the legacy will be applied for other similar charitable purposes."

It will be perceived that the second restriction, placed by Mr. Pomeroy upon the exercise of this doctrine, is here distinctly recognized, viz: that it has no application to a trust which was not legally capable of vesting as a charity at the time of the testator's death.

In this important particular, among others, the case of *Atty. Gen'l* v. *Briggs*, 164 Mass. 561, cited in behalf of the city, is widely distinguished from the case before us. Here, both the fund and its income are to be used in the erection of a schoolhouse, thus making a permanent addition to the property in a certain district; but the district was abolished nearly a year and a half before the death of the testatrix, and the fund never vested. There, the income of the fund was to be appropriated for the support of a school in a certain district, and the fund had vested in the trustees and the income actually been used for fourteen years, towards the

support of the school, before the district was abolished. It was by reason of the change of circumstances resulting from this and other conditions created, after the death of the testator and after the fund had vested in the trustees and used as stated, that the doctrine of cy pres was exercised to the extent of allowing scholars outside, as well as those inside, of the limits of the district to enjoy the benefit of the fund. And this decision was rendered in a state, where, according to Mr. Pomeroy, the doctrine of cy pres has been carried to the extreme limit found in any of the courts of the United States.

On the other hand, the recent and important case of *Merrill* v. *Hayden*, in our own state (86 Me. 133) is in harmony with the views hereinbefore expressed, and strongly supports the contention of the heirs. In that case the testator made a residuary bequest to the "Maine Free Baptist Home Missionary Society," a corporation capable of taking the devise at the date of the will, and organized "for the purpose of aiding Free Baptist Churches in this state in need of assistance." But under subsequent acts of the legislature, another distinct society was incorporated by the name of the "Maine Free Baptist Association," . . "for religious, missionary and educational purposes." All the property and rights of the old society were transferred to the new association to be used for the purposes named in its charter, and the old one thus became extinct two years before the death of the testator. It will be observed that, although the purposes of the two societies were not coincident, those of the new one embraced all that was contemplated in the old one. Funds used in "aiding Free Baptist Churches in need of assistance" would be devoted to "religious and missionary purposes," and the bequest for such purposes would clearly be a public and not a private charity. "Private trusts," says Mr. Pomeroy, "are for the benefit of certain and designated individuals, in which the cestui que trust is a known person or class of persons. Public, or as they are frequently termed, charitable trusts, are those created for the benefit of an unascertained, uncertain and sometimes fluctuating body of individuals, in which the cestuis que trustent may be a portion or class of a public com-

munity, as, for example, the poor or the children of a particular town or parish." 2 Pom. Eq. § 987; 1 Perry on Trusts, § 384; *Bangor* v. *Masonic Lodge*, 73 Maine, 428; *Doyle* v. *Whalen*, 87 Maine, 425. A bequest for the support of churches and ministers of the gospel of any Christian denomination has uniformly been held to be for public and charitable purposes. 2 Redfield on Wills 501, and cases cited. If the old society had continued to exist until after the death of the testator, and the bequest had actually vested in it before the change of circumstances, created by the extinguishment of the old society and the incorporation of the new one, then under the doctrine of cy pres as applied in Massachusetts, the new association might have been permitted to take and hold the property bequeathed, although some portion of the fund might thus have been incidentally expended for the distinct "educational purpose" not specified in the old charter. But as the new association was incorporated eleven years after the date of the will and the fund had never vested in the old society, it was properly held by our court that the legacy lapsed to the estate of the testator and descended to his heirs. In the opinion the court say: "He precisely designated, by its correct legal name, a then existing corporation capable of receiving his proposed bounty. He as precisely expressed his intent to bequeath the residue of his estate to that particular corporation. The claimant association was not in the testator's mind, nor within the purview of his bounty, for it did not exist. . . . . We cannot find that the testator intended to make any bequest to the claimant association, the Maine Free Baptist Association, or that he had it in mind to aid in the purposes for which it was incorporated, or to make it the successor to his bounty in case of the extinction of the legatee he selected."

The purposes of the new association in the case cited are not more clearly and widely distinguishable from those of the old society than are the purposes and functions of the City of Belfast from those of Central School District, in the case at bar, even if those of the city are considered solely with reference to the maintenance of schools. In the case of the legacy to the Free Baptist Churches, the immediate beneficiaries were the church organiza-

tions and the ministers of the gospel; the true beneficiaries contemplated by the pious testator were the unascertained and fluctuating mass of the people who would derive profit from the Christian teachings of the church. So the immediate cestui que trust of the bequest to aid in the erection of a new schoolhouse was the Central School District therein named, which is declared by the statute to be a "corporation with power to hold and apply real and personal estate for the support of schools therein, and to sue and be sued." R. S., Ch. 11, § 40. The cause of public education, it is true, might be advanced by erecting a new schoolhouse and thus promoting the health and comfort of the children of the district. While this gift, as well as that to the Free Baptist Churches, is therefore a bequest for a charitable purpose, an important distinction must not be overlooked. With respect to education the statutes of the state impose upon the taxpayers of the district the *public duty* to provide all suitable buildings necessary for the accommodation of the scholars. Hence the true beneficiaries of the trust may well be deemed the taxpayers of the district, and when the school districts were abolished, this obligation was devolved upon the city or town. If the testatrix's gift could have been vested in the school district and been administered as intended, the taxpayers of that district would have been relieved of a public duty to the extent of the fund in question available for the erection of the schoolhouse. But the taxpayers of no other district would have been thus relieved by the gift. If now, any proper authority existed in the court to substitute the City of Belfast for the Central District, as the object of the donor's bounty, no scheme could be devised whereby the taxpayers residing on the territory comprised within the limits of Central School District, could enjoy the exclusive benefit of the gift. All other taxpayers in the city would necessarily receive their ratable share of the fund in common with those of Central District.

It has been seen, too, from the statute of 1893, abolishing school districts, that if the testatrix had died before Central District became extinct, this legacy could not have vested in the city, since the corporate powers of the district would have continued for the

purpose of holding the fund and executing the trust, and the schoolhouse when built would have been the property of the Central District. And if the district had existed after the death of the testatrix and the schoolhouse had actually been erected, with the aid of the fund in question, before the district was abolished, the law would have required the city on taking possession of the property to remit to the taxpayers of the district the appraised value of the building.

It would seem incongruous to hold that the City of Belfast can now derive more benefit from the property, than it could have done if the testatrix had died before the district was abolished. Yet such would be the result if the city's contention is sustained.

In the exercise of a spirit of benevolence, mingled with a laudable desire to have her name associated with a public improvement in the place of her residence, the testatrix was willing to relieve the taxpayers of Central School District of a portion of the public burden. Non constat, that she was willing to extend this bounty to fifteen other districts. She "precisely designated by its correct legal name a then existing corporation capable of receiving the proposed bounty." She presumptively had knowledge that this corporation ceased to exist a year and a half before her death, but no codicil is added to her will designating the City of Belfast in the place of Central District. The court is not properly authorized to substitute its arbitrary conjecture for the clearly expressed will of the testatrix, which thus remained unchanged after full knowledge of a change of circumstances. It is not the duty of the court to be "curious and subtle" in devising schemes to aid testators in disinheriting their next of kin under circumstances like these.

By the abolition of Central School District, the residuary bequest to that corporation lapsed to the estate of the testatrix, and descended to her heirs as intestate property.

Decree accordingly. Reasonable fees to be allowed out of the fund to the counsel for the defendants.

JOHN HANSCOM *vs.* HOME INSURANCE COMPANY.

SAME *vs.* NORTH BRITISH, ETC., INSURANCE COMPANY.

Androscoggin. Opinion June 1, 1897.

Insurance. Dwelling-House. Non-Occupancy. Waiver. Proofs of Loss. False Swearing. R. S., c. 49, § 20.

A waiver involves the idea of assent, and assent is primarily an act of the understanding. It presupposes that the person to be affected has knowledge of his rights, but does not wish to enforce them. It is an intentional relinquishment of a known right, and is a question of fact whenever it is to be inferred from evidence adduced, or is to be established from the weight of evidence. Again, it may happen that a waiver of a breach of the condition in a policy is not actually intended; but if the conduct and declaration of the insurer are of such a character as to justify the belief that a waiver is intended, and acting upon this belief the insured is induced to incur trouble and expense and is subjected to delay to his injury and prejudice, the insurer may be prohibited from claiming a forfeiture for such a breach, upon the principles of equitable estoppel.

A policy of fire insurance upon a dwelling-house, furniture and other personal property contained these stipulations :—"This entire policy unless otherwise provided by agreement indorsed hereon, or added thereto, shall be void. . . if the building herein described, whether intended for occupancy by the owner or tenant, be or become vacant or unoccupied, or so remain ten days, ... or if the subject of insurance be personal property and be or become encumbered by a chattel mortgage. This entire policy shall be void . . . . in case of any fraud or false swearing by the insured touching any matter relating to this insurance, or the subject thereof, whether before or after a loss."

Held; that the fact that the furniture remained in the house, during the owner's absence, and that his hired man made a frequent inspection of the household goods and had a general oversight of the buildings during the day, being on the premises throughout the day every day, is not a full equivalent for the constant supervision involved in the occupancy of the premises as a customary place of abode, and the actual presence in the building of those who are living in it as a dwelling-house day and night.

In this case the company's agent knew that the plaintiff designed and used the premises as a summer residence.

The buildings and a considerable portion of the personal property were wholly destroyed by fire July 22, 1895; and the defendant claimed that the dwelling-house had been unoccupied from the 8th day of January preceding until the

day of the fire, without the knowledge or consent of the insurer or his agent. It was also claimed that the personal property was encumbered by a chattel mortgage prior to the loss, and that there was false swearing by the plaintiff in his formal proof of loss and in his testimony before the court.

Held; that if the defendant had denied its liability under the policy by reason of forfeiture, arising from the non-occupancy of the buildings, a cause of action would have accrued within sixty days after such denial. *Also;* that the defendant had waived the alleged forfeiture by failing to make such claim immediately after the fire and refusing absolutely to pay the loss. On the contrary, the company informed the plaintiff that it was *necessary* for him to furnish a schedule of the furniture; that he could take time to furnish it; that what was wanted was the real value of the property and that when the schedule was wanted the agent would come and see him; furnished him with blanks and instructions on which to make proofs of loss, subjected him to trouble and expense in preparing the schedules and proofs of loss; and required his attendance at the general manager's office, at a distance on two occasions, for conference as to the ownership of the property and the extent of the loss. Under these circumstances, covering a period of four months after the fire, the defendant cannot now be permitted to set up in defense a forfeiture of the policy alleged to have been created by the non-occupancy of the buildings.

Held; that the mortgage so far as it affects the personal property embraced in the policy was not completed by delivery until the day after the fire; and could not have the effect of increasing the risk of insurance. Hence it would be inequitable now to give effect to the encumbrance as a reason for avoiding the policy,—there being no evidence that the insurance company for nearly three months following the fire intended to refuse payment on account of the mortgage.

Held; that erroneous estimates and innocent misstatements are not a cause of forfeiture, when it is conceded that the loss under a policy, honestly stated, exceeds the amount of insurance.

On Report.

The case is stated in the opinion.

A. R. Savage and H. W. Oakes; Jesse M. Libby, for plaintiff.

G. M. Seiders and F. V. Chase, for defendants.

Non-occupancy: R. S., c. 49, § 20; *White* v. *Phoenix Ins. Co.*, 83 Maine, 279, Id. 85 Maine, 97; *Lancy* v. *Home Ins. Co.*, 84 Maine, 492; 1 May, Ins. § 249, A; *Bonenfant* v. *Ins. Co.*, 76 Mich. 654; *Ashworth* v. *Builders Ins. Co.*, 112 Mass. 422; *Keith* v. *Mutual Ins. Co.*, 10 Allen 228; *Hermann* v. *Adriatic Ins. Co.*, 85 N. Y. 162; *Kimball* v. *Monarch Ins. Co.*, 70 Ia. 513; *American Ins Co.* v. *Padfield*, 78 Ill. 167; *Corrigan* v. *Conn. Fire Ins. Co.*, 122

Mass. 298; *Moore* v. *Ins. Co.*, 64 N. H. 140; *Sonneborn* v. *Ins. Co.*, 44 N. J. 220; *Fehse* v. *Council Bluffs Ins. Co.*, 74 Ia. 676; *Litch* v. *Ins. Co.*, 136 Mass. 491.

No waiver: R. S., c. 49, § 21; 2 May on Ins. § 507.

False swearing: *Claflin* v. *Ins. Co.*, 110 U. S. 81; *Sleeper* v. *Ins. Co.*, 56 N. H. 401; *Wall* v. *Ins Co.*, 51 Maine, 32; *Linscott* v. *Ins. Co.*, 88 Maine, 497; *Dolloff* v. *Ins. Co.*, 82 Maine, 266.

Chattel mortgage: *Stewart* v. *Hanson*, 35 Maine, 506; *Flanders* v. *Barstow*, 18 Maine, 357; *Hinch* v. *Ins. Co.*, 112 Pa. St. 128; *Ellis* v. *State Ins. Co.*, 61 Ia. 577; 1 May on Ins. § 291, A; *Treadway* v. *Hamilton Ins. Co.*, 29 Conn. 68; *Sweetser* v. *Lowell*, 33 Maine, 452; *Foster* v. *Perkins*, 42 Maine, 174.

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

WHITEHOUSE, J. These actions were brought on two policies of insurance against loss or damage by fire, issued to the plaintiff by the defendant companies respectively. The two cases were heard together and come to the law court on a report of the evidence relating to both claims. The aggregate amount of insurance effected in the two companies on the plaintiff's farm buildings and certain personal property, was $5500. Of this amount $3000 was on the buildings, $1500 on the household furniture, $500 on vehicles, etc., and $500 on horses. It is stipulated in the report that if the defendants are found liable, judgment shall be rendered for the plaintiff for $2100 against the Home Insurance Company and for $3000 against the North British and Mercantile Insurance Company.

Each policy contains the following stipulations: "This entire policy, unless otherwise provided by agreement indorsed hereon, or added hereto, shall be void . . . . . if a building herein described, whether intended for occupancy by the owner or tenant, be or become vacant or unoccupied, or so remain for ten days, . . . or if the subject of insurance be personal property and be or become encumbered by a chattel mortgage."

"This entire policy shall be void . . . . in case of any

fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

Thereupon it is contended, in behalf of the defendants, that they are justified by the evidence in resisting payment on the three distinct grounds covered by the foregoing stipulations in the policies.

The buildings and a considerable portion of the personal property were totally consumed by fire about 11 o'clock P. M., on the 22nd of July, 1895; and it is claimed that the dwelling-house had been unoccupied from the 8th day of January preceding until the date of the fire, without the knowledge or consent of the defendants or their agents. It is also claimed that the personal property covered by the policies was encumbered by a chattel mortgage after the execution of the policies and prior to the loss; and that there was false swearing on the part of the plaintiff after the loss, in his formal proof of loss, and in his testimony before the court when the evidence was reported for this court.

The buildings in question were situated on the southerly side of a road running nearly east and west, on White Oak Hill in the town of Poland, about two miles from the nearest village. At a distance of about eight hundred feet westerly was the town farm, and still further west were two other farm houses distant about one-third of a mile and one-half of a mile respectively. Next easterly from the plaintiff's buildings on the same road, was a small house about a quarter of a mile distant, occupied by an elderly lady. Two hundred feet further to the east was another small house, and a half mile to the east of the plaintiff's buildings was another farm house.

The plaintiff's buildings consisted of a dwelling-house thirty feet wide on the street and running back thirty-five feet, a stable thirty-nine and one-half feet by sixty, and a shed one hundred feet long connecting the house with the stable.

The plaintiff's home was in Brooklyn, in the State of New York, but he occupied these premises in Poland during the summer months, spending the rest of the year in New York.

In the fall of 1894, he left the premises and returned to

Brooklyn on the 13th of September, leaving his sister Mrs. Lane and one Holmes and his wife in charge of the premises and in the actual occupancy of the house. Mrs. Lane died soon after, but Holmes and his wife remained until January 9, 1895, when they left. At this time there were two colts, one horse, five or six hogs and thirty or forty hens on the premises, belonging to the plaintiff. Thereupon a young man named Thurston, who lived with his grandmother in the first house east of the plaintiff's, a quarter of a mile distant, was engaged by the plaintiff to take charge of the premises and take care of the stock. Thurston continued to live at his grandmother's home, sleeping there and generally taking his meals there, from that time until the date of the fire. No one slept in the plaintiff's house during this time, but Thurston ate some of his meals there, which were brought to him from his home, and was on the premises throughout the day every day, except when called away by business for the plaintiff, with a single exception when he procured some one to take his place. He piled up the wood, helped cut the hay, took care of the garden and had the general oversight of the place. Early in May, 1895, he cleaned the house and put it in order for the reception of Mr. Hanscom and his family and from that time forward he went through the house nearly every day and dusted, swept and aired it. Prior to July 22, the coverings had been taken off the furniture, and on that day Thurston was engaged in cleaning up around the buildings outside and inside. The blinds were all open, the windows up and the screens in place. During the summer months the doors of the barn were generally open, and those of the carriage house frequently were. The day before the fire occurred at night these doors were open all day. After the screens were put in, a month before the fire, the windows in the house had generally been open during the day. It was Thurston's practice when he got ready to go home nights, to begin at the further end of the barn and pass through the barn and carriage house, fastening the doors as he proceeded, and thence through the house and out of the front door. On the day of the fire he had been through the entire house, airing every room, and left the buildings with all the doors securely fastened.

Under these circumstances and in view of the fact that it must have been well understood by the defendant's agent, Mr. Gammon, who had been a frequent visitor there for several years, that it was designed and used by the plaintiff as a summer residence, it is contended by the plaintiff's counsel, in the first place, that the house ought not to be deemed to have been "unoccupied or vacant" at the time of the fire, within the meaning of the terms of the policy; or if so, that any presumption of increase of risk ordinarily arising from non-occupancy is fully rebutted by the peculiar circumstances and conditions existing in this case, and by the appearances of occupancy and the precautions actually taken for the protection and safety of the premises.

It is the opinion of the court that the plaintiff's contention upon the first proposition is not sustained.

The fact that the furniture remained in the house and that the plaintiff's hired man made a frequent inspection of the household goods and had a general oversight of the buildings during the day, is not a full equivalent for the constant supervision involved in the occupancy of the premises as a customary place of abode, and the actual presence in the building of those who are living in it and using it as a dwelling-house day and night. *Ashworth* v. *Builders Ins. Co.*, 112 Mass. 422; *Hermann* v. *Adriatic Ins. Co.*, 85 N. Y. 162; *Bonenfant* v. *Ins. Co.*, 76 Mich. 654; May on Ins. 249, A; Wood on Insurance, page 180.

Whether or not the risks of an insurance on buildings were materially increased by their non-occupancy under peculiar circumstances and conditions, and the construction of section 20 of chapter 49 of the revised statutes, with special reference to the burden of proof, were questions considered by this court in the recent case of *Jones* v. *Granite State Insurance Company*, ante, p. 40. Assuming without deciding, in the case at bar, that the risks may have been appreciably increased by the facts relating to the occupancy of the buildings, the evidence afforded by the natural presumption of such an increase of risk, on the one hand, and by the immediate supervision, care and oversight on the other, may reasonably be deemed so nearly in equilibrio, as to strengthen

the probability underlying the plaintiff's third proposition that the defendants waived any forfeiture which may have occurred by reason of the non-occupancy of the dwelling-house.

The question of waiver or estoppel in this class of cases has frequently been before the courts in different jurisdictions, and its solution should now be attended with little or no difficulty.

A waiver involves the idea of assent and assent is primarily an act of the understanding. It presupposes that the person to be affected has knowledge of his rights, but does not wish to enforce them. *Jewell* v. *Jewell*, 84 Maine, 304. It is an "intentional relinquishment of a known right," (*Robinson* v. *Penn. Fire Ins. Co.* post); and is a question of fact whenever it is to be inferred from evidence adduced, or is to be established from the weight of evidence. *Williams* v. *Relief Association*, 89 Maine, 158; *Nickerson* v. *Nickerson*, 80 Maine, 100. Again it may happen that a waiver of a breach of the condition in the policy was not actually intended; but if the conduct and declaration of the insurer are of such a character as to justify the belief that a waiver was intended, and acting upon this belief the insured is induced to incur trouble and expense and is subjected to delay to his injury and prejudice, the insurer may be prohibited from claiming a forfeiture for such a breach, upon the principles of equitable estoppel. Wood on Fire Ins. 176–832–837, and cases cited; May on Insurance, § 504; *Peabody* v. *Accident Association*, 89 Maine, 96.

In support of the claim of waiver in this case the plaintiff calls attention especially to the facts disclosed by the testimony of Mr. Champlain, the resident secretary of the North British Mercantile Insurance Company having general management of their business in this state. He was notified of the fire by Mr. Gammon, the local agent at Mechanic Falls, who issued both of the policies in suit. On the 26th of July he met Mr. Gammon at his place of business and together they went to the Hanscom place. Mr. Champlain there learned from Mr. Gammon that the "family had not been in the house since the fall before, and was informed by the plaintiff that Thurston the night before the fire went to his home after doing the chores, and did not return to the place. Mr.

Gammon says he was informed of the non-occupancy on the morning after the fire. Continuing his testimony, Mr. Champlain says: "I then questioned him as to the value of the building. He said, some eight or nine years ago, I purchased this place of my sister, Mary A. Lane; I gave her $2500 for the place. Since then I have laid out a good deal of money on the buildings, as much as $10,000. . . . . I then questioned him about the furniture. He said he had a good deal of furniture in it. Then, I said to him, are you prepared to-day to give a schedule showing the value, or the values, of the property burned. He said no, I am not; the property was worth more than the insurance, and I do not see the need of it. I told him it would be necessary for him to make a schedule, that he probably had his bills of his repairs to the house, and also of his furniture, that he should take those bills and from them and from what information he had, he should make us a schedule, showing the correct value of the house and the barn, also of the personal property in the house, and the personal property in the stable or barn; that he could take time to do it, that what we wanted in such a case was the real value of the property at the time of the fire. He said he did not see any need of doing it, but he would do it. I told him, when he had his schedule completed, to give it to our agent who was present and he would forward it to me. Upon its receipt I would endeavor to make arrangements with Mr. Moses R. Emerson, the general agent of the Home Insurance Company, to meet me and come to see him.

"Then we went up to the ruins of the fire, which was quite a little distance from the Walker house. Mr. Hanscom showed me the size of the buildings, explained to me the rooms of the main house, he showed me the remains there were of the plumbing, the soil-pipe that came down, he said, from the bathroom and explained to me about the construction of the house; then he took the L part in the same way; and the stable and the barn.

"Then we returned, and going by the Thurston house he pointed it out and said this is where Mr. Thurston lived, and this is where the furniture, that was removed from the house, is now located. I asked him to show it to me, and we went in; I think it was sort of

a shed or carriage-house, something of that nature; it was not in the main house. It was all piled up there indiscriminately; there was quite an amount of it. I said, it will be necessary for you to also make a schedule of this property saved, and give that to Mr. Gammon, our agent, with the other schedule I spoke to you about.

"The schedule was sent to me very shortly after that; I think I received it in July. Upon my return, I endeavored to arrange a meeting between Mr. Emerson of the Home, Mr. Hanscom and myself. On the 27th of August, Mr. Emerson sent Mr. Wetherbee, special agent of the Home Insurance Company, to Portland, and we came together to Mechanic Falls, drove to Poland to find Mr. Hanscom. I then made arrangements for Mr. Emerson and Mr. Hanscom to meet me at my office on the 4th of September. They came there; Mr. Emerson and I talked over the schedules that we had received, gave Mr. Hanscom blanks upon which to make his proofs, and told him to make them out, which he did, and served upon our agents the 10th day of September.

"I received that proof from Mr. Gammon on the 11th. Between the time I first went to see Mr. Hanscom in July and the 11th of September, when I received the proof, Mr. Hanscom came into my office twice, I think, and said he thought we ought to pay the loss; that he had had a large loss there; he thought we ought to pay it. I told him I would arrange, as soon as possible, to have Mr. Emerson and myself to see him, and then we would instruct him what to do about his proof, so that he could go ahead and make it. On one of those occasions I said to him, I have made some inquiries about the bills of goods purchased at W. T. Kilborn & Co.'s, and Walter Corey & Co., and I find that they were largely purchased by Mrs. Pope, and that small amounts were purchased by Mr. Hanscom; I also find by looking at the records in Auburn that the price you paid Mrs. Lane for the property was $1000, that no money seemed to pass, as on that day you gave her a bond back for $1000, to support her during the remainder of her life; these statements do not exactly correspond with those you made to me. Mr. Hanscom was quite excited, rather violent in his talk.

"On the 10th day of October I was called to the telephone, and

learned that Mr. Hanscom wished to speak to me. He said, I want to have that claim of mine settled to-day. I said, I cannot settle it to-day, Mr. Hanscom, the claim is not due, and we should not think of settling the claim before it is due. He said the claim is due to-day. I said no, the claim is not due until the 11th day of November; your proofs were received on the 11th of September, and the sixty days carry it until the 11th of November. He said, I am coming down and I want that claim settled to-day. I said, it will do no good for you to come down, Mr. Hanscom, as we shall not settle the claim to-day; we shall not settle it before the 11th day of November, and it is somewhat doubtful if we do then. About half past 12 of that day he came to my office and demanded payment. I told him that we should not pay it. He said the claim was due. I told him the claim was not due. He insisted that he made his proof on the 10th of August. I told him the proof was not made until the 10th of September, and received by me the 11th of September. Mr. Hanscom was quite excited about it. He said he would sue us, he would make us pay it all, that we would have to pay interest from the 10th day of August. I said to him that remains to be determined. On the 12th day of November, Mr. Hanscom again came into my office and demanded his pay. He said the claim had become due, and he wanted his money. I told him that I should not settle that day, that I would confer with my company, and also with Mr. Emerson of the Home, then we would let him know what we decided to do.

"I conferred with my company, and with Mr. Emerson, and we both declined to pay. Mr. Emerson, afterwards, arranged a meeting between Mr. Hanscom, himself and myself at my office on the 19th day of November. At that meeting Mr. Emerson and I thoroughly discussed the matter, decided that we would not pay the claim, informed Mr. Hanscom that on account of the non-occupancy of the property, the excessive valuation put upon the furniture and information that we had received that the personal property belonged largely to other people, we declined to pay it. Mr. Hanscom was considerably excited, said the property all belonged to him, that he would make us pay, sue us, and so on,—the old

story. I said to Mr. Hanscom, when I first came to see you in regard to this matter, you told me that you paid $2500 to your sister, Mary A. Lane, for this place. I went to the records and found that you paid $1000. You told me that you purchased your furniture largely of Walter Corey & Co. and W. T. Kilborn & Co. I went to them, and found that you purchased very little furniture of them, that a large part of the furniture was purchased by Mrs. Pope, and paid for by Mr. Pope's checks; that on account of the non-occupancy of the property and the excessive value put upon the furniture, and the information that we had that it largely belonged to others, we declined to pay; we had concluded that we did not owe him anything. Mr. Hanscom was very much excited, talked violently, gesticulated violently, declared we would have to pay it with interest, etc., and went out.

"When I said to him you told me that you paid $2500 and I found that you paid $1000, he said, yes, I afterwards made it up to $2500. I said to him, I found no record of any such deed."

On cross-examination the witness further testified as follows:

Q. Having noticed that the buildings, as you claim, were not occupied, you still directed Mr. Hanscom to make out a proof of loss, did you not?

A. I directed him to make out a schedule of the articles burned; told him how to do it. They were furnished within a few days. Later I furnished him the blanks to make out the formal proofs of loss.

Q. Told him how to do that?

A. I do not think I gave him any instruction at that time. Mr. Emerson and I gave him the blanks, and told him to make out his proofs of loss.

Q. At that time you had raised no question with him in regard to the increased risk by non-occupancy?

A. I had mentioned the non-occupancy, and ascertained the non-occupancy at the time I first saw him.

Q. You did not give it to him at that time as a reason for not paying?

A. No question of paying at that time.

Q. You still directed him to go on and make out his proofs of loss?

A. I gave him the blanks. I did not direct him how. I did not tell him, at that time, I should not pay it because the buildings were not occupied.

Q. Did you ever tell him, until the 11th or 12th of November, that you should not pay on the ground of non-occupancy?

A. I do not think I ever told him we should not pay on any ground, until that time. He furnished the proofs of loss. I told him on one occasion that I had received information from other people that somebody else owned part of the property. I think I told him from whom I had received the information; from W. T. Kilborn & Co., and Walter Corey & Co., and N. Q. Pope. On one occasion I told Mr. Hanscom that I had received information from N. Q. Pope. Mr. Pope resides in the State of Maine part of the time; his home is near Portland, a portion of the time; his family is there a portion of the time.

According to Mr. Champlain's testimony it was November 19 "when they informed the plaintiff that they would not pay on account of non-occupancy, among other reasons." Yet on November 30, Mr. Emerson wrote to the plaintiff's attorney saying: "We have had several conferences with Mr. Hanscom, looking to a final settlement of his claims, but fail to arrive to any agreement as to the amount for which the company is liable under the policy."

It is manifest from this testimony that, being reasonably satisfied with the precautions taken by the plaintiff for the protection of his buildings, the defendants' agents had no thought of contesting the claim on the ground of non-occupancy until they became irritated and incensed by the plaintiff's persistency and impatience in pressing his demand for payment, and by the discussion over the value and ownership of the furniture. The foregoing acts and declarations of the agents afford stronger indication of an intention to waive the forfeiture, if any, and, when examined in their relation to the action of the plaintiff induced thereby, present also more satisfactory grounds for an estoppel than those held sufficient for the purpose in numerous decided cases analogous to the present.

In *Titus* v. *The Glens Falls Insurance Company*, 81 N. Y. 410, the policy contained a condition declaring it void in case foreclosure proceedings were commenced against the insured property, and such proceedings having been commenced and the property advertised for sale before the fire, the defendants claimed a forfeiture. Upon this branch of the case the court say: "The insurance company may, consulting its own interests, choose to waive the forfeiture, and this it may do by express language to that effect, or by acts from which a waiver follows as a legal result. . . . . But it may be asserted broadly that if, in any negotiations or transactions with the insured, after knowledge of the forfeiture, it recognizes the continued validity of the policy, or does acts based thereon, or requires the insured by virtue thereof to do some act or incur some trouble or expense, the forfeiture is as a matter of law waived; and it is now settled in this court after some difference of opinion, that such a waiver need not be based on any new agreement or estoppel. . . . . After the fire, and after the defendant had notice of the proceedings, it required the insured to appear before a person appointed by it for that purpose, to be examined under the claim in the policy hereinbefore mentioned, and he was there subjected to a rigid, inquisitorial examination. It had the right to make such examination only by virtue of the policy. When it required him to be examined, it exercised a right given to it by the policy. It then recognized the validity of the policy, and subjected the insured to trouble and expense after it knew of the forfeiture now alleged, and it cannot now, therefore, assert its invalidity on account of such forfeiture." See also *Landers* v. *Watertown Insurance Company*, 86 N. Y. 414 (40 Am. Rep. 554); *Trippe* v. *Provident Fund Society*, 140 N. Y. 23.

In *Gans* v. *St. Paul F. & M. Insurance Company*, 43 Wis. 108 (28 Am. Rep. 535) the policy contained the usual provision that if the building should become unoccupied without the consent of the company, the policy should be void, and the loss occurred during the period of non-occupancy. It was held in accordance with the previous decisions of that court that "the requiring of further proofs of loss after the company was chargeable with notice or

knowledge that a condition of the policy had been broken (which requirement subjected the plaintiff to expense and delay) is a waiver of the breach, and estops the company to claim a forfeiture of the policy." See also *Webster* v. *Phœnix Insurance Company*, 36 Wis. 67, (17 Am. Rep. 479); and *No. W. M. Life Insurance Company* v. *Germania Fire Insurance Company*, 40 Wis. 446. So also in *Cannon* v. *Home Insurance Company*, 53 Wis. 594, it was held that where there has been a breach of condition, and the insurer with full knowledge of the breach, and without denying its liability on that ground, requires the assured to furnish, and he does furnish, at some trouble and expense, proofs of loss under the policy, whether first or additional proofs, the breach could not be set up as a defense.

In *Penn. Fire Insurance Company* v. *Kittle*, 39 Mich. 51, a forfeiture was claimed by reason of additional insurance, and the question of waiver was submitted to the jury as one of fact, and they found in favor of the insured. In the opinion by Cooley, J., it is said: "We think the jury were warranted in finding that the defendant, by calling upon the plaintiff to go on and make out her proofs and by requiring her to be at the trouble and expense of correcting these to satisfy the criticism made by the agent, without giving her to understand that the company would rely upon the forfeiture, should be held to have waived it; and that if it was the purpose all the while to insist upon it, the agent did not act towards her in good faith."

In *Cleaver* v. *Traders Insurance Company*, 71 Mich. 414, (15 Am. St. Rep. 275) it was also claimed that a forfeiture had been incurred by taking additional insurance contrary to the conditions of the policy. But with full knowledge of the facts showing such forfeiture, the company failed to notify the insured of an intention to insist on such defense until after its adjuster had examined into the loss and received from the insured all the information he asked for in relation to its extent and value, taking two days of his time and the services of a man furnished by the insured, and making no point of the taking of such additional insurance as a reason why the insurance should not be paid. And it was held that these facts

were sufficient to warrant the jury in finding a waiver of the forfeiture by the company.

See also *Marthinson* v. *No. British and Mer. Insurance Company*, 64 Mich. 372, in which the court say: "With a knowledge of all the acts creating the forfeiture claimed upon the trial, the defendant company put the assured to expense in perfecting proofs of loss, which under the present claim of defendant were wholly unnecessary, as the proofs however perfect, were valueless, if the defense of forfeiture was a good one. By this action the defendant company must be held to have waived such defense." The question of waiver, however, appears to have been submitted to the jury as a question of fact, and their finding was in favor of the plaintiff.

In *Niagara Fire Insurance Company* v. *Miller*, 120 Pa. St. 504, (6 Am. St. 726), the court say: "It is not denied that the encumbrances exceeded the amount stated by the insured. Whether it was by accident, ignorance or design does not appear. The court below . . . . submitted the question of waiver to the jury who found against the company. I do not think that the mere fact of the company's calling upon the assured to furnish the preliminary proofs of loss would of itself be a waiver of the company's right to avoid the policy. Cases might arise where such proofs might be necessary to enable the company to show the breach of warranty. There must be an intention to waive a forfeiture by notice or acts inconsistent with acts exercising the right to forfeit. . . . . With full knowledge of the encumbrances, the company not only called for proofs of loss, but required the assured to furnish full plans and specifications of the building destroyed, and joined in the appointment of appraisers. . . . . The company was bound to good faith to the assured, and if, with the knowledge in its possession of every fact upon which to avoid the policy, they misled the plaintiff for nearly a year, subjected him to the expense of procuring plans and specifications of his building, and never informed him that they would not pay because the policy was avoided, they have no ground to complain if they are now held to be estopped from setting up such a defense."

In *Peabody* v. *Accident Association*, 89 Maine, 96, the court

say: "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."

If the defendants in the case at bar had frankly denied all liability on the policies by reason of the alleged forfeiture, it would have been a waiver of proofs of loss and the cause of action would have accrued within sixty days after such denial, *Marston* v. *Mass. Life Insurance Company*, 59 N. H. 94; *Walsh* v. *Insurance Company*, 54 Vt. 351; while the practical effect of the course taken by the company towards the plaintiff was a postponement of the action for more than four months from the date of the fire. Instead of saying to the plaintiff explicitly and unequivocally, immediately after the fire, that it clearly appeared from his own admission and the statements of Thurston that his policies were forfeited for non-occupancy, and that they must absolutely refuse to pay the loss, they informed him that it was *necessary* for him to furnish a schedule of the furniture, that he could take time to do it, that what they wanted was the real value of the property and that when the schedule was prepared the agents would come and see him; they furnished him with blanks on which to make his proofs of loss, and gave him instructions with reference to the proofs; they subjected him to the trouble and expense of preparing these schedules and formal proofs of loss and required his attendance upon them at Portland on two occasions for the purpose of holding conference in regard to the ownership of the property, and the extent of the loss. The conclusion is irresistible that, during the four months succeeding the fire, the defendants either intended in good faith to waive the alleged forfeiture arising from non-occupancy, and to pay the amount of the loss when satisfactorily determined; or, they were guilty of "inexcusable imposition" in subjecting the plaintiff to unnecessary trouble and expense, and in delaying his action, for several months, by encouraging the delusive hope that the loss would be paid upon receipt of due proofs of loss. The former inference is warranted by the evidence, is more creditable to the defendants and more equitable toward the

plaintiff. It is accordingly the opinion of the court, that the defendants cannot now be permitted to set up in defense a forfeiture of the policy alleged to have been created by the non-occupancy of the buildings.

II. The second ground of defense is that the household furniture and other personal property on the premises became encumbered by a chattel mortgage for $1000 on the 22d day of July, 1895, and that the policy was therefore forfeited before the fire, which occurred near midnight on the same day. It has been seen to be one of the conditions that "this entire policy shall be void if the subject of the insurance be personal property and be or become encumbered by a chattel mortgage." It appears from the copy of the mortgage in the case, that it covered the land and buildings in question, "together with all the furniture contained on said premises, with all the stock and fixtures on the premises hereby mortgaged." It is not claimed that the forfeiture was incurred by virtue of the mortgage on the real estate (see *Smith* v. *Mut. Fire Insurance Company*, 50 Maine, 96) but it is insisted that this encumbrance placed on the personal property without the consent of the defendant voided the policies.

In regard to this transaction the plaintiff testified as follows: "I 'placed' a mortgage on this place the 22nd of July. The buildings were burned on the night of that day. I did not get the money on the mortgage until the next morning, the 23rd. I received the telegram that the buildings were burned after I had . . . . purchased my tickets; it must have been one o'clock in the afternoon." It also appears from the certificate of the county clerk on the mortgage, that the signature of the commissioner, who took the acknowledgment, that the instrument was not presented to him for authentication until July 23. In view of these facts it does not satisfactorily appear that the transaction was completed by the delivery of the mortgage and the payment of the money until after the fire had occurred. It is a reasonable inference that the instrument was delivered after the clerk's certificate had been obtained and at the same time the money was received. In any event, it is obvious that the existence of this encumbrance

was wholly unknown in Poland at the time of the fire, and that it could not possibly have had the effect to increase the risk of the insurance. Furthermore, although the mortgage was recorded in Androscoggin county on the 24th of July, and the defendants' agent must have known of the existence of it from his examination of the records early in September, there was no intimation from the defendants, for nearly three months following, that they intended to refuse payment on account of this chattel mortgage; and in view of all the evidence heretofore recited, showing an intention to waive any forfeiture, it would now be grossly inequitable to give effect to this encumbrance as a reason for avoiding the policies.

III. Finally it is contended, by the defendants, that the policies are both void by reason of false swearing on the part of the plaintiff in his formal proofs of loss and in his testimony before the court.

It has been seen that each of the policies in suit is by its own terms declared void "in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof;" and in such a case it is settled law in this state that if the insured knowingly and purposely makes false statements on oath in his proofs of loss in relation to the amount or value of the goods destroyed, the policy is thereby voided both as to the buildings and personalty covered by it, although the actual losses, truly stated in the proofs of loss, may exceed the whole amount of the insurance. The forfeiture of all claim under the policy is the penalty for . . . . . wilfully false swearing, whether such false swearing in fact operates to defraud the company or not. *Dolloff* v. *Phœnix Insurance Company*, 82 Maine, 266. But in determining whether an excessive valuation, for instance, of any article of personal property was the result of wilfully false swearing, or of an error in judgment, misinformation, misrecollection or mistake, it is obviously material and important to consider the amount of the actual loss in relation to the amount of insurance, and to inquire whether the insured could have had any motive to swear falsely in order to swell the amount of the loss, when it was already conceded that the loss, honestly stated, would exceed the

amount of insurance. Erroneous estimates and innocent misstatements are not a cause of forfeiture. As stated in the instruction sustained by this court in *Linscott* v. *Orient Insurance Company*, 88 Maine, 497: "If a man attempt to defraud the company by means of false swearing . . . he has forfeited his whole claim. If he is blameless in these particulars although inaccurate, although he has made misstatements that are not chargeable to his dishonesty, not chargeable to his falsehood, not chargeable to his desire and determination to cheat and defraud and deceive, but are mere mistakes of either judgment or memory, then you will deal with the witness accordingly. Punish no man for a mistake, but visit condemnation upon men who are false and fraudulent, and upon such only."

The length to which this opinion has already been extended, by reason of the importance of the questions involved, forbids any discussion of the details of the evidence relating to this branch of the case. The announcement of conclusions is of more importance to anxious suitors and less burdensome to the profession when published, than the elaborate analysis of voluminous testimony.

The total insurance on the buildings was $3000. The plaintiff states in his proofs of loss, and in his testimony, that they cost him $8500. Forest Walker, a carpenter who has for many years had charge of the work at Poland Springs, was called as a witness for the defendants, and testified that at the time of the fire they were worth from $5500 to $6000. The valuation placed upon the buildings by the defendants' local agent, Mr. Gammon, was from $4000 to $5000.

The whole amount of insurance on the personal property, not including the horses, was $2000. The insurance on the horses was $500, but as the plaintiff sustained a loss of only one horse of the estimated value of $100, his claim for insurance on the personal property is for $2100. In the proofs of loss the estimated value of furniture destroyed is $2785.75, and of the property saved $1795, a total of $4570.75. In the testimony of the defendants' agent, Mr. Gammon, the value of the property covered by the furniture clause is estimated at $3500, and the value of the other

personal property is fixed in the proofs of loss at $1262.50, a total of $4762.50. According to the proofs of loss, the value of the personal property destroyed and damaged was $4048.25, nearly double the amount of insurance claimed. It has also been seen that the parties stipulated in the report that, if the plaintiff is entitled to recover, he is to have the full amount of the insurance claimed. Indeed, the testimony of the plaintiff in relation to the value of the multitude of items involved in the inquiry indicates entire confidence on his part that the losses greatly exceeded the insurance, and leaves the impression that he considered all efforts to make a critical examination of values as unimportant and superfluous. Under these circumstances, it would seem that he had no motive to make statements on oath that were knowingly and designedly false in relation to values either in his proofs or in his testimony. It must be admitted, however, that his valuation of the personal property in many instances appears to be excessive, and that there is often a discrepancy between the value stated in the proofs of loss, and the estimate given in his testimony. He sometimes betrays impatience under cross-examination, and gives answers that are hasty and ill-considered, and makes statements that are often indefinite and apparently inaccurate. The schedule appears to have been the result of the combined efforts of himself and his wife and son and Thurston, the hired man; and he evidently testifies under the embarrassment which any householder would experience in attempting to recall specifically a multitude of articles in a dwelling-house destroyed by fire, and to fix the price or estimate the values of those which he did not purchase and with which he was not familiar. His testimony shows confusion and uncertainty resulting from his attempts to apply his memory, make use of his information, and exercise his judgment in regard to the different articles. Before the change in his circumstances, which made it necessary to raise money on mortgages, he appears to have lived in affluence and to have been accustomed to select purchases of the best quality with but little regard to the expense. He shows that partiality in favor of the worth of his own property and that tendency to over-estimate the value of favorite and familiar articles, which

are the proverbial attributes of ownership. But it appears from his testimony that, with the exception of the instances in which he stated the cost price of the articles, his statements are for the most part such estimates, expressions of opinion, and even conjectures as he might reasonably be expected to give, and such as were not calculated or designed to mislead or deceive. In some instances he may be censurable for not exercising more care and caution in giving his answers, or more frankness and promptness in disclaiming the requisite knowledge to make accurate statements; but it appears, from the schedules furnished the defendants, that he placed relatively the same estimates upon the value of the property saved as he did upon that which was lost. The claim that the plaintiff was not the owner of all the furniture was abandoned by the defendants.

The conclusion therefore is, after a careful and patient examination of the case, that the charge of wilfully false swearing on the part of the plaintiff is not so clearly and fully established by the evidence as to justify the court in declaring that he has incurred the penalty of forfeiting his entire insurance.

According to the stipulations in the report, the entries must be,

Judgment for the plaintiff against the Home Insurance Company for $2100 and against the North British and Mercantile Insurance Company for $3000, without interest in either case.

ANGUS T. SAWYER *vs.* RUMFORD FALLS PAPER COMPANY.

Oxford. Opinion May 31, 1897.

Negligence. Fellow-Servant. Proximate Cause. Defective Machinery.

The plaintiff recovered a verdict of $4250 for personal injuries sustained while employed in the defendant's mill. He charged the defendant with actionable negligence in three particulars;—first, the continued use of a defective dynamo-belt with full knowledge of its condition; second, the omission to provide any temporary lights to supply the place of electric lights, which were known by the defendant to be frequently extinguished; and, finally, the retention of a disobedient machine-tender after knowledge of his alleged incompetency and inefficiency.

Upon a general motion for a new trial, it appeared that the case was submitted to the jury on the evidence furnished by the plaintiff only, the defendant offering no testimony. *Held;* that the absence of light was the reason of the plaintiff's failure to seize the lever to save himself from falling; that such an occurrence might be reasonably expected to result from such a cause in the darkness, either in the way it did happen, or in some similar way; and that it must be regarded as the real and proximate cause of the injury.

The plaintiff was injured in attempting to remove broken paper that was choked between the roll and the doctor, when the presses were in motion. He anticipated no more unusual or extraordinary service was required at this time than when he had at other times successfully and safely performed the same service without injury or apparent knowledge of the danger; but he had no knowledge that the paper was choked on the doctor, and only a partial appreciation of the peril involved in his attempt to remove it in the darkness.

Hence, when he stepped upon the platform in obedience to the order of the machine-tender, he understood that he was simply required to render an ordinary service which he had before safely and successfully performed; and obeyed that instinctive impulse to follow the direction of his superior, which is the characteristic of a faithful, resolute and loyal servant, and his conduct is entitled to be viewed in the light of reasonable charity.

Held; that while neither the prudence of the plaintiff nor the negligence of the defendant can be regarded as conclusively established, the verdict of the jury is not so utterly without support from the evidence as to justify the court in saying that it is manifestly wrong and must be set aside.

Upon the question of damages, *the court orders*, that if the plaintiff will remit all of the verdict above $2500, within thirty days after receipt of the rescript by the clerk, the motion for a new trial is to be overruled; otherwise, the motion is sustained and the verdict set aside.

ON MOTION BY DEFENDANT.

This was an action brought to recover damages resulting from personal injuries sustained by the plaintiff while employed in the defendant company's paper mill at Rumford Falls. At the trial of the case the defendant's counsel moved for a non-suit, and, the motion being denied, rested upon the evidence already presented. The jury returned a verdict for the plaintiff in the sum of $4250. The defendant company filed a general motion that the verdict be set aside as being against law and evidence, and for excessive damages.

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

Proximate cause: 16 Am. & Eng. Enc. p. 439; 2 Thompson on Negligence, 1805; *Lake* v. *Milliken*, 62 Maine, 240; *Eaton* v. *Boston R. Co.*, 11 Allen, 500; *Pollard* v. *M. C. R. R. Co.*, 87 Maine, 55.

Contributory negligence: *Mundle* v. *Hill Manfg. Co.*, 86 Maine, 405; *Wormell* v. *M. C. R. R. Co.*, 79 Maine, 405; *Smith* v. *Peninsula Car Works*, 60 Mich. 501, (1 Am. St. Rep. 542, and cases cited).

Assuming risk: *Miner* v. *Conn. R. R.*, 153 Mass. 403; *Campbell* v. *Eveleth*, 83 Maine, 55; 4 Am. & Eng. Enc. p. 34.

Fellow-Servants: 7 Am. & Eng. Enc. p. 843; *Flike* v. *B. & A. R. Co.*, 53 N. Y. 549-553; Thompson on Negligence, p. 1031.

G. A. Wilson and H. C. Smyth, for defendant.

Accidental casualty: *Elwell* v. *Hacker*, 86 Maine, 417; *Nason* v. *West*, 78 Maine, 254; *Brown* v. *Collins*, 53 N. H. 451; *Davis* v. *Saunders*, 2 Chit. R. 639; *Sheldon* v. *Sherman*, 42 N. Y. 486; *Richards* v. *Rough*, 53 Mich. 212; *Sjorgren* v. *Hall*, 53 Mich. 274; *Wormell* v. *M. C. R. R.*, 79 Maine, 403; *Brown* v. *E. & N. A. Railway Co.*, 58 Maine, 387; *Osborne* v. *Knox & Lin. Railroad*, 68 Maine, 51.

Proximate cause: Shear. and Redf. Neg. § 26; Whart. on Neg. § 3. The unexpected giving away of the paper, under the force being used by the plaintiff, was the proximate and sole cause of plaintiff's accident. *Conley* v. *Am. Express Co.*, 87 Maine, 352; *Mil. R. R. Co.*, v. *Kellogg*, 94 U. S. 469; *La. Mut. Ins. Co.*

v. *Tweed*, 7 Wall. 44; *Washington* v. *Balto. etc., R. R.*, 17 W. Va. 190; *Moulton* v. *Sanford*, 51 Maine, 127; *O'Brien* v. *McGlinchy*, 68 Maine, 557; Beven on Neg. 53; *Hofnagle* v. *N. Y. Cen. & H. River R. R. Co.*, 55 N. Y. 611; *Vicars* v. *Wilcox*, 8 East, 1; *Cuff* v. *Newark etc., R. R. Co.*, 35 N. J. L. 32; *Ashley* v. *Harrison*, 1 Esp. 48.

Contributory negligence: Cooley on Torts, 674; *Cassidy* v. *M. C. R. R.*, 76 Maine, 489; Pierce on Railroads, 323; *Mayor* v. *Bailey*, 3 Denio, 433; *Creamer* v. *Portland*, 36 Wis. 92; *Hammond* v. *Muckwa*, 40 Wis. 35; *Otis* v. *Janesville*, 47 Wis. 422; *Strong* v. *Sac. & Pl. R. Co.*, 61 Cal. 321; *Baltimore & Ohio R. R. Co.* v. *Fitzpatrick*, 35 Md. 32; *Manley* v. *Wilmington R. R.*, 74 N. C. 655; *Kerwhacker* v. *Cleveland, etc., R. R.*, 3 Ohio St. 172; *Dash* v. *Fitzhugh*, 2 Lea, (Tenn.) 306; *Houston, etc., R. R.* v. *Gorbett*, 49 Texas, 573; *Bridge* v. *Grand Junction Ry. Co.*, 3 Mee. & W. 244; *Terre Haute, etc., R. R. Co.* v. *Graham*, 95 Ind. 286, 291; *Monongahela City* v. *Fischer*, 111 Pa. St. 9; *Murphy* v. *Deane*, 101 Mass. 455; *Irwin* v. *Sprigg*, 6 Gill, (Md.) 200; *Richmond, etc., R. R. Co.* v. *Anderson's Admr.* 31 Gratt. (Va.) 812; *Washington* v. *B. & O. R. Co.*, 17 W. Va. 190; Beach on Cont. Neg. 2d Ed. § 9, p. 10, § 100, p. 128.

Fellow-servant: Beach on Cont. Neg. § 115, p. 138; *Holden* v. *Fitchburg R. R. Co.*, 129 Mass. 268; *Doughty* v. *Penobscot Log Driving Co.*, 76 Maine, 143; *Blake* v. *M. C. R. R.*, 70 Maine, 63; *Lawler* v. *Androscoggin Railroad Co.*, 62 Maine, 463; *Carle* v. *B. & P. C. & R. R. Co.*, 43 Maine, 269; *Beaulieu* v. *Portland Company*, 48 Maine, 291; *Tunnay* v. *Midland Railway Co.*, Law Rep. C. B. 291; *Feltham* v. *England*, L. R. 2 Q. B. 33; *Gallagher* v. *Piper*, 33 L. J. C. P. 335; *Gillshannon* v. *Stony Brook R. R.*, 10 Cush. 228; *Hurd Admr.* v. *Vt. C. R. R. Co.*, 32 Vt. 473; *Osborne* v. *Knox & Lincoln R. R.*, 68 Maine, 51; *Hodgkins* v. *Eastern R. R.*, 119 Mass. 419; *Shannon* v. *N. Y. & H. R. R.* 62 N. Y. 251; *Farwell* v. *B. & W. R. R.* 4 Met. 59; *U. S. Rolling-Stock Co.* v. *Wilder*, 116 Ill. 100; *Davis* v. *Detroit R. R.* 20 Mich. 105; *Harkins* v. *N. Y. R. R.* 65 Barb. 129; *Hatt* v. *Nay*, 144 Mass. 186; *Indiana R. R. Co.* v. *Dailey*, 110 Ind. 75; *Wright* v.

N. Y. Cent. R. R. Co., 28 Barb. 80; *Russell* v. *Tillotson*, 140 Mass. 201; *Lanning* v. *N. Y. Cent. R. R. Co.*, 49 N. Y. 521; *Lake Shore R. R. Co.* v. *Knittal*, 33 Ohio St. 468; *Kansas Pac. R. R. Co.* v. *Peavey*, 34 Kansas, 474; *Frazier* v. *Penn. R. R. Co.*, 38 Pa. St. 104; *Texas M. R. R. Co.* v. *Whitmore*, 58 Tex. 276; *Kroy* v. *Chicago R. R.* 32 Iowa, 357; *Cregan* v. *Marston*, 126 N. Y. 568; *Kaare* v. *T. S. & I. Co.*, 139 N. Y. 369-378; *Harley* v. *Buffalo Car Mfg. Co.*, 142 N. Y. 31.

Assuming risk: *Tuttle* v. *Detroit etc., R. Co.*, 122 U. S. R. (11 Sup. Ct. Rep. 116); *Texas & Pac. Ry. Co.* v. *Rogers*, 6 C. C. A. 403, (U. S. Cir. Ct. App. Fifth Circuit, June 27, 1893); *Nason* v. *West*, 78 Maine, 258; *Coolbroth* v. *M. C. R. R.*, 77 Maine, 165; *Judkins* v. *M. C. R. R.*, 80 Maine, 418; *Griffiths* v. *London & St. Katherine Docks Co.*, 12 Q. B. Div. 495; *Wheeler* v. *Wason Manfg. Co.*, 135 Mass. 298; *Sullivan* v. *India Manfg. Co.*, 113 Mass. 396; *Fitzgerald* v. *Conn. River Paper Co.*, 155 Mass. 155; *Osborne* v. *Knox & Lincoln R. R.*, 68 Maine, 51; *Plant* v. *Grand Trunk*, 27 Up. Canada Q. B. 78; *Searle* v. *Lindsey*, 11 C. B. (N. S.) 429; *Gibson* v. *Erie Ry.*, 63 N. Y. 449; *Missouri Furnace Co.* v. *Abend*, 107 Ill. 51; *Smith* v. *Sellers*, 40 La. An. 527; *Indianapolis, etc., R. R.* v. *Watson*, 114 Ind. 20.

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

WHITEHOUSE, J. The plaintiff obtained a verdict for $4250 as compensation for personal injuries sustained while employed in the paper mill of the defendant company at Rumford Falls. The case comes up on a motion to have this verdict set aside as against the evidence relating to the question of the defendant's liability, and also because the damages are excessive.

The case was presented to the jury on the testimony of the plaintiff and his witnesses, no testimony being introduced by the defendant.

The accident occurred on the 7th day of December, 1894, while the plaintiff was engaged in the service of the company in the

capacity of "third hand" in a gang of four on the No. 2 paper machine in the defendant's mill. At that time he was twenty years old and had been employed in the mill about eighteen months in the aggregate, viz: about five months as a helper in setting up machines, about five months as a "fourth hand" and about seven months as "third hand" on the No. 2 machine. The mill was operated day and night, and on the occasion in question he was on the night gang. About four o'clock in the morning of December 7, by reason of the breaking of the dynamo-belt, the electric lights by which the mill was lighted were suddenly extinguished, leaving the machine room where the plaintiff was employed as well as the rest of the mill in complete darkness. What then happened the plaintiff described in his testimony as follows: "When the light went out I was where the winder is, and I was sitting down with the fourth hand, and the machine tender was down to the wet end, lighting a match once in a while. Six or seven minutes after the light went out the machine tender whistled, and he lighted a piece of paper and we went down, the fourth hand and I; and he gave me the order to pull the broke the [broken paper] off the second press; so I went and I stand on that step and I begun to pull off the broke, and the broke was choked. . . . When I stepped up on that stand I went to pull the broke and I went to pull it out and the paper gave way in my hand and I fell backward, and I went to stop myself from falling and I went to put my hand on the rod or lever, some call it a rod, and I missed that rod and I fell, my hand on the top of the felt, and my hand went between the rolls and it caught my hand here and you see how it cut it." As the result of the accident the plaintiff lost three fingers and a portion of the forefinger of his left hand, and a portion of the outside of the hand itself.

There was evidence tending to show that the dynamo-belt was old and much worn, and being used in a wet place, its strength had become so impaired that it was no longer suitable for use.

It also appears that from different causes, the electric lights had frequently been extinguished prior to this time, on an average two or three times a week, and that they had twice been out for a few

moments, on the night in question, before the time when the accident happened. In anticipation of these contingencies, a supply of lanterns had been provided for temporary use while the electric lights were out in the room where the paper machines were located; but for several months prior to December 7, 1894, none of these lanterns appear to be in existence, and no others had been furnished to take the place of those broken or carried away.

There was, however, on each press of the paper machine, what is termed a friction clutch, which was used to stop one or more of the presses while the machines were still running; and orders had been given by the superintendent to all of the machine tenders to stop the presses whenever the lights went out, and the paper broke in the night time. But there was evidence that this order was disobeyed by the machine tender, who had charge of the operating of machine No. 2, and had been disobeyed by others prior to that time.

In view of this evidence it is contended, for the plaintiff, that there was actionable negligence on the part of the defendant company in at least these three particulars; first, the continued use of a defective dynamo-belt with full knowledge of its condition; second, the omission to provide any temporary lights to supply the place of the electric lights which were known by the defendant to be frequently extinguished; and finally the retention of a disobedient machine-tender after the knowledge of his alleged inefficiency and incompetency. It is confidently urged that as a practical result of these conditions, the plaintiff was required to labor in total darkness in connection with dangerous machinery, and that on the occasion in question, while faithfully and zealously performing his master's work, the plaintiff sustained an injury which he would not have received if the room had been suitably provided with light or with means for lighting it. It is claimed that, although the unexpected breaking of the choked paper which the plaintiff was struggling to draw out of the machine may have been the immediate occasion of his fall, the absence of light was the reason why he failed to seize the lever to save himself from falling; that such an occurrence might reasonably be expected to result from

such a cause, either in the way it did happen or some similar way, and that it must be regarded as the real and proximate cause of the injury.

On the other hand, the learned counsel for the defendant company as confidently argue that there was no causal connection between the temporary absence of light in the machine room and the plaintiff's injury; that the injury was not the ordinary or probable result of the darkness in the room, but was due to the breaking of the choked paper, a wholly unlooked-for and unexpected event, and must be deemed a purely accidental occurrence causing damage without legal fault on the part of any one.

It is also suggested that, as the machine tender was only a fellow-servant, his failure to stop the rolls of the press by the use of the friction clutch was but the negligence of a fellow-servant, for which the defendant is not responsible, if indeed the failure to use it was not the negligence of the plaintiff himself.

It is further contended that the plaintiff was under no obligation to obey directions from any one to labor in an unsuitable and dangerous place, and that if he continued to labor in such a place, or obeyed an order to perform a special service in such a place, with full knowledge and appreciation of the dangers, he must be held to have assumed all the risks incident to the service under such circumstances.

Finally, it is insisted that the plaintiff should be precluded from recovering by his own want of ordinary care and prudence; that after the lights went out he sat for six or seven minutes in a place of perfect safety; if he had remained there no accident would have befallen him; and that the act of stepping from such a place of security into close proximity to the running machinery and of reaching over it to perform a dangerous service in the midst of total darkness, was imprudent and reckless, and must be deemed contributory negligence on the part of the plaintiff.

The principles of law applicable to these several contentions of the parties, on the one side and the other, have been so fully considered and carefully distinguished in the recent decisions of this court, that no further discussion of them can be required on the

motion here presented for a new trial as against evidence. They were elaborately stated and aptly illustrated by the presiding justice in the instructions to the jury to which no exceptions have been taken.

The evidence all came from the testimony of the plaintiff and his witnesses, and must receive all the probative force to which it is fairly entitled when thus uncontradicted and unmodified. The evidence tending to show inefficiency and incompetency on the part of the "tender" of the plaintiff's machine is not sufficient to establish the liability of the company on that ground. But the defendant had knowledge that it was a common occurrence for the electric lights to go out, and it is admitted the men were expected to keep the machines in operation and carry on the work during these periods of temporary darkness, provided the paper did not break. It is obvious that there was the same liability that the paper would "break" and also that it would gather and "choke" between the roll and the "doctor" in the night time as in the day time, but with less probability of seasonable discovery. Under ordinary circumstances, however, it involved more trouble, difficulty and delay to stop the presses by means of the friction clutch for the purpose of removing the broken paper and relieving the "choke" on the doctor, than it did to accomplish the same thing while the presses were running. Hence it does not appear that the workmen were ever reprimanded for disobeying the order to stop the presses under such circumstances. The plaintiff had but a limited and imperfect acquaintance with the operation of the machine on which he was working. He had never handled the paper when choked and had received no special instructions touching his duty when the paper broke, except to go upon the platform or step and remove the broken paper while the presses were running. He had several times performed this service without injury or apparent knowledge of danger. On the occasion of the accident, when directed to "pull the broke off the press," he had no knowledge that the paper was choked on the doctor, and only a partial appreciation of the peril involved in his attempt to remove it in the darkness. When he stepped upon the platform, in obedience to the order of the tender,

he understood that he was simply required to render the ordinary service of removing the broken paper which he had before successfully and safely performed. He anticipated no unusual or extraordinary service requiring greater risk or peril. He doubtless understood that there was a general order that the presses should be stopped at night if the paper broke while the lights were out, but he also knew that this was a custom more honored in the breach than the observance. He was under no obligations to obey an order to remove broken paper while the press was in motion in the darkness, but he evidently believed that he was expected to do it if requested by the machine tender. No accident had happened in so doing prior to that time. He obeyed that instinctive impulse to follow the direction of his superior, which is the characteristic of a faithful, resolute and loyal servant, and his conduct is entitled to be viewed in the light of reasonable charity.

The removal of broken paper choked between the roll and the doctor, while the presses were in motion, was attended with more danger when the lights were out. That the workman might be thrown from his proper position by the sudden giving away of the paper under the force applied to remove it, or in some similar way, was an occurrence which might reasonably have been anticipated and regarded as likely to happen; but the injurious consequence of such an accident might have been avoided if the defendant had exercised reasonable care and diligence in providing sufficient means for lighting the room in the night time. The omission of the defendant to exercise such care, diligence and prudence would thus become the real, efficient and proximate cause of the plaintiff's injury.

After a careful examination of all the evidence and of the arguments of the learned counsel, it is the opinion of the court that while neither the prudence of the plaintiff nor the negligence of the defendant can be regarded as conclusively established, the verdict of the jury is not so utterly without support from the evidence as to justify the court in saying that it is manifestly wrong and must be set aside.

If the plaintiff will remit all of the verdict above $2500, within

thirty days after receipt of the rescript by the clerk, the motion for a new trial is to be overruled. Otherwise the motion will be sustained and the verdict set aside.

Ordered accordingly.

STATE vs. FRANK M. BOWMAN.

Kennebec. Opinion June 1, 1897.

Grand Jury. Stenographer. Practice.

The presence of a stenographer before a grand jury, while witnesses are being examined, by express order of the court, who takes stenographic notes of the testimony, although he retires before the jury commence their deliberation, invalidates an indictment found upon the testimony of witnesses given under these circumstances.

Held; that this is a matter that can be taken advantage of by the respondent in an indictment.

ON EXCEPTIONS BY DEFENDANT.

The case is stated in the opinion.

G. W. Heselton, County Attorney, for State.

There is no law which directs the use of an interpreter, when necessary, before a grand jury; yet when necessary, the court has never hesitated to use one. No law or constitutional right is infringed in this case, the stenographer not being present during the deliberation of the grand jury. Such is the practice in Illinois, Indiana and in Tennessee, including the federal courts of that state. Their appointment for such purposes is authorized by statute in New York. The legality of this practice was not tested before the law court in Massachusetts, where a stenographer was used twice before the grand jury to take evidence in important cases.

Counsel cited: *Getchell* v. *The People*, 146 Ill. 145; *People* v. *Lacore*, Circuit Court, September Term, 1893, at Joliet, Ill; *State* v. *Clough*, 49 Maine, 577; *State* v. *Reed*, 2 Blatch. 455;

Whart. Crim. Plead. § 367; *State* v. *Fassett*, 16 Conn. 457; *State* v. *Reed*, 67 Maine, 129; *Low's Case*, 4 Maine, 439; 4 Bl. Com. 126; 1 Chitty Crim. Law, 496; *State* v. *Benner*, 64 Maine, 267.

S. and L. Titcomb, for defendant.

Plea in abatement: *State* v. *Flemming*, 66 Maine, 142. Broom's Legal Maxims, p. 62; 1 Black. p. 67.

Law of the land: Blackwell on Tax Titles, 17-24; *Bank* v. *Cooper*, 2 Yerger, (Tenn.) 599, (24 Am. Dec. 537-545, and note); *Bardwell* v. *Collins*, 44 Minn. 97, (20 Am. St. Rep. 554-559, and note); *U. S.* v. *Reed*, 2 Blatch. 455; 9 Am. & Eng. Enc. p. 16; *Com.* v. *Green*, 126 Pa. St. 531, (12 Am. St. Rep. 915); 1 Bishop Crim. Proc. § 857.

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

WISWELL, J. To an indictment charging him with being a common seller of intoxicating liquors, the respondent filed a plea in abatement, in which it is alleged, in substance, that while the grand jury which found and returned this indictment was in session, the presiding judge made and issued the following order to the official stenographer of the court: "At the request of the county attorney you are instructed to attend with him before the grand jury, there to assist him in taking down the testimony of witnesses in the case of State v. F. M. Bowman being investigated by the grand jury. You will not be present during the deliberations of said jury and you will not disclose any testimony so taken down or heard by you excepting to said jury, or the county attorney, or by order of the court." In obedience to this order the stenographer, after being sworn to faithfully perform the duties imposed upon him by the foregoing order, attended with the county attorney before the grand jury and took down the testimony of the witnesses for the state in the case against the respondent then being investigated. He left the grand jury room before the jury commenced their deliberations upon the case.

To this plea in abatement the county attorney demurred, the demurrer was sustained, the plea adjudged bad and the respondent took exceptions.

The question presented is whether the presence of a stenographer before the grand jury, while witnesses are being examined, by express order of court, who takes stenographic notes of the testimony, but who retired before the jury commenced their deliberations, invalidates an indictment found upon the testimony of witnesses given under these circumstances.

It has long been the policy of the law, in the furtherance of justice, that the investigations and deliberations of a grand jury should be conducted in secret. The obvious reasons for this, founded upon sound principles of public policy, are to secure the utmost freedom of disclosure of alleged crimes and offenses; to secure that freedom of deliberation, expression of opinion and of action among the grand jurors which would be impaired if the part taken by each might be disclosed to the accused or to others; to prevent, to some extent, the opportunity of perjury and subornation of perjury by withholding the knowledge of facts testified to before the grand jury; and to conceal the fact that an alleged crime is being investigated, or that an indictment has been found, so as to avoid the danger of the escape of the accused before his arrest.

In accordance with this policy, the oath administered to grand jurors, established by common law usage, ancient and modern, and prescribed by our own statute, contains this clause: "The State's counsel, your fellows, and your own, you shall keep secret." The expression, "State's counsel" means more than the opinions or advice given by the prosecuting attorney to the jury. The injunction of secrecy applies as well to the secrets of the State, the persons accused, the facts testified to which indicate the guilt of the accused of the offense under investigation, and the witnesses who testify to such facts. In the case of *State* v. *Fasset*, 16 Conn. 457, it is said: "The grand jury swear 'the secrets of the cause, their own and their fellows, they will observe and keep.' The secrets of the cause must relate to the persons accused, the witnesses, who they are and what they testify." We think that the

expression "State's counsel," in the oath prescribed by our statute, is equivalent to "the secrets of the cause" construed in the above case.

In view of the fact that public policy requires secrecy, not only as to deliberations of a grand jury, their own counsel and their fellows, but also as to the witnesses who testify and their testimony, the State's counsel, for the reasons suggested, and as the oath of the jurors, declaratory of this policy, enjoins them to keep secret the State's counsel,—was it proper for the court to order a person, other than the county attorney or assistant, to be present while witnesses were being examined before the grand jury and to take down their testimony? We think it was not; that it was contrary to the policy of our laws and to the universally prevailing custom in our state.

It would be of little avail to swear the jurors to keep secret the "State's counsel" and at the same time to open the doors of the jury room to persons unauthorized by law, while the State's counsel is being disclosed to the jury. Although, in this case, the stenographer went through the form of taking an oath "not to disclose any testimony so taken down or heard by you, excepting to said jury or the county attorney, or by order of the court," such an oath was not authorized by law; it was extra-judicial and had no binding force.

It is true, that the obligation of secrecy as to the "State's counsel," or State's secrets, may subsequently be removed, and that after the purposes of secrecy have been accomplished, any revelations, in this respect, may be made which justice demands. In accordance with this principle, the case of *State* v. *Benner*, 64 Maine, 267, was decided, a leading case upon the subject, in which it is said: "But the oath of the grand juror does not prohibit his testifying what was done before the grand jury when the evidence was required for the purposes of public justice or the establishment of private rights." And again: "So, in all cases when necessary for the protection of the rights of parties, whether civil or criminal, grand jurors may be witnesses."

But in this case neither public justice nor the establishment of

private rights required that the testimony of witnesses, who testified while the accusation against the respondent was under investigation, should be disclosed in the presence of a stenographer whose presence was neither authorized by statute nor custom. And at that time none of the purposes of secrecy had been accomplished.

Another, and perhaps more difficult, question is, whether this is a matter that can be taken advantage of by the respondent. The presence of the stenographer affected only the injunction of secrecy as to the "State's counsel." If this can be waived by a prosecuting attorney, so that it cannot be taken advantage of by a respondent, it was done in this case.

In *State* v. *Clough*, 49 Maine, 573, in which it was decided that the presence of an unauthorized person, who participated as a juror in the proceedings of the grand jury, invalidated the indictment, although twelve competent grand jurors concurred in finding it, it is said: "The mere fact that a stranger was present, when the indictment was found, would not render it void. Though obviously proper and highly important that the proceedings of a grand jury should be in secret, one who is indicted cannot take advantage of it if they are not." This question was not involved in the decision of the case; the person present in the grand jury room in that case was an unauthorized person who assumed to act as a grand juror; but it is unnecessary to decide whether it is a correct statement of the law, because the stenographer, in this case, was not a mere stranger. He was in the grand jury room by express order of court; he participated in the proceedings to the extent of taking and preserving the testimony.

Although the obligation of secrecy in regard to the "State's counsel," required by immemorial usage, and imposed by the oath of grand jurors prescribed by our statute, was undoubtedly intended for the benefit, more particularly of the State, we think that neither the prosecuting attorney can waive it, nor the court nullify its objects. If such an order may be made at the request of the county attorney, we know of no reason why it may not be done without his request or even against his protest. If done under

such circumstances, the government could not present the question for review to the law court; it can only be raised in any case by a respondent. We think that in the interests of justice and in accordance with the principles of public policy, it is wiser to hold that this is a matter which may be taken advantage of by a respondent, than that although improper and unauthorized it can not be made the subject of review.

Another consideration should not be lost sight of. The object of an investigation by a grand jury is not only to bring the guilty to trial, but also to protect the innocent from groundless accusation. The duties of grand jurors are important and responsible. They should be entirely independent; they should be uninfluenced by any consideration except a desire to "diligently inquire and true presentment make of all matters and things" given them in charge, according to their oaths and their consciences. If it be competent for the court to order a stenographer to be present and take stenographic notes of the testimony of witnesses, for such future use as the court might order or the law allow, it might be done in one case only during a whole session, while all other matters were investigated in the ordinary way. Should that be done, we cannot tell what influence such a discrimination might have upon the jurors. We think that in some cases it might affect their independence, and impair the rights of the accused.

Our conclusion is that, for the reasons given, the proceeding is unauthorized and improper and that the indictment so found is void.

The entry will therefore be,

Exceptions sustained. Demurrer overruled.
Plea in abatement adjudged sufficient. Indictment quashed.

WINFIELD S. SAWYER *vs.* J. M. ARNOLD SHOE COMPANY.

Penobscot. Opinion June 1, 1897.

Negligence. Elevator. Evidence. Exceptions.

In an action to recover for personal injuries by a defective elevator, the alleged defect being the manner in which one of the dogs used to hold up the elevator gate was attached to the gate, it is competent to ask an expert in mechanical devices how the dog might be fastened so that there would be no danger of its moving except in the natural or intended way.

It is proper for an expert to describe the different ways that the device can be secured so as to be safe, because the jury are thereby enabled to pass upon the question whether the defendant used ordinary care in the particular respect complained of.

To a requested instruction to the jury by the defendant, containing a general principle of law, applicable to the defendant's duty to furnish suitable appliances, the presiding justice said: "That is so; but what would be due care in driving a dull horse would not be in driving a locomotive."

Held; that this qualification to the requested instruction is not open to objection. It is simply an illustrative way of saying that ordinary care in any case depends upon the circumstances of the case; that what may be ordinary care under some circumstances would be gross negligence under others.

The defendant requested this instruction: "However strongly the jury may be convinced that there may be better or less dangerous appliances, or machinery, it should not say that the use of appliances or machinery commonly adopted by those in the same business is a negligent use for which liability should be declared or imposed."

In answer, the presiding justice said to the jury: "Not if they (the jury) believe at the same time that it was reasonably sufficient themselves. The common use will not of course prove its usefulness. That is evidence of its usefulness, but not conclusive." Whereupon the defendant asked the court: "Would it not be due care to use as is ordinarily used by persons in the same line of business?" To which the court replied: "Yes, but that must be reasonably safe and sound; or he should use due care to have it safe and sound." The defendant then requested this instruction: "That he does use reasonable care when he uses the same machinery that is in use in the same sort of business." To which the court replied: "Though the jury should find that it was actually defective? I should not say to the jury that if they found that machinery actually defective and insufficient, it would be any better because others used it."

Held; that these rulings are unobjectionable upon the point involved. Ordinary care is such care as persons of ordinary prudence exercise under like circumstances. It does not depend upon custom.

Evidence was admitted during the trial that the defendant held an accident policy upon the elevator. This evidence was admitted only for the purpose of showing any admission of the defendant as to how and when the accident happened, and whether the defendant was using ordinary care or not. In his charge to the jury the presiding justice said: "Now it is contended by the plaintiff that they (referring to the defendant) exercised no care; that they entrusted to insurance. And there I think it admissible that it should appear that there was an insurance, or that they trusted to one rather than upon any investigation, inquiry or experiment, or conduct otherwise of their own."

Held; that this instruction was erroneous. The burden was upon the plaintiff to prove the negligence of the defendant, and because the defendant had taken the precaution of protecting itself against accidents, this fact should not influence the jury in determining the question of negligence.

Juries should not be allowed, in cases of this kind, to take into consideration the fact that an employer is insured against accidents. It would do more harm than good, and would increase the already strong tendency of juries to be influenced in cases of personal injuries, especially where a corporation is defendant, by sympathy and prejudice.

On Motion and Exceptions by Defendant.

This was an action to recover damages, sustained by the plaintiff, on account of the alleged negligence of the defendant company in not providing suitable machinery and appliances in and about a freight elevator in the defendant's store, and under their management and control, whereby the said plaintiff, while engaged in the employ of the defendant company, and while passing on to said elevator in the performance of his duty, sustained severe injuries in and to one of his legs. The jury returned a verdict for the plaintiff for $771.00.

The case is stated in the opinion.

P. H. Gillin and C. J. Hutchings, for plaintiff.

F. A. Wilson and C. F. Woodard, for defendant.

Sitting: Emery, Foster, Whitehouse, Wiswell, Savage, JJ.

Wiswell, J. This action was to recover for personal injuries sustained by the plaintiff, and caused, it is alleged, by a defective elevator of the defendant, which the plaintiff had occasion to use

in the course of his employment. The alleged defect was the manner in which one of the dogs used in holding up the elevator gate was attached to the gate. Various exceptions are alleged in regard to the admission of testimony, and as to the instructions to the jury, which we will consider in detail.

I. An expert upon mechanical devices, called by the plaintiff, was allowed to answer, against the defendant's objection, this question: "How might that dog have been fastened on so there would be no danger of the dog moving except in the natural or intended way?" We think that the question was properly allowed. The issue for the jury to pass upon was whether the defendant had used ordinary care, in view of the particular circumstances of the situation, in providing a reasonably safe elevator for the plaintiff to use in the course of his employment. It did not by any means follow that the manner of securing the appliance, which the witness might describe in his answer, was the only proper way in which it could be done, or that it was a practical or necessary way, or that the defendant was negligent in not having adopted that method. But to enable the jury to pass upon the question of whether the defendant had used ordinary care in the particular respect complained of, it was certainly proper for a qualified person to describe the way, or the different ways, that the device could have been secured so as to have been safe.

II. Counsel for defendant requested this instruction: "An employer performs his duty when he furnishes appliances of ordinary character and reasonable safety, and reasonable safety means safe according to the usages, habits and ordinary risks of the business. No man is held to a higher degree of care than the fair average of men in the same line of business conducted under substantially similar circumstances." In answer to which the justice presiding said: "That is so; but what would be due care in driving a dull horse would not be in driving a locomotive." The defendant excepts to the qualification. We think that there is nothing objectionable in this remark. It was simply an illustrative way of saying that ordinary care in any case depended upon the

circumstances of the case; that what might be ordinary care under some circumstances would be gross negligence under others, a proposition too clear and well settled to need comment.

III. Counsel for the defendant requested this instruction: "However strongly the jury may be convinced that there may be better or less dangerous appliances, or machinery, it should not say that the use of appliances or machinery commonly adopted by those in the same business is a negligent use for which liability should be declared or imposed." In answer to which the justice presiding said to the jury: "Not if they (the jury) believe at the same time that it was reasonably sufficient themselves. . . . . The common use will not of course prove its usefulness. That is evidence of its usefulness, but not conclusive." Whereupon defendant's counsel asked the court: "Would it not be due care to use such as is ordinarily used by persons in the same line of business?" To which the court replied: "Yes, but that must be reasonably safe and sound; or he should use due care to have it reasonably safe and sound." Defendant's counsel then requested this instruction: "That he does use reasonable care when he uses the same sort of machinery that is in use in the same sort of business." To which the court replied: "Though the jury should find that it was actually defective? I should not say to the jury that if they found that machinery actually defective and insufficient, it would be any better because others used it."

We think the defendant has no cause of complaint in regard to any of the rulings of the justice presiding upon the point involved in these requests. Ordinary care is such care as persons of ordinary prudence would have exercised under like circumstances. It does not depend upon custom. "It would be no excuse for a want of ordinary care that carelessness was universal about the matter involved, or at the place of the accident, or in the business generally." *Mayhew* v. *Sullivan Mining Co.*, 76 Maine, 100.

IV. The defendant corporation was insured against accident. This fact incidentally appeared in the case because of a statement in writing from the defendant to the insurance company, which, it

was claimed, contained certain admissions of the defendant, and was admitted only for the purpose of showing any admission of the defendant as to how and when the accident happened, and whether the defendant was using ordinary care or not. In his charge to the jury the justice presiding said: "Now it is contended by the plaintiff that they (referring to the defendant corporation) exercised no care, that they entrusted to the insurance. And there I think it admissible that it should appear that there was an insurance, or that they trusted to one rather than upon any investigation, inquiry, or experiment, or conduct otherwise of their own."

We think that this was error; that while the fact that the defendant was insured against accidents should have no legitimate bearing, it might very naturally have an improper influence upon the jury in passing upon the one question involved, whether or not the defendant had failed to exercise that degree of care which the law required of it. The burden of proving that the defendant had failed in this respect was upon the plaintiff, and we do not think that because the defendant had taken the precaution to be insured against accident, that it should have any influence with the jury in determining that question. It is true that the fact of insurance might have the effect of lessening the defendant's reason or motive for being careful. But the question was not, as to how much or how little motive the defendant had for being careful, but whether or not it had in fact exercised due and reasonable care.

We think that to allow juries, in cases of this kind, to take into consideration the fact that an employer was insured against accidents, would do more harm than good, and would increase the already strong tendency of juries to be influenced, in cases of personal injury, especially where a corporation is defendant, by sympathy and prejudice.

The only case which has been called to our attention, or that we have noticed, which at all touches this question, is that of *Anderson* v. *Duckworth*, 162 Mass. 251, in which the defendants were insured against accidents, and that fact appeared in evidence because of a conversation between the plaintiff and one of the defendants, in which, it was claimed, that there was an admission of liability and

a reference made to the fact that the defendants were insured against accident. At the trial the jury was instructed that the fact of insurance had nothing to do with the duty of the defendants to the plaintiff or their liability to him. In the opinion of the court it is said: "And we think that it was competent for the court, in the exercise of its discretion respecting the conduct of the trial, to admit the conversation, with a caution to the jury that the fact of insurance was not to be taken as an admission by the defendants."

It is the opinion of the court, therefore, that upon this point, the exceptions must be sustained.

Exceptions sustained.

HORACE W. SARGENT *vs.* INHABITANTS OF MILO.

Piscataquis. Opinion May 29, 1897.

Taxes. Electors. Unincorporated Places. R. S., c. 4, § 58.

Electors living in unincorporated places may furnish lists of their polls and estates to the assessors of any adjacent town, on or before the first day of April, and said assessors shall assess state and county taxes upon all such persons. And such electors so presenting their polls and estates may vote in such town in all elections for governor, senators, representatives and county officers.

Held; that such elector is not liable to be assessed for a town tax.

The case appears in the opinion.

J. B. Peaks, for plaintiff.

G. W. Howe, for defendants.

PER CURIAM: On the 30th day of March, 1892, the plaintiff, then living in the unincorporated township of Lake View, or number 4, range 8, adjacent to the town of Milo, furnished the assessors of that town with a list of his poll, and of his estate, consisting of one horse; and thereupon the assessors of Milo, in pursuance of said application, and as they understood, in conformity with R. S., c. 4, § 58, on the first day of April of that year assessed the

plaintiff a tax of three dollars upon his poll and one dollar and a half upon his horse in accordance with the list by him furnished to them.

The application made by the plaintiff to the assessors of the defendant town, and the list furnished, was for the purpose of voting in that town, and by virtue of the statute above mentioned he should have been assessed a state and county tax.

The assessors of Milo, however, through some mistake or inadvertence assessed upon the plaintiff a state, county and town tax. That statute provides that "electors living in other unorganized places, may furnish lists of their polls and estate to the assessors of any adjacent town, on or before the first day of each April, and said assessors shall assess state and county taxes upon all such persons, and they shall be collected in the same manner and by the same officers, as if such electors were inhabitants of such town; and such electors so presenting their polls and estates may vote in such town in all elections for governor, senators, representatives and county officers."

The plaintiff contends that the tax thus imposed by the assessors was illegal, and having paid the same under protest and to avoid arrest, he seeks to recover back the money in this action.

The jurisdiction of the assessors by statute was limited to the state and county tax. For them also to undertake to assess a town tax, in addition to the state and county tax, was more than an error, mistake or omission in exercising their jurisdiction to assess state and county taxes.

It was going outside of their jurisdiction. The assessment of the town tax was not a mere irregularity. It was wholly unauthorized and hence void.

The town has received the plaintiff's money without right. In equity and good conscience it should be refunded, and this action therefor is sustained.

Judgment for plaintiff.

CHARLES E. TREFETHEN, and another, In Equity,

vs.

ERI V. LYNAM, and others.

Cumberland. Opinion May 31, 1897.

Husband and Wife. Fraudulent Conveyance. Burden of Proof. R. S., c. 77, § 6, cl. X.

The court will scrutinize thoroughly, and even with suspicion, the transfer of means and earnings by husbands to their wives however innocent any such transaction may appear, when the effect of the transfer is not for the support of the family, but to put them beyond the reach of creditors. The wife will not be allowed as against creditors to absorb the debtor husband's property under the cover of family support.

When a husband appropriates his own money to erecting buildings upon his wife's land with her consent, the increment of value thereby created can be taken by his prior creditors through proceedings in equity, even though there was no actual intent to defraud such creditors.

When a wife receiving from time to time her husband's income first invests it in her separate business, and then pays the family expenses out of that business, the burden is upon her, as against his prior creditors, to show affirmatively the amount actually consumed in such expenses.

In such accounting the wife cannot be allowed for rent of her real estate occupied by the family, at least in the absence of a pre-existing agreement by the husband to pay rent.

IN EQUITY. ON APPEAL.

This was an equitable trustee process, under R. S., c. 77, § 6, cl. X, heard in the court below on bill, answers and proofs, and where the bill was dismissed. The plaintiffs appealed to this court.

One of the principal portions of the decree appealed from is as follows:

"That as Mrs. Lynam owned the real estate, she was entitled to its income, and might justly appropriate to herself from her husband's remittances an amount equal to a fair rental of the premises occupied by her husband's family, which were owned by her; and that the amounts remitted to her by her husband have not

exceeded the amount expended for the support of his family, and the fair rental of the premises occupied by his family."

The case is stated in the opinion.

Benj. Thompson, for plaintiffs.

J. A. Peters, Jr., for Mrs. Lynam and R. E. Campbell.

Burden of proof on plaintiffs: *Stratton* v. *Bailey*, 80 Maine 345; *Metcalf* v. *Metcalf*, 85 Maine, 473.

It would be harsh and inequitable to hold the wife to a strict keeping of accounts with her husband, no fraud being claimed and the wife having no reason for thinking that an account would ever be needed. Business men expect settlements; a husband does not require it of his wife.

Rent: As between husband and wife it is not necessary to decide that rent can be charged and collected. But in equity, as against creditors, a wife living by force of necessity practically apart from her husband, on her own homestead, is entitled to appropriate from her husband's remittances a fair sum for the premises occupied by herself and her husband's children. The husband is certainly bound to provide both a home and a living to wife and children. If this house should burn down and the wife and family move into the house of a stranger, the husband would be liable for the rent. If he should send home money for expenses she could certainly appropriate a portion for rent.

By the laws of this state a married woman is entitled to the total income and use of her own property, even as against her husband. If, as against creditors of her husband, she cannot appropriate from moneys sent by him for general family expenses, a fair sum for use of her property, then she does not get the whole benefit and income of it; but the creditors of the husband get it.

While this proposition is correct, it is incidental to the issue, as outside of rent, all remittances by the husband were required for the support of the family.

Cases cited by counsel for plaintiff contain either a strong element of fraud, interest acquired by husband furnishing part of purchase money, or by breach of trust on part of wife, or by contract, express or implied, between husband and wife.

Husband's improvements on wife's land cannot be taken by his creditors, except in cases of fraud: *Webster* v. *Hildreth*, 33 Vt. 457, (78 Am. Dec. 632); *Robinson* v. *Huffman*, 15 B. Monroe, 80, (61 Am. Dec. 177); *Eilers* v. *Conradt*, 39 Minn. 242, (12 Am. St. Rep. 641); *Lewis* v. *Johns*, 24 Cal. 98, (85 Am. Dec. 49); *Phillips* v. *Hall*, 28 Atl. Rep. (Pa.) 502; *Smith* v. *Reber*, 18 Atl. Rep. 462, (N. J. Eq.); *Peck* v. *Brummagim*, 31 Cal., 440, (89 Am. Dec. 195 and notes); *Lynde* v. *McGregor*, 13 Allen, 182, and note in same (90 Am. Dec. 188).

Money and labor expended voluntarily by husband upon his wife's land gives him no right, title or interest therein: *Holmes* v. *Waldron*, 85 Maine, 312; *Humphreys* v. *Newman*, 51 Maine, 40; *Burleigh* v. *Coffin*, 22 N. H. 118, (53 Am. Dec. 236); *Marable* v. *Jordan*, 5 Humphreys, 417, (42 Am. Dec. 441 and note); *Pierce* v. *Pierce*, 25 Vt. 511.

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

EMERY, J. From the documents and the testimony of the various defendants themselves, the following facts appear to be practically undisputed.

In 1859, the defendant, Linda M. Lynam (then Linda M. Clement) was the owner by inheritance from her father of a homestead at Seal Harbor, Mt. Desert, and was living upon it with her mother. In that year she married the defendant, Capt. Eri V. Lynam, and the pair began married life upon this homestead and their home has been upon it ever since. The family has consisted of Mr. and Mrs. Lynam, their children and Mrs. Lynam's mother. In 1882, the defendant Robert E. Campbell married a daughter of the other two defendants and lived with her upon the same homestead as a member of the family. Capt. Lynam's occupation was that of a master mariner and he was absent most of the time after 1874 upon foreign voyages.

In 1883, Mrs. Lynam and her son-in-law Campbell began the enterprise of building and running a summer hotel on her place.

One hotel building was erected and furnished in 1884 and a second one in 1887. The money was raised by notes of Mrs. Lynam and her mother, Mrs. Clement, secured by a mortgage of the homestead. In this way money was borrowed as follows: In 1883, $4000 at 8 per cent; in 1884, $6600 at 8 per cent; in 1887, $1500 at 8 per cent, amounting to $12,100. In addition to the above, $2500 were borrowed on note alone at seven per cent in 1887. The business was managed by Campbell for himself and Mrs. Lynam under the name of Lynam & Campbell. Mrs. Lynam and a minor daughter worked in and about the hotel during the season at least. The interest on the loans, aggregating over $1000 annually, and occasionally small sums upon the principal were paid from year to year up to 1892. A $1000 payment was made in 1889, and another $1000 payment in 1893. In 1894, some of the property of Mrs. Lynam was sold to one Cooksey and from the proceeds of that sale the various mortgages were finally paid that year.

During all this time Capt. Lynam was away at sea, coming home at infrequent intervals and for short stops only. From time to time he remitted sums of money to his wife, the different remittances varying in amount from $50 to $500. They were usually by draft or cheque. In making these remittances Capt. Lynam gave no directions as to what should be done with the money. He seems to have left its disposition entirely to his wife's discretion. The remittances, with but few if any exceptions, were turned over by Mrs. Lynam to Mr. Campbell and by him deposited in the bank to the credit of Lynam & Campbell,—in the same account with the hotel business. One draft of $350 was sent direct to Mr. Campbell who deposited it to the same account. The aggregate amount of these remittances is much in dispute. The respondents admit that they averaged $700 yearly. The plaintiffs claim that they were nearer $1200 per year. There seems to be no exact account of the amount, and it is to be largely determined by inference from circumstances.

As stated above, nearly all the remittances, whatever the amount, were turned into the funds of Lynam & Campbell. Out

of these funds of Lynam & Campbell, were paid the hotel expenses, the interest on the notes, the partial payments upon the principal, and also the family expenses of the Lynam and Campbell families who were living together. No accounts were kept, and both Mrs. Lynam and Mr. Campbell are utterly unable to state the amount expended for either or both families. The two families comprised five persons, Mrs. Lynam, her mother, and an unmarried minor daughter, with Mr. and Mrs. Campbell. Nor were any accounts kept of the hotel business; but both Mrs. Lynam and Mr. Campbell say there was little or no profit in it. Mrs. Lynam says there was a loss.

At a period about midway between the years 1874 and 1883, Capt. Lynam, with his wife's consent, built a stable on the homestead expending thereon about $300 of his own money. He does not claim to have built the stable with his own labor and as he was away at sea the greater part of the time after his marriage, it is a fair inference that the stable was built out of his money.

But all this while, and as early as 1874, Capt. Lynam was indebted to the plaintiffs in a sum of over $1500, with interest, which he has never paid any part of and has had no property in his name with which to pay it. This indebtedness (now in the form of a judgment) does not seem to have been known to Mrs. Lynam or Mr. Campbell till 1889.

The plaintiffs now bring this bill in equity in the nature of an equitable trustee process under R. S., c. 77, § 6, cl. X, to reach and apply to their judgment the money of Capt. Lynam thus appropriated or used in the improvement of Mrs. Lynam's property, and in her business enterprise. They claim that they have shown a direct appropriation of their debtor's money to the erection of the stable, which they say ought, in equity at least, to be appropriated to his debts. While they do not claim to have shown any direct appropriation of any specific sum of their debtor's money to the payments on the hotel erections, they do claim they have shown a general appropriation of nearly all his earnings by the business association of Lynam & Campbell, and their incorporation into the fund from which that concern paid the interest, and

some parts at least of the principal of the hotel mortgages. They further claim that having shown this, the burden is on the respondents to show that the debtor's money thus taken was in fact expended for his family's suitable maintenance, and that they have failed to do this and hence should submit to its re-appropriation for his debts.

The justice hearing the cause, in the first instance, did not sustain these claims of the plaintiffs, but dismissed the bill upon the following grounds among others: (1) as to the stable, that it was built without any understanding between Capt. Lynam and his wife as to its ownership, and so became a part of the wife's realty with no legal or equitable title thereto left in him; (2) that Mrs. Lynam was entitled to deduct from her husband's remittances a fair rental for her homestead occupied by their family; (3) that (making the above allowance for rent) it did not appear that any appreciable or ascertainable part of Capt. Lynam's remittances was in fact applied to his wife's property or business. The justice seemed to put on the plaintiffs the burden of showing such specific application. He also seemed to intimate that there was or might be a surplus if the rent were excluded.

On account of the intimacy of the marriage relation the husband and wife cannot ignore the creditors of either to the extent that two strangers might. A debtor's wife receiving her husband's earnings may entirely consume them in the suitable support of his family including herself, without becoming in any way answerable to his creditors. She has no right, however, as against his prior creditors to appropriate her husband's earnings or income to making investments in her own name either for him or herself,—or to keeping down or paying off encumbrances on or otherwise improving her own property,—or to paying the debts or increasing the profits of her separate business. Nor can she rightfully retain, as against them, the value of permanent additions voluntarily made by him to her property. Outside of the statute exemptions he cannot acquire any property which shall be free from the claims of prior creditors; nor can she acquire such property out of his principal or income. Whenever it appears that she has thus

absorbed his money or estate, she can be compelled to account for it by this equitable trustee process. The prior creditor of the husband need not show an actual fraudulent intent on the part of either husband or wife. It is enough for him to show that the wife has acquired some property or value out of her husband's unexempted principal or income. This value thus obtained should be restored by her for the payment of his prior debts, though the husband or his representatives might have no legal or equitable claim to such restoration. The wife may owe a duty of restoration to her husband's prior creditors without owing any such duty to him. These propositions are deducible from the following cases. *Call* v. *Perkins*, 65 Maine, 446; *Sampson* v. *Alexander*, 66 Maine, 182; *Robinson* v. *Clark*, 76 Maine, 494; *Lane* v. *Lane*, 76 Maine, 526; *Stratton* v. *Bailey*, 80 Maine, 345; *Merrill* v. *Jose*, 81 Maine, 22; *Berry* v. *Berry*, 84 Maine, 541.

I. It is undisputed that Capt. Lynam, while in debt to the plaintiffs and having no visible property of his own, directly expended with his wife's consent some $300 of his own money in making a permanent, visible, appreciable addition to his wife's estate and to its value,—not merely keeping up the estate, or carrying it on, but adding to it. This addition (stable) became a part of the wife's realty and Capt. Lynam himself, as found by the justice of the first instance, may have no right in it, or to re-imbursement for it.

Under the principles above stated, however, the husband's right is not the test of his prior creditors' right. As to them, neither husband nor wife can erect buildings on her land with his money, and retain the benefit. In the absence of fraudulent intent or active participation upon the part of the wife, it might not be equitable to require her to account for the full sum thus substracted from her husband's means and appropriated to her property, since the benefit to her estate might not be so much; but she should not retain any benefit, or increment in value of his estate made at the expense of her husband's prior creditors. To turn over to those creditors the benefit or increment, if any, thus obtained would cause her no loss of her own property, but would

simply transmit some part of the husband's property to his creditors,—a most equitable proceeding.

II. It is undisputed that Capt. and Mrs. Lynam and their family lived upon her homestead. It does not appear, however, that there was ever any agreement or understanding between them for the payment of rent by him to her therefor. Without expressing an opinion upon the effect of such an agreement if its existence were shown, it may be safely said that in the absence of that agreement the wife has no right to such rent from the husband. It is true the wife may, at her will, manage and dispose of her own property including her homestead upon which the family live. She may lease it to other parties and recover and retain the rent, but while she occupies it herself with her husband and family she cannot, at least in the absence of any agreement, require the husband to pay to her rent therefor. The relation between them as to such occupancy is that of husband and wife uniting to make a common home. The relation of landlord and tenant is not to be inferred or implied. The occupation is that of both. *Southworth* v. *Edmands*, 152 Mass. 203. There are doubtless numberless instances in this country where the husband and wife and family are living upon a homestead owned by the wife; yet no case has been found of a claim made in the courts by the wife against the husband or his estate for the rent, in the absence of an agreement. This circumstance is strong against the validity of such a claim.

If the wife cannot insist on such rent, as against her husband or his estate, it follows that she cannot insist upon it as against his creditors. Her husband's indebtedness does not create for her a new right in his property.

III. A wife simply keeping her own and her husband's home and family need not account to her husband's creditors for any part of his income received by her, so long as it does not appear that she is using any part of it for her separate profit. In this case, however, it does affirmatively appear that the wife with a business associate was engaged in a business for her own profit entirely apart from her husband, and that all or nearly all of her husband's

remittances were, in the first instance, turned into this business, to the account of Lynam & Campbell. The support of the families of both was drawn indiscriminately from the funds of the business. This procedure was certainly unjust to her husband's creditors,—this subjecting their debtor's income, not solely to the support of himself and family, but to the risk of a business from which he was in no event to derive any profit or increase of estate. At least, it has put on the wife and her business partner the duty of showing affirmatively that such absorption of her husband's income into her property and business worked no wrong to his creditors,—that an equivalent sum was properly and actually consumed by the husband's family. This they have not done. At the most they only give a guess.

It is urged, at this point, that the justice of the first instance has found this to be the fact, and that his finding of fact is not to be reversed unless clearly wrong. We do not understand the justice to have found this specific fact. His finding was general, including both law and fact. He seemed to concede that the Lynam family expenses alone, not counting rent, might not have consumed the remittances. He made much account of the rent in arriving at his conclusion.

The lamentable tendency of so many debtors to transfer their means and earnings to their wives' possession or to expend them upon their wives' property, not for the support of the family, but to store them away from the reach of their creditors, renders it necessary for the courts to scrutinize thoroughly, and even with suspicion, any such transaction however innocent it appear on the surface. The wife must not be allowed to absorb the debtor husband's property under the cover of family support. *Robinson* v. *Clark*, 76 Maine 494; *Seitz* v. *Mitchell*, 94 U. S. 580. Applying that scrutiny to this case, we are satisfied that at least fifteen hundred dollars of the debtor husband's earnings have been used in additions and improvements upon the wife's real estate with her consent, by which her estate has been increased in value to that full amount.

The plaintiffs are entitled to judgment and execution for that

amount and costs against the debtor husband and the defendant wife, to be applied to their former judgment against the husband. The defendant Campbell does not appear to have any interest in the property, and hence the bill should be dismissed as to him but without costs.

Decree below reversed.
New decree in accordance with this opinion.

SOPHRONIA E. ROBINSON

vs.

PENNSYLVANIA FIRE INSURANCE COMPANY.

Knox. Opinion June 2, 1897.

Insurance. Dwelling-House. Carriage-House. Waiver. Estoppel. Issues of Law and Fact. R. S., c. 49, § 21.

When there is no express waiver, it is not only necessary for the jury to determine what the facts are, which are relied upon for the purpose of showing a waiver, but it is also the peculiar and appropriate province of the jury to determine what inferences are properly deducible from such facts.

That the question whether or not there has been a waiver, where it is a matter of inference, is one of fact for the determination of the jury, is generally, if not universally, held by the courts of this country.

In an action on a fire insurance policy there was evidence that the plaintiff did not furnish proofs of loss within a reasonable time as required by R. S., c. 49, § 21, but claimed that the defendant had waived the same. There was also evidence tending to prove that the defendant denied its liability for the reason that the policy did not cover the goods which were in a new building, or carriage-house, which the plaintiff claimed belonged with her dwelling-house. The plaintiff contended that such denial was a waiver of the proofs of loss, and the defendant contended the contrary.

Upon the question of waiver the presiding justice instructed the jury as follows: "So, gentlemen, you will determine whether or not from the beginning, the defendant has denied its liability under this policy because they claim it did not cover this property; and if it has, then, gentlemen, they have waived any proof on the part of the plaintiff; and, as I have said to you, she may recover, provided she satisfies you that the policy covers the property consumed by reason of its being in the building that was mentioned in the policy."

Held; that the question as to whether or not there had been a waiver, was one of fact for the jury.

It was, therefore, for the jury to determine, from the acts relied on and proved, whether the inference could be properly drawn, either, that there was an intention upon the part of the insurer to waive its rights to have a proof of loss furnished by the insured; or that the denial of liability, for another cause, was of such a character, or made under such circumstances, as to reasonably induce a belief upon the part of the insured, that the furnishing a proof of loss would be a useless formality, and that in relying upon the belief thus induced, the plaintiff neglected to make one.

The carriage-house building was erected soon after the policy was issued and distant from the dwelling-house nearly two hundred feet, but on the same lot. The presiding justice after instructing the jury that they would determine whether or not said building belonged to the house and stable, to be used therewith as a carriage-house building, or whether it was a separate place where business was to be carried on and extra-hazardous articles were to be kept, further instructed the jury as follows: "It is not necessary that it should be a building where only carriages are kept—it might be used for various purposes—the only question is, did it belong to them to be used to some extent as a carriage-house with that stable? If it did, then this policy covered the property that was in it, and the plaintiff would be entitled to recover under the policy. If it did not, then the plaintiff cannot recover."

Held; that these instructions are correct and in accordance with the previous decision of this court in 87 Maine, 399. The building, viz: "her frame stable and carriage-house buildings, belonging with said dwelling and on the same lot" was within the description in the policy, if it was in part used by the plaintiff as a carriage-house, belonging with her dwelling-house and on the same lot, although it was also used to some extent by persons other than the plaintiff for other purposes.

See *Robinson* v. *Insurance Company*, 87 Maine, 399.

The case is stated in the opinion.

T. P. Pierce, for plaintiff.

Waiver: Counsel cited: *Lewis* v. *Monmouth Ins. Co.*, 52 Maine, 492; *Nickerson* v. *Nickerson*, 80 Maine, 100; *Day* v. *Insurance Co.*, 81 Maine, 247; May on Ins. 1st Ed. § 469, p. 573; *Tayloe* v. *Merchants F. Ins. Co.*, 9 Howard, 191; *Clark* v. *N. E. F. I. Co.*, 6 Cush. 342, and cases; *Bartlett* v. *Union M. F. Co.*, 46 Maine, 503; *Underhill* v. *Agawam F. I. Co.*, 6 Cush. 440; *Priest* v. *Citizens I. Co.*, 3 Allen, 602; *Franklin I. Co.*, v. *Coates*, 14 Md. 385; *Rogers* v. *Traders I. Co.*, 4 Paige, 583.

W. H. Fogler, for defendant.

Waiver: a question of fact for the jury: *Nickerson* v. *Nickerson*, 80 Maine, 100; *Smith* v. *Cal. Ins. Co.*, 87 Maine, 190; *Diehl*

v. *Adams Co. Ins. Co.*, 58 Pa. St. 443, (98 Am. Dec. 302); *Enterprise Ins. Co.* v. *Parisot*, 35 Ohio St. 35, (35 Am. Rep. 590); *McPike* v. *Western Ass. Co.*, 61 Miss. 37; *West* v. *Platt*, 127 Mass. 372; *Savage Mfg. Co.* v. *Armstrong*, 17 Maine, 34; 7 Am. & Eng. Enc. of Law, 1056; *Farmer's Ins. Co.* v. *Moyer*, 97 Pa. St. 441; *Farmer's Ins. Co.* v. *Taylor*, 73 Pa. 342; *Penn. Ins. Co.*, v. *Dougherty*, 102 Pa. St. 568; *Brink* v. *Hanover Ins. Co.*, 70 N. Y. 591–2; *Trask* v. *Ins. Co.*, 29 Pa. 198, (72 Am. Dec. 622); *Patrick* v. *Ins. Co.*, 43 N. H. 621, (80 Am. Dec. 197); *Beatty* v. *Ins. Co.*, 66 Pa. 9, (5 Am. Rep. 318); *Bennett* v. *Lycoming Co.*, 67 N. Y. 274; *Underwood* v. *Farmer's Ins. Co.*, 57 N. Y. 500; *Norwich & N. Y. Trans. Co.* v. *Western Mass. Co.*, 34 Conn. 561; *Heath* v. *Franklin Ins. Co.*, 1 Cush. 257; *Graves* v. *Wash. M. I. Co.*, 12 Allen, 361; *Aetna Ins. Co.* v. *Tyler*, 16 Wend. 401; *Blake* v. *Exchange Mut. Ins. Co.*, 12 Gray, 265; *Tayloe* v. *Merchants F. Ins. Co.*, 9 Howard, 390–403; *Peoria M. & F. Ins. Co.* v. *Whitehill*, 25 Ill. 382–388; *Susquehanna Ins. Co.* v. *Staats*, 102 Pa. St. 529.

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

WISWELL, J. By a policy dated May 27, 1892, the defendant insured against fire the household furniture, and certain other personal property, of the plaintiff, "while contained in her one and one-half story frame-dwelling and additions, situated No. 112 on the south side of the old Thomaston Road in Rockland, Maine." And, in another clause, "$325 on her vehicles of all kinds, harnesses, robes and all horse furnishings, hay and grain, together with farming and miscellaneous tools, all while contained in her frame-stable and carriage-house buildings, belonging with said dwelling and on the same lot."

At the date of the policy the plaintiff, with her husband, was occupying the frame dwelling-house and additions mentioned in the policy. The buildings consisted of a house, ell and stable all connected. In the month of May, 1892, the plaintiff erected, and

completed at about the date of this policy, another building on the same lot with the dwelling-house, one hundred and eighty-nine feet distant from the stable connected with the dwelling-house. The testimony showed that this new building was occupied in part by the plaintiff's son in making and painting carriages, in part for the storage of carriages there for sale, and that it also contained various carriages, harnesses, robes and other articles belonging to the plaintiff, and paint stock, paint brushes and carriage tools belonging to the plaintiff's son.

The new building, described as a "frame carriage-house and paint-shop building," together with the paint stock, materials and tools, household furniture and other articles contained therein, was also insured by the same company, under a policy dated June 30, 1892, and issued to the plaintiff and her son.

On September 30, 1892, the new building and all of its contents were destroyed by fire. The defendant paid the plaintiff and her son the full amount of insurance under the policy dated June 30. This suit is to recover for the loss of carriages, harnesses and other articles, mentioned in the description in the policy, belonging to the plaintiff and contained in this building. The defendant denied all liability upon the policy in suit, claiming that the property in the new building was not covered by the policy for the reason that, although it stood on the same lot with the dwelling-house, it was not "a carriage-house building belonging with said dwelling."

Upon this point the presiding justice, after instructing the jury that they would determine whether or not said building belonged to the house and stable, to be used therewith as a carriage-house building, or whether it was a separate and distinct place where business was to be carried on and extra-hazardous articles were to be kept instructed the jury as follows: "It is not necessary that it should be a building where only carriages are kept. It might be used for various purposes. The only question is, did it belong to them to be used to some extent as a carriage-house with that stable? If it did, then this policy covered the property that was in it, and the plaintiff would be entitled to recover under the policy. If it did not, then the plaintiff can not recover."

We think that the instructions were appropriate and correct and in accordance with the opinion of this court when the same question between the same parties was before the court, see 87 Maine, 399. It certainly was not necessary that the building should be used exclusively as a carriage-house. It was within the description of the policy, if it was in part used by the plaintiff as a carriage-house belonging with her dwelling-house and on the same lot, although it was also used to some extent by persons other than the plaintiff, for other purposes.

As to the second point raised, we quote from the bill of exceptions: "The plaintiff did not within a reasonable time after her loss deliver to the defendant an account of the loss and damage as required by section 21 of chap. 49 of the Revised Statutes, but claimed that the defendant by its agents had waived the delivery of such proof of loss. There was evidence tending to prove that, when the defendant's agents were notified of the loss, they denied that the defendant was liable for such loss on the policy in suit for the reason that the policy did not cover the goods and chattels, in said new building, destroyed by fire. The plaintiff contended that such denial was a waiver of the proof of loss required by the statute, while it was contended by the defendant that such denial of the plaintiff's claim was not such a waiver."

Upon the question of waiver the presiding justice instructed the jury as follows: "So, gentlemen, you will determine whether or not, from the beginning, the defendant has denied its liability under this policy because they claim it did not cover this property; and if it has, then, gentlemen, they have waived any proof on the part of the plaintiff, and, as I have said to you, she may recover, provided she satisfies you that the policy covered the property consumed by reason of its being in the building that was mentioned in the policy."

We think that this instruction was erroneous. Ordinarily, the question as to whether or not there has been a waiver, is one of fact for the jury. "It is always so whenever it is to be inferred from evidence adduced, or is to be established from the weight of evidence." *Nickerson* v. *Nickerson*, 80 Maine, 100.

It was a question of fact in this case. There was no express waiver; it was therefore for the jury to determine whether, from the acts relied upon and proved, the inference could be properly drawn, either, that there was an intention upon the part of the insurer to waive its right to have a proof of loss furnished by the insured, or, that the denial of liability, for another cause, was of such a character or made under such circumstances as to reasonably induce a belief upon the part of the assured, that the furnishing of a proof of loss would be a useless formality, and that in relying upon the belief thus induced, she neglected to make the required proof of loss within a reasonable time.

When there is no express waiver, it is not only necessary for the jury to determine what the facts are, which are relied upon for the purpose of showing a waiver, but it is also the peculiar and appropriate province of the jury to determine what inferences are properly deducible from such facts.

That the question whether or not there has been a waiver, where it is a matter of inference, is one of fact for the determination of the jury, is generally, if not universally, held by the courts of this country. It was early so decided in this state in the case of *Savage Mfg. Co.* v. *Armstrong*, 17 Maine, 34, in which it was held "whether there was or was not such a waiver is for the decision of the jury, and the presiding judge can not order a nonsuit, even if the court should be of opinion that the evidence of waiver would not warrant a verdict." This case was cited and approved in *Nickerson* v. *Nickerson*, supra.

In *Smith* v. *California Ins. Co.*, 87 Maine, 190, the plaintiff's counsel requested the presiding judge to rule as a matter of law that the defendant had waived their right to arbitration. The court declined to do this, but explaining what might constitute a waiver, it submitted the question to the jury to determine for themselves. The ruling was sustained, although there was no discussion of the question as to whether this was within the province of court or jury.

In *Fitch* v. *Woodruff, etc., Iron Works*, 29 Conn. 91, it was held that this was a question for the jury, "because a question of

waiver is one of intention and most usually depends on acts or declarations, which in regard to their character, are of an inconclusive or doubtful nature, and furnishes only evidence of intention and grounds of inference and deduction which it is the appropriate province of the jury only to consider."

In *Fox* v. *Harding*, 7 Cush. 516, it is said: "It may be laid down as a general rule, that the question, whether the evidence in any case establishes a waiver of any legal right by a party, is one of fact to be settled by the verdict of a jury. . . . . In all questions of this sort, so much depends on the intent with which parties act, that it would be impossible for courts to establish any certain rule by which all cases could be governed. They must necessarily be left to the determination of juries, whose peculiar province it is, to ascertain the intent of parties as gathered from the various facts and circumstances proved in each particular case."

In *Nashua & Lowell R. R.* v. *Paige*, 135 Mass. 145, it is said: "Taking the view most favorable to the defendant, it was a question of fact, upon the evidence, whether he had not thus waived his rights upon which the plaintiff would, in a jury trial, have the right to go to the jury. The ruling, therefore, that, as matter of law, the defendant was entitled, upon the evidence, to recover under his declaration in set-off without passing upon this disputed question of fact, was error." Numerous other cases to the same effect might be cited, but it is unnecessary.

Nor, in our opinion, was the instruction complained of, a strictly correct statement of the law. It was too broad and unqualified. The mere denial by the company of its liability, because of the claim that the property destroyed was not covered by the policy, was not in and of itself a waiver. It would be evidence from which a jury, in connection with all the other facts and circumstances, might draw the inference that a waiver was intended; or, it might have the effect of a waiver, under certain circumstances, upon the doctrine of estoppel. A waiver is the intentional relinquishment of a known right. And even where a waiver is not intended, the language, conduct or even the silence of one party to a contract, may be of such a character and under such circum-

stances, as to induce the other party to believe that a waiver was intended, and, if acting upon this belief, he fails to perform a required condition, then the party, whose conduct caused the belief, will be estopped from taking any advantage thus obtained.

Upon the same principle it has very generally been held, that if an insurance company denies its liability upon other ground, and thereby causes the insured to believe that a compliance with the condition to furnish proofs of loss would be unavailing, and but a useless formality, and he, for that reason neglects to comply with such condition, it will be considered as equivalent to a waiver.

It is true that many decided cases contain statements to the effect, that a general denial by an insurance company of all liability, waives notice and proof of loss, but an examination of these cases will show that they very generally rest upon the essential principles of estoppel. And while this is not universally true, and although some courts assert that this rule is independent of, or at least, not necessarily based upon the doctrine of estoppel, we think that upon principle there can be no waiver unless one was intended, or unless the circumstances create an estoppel.

In *Welch* v. *London Assurance Corporation*, 151 Penn. St. 607, it was decided that when the insured, in good faith and within the stipulated time, does what he plainly intends as a compliance with the requirements of his policy as to proofs of loss, good faith equally requires that the company shall notify him promptly of any objections thereto, so as to give him an opportunity to obviate them, and that mere silence *may* so mislead him, to his disadvantage, to suppose the company satisfied, as to be of itself sufficient evidence of waiver by estoppel. In the opinion in that case it is said: "The plaintiff's fifth point, however, that if the authorized agent of the defendant refused payment of the loss, giving a specified reason therefor to the plaintiff, they must be confined to that reason upon the trial, and the jury should disregard any other defense now made by them, was entirely too broad, and its affirmance, as a general proposition of law, would be clear error. It ignores the elements of estoppel, and lays down a rule without reference to conditions essential to its existence and applicability."

And later in the same opinion, in speaking of certain cases in that state, it is said: "All of these cases rest upon the substantial element of estoppel, that the defendant, having led the plaintiff to suppose that a compliance with the preliminary formalities would be unavailing, could not thereafter set up the want of such preliminaries. Of the soundness of that principle there can be no question."

In *New York Life Insurance Co.* v. *Eggleston*, 96 U. S. 572, Mr. Justice Bradley, in delivering the opinion of the court said: "Any course of action on the part of an insurance company which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract."

In *Agricultural Insurance Co.* v. *Potts*, 55 N. J. Law, 158, the court adopts the language of Mr. Justice Bradley above quoted. In this case the insured procured additional insurance without the written consent of the insurer, as required by the policy; he notified the company and the company directed its agents to cancel the policy, which they failed to do until after the loss. It was held that the insurer was estopped from setting up a forfeiture, the court saying in its opinion: "The case thus presented would, in my opinion, come within the elemental rule of estoppel that in dealing with others no one shall be permitted to deny that he intended the natural consequences of his conduct, when such conduct has in fact induced others to rely upon it to their loss."

"In cases like the present, it must appear that the insured was misled to his prejudice; and where no act has been done, or left undone by the insured, in reliance on the act or non-action of the insurer, there can be no estoppel. The acts or declarations must have influenced the conduct of the other party to his injury." *Wheaton* v. *North British & Mercantile Ins. Co.*, 76 Cal. 415, (9 Am. St. Rep. 216).

In *Butterworth* v. *Western Insurance Co.*, 132 Mass. 489, the principle of estoppel is recognized in this language: "No objection

is here made to the proofs, but, on the contrary, they are by implication recognized as satisfactory. It is against good faith for the defendant, after thus having lulled the plaintiffs into a feeling of security, to object at the trial that the proofs were not sufficient; and the jury were justified in finding, if not required to find, a waiver by the defendant."

The decisions of the New York Court have been somewhat conflicting upon this question, but in *Devens* v. *Mechanics & Traders Insurance Co.*, 83 N. Y. 168, the Court of Appeals distinctly recognizes this doctrine in the following language: "The doctrine of waiver was, we think, properly applied in that case, but it should not be extended so as to deprive a party of his defense, merely because he negligently, or incautiously, when a claim is first presented, while denying his liability, omits to disclose the ground of his defense, or states another ground than that upon which he finally relies. There must, in addition, be evidence from which the jury would be justified in finding, that with full knowledge of the facts there was an intention to abandon, or not to insist upon the particular defense afterward relied upon, or that it was purposely concealed under circumstances calculated to, and which actually did, mislead the other party to his injury."

The doctrine is thus stated in Bigelow on Estoppel, p. 660: "Frequent illustrations of the estoppel in question are to be found in cases of actions upon insurance policies, where the conduct of the underwriter has been such as reasonably to lead the assured to believe, until too late, that a requirement of the policy, as e. g. in regard to the proofs of loss or the prompt payment of the premium or of a premium note, will not be required. If the assured as a sensible man has really been misled it would be a fraud upon him to insist upon the term or condition forborne." And on page 664 the same author says: "The question to be considered in such cases, it will be seen, is whether the conduct of the one party had had a natural tendency to prevent the other from doing what he has undertaken to do and has not done."

For the reasons given, and upon the authority of the cases cited, this exception must be sustained.

Exceptions sustained.

HIRAM RICKER AND SONS, In Equity,

vs.

PORTLAND AND RUMFORD FALLS RAILWAY.

Androscoggin. Opinion June 2, 1897.

Equity. Practice. Trade-Mark. Poland Spring. R. S., c. 77, § 17; Equity, Rule XXII; Stat. 1893, c. 156.

Where an answer to a bill in equity is filed containing, as permitted by the practice in this State, a demurrer, *held;* that either party may then set the cause for hearing on the demurrer alone, before replication filed. But if the complainant files a replication to the answer, then he only can set the cause for hearing before the lapse of sixty days, within which time testimony may be taken.

When a cause is set down for hearing generally and not specifically on the demurrer, after replication filed, and before the expiration of sixty days after issue joined, *held;* that in the absence of agreement of parties this could be done by complainant alone. *Held;* that the effect of such proceeding is a waiver of the replication and the cause is set down for hearing on bill, answer and demurrer, the answer to be taken as true. Upon such hearing, the bill, answer and demurrer are all to be passed upon by the court.

The plaintiffs alleged in their bill, praying for an injunction, that the use of the words "Poland Springs" by the defendant railway to designate its station in the town of Poland, where the plaintiffs have a spring of water with the same name, besides a large hotel, endangered their trade-mark in the name of "Poland Spring water;" and also alleged that water shipped from the defendant's station may be marked "Poland Spring water" and sold in competition with the plaintiffs' water. The bill did not allege that this had been done, or was threatened to be done, by the defendant or any one else.

Held; that conceding the plaintiffs have a trade-mark, it has not been infringed upon, nor threatened to be infringed upon, by the defendant. The defendant is a railroad company, chartered for the transportation of persons and merchandise, as a common carrier, and only for that. It would be ultra vires for it to enter upon the business of bottling, shipping and selling water, or to enter into commercial business not necessary and incident to its business of common carrier. Until it does or threatens to do this, the plaintiffs are not injured and have no cause for an injunction upon that ground.

Held; that because the plaintiffs for a series of years had run a stage line from Danville Junction, a station on two other railroads, to their hotels, affords no legal right to exclude another stage line over the same route; and much less

from another station upon another railroad to the same destination, so long as the new line is not represented in some way as that of the plaintiffs, or by this means a fraud is perpetrated upon the traveler or the plaintiffs. Such competition is not open to legal objection in the absence of fraudulent representation.

IN EQUITY. ON EXCEPTIONS AND APPEAL.

The case appears in the opinion.

Elder, Wait and Whitman, of the Boston bar; *A. R. Savage and H. W. Oakes*; *W. H. Newell and W. B. Skelton*, for plaintiffs.

Plaintiffs' stage line: *Marsh* v. *Billings*, 7 Cush. 322; *Stone* v. *Carlain*, 2 Sandf. 738; *London Genl. Omnibus Co.* v. *Turner*, 38 Solic. Jour. 457; *Croft* v. *Day*, 7 Bevan, 84; *Knott* v. *Morgan*, 2 Keen, 213; *Boulnois* v. *Peake*, L. R. 13 Ch. Div. 513, n.

The arm of a court in equity will not be shortened because this is a sale of transportation and not of merchandise. If amusements and hotels are protected against unfair competition, there would seem to be no reason why transportation may not be.

It is no answer to say that the plaintiff can change its stage line to the defendant's station, and that the latter is nearer Danville Junction. The plaintiff has a right to be protected against unfair competition in the stage route which it has for years operated. It has a right to receive its passengers at a point which they can reach most conveniently. Fraud will be presumed from the intentional use or simulation of a name rendered valuable by another. *Glen & Hall Mfg. Co.* v. *Hall*, 19 Am. Rep. 278; S. C. 61 N. Y. 226. See Browne on Trade-marks, §§ 96 to 101. The name of an amusement will be protected, *i. e.* Christie's Minstrels. *Christie* v. *Murphy*, 12 Howard Pr. 77.

The name of a coal company, though not a trade-mark. The Pall Mall Guinea Coal Co. an infringement on The Guinea Coal Co., though both in Pall Mall. *Lee* v. *Haley*, L. R. 5 Ch. App. 155.

Though the name "Stone Ale" could not be protected as a trade-mark, it was protected because defendant's use of the name was unfair competition and likely to mislead the public. *Thompson* v. *Montgomery*, 41 Ch. D. 35.

So of Colton Dental Association, *Colton* v. *Thomas*, 2 Brews. 308.

So of New York Dental Rooms, which was protected against Newark Dental Rooms. *Saunders* v. *Jacobs*, 20 Mo. App. 96.

So of "Golden Lion" on a dry goods house. *Walker* v. *Alley*, 13 Grant, Up. Can. Ch. 366.

So of bronzing horseshoe nails without any name. *Putnam Nail Co.* v. *Bennett*, 43 Fed. Rep. 800.

So of names of hotels. What Cheer House. *Woodward* v. *Lazar*, 21 Cal. 448; Irving House. *Howard* v. *Henriques*, 3 Sandf. 725.

"Keystone Line." *Winsor* v. *Clyde*, 9 Phila. (C. P.) 513.

Browne on Trade-marks, 2 ed. § 528; Harvard Law Review, Vol. IV. 321. Title on Certain Cases analogous to Trade-marks.

Injury to Trade-Mark: *Taendslicksfabricks Atkaibolaget Vulcan* v. *Meyers*, 139 N. Y. 364; *Wheeler* v. *Johnson*, 3 L. R. Ireland, 284.

Whatever the law may be generally in regard to the use of a geographical name as a trade-mark, (*McAndrew* v. *Bassett*, 4 De G. J. & S. 380), the law is well settled that when the plaintiff is the sole owner of the entire tract to which the name in question is applied, his use of that name as a trade-mark will be protected. *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508; *La Republic Francais* v. *Schultz*, 57 Fed. Rep. 37; *Parkland Hills, etc., Co.* v. *Hawkins*, 26 S. W. 389; *Braham* v. *Beachim*, 7 Ch. Div. 848; *Carlsbad, etc.*, v. *Kutnow*, 71 Fed. Rep. 167, affirming 68 Fed. Rep. 794.

W. H. White and S. M. Carter; G. C. Wing; G. D. Bisbee; J. P. Swasey and E. M. Briggs, for defendant.

As used, the word "Poland" is a geographical word, being the name of a town, and as such is free to every one to use as he sees fit. *Canal Co.* v. *Clark*, 13 Wall. 322; *Mill Co.* v. *Alcorn*, 150 U. S. 460.

Not only is the name of a town free to all, but likewise the name of a locality or region, although it has no distinct political existence, as "Green Mountains" and "Genesee Valley." *Hoyt*

v. *Lovett*, 71 Fed. Rep. 173; *Genesee Salt Co.* v. *Burnap*, 67 Fed. Rep. 534.

The words are used by the defendant in a strictly geographical sense,—not as part of a trade-mark or trade name, or for indicating the place of manufacture of an article offered for sale, or the locality in which it is produced, but for giving a name to a particular place, and a station upon its railroad, representing as such stations do the surrounding locality. Hence the rules of law applicable to trade-marks and trade names do not govern such a use of geographical terms. But even if the question were as to the right to the use of these words in a trade name, the same rule would apply as to such use. The cases cited above were trade name cases. The name of a state, town, or city can never be protected except under special circumstances. *Carlsbad* v. *Tibbetts*, 51 Fed. Rep. 852; *Candee* v. *Deere*, (5 Am. Rep. 125,) 54 Ill. 439; *Connell* v. *Reed*, 128 Mass. 477; *Nebraska Loan & Trust Co.* v. *Nine*, 27 Neb. 507, (20 Am. St. Rep. 686).

There never can be an exclusive property in a geographical name. The only rights in connection therewith are to have the improper use of it enjoined. *Chadwick* v. *Covell*, 151 Mass. 190; Pomeroy's Eq., § 1354.

The underlying principles of all these cases is fraud, unfair competition in business as opposed to fair competition. *Dover, etc.*, v. *Fellows*, 163 Mass. 191.

If the public were unfairly deceived by tickets and route advertised by defendant, it would be a matter between the public and the defendant,—a question of damage. This plaintiff could not maintain a bill to enjoin such tickets and advertisements unless he could show in himself exclusive right to transport passengers to Poland Springs. *N. Y. & Rosendal Cement Co.* v. *Cockley Cement Co.*, 44 Fed. Rep. 277; affirmed 45 Fed. Rep. 212.

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

STROUT, J. Bill in equity praying an injunction against the use by defendant of the words "Poland Springs" and "Poland Springs

Junction" to designate two stations upon its road. Answer was filed, which contained, as permitted by our practice, a demurrer. Either party could then set the cause for hearing on the demurrer alone, before replication filed. But complainant filed replication to the answer. After that, complainant only could set the cause for hearing before the lapse of sixty days, within which time testimony could be taken. R. S., c. 77, § 17, as amended by c. 156, of laws of 1893; Equity Rule 22.

This cause was set down for hearing generally, and not specifically on the demurrer, after replication filed, and before the expiration of sixty days after issue joined. In the absence of agreement of parties, this could be done by complainant alone. The effect of this proceeding was to waive the replication, and set the cause for hearing on bill, answer and demurrer, the answer to be taken as true. Upon such hearing, the bill, answer and demurrer were all to be passed upon by the court. *Dascomb* v. *Marston*, 80 Maine, 230. Hearing was had by a single justice, and by him the demurrer was sustained and the bill dismissed. The case comes here upon appeal from that decision and exceptions to the ruling. The appeal vacated the decree below. And the cause would now regularly be heard by this court upon the bill, the answer taken as true, and the demurrer contained in the answer; but as counsel have argued the demurrer alone, we confine our opinion to it.

The complainant owns a tract of land in Poland, upon which are two hotels; one known as the "Mansion House," and the other as the "Poland Spring House," with accommodations for over five hundred people in both houses. The bill alleges that upon said tract of land there is "a spring of water known as the Poland Spring, which water is of great medicinal and commercial value and has been for upwards of thirty years. That it is widely sold throughout the United States and foreign countries." . . . "That it is of great value, both because of the patronage which it draws to said hotels, and because of its wide sale." That it has been for many years sold "under the name of Poland Spring water or Poland water, natural mineral spring water;" and that said name is of great value "as a trade-mark;" and that "by reason of the

reputation of the water from said spring and of the popularity and reputation of said hotels," the tract of land has been for many years and still is known as "Poland Spring" or "Poland Springs."

The defendant operates a railroad running from Mechanic Falls to a point on the Maine Central railroad about three miles east of Danville Junction, and has upon its line a station at a point nearest to complainant's property, and about two miles distant therefrom, which is named and called "Poland Springs;" and at its junction with the Maine Central, it has a station called "Poland Springs Junction." The bill alleges that, at or near said station named "Poland Springs," there is no house, shop or settlement requiring the existence of said station."

Complainants allege that the use of the words, "Poland Springs," by defendant "to designate its station," endangers their trade-mark in the name of "Poland Spring water;" and that water shipped from defendant's station may be marked "Poland Spring water," or "water from Poland Spring," and sold in competition with complainants' water. There is no allegation in the bill that this has been done, or is threatened to be done, by the defendant or any one else.

It may be conceded that the complainants have a trade-mark, as claimed; but it has not been infringed upon, nor threatened to be infringed upon, by the defendant. Defendant is a railroad company, chartered for the transportation of persons and merchandise, as a common carrier, and only for that. It would be ultra vires for it to enter upon the business of bottling, shipping and selling water, or to enter into any commercial business, not necessary and incident to its business of common carrier. Until it does, or threatens to do this, the complainants are not injured, and have no cause for an injunction upon that ground. The cases cited by the learned counsel for complainants in his very able and instructive argument, in relation to trade-marks, have no application to the facts of this case.

Complainants allege that the name "Poland Springs," given to defendant's station nearest complainants' property, tends to deceive the public, and induce the belief that the station is at the com-

plainants' hotel property. It is matter of common knowledge that the stopping places on railways are stations upon the road. The names given to such places indicate only that passengers, destined for the place named, are to alight at that station, as the nearest or most direct point from which to reach their destination. The word "station" is not added to the name, because it is implied from the universal understanding of railway travelers. In many instances the station is named for a town, which may be several miles distant from the station. It is universally understood to be the station, which may be either at the place sought, or the nearest approach to it from the railway. Naming this station "Poland Springs," does not mean, and probably no railway traveler, familiar with the practice of naming stations on railways, ever supposed it meant, the "Poland Spring hotel," or the Poland Spring property. It appeared to be admitted at the arguments, that if defendant had added the word "station" to that of "Poland Springs," there would have been no objection. But the word station is so universally implied, that it would be superfluous to add it. Every regular stopping place of a railway train, where it receives or leaves passengers, is a station, and universally so understood.

The station is called "Poland Springs," in the plural. The trade-mark claimed by complainants, is "Poland Spring," indicating one only. The station name indicates the nearest approach by that railway to the mineral springs in Poland, not to any particular one.

The bill alleges that defendant has contracted with the Maine Central and Boston and Maine railroads, to sell tickets with coupons marked "Poland Springs;" and that the holders intending to visit complainants' "hotel property" are misled thereby to suppose they are to be transported to complainants' "hotel property;" and the complainant "is greatly and peculiarly injured in its said stage line and in its said hotel and spring water properties." It is not claimed that defendant owns or manages any hotel, or threatens to do so, in competition with complainants' hotels.

It would seem that a railroad, which carried guests four miles nearer complainants' hotels than any other railroad, would benefit

the hotels by tending to increase their patronage, as travelers are apt to seek the quickest and easiest transportation to their destination.

But the gravamen of complainants' bill, is that "for many years a stage line, now owned by complainants, has been operated throughout the year from its said property to Danville Junction, on the line of the Maine Central and Grand Trunk Railways, receiving from said companies all passengers holding tickets with coupons entitling the holder to be transported by this stage line to plaintiffs' property." These tickets, with stage coupons, it is alleged, were issued by various railroads, presumably by arrangement with complainants; and thus the profitable transportation by stage was insured to the complainants. There is no allegation in the bill that the facilities for transportation from defendant's station, named Poland Springs, to complainants' hotel, are not ample and convenient. In the absence of such allegation, it is fair to presume that no complaint is made upon that ground by complainants or travelers visiting complainants' hotels. It is admitted that the distance from defendant's station to complainants' hotels, is four miles less than by complainants' stages from Danville Junction; and travelers can reach complainants' hotels from defendant's station, with much less fatigue than by complainants' stages. Yet the complainants ask this court, sitting in equity, to aid it in deceiving travelers desiring to visit its hotels, into the belief that the only practicable approach thereto is by way of Danville Junction, and thus secure to it the profits on six miles of stage transportation, as a gainful monopoly, although the traveler is thereby subjected to four miles of unnecessary stage ride, which to the aged, infirm or timid, is a serious inconvenience. The widely reputed medicinal quality of its water, naturally attracts to complainants' hotels a large number of the weak and invalids who hope for benefit from its use. They should be freed, as far as practicable, from unnecessary annoyance or fatigue on their journey thither.

The principle in *Marsh* v. *Billings*, 7 Cush. 322, and kindred cases, does not apply. In that case the defendant was restrained

from placing the words, Revere House, on his coaches and the caps of his drivers, because it tended to lead the public to believe the coaches were owned or controlled by the proprietors of the Revere House. Defendant in that case was engaged in the business of carrying passengers to and from the railroad stations to hotels; and it was the well known custom for hotels to indicate to the public the coaches controlled by them, by the name of the hotel upon the coaches and caps of the drivers. A railway, as a common carrier of passengers, terminates the transportation at its station, and does not undertake to carry passengers to any hotel, or other special place, beyond its station. The name of its station involves no such implication. The name of defendant's station would not justify or suggest the inference, that the line of stages from the station to complainants' hotel was owned or controlled by the complainants.

The fact that complainants for a series of years had run a stage line from Danville Junction to their hotels, affords no legal right to exclude another stage line over the same route; much less from another station upon another railroad to the same destination, so long as the new line is not represented in some way as that of complainants, and by this means a fraud is perpetrated upon the traveler, or the complainants.

The duty of the railway was accomplished when it furnished safe egress to its passengers at their terminal station, in the absence of special contract for farther transportation. If the passenger's ticket contained a coupon for conveyance from the station to complainants' hotel, the natural implication would be that the stage connection was controlled by the railway rather than by complainants. It is not charged that any representation, that this stage communication was that of complainants', was made in fact; and no fraud, to the injury of complainants' line, is shown to have been practiced.

It is inconceivable that travelers, familiar with the connection of the Maine Central and Grand Trunk railways at Danville Junction with a stage line to Poland Spring hotel, should suppose, when they alight from defendant's road at its station "Poland

Springs," several miles from Danville Junction, and take stage to complainants' hotels, that they are being conveyed by the stage line running from Danville Junction, or one controlled by the same proprietors. And if they did, in the absence of express fraudulent representation, complainants could not object;—one approach being from the Maine Central or Grand Trunk at Danville Junction, the other from defendant's road at a station about three miles east of Danville Junction,—two independent lines from different railroads, by different routes, to the same ultimate destination. Such competition is not open to legal objection, in the absence of fraudulent representation. And if not familiar with the connection at Danville Junction, the traveler would be without knowledge of the proprietorship of the stage line from thence, and would have no preference for complainants' line over any other affording as good accommodation. *Marsh* v. *Billings*, supra, rests upon the ground that the defendant fraudulently represented his coaches to be those employed or controlled by the Revere House. The liability in that case, the court says, was not "that they had the words Revere House on the coaches and on the caps of the drivers merely, but that they falsely and fraudulently held themselves out as being in the employment, or as having the patronage and confidence of the lessee, of the Revere House."

The case stated by the bill does not entitle the complainants to the relief prayed for. The demurrer was rightly sustained.

Decree affirmed; demurrer sustained.
Bill dismissed with additional costs.

IRA K. FARRINGTON, and others, In Equity,

vs.

WILLIAM L. PUTNAM and another, Executors, and others.

Cumberland. Opinion June 4, 1897.

Will. Devise. Charitable Association. Limitation. Governmental and Judicial Questions. Maine Eye and Ear Infirmary. R. S., c. 55, §§ 1, 4, 10; c. 66, § 2.

The Maine Eye and Ear Infirmary is a charitable association organized under a general statute which allows it to take and hold by purchase, gift, devise or bequest, personal or real estate, in all not exceeding one hundred thousand dollars in value owned at any one time. The institution already has that full amount of property as capital, and, if it receives the personal and real estate bequeathed and devised to it in trust for charitable purposes by the late Ira P. Farrington, it will then possess the property so bequeathed and devised in excess of the amount authorized by its act of organization. The next of kin of the testator, by a bill in equity instituted after the probate of the will, against the corporation and the executors, seek for this cause to have such provisions of the will declared to be inoperative and void.

Held; that the will is valid on its face, there being no statute in this state limiting the testamentary capacity of the testator; that the limitation, in the charter of the corporation, of the amount of property it may hold, was mainly intended as a regulative and directory provision, and is only impliedly and not expressly prohibitory, no penalties being attached thereto; that the charter is a contract or compact between the corporation and the state, the limitation being for the benefit of the general public represented by the state, and not for the heirs of the testator or any particular persons; that any transgression of the compact by the corporation in accepting excessive devises or bequests is an offense only against the state, and in no sense an offense against the heirs of the testator or his next of kin; that the contested devises and bequests are voidable only and not void, and must be treated as valid until declared void; that whether they shall be declared void or be permitted to remain as valid is a question of policy or expediency which the state must determine for itself, a governmental and not a judicial question; that such question can only be determined in a direct proceeding originated by the state through its representative officers, and not by any collateral proceeding brought by or for the benefit of any individuals to set such provisions aside; and, finally, that the state has not hitherto, in the present condition of its charitable institutions, felt any motive to enforce strict

exactions upon them, nor has the legislature yet seen cause for placing restraint upon the power of testators to bequeath property to such institutions, a step easily taken when deemed necessary or wise to do so.

IN EQUITY. ON EXCEPTIONS AND APPEAL.

This was a bill in equity, brought by and in behalf of the several heirs at law of Ira P. Farrington, late of Portland, deceased, against the executors of said Farrington's estate and the Maine Eye and Ear Infirmary, of said Portland, such of said heirs at law as were not made plaintiffs in the bill being joined as defendants therein. Demurrers were filed by the executors and by the Maine Eye and Ear Infirmary, and the cause came on to be heard in the court below, where the demurrers were sustained and the plaintiffs filed exceptions. The presiding justice made a decree dismissing the plaintiffs' bill and from this decree an appeal was taken to this court.

The bill in equity with its exhibits, the demurrers both of the executors, and of the Maine Eye and Ear Infirmary, and the opinion and rulings of the presiding justice, and the decree by said justice were all made a part of the bill of exceptions.

The case is stated in the opinion.

Orville D. Baker and Clarence Hale, for plaintiffs.

Direct gifts to a corporation, not in form of a trust, turn primarily on the construction of the particular statute, and that construction must be governed: first, by the language; second, by the purposes of the statute, and cannot be controlled or aided by the construction put by other courts upon other statutes wholly different in language or in purpose.

The Maine Eye and Ear Infirmary is strictly limited by our statute in its original capacity to $100,000; the corporation has no acquiring capacity beyond that amount; and, therefore, a bequest to it in excess of that sum is absolutely void, and no title to such property can reach or vest in the corporation, even if the conveyance were by deed.

If the statute would not prevent title from vesting under an executed deed, it contains a clear, implied prohibition against the acquisition of such property, and such implied prohibition is as

strong as an express prohibition, the same as an implied contract, once established, is as binding as an express contract. Hence, no executory conveyance or trust in defiance of the statute can be carried out by the courts.

The statute is to be enforced by direct application of the heirs, the only parties interested in the property, sparing the corporation any forfeiture of its charter or confiscation of its general property which is rightfully held. Such a remedy aims directly at the prohibited property and nothing more; and is the only remedy by which the purposes of the statute can be accomplished.

Even in the case of deeds, so long as anything remains to be done by act of law, or by assistance of the court, to perfect even the mere possession in the grantee, it is more than doubtful whether the court ever lends that necessary aid to accomplish the violation of the statute; and no well considered case will be found, or has been cited, where the court has sustained an action on such a deed, unless the grantee has already obtained actual possession as well as title.

As to the cases cited by the defendants, it is to be noted: first, that the tribunals themselves are of little authority; second, that the distinction between title and possession was not brought to the court's attention, nor in any way passed upon as a part of their decisions.

In the case of wills, as under the statutes of Maine, affirmative acts and decrees of the court are necessary to perfect and consummate the title, first, by approval of the will; second, by decree of distribution and, third, by sustaining the direct suit, if the executor declines to pay. There is no possible ground, either in law or equity, on which the court will lend the aid of its decrees to perfect an incomplete violation of the statute and of the policy of the law, and thus make itself particeps criminis in the illegal acts.

In cases of charitable trusts, such as this is conceded to be, the court will distinguish between the trustee and the beneficiary; between the mere conduit of title and the beneficial object of the trust. The trustee may be incapable, and yet the beneficial objects

of the trust may be valid; or the trustee may be capable, and the beneficiary incapable,—the objects of the trust be illegal and void.

Where the trustee alone is incapable, but the objects are valid, the law regards the valid nature of the trust rather than the illegal conduit, and will execute the trust, when necessary, by appointing a new trustee. In such case, the trust itself being valid, the heirs can have no possible interest in the bequest, and, therefore, the government alone can raise the question of the trustee's incapability.

But where the beneficial object of the trust is itself illegal, or where the beneficiary himself is incapable, the trust is illegal through and through; such trusts are against the conscience of the court, and equity will not execute them, but they are wholly void; even though the legal title may have actually vested in a capable or incapable trustee, equity obliges him to hold that title as a resulting trust for the heirs, and the heirs have full power to contest this question directly, and without waiting for the state. And the court will not, for these reasons, appoint a new trustee; nor, for the same reasons, does the doctrine of cy pres apply.

J. W. Symonds, D. W. Snow and C. S. Cook; C. L. Hutchinson; C. F. Libby, F. W. Robinson and Levi Turner; and Edward Woodman, for defendants.

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

PETERS, C. J. Ira P. Farrington, the testator, whose will is called in question by this bill in equity, died at his home in Portland, December 17, 1894, leaving a will dated July 9, 1891, and a codicil dated January 4, 1893. The will was probated in January, 1895, in the probate court below and approved by this court in the next April afterwards. The will, after a most generous provision for his widow, and numerous bequests to his relatives, besides several large bequests to certain local charities other than those to be herein named, contains the following residuary clause:—"Fifth. All the rest and residue of Estate, Real and Personal or Mixed,

wherever situate, which I may own at my decease, or which I may then have the right to dispose by Will, including all and any of the foregoing legacies, devises and other provisions which may in whole or in part lapse or for any reason fail, I give the Maine Eye and Ear Infirmary in the city of Portland, incorporated according to the Statutes of Maine, the Maine General Hospital and the Portland Public Library, share and share alike, upon trusts nevertheless, as follows:

"The one-third given said Eye and Ear Infirmary shall be maintained as a separate fund, designated as 'The Farrington Fund,' held, invested and re-invested, and the net income thereof applied forever annually, or oftener, to the Charitable purposes of the Corporation.

"Likewise the one-third given the Maine General Hospital shall be in the same manner maintained as a separate fund, designated as 'The Farrington Fund,' held, invested and re-invested, and the net income thereof applied forever annually, or oftener, one-half for the support of free beds, in its hospital, to be known as 'the Farrington Free Beds,' and the other half to the general Charitable purposes and the maintenance of the Corporation.

"And likewise the one-third given the Portland Public Library shall be in the same manner maintained forever as a separate fund, designated as 'The Farrington Fund,' held, invested and re-invested, and the net income thereof applied forever annually, or oftener, to the support of the Library of said Corporation.

"Provided, nevertheless, that whatever principal sum or sums may come hereunder to the Portland Public Library shall be paid to the city of Portland on the following trusts, namely,—

"To pay thereon perpetually interest semi-annually at the rate of four (4) per cent per annum, to the Portland Public Library, said interest to be applied as aforesaid by said Portland Public Library to the support of its Library.

"Said fund shall be entered on the books of the city as 'The Farrington Fund for the benefit of the Portland Public Library,' and the interest so paid by the city shall be entered on the books of the Portland Public Library as interest from such 'Farrington Fund.'

"If the city shall decline to accept the same on the trust aforesaid, or if for two years after request in writing by my executors to accept the same as aforesaid, the city shall neglect so to accept, I direct that said principal sum or sums be paid to said Portland Public Library to be held, invested and re-invested and the net income thereof applied as hereinbefore set out."

The testator names Hon. William L. Putnam and Hon. Thomas H. Haskell as executors, and confers certain authority over his estate on them as such executors as follows: "I give the executors full possession, management and control of all my real estate wherever situate, subject to the devise of my beloved wife; and I authorize them from time to time to lease, sell or exchange the same, or any part thereof, and to receive the proceeds of such leases and sales and all other incomes or other proceeds thereof, for the purpose of fully executing this will, reminding them, however, that their authority over my estate whether real or personal is given solely for the purpose of closing and distributing the same as heretofore mentioned directed, with a prudent regard for obtaining fair prices within a reasonable time to be taken therefor."

The codicil is as follows:

"I hereby re-publish and re-affirm said will except as herein modified.

"The gift of the one-third part of the rest and residue of my estate to the Maine General Hospital by the fifth clause of said will and all gifts and devises in any part of said will to said Maine General Hospital, I hereby revoke; and I hereby give, devise and bequeath all the same one-third and all other said gifts and devises, to the Maine Eye and Ear Infirmary, to hold to the use of it and its successors and assigns forever; the same to be in addition to, and not to affect or change, the gifts and devises to said Maine Eye and Ear Infirmary in said will contained. I double the gift of $20,000, to the Home for Aged Men of Portland."

The Eye and Ear Infirmary is a charitable association organized under the general statute which authorizes the formation of such corporations. R. S., Ch. 55, § 1. Numerous kinds and classes of persons and associations are permitted by this section to be organ-

ized into corporations, including all social, military, literary, scientific, temperance, moral, musical, agricultural, and many other societies and organizations. Section four of the chapter prescribes as follows: "Such corporations may take and hold by purchase, gift, devise or bequest, personal or real estate, in all not exceeding one hundred thousand dollars in value, owned at any one time, and may use and dispose thereof only for the purposes for which the corporation was organized." The constitution of the Infirmary, a public record, declares the purpose of the institution as follows: "The object of the corporation shall be the establishment and maintenance of an infirmary in Portland, Maine, where a daily clinic may be held for the treatment, free of charge, of poor persons throughout the state, suffering from diseases of the eye and ear."

The bill alleges that the Infirmary had at the death of the testator property to the full amount of one hundred thousand dollars in value, and that any additional amounts to be received through this will would be in excess of the limit allowed by its charter and in disregard of the statutes of the state; and so it further alleges "that the said Maine Eye and Ear Infirmary is incompetent to receive and incapable of holding any property beyond the amount which it now possesses, and that the bequests and devises made to it under Item 5th of the said will and under the codicil to said will of said Ira P. Farrington are invalid and void, and revert to the heirs of Ira P. Farrington." The bill includes the Infirmary and the executors as respondents, the prayer of the same being that the parties be enjoined, the one against paying over, and the other against receiving the devises and bequests in execution of the intention of the testator.

Both of these respondents, the executors and the corporation, filed general demurrers to the bill, which were sustained by the justice before whom the case was heard below, and the case comes to us on exceptions and a final decree in favor of the respondents. Mr. Justice STROUT of this court, by whom the issues were decided, filed a written judgment in the case from which we reproduce that portion of the same which bears upon the questions we propose now to discuss, reading as follows: "This is a bill in equity, and

comes before the court on demurrers. The will of Ira P. Farrington contains a bequest to the Maine Eye and Ear Infirmary. The complainants allege that that corporation is authorized to hold property to the amount of $100,000, and no more; and that it now holds property to that amount, and therefore cannot take the legacy given to it by the will. As the demurrer admits the facts, it must be assumed that the legatee now holds the full amount of property which it is entitled to hold. It is admitted to be a public charitable institution. Can it take the legacy, or devise? The gift is from the residue of the estate, after payment of legacies, and may include both real and personal property.

"At common law, corporations were entitled to take and hold real or personal property to any amount, if it was reasonably useful and convenient in attaining its legitimate ends. In England, so large an amount had been acquired and held by its corporations, particularly the ecclesiastical, that as a measure of purely public policy the statute of mortmain was enacted to prevent the accumulation of real estate in ecclesiastical corporations. That statute has not been generally adopted in this country; but it has been deemed wise in many instances to limit in the charter, or by general law, the amount of property to be held by corporations. In this state, by statute, corporations are entitled to hold and convey lands and other property. R. S., c. 66, § 2. This authority is unlimited, unless the charter, or general law under which the corporation is created, or some statute, imposes a limit. A limit of $100,000 is imposed by the statute under which this corporation was created. Taken in connection with the common law, and the general statute upon the subject, it is apparent that the limitation upon this class of corporations, not applicable to many others, was a matter of public policy. As such, it is for the state alone to take advantage of its breach, if it chooses, or it may waive it; and consequently private parties cannot be permitted to assert against the corporation a violation of the limitation. The decided weight of authority is to this effect, and the principle is deemed sound.

"A devise of lands operates a conveyance upon probate of the will. The devisee takes by purchase. The title may be defeated,

if the subject of the devise is required for the payment of debts. A bequest of personalty also is perfected in the legatee, at the date of the probate of the will, subject to the same contingency, although the time of payment may be deferred by the provisions of the will or the contingencies of administration.

"The will, in this case, gave to the Infirmary one-third of the residue of the estate, after payment of legacies, in trust, to be invested and kept invested, the income only to be applied to the charitable purposes for which the institution was organized. The codicil added another third of the residue to the gift, but said nothing about trust; but the fair construction of the codicil, taken in connection with the trust created by the will, is that the trust attaches to the entire two-thirds. The effect of the codicil was to increase the one-third in the original will to two-thirds. No other change was intended by the testator. The whole scheme in his mind was charity. The gift was to a public charity, administered by the corporation created for that purpose.

"The Infirmary can take the gift, upon the trusts specified, and hold it against all, except the state, although the amount is in excess of the limitation in the statute.

"If, however, the Infirmary should be regarded as incompetent to take the property in trust, it being devoted by the testator to a public charitable use, the court would appoint a trustee to carry into effect the testator's bounty. A public charity, definite in its objects as this is, is never allowed to fail for want of a trustee, and if the trustee originally appointed is incapable, from any cause, to take the property and execute the trust, a competent trustee will be appointed."

The question on the first branch of the case, therefore, is whether these devises and bequests are absolutely void as the complainants contend, or whether they are merely voidable according to the view of the question taken by the respondents. After very much examination of the authorities pro and con, and careful consideration of the principles which affect the respective positions of the parties, we feel forced to the conclusion that the position advocated by the complainants ought not to be sustained. We feel

very much impressed with the theory, stated in many of the cases, that a charter is a contract between the state and the corporation; and that for any misuse or abuse of its privileges or powers the corporation is amenable to the state only, no individual having anything to do with the question. As applicable to the present case, the principle is that, if the infirmary, by accepting these bequests and devises, increases its property ever so much in excess of the amount in value which the statute allows it to possess, it would be a transgression of the law which the state can prosecute or not as it pleases, and the heirs of the testator have no interest therein. As long as the state does not interfere for the violation, it waives it and permits the infirmary to retain the property.

The general statute under which this infirmary was organized is not expressly prohibitory, but rather regulative and directory. No penalties are attached and none intended more than a possible forfeiture of the excessive property received, or of the charter, or of one or both. This interpretation of the statute cannot by any possibility be harmful to the community, as the state can make it as stringent as it pleases at any time. But thus far the state has had no motive either to amend the statute or to enforce forfeitures for violation of its provisions. And in one section of the chapter relating to general organizations the legislature allows devises, bequests and gifts to towns for the establishment, or increase of public libraries, without imposing any limitation whatever. R. S., Ch. 55, § 10. There cannot be an objection that such absorption of property excludes capital from taxation, because that is a matter wholly within the control of the legislature.

An over-strict construction of the law and of the rights of parties under the law in the case before us is neither expedient nor reasonable. Here is an institution, and the only one of the kind in the state, and virtually a state charitable institution of the most beneficent and humane kind, seeking money for supporting its very life and existence, and to enable it to render assistance free of charge to the poor of the state suffering from diseases of the eye and ear. This testator, who had been always a director in the institution and finally its president, knowing and fully appreciating

its condition and necessities, after making provisions for other local charities, and giving to his next of kin preferred bequests according to his own judgment as to what they should have out of his estate, made, not while in the extremities of sickness, but nearly five years before his death, these legacies and devises for the use of the infirmary. Presumably he and those whose assistance he obtained to aid him in executing his purposes never dreamed that there was any obstacle in the way of his giving or the infirmary receiving the bounties which he so strongly desired to be charitably expended. And now what a spectacle is presented if equity be successfully invoked to take advantage of this accident or mistake; equity, whose boasted vocation is to relieve against accident and mistake, in order to wrest from this institution these donations for the benefit of distant relatives and heirs! What a public misfortune it would have been, if on account of the limited amount of capital it is by its charter privileged to hold, it had turned out that our oldest college in this state was prevented from receiving the munificent bequests lately tendered to it by deceased citizens of the states of California and New York, such donations not having as yet been actually received, and the state itself powerless to allow the college to take the gifts merely on account of such limitation!

It will be noticed that most of the authorities, on which the complainants rely, concede that the rule which we would apply to devises is at all events applicable to gifts by deed, the argument being that in such a case as this a deed would be valid and a devise void. It seems inconsistent that such potential consequences should attach to the mere form of transmitting the property. We do not appreciate the justice of saying that a deed of property delivered by a donor on the day of his death to a corporation would be good, and a devise of the same property made on the same day would be bad. But the argument by the complainants is that, in the one case, the transaction is executed and, in the other case, that it cannot be considered as executed without a resort to the forms and assistance of the courts. We think the whole thing involves a distinction without a difference, a formal but not substantial distinction. Each mode of transfer needs the protection and aid

of the law to render it operative. In the first place, the will must be probated, it is said. But on that question no inquiry can be instituted to see if there be any impropriety in any particular devise or bequest. The residuary bequest in this will is fair and proper on its face, and that is all that is required. The act of probating the will is the probating of all its parts. A devise of real estate vests such estate at once in the devisee, the title of such devisee being liable to be defeated if the estate be necessary for the payment of debts or the expenses of administration. Section 15, Ch. 74, R. S., reads as follows: "No will is effectual to pass real or personal estate unless proved and allowed in the probate court." This will has been approved by the probate courts below and above with no questions or exceptions thereto pending. But it is said the bequest of the personal estate cannot be carried into effect until a distribution has been ordered and the executors' accounts have been approved. We think that even this fine technicality may be avoided by the executors, if need be. They would be justified in paying all the property left in their hands as residuary estate without any order therefor, should the devisees be willing to accept it and discharge the executors from their responsibilities. A good many estates are settled by the parties interested without any aid or order from the probate court.

The foregoing reasoning only serves to illustrate the unsubstantial foundation upon which it is endeavored to raise a technical excuse for pronouncing a deed voidable and a devise absolutely void. The true and conclusive answer, however, to this indefensible position of the complainants is that it is utter assumption on their part in declaring a devise like this to be void, when it is voidable merely, and can be rendered void in no way other than by the act of the government itself. No wrongful act by a corporation renders its charter void or creates any forfeiture without proceeding by which such forfeiture shall be established. A cause for forfeiture is not itself forfeiture. The same section which prescribes the amount of property which this corporation may hold, also declares that it may use and dispose of the same for the purposes for which it was organized. Suppose the corporation wrong-

fully uses or disposes of its property, could any party but the state intervene to punish the corporation for such transgression?

Now what is there illegal, let us ask, in this court or in the probate court below acting in the furtherance of bequests that are simply voidable and consequently valid until they have been declared to be otherwise upon the intervention of the state? If the state has the exclusive privilege, as it has, of rendering the voidable bequest void, what is there wrongful in our regarding it as sound and sufficient while the question of its validity is not acted upon by the state, or the error is waived or permitted by the state? What right has the judicial branch of the government to dictate what the state should do against its will or its policy, and decide a question for the state which the state can better decide for itself? What right has the court to deprive the state of all opportunity to determine whether it will thus severely punish this corporation for the mistake of the testator or will waive or overlook it? Certainly the state should not be prevented from making such election. If courts at the instigation of heirs can refuse to act upon voidable bequests as valid until avoided by the state, then, as a matter of course, the state can practically never have any opportunity to exercise its discretion in such a case any more than as if such right never existed, and the court would be assuming the prerogative of really acting in opposition to the state. The court could not exercise any broad discretion in the solution of the question, while the state could. It certainly is an excellent policy to refer such questions to the discretionary power of the state, which can determine them, according to the circumstances, upon the great principles of justice and generosity, and in conformity with the wishes and welfare of the whole community. Among so many societies and associations as are organized under the general statute there will always be exceptional cases where, from their amount of business or other causes they have come to exceed the limitation of capital allowed them, and it is reasonable that the state should have the privilege, if it pleases, of relaxing the statutory restraints in such exceptional cases. And the circumstances of the present case make the strongest appeal for the protection of this devisee

against the loss of the generous gifts to it from one who loved the institution as he would have loved his child, and who devoted to its interests his time and services, and, as he supposed, a goodly share of his estate which had been earned by his industry and economy for a long lifetime. And it may not be amiss to state the fact that the legislature has lately increased the limitation of capital which the infirmary may hold from one hundred thousand to one million of dollars.

There is but little authority, either English or American, favoring the conclusion that bequests or devises not strictly authorized by law are to be considered void instead of voidable. This will be seen in the examination of cases in this country to be made in the progress of this discussion. But it may also be worth the while to notice what application has been made of the principle by the English courts in view of the statutes of mortmain as existing in that country. In Grant on Corporations, a reputable English work on the subject, at page *101, the author states the doctrine as follows: "The meaning of the term unlicensed corporation is this. As was observed above, the conveyance of lands to a corporation was not made void to all intents and purposes by the statutes of mortmain, but only voidable at the option of the lords and the crown; consequently if the mesne lords and the crown all consented to waive the escheat, each in their respective rights, the corporation to whom the land was granted enjoyed the property unmolested. In process of time the rights of the lords becoming difficult to trace, a license from the crown was generally considered sufficient to ascertain the right of property to the corporation; and this license it became usual for corporations to obtain from the crown, enabling them to take lands to such a value, notwithstanding the statutes of mortmain. In strictness, however, the license to hold in mortmain was only a waiver of the right of the crown to enter on the lands alienated; for as no royal charter can per se take away the property, or prejudice the interest of the subject, such license did not abrogate the right of the mesne lords to enter, and therefore, with respect to them, the corporation was not secure until the lapse of the periods respectively limited for the assertion

of their rights. In fact the king's license had only the effect of waiving the crown's right to the escheat, etc., etc." The author further says: "The question is of the more importance, as there is no doubt that many corporations have greatly exceeded the limits of their license, and hold such surplus lands without any right derived from it for their doing so. It is clear, however, that if a corporation have exhausted their license to hold in mortmain, the fact does not make a devise or conveyance to them void. The only result is, that they may take, though, unless they can obtain an extension by the crown of their license, they cannot hold the lands, unless the mesne lords and the crown choose to sleep upon their respective titles."

The cases in this country, most of them which favor the principle that an estate in the condition this is goes to the heirs of a testator rather than to the devisee, seem to inculcate the idea that the heirs may waive their right so as to allow the estate to pass to the devisee. And we have not the slightest doubt that, but for the interference of the heirs in the present case by this bill in equity, no obstacle would have stood in the way of a complete administration of the testator's estate according to his clearly expressed intention. No court would have had the least hesitation in following the ordinary course of procedure, or would have entertained the thought, suo moto, of instituting inquiry to see whether the bequests in question were valid or not. But why should a bequest, invalid when not consented to by the heirs, become unobjectionable when such consent is obtained? If illegal as coming from the testator, why not just as illegal when coming from the testator and his heirs? Such considerations as these go to show how illogical and untenable a position it is to denominate the devises and bequests in the present will absolutely void.

Each side relies on certain authorities in defense of its position, and between the two sides many have been referred to. The first one relied on by the complainants, and probably one of the earliest decisions on the question in this country, is *Trustees of Davidson College* v. *Chamber's Executors*, reported, in 1857, in 3 Jones, N. C. Eq. 251. The same question arose there that exists here, and

the case was decided according to the contention of the complainants in this case. It went on the theory that, as the college was seeking to obtain an illegal bequest, the law could not assist it to do so, and that the bequest was absolutely void. It was a severe and technical decision, reasoned out without the aid of authorities, as few in this country existed to throw light on the subject at that time. But the opinion admits that its severe doctrine did not apply to real estate and only to personal property. Should that be the law in this state, and we do not see why not if the law of that case is to prevail here, it may turn out that the residuary clause here is valid as operative only on real estate. But in our judgment the dissenting opinion in that case by Nash, C. J., is more satisfactory than the prevailing opinions delivered by the two associate justices. The argument of the chief justice is more in consonance with the doctrine which has grown up since that day. The chief justice, after declaring that the restriction as to amount of corporate property is merely directory, and that the bequest was not void but at the most voidable, goes on to say: "If the restriction is a condition, it is a condition subsequent, for a breach of which no action can be taken against a corporation but by the sovereign; and with the latter and its officials it is a matter of discretion whether a forfeiture will be enforced or not. To work a forfeiture of chartered privileges there must be something more than accidental negligence, excess of power, or mistake; there must be something wrong arising from willful abuse or neglect. There is here no judicial forfeiture for none has been judicially pronounced. Granting that, by taking the whole of the property devised, the total amount would exceed in value what the corporation was entitled to possess, and thereby its charter might be forfeited, can the defendants (executors) or next of kin take advantage of the condition in these proceedings? A charter is a contract between the corporation and the sovereign. It is well settled that none but the parties and their privies can take advantage of a breach of a condition. Now neither Mr. Chambers (donor) nor his executors, nor his next of kin are any parties or privies to this contract. Upon what principle then is it that the executor can refuse his

assent to this legacy to the college, or upon what principle can the next of kin claim it or any portion of it?" And the chief justice considers many English cases in support of his plain propositions, and we are only prevented from quoting more at length from his opinion by the want of space.

The next case cited by the complainants is that of *Cromie's Heirs* v. *Louisville Orphans' Home Soc.* 3 Bush, (Ky.) 365, decided in 1867. And this case we consider more favorable to the party against whom it is cited than to the party citing it. It appears that a citizen of Kentucky made different bequests in his will and among them one to an incorporated society in the State of New York, which already possessed all the property that the laws of New York allowed it to have for its capital. The testator's heirs contested the validity of the bequest on that account. The opinion of the court is peculiar and savors a little of judicial sectionalism. While it was admitted that the remedy for taking an excess of capital would be in a forfeiture of some kind, and that the forfeiture would belong to the State of New York, still it was thought inexpedient to send it there because that state might apply the proceeds of any forfeiture for purposes different from the objects to which the same would be applied in Kentucky; and so it was held that, as Kentucky could not avail itself of any forfeiture for the fault of a foreign corporation, and as New York should not have it under the circumstances, the heirs of the testator living in Kentucky better have the benefit of the same. But the court speaks significantly on the legal question as follows: "The question of title is between the corporation and the owner of the forfeited right." . . . . "The limitation in this case is a mere matter of state policy, and the state of New York can alone take advantage of its violation." And then the court goes on to justify its withholding from New York what it admits belongs to that state, and its giving the same to the heirs, in the manner following: "But notwithstanding this legal conclusion, should a court of equity enforce the devise against the heirs when, if the limitation has been transcended, the state of New York may take from the devisee the excess over the maximum of the prescribed value,

and their court might thus give it, whatever it may be, to an object never contemplated by the testator and to which he never would have devised it? The answer is, clearly not." The opinion concedes the point precisely as the defense in the present case claims it to be, but avoids its enforcement on account of the peculiar situation of the parties to be affected by the result.

The case of *Chamberlain* v. *Chamberlain*, 43 N. Y. 424, is cited by the complainants as an authority favoring the position espoused by them. The opinion on this point is not fortified by any authorities, is quite brief as far as relates to the present question, and gives as a reason for its conclusion that "unlimited trusts of this character might become an unmitigated evil." But, let us ask, is that a question for the courts to determine or is it for the state, a judicial, or is it a governmental power or policy! Cannot the state by its representative officers regulate the tendency of the so-called evil with their power of instituting proceedings for forfeitures and escheats, or cannot the state by its legislative power entirely prevent it by penalties or provisions to that end whenever it sees fit to do so?

But the opinion in the case cited admits as much when it goes on to say: "Doubtless the restriction on corporations is a governmental regulation and one of policy to be enforced by the government." That is precisely what the respondents are contending for. Then the opinion adds: "But an individual whose interests are affected may also insist on the legislation as a restriction." There is precisely the difference between that case and this. The effect of the reasoning in that case is that such an excessive bequest is voidable only and not void, but that it may be avoided by the government or by the heirs of the testator. On the other hand the present respondents admit that such a bequest is voidable, and contend that it can be avoided only by the state—that the bequest is not of itself a forfeiture, but at most a cause for forfeiture. It seems to us inconsistent to declare that the heir has the same right as the state, for in such case, as we have said before, the heir would practically have the exclusive right of repudiation and the state have none. Should not the state control its own policy and

action on the question ? Nor do we see how the apprehended evil of trusts is going to be prevented by regarding deeds of trust voidable and devises void.

The complainants also rely very much on the Cornell University case, reported in 1888, under the title of *Matter of McGraw*, 111 N. Y. 66, a strongly stated case and in point here, excepting as the New York policy differs from the policy maintained elsewhere, and as the municipal law there differs from the statutes of other states and especially from the statutory system of our own state. It is there held that such devises and bequests as these are absolutely and irrevocably void, and in this respect the case is not wholly consistent with the views expressed by the same court in the Chamberlain case already commented on, and is in great advance of any doctrine expressed in any previous case in that state. The result is reached by an interpretation "of the general statutes of the state relating to the organization and holding of property by corporations of the class of Cornell University as the same have been affected by the terms of the special charter granted to it." While in our own state we have no statute affecting the question outside of the terms of the corporate charter itself, or of the general law authorizing the charter, the New York code contains clauses touching the ability of corporations to acquire property which her court construes to be expressly and utterly prohibitory. The provisions are of themselves severe and they are also strictly and severely construed by the New York Court. This same case came before the Supreme Court of the United States afterwards, and that court declined to review the decision of the New York Court of Appeals upon the ground that no federal question was presented, inasmuch as the decision sought to be reviewed was based upon the charter of the University and the municipal law of the state of New York. *Cornell University*, 136 U. S. 152. The statute of wills in New York is disabling and restraining in its character and prohibits a devise to a corporation unless specially permitted by its charter or by some statute to take property by devise. Her statutes on analogous subjects have been restrictive and her decisions have been accordingly. Its code

forbade a charitable trust to be created upon real estate. Its decisions decline to uphold a trust when a trust exists without a trustee, differing therein from the decisions of other states. Mr. Schouler (Schoul. Wills, § 26, note) says: "Under the policy of the New York code an unincorporated association appears to be treated with little favor as the beneficiary of a devise." The same restrictive policy led its highest court to hold that a mortgage to a National Bank to secure future advances as well as past indebtedness was void (*Crocker* v. *Whitney*, 71 N. Y. 161) and this doctrine was overruled by the more liberal policy of the United States Supreme Court in *National Bank* v. *Whitney*, 103 U. S. 99. In *Rainey* v. *Laing*, 58 Barb. 189, the Supreme Court of New York in a carefully argued and considered case precisely like the present decided that the devise was valid as against all parties but the state, and the difference between that opinion and the one rendered by the Court of Appeals is that the one proceeds upon the liberal policy more generally entertained by courts and the other was governed by the more restricted and peculiar policy of the code and courts of New York. The case of *Wood* v. *Hammond*, 16 R. I. 98, is also relied on by the complainants as an authority of importance in their favor, a case which follows the opinion of the New York court in the McGraw case, and in point corroborates that opinion. See also *Coggyershall* v. *Home for Children*, 18 R. I. 696. The only other case cited on this branch of the case in behalf of the complainants is *De Camp* v. *Dobbins*, 31 N. J. Eq. 671, and as the defense also relies on the same case reported in an earlier volume, we will defer commenting on that authority until we make a cursory review of some of the adjudged cases cited on the other side of the question.

In opposition to the doctrine attempted to be maintained by the complainants, the respondents have cited quite an array of cases, both of a direct and indirect bearing on the question, some of which will receive our examination.

The first on the list is *Jones* v. *Habersham*, 107 U. S. 174, a case of devise precisely in point, where Gray, J., delivering the opinion of the court, said: "But there are two conclusive answers

to this argument. First, restrictions imposed by the charter of the corporation upon the amount of property it may hold cannot be taken advantage of collaterally by private persons, but only by the state which created it." This case is assailed in the argument of counsel in several ways, and, we think, without actual effect. It is said that it is brief, but its brevity indicates the assurance which the learned justice felt that his proposition was correct. It is also objected to the force of the opinion that two grounds are given for the result to stand upon. But the ground invoked by the respondents is first given as of first importance, and this as well as the other ground is declared to be conclusive. It is further objected that the cases cited in support of the proposition of the opinion are not pertinent to the issue. The opinion does not discuss the very fine distinction, which the complainants contend for, between a gift by devise and a gift by deed, for the reason undoubtedly that the court entertained the belief that there is no real difference between the two, and that either is voidable only and not void. And so the cases in support of the opinion are cited from both classes of the authorities. One voidable mode of gift cannot differ from any other voidable mode in its consequences and effect. And if it be admitted that a devise of the kind in question is only voidable, all that the complainants are contending for falls to the ground. The learned counsel for the complainants does not notice the fact that the same case came to the supreme court by appeal from the circuit court below, where it was elaborately discussed by counsel and court, on this and other points, Mr. Justice Bradley of the supreme court sitting in the capacity of a circuit judge, and delivering the opinion of that court, reported in 3 Woods, 443, in which opinion the learned justice, among other things, remarks as follows: "It seems to us that the gift to the Georgia Historical Society is not void. This, if the society accepted the trust, may have been cause of forfeiting its charter, but the gift would be none the less vested in it. To hold otherwise would be to render the society exempt from any inquiry on the subject at the suit of the state." . . . . "Certain things there are ultra vires of a corporation, but when it has the power to hold property, and is forbidden to hold

beyond a certain amount, the matter being one of degree merely, or of more and less, this is not a question of ultra vires but of a violation of its charter. A contrary rule would involve many absurdities, [the court here stating some of them.] The corporation may be amenable to the penalty of violating its charter, but individuals cannot call it in question. Its tenants must continue to pay its rent, and its debtors their debts; the state alone has the right to proceed against it. The state may see fit or may not see fit to do so. It would depend on the circumstances of the case, the greatness of the excess, the causes which led to it, etc. The state may condone the offense, and the legistature may relieve by enlarging its powers." The late Justice Bradley was far-famed as an original thinker, and his idea that if the contrary rule prevailed a corporation could never be punished for accepting a bequest which gave it property of value above the limit allowable, because it could defend upon the ground that the bequest was completely void, is certainly original and forcible.

A similar if not the same question arose in *National Bank* v. *Whitney*, 103 U. S. 99, affecting the present case in several respects. The case was first decided by the New York court of Appeals and its decision reversed by the Supreme Court of the United States. The National banking act allowed banks instituted by its authority to take mortgages on real estate for certain specified purposes "and no other." This bank took a mortgage on real estate to secure past indebtedness and also for such future advances as the bank might furnish the mortgager. The latter branch of the transaction was directly forbidden by the banking act, the security not being for one of the purposes permitting it to be taken, and was declared by the New York court to be utterly void, but by the supreme court to be voidable only until rendered void by some action on the part of the federal government. In the appellate court Field, J., in the opinion says: "Disregard for the prohibition only laid the association open to punishment by the government. The impending danger of a judgment for ouster and dissolution was, we think, the check and no other contemplated by Congress. The consequence insisted upon did not follow. The

statute did not declare such security void, but was silent on the subject. And had Congress so intended, it could easily have said so." All of this reasoning is as fitting in the present case as in that. There is nothing in the statute or charter of the Infirmary stating that either deed or devise to it bestowing more property upon it than one hundred thousand dollars shall be void. We have already sufficiently discussed the position that the law commits no wrong to actively participate in the execution of merely voidable bequests, for the reason that such bequests are to be considered valid by the courts until vacated or avoided by the state through its representative officers. But that fallacious position of the complainants, as we think it is, was involved in the case cited. The bank was the plaintiff, asking for the aid of the law, not for defending a possession but for obtaining possession. It never had any actual possession of the land or its proceeds. Subsequent mortgagees of the same property had the possession first of the land and then of its proceeds. The bank was not sent out of court as a party unworthy on that account the protection of the court. Feeling the force with which this case presses against their position the complainants contend that there is a substantial difference between that case and this. We think, however, that the principle supporting both cases is essentially the same, and must seem to be so to the mind of an impartial investigator. The legal authors so estimate it, as will be seen hereafter.

Vidal v. *Girard's Executors*, 2 How. 127, may also well be regarded as a significant authority on the question, where Story, J., says: "If the trusts were in themselves valid in point of law, it is plain that neither the heirs of the testator, nor any other private persons, could have any right to inquire into or contest the right of the corporation to take the property, or to execute the trusts; but this right would exclusively belong to the state in its sovereign capacity, and in its sole discretion, to inquire into and contest the same by a quo warranto, or other proper judicial proceeding."

In harmony with these federal cases is the very recent decision of the same question by the Maryland Court of Appeals in the case of *Hanson* v. *Little Sisters of the Poor in Baltimore*, 79 Md.

434, (affirmed January, 1897, in *Congregational Church B'ld'g Soc.* v. *Everett*, Maryland Appeals, 36 Atl. Rep. 654,) in which the court gives its reasons for preferring the adoption of the doctrine of the federal courts rather than that promulgated in the Cornell University case by the court in New York. In that case the proceeding was, as it is here, by a bill in equity brought by the heirs to have the devise declared void. The court in its opinion states the question and its decision of it clearly where it says: "It cannot be doubted that this corporation had power to take and hold any estate or property not exceeding the charter limits, and the devise, therefore, was not void on its face, and must be held valid as to all the world until it has been determined, at the instance of the state, that the charter has been violated. If they have violated the law of their being they have committed a wrong, not against any particular individual, but against the state, and this wrong can only be inquired into at the instance of the state. In other words, the corporation can take property to any amount, but can hold it, as against the state, only to the amount provided by its charter." How does the active participation of a court, in promoting the administration of such a devise, become wrongful, as the complainants contend, so long as the wrong on the part of the corporation is not inquired into by the state, and the state, instead of urging objection, by its legislature consents thereto? Of course, in no sense can the state be considered as any party to the present proceedings. The meaning of the argument of the court in the case cited is that, while it is the law that a charitable corporation shall hold only the amount of capital prescribed by its charter, it is also the law that no one besides the state can, in any suit or proceeding, properly take notice of such transgression by the corporation.

In the case cited the court also says: "The contrary doctrine would make it very hazardous to take title from a corporation with such a limitation on its charter, and, if the objection could be made by any one, title to property once held by such corporations would cease to be marketable, litigation would be promoted, and courts would be constantly called on to decide the very difficult

question of fact as to whether the property of a corporation does or does not exceed in value the charter limits. In the case now before us, the estimates of the witnesses differ greatly, and a devise or bequest would be held valid or void according to the estimate adopted by the court. We think this is one of the cases which may be put in the class with those referred to by the late Justice Miller in his dissenting opinion in *Fritts* v. *Palmer*, 132 U. S. 293, where he says: "I can conceive of cases where corporations have been authorized to acquire a limited amount of real estate, such as the legislature may conceive to be useful and necessary to the purpose for which they are organized, in which the question as to whether they have exceeded that amount may be one for the state alone, and not of any private citizen." The counsel for the present complainants argues that the objection of inconvenience should have but the slightest influence on a question where so much principle is involved. We think, however, that the position of the Maryland court in this respect is not to be underrated. Certainly, titles affected in the way above-named would be much more hazardous if a devise of the kind be declared void instead of voidable, for a devise to all intents and purposes void must remain so through all the mutations of ownership, and the heirs might never be shut out from reclaiming the property thus illegally devised. Many fixed principles of the law have been established on grounds of policy merely, even by the creation of legal fictions if necessary to reach a just result. There are policies within a policy, questions within a question, the smaller controlling the greater question as the rim of a wheel is supported and controlled by its spokes. The difficulty of applying the restrictive rule is a circumstance worth consideration. In one of the New York cases where, under the policy acted on in that state, a part of the bequest only could be received, the decree of the court was that so much of the bequest of money might be taken as would at seven per cent per annum create an annuity of four thousand dollars; and undoubtedly the same fund would produce to-day not more than half as much annuity. Do not such considerations help to induce the belief that the liberal policy advocated by the defense is the better policy?

Another case is cited by the defense over which there is some contention between the parties as to its value as a precedent, the case of *DeCamp* v. *Dobbins*, 29 N. J. Eq. 36. The exact question arose there as it exists here, and Chancellor Runyon decided it on the same line on which the question was disposed of in the cases in the federal supreme court, although the Chancellor thought the same result might be reached also upon another ground disclosed by the facts. The case appears again on appeal in 31 N. J. Eq. 689, when the first decree was affirmed, Beasley, C. J., writing an opinion sustaining the decree upon a ground other than that selected by the Chancellor and in opposition to the latter's opinion. The counsel here assumes that the whole court adopted the views of Chief Justice Beasley. The case does not show such a thing. In closing his opinion the Chief Justice says: "I shall vote to affirm the decree below," and thereupon it is stated by the reporter that the decree below was unanimously affirmed. It is not intimated upon what ground the numerous members of that court cast their votes, whether upon the opinion of the Chancellor or that of the Chief Justice, and there was no occasion that it should appear. On the contrary we think we are justified in the inference that the Chancellor was supported by the court excepting the Chief Justice, and we notice that another court has the same supposition. *Wood* v. *Hammond*, 16 R. I. 98, cited supra. The Chancellor stated (29 N. J. E. p. 41) the essential conclusion arrived at in his opinion as follows: "If such limitations did in fact exist, it would not incapacitate the corporation from taking the gift, although its property at the time of receiving the gift was of the full annual value of two thousand dollars. If a corporation takes land by grant or devise in trust or otherwise which by its charter it cannot hold, its title is good as against third persons and strangers; the state alone can interfere." (Perry on Trusts, § 45; *Wade* v. *Am. Col. Society*, 7 S. & M. 633.) And again, if the limitation did in fact exist, the legislature might remove the restriction and permit the corporation to execute the trust or authorize it to receive the gift and administer the trust notwithstanding the limitation. This court will not suffer a trust to fail

for want of a trustee, but will uphold the trust for a reasonable time, when necessary in order to enable the trustee to obtain the requisite authority to take and execute it; cites *Bridges* v. *Pleasants*, 4 Ired Eq. 26, 30; *Inglis* v. *Trustees of Sailor's Snug Harbor*, 3 Pet. 99."

In *Hamsher* v. *Hamsher*, 132 Ill. 273, where the validity of a devise was involved, it is said in the head note of the case: "Whether the corporation exceeds its power in receiving land by gift or devise is a question alone for the state." And in the opinion the court says: "If the Young Men's Christian Association of Decatur has exceeded in extent its power of holding real estate, appellant, (heir) we concede, cannot take advantage of the fact. (*Alexander* v. *Tolleston Club*, 110 Ill. 65.) Where a corporation may for some purposes acquire and hold the title to real estate, it cannot be made a question by any party, except the state, whether the real estate has been acquired for the authorized uses or not. (*Hayward* v. *Davidson*, 41 Ind. 214.) There being capacity to purchase or to receive by devise whether the corporation, in so purchasing or receiving, exceeds its power is a question between it and the state and does not concern the appellant."

In a peculiar case of devise in Massachusetts, *Baker* v. *Clarke Institution*, &c., 110 Mass. 88, the court says: "The purposes and objects of the trust are distinctly set forth. If its full execution had been found to be impossible by reason of the continued incapacity of the cestui que trust to take the whole fund, it might have become necessary and proper for the court to declare a resulting trust, as to the excess, in favor of the next of kin, to be applied by law," citing the New York case of *Chamberlain* v. *Chamberlain*, supra, for that proposition. Later in the opinion the court says: "But even if it was intended to evade or disregard the limit of legal capacity, we are not prepared to hold that it would render the bequest invalid, either in whole, or for the excess." And the court further adds: "But we cannot doubt that a removal by the Legislature, of such a restriction upon the capacity of the corporation, before the complete execution of the trust, will enable it to receive the whole fund for its benefit, although for

peculiar reasons not important here, it could not do so at the time the will took effect." Here, certainly, is seen the idea of the court, that the excessive bequest was no more than a voidable act, indirectly said as strongly as if directly expressed. Mr. Schouler in his work on Wills § 24, under the belief that receiving an excessive amount of capital is a voidable act merely, as will be seen by a later reference to his text, says, in a note: "Enabling acts of this character are frequently met in the special legislation of American states at each session, that of Massachusetts for instance."

Chambers v. *St. Louis*, 29 Mo. 543, is a case of a devise of property to a municipal corporation for certain purposes, and the question was as to what extent the corporation could take and hold the property. In this case the court, among other things, said: "It is a matter between the state and the city. The law is only directory in relation to corporations taking land. It inflicts no penalty nor does it in terms avoid the conveyance. Nowhere is a corporation in express terms prohibited from taking and holding lands. . . . It is not for the courts in a collateral way to determine the question of misuser by declaring void conveyances made in good faith." The city was authorized to acquire land necessary only for its municipal purposes. The case of *Hayward* v. *Davidson*, 41 Ind. 212, involved a similar question upon a devise to county commissioners for the benefit of a county, and was decided the same way as was the case in Missouri.

We have already referred to the case of *Rainey* v. *Laing*, 58 Barb. 453, as differing entirely from the *McGraw* or *Cornell University* case, for the reason that it was decided on a policy generally prevailing in the American courts rather than on the statute of wills in the state of New York which statute is, as construed by its Court of Appeals, intensely prohibitory in its character. In the case cited (*Rainey* v. *Laing*), the court said: "That the question whether the property with that which the Synod already held would exceed in amount the sum to which its charter restricted it, could not be tried in an action brought by the executors for the construction of the will.

"That the question was not to be determined collaterally but only in a direct proceeding by the state.

"That the condition imposed in the act incapacitating the Synod, being not against its taking but against its taking and holding, the corporation could take, but whether it could hold was another question, not necessary or proper in this collateral way to be considered, a question purely of public policy with which individuals had no concern, but in which the state as the sovereign was alone interested and which it might either raise or waive according to its pleasure."

Another case of devise, relied on by both parties, *Heiskell* v. *Chickasaw Lodge*, a late case reported, in 1889, in 3 Pickle, (Tenn.) 668, 686. The case holds that as to a devise, where the charity is definite, heirs and other devisees cannot question the legal capacity of the trustee to hold and administer the trust, but the state alone can do so. At the time the devise took effect, the corporation held more than the amount prescribed in its charter. The same case also held, in deference to the decision in the Cornell case, that there is a difference whether the funds bequeathed have been actually received or not by the donee, while we do not understand the latter case as admitting that a devise or bequest of the kind would be otherwise than void under any circumstances. But Mr. Pritchard, a Tennessee author, explains, in a note to his work on Wills, published as lately as 1894, that the Tennessee court was misled by not noticing the grounds upon which the Cornell University case was decided by the New York court. And we quote below a portion of this note, numbered 13 to section 153 of the work referred to, as being instructive because of its references to many cases, and nests of cases in books, and particularly because it contains a clear explanation of why and how the New York policy, as illustrated in the Cornell University case, differs from the policy of other states on the same question. The note discusses the English statutes of mortmain, and says that by the English statutes of mortmain, beginning with 9 Henry III, corporations were prohibited from taking or holding lands without the King's license and that they were therefore excepted from the

operation of the statutes of Wills. The note then says that these statutes were never adopted in Tennessee, and then continues: "In Pennsylvania, however, no corporation can take or hold lands unless specially authorized by act of the Legislature. *Goundie* v. *Northampton Water Co.* 7 Pa. St. 233; *Watts App.* 78 Pa. St. 370. The exception contained in the English statute of Wills was incorporated into the New York statute of Wills, and under it, it was held that a devise of land directly to a corporation was void, but that a devise to a natural person in trust for a corporation was good. *McCartee* v. *Orphan Asylum Soc.* 8 Cowen, 437, (18 Am. Dec. 516.) A later statute of that state provides that devises of land may be made to every person capable by law of holding real estate, but no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise. 2 R. S. (N. Y.) 57 §§ 1, 2, 3. This statute renders devises directly or indirectly to a corporation void in the prohibited cases. *Dunning* v. *Marshall*, 23 N. Y. 366; *Bascom* v. *Albertson*, 34 N. Y. 584; *King* v. *Rundle*, 15 Barb. 150; *Matter of McGraw*, 111 N. Y. 66, 84. This statute operates upon the testamentary power. Consequently a devise made in New York to a foreign corporation is void, although the foreign corporation has authority by its charter to receive the devise. *White* v. *Howard*, 46 N. Y. 144, 165; *U. S.* v. *Fox*, 94 U. S. 315; *Boyce* v. *City of St. Louis*, 29 Barb. 650. But a New York corporation can take by devise in Connecticut although the devise would be prohibited if made in New York. The reason is that the corporation carries with it its charter but not the law of devise of New York. *White* v. *Howard*, 38 Conn. 342; *Thompson* v. *Swoope*, 24 Pa. St. 474; *American Bible Society* v. *Marshall*, 15 Ohio St. 537. But see contra, *Starkweather* v. *American Bible Society*, 22 Am. Rep. 133 (72 Ill. 50); *U. S. Trust Co.* v. *Lee*, 24 Am. Rep. 236 (73 Ill. 142). A devise of land in New York to the United States is bad. *Matter of Fox*, 63 Barb. 157 (52 N. Y. 530); *U. S.* v. *Fox*, 94 U. S. 315, but good in Massachusetts where there is no limitation as to devises to corporations. *Dixon* v. *U. S.* 125 Mass. 311. Corporations are usually limited as to the amount or value

of real estate which they may hold, but, even where the corporation is already holding as much land as it is authorized to hold, its right to land devised to it can be questioned by the state only, unless, as in New York, there is some statute declaring the devise itself void. *The Bank* v. *Poitiaux*, 15 Am. Dec. 706 (S. C. 3 Randolph, (Va.) 136); *Mallett* v. *Simpson*, 55 Am. Rep. 594, (94 N. C. 37); *Blount* v. *Walker*, 78 Am. Dec. 709 (11 Wis. 334); *Leazure* v. *Hillegas*, 7 S. & R. (Pa.) 313; *Bayard* v. *Bank of Washington*, 11 Id. 411; *De Camp* v. *Dobbins*, 29 N. J. Eq. 36; *Hough* v. *Cook Co.* 73 Ill. 23; *Barron* v. *Turnpike*, 9 Hump. 304. In *Heiskell* v. *Chickasaw Lodge*, 3 Pickle, 668, 686, it is stated that there is a distinction between the case where a corporation is actually holding property in excess of the limitation of its charter and the case where a devise is made to it and the property devised has not yet come to its possession, and it is said that in the first case no one but the state can raise the question or enforce the forfeiture; but in the second case the heirs or residuary legatee may raise the question, because the gift would be void and the property would go the same as if it had not been made. Dickinson, Sp. J. cites *Matter of McGraw*, 111 N. Y. 66, to sustain this distinction. He seems to have overlooked the fact that the statute of Wills in New York expressly declares such devises void. There can be no objection to the heirs making the question where the testamentary power is thus expressly limited by statute. In the absence of such a statute the devise is not void as fully shown by the authority cited above, and the heirs could no more attack it before the corporation went into the possession of a realty devised than afterwards. See extended note to *Page* v. *Heineberg*, (40 Vt. 81) 94 Am. Dec. 378, 381-387; *Barron* v. *Turnpike*, 9 Hump. 304; *Dockery* v. *Miller*, Id. 731; *Fellows* v. *Miner*, 119 Mass. 541; 1 Mor. Corp. 332, 333, 678; *National Bank* v. *Whitney*, 103 U. S. 99; *Runyan* v. *Coster*, 14 Pet. 122."

The foregoing cases, with one exception, are where the question is discussed as to the ability of corporations to acquire by devise or bequest property exceeding the amount which their charters expressly allow them to possess. In addition to those authori-

ties, many others are cited by the counsel for the respondents which affect the question in a less direct but more general way, and are important as containing discussions of the general principle at stake, and as indicating the common judicial sentiment on this and kindred questions; some of them bearing with special force on the question by analogy to it, others being the private opinions to some extent of individual justices perhaps, but all of them combined operating with much force and effect on the particular issue involved. The same idea pulsates through them all. Some of them are the following:

In *Heard* v. *Talbot*, 7 Gray, 113, in discussing the relations in which a corporation stands towards the state as well as towards individuals interested in the same question, the following remarks made in the opinion of the court appear: "Although the disuse of the canal and its abandonment by the corporation may be a gross disregard of the duty imposed on them by law and an essential violation of the terms and conditions implied from the contract entered into with the government by the acceptance of a charter, and upon due proceedings had may be a sufficient ground upon which to decree a forfeiture of all their corporate rights and privileges, they do not constitute any valid ground upon which the exercise by the corporation of any of the powers conferred by their charter can be defeated or denied by third persons in collateral proceedings. This results from the very nature of the act of incorporation. It is not a contract between the corporate body, on the one hand, and individuals whose rights and interests may be affected by the exercise of its powers, on the other. It is a compact between the corporation and the government from which they derived their powers. Individuals, therefore, cannot take it upon themselves in the assertion of private rights, to insist upon breaches of the contract by the corporation, as a ground for resisting or denying the exercise of a corporate power. That can be done only by the government with which the contract was made, and in proceedings only instituted against the corporation. . . . Therefore, it has been often held that a cause of forfeiture, however great, cannot be taken advantage of or enforced against corpora-

tions collaterally or incidentally, or in any other mode than by a direct proceeding for that object in behalf of the government."

In *Davis* v. *Old Col. R. R. Co.* 131 Mass. 258, is a learned discussion by Gray, J., in the course of which he says: "There is a clear distinction between the exercise by a corporation of a power not conferred upon it, varying from the objects of its creation as declared in the law of its organization, and the abuse of a general power, or the failure to comply with prescribed formalities or regulations in a particular instance;" to which proposition many and various cases are cited. In commenting on a former case between the same parties, it is in the opinion said as follows: "The objection that a corporation had no right to trade in gravel or land was raised by the defendant by way of defense to a bill in equity by the corporation for specific performance of his agreement. . . . . There can be no doubt of the correctness of the decision overruling the objection. The corporation by its purchase had acquired a title to the land, which was good against all the world, except possibly by the commonwealth."

It was upon the distinction above stated that it was held, in *Brunswick Gas Light Co.* v. *United Gas Co.*, 85 Maine, 532, that one gas company could not sell its charter, inclusive of rights obtained through the exercise of the principle of eminent domain, to another gas company without the consent of the legislature. The same distinction is aptly stated, in a *South Dakota mining case*, *Gilbert* v. *Hole*, 49 N. W. Rep. 1, in this way: "There is a difference between exercising power entirely foreign to the nature of a corporation and exercising legitimate powers to an improper extent. In the former case, the acts done might be absolutely void; in the latter, they would only be voidable by a proper proceeding on the part of the state." The general rule illustrated by some of the preceding cases is also well put in case of *Alexander* v. *Tolleston Club*, 110 Ill. 65, where the head note reads thus: "When a corporation, by the law of its creation is authorized in some cases or for some purposes or to a certain extent to take and hold a title to real estate, it cannot be made a question by any party except the state whether its real estate has been secured for

the authorized use or not, or is in excess of the capacity of the corporation to take and hold. The state alone must assert her policy in that regard." In another Illinois case it is said: "A third person cannot in a collateral proceeding question the power of a corporation to hold real estate; only the state can do this, and in a direct proceeding." *Barnes* v. *Suddard*, 117 Ill. 237. (13 Am. & Eng. Cor. Cases, 7).

But the present suit is not either instituted or controlled by the state. It is a collateral proceeding by private parties. The state is not thereby exercising her policy, and if the suit can be sustained the state will have no opportunity whatever to express by any act its assent or dissent in relation to the conduct of the corporation in accepting the bequests. The state is neither directly or indirectly represented in the litigation. What can be plainer! But the corporation is using the state's machinery for their purposes, it is said. Is not that the business of the state whether such use of her procedure shall be had or not? Cannot the court wait until the state through her officials comes into court asking for any judicial assistance?

In *Briggs* v. *Cape Cod Ship Canal*, 137 Mass. 71, the point of many cases is expressed in these words: "The act of incorporation is a contract between the commonwealth and the corporation; whether the corporation has complied with the conditions is a question of fact to be judicially determined. The commonwealth may waive a strict compliance with the terms of the act, and may elect whether it will insist upon a forfeiture, if there has been a breach of condition." Even the North Carolina court feels some amelioration of its rigid doctrine maintained in *Chambers' Executors* v. *Davidson College*, the first case cited on complainants' brief, when, in *Mallett* v. *Simpson*, 94 N. C. 37, thirty years after its first decision, it says: "Conceding that the railroad company had not purchased the land in question or used it for the purposes contemplated by the charter, the deed to it vested the legal title in it and its right to purchase and hold land could not be collaterally assailed. No one but the state could take advantage of the defect that the purchase was ultra vires."

The case of *Penobscot Boom Corporation* v. *Lamson*, 16 Maine, 224, is the only one looking towards the present question, but it contains a germ of the true principle when it decides that, in an action by a corporation, the defendant cannot take an advantage of any use or abuse of its coporate powers.

The law authors are nearly or quite unanimous in their concurrence on the exact question presented for our determination. In Devlin on Deeds, volume 1, § 120, it is laid down that "if a charter of a corporation forbids it to purchase or take lands, a deed made to it is void." And the author in the next following section (121) ascribes to the state the discretion of applying any remedy, saying that "the general rule is that the state alone can take advantage of the clause of the charter prohibiting a corporation from holding land." In Beach on Private Corporations, § 378, it is said that "no party except the state can object that the corporation is holding real estate in excess of its rights." And it seems to us that it is a consistent deduction from that proposition to say that no party but the state can object to any effort by a corporation to acquire real estate. How can a thing be wrong in the beginning and right in the end? How can it be logically said that a contemplated act is wrong and as soon as consummated is right? It would seem as if the first step towards a wrong act would constitute less offense than the last step would.

Says Mr. Perry, in his reliable work on Trusts, "if a corporation takes land by grant or bequest in trust or otherwise which by its charter it cannot hold, its title is good as against third persons and strangers; the state only can interfere." Perry, Trusts, § 45.

The quotation below from Schouler on Wills (§ 24) directly implies that the bequests he is speaking of are merely voidable, for if void a legislature at its will could not cure the difficulty. The author says: "But limitations and restrictions under the act of incorporation should here be regarded, to the extent, at least, of procuring an enabling act from the legislature to hold the property where the original charter privileges would otherwise be transcended. In Massachusetts and many other states no disability to take by either devise or bequest is imposed by the statute of wills

upon corporations. But the American rule is not uniform. Under the New York code, for instance, it is expressly declared that no devise to a corporation shall be valid unless the corporation be expressly authorized by its charter or by statute to take by devise."

The text of the section, in Pritchard on Wills, section 153, an extended note to which we have already incorporated in this opinion, on a review of the authorities, says that when a corporation is already holding as much land as it is authorized to hold, its right to land devised to it can be questioned by the state only unless, as in New York, there is some statute declaring the devise to be void. It is said in Morawetz on Pri. Cor. § 671, as follows: "The statute of New York prohibiting devises of real estate to corporations, unless expressly authorized by their charters or by statute to take by devise, renders prohibited devises absolutely void; and it has been held that the legislature cannot by subsequent enactment validate a devise which is void under the statute, for this would impair the vested rights of the heir.

"A distinction should be observed between the effect of laws restricting the power of testators to devise their property to corporations, and laws restricting the power of corporations to take property. Such laws differ both in their application and in their legal effect." Again the author says in another section (§ 332) as follows: "A distinction should be observed between those laws whose object it is to regulate corporations in respect of their power of acquiring and holding property, and laws whose object is to restrict the power of testators to dispose of their property. Laws of the former description are enacted in pursuance of a general policy of preventing corporations from acquiring the ownership of real estate in the absence of express authority from the state. But laws prohibiting devises to corporations are intended to restrict the testamentary capacity of testators, and their object in many instances is to prevent testators from being driven by the improper use of religious influence to devise their property to religious institutions and thus disinherit their heirs."

Mr. Thompson, the learned and able commentator on Corporations, in his work which is the latest of any in this country on the

subject, considers carefully the precise point in dispute between the present parties; and, in a lengthy section, fairly and fully states the effect of the authorities on both sides, and expresses his own opinion on the point in very positive terms in the manner following: "According to one view, if the amount of land which a corporation may hold is prescribed by its governing statute, and if it has already acquired lands to such an extent that a further devise to it will exceed that limit, then, in so far as the devise is in excess of that limit, it is void and the title vests in the heirs. In such a case, the principle that the state alone can question the right of the corporation to hold the lands, does not in the opinion of some of the courts apply, but the heirs of the testator can raise the question. Nor, in such a case is the construction put upon the language of the statutes of mortmain applicable, making a distinction between the power to take and the power to hold; but such a statute in the absence of some plain expression showing the contrary intent, is construed as prohibiting a taking where the prescribed limit has been reached. But other courts have taken the view that here, as in other cases, the question of the capacity of the corporation to take, is one which can be raised by the state alone, and this is the *only view sustainable* on the analogies of this question. That view is that a *devise* to a corporation, incapable for that or any other reason from taking, is good as against every one save the state; just as is a deed to a corporation or to an alien; so that whenever the state waives its objection to it, that is an end of the discussion. But under the former view the devise is void only as to the excess; it is good up to the statutory limit, though there may be difficulty in determining that limit. Moreover under this doctrine an act of the legislature passed subsequently to the death of the testator, enlarging the power of the corporation to take, will not affect the rights of the heirs, because the title vests in them instantly on the death of the testator, and it is not competent for the legislature to divest it." Thomp. Corp. § 5787.

The author, in section 6033, characterized the question as follows: "These considerations bring us to the somewhat new and

growing doctrine, that whether a corporation has acted in excess of its granted powers or in the face of an expressed or implied statutory prohibition, is one which cannot be raised in litigation between it and a private party or between private parties, but can only be raised by the state in a direct proceeding, either to forfeit the franchises of the corporation or to subject it to punishment for doing the unlawful act." Other extracts from Mr. Thompson's book could be profitably added hereto, if it were reasonable to usurp so much space.

The complainants quote a part of a section from the same author, as follows: "This principle [that the state alone can interfere] has no application where the corporation is seeking the aid of a court of justice to enable it to acquire lands which it has no power to acquire and hold. Here the principle is that a court of justice will not aid a corporation to do that which is impliedly forbidden by its charter or by the law." This might be misleading if read without the omitted portion of the section, which is as follows: "It has, for instance, no application to a case where a suit in equity is brought to compel the specific performance of a contract to convey land to a railroad company, which the latter has attempted to acquire, not for any purpose connected with the building and operating of its road, but merely for speculative purposes. In such a case the specific performance was refused on the ground, among others, that the company had no power under its charter to take and hold land for such purposes." It is evident enough from the omitted extract, as well as from the citation in the note to the section that the meaning of the author is not inconsistent with his avowals in other sections of the work. The section applies to cases when a corporation has no power to be exercised and not merely where it exercises an excess of power of the same kind as that authorized by its charter. See, on this point, *Case* v. *Kelly*, 133 U. S. 21.

The complainants quote in their brief an article in the Harvard Law Review (January, 1896,) in which the writer, who was said at the argument by counsel for complainants to be a recent graduate of Harvard Law School, favors upon the admittedly doubtful

question, the view taken in the *McGraw* case and not that adopted by the United States Supreme Court. But the writer makes no allusion to the fact that the opinion in his favorite case was based on certain stringent statutes of New York affecting the testamentary capacity of the testator to give, as well as upon the lack of ability in the donee to receive, while a different question was presented in *Jones* v. *Habersham*, supra, in which Mr. Justice Gray wrote the opinion. The writer also asserts that the latter case received but slight consideration at the hands of the court, he evidently not being aware that the same case was first deliberately considered and decided by the circuit court where Bradley, J. of the Supreme Court, delivered the opinion, Gray, J., stating that fact in the first line of his own opinion. The complainants also cite a bare remark in Bigelow's edition of Jarman on Wills, in note on page 63 of 6th edition, in which the editor seems to regard the doctrine that such a gift is invalid as the better doctrine.

But that learned author, in his brief note on the subject, takes no notice of the distinction between a want of testamentary capacity to give and a mere lack of authority in the corporation to take.

Taking now a retrospective glance at the cases and authorities on both sides which we have noticed in the foregoing pages, we feel impressed with the correctness of the statement of STROUT, J. at the hearing of this case below, that the decided weight of authority is in favor of these respondents on this "new and growing question" as the author Thompson expresses it. Upon closing his discussion of the direct cases cited on his opening brief, the learned counsel for the complainants says: "But if the decisions of New York are claimed to rest upon the provisions of special New York statutes, what has the counsel to say as to all the other cases cited by the plaintiffs from North Carolina, from Kentucky, from New Jersey, and from Rhode Island?" We have substantially, according to our view answered the question ourselves by saying that the force of the opinion of the two judges in the North Carolina case is much lessened by the able minority opinion of the chief justice in the case and by the fact that the majority opinion yields the

question as to devises of real estate; that the Kentucky case is a better authority for the respondents than for the complainants; that it is not sure that the complainants have any support in the New Jersey case outside of that contributed by the chief justice in his opinion; and that the Rhode Island case evidently follows the decisions in New York. How little authority then have the complainants to rely on outside of the McGraw case in New York? We have no reason to doubt the correctness of the result of the decision in that case as based upon exceptional statutes in that state not existing elsewhere. And, should we undertake any criticism of that opinion, it would be that while the case was decided upon the statutory policy of that state, the opinion endeavors to bend into line with its policy, the policy of other states where no such peculiar conditions are found to exist.

The counsel for the complainants have very critically reviewed the cases cited against them, and in some respects, as seems to us, upon purely theoretical rather than practical grounds. Their argument would sweep away much of the more direct authority, and all of the auxiliary cases as about worthless. This is too extreme. Of course, the cases of each class are not entirely alike, and may be of various degrees of force as authorities. But they all go to illustrate as well as to bring out the underlying principle on which a settlement of the case before us depends, and most or many of them are enough alike in support of the principle involved as to be regarded as leaves from the same tree.

The counsel rebel against regarding the National Bank cases as fitting precedents in support of the question here, but they are so regarded in some cases and by some authors, which shows how other minds than ours are influenced by them. So the counsel protest just as strongly against the alien cases as being of any importance as authority. But that class of cases is constantly cited in the books as supporting by analogy such a position as the respondents stand upon here. Deeds to aliens may not be of principal importance, but it seems to us that devises to aliens, which are good at common law, are clearly cases in point and of more consequence as precedents than any other analogous authority. Does

not the will containing a devise to an alien have to be approved with the same formalities as are required of the will of the present testator, and is the land devised any more in the possession of the devisee in the one case than in the other? It is argued in behalf of complainants that there is this distinction between an alien as devisee and a corporation as such; that in the case of an alien the disability is personal and does not attach until proved by some direct and not collateral proceeding, as bankruptcy must be proved in the case of a bankrupt or as felony must be proved in the case of a felon, before the full consequences of such a condition fall upon them. There must be a conviction. Is not that the very contention of the respondents here? What is there in this will which should lead a court to establish any illegality except by a direct proceeding for the purpose? And why should the law be any more generous to a bankrupt or a felon in the dispensation of its favors than to a charitable association? At common law, and by the statute law of some of the states, an alien can take real estate by devise and hold the same until office found to take it away from him. It is also argued for the complainants that executory contracts of an illegal nature where the illegality is participated in by both parties cannot be enforced by one party against the other, the parties being equally in fault. That principle is not applicable here. The executors and the corporation are not parties contending against each other. They are on the same side of this suit. It is admitted by the corporation that it would be a transgression of the law of its organization to accept the bequests unless the state actively or passively consents to it, and its silence is its consent. But what wrong has the testator committed by his act? The only contract that can be pertinently discussed here is that between the state and the corporation, and the state can do no wrong.

A few of the more important propositions pertinent to the case may, in conclusion, be briefly re-stated as these: That there is no restraining clause in our statute of wills preventing the testator from making these devises and bequests; that they are regular and valid on their face, nothing in the will indicating that the corpora-

tion might not be a competent trustee to administer the gifts; that the testator had no suspicion that there would be any question over the provisions of his will; that, if the bequests fail, it will be an accident caused by a mistake of the testator respecting a fact or as to the legal construction of such fact; that the same bequests (and devises) could have been safely made to almost any individual or to any one of many charitable corporations in the state instead of to this corporation; that there is a very narrow difference, if there be any, between selecting this institution and selecting any other suitable trustee for the execution of the trusts committed to it, such a corporation as this being merely a technical and metaphysical entity through which the benefit of the trusts were to go to poor persons suffering from certain diseases; that the heirs could have no voice or interest in the matter, unless accidentally so through the innocent mistake of the testator, they having no lien on the estate of either a legal or moral kind; that there are no words in the charter of the corporation, or in the statute authorizing its organization, that forbids its holding more than the amount limited by the statute, nor any penalties attached whereby to punish any transgression of the limitation, the only punishment intended being the risk of a forfeiture of the bequests, or of the charter; that the limitation is chiefly directory and regulative, and, if impliedly prohibitory, incidentally and mildly so; that the charter is a contract between the corporation and the state in which no person is legally interested but the parties thereto, the same general rules of interpretation applying as in other contracts; that if the corporation fails to keep its side of the contract the state can take advantage of the default or not as it pleases; that the transgression may be so slight in its consequences that the state will forgive the offense, or forgive it because occasioned by some accident or error resulting while the corporation is acting in good faith, or the state may, acting through its prosecuting officers, punish the offense for the public good; that the state may by its legislature authorize the corporation to increase its capital before the act is done, or, if the increase be made without authority, may ratify the act afterwards either by some

legislative provision or, as may be done between any other contracting parties, by its silence and any other acts indicating consent; that from the foregoing propositions it is clearly deducible that bequests like the present are voidable only, and may be avoided by the state alone, and are in no sense to be regarded as void; that a policy arose as to what better be done in the circumstances of each particular case, and that that policy belongs to the state and not to the court and is an executive and not a judicial right, for the court would decide the question in the case for all cases and all time, while the state may decide the question differently at different times according to its discretion and the public good. This right the state has never surrendered and the court cannot take it from the state. But it would surely deprive the state of its privilege if the court fails to act upon these bequests as valid bequests until, in proper and independent proceedings, such bequests are declared to be void.

This conclusion renders it unnecessary and inexpedient to discuss the further contention of the respondents that the bequests are valid in equity if not at law, upon the maxim that no legal trust of a charitable nature shall fail for want of a competent trustee, and that if this corporation cannot act some other party may be appointed by the court that can.

Exceptions overruled.

Appeal dismissed, and decree below affirmed.

STATE *vs.* JOHN W. GUTHRIE.

SAME *vs.* PATRICK W. FORD.

Hancock. Opinion June 16, 1897.

Search Warrants. Intox. Liquors. Art 5, Declaration of Rights. Const. Law. R. S., c. 27, § 40.

It is an integral principle in our system of law and government that ministerial officers assuming to execute a statute or process upon the property or person of a citizen, shall execute it promptly, fully and precisely. The time of execution is as essential as any other element.

A warrant to search for intoxicating liquors remains in force for a reasonable time only.

What is a reasonable time within which such a warrant may be lawfully executed is a question of law for the court to determine in each case according to its circumstances.

An unexplained and hence apparently needless delay for three days in the execution of such a warrant is unreasonable, and hence unlawful.

ON REPORT.

This was a search and seizure process. The case came into the court below upon appeal from a trial justice and was reported to the law court upon an agreed statement. The law court, among other things, was to determine what effect, if any, the fact that the warrant dated July 20, 1895, was served July 23, 1895, may have upon the complaint and warrant or the evidence of the identity of the liquors seized necessary to authorize a conviction under it.

The case appears in the opinion.

E. S. Clark, County Attorney, for State.

In *State* v. *Hale*, 81 Maine, 34, the court decided that "the return implies that the liquor ordered to be seized and the liquor seized are the same." In *Com.* v. *Intox. Liquor*, 110 Mass. 182, it was held that "the jury is warranted in finding that the liquors seized were the liquors described, although the officer who made the complaint and the seizure testified that at the time of making

the complaint he had no knowledge of the quantity, kinds or packages of the liquors." See also *Com.* v. *Certain Intox. Liquors*, 13 Allen, 52. The service of a writ by arrest of the defendant, will not be ground of abatement, or illegal, simply because he was not a resident, nor within the state, when the writ was made, and the oath that he was about to depart, etc., (required by the R. S., c. 113, § 2, to authorize the arrest,) was taken. *Adams* v. *McFarlane*, 65 Maine, 143.

L. B. Deasy, for Guthrie; and *H. E. Hamlin*, *A. W. King*, *J. E. Bunker*, *Jr.*, for other defendants.

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

EMERY, J. A warrant to search for intoxicating liquors in a building occupied by the respondent was issued July 20th, the day of the making the complaint. It is not stated on what day the warrant came into the hands of the officer who undertook to execute it, but presumably it was delivered to him at once. He held the warrant for three days, apparently needlessly, and then assumed to execute it July 23rd when he found and seized some intoxicating liquors, and arrested the respondent. Upon this warrant the respondent is now before the court, and contends in limine that, in the absence of reasons for the delay, the officer's authority to search and arrest on this warrant did not continue for three days and had expired at the time of this arrest.

The question presented is of fundamental importance and yet, so far as our research or that of counsel has extended, it has not before received adjudication. Either officers have hitherto served search warrants promptly, or respondents have not cared to raise the question of their duty to do so. The result is that we must base our judgment on reasoning from accepted principles rather than on authority.

There are some fundamental and almost self-evident propositions to be stated at the outset.

When there is named in any process, or in the law authorizing

it, a time within which it is to be executed and returned, the process cannot be executed after that time, but becomes functus officio, except perhaps for return.

When no time is thus named, the process must be executed within a reasonable time from its issuance and becomes functus officio thereafter, or the time within which it may be executed is unlimited, and it never becomes functus officio however long held back by the officer. We are not able to see any middle ground between these alternative propositions.

The result of a search under a search warrant, in liquor cases at least, is not the test of the authority to make the search under the warrant. The validity of the warrant, the authority of the officer under it, to enter upon the prescribed premises does not depend upon what he finds after entry. The prior authority, or want of authority, in an officer to begin the execution of a search warrant is fixed when he begins. A corollary of this proposition is that the life of a search warrant does not depend upon the existence or continued existence of the liquor described in the complaint. As the warrant may outlive those liquors, so it may expire before they disappear. It is an integral principle in our system of law and government that ministerial officers assuming to execute a statute or process upon the property or person of a citizen shall execute it promptly, fully and precisely. The time of execution is as essential as any other element. This principle has been sufficiently stated and explained in former opinions of this court. *Carter* v. *Allen*, 59 Maine, 296; *B. & M. R. R.* v. *Small*, 85 Maine, 462.

We think the foregoing propositions are applicable with especial directness and force to the nature and purpose of a search warrant. It is a sharp and heavy police weapon to be used most carefully lest it wound the security or liberty of the citizen. It was unknown to the early common law and came into use almost unnoticed in the troublous times of English history. Lord Coke denied its legality, but finally the courts and parliament, recognizing its great efficiency, contented themselves with carefully restricting and controlling its use. *Entick* v. *Carrington*, 19 Howell's State Trials, 1030. The danger of its abuse has been so

clearly apprehended in this country that constitutional barriers have been erected against it. In the Declaration of Rights in the Constitution of this State, Art. 5, it is provided that the people shall be secure in their persons, houses, papers and possessions from all unreasonable searches and seizures.

Nothing in the complaint or warrant or in the law concerning them indicates that, after complaint is made, the warrant is to be held by the magistrate or officer as a weapon to be used at his discretion. The very nature of the search warrant indicates that when complaint is made, the warrant (if issued at all) should be promptly issued and executed. The purpose is to seize the thing, alleged to be at that time in the place to be searched, to prevent its removal or further concealment.

Especially is this so when complaint is made for a warrant to issue to search for intoxicating liquors. The complaint is against the particular liquors on deposit at the date of the complaint, and the warrant under the Declaration of Rights, Art. 5, can be issued against those liquors only;—but such liquors are usually being continually disposed of and replaced, if at all, by other and perhaps different liquors. Unless the warrant is issued and served at once, the officer is likely to find only liquors which were deposited after the complaint was made. In any case of delay it would be difficult, if not impossible, to prove the identity of the liquors found with those complained against. The prosecution would fail, resulting only in expense to the State, and expense and annoyance to the citizen.

The Legislature has recognized this necessity of immediate execution of the warrant in liquor prosecutions, and has commanded it. The officer is expressly directed by the warrant and the statute to "make immediate return of said warrant," and to have the respondent "forthwith" before the magistrate for trial. R. S., Ch. 27, § 40. In view of the nature and history of this peculiar process, this language of the Legislature fairly indicates the intention that the warrant should be executed "immediately" and "forthwith," and not in the unlimited discretion of the officer. *State* v. *Leach*, 38 Maine, 432.

Guided by the principles and reasoning above stated, we are led to the conclusion that a search warrant for intoxicating liquors must be served within a reasonable time after issuance or be abandoned.

What is a reasonable time within which the service of such a warrant can lawfully be made is also a question of law for the court.

The officer is not held to more than reasonable promptness. The time he may take, the reasonable time, necessarily varies with the circumstances. The hour in the day of making the complaint,—the distance of the place to be searched,—the state of the weather,—the condition of the roads,—the lack of facilities for travel,—the obstructions met,—and other circumstances may make a long delayed service practically immediate and forthwith, and hence within a reasonable time.

In this case none of these nor any circumstances are shown. The officer lived in the immediate neighborhood of the place to be searched. Nothing appears indicating that the warrant could not have been easily executed on the day the complaint was made. No reason whatever is shown for the delay of three days. Such a delay was needless. In cases of seizures without warrant, it has been held unreasonable and hence unlawful to delay the warrant more than twenty-four hours. *Weston* v. *Carr*, 71 Maine, 356; *State* v. *Dunphy*, 79 Maine, 104; *State* v. *Riley*, 86 Maine, 144. An unexplained delay of three days in serving such a warrant seems clearly needless, unreasonable and hence unlawful, and destructive of the power of the warrant.

It is urged that the conclusion reached in this case will materially impair the efficiency of one of the most useful instrumentalities for the enforcement of the liquor statutes. Even if such were the effect we could not shrink from declaring the law as we believe it to be. But no such effect need be apprehended. No case can be stated in which a needless delay of service will aid the prosecution. Any such case when stated will, ipso facto, show the delay to have been needful and hence reasonable, and hence remove the case from the purview of this opinion. On the other hand the more

promptly the warrant is served, the more likely the officer is to find the liquors complained of, and the more easy to prove the identity. Every hour's delay, whether from the officer's inefficiency or from his collusion with respondents, endangers the success of the prosecution.

It is suggested that the prosecution often needs to obtain search warrants in advance, in order to have them in readiness to seize the liquors at the moment of deposit before they can be concealed,— that such a procedure is very efficacious and even essential to circumvent the cunning of liquor sellers, and that the rule here evolved will nullify it. If such a practice obtains, it should be nullified.

No prosecution can be lawfully begun, no criminal process lawfully issued, before the offense is committed. The practice suggested, if it obtains, is a scandalous abuse of legal process based upon the perjury of the complainant and subjecting all concerned in it to penalties and damages.

Respondents discharged.

DANIEL P. RHOADES *vs.* FRANK M. COTTON.

Somerset. Opinion June 18, 1897.

Sales. Delay to Deliver. Action. Practice.

When it appears in a case submitted to the law court upon a motion for a new trial and exceptions to the rulings of the presiding justice, that on the undisputed facts the action cannot be maintained, *held* ; that it is unnecessary to consider further either the motion or the exceptions.

The defendant gave a written order, April 28, 1897, at Waterville, to the plaintiffs' traveling agent for certain merchandise to be shipped immediately. The plaintiff received the order at Syracuse, N. Y., on May 1. The defendant stated to the salesman, at the time he gave the order, that he must have certain flags named in the order in season for Memorial day. The other goods were adapted to campaign purposes and for the Fourth of July. The plaintiff delivered on May 18 the goods described in the order to the railroad at Syracuse, properly boxed and directed to the defendant at Water-

ville, where they arrived by freight on June 1st or 2nd. On May 28, and as soon as the goods arrived, the defendant countermanded the order, refused to receive the goods, and they were there shipped back. The plaintiff declined to take back the goods and brought an action. *Held* ; that the delay in not shipping the goods until May 18, under the circumstances, was unreasonable and that the action cannot be maintained.

ON MOTION AND EXCEPTIONS BY PLAINTIFF.

This was an action of assumpsit, writ dated August 6, 1896. The writ contains two counts ; one for goods sold and delivered ; and one for not accepting the goods sold. And also for goods bargained and sold.

The plea was the general issue, and brief statement as follows : And for a brief statement of special matter of defense to be used under the general issue pleaded, the said defendant further says : That the alleged causes of action set forth in plaintiff's writ arose out of an express written contract, the terms of which have not been complied with by plaintiff so as to entitle him to recover in this action.

The verdict was for the defendant.

The plaintiff took exceptions to the charge of the presiding justice as follows :

(1) "In this case, here is a contention between the parties as to whether this common carrier, which is the railroad, was the agent of Rhoades, in Syracuse, or the agent of this defendant. If the defendant by his contract and order with Rhoades understood that they were to be delivered to a common carrier, and if Rhoades understood that they were to be delivered by him and that it was his duty only to deliver them to the common carrier, then I instruct you that when they were so delivered to the common carrier, the title passed and vested in this defendant."

(2) "Now I instruct you that the mere fact that a seller delivers goods which are ordered, to a common carrier, when there is no contract, other than to send the goods, is not a delivery such as to vest the title in the purchaser. I make a square ruling on that, and if I am wrong, the party aggrieved will have his rights."

The bill of exceptions is reported with a full copy of the charge of the presiding justice, but the motion for a new trial was not accompanied with a full report of all the testimony.

The case is stated in the opinion.

Edmund F. and Appleton Webb, for plaintiff.

Counsel argued that the railroad company was the agent of the defendant and not of the plaintiff, and cited: Benj. Sales, p. 793; *Magruder* v. *Gage*, 33 Md. 344 (3 Am. Rep. 180); *Dutton* v. *Solomon*, 3 B. & P. 582; *Dunlop* v. *Lambert*, 6 Clark & Fin. 600; *Sarbecker* v. *State*, 65 Wis. 171 (56 Am. Rep. 626); *Com.* v. *Farnum*, 114 Mass. 267; Benj. Sales, § 675.

The jury rendered a verdict against the charge of the court, and against the admitted evidence of the defendant.

Harvey D. Eaton, for defendant.

Delivery to carrier is not delivery to purchaser: *Hanson* v. *Armitage*, 5 B. & Ald. 557; *Acebal* v. *Levy*, 10 Bing. 376; *Coombs* v. *Bristol & Exeter Ry. Co.*, 3 H. & N. 510; *Cusack* v. *Robinson*, 1 B. & S. 299, *Coates* v. *Chaplin*, 3 Q. B. 483.

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

SAVAGE, J. On April 28, 1897, the defendant gave a written order to the traveling salesman of the plaintiff, at Waterville, for certain merchandise. The order contained the direction to ship "immediately." The plaintiff received the order at Syracuse, N. Y., where his place of business was, about May 1. On May 18, the plaintiff delivered the goods described in the order to a railroad company at said Syracuse, properly boxed and directed to the defendant at Waterville. The goods reached Waterville, by freight, on June 1 or 2. When the defendant gave the order he told the salesman he must have certain flags referred to in the order in season for Memorial day. The remainder of the goods "were adapted to campaign purposes and for the Fourth of July." On May 28, the defendant wrote to the plaintiff countermanding the order, and on June 1 or 2, as soon as the goods reached Water-

ville, the defendant refused to receive the goods and ordered them returned to the plaintiff, and they were shipped back. Plaintiff declined to receive the goods back, and insists on holding the defendant to his contract under the order.

Plaintiff's declaration is in assumpsit for "goods sold and delivered;" for "goods bargained and sold;" and for "not accepting the goods sold." The verdict was for the defendant.

The case comes up on motion for a new trial, under which the plaintiff relies upon the ground that the verdict was "against law and the charge of the justice," and upon certain rulings of the presiding justice in his charge, as to the effect of the delivery of the goods by the plaintiff to the railroad company at Syracuse.

If upon the foregoing undisputed facts this action cannot be maintained, it becomes unnecessary to consider further either the motion or the exceptions. *Rockland* v. *Morrill*, 71 Maine, 455; *Mathews* v. *Fisk*, 64 Maine, 101.

The defendant contends that the shipment was not seasonable, and we think his contention must be sustained. The goods were to be shipped "immediately." The word "immediately" undoubtedly has a relative meaning and must be read in the light of surrounding circumstances. It was understood that the defendant ordered a portion of the goods for use on Memorial day. They were not shipped until May 18, eighteen days after the receipt of the order, and did not reach Waterville until after Memorial day. It is the opinion of the court that the delay was unreasonable, and that the action cannot be maintained. *Fisher* v. *Boynton*, 87 Maine, 395.

Motion and Exceptions overruled.

H. WINFIELD BENNETT *vs.* CHARLES C. DAVIS.

Cumberland. Opinion June 19, 1897.

Deed. Covenant. After—Acquired Title.

Under a quitclaim deed containing a covenant of special warranty "against the lawful claims and demands of all persons claiming by, through or under" the grantor, a title or interest subsequently acquired by the grantor does not inure to the grantee.

Pike v. *Galvin*, 29 Maine, 183, re-affirmed.

See *Bennett* v. *Davis*, ante p. 102.

ON REPORT.

This was a petition for partition. The petitioner claimed one-undivided sixth of the premises described. The defendant denied the title of the petitioner and claimed to own the whole premises.

Three brothers, Elbridge, Henry and Joseph, were once seized of the premises, one-third each.

Elbridge gave a deed to Henry, wherein he says: "I do hereby remise, release, bargain, sell and convey and forever quitclaim unto the said Henry, his heirs and assigns, forever a certain lot of land with the buildings thereon" (describing the premises of which partition is sought. A copy of the deed made a part of the case is given below.) "To have and to hold," &c., and warranting the premises against all claims "by, through or under him."

Thereafterwards, Joseph, being seized of one-third, died and Elbridge and Henry inherited one-twelfth each and purchased all the interest of the other heirs in Joseph's lands, giving them one-sixth each in the premises described. This one-sixth Elbridge conveyed to the petitioner, and he now holds the same unless it inured to Henry, the grantee of Elbridge, under the deed before mentioned purporting to convey the whole land, in which case the petitioner had no title and the defendant owned the whole, otherwise five-sixths.

Upon the above statement the case was reported to the law court for decision.

(Deed.) Know all men by these presents, that I, Elbridge G. Bennett, of Deering, in the County of Cumberland and State of Maine, in consideration the sum of one dollar paid by Henry P. Bennett of said Deering, the receipt whereof I do hereby acknowledge, do hereby remise, release, bargain, sell and convey, and forever quit-claim unto the said Henry P. Bennett, his heirs and assigns forever, a certain lot of land with the buildings thereon situated in said Deering, on the southwesterly side of the road leading from Stroudwater Village to Portland; being the same premises conveyed to Henry P. Bennett, Joseph J. Bennett and Elbridge G. Bennett, by Andrew Gray, by deed dated March 24, 1864, recorded in Cumberland Registry of Deeds, Book 326, Page 534, to which reference may be had for a particular description.

To have and to hold the same, together with all the privileges and appurtenances thereunto belonging, to him the said Henry P. Bennett, his heirs and assigns forever. And I do covenant with the said grantee, his heirs and assigns, that I will warrant and forever defend the premises to him the said grantee, his heirs and assigns forever, against the lawful claims and demands of all persons claiming by, through, or under me.

In Witness Whereof, I, the said grantor and Sarah S. Bennett, wife of the said Elbridge G. in testimony of her relinquishment of her right of dower in the above described premises, have hereunto set our hands and seals this ninth day of March, in the year of our Lord, one thousand eight hundred and seventy-eight.

ELBRIDGE G. BENNETT, [Seal.]
SARAH S. BENNETT, [Seal.]

Signed, sealed and delivered in presence of
ANDREW HAWES.

(Acknowledged March 9, 1878, and recorded March 12, 1878, in Book 440, page 399, Cumberland Registry.)

M. P. Frank and P. J. Larrabee; *I. W. Parker*, with them, for plaintiff.

Geo. Libby, for defendant.

The defendant claims that the deed of 1878 was a conveyance of the land itself with a covenant real which runs therewith and

that Elbridge G. Bennett, and his grantee claiming under him, are estopped by this deed from claiming or holding any part of the premises therein described.

Where one makes a deed with warranty purporting to convey an entire farm of which he is only tenant in common and afterwards acquires by descent or purchase a title to a further undivided part of the farm, such after-acquired title, inures by way of estoppel to his grantee. *Perry* v. *Kline*, 12 Cush., p. 118; *Knight* v. *Thayer*, 125 Mass. 25; *White* v. *Loring*, 24 Pick. 322; *Somes* v. *Skinner*, 3 Pick. 52.

The petitioner, by the law of estoppel, is barred by this deed from claiming title to any part of these premises; and further, because the fair presumption is that Elbridge G. Bennett did just what he intended to do when he affixed his hand and seal to the deed of 1878.

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

EMERY, J. One Elbridge G. Bennett acquired by inheritance and deed a title to one-undivided sixth of the premises sought to be divided. After acquiring that title the only conveyance he made of the premises was by his deed to the petitioner. But before he acquired any title to this one-sixth he executed and delivered to Henry Bennett the deed set out in full in the case. This last named deed was recorded on the day of its date but it does not appear that the petitioner had any notice of it, other than what constructive notice such record would impose upon him. Which grantee is protected under our laws? The petitioner, the later grantee, relies upon the principle of the registry law. The respondent claiming under the earlier grantee relies upon the principle of estoppel.

The two principles certainly conflict. This conflict is frankly acknowledged in forcible language, but ingeniously avoided, in *Salisbury Savings Society* v. *Cutting*, 50 Conn. 118. The court said: "If we were called upon to decide this question we should

regard it as one of very serious difficulty, inasmuch as in sustaining the later deed we should have to deny the controlling application to the case of the well-settled principles of estoppel, while in sustaining the prior deed we should have to violate the entire spirit of our registry system, which it is the policy, and we may say in every other case, the unyielding policy, of the law to sustain."

The spirit of the system of registry of deeds, in this country is that when a title has been traced to a party, the search for conveyances or incumbrances made by him may begin at the date of his accession to the title. *Calder* v. *Chapman*, 52 Penna. St. 359, (91 Am. Dec. 163); *Farmer's Trust & Loan Co.* v. *Maltby*, 8 Paige, 361; *Bingham* v. *Kirkland*, 34 N. J. Eq. 229; *Doswell* v. *Buchanan*, 3 Leigh, 365, (23 Am. Dec. 280); *Buckingham* v. *Hanna*, 2 Ohio, 551, 557; Wade on Notice, § 214; Rawle on Covenants for Title, 428; Hare's notes to the *Duchess of Kingston's Case*, 3 Smith's Leading Cases, p. 626; Note to *Salisbury Savings Society* v. *Cutting*, 50 Conn. p. 122. In *McCusker* v. *McEvery*, 9 R. I. 528, the court felt constrained by authority to give effect in that particular case to the doctrine of estoppel, but said "we think a statute is called for in view of this state of the law in order to carry into full effect the policy of our recording act, and to prevent its operating in cases of this kind as a snare rather than as a protection to purchasers."

On the other hand it has been several times held in this state, rather upon authority than reason, that where one has assumed to convey by what is known as a full warranty deed, with warranty against all the world, a parcel of land he did not own, any title afterward coming to him will inure at once to his former grantee. *Lawry* v. *Williams*, 13 Maine, 281; *Baxter* v. *Bradbury*, 20 Maine, 260; *Crocker* v. *Pierce*, 31 Maine, 177; *Powers* v. *Patten*, 71 Maine, 583. In the last case cited the court said the rule had been severely criticised in some quarters, but it had become the settled law of this state.

In *Fairbanks* v. *Williamson*, 7 Maine, 96, the rule of estoppel was applied to the case of a deed containing a covenant of non-

claim, i. e. a covenant that the grantor, his heirs and assigns, should never have or make any claim to the conveyed premises. In *Pike* v. *Galvin*, 29 Maine, 183, however, the court in an elaborate opinion overruled in terms the former case of *Fairbanks* v. *Williamson*, and held that the rule of estoppel should not be applied to a deed with a covenant of non-claim, although the covenant embraced all persons claiming under the grantor or his heirs. The decision in *Pike* v. *Galvin*, has been repeatedly and distinctly affirmed. *Partridge* v. *Patten*, 33 Maine, 483; *Loomis* v. *Pingree*, 43 Maine, 314; *Harriman* v. *Gray*, 49 Maine, 538; *Read* v. *Whittemore*, 60 Maine, 481.

There are also cases holding that the rule does not apply to any covenants however full and strong in a deed purporting to convey only the grantor's present right, title or interest. *Coe* v. *Persons Unknown*, 43 Maine, 432; *Ballard* v. *Child*, 46 Maine, 152. The covenants in these cases were held to apply only to the particular right, title or interest then conveyed and not to any after-acquired title.

Thus we find the law settled in this State as to three classes of deeds,—(1) those of full warranty against all the world,—(2) those with the covenant of non-claim,—and (3) those which purport in terms to convey only the grantor's existing right, title or interest. Under deeds of the first class an after-acquired title inures to the grantee. Under deeds of the second and third classes an after-acquired title does not pass to the grantee.

But there seems to be a criterion which, for the purpose of this opinion, may reduce the above named three classes to two,—(1) those in which appears an intent to convey an actual estate and protect it against all the world; and (2) those in which appears the intent to merely transfer whatever estate the grantor then has, with a guaranty against any then conflicting conveyances or incumbrances. A grantor in a deed of the first class, having assumed to convey an actual estate and to make it good in the grantee, cannot afterward acquire and hold that estate against his grantee, nor convey it to the detriment of his grantee. He is bound by his covenant to transfer it to his grantee, and the law, as settled in

this State to save circuity of action, holds it to be thus transferred ex vigore legis, even against a subsequent grantee where the first deed was recorded. A grantor in a deed of the second class, not having assumed to convey an actual estate and to make it good against all claims but only to relinquish whatever estate he may have with a guaranty that he has not given any one else any claim to it, is not bound to make any other title or estate good to grantee. If at the time of his deed, he has suffered no one else to acquire any rights or claims under him there can be no breach of his covenant. After such a deed he is free to acquire other titles or estates in the same land, and hold them against his grantee, for he never covenanted against such titles or estates, but only against the title or estate he conveyed, whatever it was.

The particular deed in this case clearly is within the second class last above described. In it there appears no intent to convey and make good an actual estate. It contains the usual language of a deed of quitclaim. It contains no assertion that the grantor has or will convey any actual estate. There is no covenant for such an estate. The covenant is that the grantor had not then given anybody any inconsistent right or claim,—that the grantee need not look for prior conveyances or incumbrances—but could look to his grantor to protect him from such.

The grantor is not bound by that covenant to acquire or extinguish for his grantee any title, estate or incumbrance outstanding in other persons,—not created or suffered by him. If the grantee should be obliged to buy them in or extinguish them to protect his estate, that would be no breach of the covenant. Such outstanding claims in other persons, not created by the grantor, are without the purview of the covenant. Either party may acquire them. If the grantor acquire them, he is not obliged to transfer them to his grantee, and the law does not so transfer them.

The only case in Maine that we find with a deed like this is *White* v. *Erskine*, 10 Maine, 306. There one Moody conveyed to one Young "by deed of quitclaim with special warranty," but he had prior thereto mortgaged the premises to Stebbins and Otis. Subsequently to his deed to Young he acquired the interest he had

before conveyed to Stebbins. It was held that this interest inured to his grantee Young. It was an interest he had himself created, and one he had warranted against. It was a "lawful claim by, through or under him." The grantor in the deed in the case at bar could not acquire or hold or convey an estate or interest he had himself created before his deed, but any other estate or interest he was free to acquire and convey.

Judgment for the petitioner for one-undivided sixth part of the land, and for partition accordingly.

EMERSON K. WILSON, and others, *vs.* EDWARD B. CURTIS.

Washington. Opinion June 23, 1897.

Will. Life Estate. Use. Occupation.

Upon a writ of entry to recover the lower story of a store, it appeared that the testatrix in her lifetime owned the premises in fee. The plaintiffs were her residuary devisees, and claimed title to the premises under the will. The defendant claimed title as assignee of the husband of the testatrix, to whom she made the following devise, viz: "I give, bequeath and devise to my beloved husband, Emery S. Wilson, the house-lot and buildings thereon in Cherryfield now occupied by us, together with all personal property appurtenant and belonging to the same, except such as may hereafter be bequeathed otherwise herein. Also the use and occupancy of the lower half of the store as now occupied by him."

Held; that the husband acquired a life estate in the demanded premises.

Also; that a devise of the use and occupancy of land passes an estate in the land and consequently a right to let or assign it, and is not confined to the personal use or occupancy of the property, unless the context clearly calls for a more limited construction.

ON REPORT.

This was a writ of entry to recover the lower story of the Wilson store in Cherryfield. Plea, the general issue.

The question at issue was whether Emery S. Wilson, husband of the late Deborah S. Wilson, took an estate under the will of his wife that passed by assignment to the defendant.

The material portions of the will of Deborah S. Wilson are as

follows: "I give, bequeath and devise to my beloved husband, Emery S. Wilson, the house-lot and buildings thereon in Cherryfield now occupied by us, together with all personal property appurtenant and belonging to the same, except such as may hereafter be otherwise bequeathed herein. Also the use and occupancy of the lower half of the store as now occupied by him.

"To my beloved daughters Flora and Hattie I give and bequeath the use and occupancy of the upper half of said store, together with all the goods and furniture in said upper half. I also give and bequeath to my said daughter Flora the chamber-set, bed, bedding and other furniture, and also the chamber occupied by her, also my watch and sewing machine; to my said daughter Hattie I also give and bequeath the chamber-set, bed, bedding and other furniture, and the chamber now occupied by her, also my cabinet organ; including also to my said daughters Flora and Hattie, the use and occupancy of such other portions of my dwelling as they may require during their pleasure.

"Wishing to divide the remainder of my estate equally among my eight children and having this day given to my beloved son Emerson what I——his just share of the same, I hereby will, bequeath and devise the remainder of my estate real, personal or mixed, wherever situated or however described to my children, Joseph, Judson, William, Mary, Irene, Flora and Hattie in equal shares."

By a codicil subsequently executed the testatrix made the following change: "Whereas by my said will I gave and bequeathed to my husband, Emery S. Wilson, the house-lot and buildings thereon in Cherryfield now occupied by us together with all personal property belonging to the same, now I do hereby make and declare this writing to be a codicil to my last will and testament, to be annexed to and taken as a part thereof, and I do revoke said bequest and give, bequeath and devise to my beloved daughters Irene, Flora and Hattie the said house-lot, buildings and personal property in equal shares subject to subsequent provisions in said will."

H. H. Gray, for plaintiff.

C. B. Donworth, for defendants.

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

WHITEHOUSE, J. This is a writ of entry to recover the lower story of the Wilson Store in Cherryfield. The case is reported to this court on the following statement of facts:

Deborah S. Wilson in her lifetime owned the premises in fee. The plaintiffs are her residuary devisees, and claim title to the premises under her will. The defendant claims title as assignee of Emery S. Wilson, to whom Deborah made the following devise, viz: "I give, bequeath and devise to my beloved husband, Emery S. Wilson, the house-lot and buildings thereon in Cherryfield now occupied by us, together with all personal property appurtenant and belonging to the same, except such as may hereafter be bequeathed otherwise herein. Also the use and occupancy of the lower half of the store as now occupied by him."

The question at issue is whether Emery S. Wilson took an estate in the store, under the will of Deborah, that passed by assignment to the defendant. It is not contended by the defendant that Emery S. Wilson took a fee in the lower half of the store; but it is the opinion of the court that he acquired a life estate in the demanded premises by virtue of the clause in Deborah's will above recited, and that this interest passed to the defendant by force of the assignment named.

The intention of the testatrix must be gathered from the whole will taken together, all its parts being construed in relation to each other, and interpreted in the light of the existing circumstances.

A comparison of the different items and clauses of the will in question reveals a clear intention on the part of Deborah S. Wilson to make a distinction between the quality of the interests given to her daughters in the dwelling-house, and the estate devised to her husband in the same premises, and also between the estate given to her husband in the homestead and that given to him in the lower half of the store. She gives and devises to her "beloved husband" "the house-lot and buildings thereon" now

occupied by them in Cherryfield; also "the use and occupancy of the lower half of the store as now occupied by him." She gives to her daughter Flora "the chamber now occupied by her," and to Flora and Hattie the use and occupancy of such other portions of the dwelling-house "as they may require during their pleasure." . . .

It is a familiar and well-settled rule of law that a gift of the income of real estate is a gift of the real estate itself. A gift of the income for life is the gift of a life estate, while a gift of the perpetual income is a gift of the fee. *Sampson* v. *Randall*, 72 Maine, 109; *Fuller* v. *Fuller*, 84 Maine, 475.

The absolute devise of the homestead to her husband was manifestly designed by the testatrix, and effectually operates as a gift of the fee, while the employment of the terms "use and occupancy" in the devise of the lower half of the store, as clearly indicates a purpose to give him a different estate in those premises. But a comparison of the terms of this devise, with the language of the devise to the daughters above mentioned, further discloses an intention on the part of the testatrix to give her husband the right to enjoy the income of the lower half of the store during his life-time, and not to restrict his enjoyment of the use of it to the period of his personal occupancy. "A devise of the use and occupancy of land passes an estate in the land, and consequently a right to let, or assign it, and is not confined to the personal use or occupation of the property, unless the context clearly calls for the more limited construction." Jarman on Wills, (6 Am. Ed.) 759; *Whittome* v. *Lamb*, 12 M. & Wels. 813; *Rabbeth* v. *Squire*, 19 Beav. 70; *Mannox* vs. *Greener*, L. R. 14 Eq. 456; Schouler on Wills, § 503.

It has been seen that upon a comparison of the different parts of the will in question, there is nothing in the context which calls for the more limited construction; but on the contrary, a careful examination of the several items and clauses shows a plain intention to give a life estate, and only a life estate, in the demanded premises. The entry must therefore be,

Plaintiffs nonsuit.

CITY OF BATH *vs.* WILLIAM B. PALMER.

Sagadahoc. Opinion June 30, 1897.

Equity. Practice. Exceptions. R. S., c. 77, §§ 22, 25.

Under the rules regulating equity practice in this state, as provided in R. S., c. 77, §§ 22 and 25, it is irregular to bring exceptions in an equity cause to the law court before final hearing; and such hearing will not be allowed, unless the question does not admit of delay until then.

A demurrer to a bill was overruled and exceptions were taken. The bill was then amended, and a demurrer interposed to the amended bill, which was overruled and exceptions taken. Without further proceeding the case was brought to the law court. *Held;* that this is irregular. The defendant should have answered, and after final hearing before a single justice, and appeal taken from his decree, the exceptions to the previous interlocutory decrees would then be properly before the law court.

ON EXCEPTIONS.

The case is stated in the opinion.

F. E. Southard, for plaintiff.

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

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

STROUT, J. This cause must be dismissed from the law docket as prematurely here.

There was a demurrer to the bill, which was overruled, and exceptions taken. An amendment to the bill was then allowed, and a demurrer filed to the amended bill, which was overruled, and exceptions taken. Without further proceedings, the cause was brought here.

Both decrees, overruling the demurrer, were interlocutory and not final, and left the cause for further hearing upon answer and proof. By R. S., c. 77, § 22, an appeal may be taken from any interlocutory decree or order, "but such appeal shall not suspend any proceedings under such decree or order, or in the cause, and

shall not be taken to the law court until after final decree. Upon an appeal from a final decree, all previous decrees and orders are open for revision, renewal or approval." By section 25, exceptions may be taken to rulings, but the "allowance and hearing of exceptions shall not suspend the other proceedings in the cause."

The rule laid down in *Maine Benefit Association* v. *Hamilton*, 80 Maine, 99, is "that it is irregular to hear exceptions in an equity cause before final hearing, and that such hearing should not be allowed, unless the question does not admit of delay till then."

Nothing in this cause brings it within the exception. After answer and proof and a final hearing, these interlocutory decrees may not be regarded by the parties as of sufficient importance to present to the law court.

If there shall be an appeal from the final decree, the rights of all parties will be fully preserved.

Exceptions dismissed.

DORA M. WHITEHOUSE

vs.

EUGENE W. WHITEHOUSE, and another, Executors.

Kennebec. Opinion July 1, 1897.

Trust. Consideration. Delivery. Contract. Gift. Check. Practice.

The defendants' testate agreed with the plaintiff that, if she would renew an engagement of marriage with him which he had broken without just cause, he would, in case he died without marrying her, provide her at his decease with property enough to support her for her lifetime without the necessity of any labor on her part. Some time afterwards while in failing health, not having married her, and deeming that his indebtedness to her on that account would be five thousand dollars, he made a check to her for that sum, depositing the same in his safe in his office in a sealed envelope addressed to an uncle of hers in trust for her benefit. After that he said to the uncle in his office where the safe was: "There is a sealed package in my safe assigned to you, placed there for safe keeping, and that package I deliver to you in trust for Dora M. Whitehouse [plaintiff.] I have not mentioned her in my

will for the reason that what that package contains belongs to her. My brother knows all about this, and at my death he will open the safe and deliver the package to you, and I entrust you to give the contents to Dora for the contents belong to her." The uncle assented and upon communicating the fact to his niece she also assented thereto. The package addressed to the uncle with an indorsement to "deliver at once," contained an envelope directed to the plaintiff containing the check in suit.

Held; that the transaction amounted to a declaration of trust founded upon a valuable consideration with a symbolical or constructive delivery.

The doctrine that the donor's own check may not be the subject of a donation causa mortis does not apply when such check is given for a valuable consideration received by the donor in his lifetime. In such case there is a contract as well as a trust.

It is immaterial that the check bore a date, whether by design or mistake, several months later than the date of the death of the person executing it.

Objection to the amendment of a declaration becomes immaterial when the verdict is sustained without any aid from the amendment.

ON MOTION AND EXCEPTIONS.

This was an action of assumpsit, the original writ containing three counts; one upon an account annexed for services amounting to $1057; the second to recover the sum of $5000, for money had and received; and the third upon an account annexed for $988 for board.

At the March Term, 1896, the plaintiff filed an amendment to said writ, the allowance of which was seasonably objected to by the defendants, but the court allowed the same subject to defendants' objection.

To the ruling of the court in allowing this amendment the defendants excepted. No evidence was introduced in regard to the two accounts annexed and no claim was made to recover upon either of them.

The defendants requested the court to instruct the jury, as a matter of law, that this action could not be maintained upon the evidence, and that the jury were not authorized to give a verdict for the plaintiff upon the evidence in relation to the action as it stood upon the pleadings. The court declined to give such instruction, but instead thereof instructed the jury as follows:

"I instruct you, as a matter of law, that if these parties were engaged, if the time of their marriage was fixed and postponed at

his request and, in consideration of her assenting to the postponement, he made the arrangement which has been testified to, that he would give her of his estate sufficient for her support without work, for the rest of her life, and if for the purpose of fulfilling in whole or in part the obligation that rested upon him by reason of that special promise he did draw this check and place it in that envelope, drawing it in favor of the plaintiff, directing the envelope to Mr. Taylor, explaining to him the object and the beneficiary of whatever was contained in that envelope, and if the check was retained, as it is admitted to have been retained, by the executors after they came into possession of his estate, then there is money to the extent of the amount of this check in the hands of the executors as a part of the estate of Dr. Tibbetts, which in equity and good conscience belongs to the plaintiff and which she can recover in this action and in this form of action."

To the ruling of the court declining to give the instruction above requested and giving the instruction above quoted, the defendants excepted.

The jury returned a verdict for the plaintiff, and the defendants also filed a general motion for a new trial. The defendants offered no evidence.

The case is stated in the opinion.

(Amended Declaration.) Also, for that said Tibbetts, in his lifetime, on the twenty-second day of November, 1886, being then sole and unmarried, at said Vassalboro, to wit: at said Augusta, in consideration that the plaintiff, then also sole and unmarried, then and there promised said Tibbetts that she would marry and take him to husband, promised the plaintiff to marry her and take her to wife on New Year's day meaning the first day of January, 1887; and afterwards said marriage was by mutual consent postponed until Thanksgiving Day, 1889, being the twenty-eighth day of November, 1889; and afterwards prior to said 28th day of November, 1889, at the request of said Tibbetts in consideration that the plaintiff would not insist on the performance of his said contract on the date agreed, but would again defer the date of their marriage and would not cancel their said

engagement but would permit it still to subsist, said Tibbetts then and there promised the plaintiff that, if he should die before marriage to the plaintiff, he would leave her enough of his property to support her abundantly throughout her life, without any necessity for labor on her part.

And the plaintiff avers that, in reliance upon said agreement by said Tibbetts and solely because thereof, she waived the performance of his said contract on the date agreed and assented to this last named postponement of her said marriage to said Tibbetts, and did not cancel her said engagement of marriage, but suffered the same still to subsist down to the time of said Tibbetts' death; and the plaintiff avers that said Tibbetts died on the 19th day of September, 1892, and that he did not marry the plaintiff at any time before his death, and that the amount necessary for her abundant support, without labor, during her life, was five thousand dollars, and that, in consequence of the promise of said Tibbetts herein recited, the estate of said Tibbetts, in the hands of the defendants as his executors, became liable, and in consideration thereof, promised to pay the plaintiff said sum on demand, but has never paid the same, and said executors still neglect and refuse so to do. And the plaintiff avers that, in pursuance of said Tibbetts' agreement as hereinbefore set forth, and in part performance thereof, he did, in his lifetime, leave for her use and benefit, at his death, a check for five thousand dollars signed by him and payable to her, being the same check set forth in the specification under the second count of this writ, which check came into the possession of said executors; but that said defendants refused to deliver her said check, but converted the same and the proceeds thereof to the use of said estate, and have retained the same and refused to pay over any part thereof to the plaintiff. Whereby the plaintiff says that said defendants hold said sum of five thousand dollars, and the interest thereon, as money which in equity and good conscience belongs to the plaintiff and should be paid to her.

The facts appear in the opinion.

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

L. C. Cornish; E. W. Whitehouse and W. H. Fisher, for defendants.

Where the donor has the legal title and the property is of such a nature that a legal estate can be transferred, that is, in land, chattels, money, etc., an imperfect conveyance or assignment which does not pass the legal title will not be aided in equity. If a party makes himself trustee, no transfer of the subject matter of the trust is necessary; but if he selects a third party the subject of the trust must be transferred to him in such mode as will be effectual to pass the legal title. *Dickerson's Appeal*, 115 Pa. St. p. 193.

In *Milroy* v. *Lord*, 4 De G. F. & J. 264, the deceased gave a written declaration of trust conveying certain bank shares to A to hold in trust for B, with power of attorney for transfer; but the shares were never transferred and the court held that the legal title never changed; that the transaction constituted an imperfect gift but no trust.

Dr. Tibbetts' acts constituted at best an imperfect gift, and the estate cannot be held for the amount in the bank represented by this check any more than estates could be held for deposits in savings banks in similar cases of imperfect gift. *Savings Bank* v. *Fogg*, 82 Maine, 538.

Amendments not allowable: R. S., c. 82, § 10; *Annis* v. *Gilmore*, 47 Maine, 152; *Ball* v. *Claflin*, 5 Pick. 303.

Motion: It is not to be denied that there was a contract of marriage between these parties. It is also probable that the allegations in the second writ, namely, the writ on the breach of promise of marriage are true; it is also true that Dr. Tibbetts left a check in the form and in the manner described in the evidence. We claim, however, that the action of Dr. Tibbetts was simply an imperfect gift or imperfect trust; that no part of his estate passed to the plaintiff because of the same, and that the plaintiff cannot maintain an action in this form against the executors to recover the proceeds.

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

PETERS, C. J. The plaintiff presents a very meritorious claim, in this equitable action of money had and received, for the

recovery of the amount of a check on a Waterville bank, running to her for the sum of $5000, and executed by Dr. Benjamin L. Tibbetts of whose estate the defendants are executors. The consideration for the check was an indebtedness for that sum or more due her from him in his lifetime, the indebtedness growing out of their relations while engaged to be married to each other. The matrimonial engagement had existed between them for sixteen or more years, commencing in her earliest womanhood and ending when he died September 19th, 1892. He was a widower during the period of their engagement, and much her senior in years.

During their engagement a day for their marriage had been several times appointed by them, and when such day arrived he had habitually made some excuse for requesting its postponement. Finally, on Thanksgiving Day in 1889, upon his again failing to keep his agreement to be married on that day, feeling that her self-respect would no longer permit such repetitions of broken promises, and being strongly influenced thereto by the wishes of her mother, she resolved to discontinue further relations with him, and refused to again renew or continue their engagement of marriage. Shortly afterwards, however, besieged by his apparently sincere promises and protestations, she became induced to consent to a renewal of the engagement, in consideration of his agreement, expressly declared in the presence of her mother, that, if she would consent to a renewal of the engagement and a reasonable postponement of the marriage, and he should die before a marriage between them took place, he would provide her with an amount out of his estate which would be enough for her support for the rest of her life without labor. Thereupon the engagement continued, for better or worse, until he died, and they never were married to each other.

The sequel is told by Mr. Taylor, an uncle of the plaintiff, whose testimony we quote: "I am an uncle to Dora M. Whitehouse. (I am knowing to the fact that for sixteen or seventeen years before his death Dr. Tibbetts was understood to be engaged to Miss Whitehouse,) and during all that time was on intimate terms with her and her family; that in the summer of 1892, dur-

ing hot weather, I called one day on Dr. Tibbetts, and he said to me, when I went into his office and passed the time of day, 'Good morning, I am very glad you called for I have some important business with you,' and I replied, 'All right,' then the doctor said to me: 'There is a sealed package in my safe assigned to you, placed there for safe keeping, and that package I deliver to you in trust for Dora M. Whitehouse. I have not named Dora's name in my will for the reason that what that package contains belongs to her; my brother knows all about this, and at my death he will open the safe and give the package to you, and I entrust you to give the package to Dora for the contents belong to her.' I said, 'All right.' Just previous to the words above stated I asked Dr. Tibbetts when I entered his office how he was, and he said, 'Well, poorly; if something don't take place in my favor pretty soon I can't stand it a great while.' That is all the conversation we had on that subject.

"On the morning just after Dr. Tibbetts' death I was at the house and saw the doctor's brother, Samuel Tibbetts, one of the executors, in presence of Dr. Mabry, and I said to Mr. Tibbetts: 'There is a package in that safe belongs to me,' and he replied: 'I have not time to get it now for we are in a hurry laying out the doctor;' said he: 'I am coming down in a short time after the funeral to open the safe, and then I will hand it to you; I will notify you when I am coming,—what is your post office address?' and I told him it was South Vassalboro. Said I: 'Give me a piece of paper and I will write it down,' and then Dr. Mabry said: 'I know his post office address, and if you forget it I can tell you.' I answered: 'All right,' and that ended the conversation with us there. I received no notice of the time the safe was opened, and Tibbetts never did deliver to me the package which was in the safe. Afterwards, on or about the 3d of April, 1893, I had a talk with Tibbetts, the executor, in the office and in the presence of E. W. Whitehouse, and then demanded the package and check, but I never got it, as he declined to give it to me.

"Dr. Tibbetts died September 19, 1892.

"The same day that Dr. Tibbetts delivered to me the package

in trust when I got home I said to Dora: 'I have got something to tell you,' and she replied: 'What is it?' I said: 'Dr. Tibbetts has left a package delivered to me in trust for you.' (She replied: 'The doctor told me that if he died before we were married I should be well provided for.') Neither Dora nor I knew what the package contained until after the death of Dr. Tibbetts.

"Dr. Mabry, S. S. Brown, Samuel Tibbetts and S. S. Lightbody were present when the safe was opened and saw Brown take and break open the package."

Upon the interpretation to be given to the testimony of Mr. Taylor, in connection with the other facts previously stated, depends the question whether the present action is maintainable. It may not be amiss, however, to add that the plaintiff for all the time she was engaged to the doctor was attentive to his welfare and interests by a continual service expended in keeping his books and drawing off his accounts, doing his washing, mending and making clothes for him, and other like services.

When the interview was had with the uncle of the plaintiff by the doctor, only about a month before his death, the doctor evidently believed his last sickness was upon him, and he knew that the contemplated marriage was then a most improbable if not impossible thing. There may be some doubt if he ever intended to consummate the engagement by marriage, but her faith in him never failed, although it faltered at a time. But he no doubt sincerely intended to keep his promise to provide sufficiently for her out of his estate. He calculated in his own mind that five thousand dollars would be equal to the provision promised her, and he drew the check for that amount as payment of that sum, or as security for its payment. The act speaks for itself with no uncertainty. He says "this package belongs to her," thereby admitting his indebtedness to her for that amount.

There was, according to this evidence, at least a most significant constructive delivery of the package and its contents to Mr. Taylor, while he was in the office where the safe was in which the package was deposited; he assenting to the confidential instruc-

tions imparted to him, and, although not knowing exactly what the package contained, believing that the contents were valuable, and appreciating the nature of the trust committed to him. The package thereafter remained in the safe until the doctor's death, the latter intending to make, and undoubtedly supposing he had made, a sufficient and legal delivery of the package to the trustee. The plaintiff approved of the transaction when informed of it.

We might, no doubt, safely stop at this point in the discussion, allowing the validity of the check to depend on a declaration of trust which is exhibited by the case, according to the principle in equity settled in the late case of *Bath Savings Institution* v. *Hathorn*, 88 Maine, 122, and *Norway Savings Bank* v. *Merriam*, *Idem*, 146. But we think this case has stronger grounds to rest upon than those cases have, and that, while he resorted to some of the forms of a trust in order to effectuate his intention, the doctor was endeavoring, by what he did, to secure to the plaintiff the payment of five thousand dollars which he conceived would be due her under his agreement that he would provide her with enough out of his estate to support her without labor on her part during her lifetime. The sum due her from the nature of such a contract would be a claim against his estate after his death; but the contract was a subsisting obligation binding him while he lived. An action would lie on the original contract, or on the check tendered by him as a settlement and payment of such contract, and accepted by the plaintiff accordingly.

To be sure, the check did not come to her hands in the lifetime of the drawer. Nor did it need to in order to be valid by delivery. The delivery to the uncle inured to the benefit of the niece, on the principle that where a deed or other instrument of title is delivered by a grantor in his lifetime to a third person with directions to deliver the same to the grantee after the grantor's death, and such after-delivery is made, the title under such deed or instrument takes effect at the date of the first delivery. This is because of the effect of the relation between the two acts of delivery. Says Chief Justice Shaw, in *Foster* v. *Mansfield*, 5 Met. 412, where the principle is clearly discussed: "When the future delivery is to

depend on the payment of money or the performance of some other condition, it will be deemed an escrow. When it is merely to await the lapse of time, or the happening of some contingency, and not the performance of any condition, it will be deemed the grantor's deed presently." In the case cited it was a deed of land which received a first and a second delivery. But the doctrine is just as logically applicable in the case of the delivery of a bond, check, note, certificate of stock, or any other instrument or muniment of title.

It is argued that the second delivery never took place inasmuch as the check did not at any time, even after the doctor's death, come into the hands of the plaintiff. The answer to such suggestion is that her demand for the check and the defendants' refusal to deliver it was in effect equivalent to a second delivery. Equity would have compelled any person having the check to surrender it to the plaintiff, and the law would allow an action for its conversion against any persons who had secreted or despoiled the same. The defendants are estopped from asserting such a point of defense.

Nor can the defense successfully rely on the doctrine that a check cannot be the subject of a donatio mortis causa unless the check be presented and paid in the lifetime of the donor; a check, not supported by value received, being considered under such circumstances as of a testamentary character. That is, a man may not donate what is merely his own naked promise. The objection does not lie here because the check in the present instance was not a gift of any kind, but a contract founded on a full and even overflowing consideration. Mr. Perry, in his book on Trusts, (vol. 1, § 95,) says: "Where an agreement is entered into for a valuable and legal consideration, and a trust is intended, the mere form of the instrument is not very material, for if the trust is not perfectly executed or created by the instrument, a court of equity may enforce it as a contract." The case of *Morrill* v. *Peaslee*, 146 Mass. 460, in some of its features bears a resemblance to the present case. It appeared there that a married woman separated from her husband for extreme cruelty practiced upon her by him,

and had applied for a divorce and alimony. During the pendency of the divorce proceedings, she was induced to return to cohabitation with him on his giving a note for $5000, to a trustee for her benefit, the note not to be collected during his lifetime, but afterwards out of his estate, provided she cohabited with him thereafter so long as he lived, and she did so. A majority of the court refused to sustain an action brought by the trustee on the note against the executors of the husband, but only on the ground that there was no consideration for the note, inasmuch as it was her duty to return to her husband if she could live with him. Three members of the court dissented in a separate opinion, which Mr. Perry, in the section of his work before cited, characterizes as "far weightier" than the opinion of the court.

The plaintiff was the legal owner of a check, or if not the legal surely the equitable owner, which amounted to an appropriation of $5000 for her use by the drawer of such check, according to the case of *Emery* v. *Hobson*, 63 Maine, 32; and in equity was an assignment of so much of the drawer's funds as amounted to that sum, according to the case of *National Exchange Bank* v. *McLoon*, 73 Maine, 498; and those funds have been wrongfully covered into the estate of the drawer of the check by his executors. Those funds should be restored to the true owner, and the law and equity conspire together in requiring such restoration.

It is immaterial that the check turned out, either by design or mistake, to bear a date some months later than the date of the death of the person executing it.

The amendment to the declaration, to which an exception was taken, becomes of no consequence, as the verdict is sustained without the aid of any amendment.

Motion and Exceptions overruled.

INHABITANTS OF BRUNSWICK, Pet'rs. for Mandamus.

vs.

CITY OF BATH.

Sagadahoc. Opinion July 2, 1897.

Way. Bridge. Mandamus. R. S., c. 18, § 53 ; Spec. Laws. 1842, c. 29 ; 1843, c. 67 ; 1861, c. 26.

The legislature in 1842 authorized the then town of Bath to erect and maintain a free bridge across New Meadows river, the channel of which river was then a boundary line, at the place of location of the bridge, between the towns of Bath and Brunswick, now between the towns of West Bath and Brunswick, as well as between the counties of Cumberland and Lincoln, and now between Cumberland and Sagadahoc counties. The legislature also authorized the county commissioners in their respective counties to lay out ways to the bridge from Bath and from the bridge in Brunswick, which was done, Brunswick constructing the way as laid out on its territory, and the roads have been used for public travel ever since The bridge having been carried away by freshet, the legislature, in 1861, authorized the City of Bath after the town of West Bath had been incorporated out of its territory, to rebuild the bridge, the act containing a provision that "if the city shall erect and complete such bridge, it shall have the same control thereof, and be under the same liabilities to keep the same in repair, as if the bridge were wholly within the limits of said city, and may raise money by taxation or otherwise for the purpose of building and maintaining said bridge." The city built the new bridge in pursuance of the act, and having lately neglected to keep it in repair the town of Brunswick seeks by mandamus to require it to do so.

Held ; that mandamus is a proper remedy, and the town of Brunswick a proper party to prosecute the remedy, and that the City of Bath is under obligation to keep up and maintain the bridge until the public way over it shall be discontinued by the commissioners of the two counties, or until the city may obtain relief from its self-assumed liabilities by some act of the legislature.

The case having been certified to the Chief Justice, upon the petition and answer to be taken as the alternative writ, it is ordered, that the peremptory writ issue from the clerk of Sagadahoc county.

ON REPORT.

This was a petition for mandamus. The parties agree that the petition and answer should be reported to the law court, for its determination of all questions of law involved therein, the peti-

tion and answer to be taken as the alternative writ, and such special acts of the legislature as either party may rely upon to be also taken as part of the case.

It was admitted that the town of Bath built or repaired the Bull Rock Bridge under the authority of chapter 29, of the private and special Laws of 1842, that the bridge was washed away April 5, 1852, and that it was rebuilt by the City of Bath in 1861, under the authority of chapter 26, of the private and special Laws of that year.

The facts appear in the opinion.

Barrett Potter, for plaintiffs.

F. E. Southard, for defendants.

Mandamus not proper remedy: *Baker* v. *Johnson*, 41 Maine, 15; *Belcher* v. *Treat*, 61 Maine, 577; *Davis* v. *Co. Com.* 63 Maine, 396; *Townes* v. *Nichols*, 73 Maine, 515.

Brunswick is not a proper party to move for the writ.

No county way has ever been laid out over this bridge that could in any manner affect the rights of Bath.

Bath as a town had complete control over Bull Rock Bridge as it was built by her, could discontinue or remove it at any time she saw fit to do so, and the city of Bath has the same right.

Bath has discontinued the bridge so far as she is concerned and so far as her liability goes. She has not discontinued or attempted to discontinue the county way. That remains as laid out in 1844 and West Bath and Brunswick must now keep it in repair.

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

PETERS, C. J. The inhabitants of Brunswick in their corporate capacity seek by proceedings in mandamus to compel the city of Bath to put in repair a bridge which crosses New Meadows river at a place called Bull Rock or Little Bull Rock, so that such bridge shall be safe and convenient for public travel thereon. The questions involved require some historical statement of the origin of the bridge and of the manner in which it has been heretofore maintained.

In 1842 a special legislative act was obtained by the then town of Bath allowing it to erect and maintain this bridge, the act reading as follows: "Sect. 1. The town of Bath is hereby authorized to erect and maintain a free bridge over New Meadows river, from land of Robert Harding in Brunswick over Little Bull Rock (so-called) to land in Bath; said bridge to be provided with a convenient draw sufficient for the passage of vessels on said river, and also to be built of good materials, substantially made, well railed, and convenient for the passage of travelers thereon.

"Sect. 2. If the town of Bath shall erect and complete said bridge, the said town shall thereafter have the same control thereof, and be under the same liabilities to keep it in repair, as if it were wholly within the limits of said town and said town is authorized to raise money by taxation or otherwise, for the purpose of building and maintaining the same."

By virtue of the authority of this act the bridge was erected, in the summer of 1842, by the inhabitants of Bath, and maintained exclusively at their expense until April, 1852, when it was carried away by freshet.

New Meadows river at the place where crossed by this bridge being then the boundary line between the counties of Cumberland and Lincoln, now between Cumberland and Sagadahoc counties, the counties first named were authorized by a special act, passed by the legislature in 1843, (ch. 67 priv. and spec. laws 1843), to lay out a road over the bridge, the act running as follows:

"Sect. 1. The county commissioners of the counties of Lincoln and Cumberland are hereby authorized, after petition and notice as required by the twenty-fifth chapter of the revised statutes, to lay out a highway from High street in the town of Bath, county of Lincoln, over the bridge erected on New Meadows river, at a place called Little Bull Rock, to some point in the county of Cumberland.

"Sect. 2. Nothing in this act shall be so construed as to affect the powers and obligations imposed on the town of Bath by an act passed March 10, 1842, entitled 'an act to authorize the town of Bath to erect a bridge over New Meadows river.'" Under the

authority of this act the commissioners of the two counties in 1843, acting jointly, laid out the highway accordingly.

There was no bridge, after the one which was swept away in 1852, until 1861, when another legislative permission for the building of a bridge was obtained by Bath (ch. 26 priv. and spec. laws 1861,) the new act reading as follows:

"Sect. 1. The city of Bath is hereby authorized to erect and maintain a free bridge over New Meadows river, from land in Brunswick, over Little Bull Rock (so-called) to land in West Bath; said bridge to be built of good materials, substantially made, well railed and convenient for travelers to pass thereon.

"Sect. 2. If the City of Bath shall erect and complete said bridge, the said city shall thereafter have the same control thereof, and be under the same liabilities to keep it in repair as if it were wholly within the limits of said city, and said city is authorized to raise money by taxation or otherwise, for the purpose of building and maintaining said bridge."

In 1861, following the act above quoted, the city of Bath erected a new bridge on the old location, and has ever since maintained it in at least a passable condition until shortly before the institution of this petition, when, it is alleged, the structure became unfit and unsafe for public travel. Both Bath and Brunswick have built and maintained roads in connection with the bridge for the use of themselves and the public generally. It is inferable from the tone of the arguments of counsel that when the bridges were first erected the principal benefits thereof accrued to the city of Bath and its citizens, while at the present day, by the mutations of business, Brunswick and its citizens receive greater advantages from the bridge than does Bath; especially if the latter is to pay all the expenses of maintaining the same. The fact that New Meadows river is now the boundary line separating Brunswick from West Bath, instead of from Bath as formerly, the latter town having been created in 1855 out of territory before that time constituting a portion of Bath, may be one reason why the city is less interested in maintaining the bridge than formerly.

The first objection urged by the respondents against the petition

is, that the complainants are not a proper party to maintain mandamus in such a case. We think otherwise. The town is certainly a much interested and a responsible party. The case cited by the petitioners, *Inhabitants of Cambridge* v. *Charlestown Branch R. R. Co.*, 7 Met. 70, fully sustains their position on this point.

It is contended that mandamus is not a proper remedy for the reason that the petitioners have a complete and adequate remedy at law in either one of two ways; first, by indictment; and, secondly, by petition to the county commissioners under a provision of the statute (R. S., ch. 18, § 53) which invests such commissioners with the power to compel a municipality to repair its neglected ways. But while those might be modes of legal remedy, they would not be adequate and sufficient for the reason that, inasmuch as the middle of the bridge is the divisional line between two counties, the remedy would have to be pursued by separate indictments or petitions in two counties, and not by any joint prosecution or procedure in any one county alone. And the result might be one way in one county and another way in the other, and it would be very likely to be so if any local feeling or prejudice should affect the question. Such a legal remedy as either of the uncertain modes suggested would be unsuitable and unsatisfactory. This court has said that mandamus will be granted if it be doubtful if there be another effectual remedy, or if the court does not clearly see its way to one. *Baker* v. *Johnson*, 41 Maine, 15. Mandamus has frequently been sustained against county supervisors and county commissioners to require of them the execution of ministerial duties resting on them; and against corporations and their officers to enforce the performance of corporate duties. *Railroad Commissioners* v. *P. & O. C. R. R. Co.*, 63 Maine, 269. Towns may compel, by mandamus, railroad companies to keep in repair bridges in their towns which the companies are bound to maintain. *State* v. *Gorham*, 37 Maine, 451. Generally, where ministerial duties are clearly defined and are legally established, mandamus will be upheld to enforce them. It is not a sufficient answer to the application that the party is also legally liable to indictment for the act complained of. Bou. Law Dic. Title Mandamus, and cases cited.

At the same time whether the writ of mandamus should be granted or not, depends on the judicial discretion of the court, and it may be denied on grounds of expediency when equity does not clearly require the contrary. *Belcher* v. *Treat*, 61 Maine, 577. Acting on this principle the court in Massachusetts refused to grant the writ to compel county commissioners to construct an unnecessary way, although legally laid out, basing its refusal on the ground that another way already constructed sufficiently subserved the public convenience. *Hill* v. *Co. Com'rs*, 4 Gray, 414. While we may entertain the idea that there is less necessity for this bridge now than when it was built in 1842, or rebuilt in 1861 after its abandonment for ten years, still, inasmuch as no evidence whatever was introduced at the hearing, bearing on the question of any necessity for the bridge, or of its importance to the people of either Brunswick or Bath, we feel that we are bound to assume that public necessity and convenience require its continuance.

And this brings us to perhaps the most important question of the case, and that is whether Bath is under any obligation to maintain the bridge longer than she desires to use the same for her own purposes; whether or not, in other words, she can so far abandon it as to deprive the public of its use. It is contended in behalf of the respondents that the liability imposed on them was a consideration for the privileges conferred, privilege and liability existing dependently together; and that when one ceased both ceased, and when the city of Bath surrendered the privileges of the bridge she became absolved from the burden of further maintaining it. The city has signified to the public her purpose of abandonment by the act of her city council in passing a vote, December 14, 1896, to discontinue her part of the way. This vote, if ineffectual to abate the way, is effectual to indicate an intention to abandon the privilege of maintaining the bridge.

The petitioners contend, on the other hand, that the privilege conferred and the liability incurred are absolute and unconditional after once accepted by the city of Bath, and that she cannot voluntarily relinquish one for the sake of avoiding the other; and that she should maintain the bridge in good repair as diligently as

she must any highway or portion of any within the limits of her own territory, and continue to do so until relieved from the obligation either by some legislative enactment, or by a discontinuance of the way obtained through the joint action of the two boards of county commissioners. We feel constrained to believe that this position of the petitioners is the correct view of the question presented.

Writ to issue.

IDA M. EMERY *vs.* CITY OF WATERVILLE.

Kennebec. Opinion July 5, 1897.

Way. Defect. Notice. R. S., c. 18, § 80.

The mere fact that a street commissioner directed a subordinate to construct a cross-walk across a street does not of itself charge the street commissioner with "actual notice" (under R. S., c. 18, § 80) that the cross-walk was so constructed as to become a defect in the street.

Held; that the question of notice, under such circumstances, is not one of general legal principles, but is purely one of statutory interpretation, since the injured party's right of action, if any, is based solely on the statute. The doctrines of principal and agent, or master and servant, in this respect are not applicable.

Holmes v. *Paris*, 75 Maine, 559; *Buck* v. *Biddeford*, 82 Maine, 433, distinguished.

ON EXCEPTIONS BY DEFENDANT.

This was an action on the case to recover for damages sustained by plaintiff, on account of the alleged defective condition of Sherwin street in the city of Waterville. The plea was the general issue and defendants particularly relied upon plaintiff's failure to prove legal notice of the alleged defect to the municipal officers. Upon that point the presiding justice instructed the jury as follows: "I feel it my duty to say that there is sufficient evidence here, uncontradicted and uncontroverted, to hold that the street commissioner had twenty-four hours actual notice of the condition created by his order. Therefore, you will consider that the evidence here shows that the street commissioner must be deemed to

have had twenty-four hours actual notice of the condition created by his order." The jury returned a verdict for the plaintiff, and to these rulings and instructions defendants excepted.

C. F. Johnson, for plaintiff.

The defendant city by its own act having created the defect, which caused the injury, is estopped to set up want of notice; or to shield itself from liability because there is a failure to meet the statute requirement of notice. That statute does not apply to cases of this kind. The street commissioner, having created this defect by his orders to his employees acting under him, had twenty-four hours actual notice, as required by the statute. *Holmes* v. *Paris*, 75 Maine, 559; *Buck* v. *Biddeford*, 82 Maine, 433; *Haines* v. *Lewiston*, 84 Maine, 18. The acts of the foreman and the laborer, who built the cross-walk were as much the acts of the street commissioner as if he had performed them with his own hands. Otherwise, a city might escape all liability for structural defects by having its street commissioner issue orders for work and then avoid the inspection of it.

In Dillon Mun. Corp. Vol. 2, § 1024, 4th Ed. it is stated: "Where streets have been rendered unsafe by the direct act, order, or authority of the municipal corporation, not acting through independent contractors—the effect of which will be considered presently—no question has been made or can reasonably exist as to the liability of the corporation for injuries thus produced, while the person suffering them is without contributory fault or is using due care. Even in those States in which a municipality is not held impliedly liable for a private action for neglecting to keep its streets in repair, it is yet held to be liable if its officers, under its authority, by positive acts, place obstructions on the streets, or, by such acts, otherwise render them unsafe, whereby travelers are injured." *Stoddard* v. *Winchester*, 157 Mass. 567, and cases cited; *Wendall* v. *Troy*, 39 Barb. 329; *Conrad* v. *Ithaca*, 16 N. Y. 158; *Storrs* v. *Utica*, 17 N. Y. 104; *Turner* v. *Newburgh*, 109 N. Y. 301; *Bressau* v. *City of Buffalo*, 90 N. Y. 679; *Springfield* v. *Le Clair*, 49 Ill. 349 (68 Am. Dec. 553); *Detroit* v. *Gary*, 9 Mich. 165—186; *Glantz* v. *South Bend*, 106

Ind. 305; *Houston* v. *Isaacks*, 68 Tex. 116; *Baltimore* v. *Pendleton*, 15 Md. 12; *Gregg* v. *Weathersfield*, 55 Vt. 385; *Spearbrocker* v. *Larrabee*, 64 Wis. 573; *Adams* v. *Oshkosh*, 71 Wis. 49; *Studley* v. *Oshkosh*, 45 Wis. 380.

H. D. Eaton, City Solicitor, for defendant.

The old statute simply required reasonable notice to the city or town. The new statute requires actual notice to some one of an enumerated list of officers.

The cases cited by the plaintiff arose under statutes, by the terms of which a town or city may be held liable if they had "reasonable notice of the defect, or might have had notice thereof by the exercise of proper care and diligence." These cases in other states, arising under different statutes, do not apply to the case at bar.

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

EMERY, J. The street commissioner of Waterville was requested to continue a gravel sidewalk along Summer Street across Sherwin Street. This would make a gravel cross-walk across Sherwin Street at its junction with Summer Street. He, without personally going to the locality, directed a foreman to have some gravel hauled there and spread so as to make such a cross-walk and grade up the sidewalk on Summer Street. The foreman sent the gravel and sent a laborer in the employ of the city to spread it across Sherwin Street. The laborer undertook to do so, but did it in such a manner that the gravel, as left by him across Sherwin Street, became a defect in that street through which the plaintiff was injured.

The street commissioner had no other notice of that defect than what could properly be implied from the circumstances above stated. Was that an "actual notice" to him within the statute R. S., c. 18, § 80? The question is not one of general legal principles, but is purely one of statutory interpretation, since the plaintiff's right of action, if any, is based solely on the statute.

The plaintiff contends that the street commissioner, through his subordinates, created or caused the defect and hence must be held either to have had actual notice of the defect, or else not to be entitled to more notice, under the doctrine of *Holmes* v. *Paris*, 75 Maine, 559; and *Buck* v. *Biddeford*, 82 Maine, 433. But did the street commissioner in this case create or cause the defect?

In *Holmes* v. *Paris*, supra, he clearly did. He "deposited and left heaps and piles of dirt in the traveled part of the highway." He therefore knew they were there,—knew the actual condition of the road,—knew its defective condition, since "heaps and piles of dirt in the traveled part" of a road in themselves constitute a defect. In *Buck* v. *Biddeford*, supra, the defect was an improperly, and visibly improperly, constructed iron grating over a cesspool in the street. The street commissioner directed that particular grating, or pattern of grating, to be placed in the street. He knew it was there, knew its actual condition, and hence knew the defective condition of the street.

In the case at bar, the street commissioner directed gravel to be hauled and spread to make a cross-walk at the place named. He undoubtedly therefore created a cross-walk there. He was also bound to assume that his orders were executed and hence bound to know that gravel had been hauled and spread there. But he was not bound to assume, or even apprehend, that the work he had commanded was left incomplete or imperfect. While the cross-walk was his, the imperfections were not his. A cross-walk in itself is not a defect. To know of a cross-walk is not to know of a defect. The defect was created not by the commissioner but by the laborer, without instructions or directions so to do. The commissioner, while cognizant of the existence of a cross-walk, was ignorant of any defect in the street, ignorant indeed of any conditions which might constitute a defect.

The case of *Rich* v. *Rockland*, 87 Maine 188, is illustrative of the distinction above made. The plaintiff urges that it does not apply, inasmuch as there the defect created,—the ridge of frozen snow,—was not part of a thing constructed or ordered to be constructed by the commissioner, but was outside of that work.

Nevertheless the cases are similar in this, that the subordinate and not the commissioner created the defect.

A defect created in a street by a subordinate, even in the line of his general duty or employment, is not thereby created by his superior the street commissioner. The doctrines of principal and agent, or master and servant, in this respect are not applicable. Within the purview of this statute, the act of the subordinate is not the act of the commissioner unless specifically directed by him. The subordinate's creation or knowledge of a defect is not notice to the commissioner of that defect. *Welch* v. *Portland*, 77 Maine, 384.

Exceptions sustained.

INHABITANTS OF DRESDEN *vs.* EDMUND BRIDGE, Executor.

Lincoln. Opinion July 19, 1897.

Tax. Supplemental Assessment. Omission. Evidence. Exors. and Admrs. R. S., c. 6, § § 35, 36, 92, 93, 142.

In an action of debt, under the statute, to recover a tax upon personal estate, assessed to "Samuel J. Bridge, Est. of," for the year 1894, it appeared that after the death of Samuel J. Bridge and the appointment of the defendant as his executor, the assessors adjudged the personal estate of said Samuel, in gross and which was liable to taxation, to be eighty-eight hundred dollars, (no list of the personal estate having been furnished to the assessors according to the statute) and they assessed a tax upon that valuation, which was paid. In November following, the assessors made a supplemental assessment upon personal property of the estate, in gross, of the amount of $359,503.94, and certified to the collector, in their committal of the tax, that this estate was omitted from the April assessment "by mistake."

Held; that the assessors had not "omitted" any item "by mistake" but had undervalued the gross amount; and that their supplemental assessment was unauthorized by law.

The "omission", mentioned in the statute, does not mean that an erroneous judgment of the value of an estate can be corrected by a supplemental assessment; and the assessors cannot afterwards enlarge their estimate of the value of property under the form of a supplemental assessment.

The statute provides that "the personal property of deceased persons in the

hands of their executors or administrators not distributed, shall be assessed to the executors or administrators." An executor or administrator becomes personally liable for a tax so assessed and a suit may be brought against them personally, and not against the property of the deceased in their hands. But the tax must be assessed against such executor or administrator to render them personally liable.

Held; that this tax was not assessed against the defendant, and he is not liable therefor.

Parol evidence is not admissible to show that the assessors meant the assessment should apply to the defendant as executor. It is not competent for the plaintiff to change the form and character of the assessment, and to make an assessment to "Samuel J. Bridge, est. of" a personal assessment to the defendant.

Fairfield v. *Woodman*, 76 Maine, 549, affirmed.

ON REPORT.

The case appears in the opinion.

J. H. and J. H. Drummond, Jr., for plaintiffs.

L. C. Cornish, for defendant.

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

STROUT, J. Samuel J. Bridge, an inhabitant of plaintiff town, died on the sixth day of November, 1893, testate. On the fifth day of December, 1893, defendant was duly appointed his executor. In the assessment of taxes in Dresden in April, 1894, after the statute notice to bring in lists of taxable property had been given, and no list of the Bridge estate had been furnished, the assessors, in accordance with R. S., c. 6, § 93, judged the estate liable for taxation upon personal property to the amount of eighty-eight hundred dollars, and assessed a tax upon that amount, which has been paid. On November 28, 1894, the assessors made a supplemental assessment upon personal property of the amount of three hundred and fifty-nine thousand five hundred and three dollars and ninety-four cents, and committed the same to the collector, with their certificate that that estate was omitted from the April assessment by mistake. This supplemental tax was assessed, "Samuel J. Bridge, est. of" and amounted to seven thousand

three hundred and sixty-nine dollars and eighty-three cents, to recover which this suit is brought.

Two principal grounds of defense are relied upon.

1. That the supplemental tax was unauthorized, and is invalid, because there was no omission from the April assessment "by mistake"; and,

2. Because the tax assessed to "Samuel J. Bridge, est. of" was not a legal assessment against the defendant as executor, and created no personal liability against him.

In regard to the supplemental assessment, the statute provides, c. 6, § 35, that "when any assessors, after completing the assessment of a tax, discover that they have by mistake omitted any polls or estate, liable to be assessed, they may, during their term of office, by a supplement to the invoice and valuation, and the list of assessments, assess such polls and estate." Section 92 of the same chapter provides for notice to the inhabitants to bring in lists of taxable property; and § 93 that "if any person after such notice does not bring in such list, the assessors shall ascertain otherwise as nearly as may be, the nature, amount and value of the estate, real and personal, for which in their judgment he is liable to be taxed", and bars any application to the assessors or county commissioners for any abatement of the tax, unless he offers such list and satisfies them that he was unable to offer it at the time appointed.

In this case no list was furnished, and the assessors, in the April assessment, acted under the provisions of § 93, and adjudged the value of the personal estate to be eighty-eight hundred dollars. Mr. Cate, one of the assessors, testified that when the April tax was assessed, he knew Mr. Bridge was a man of large estate, that he had in his lifetime given to institutions in the town, for the benefit of the town, between forty and fifty thousand dollars,—such gifts as are only made, or can be made, by men of large wealth. With this knowledge, and with the right to doom this estate, without right of appeal for abatement, the assessors deliberately, as their judgment, inventoried the personal estate in gross at

eighty-eight hundred dollars, and assessed a tax upon that amount. They thus in April exercised and exhausted the right and power given them by § 93, and could not rejudge the matter, after completion of the assessment and committal to the collector. The "mistake" mentioned in § 35 by which were "omitted any polls or estate," and which alone justifies a supplemental assessment, relates only to an "omission," and does not mean that an erroneous judgment of the value of an estate taxed can be corrected by a supplemental assessment. When the inventory of the estate was returned to the probate court, the assessors attempted, by the supplemental assessment, to revise and correct their estimate of the value of the personal estate, which they had once estimated and assessed. They had not "omitted" any item of personal property in April, but had doomed the personal estate in the aggregate. Finding subsequently that the aggregate personal property was more than their estimate, they sought to make a new valuation. No element of omission by mistake existed; no poll or estate was omitted. The personal estate, in the aggregate, was assessed and taxed in April; it was not omitted by mistake or otherwise. The judgment of the assessors was not accurate. If their doom of value had proved to be in excess of the value of the personal, the estate could not be relieved on that account.

The omission contemplated by the statute is of some specific item, as one parcel of land, or a building so situated as to be personal property, or a ship, when the items of personal property are named and separately appraised in the inventory. It is *omission*, and not erroneous judgment, that the statute provides for. The omission may be supplied by the supplemental assessment; the erroneous judgment cannot be corrected in that way.

In this case, in April, the personal estate was valued and assessed in gross, and not by items. The supplemental assessment is also in gross, and covers the same personal estate. It had been estimated and appraised in gross in April. It could not be again estimated and appraised in November.

It would hardly be contended, that if the assessors had inventoried an estate specifically, by items, and had appraised a specific

piece of property, as for example, a ship, at a certain value, and after the tax had been completed and committed to the collector, they found that the ship was worth more than their appraised and assessed value, they could by supplement assess such excess, as estate "omitted" by mistake. Yet this supplemental assessment attempted to do that,—nothing more or less.

Upon the facts of this case, the supplemental assessment was unauthorized and invalid.

Upon the second point:—

The supplemental tax was assessed to "Samuel J. Bridge, est. of." Revised Statutes, c. 6, § 14, paragraph 8, provide that "the personal property of deceased persons in the hands of their executors or administrators not distributed, shall be assessed to the executors or administrators", until the property is distributed and notice given. Such assessment makes the executor or administrator personally liable for the tax. Being personally liable, a suit for the tax should be brought against him personally, and not against the property of the deceased in his hands. This suit is so brought. But to subject him to personal liability, the tax must be assessed against him. There is no statute which authorizes the assessment of a tax in the form of this assessment. "To sustain the action, it must be shown that the tax was so assessed as to make the defendant personally liable for its payment." This was decided in *Fairfield* v. *Woodman*, 76 Maine, 350. So in *Elliott* v. *Spinney*, 69 Maine, 31, under a statute which authorized the assessment of a tax on undivided real estate of a deceased person, to his heirs or devisees, without designating any of them by name, it was held that an assessment to the heirs, when the estate was held by devisees, was erroneous, and a suit for the tax could not be maintained.

It is true, that in *Fairfield* v. *Woodman*, supra, the tax was upon real and personal. But as the law requires, and the universal practice is, to value the real and personal separately, there could have been no difficulty in separating the two. The court did not base its decision upon the ground that the tax united real and personal, but upon the broad ground, that a tax assessed to

the "estate of Orin Woodman", in which personal estate was taxed, imposed no personal liability upon his administrator.

In November, when this tax was assessed, there was an existing executor of Samuel J. Bridge.

Plaintiff claimed to show by parol that the assessors meant the assessment to apply to the executor, and claimed that the tax to the estate was in effect a tax to him, but such contention cannot prevail. It goes beyond a question of mere identity, which may be shown by parol, as in *Farnsworth Co.* v. *Rand*, 65 Maine, 23, or as in *Bath* v. *Reed*, 78 Maine, 276, where it was held that an assessment against the administrators of R was good against the executors, under R. S., c. 6, § 142, and that parol evidence was admissible to show that the executors were intended to be taxed. The tax purported to be against the legal representative of the estate. The error was in designating that representative as an administrator, when he was an executor. It was an error rendered harmless by § 142. But here, the plaintiff attempts to change the form and character of the assessment, and to make an assessment to "Samuel J. Bridge, est. of" a personal assessment to Edmund Bridge. This would be a radical change of the record, which the law does not allow.

It is unnecessary to consider the other points raised. There must be,

Judgment for defendant.

CHARLES B. WELLINGTON

vs.

MONROE TROTTING PARK COMPANY.

Kennebec. Opinion July 21, 1897.

Horse-Race. Gaming. Fraudulent Award. Payment.

In an action against the "Monroe Trotting Park Company," to recover an unpaid trotting premium, evidence of the existence of the "Waldo and Penobscot Society" has no tendency to rebut the plaintiff's claim that the first named corporation is liable.

In an action to recover an unpaid trotting premium claimed to have been won by the plaintiff's horse in a horse-race conducted by the defendant, *held;* that the judges constituted the tribunal to which the parties submitted when they entered their horses for the race; and by their decision, if honestly given, the parties are bound.

The plaintiff will not be debarred from recovering a premium which his horse has clearly won when the judges, through the fraud of one of their number, are led to award the premium to another horse.

In a final heat between two horses, at about dark, and when the stand was crowded, it appeared that the three judges did not meet in consultation; but that one of them assumed to communicate between the other two, and falsely informed each that the other and himself had decided to give the race to a horse which, in fact, had not won it; and that each of these two judges was thereby led to believe that a majority of the three had decided in favor of that horse; and relying upon the information so received, each submitted to the supposed majority, and therefore a public decision was accordingly announced.

Held; that such conduct on the part of the judge who gave the false information to the other two judges was fraudulent; and that a decision so procured is not a bar to an action to recover the premium by the owner of the horse which actually won the race.

The defendant sent the plaintiff a check for thirty dollars for second money in this race. The premium offered was $200, and the plaintiff, claiming fifty per cent as first money, notified the defendant that he would not accept the check as second money, but would credit it on account. The check was cashed, and the defendant made no reply.

Held; that, under the circumstances of this case, the plaintiff cannot be considered as having received the check in settlement of the claim sued for.

ON REPORT.

This was an action brought in the Superior Court for Kennebec County to recover a trotting premium which the plaintiff claimed had been won by his horse "Combination," and reported by the presiding justice to the law court. It was not denied that the contract was valid under the Stat. 1891, c. 70, which authorizes competition for such premiums.

The case is stated in the opinion.

(Declaration.)

In a plea of the case, for that the said defendant is a corporation, duly incorporated under the laws of the State of Maine, and is the owner and controller of the Monroe Trotting Park Company, and all the appurtenances thereto belonging; that during the year A. D. 1894, to wit, July 4th, A. D. 1894, the defendant advertised for and gave a race meeting, for which purpose, among other things, was the purpose of its incorporation; that at said meeting it offered to the public in general, and owners of horses eligible to the 2.30 class, at the gait of trotting, a purse or premium of $200, the conditions of said race being that a horse winning three heats out of not less than five, should have 50 per cent of the purse thus offered for contest of speed, at the trot on said course.

The plaintiff avers that he was on said 4th day of July, A. D. 1894, and for some time prior thereto, the owner of a horse, known by the name of "Combination," and that said horse was eligible to the 2.30 class trotting; that the plaintiff in good faith, and in strict compliance with all the rules and regulations of the defendant, for its trial and contest, to be held on its park at Monroe, Maine, duly entered said horse "Combination" in the 2.30 class, so-called, of said exhibition, to contend with other horses for the purse or premium of $200 offered as aforesaid by the defendant; that he also paid the defendant, as required by the rules and conditions of said contest of speed, the sum of $20, or, as is commonly known, 10 per cent entrance fee; that said defendant received said $20, entered the name of said horse "Combination" in its list, among the other horses contesting for said purse, on said

4th day of July, A. D. 1894; that on said 4th day of July, A. D. 1894, at the defendant's said race course at said Monroe, the plaintiff's said horse "Combination" started in the 2.30 class in said race or contest of speed, and was driven in said race by the plaintiff; and the plaintiff charges that his said horse "Combination" was able in said race to show, and actually did make the greatest and fastest flight of speed in three heats of said contest viz, the sixth, seventh and eighth heats thereof, having trotted faster in each of said three heats than any other horse contending for said purse.

And the plaintiff avers that his said horse "Combination" won the sixth, seventh and eighth heats of said race; and that Bancroft H. Conant, Chas. E. Lane and R. A. Robinson, agents and servants of the said defendant, were the judges, in the judges' stand, of said race and contest, and that when the last heat of said race had been trotted, the said judges, acting within the scope of their lawful authority as agents and servants of the said defendant, decided, announced and declared from the judges' stand of said race-course, that the plaintiff's said horse "Combination" had won said last heat and had won the race and first money, the plaintiff's said horse "Combination" having won two previous heats, which decision of said judges thereby entitled the plaintiff to have and receive of the said defendant the sum of $100, the same being 50 per cent of said purse of $200; that after said exhibition of speed had terminated, and said horse "Combination" had merited and was entitled to and had won said $100 of said purse or premium of $200, the defendant through said judges, its servants and agents, and for whose illegal acts the defendant is, and on said 4th day of July, A. D. 1894, was liable, wrongfully, unlawfully, and without any reasonable or just grounds therefor, and without the knowledge or consent of the plaintiff, took away from plaintiff's said horse "Combination" said last heat and race and said first money, and awarded and agreed to give the said race and first money, viz, $100, to a mare called "Hipponna," which mare was one of the horses duly entered and started in said 2.30 class and race, in competition with said horse "Combination" and other horses.

Whereby by reason of said illegal and wrongful acts of the said defendant, the said plaintiff's horse "Combination" was declared by said judges to have won only second money, or 25 per cent of said purse or premium of $200, viz, the sum of $50. Whereas, in truth and in fact, said horse "Combination" did win and he was entitled to $100, the same being 50 per cent of said purse of $200; by reason whereof the plaintiff has lost said sum of $100. And the plaintiff avers that he duly demanded payment of said sum, of said defendant, on July 4th, A. D. 1894.

Edmund F. and Appleton Webb, for plaintiff.

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

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

SAVAGE, J. In this case, the plaintiff sues to recover the balance of an unpaid trotting premium, which he alleges his horse won in a horse-race conducted by defendant, July 4, 1894. The defendant claims that the wrong society has been sued; that the plaintiff's horse did not win the race and "first money," but did win "second money"; and that the plaintiff having received the sum of thirty dollars sent to him as "second money" must be deemed to have received it in full settlement of his claim against the corporation conducting the race.

I. The evidence of the plaintiff tends to show that it was the defendant corporation which conducted the race. The defendant offered no evidence upon this point, except an abstract from the printed report of the secretary of the Maine Board of Agriculture, as follows: "Name of society, Waldo and Penobscot. President, M. C. Chapman of Newburg Village. Secretary, E. H. Nealley of Monroe. Treasurer, F. I. Palmer of Monroe." This evidence, if admissible, had no tendency to rebut the plaintiff's claim that the defendant corporation was the party liable in this case. That there existed a "Waldo and Penobscot" society may be true, and still this race may have been conducted by the defendant.

II. The undisputed testimony shows that at the end of the seventh heat the plaintiff's horse "Combination" and another horse "Hipponna" had each won two heats; that during the eighth heat, it being nearly dark, the judges caused patrols to watch the trotting upon that portion of the track where the judges themselves could not clearly see; that "Combination" came under the wire two or three lengths ahead of "Hipponna"; that the patrols reported to the judges that there had been no "running," "nothing wrong"; that two of the three judges, in the presence of the drivers, of whom plaintiff was one, said: "We shall give 'Combination' first, and 'Hipponna' second"; that afterwards, and after the drivers had gone away, the judges announced to the public their decision that "Hipponna" had won the race and "first money," and "Combination," second. Is this last decision binding upon the plaintiff? In the absence of proof of fraudulent practices, we think it should be. The "judges" constituted the tribunal to which the plaintiff submitted when he entered his horse for the race, and to their decision, if honestly given, he should bow.

In a letter, written by defendant's secretary to plaintiff's counsel, there is an allusion to an appeal made to the "National Trotting Association," and the decision of that body; but no evidence was offered to show such appeal, or the rules under which it was taken, or its effect.

The plaintiff claims that the judges were, as to him, the defendant's servants and agents, and that the decision in favor of "Hipponna" was caused and procured by the false and fraudulent conduct of one of them, Robinson. The other two were called as witnesses by the plaintiff, and their testimony, if believed, certainly tends to support the claim of the plaintiff, and their testimony is uncontradicted. It will not be profitable to analyze the testimony at length. It appears that the "stand" was crowded, and that the judges did not meet in consultation, but that the third judge assumed to communicate between the others, and falsely informed each of the two, who were witnesses, that the other and himself had decided to give the race to "Hipponna,"

and that each of these two was thereby led to believe that a majority of the three had decided in "Hipponna's" favor; and relying upon the information received, each submitted to the supposed majority; and thereupon the public decision was announced.

Such conduct was fraudulent, and the decision procured thereby should not be permitted to bar the plaintiff from recovering a premium which his horse clearly won.

III. The defendant sent the plaintiff a check for thirty dollars for "second money" in this race. The plaintiff notified defendant that he would not accept it as "second money", but would credit it on account. He cashed the check. No reply appears to have been made.

We do not think, under the circumstances, that the plaintiff can be considered as having received the check in settlement of the claim sued.

The premium offered was $200. The horse winning "first money" was entitled to fifty per cent. Plaintiff claims only fifty dollars, deducting the entrance fee twenty dollars, and the cash received, thirty dollars. Demand was made July 4, 1894.

Judgment for plaintiff for fifty dollars and interest from July 4, 1894.

WILLIAM F. BURR *vs.* JOSEPH B. STEVENS.

Kennebec. Opinion July 22, 1897.

Way. Adjacent Owner. Easement. Driveway. R. S., c. 18.

Whenever public necessity or convenience requires that the whole of a highway, or any portion greater than that previously traveled, should be built as a road for public travel, the duty and exclusive authority for doing such work as may be necessary for such purpose, is given by statute to road commissioners or highway surveyors.

Held; that entering upon land within the limits of the highway although outside of the wrought portion, and widening the road by excavations or embankments to the prejudice of the adjacent owner or in disturbance of his soil, is an unlawful act.

The parties were owners of adjoining lots of land, both on the highway. For the purpose of passing between his lot and the wrought portion of the highway, the defendant constructed a driveway by making excavations and piling up rocks and refuse across the plaintiff's land, but outside of the wrought or traveled part of the highway.

Held ; that the defendant had no right to build the driveway upon the land of the plaintiff, although it was within the limits of the highway, for his private use and convenience, notwithstanding there was difficulty in passing directly from his land to the highway.

AGREED STATEMENT.

This was an action of trespass q. c. in which the plaintiff alleged that the defendant with force and arms broke and entered the plaintiff's close in West Gardiner, and then and there drove his horse and wagon over the plaintiff's land, continually using the same for a driveway; also for digging up the ground and depositing rags and refuse, and moving stones thereon; and, also for digging and leaving a ditch there of more than one hundred feet in length, two feet wide and ten to fifteen inches deep.

The defendant pleaded the general issue, and also filed a brief statement, as follows: "That it is true that he has used and maintained the driveway complained of, and says that he is justified in so doing because:

"1st. Said way is wholly within the limits of the highway, and that he has a right to pass and repass over the same as his convenience may require, and incidentally thereto to remove any obstructions and make any repairs necessary to secure his safety as one of the public.

"2nd. That owing to the steep declivity in front of his homestead from the limit of the highway, it is necessary for him to take this diagonal course to reach the wrought or traveled part thereof with reasonable safety and convenience.

"3d. That this defendant and his predecessors in title have used and maintained said driveway for more than twenty years, and that all the acts complained of were done solely in maintaining and repairing said driveway and were necessary therefor."

When the action came to trial, and after presentation of the evidence, and a view of the premises by the court and jury, it was

agreed that the facts should be reported to the full court and submitted for its determination upon the following agreed statement of facts:

"It is admitted and agreed that the defendant, Joseph B. Stevens, and his predecessors in title, have used the driveway in question substantially as it is now, for more than twenty years.

"That on account of the declivity in front of the defendant's own premises to the traveled part of the highway, the use of the driveway in question upon the fee of the plaintiff between the line of the highway, and the wrought part thereof, is reasonably necessary to obtain convenient and safe access to the traveled part of the highway.

"That the whole of the land on which the alleged trespasses were committed is within the limits of the highway.

"That the acts of the defendant complained of, in the second and third counts of the writ, were only such as were reasonably necessary to make and maintain said driveway safe and convenient for travel.

"If upon the foregoing statement of facts the plaintiff is entitled to recover, he shall have only nominal damages and costs of court, without witness fees; if otherwise, the defendant shall have judgment for costs of court without witness fees."

A. M. Spear and W. D. Whitney, for plaintiff.

A. C. Stilphen, for defendant.

Highway, traveler and easements: *Morton* v. *Moore*, 81 Maine, 573; *Stackpole* v. *Healey*, 16 Mass. 33; *Gerrish* v. *Brown*, 51 Maine, 256; *Corthell* v. *Holmes*, 88 Maine, 376; *State* v. *Kittery*, 5 Maine, 259; *Johnson* v. *Whitefield*, 18 Maine, 286; *Stinson* v. *Gardiner*, 42 Maine, 248; *Dickey* v. *Maine Tel. Co.*, 46 Maine, 485; *Dunham* v. *Rackliff*, 71 Maine, 345; *Parsons* v. *Clark*, 76 Maine, 476; Dillon Mun. Corp. 4th Ed. p. 465; *Reck* v. *Smith*, 1 Conn. 103—132; *Cole* v. *Drew*, 44 Vt. 48.

Adverse use: *Coolidge* v. *Learned*, 8 Pick. 504; *Ashley* v. *Ashley*, 4 Gray, 197; *Ward* v. *Warren*, 82 N. Y. 265; *Curtis* v. *Angier*, 4 Gray, 547; *Luttrell's Case*, 4 Coke's R. 86; *Phillips* v.

Rhodes, 7 Met. 322; *Hill* v. *Lord*, 48 Maine, 96; *Brownlow* v. *Tomlinson*, 1 Manning & Granger's, Eng. Common Pleas Rep. 484; *Manion* v. *Creigh*, 37 Conn. 462; *Gloucester* v. *Beach*, 2 Pick. 59, note.

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

WISWELL, J. The parties are owners of adjoining lots of land, both upon the highway. For the purpose of passing between his lot and the highway, the defendant constructed a driveway, by making excavations and piling up rocks and refuse, across the plaintiff's land, within the limits of the highway as located, but outside of the wrought or traveled portion thereof. These acts and the use of the driveway by the defendant are the trespasses complained of. The case comes to the law court upon agreed facts with the stipulation that if the defendant is liable the damages shall be nominal.

It is unnecessary to decide whether the defendant has the right to use any portion of the highway as located for the purpose of passing between his lot and the highway, or whether, as he claims, he has gained a right by prescription to use this driveway, under the facts stated, because whatever his rights may be in regard to passing over the land of the plaintiff, he clearly had no right to make excavations or pile up rocks upon the plaintiff's land, even if this was reasonably necessary in making the driveway used by him, safe and convenient.

"The owner of land over which a highway is laid retains his right in the soil for all purposes which are consistent with the full enjoyment of the easement acquired by the public. This right of the owner may grow less and less as the public needs increase. But at all times he retains all that is not needed for public uses, subject however, to municipal or police regulations." *Allen* v. *City of Boston*, 159 Mass. 324.

The public have no right in a highway, excepting the right to pass and repass thereon. *Stinson* v. *Gardiner*, 42 Maine, 248.

It necessarily follows that the defendant had no right to build a driveway upon this land of the plaintiff, although within the limits of the highway, for his private use and convenience. In the use of this driveway he was not a traveler upon the public highway, but it was built and used by him for his private convenience because of the difficulty of passing directly from his land to the highway.

Whenever the public necessity or convenience requires that the whole, or any greater portion than previously traveled, of a highway, should be built as a road for public travel, the duty and exclusive authority of doing such work as may be necessary is given by our statutes to the road commissioners or highway surveyors.

The law is thus stated in *Hollenbeck* v. *Rowley*, 8 Allen, 473.

"But entering upon land without the traveled road, and by excavations or embankments widening the road, to the prejudice of the adjacent owner, or in disturbance of his soil, is an unauthorized act. Gen. Sts. c. 44, vest in the surveyors of highways the authority for making all necessary repairs on public highways; and individuals, unauthorized by such surveyors or other lawful authority, cannot lawfully enter upon the land of the adjacent owner situated without the limits of the worked road, and take and remove earth; nor can they interfere with the same by placing rocks, stones and rubbish upon his land without the limits of the worked and traveled way."

The entry will therefore be,

Judgment for plaintiff.
Damages assessed at one dollar.

EDWARD T. HODGE, Admr. de bonis non, In Equity.

vs.

JULIAETTE HODGE, Executrix.

Lincoln. Opinion July 23, 1897.

Admr. de bonis non. Limitations. Probate. Equity. R. S., c. 87, § 19.

An administrator de bonis non, as is indicated by the title of his office, succeeds only to the unadministered property of the intestate, that is, the goods, effects and credits which were of the intestate at the time of his decease and which remained in specie, unaltered or unconverted by any act of the administrator, or the proceeds thereof which have not been commingled with the administrator's own money.

An administrator de bonis non cannot maintain an action against the estate of his predecessor for money wrongfully received by him prior to his appointment as administrator, in the absence of allegation and proof that such money is distinguishable as a part of the intestate's property.

A debt due from a person to a testator or intestate becomes, by the debtor's appointment as executor or administrator, assets in his hands. The administrator's own debt being assets, it becomes an item in his administration account; and the question whether such debt is due, and the amount of it, becomes a question of probate administration, in the first instance, to be decided by the judge of probate, on all questions of law and fact, subject to an appeal to this court.

An indebtedness from an administrator to the estate, having been converted into assets by his appointment, is not revived by the death or removal of the administrator so that it can be sued by an administrator de bonis non.

A wife was owner of a deposit in a savings bank standing in the name of a trustee for her sole benefit. After her death, her husband procured a transfer of the deposit to himself from the trustee, without paying any consideration, and withdrew a portion of the deposit. He was subsequently appointed administrator upon his wife's estate, but did not include this sum in his inventory or account for it in any way. The husband having died, an administrator de bonis non of his wife's estate filed a bill in equity against his estate charging that he became an executor de son tort and prayed that his estate be charged with the money so withdrawn.

Held; that an action at law, under these circumstances, cannot be maintained by an administrator de bonis non against the personal representative of the husband; *also*, that the complainant has no better or greater rights, in this respect, in a proceeding in equity.

By R. S., c. 87, § 19, this court, sitting in equity, may give judgment for the amount of a claim against the estate of a deceased person that has not been presented within the time limited by statute, when justice and equity require it to be allowed, and the creditor is not chargeable with culpable negligence in not prosecuting his claim.

Held; that the only object of this statute is to relieve a creditor, under certain circumstances, from the limitation of the statute in regard to the prosecution of claims against the estates of deceased persons. It does not create a cause of action in equity, after the bar of the statute, when there was none at law before.

Held; that the bill cannot be sustained upon the ground that the money was received by the defendant's testator charged with a trust in favor of the wife's estate, because, if it were so, the identity of the trust fund has been lost. The identity of this trust fund, if such it was, having been lost, the cestui que trust can stand in no better position than other creditors.

ON REPORT.

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

The case is stated in the opinion.

T. P. Pierce, for plaintiff.

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

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

WISWELL, J. Bill in equity by the administrator de bonis non of the estate of Abigail T. Hodge against the executrix of Wm. Hodge, the administrator of Abigail T. Hodge.

The complainant, the administrator de bonis non, is the son of Abigail T. and Wm. Hodge. The intestate died April 8, 1879. Her husband, Wm. Hodge, was appointed administrator upon her estate December 7, 1880, and died June 6, 1892. The complainant was appointed administrator de bonis non on the first Tuesday of October, 1892.

The complainant alleges, in substance, that the intestate at the time of her death was the owner of a deposit in the Cambridgeport Savings Bank of Cambridgeport, Mass.; that although such deposit was in the name of one Hannah C. Wilson, it was in fact the money of the intestate, deposited by her in the name of Hannah C. Wilson, in trust for the sole benefit of the intestate;

that after her death Wm. Hodge procured from Hannah C. Wilson a transfer of said deposit, without consideration, and that on August 26, 1879, before his appointment as administrator, he withdrew from the savings bank a portion of such deposit, about $800; that he did not include this sum in his inventory as administrator and never in any way accounted for the same; that in withdrawing a portion of such deposit he became an executor de son tort; and he asks that the defendant, as executrix of such administrator, may be compelled to pay the amount so withdrawn, with interest, to him as administrator de bonis non.

The respondent both demurred and answered to the bill, and the case is here upon report of the pleadings and testimony. The defendant contends that the bill can not be sustained, either upon its allegations or upon the testimony.

It is very clear that if this sum of money had been received by Wm. Hodge in his capacity as administrator, and had been either administered or converted to his own use, neither an action at law nor a bill in equity could be maintained by the administrator de bonis non against him or his estate. As indicated by his title and commission there vests in him, as administrator de bonis non, only the unadministered property of the intestate, that is, the goods, effects and credits which were of the intestate at the time of her decease and which remained in specie, unaltered or unconverted by any act of the administrator, or the proceeds thereof which have not been commingled with the administrator's own money. *American Boards' Appeal*, 27 Conn. 344.

"But at common law the authority of the administrator de bonis non does not extend to any property which has been administered, either fully or partially, ... It follows from these principles, that the administrator de bonis non can sustain no action at law against his predecessor for anything save unadministered effects existing in specie." Woerner on Administration, pp. 744—745.

In *Beall* v. *New Mexico*, 16 Wall. 535, it is said: "To the administrator de bonis non is committed only the administration of the goods, chattels and credits of the deceased which have not

been administered. He is entitled to all the goods and personal estate which remain in specie. Money received by the former executor or administrator, in his character as such, and kept by itself, will be so regarded; but if mixed with the administrator's own money, it is considered as converted, or, technically speaking, administered."

The administrator de bonis non is entitled only to such goods or chattels of the testator as remained in specie in the hands of the executor at the time of his death, or to such money as belonged to the testator's estate, and had been kept by the executor separate and unmixed with his own. *Potts* v. *Smith*, 3 Rawle, 361. And see the very full notes to this case in 24 Am. Dec. 379.

This doctrine was fully and unequivocally sustained by this court in the case of *Waterman* v. *Dockray*, 78 Maine, 141.

But the persons legally interested are not without ample remedy in such a case. An omission by an administrator to include in his inventory any assets of the estate known to him, is a breach of his official bond. *Bourne* v. *Stevenson*, 58 Maine, 499. Or an administrator could be charged with any money belonging to the estate that was received by him, in the settlement of his administrator's account, and a failure to present and settle an account, after being cited to do so, would also be a breach of his bond, for which he and his sureties would be liable.

Nor do we think that an administrator de bonis non can maintain an action against the estate of his predecessor, for money wrongfully received by him, prior to his appointment as administrator, in the absence of allegation and proof that such money is distinguishable as a part of the intestate's property. If this money withdrawn from the savings bank was in fact the property of the intestate, at the time of her death, her husband by receiving it, became a debtor to the estate, and his subsequent appointment and qualification as administrator converted this indebtedness into cash assets in his hands, which, if the allegations of the bill are true, should have been included in his inventory and accounted for as administrator; for a failure to do this, he and his sureties were liable upon the official bond.

That a debt due from a person to a testator or intestate, becomes by the debtor's appointment as executor or administrator, assets in his hands, was decided in Massachusetts in the case of *Stevens* v. *Gaylord*, 11 Mass. 256, and the doctrine of this case has been universally followed by every subsequent decision upon the question in that state. *Winship* v. *Bass*, 12 Mass. 198; *Hobart* v. *Stone*, 10 Pick. 215; *Ipswich Mfg. Co.* v. *Story*, 5 Met. 310; *Sigourney* v. *Wetherell*, 6 Met. 553; *Chapin* v. *Waters*, 110 Mass. 195; *Choate* v. *Arrington*, 116 Mass. 552; *Tarbell* v. *Jewett*, 129 Mass. 457.

"It is now well settled, whatever may have formerly been the rule of law, that a testator, by making his debtor executor, does not give him the debt, by way of legacy, nor release or discharge it. In this respect, he now stands on the same footing with an administrator. But as an executor or administrator can not demand or receive payment of himself and can not sue himself, and yet is bound to account for his own debt, that debt must be considered as assets. Where the same hand is to pay and receive money, the law presumes, as against the debtor himself, that he has done that which he was legally bound to do, and charges him with the amount as a debt paid. . . . . It is sufficient for the present case, that the administrator is bound to account for his own debt, as a debt paid, and as assets, without other acts or ceremony. The administrator's own debt being assets, it becomes an item in his administration account, and the question whether such debt is due, and the amount of it, becomes a question of probate jurisdiction in the first instance, to be decided by the judge of probate, on all questions as well of fact as of law, subject to an appeal to this court." *Sigourney* v. *Wetherell*, supra.

In *Stevens* v. *Gaylord*, supra, it was said: "The case might have been very different if the defendant had denied that he owed this debt, and had refused to insert it in his inventory, and to account for it as the property of the deceased." And in some other of the Massachusetts cases above cited, the rule as laid down contains the qualification, "when the debt is acknowledged," although we are aware of no case in which this has been decided

to be the law, and we think upon principle and authority that there is no difference in the rule, whether the debt is acknowledged or denied.

In *Winship* v. *Bass*, supra, the indebtedness was not acknowledged, the executor refused to treat his indebtedness to the estate as assets, claiming that it was extinguished by his appointment. The court held that the debt was not extinguished but must be treated as assets, and that, as his sureties were liable upon his bond, he need not be removed.

In *Sigourney* v. *Wetherell*, supra, the indebtedness of the administrator was not acknowledged but on the contrary was strenuously denied.

In *Tarbell* v. *Jewett*, supra, it was said: "The note therefore became assets of the estate, from which the liability of the estate to the guardian could properly be met, and it is immaterial that it was not named in the inventory or account. . . . . The fact that an executor charges himself with his debt in the inventory or account is an important fact; it settles the question that he owes the estate and the amount of his debt, and, in those cases where the debt has thus been accounted for, great stress has been laid upon the fact. . . . . But an executor can not escape his liability, or change the character of it, by failing to charge himself with his own debt; if he could, then by neglecting his duty there would be no remedy for the estate. Nor is charging himself with it the only way in which the fact of his indebtedness may appear or be proved; and if it appears or is proved otherwise, then his liability is established as conclusively as if he had charged himself with the debt in his inventory, and his sureties become responsible if he fails to account for it."

In this state it was early decided in the case of *Potter* v. *Titcomb*, 1 Fairf. 53, that an administrator must inventory and account for any debt due from himself to the intestate, even though he should deny that there was such indebtedness. And in *Potter* v. *Titcomb*, 7 Greenl. 302, it was held that in order to compel an administrator, on his official bond, to pay the amount of a debt due from him to the intestate, it is necessary that he should first be

charged with the amount, in an administration account, by a decree of the judge of probate.

An indebtedness from an administrator to the estate, having been converted into assets by his appointment, is not revived by the death or removal of the administrator so that it can be sued by an administrator de bonis non. In *Tarbell* v. *Jewett*, supra, it is said: "We are not aware of any case where it has been held that a debt due from an executor, having once become assets, can be revived, and an action maintained upon it by an administrator with the will annexed; nor of any case where a debt due to the executor has been held not to be extinguished, if sufficient assets come to his hands."

In *Monroe* v. *Holmes*, 9 Allen, 244, it was held that where an executor had died leaving the estate unsettled, his administrator could not maintain an action at law against the administrator de bonis non to recover a balance due to the executor, but must present an account to the probate court for settlement. And in *Prentice* v. *Dehon*, 10 Allen, 353, it was held that, upon the same principle, such an action could not be maintained after the resignation of the executor.

Whether the debt is due to or from the executor or administrator, and the principle is the same in the case of either executor or administrator, the debt as such becomes extinguished by the appointment of the debtor or creditor, and is not revived by his death or removal from that position.

No action at law, under the circumstances of this case, could be maintained by the administrator de bonis non against the personal representative of his predecessor for the reasons already considered, and we think that the complainant can have no better nor greater rights, in this respect, in a proceeding in equity.

The defendant was appointed executrix September 6th, 1892; this bill in equity was commenced October 5, 1895. By R. S., c. 87, § 19, when a claim has not been presented within the time limited by statute, against the estate of a deceased person, this court, if of opinion that justice and equity require it and that such creditor is not chargeable with culpable neglect in not prosecuting

his claim, may give judgment for the amount of the claim against the estate. The only object of this statute is to relieve a creditor, under certain circumstances, from the limitation of the statute in regard to the prosecution of claims against the estates of deceased persons. It does not create a cause of action in equity, after the bar of the statute, when there was none at law before.

Nor can the bill be sustained upon the ground, as contended, that this money was received by the defendant's testator, charged with a trust in favor of the intestate, because, if this was so, the identity of the trust fund has been lost. There is no attempt here to hold a particular fund or property as charged with the trust; there is no allegation or testimony to the effect that this money can be traced or distinguished from other property or money of the defendant's testator, the original administrator.

The identity of this trust fund, if such it was, having been lost, the cestui que trust can stand in no better position than other creditors. *Goodell* v. *Buck*, 67 Maine, 514; *Steamboat Co.* v. *Locke*, 73 Maine, 370; *Fowler* v. *True*, 76 Maine, 43.

Bill dismissed, with costs for the respondent.

HENRY DAVIS

vs.

INHABITANTS OF MILTON PLANTATION.

Oxford. Opinion July 29, 1897.

State Paupers. Plantations. R. S., c. 24, § § 29, 33, 43.

The obligations of towns and plantations in reference to the support of paupers result from provisions of positive law.

They have no elements of contract, express or implied.

Revised Statutes, c. 24, § 33, provide that: "Persons found in plantations having a population of more than two hundred, . . . and a state valuation of forty thousand dollars, and needing relief, are under the care of the assessors of such plantations; and the duties and powers of such assessors relative to such persons, are the same in every respect as overseers of the poor in

towns have in like cases ; and such plantations shall assess and raise all moneys necessary to defray the expenses incurred in the care of such persons ; and plantations so furnishing relief, have the same remedies against towns of their settlement, that towns have in like cases. But this section does not extend to or affect the laws concerning so-called State paupers or paupers' settlements."

The effect of this section is to impose upon the assessors of such plantation the duty of looking after that class of paupers for the support of whom they have their remedy against the towns where is to be found their legal settlement.

It does not impose on such assessors the duty of looking after so-called State paupers.

That duty is imposed upon the assessors of the "oldest incorporated adjoining town, or nearest incorporated town where there are none adjoining" as specified in § 29.

ON MOTION AND EXCEPTIONS BY DEFENDANT.

This was an action to recover for the burial expenses of a state pauper who died in Milton Plantation, and of which plantation the plaintiff was a resident.

In the course of the trial the presiding justice made the following pro forma ruling: "If you find the issues of fact in favor of the plaintiff; if you find, in other words, that the plaintiff would be otherwise entitled to recover if the defendants had been an incorporated town, he may also recover against these defendants, who are only an organized plantation and not a town. It would be immaterial whether they were an organized plantation, merely, or an incorporated town. For the purposes of this trial, I give you that rule."

The defendant took an exception to this ruling and also filed a general motion for a new trial, a verdict for the plaintiff having been returned by the jury.

J. S. Wright, for plaintiff.

J. P. Swasey, for defendants.

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

FOSTER, J. The plaintiff, a resident of the defendant planta-

tion, sues to recover for the burial expenses of a state pauper who died in said plantation.

Exception is taken to the ruling of the presiding justice that if the plaintiff would be otherwise entitled to recover, if the defendants had been an incorporated town, he might also recover against these defendants who are only an organized plantation and not a town.

We think this ruling cannot be sustained.

The obligations of towns and plantations in reference to the support of paupers result from provisions of positive law. Whatever there is originates solely from statutory enactment, and it has none of the elements of a contract, express or implied. There are no equitable considerations out of which presumptions will arise in favor of either party. "The statutes upon the subject are in no sense remedial, and are not to be modified or enlarged by construction or by any apparent equities, and nothing is to be deemed to be within the spirit and meaning of the statutes which is not clearly expressed in words." *Plymouth* v. *Wareham*, 126 Mass. 475, 477.

Therefore, unless the plaintiff can bring his case within the express provision of some statute he must fail, for there is no moral obligation resting upon the defendant plantation to support its paupers. *Newry* v. *Gilead*, 60 Maine, 154, 156.

It is admitted that the person for whose burial expenses this suit is brought was a state pauper.

Revised Statutes, c. 24, § 33, imposes upon certain plantations certain obligations with reference to "persons found" within their limits, and needing relief. It is as follows: "Persons found in plantations having a population of more than two hundred, to be determined by the returns of the county commissioners, as provided by section seventy of chapter three, and a state valuation of forty thousand dollars, and needing relief, are under the care of the assessors of such plantations; and the duties and powers of such assessors relative to such persons, are the same in every respect as overseers of the poor in towns have in like cases, and such plantations shall assess and raise all moneys necessary to defray the

expense incurred in the care of such persons; and plantations so furnishing relief, have the same remedies against the towns of their settlement, that towns have in like cases. But this section does not extend to or affect the laws concerning so-called state paupers or paupers' settlements."

It is admitted that the valuation and population of the defendant plantaion bring it within that section.

But it will be noticed that the duty imposed "does not extend to" state paupers, but only such as have a settlement in some town. The effect of this section is to impose upon the assessors of such plantation the duty of looking after that class of paupers for the support of whom they have their remedy against the towns where is to be found their legal settlement. This duty was formerly cast upon the oldest adjoining town, (§ 29,) and this duty still continues in relation to the so-called state paupers.

The closing period of the section expressly provides that "this section does not extend to, or affect the laws concerning so-called state paupers or paupers' settlements." The defendant plantation was under no obligation to provide means or raise money for the relief of "state paupers," and there are no express provisions of statute giving it any remedy against the state. Any such claim for the support of state paupers in such plantations must come through the oldest incorporated adjoining town, or nearest incorporated town where there are none adjoining, as specified in § 29, (amended by c. 31, laws of 1887). Such certainly must be the clear meaning of the law, else why did the legislature re-enact the law in 1887, and why did not the legislature except from the liability imposed on the oldest adjoining town to relieve state paupers in unincorporated plantations, such as were found in plantations having a valuation of forty thousand dollars, and a population of two hundred?

This section, properly construed in connection with the last sentence contained in it, is as if it read:—"Persons [other than state paupers] found in plantations having a population of more than two hundred," etc.

It is not the duty of unincorporated plantations to provide for

support of state paupers, or raise money for their relief, but by express statute, "persons found in places not incorporated and needing relief, are under the care of the assessors of the oldest incorporated adjoining town . . . . and when such paupers have no legal settlement in the state, the state shall reimburse said town for the relief furnished," etc.

Neither does § 43 apply to a case like this, wherein it is provided that "towns shall pay expenses necessarily incurred for the relief of paupers by an inhabitant not liable for their support, after notice and request to the overseers, until provision is made for them."

If it was not the duty of the defendant plantation to provide support for deceased, who, it is admitted was a state pauper, then it was under no legal obligation to pay for the expenses of burial for which this suit is brought; could not properly raise the money therefor, there being no statute authorizing it, and this action can not be maintained.

Exceptions and motion sustained.

AMERICAN GAS AND VENTILATING MACHINE COMPANY

vs.

JOHN N. WOOD.

Androscoggin. Opinion July 30, 1897.

Bills and Notes. Contemporaneous Agreements. Estoppel.

Independent, collateral written agreements, though executed at the same time with a promissory note, do not affect the construction of such note, or afford any defense to an action upon it.

But this rule does not apply where the two contemporaneous writings between the same parties, upon the same subject matter, may be read and construed as one paper.

In such case both papers may be read and construed together, notwithstanding one of the writings is a promissory note, when the action is between the parties to it, or their representatives.

The defendant gave to the plaintiff a promissory note for one hundred and

twenty-five dollars payable four months after date, with interest. At the same time the defendant executed and delivered to the plaintiff the following written agreement :

"LEWISTON, October 15, 1890.

It is mutually agreed between the American Gas and Ventilating Machine Co. that at the end of four months if Mr. John N. Wood the giver of note dated——does not want to pay the same he shall receive it back on the surrender by him to the American Gas and Ventilating Machine Co. one hundred shares of stock in the Maine Gas and Ventilating Machine Co. held by him.

American Gas and Ventilating Machine Co.
C. W. WALDRON, Secretary."

Held ; That the note and agreement are so connected by direct reference or necessary implication, that they are to be construed together as an entire contract.

Such an agreement is executory in its nature, requiring some further act to be done by the defendant, or some good and sufficient reason for its omission, in order to render it available as a defense.

An estoppel in pais arises whenever an act is done, or a statement made, by a party, the truth or efficacy of which it would be a fraud on his part to controvert or impair.

ON REPORT.

The case is stated in the opinion.

J. W. Mitchell, for plaintiff.

The transaction shows only an unexecuted, collateral agreement to accept payment of the note in a different manner than is provided for in the note itself; the certificates of stock were never transferred by the defendant to the plaintiff; the payment by the "surrender" thereof was not made prior to the commencement of this action.

The case shows nothing more than an executory agreement between the parties for payment of the note, otherwise than in cash ; and while such an agreement, if made for a sufficient consideration might entitle the defendant to an action for damages, if the plaintiff refused to stand by it, it can be no defense to this suit. 2 Parsons on Notes and Bills, c. 15, § 2, and pp. 529—531 ; *Walker* v. *Russell*, 17 Pick. 280 ; *Sexton* v. *Wood*, 17 Pick. 116 ; *Penn. Mutual Life Ins. Co.* v. *Crane*, 134 Mass. 56 ; *Pitkins* v. *Frink*, 8 Met. 12 ; *Waterhouse* v. *Kendall*, 11 Cush. 128 ; *Turner*

v. *Rogers*, 121 Mass. 12; *Hodgkins* v. *Moulton*, 100 Mass. 309; *Wyman* v. *Winslow*, 11 Maine, 398; *Cushing* v. *Wyman*, 44 Maine, 121; *Jenness* v. *Lane*, 26 Maine, 475; *Noble* v. *Edes*, 51 Maine, 34.

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

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

FOSTER, J. This is an action upon a promissory note of the following tenor:

"LEWISTON, ME., Oct. 15, 1890.

Four months after date, I promise to pay the American Gas and Ventilating Machine Co. one hundred and twenty-five dollars at Lewiston, Me., with interest. Value received. J. N. WOOD."

The plaintiffs having proved the note declared on, are entitled to judgment unless upon the facts disclosed the other party has shown a legal defense. In support of such defense, the defendant introduces an agreement in writing signed by the plaintiff, executed at the same time when the note was given, and which reads as follows:

"LEWISTON, October 16, 1890.

It is mutually agreed between the American Gas and Ventilating Machine Co. that at the end of four months if Mr. John N. Wood the giver of note, dated——does not want to pay the same he shall receive it back on the surrender by him to the American Gas and Ventilating Machine Co. one hundred shares of stock in the Maine Gas and Ventilating Machine Co. held by him.

American Gas and Ventilating Machine Co.

C. W. WALDRON, Secretary."

It is argued in behalf of the defendant that this note and agreement constitute together an entire contract, and that they are to be construed together as part of one and the same transaction.

The plaintiff, on the contrary, contends that although made at the same time as the note, it must be considered as independent and collateral to it, repugnant to the very terms of the note, and

destructive of it; that it is but a promise to accept payment of the note in a different manner than is provided for in the note itself.

The certificates of stock mentioned in this agreement, and which from the evidence appears to have been the consideration of this note, were never surrendered by the defendant to the plaintiff prior to the commencement of this action.

Viewed in the most favorable light for the defendant, the transaction shows only an executory agreement or contract between the parties, requiring some further act to be done, or some good and sufficient reason for its omission, in order to render it available as a defense.

We are aware that there is a class of decisions which hold that independent, collateral agreements, though executed at the same time as the note, do not affect the construction of the original contract, or afford any defense to an action on the note.

Thus, an agreement in writing executed at the time of the making of a note which was payable at a certain day, to give indulgence to the maker for an indefinite period, which might extend beyond the specified time of payment, has been held not to be a part of the note, but only a collateral promise, upon which the promisee must rely. *Dow* v. *Tuttle*, 4 Mass., 414. There are other cases in the same line, and among which may be mentioned *Pitkin* v. *Frink*, 8 Met. 12, where a note was given by the defendant, and the plaintiff at the same time gave the defendant a writing in which he agreed to take his pay in horse hire, and not call on the defendant for the note so long as he kept the horse and carriage in good order for the plaintiff's accommodation, and the court held the stipulations independent, and constituted separate and distinct contracts, for a breach of which by either an action could be maintained. So also *Traver* v. *Stevens*, 11 Cush. 167, *Waterhouse* v. *Kendall*, Id., 128, and *Stanton* v. *Maynard*, 7 Allen, 335, where similar agreements by the plaintiff, made in consideration of notes given, were regarded as mutual and independent, executory stipulations, the performance of which was not a condi-

tion precedent to a recovery upon the notes. *Littlefield* v. *Coombs*, 71 Maine, 110.

But there is another class of decisions wherein it is held that two contemporaneous writings between the same parties, upon the same subject matter, may be read and construed as one paper; and this rule applies notwithstanding one of the writings is a promissory note, when the action is between the parties to it or their representatives. *Rogers* v. *Smith*, 47 N. Y. 324; *Hunt* v. *Livermore*, 5 Pick. 395; *Hill* v. *Huntress*, 43 N. H. 480; *Davlin* v. *Hill*, 11 Maine, 434.

In the latter case the court held that in an action on a promissory note, writings connected therewith by direct reference or necessary implication, are admissible in defense as parts of the same contract.

So in *Hill* v. *Huntress*, supra, an agreement, made at the same time as the note, contained a stipulation that the promisors of the note were to pay the amount of it in tanning hides for the payee, and the court held that the note and written agreement, made at the same time, relating to the manner of payment of it, were to be construed as one special agreement, as between the original parties and those standing in like situation. The court there say, in speaking of the note: "As between the original parties, notwithstanding its form, this instrument is but one part of a special contract, the other part of which, as it was made, was contained in the written agreement of the same date, and purporting to be executed at the same time. Different instruments are to be construed together, as parts of the same contract, where it is necessary to carry into effect the agreement and intention of the parties."

Many of the cases relate to instances where the stipulation, agreement or memorandum, is written upon the face or back of the note itself, as in *Littlefield* v. *Coombs*, 71 Maine, 110; *White* v. *Cushing*, 88 Maine, 339; *Barnard* v. *Cushing*, 4 Met. 230; *Costelo* v. *Crowell*, 127 Mass. 293, and the cases therein cited, and where such terms become a substantive part of the note and qualify it as if inserted in the body of the instrument.

But it was otherwise in the cases of *Hill* v. *Huntress*, 43 N. H. 480, *Hunt* v. *Livermore*, 5 Pick. 395, and *Davlin* v. *Hill*, 11 Maine, 434, where the agreement was contained in writings independent of the notes which they were held to modify and govern in accordance with the intention as expressed in the several instruments.

In *Davlin* v. *Hill*, supra, the language of our court, as expressed by WESTON, J., is this: "It is manifest that the note, the plaintiff's agreement in writing of the same date, and the instrument upon the back of which it was written, and which is referred to therein, were intended to be evidence of the stipulations of the parties, in relation to the transaction. It was not necessary that the contract should be written on one piece of paper. If written on several, connected by direct reference or necessary implication, they form together evidence of what the parties have agreed."

In the case at bar the agreement bears the same date as the note, and refers expressly to the note in suit. In that agreement it is mutually agreed that if the defendant, at the date of maturity of the note, does not want to pay the same, he shall receive it back upon surrendering to the plaintiff the shares of stock held by him.

Can there be any doubt as to what the intention of the parties was? Are not the note and agreement "connected by direct reference or necessary implication?" We think so, and that the same should be construed together as an entire contract, the stipulations of which are mutual and dependent, rather than independent and collateral. Had there been a surrender or tender of the stock within the time limited by the contract, it would have constituted a defense to this action. There is no evidence or claim on the part of the defense that this was done.

What, then, is the justification offered by the defendant to exonerate him from the consequences of his failure so to surrender the stock? It is, that by the acts and declarations of the authorized agent of the plaintiff corporation, the defendant was induced to retain the stock, and that the plaintiff is thereby estopped from claiming that the defendant was at fault in not making a surrender of the same before suit was commenced.

We think this position of the defendant is well founded.

It appears that C. W. Waldron was not only owner of one-third of the capital stock of the plaintiff corporation, but was a director, secretary and general manager of the corporation in this state, and was generally empowered to act in reference to all matters pertaining to the business of the corporation. When the time mentioned in the note and agreement had expired, it was deemed advisable that an extension should be given upon this and other similar notes held by the plaintiff against other parties, in order to test the machines manufactured by the plaintiff and to ascertain if they could be made to produce satisfactory results. Such extension appears to have been granted, extending the time to May 15, 1891. But in the meantime, letters were written in behalf of this defendant and others similarly situated explaining the situation, and from all that appears in the case, it is evident that all parties were co-operating to obtain a result in relation to the use of the machines that would be of value to all concerned. This appears from the correspondence, as well as from the whole tone of the evidence given by Mr. Waldron. The defendant and other stockholders had the assurance that the plaintiff would act in good faith for the furtherance of their material interests, and they were led to believe that the control and decision as to such matters was vested in Mr. Waldron. It appears from the testimony of Waldron that up to the time this note was sued the other directors agreed with him entirely. He had frequent conversations with the Lewiston stockholders, including this defendant, and he was in hopes they would be glad to pay their notes and keep their stock, and it was understood that the result would be that if they found the machines were good for nothing, they would want to get out of it. He had repeated conversations with the defendant, and told him, not only during the time covered by the extension, but afterwards, that he might hold on to the stock and give it up when it was found that nothing could be accomplished with the machines. It is needless to further discuss the testimony, and it is sufficient to say, that in view of the repeated statements of Mr. Waldron, and his requests to the defendant to retain the stock till it was found

that the success of the enterprise could no longer be assured, and finally his assurance in his letter to the defendant that the note had been sent for collection by mistake, and that there was nothing due upon it, we think the plaintiff may properly be held to be estopped from claiming that the defendant was at fault in not surrendering the stock before suit was commenced, or is without remedy in consequence of such failure to return it to the plaintiff within the time stipulated.

This doctrine of estoppel in pais has been frequently applied to prevent a party from taking advantage of his own wrong. It was applied in *Caswell* v. *Fuller*, 77 Maine, 105, wherein HASKELL, J., makes use of the following language: "That a man should be allowed by his own speech and conduct to lead another astray, and thereby take substantial benefit from the error of which he was the cause, is subversive of natural justice." To the same effect may be cited *Stanwood* v. *McLellan*, 48 Maine, 275; *Ripley* v. *Insurance Co.*, 30 N. Y. 136, 164.

An illustration frequently given is, that if a landlord even without consideration, agrees that his tenant may pay after rent day, and by reason thereof he should omit to pay at the day, the landlord is estopped from enforcing a forfeiture.

Such an estoppel arises whenever an act is done, or a statement made, by a party, the truth or efficacy of which it would be a fraud on his part to controvert or impair. *Marston* v. *Insurance Co.*, 89 Maine, 266, 272.

Judgment for defendant.

MAURICE E. CUMMINGS *vs.* ERNEST J. GILMAN, and another.

Kennebec. Opinion August 2, 1897.

Sales. Delivery.

The general rule is that, as between seller and purchaser, and as against strangers and trespassers, the title to personal property passes by sale without delivery, when no question arises in relation to the statute of frauds.

This rule does not operate against subsequent bona-fide purchasers, attaching creditors without notice, and others standing in like relation. As against them there must be delivery of the property sold.

Where the same goods are sold to two different purchasers by conveyances equally valid, he who first lawfully acquires possession will hold them against the other.

In the present case the apples sold remained in the vendor's possession till the defendants hauled them away. The defendants having paid for them, and got the first possession, they will be entitled to hold as against the plaintiff who purchased from the owner, but never got the actual possession.

ON MOTION AND EXCEPTIONS BY PLAINTIFF.

This was an action of trover for forty-five barrels of apples, tried to a jury in the Superior Court for Kennebec County, where a verdict was returned for the defendants.

The plaintiff, in addition to a general motion, took exceptions to a part of the charge to the jury as follows:—

"But the defendants raise another legal point, and that is based upon a question of fact for you to determine. They claim that the testimony of Gordon himself shows that the delivery before payment could be demanded, was to be made at the depot, and they claim that if payment was to be made at the depot, or if it was a condition of the sale that those apples were to be delivered at the depot, then the bargain was not completed, as is claimed by the defendants, until they were delivered at the depot.

"Well, gentlemen, it is undoubtedly true that all the conditions of the sale according to the contract must be complied with before the sale is completed. You must first get at the intention of the

parties. What did they intend in this case? Was it intended that the sale should be completed there at Ingham's place with the packing of the apples in the barrels? Could Ingham then have demanded payment? And if payment had been refused could he have enforced it? If the sale was completed, if all the conditions and intentions of the parties had been complied with, then the sale was completed and he could have demanded pay and enforced it if the payment was not made thereafter.

"But if it was a condition of the sale, and if he had no claim upon Gordon for the price until they had been delivered at the depot, then the sale was not completed until they were delivered.

"So, that, gentlemen, it is a question for you to determine what was the contract. Was it for a delivery and completion of the sale—a delivery to the agent of Gordon there in such manner that Gordon would then have been obliged to pay? Or was he not obliged to pay anything until the delivery at the depot? If so it was an uncompleted sale. It was executory on his part, and a sale to these defendants, under the circumstances to which they have testified, would so put and vest title in them that Cummings could not maintain this action against them."

The presiding judge refused to give the following instructions requested by the plaintiff.

"If one sells property not belonging to him without consent of the owner, such owner may reclaim it in the hands of the buyer, although it was sold and purchased bona-fide and for a valuable consideration."

"In a bargain and sale the thing which is the subject of the contract becomes the property of the buyer the moment the contract is concluded, and without regard to the fact whether the goods be delivered to the buyer or remain in possession of the seller."

To these rulings and instructions and refusals to instruct, the plaintiff excepted.

E. O. and Fred E. Beane, for plaintiff.

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

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

FOSTER, J. Trover for forty-five barrels of apples. This case is before the court upon motion and exceptions by the plaintiff, verdict being for defendant. The apples were raised by one Ingham, who, as the plaintiff contends, sold the same to Gordon & Henry, traders at Readfield, and that they sold the same to the plaintiff.

The defendants assert that Ingham sold and delivered the apples to them, and that they were bona-fide purchasers with no notice of any sale by Ingham to any other party, they paying in full for the apples.

The principal point involved at the trial was in relation to delivery.

Although the general rule is that, as between seller and purchaser, and as against strangers and trespassers, the title to personal property passes by sale without delivery, (when no question arises in relation to the statute of frauds) nevertheless the same rule does not operate against subsequent bona-fide purchasers, attaching creditors without notice, and others standing in like relation. To render a sale valid against these there must be delivery of the property sold. *Ludwig* v. *Fuller*, 17 Maine, 162; *Vining* v. *Gilbreth*, 39 Maine, 496; *McKee* v. *Garcelon*, 60 Maine, 165.

When, therefore, the same goods are sold to two different purchasers, by conveyances equally valid, it is well settled that he who first lawfully acquires the possession will hold them against the other. *Lanfear* v. *Sumner*, 17 Mass. 110; *Jewett* v. *Lincoln*, 14 Maine, 116; *Brown* v. *Pierce*, 97 Mass. 46, 48.

In this case the apples remained in the vendor's possession until the defendants hauled them away.

The sale under which the plaintiff claims title was to Gordon & Henry while the apples were lying in a bin, unpacked. They never paid for the apples, and the only expense they had been to was the packing. The barrels belonged to Ingham. The court under proper instructions presented the contention of the parties

to the jury. Defendants claimed that the first alleged sale was conditional, that the conditions never having been complied with, it became merely an executory contract, unfulfilled by the parties to it.

If it was a conditional sale, and anything further remained to be done by either party as a condition precedent to the passing of the title, then there was no completed sale.

All questions of fact in relation to the contract of sale by Ingham to Gordon & Henry, and of delivery, were left to the jury, and from an examination of the evidence we see no reason for disturbing the verdict.

Nor do we think the plaintiff's exceptions can be sustained. There is nothing in that part of the judge's charge which is excepted to which will warrant the court in saying there was error; and the same may be said in reference to the exceptions in relation to the requested instructions. The first request was misleading, and could hardly be said to be applicable to the facts in issue. The second request, while it may be unobjectionable in its application between vendor and vendee, is not to be applied when the rights of subsequent bona-fide purchasers are involved.

Motion and exceptions overruled.

HENRY ST. JOHN SMITH *vs.* LORENZO D. M. SWEAT.

Hancock. Opinion August 2, 1897.

Deed. Description. Boundaries. Monuments.

Plaintiff claimed title to the premises demanded under three mortgages of different dates, the last two of which have been foreclosed. Defendant, under a fourth mortgage from same mortgagors, and also under a deed from the assignees of the mortgagors, in which the mortgagors join, the description in the deed being such, as the defendant contended, as to embrace a larger tract than that covered by the plaintiff's mortgages.

The land described in the several mortgages was bounded in each as follows: "On the north by the street sometime called West End Avenue; on the east by land formerly of James Hamor, deceased; on the south and west by land of John A. Rodick."

The premises demanded were conveyed to the mortgagors by three separate conveyances, the last two being additions to the first purchase.

The descriptive words of the bounds contained in the title deeds, of the first purchase, to the mortgagors, are identical with those contained in the several mortgages. But the boundaries, although identical in each mortgage, and although the mortgages were given at different times, are true and correct as applied to the facts existing at the times when the several mortgages were given.

The mortgages are not to be construed together, but as separate instruments, and in reference to the facts existing at the different times when they were given.

The same terms, or words of description, therefore, although identical in the several mortgages may properly cover and include distinct and different tracts, being descriptive of such tracts as bounded at the date of the different mortgages, and hence may cover more land in one case than in another and follow a receding line.

The boundaries may have receded, and yet the same words may be aptly used to meet the changed conditions at the time when the mortgages were written.

A particular description of premises conveyed, when such particular description is definite and certain, will control a general reference to another deed as the source of title.

Nor will a clause in a deed, at the end of a particular description of the premises by metes and bounds, "meaning and intending to convey the same premises conveyed to me," etc., either enlarge, or limit, the grant.

When a deed gives a boundary by land of another, the true line of the ownership of the adjoining land is the monument.

And it matters not whether the deed of the land referred to is recorded or not.

ON REPORT.

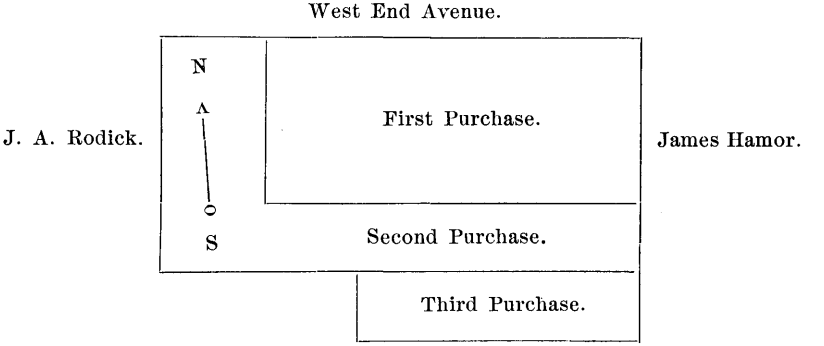
The case appears in the opinion.

H. E. Hamlin, for plaintiff.

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

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

FOSTER, J. This is a real action to recover possession of a parcel of land in Bar Harbor, known as the "West End Hotel" property, which parcel as described in plaintiff's writ includes three lots marked respectively, "First Purchase," "Second Purchase," and "Third Purchase" on the plan which is made a part of the case.



The plaintiff claims title under three mortgages, and foreclosure of the second and third mortgages. In each of these three mortgages the description of the premises is substantially the same.

The defendant claims under a fourth mortgage from the same mortgagors, in which the description is substantially the same as in the three mortgages of the plaintiff, and also under a deed from the assignees of the original mortgagors, in which the mortgagors join, the description in the deed being much fuller, and, as the defendant contends, conveys a larger tract than is conveyed by either one of the four mortgages.

The defendant claims that the four mortgages conveyed the lot

which upon the plan is marked "First Purchase," and nothing more; that the later deed to him from the mortgagors and their assignees conveyed to him the lots which are marked "Second Purchase" and "Third Purchase."

The defendant seasonably disclaimed any right, title or interest in the lot marked "First Purchase," and as it is admitted that he was not in possession of the premises marked "First Purchase" at the time this action was commenced, the real question, therefore, is, whether the plaintiff's mortgages cover the "Second Purchase" and "Third Purchase," or only so much as is marked "First Purchase" upon the plan.

The question at issue, then, is in reference to the true construction of the three mortgages under which the plaintiff claims title. He cannot prevail upon the issue raised by the pleadings unless he proves title as against the defendant to the part not disclaimed.

All the property was at one time owned by Oren M. Shaw and Fred A. Shaw, who for a long time conducted the West End Hotel under the firm name of O. M. Shaw & Son, and from whom both parties to this action claim title.

At the time when the first mortgage was given to plaintiff (March 17, 1881,) the Shaws were owners of "First Purchase" and "Second Purchase"—the "First Purchase" by deeds of undivided halves from one James P. Armbrust, dated May 7, 1880, and March 17, 1881, and the "Second Purchase" by deed from John A. Rodick, dated May 26, 1880, (though not recorded till November 26, 1881.)

The description of the premises contained in the mortgage is as follows: "A certain parcel of real estate situated at Bar Harbor, in the town of Eden, Hancock County, State of Maine, to wit: the parcel known as the 'West End Hotel' or 'Haywood House Lot,' and bounded as follows, to wit:—on the north by the street sometime called 'West End Avenue;' on the east by land formerly of James Hamor, deceased; on the south and west by land of John A. Rodick, and containing one acre, more or less. Also all the plant of said 'West End Hotel,' including the furniture, fittings, tools, apparatus, and all other personal property used in

the business of carrying on said hotel and appertaining thereto, wherever the same may now be situate.

"Meaning and intending hereby to convey all the right, title and interest which we acquired by deed of James P. Armbrust to us, dated May 7, A. D. 1880, recorded in Hancock Registry of Deeds, book 172, page 190, and deed from said Armbrust to us of even date herewith. Also all renewals of the aforesaid personal property and all personal property which may hereafter be put upon the premises for hotel uses; but all groceries and other supplies for consumption by guests or servants are excluded from this mortgage."

The second and third mortgages, dated respectively September 20, 1882, and September 15, 1888, are identical in description of the premises, so far as the language is concerned, except in the clause "Meaning and intending," etc., the word "include" is used instead of the word "convey."

The two Armbrust deeds to which reference is made in all the mortgages, and by which the Shaws received title to the "first purchase," contain the following description: "A certain parcel of real estate situated at Bar Harbor, in the town of Eden, Hancock County, State of Maine, to-wit:—the parcel known as the West End Hotel or Haywood House Lot, and bounded as follows, to-wit: on the north by the street sometimes called West End Avenue; on the east by land formerly of James Hamor, deceased; on the south and west by land of John A. Rodick, and containing one acre, more or less . . . . Also . . . all the plant of said West End Hotel, including the furniture, fittings, tools, apparatus, and all personal property used in the business of carrying on said Hotel, and appertaining thereto, wherever the same may now be situate."

The descriptive words, therefore, not only of the Armbrust deeds, but of the several mortgages, may be said to be identical. The fact that the Armbrust deeds cover only the "First Purchase," and that in the mortgages reference is made to the Armbrust deeds, "meaning and intending hereby to convey all the right, title and interest which" the mortgagors acquired by those

deeds, is the cause of whatever contention there is in this case; and compels the court to determine whether the plaintiff's mortgages cover the "First Purchase" only, or the "First Purchase," "Second Purchase," and "Third Purchase." To ascertain this, we must consider not only the language contained in the mortgages, but the existing state of facts at the time when the several mortgages were given. When this is done, we think the question propounded by the defense may be properly answered, viz: How is it possible to enlarge the exact description contained in the title deeds to the mortgagors of the "First Purchase," so as to make the same terms, without diminution or change, cover and include a larger tract?

When the first mortgage was given the mortgagors owned both the "First Purchase" and the "Second Purchase." The "First Purchase," by description in the Armbrust deeds of conveyance to the mortgagors, was bounded on the west and south by land of John A. Rodick, on the east by land formerly of James Hamor, deceased, and on the north by West End Avenue. When the "First Purchase" was enlarged by adding to it the "Second Purchase," the "First Purchase" was no longer bounded on the south and west by land of John A. Rodick, but by land of the mortgagors themselves which they had purchased from said Rodick. Notwithstanding the language, descriptive of the premises, contained in the first mortgage is identical with that in the deeds from Armbrust conveying the "First Purchase," yet when that mortgage was given, the mortgagors being the owners of the "First Purchase" and "Second Purchase," it is not correct as bounding the "First Purchase" merely, but is correct in bounding the "First Purchase" as enlarged by the "Second Purchase."

But the defense claims that inasmuch as the language of the description in the Armbrust deeds and the plaintiff's mortgage are identical, the clause "Meaning and intending thereby to convey all the right, title and interest which we acquired by deed of James P. Armbrust to us, dated May 7th, A. D. 1880, recorded in Hancock Registry of Deeds, book 172, page 190, and deed from said Armbrust to us of even date herewith," limits the grant to

only so much as was covered by the Armbrust deeds, or the "First Purchase." This, it is claimed, is strengthened by the fact that reference is also made to the quantity of "one acre more or less."

We do not think the position of the defense can be sustained.

It is too well settled to require the citation of authorities that a particular description of premises conveyed, when such particular description is definite and certain, will control a general reference to another deed as the source of title.

So a clause in a deed, at the end of a particular description of the premises by metes and bounds, "meaning and intending to convey the same premises conveyed to me," etc., does not enlarge, or limit, the grant. *Brown* v. *Heard*, 85 Maine, 294; *Hobbs* v. *Payson*, 85 Maine, 498; and cases cited. The exception to this rule is where the particular description of land by metes and bounds is uncertain and impossible; then a general description in the same conveyance will govern. *Sawyer* v. *Kendall*, 10 Cush. 241; *Hathorn* v. *Hinds*, 69 Maine, 326, 329.

In the present case the land described in the first mortgage was particularly described and definitely bounded, ... "on the north by the street sometime called 'West End Avenue'; on the east by land formerly of James Hamor, deceased; on the south and west by land of John A. Rodick." Any reference to the source of the mortgagor's title, or what was meant or intended to be conveyed, cannot limit the grant with bounds as definite as those contained in this mortgage. To hold otherwise would give a construction to the mortgage as embracing only the "First Purchase," with boundaries on the west and south not as they existed at the date of the mortgage, but as they formerly were,—not by land of John A. Rodick, but by land of the mortgagors that was formerly land of John A. Rodick.

What has been said in reference to the first mortgage applies equally to the plaintiff's second mortgage of September 20, 1882, which contains precisely the same description as the first. The mortgagors owned the same property at the date of the second mortgage as at the date of the first,—the "First Purchase" and the "Second Purchase." If the plaintiff's first mortgage em-

braced these two purchases then the second mortgage did also; the boundaries named in each were the same, and the same boundaries existed at the time when the second mortgage was executed as when the first one was.

The "Third Purchase" was made February 16, 1887, thereby enlarging the parcel embraced in the first and second purchases. After this, the third mortgage was given to the plaintiff, dated September 15, 1888, the descriptive words of the real estate thereby conveyed being identical with the two previous mortgages. After the "Third Purchase" had enlarged the premises embraced in the "First Purchase" and "Second Purchase," the whole parcel, as thus constituted, was bounded the same as before the enlargement, viz:—on the north by the same avenue, on the west and south by land of John A. Rodick, and on the east by land formerly of James Hamor, deceased.

When, therefore, the description contained in plaintiff's third mortgage is applied to the parcel thus enlarged, it certainly is a description which by metes and bounds embraces the enlarged parcel, notwithstanding the *words* of the description are *identical* with those in the deeds conveying title to the "First Purchase" from Armbrust to the mortgagors.

Therefore, it is possible that successive mortgages, each describing the mortgaged estate by *words* identically the same, may embrace and convey different parcels, when such is the intention of the parties. This intention may be considered as effectually expressed in the writing, when the description is plain, specific and adequate to convey the same. *Hathorn* v. *Hinds*, supra. There is no ambiguity in these descriptions; fixed and definite boundaries are given; and these boundaries must prevail, unless we are to attach more importance to a mere reference to source of title, or an intention clause, than to specific descriptions; and this, as we have seen, cannot be done. Words of reference, or of explanation or intention, never destroy a specific grant.

It is true that the particular descriptions in plaintiff's first two mortgages are the same, and it is proper that they should be for they cover the same land, the "First Purchase" and the "Second

Purchase"; but while the *particular words* employed in the third mortgage are identically the same as in the other two, yet in *fact* the *description* is not the same, because by its definite and precise boundaries it covers more land. Each mortgage is to be construed by itself. The one has not necessarily any connection with either of the others. Hence, the same *words* of description employed in successive mortgages may cover more land in one case than in another and follow a receding line. The *words* of description in the successive mortgages may be the same, and yet may refer to different boundaries. The boundaries may have receded, as in the present case, and yet the same *words* may be aptly used to meet the changed conditions at the time when the mortgages were written.

To illustrate: A owns a piece of land bounded on the south and west by land of B, and mortgages to C with such boundaries. Subsequently A buys another piece of adjoining land from B, but, with this addition, A's land is still bounded on the south and west by land of B. A again mortgages to C, using the same *words* of description as in the first mortgage, that is, bounding his land on the south and west by land of B. Can there be any doubt that C would acquire title by mortgage to both of A's lots? Yet here is a receding line; here is a case where the *words* of description in A's second mortgage are the same as in the first mortgage, and yet cover and convey more land. "When a deed gives a boundary by land of another, the true line of the ownership of the adjoining land is the monument." *Jewett* v. *Hussey*, 70 Maine, 433. And it matters not whether the deed of the land referred to be recorded or not. *Bryant* v. *M. C. R. R. Co.*, 79 Maine, 312.

With the view which we have taken in reference to the plaintiff's mortgages it becomes unnecessary to enter further into detail in reference to the facts in the case, or what might be adduced in support of the intention of the mortgagors to convey, by their mortgages, the land described in each.

The entry must be,

Judgment for the plaintiff for the land demanded.

ASA M. SEAVEY *vs.* WALTER H. CLOUDMAN.

York. Opinion August 16, 1897.

Landlord and Tenant. Tenant at Will. Notice. R. S., c. 94, § 2.

A tenancy at will is terminated by the alienation of the premises by the landlord, and without giving the tenant the notice provided for in R. S., c. 94, § 2.

Held; that the word "party" in R. S., c. 94, § 2, is to be understood as *party to the contract.* The notice is to be given by one contracting party to the other contracting party, by the landlord to the tenant, or by the tenant to the landlord. This statute is not applicable when the relation of landlord and tenant does not exist. The words "and not otherwise" refer rather to the acts of the *parties to the tenancy* than to the effects of their acts by operation of law.

ON REPORT.

The case is stated in the opinion.

Geo. F. and Leroy Haley, E. J. Cram, for plaintiff.

The plaintiff claims that under R. S., c. 94, § 2, an alienation of the premises did not terminate his tenancy, and that as there was no mutual agreement to terminate his tenancy he was entitled to thirty days' notice in writing.

When the case of *Esty* v. *Baker*, 50 Maine, 325, was decided, the statute was as follows: "A tenancy at will may be terminated by a written notice to quit, served on the tenant thirty days before the time named for its termination, but if no rent is due when a rent is payable, it shall not be terminated, except at the option of the tenant, until rent shall become due." The case of *Esty* v. *Baker*, decided in 1862, held that the statute did not change the common law rule that an alienation terminated the tenancy. This caused the legislature the next year, 1863, to enact chapter 199, which is entitled: "An act additional to chapter 94 of the Revised Statutes relating to tenancies," which reads as follows: "All tenancies at will may be determined by either party by thirty days' notice in writing for that purpose, given to the other party, and not otherwise except by mutual consent, and

except in cases where the tenant is liable to pay rent and no rent is due at the time the notice expires, and no further notice shall be required to entitle the landlord to the process of forcible entry and detainer."

This statute was construed by the court in *Cunningham* v. *Horton*, 57 Maine, 420, to supersede the mode of determining tenancies at common law.

The statute of 1863, c. 199, as far as it relates to the issues in this case, has not been changed, except in the revision the first word of the act, "all," has been omitted.

It was undoubtedly passed because the court, in *Esty* v. *Baker*, supra, had given a different construction to the statutes than the court did in *Young* v. *Young*, 36 Maine, 133, in which case the court held that alienation did not deprive the tenant of the right to written notice.

This case depends upon the statutes; and Massachusetts decisions do not apply, the statutes in that state being different.

The words in the original act can mean nothing but "all." The words "not otherwise" are prohibitive words and exclude all other ways (except those enumerated and which do not affect this case.)

It has been the law in this state for a long time that an estate could be burdened with the rights of a tenant, which the purchaser of the estate would be obliged to respect. R. S., c. 73, § 8.

Howard v. *Merriam*, 6 Cush. 532, recognizes the right of the legislature to change the rights as they existed at common law of landlord and tenant.

Addison E. Haley, *B. F. Hamilton and B. F. Cleaves*, for defendant.

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

SAVAGE, J. Trespass quare clausum. Prior to July 18, 1895, the plaintiff was tenant at will of the premises. On that day his landlord, the owner, conveyed the same by deed to Mousam Lodge of Odd Fellows. August 19, 1895, the plaintiff paid one month's

rent to the trustees of Mousam Lodge. It is unnecessary to inquire what the effect of this payment was, for the Lodge on August 23, following, leased for the term of one year to Zebedee M. Cushman, a portion of the premises conveyed, also the wooden building occupied by the plaintiff, and standing on the remaining portion, and in the lease agreed to remove the building to the land leased, and put it in a condition fit for occupancy as a dwelling-house. The plaintiff had notice of this lease on the same day, and was then notified to remove from the premises. August 28, the plaintiff was forcibly evicted by the defendant and others. The defendant justifies as the servant of the lodge and of Cushman the lessee.

The only question presented by counsel, and the only question decided by us, is whether the plaintiff's tenancy had been terminated prior to the eviction of the plaintiff. The plaintiff says it had not. The defendant contends that it had, by alienation, by the sale from plaintiff's landlord to Mousam Lodge, and by the lease from Mousam Lodge to Cushman. Either was an alienation, and if either transaction terminated the tenancy of the plaintiff, it is immaterial which.

This court ruled in *Esty* v. *Baker*, 50 Maine, 325, decided in 1862, that by alienation of the estate by the landlord, a tenancy at will is changed to a tenancy at sufferance. But the plaintiff urges that this rule was changed by chapter 199 of the laws of 1863, (now R. S., chap. 94, § 2,) which provided that "all tenancies at will may be terminated by either party by thirty days' notice in writing for that purpose given to the other party, and not otherwise save by mutual consent."

The statutes in force when *Esty* v. *Baker*, supra, was decided provided that "a tenancy at will may be terminated by a written notice to quit, served on the tenant thirty days before the time named for its termination." And the plaintiff's argument is that the legislature, in 1863, intended to change this rule laid down in *Esty* v. *Baker;* and particularly it is urged that the use of the word "all" and the words "and not otherwise" are conclusive that no tenancy at will can be determined, or ended in any other

way whatever, than by the statutory notice to quit or by "mutual consent."

We do not think so. Prior to the revision of 1841, we had no statute on the subject of determining tenancies at will. The common law rules were in force. In R. S., 1841, chap. 95, § 19, it was provided that "all tenancies at will may be determined by either party by three months' notice in writing for that purpose, given to the other party." This was omitted in the revision of 1857. Revised Statutes, 1857, chap. 94, § 2, was held in *Withers* v. *Larrabee*, 48 Maine, 570, (1861), to be a re-enactment of the statute of 1849, c. 98, which provided for the maintenance of the process of forcible entry and detainer, although the relation of landlord and tenant did not exist between the parties; and of the statute of 1853, c. 39, § 1, which related to the termination of a tenancy at will on the part of the landlord. "These acts . . . . have relation to the process of forcible entry and detainer alone, and have nothing to do with the determination of tenancies at will *by either party* upon notice in writing . . . . consequently tenancies at will are now as they were before the revision of 1841." Chapter 98 of the laws of 1862 was the counterpart of the statute of 1853, supra, and gave the tenant the right to terminate the tenancy by giving notice in writing. It, like the former statute, related only to the process of forcible entry and detainer. Chapter 199 of the laws of 1863, therefore, restored § 19 of chap. 95, R. S., 1841, and added the words "and not otherwise except by mutual consent." As before stated that statute is found now in R. S., 1883, chap. 94, § 2.

It will be observed that the statute has reference to the determination of tenancies by the will and acts of the parties, and not by operation of law. The relation of landlord and tenant is created only by contract, express or implied. *Little* v. *Libby*, 2 Maine, 242. We think that the word "party" in the statute is to be understood as *party to the contract.* The notice is to be given by one contracting party to the other contracting party, by the landlord to the tenant, or by the tenant to the landlord. After alienation has taken place, how can the tenancy be deter-

mined, upon the theory of the plaintiff? Can notice be given by the landlord? He has ceased to have any interest in the premises. Can notice be given by his grantee or lessee? He is not a party to the contract. The alienee does not become the lessor at will of the former lessee at will, nor does the tenant at will become tenant to the alienee. *Howard* v. *Merriam*, 5 Cush. 563.

It will, also, be observed that the statute in question does not assume to change the nature or essentials of a tenancy at will at common law. It only provides a new method by which the parties to the relation may terminate it as between themselves. Those incidents or limitations which attach themselves to the relation by operation of law are not affected by the statute.

Said Shaw, C. J., in *Howard* v. *Merriam*, supra: "It is an intrinsic quality in an estate at will, that it is personal and can not pass to an assignee; and that by an alienation in fee, or for years, the estate at will is, ipso facto, determined and can not subsist longer. This is a limitation of the estate, which is incident to its very nature; when therefore it is thus determined by operation of law, it is determined by its own limitation without notice." It is, therefore, an incident to any tenancy at will that it is limited to such time as the lessor shall own the estate, as it is also limited to the lifetime of the parties. *Ferrin* v. *Kenney*, 10 Met. 294; *Baker* v. *Smith*, 21 Maine, 414; *Burdin* v. *Ordway*, 88 Maine, 375.

The words "and not otherwise" refer rather to the acts of the parties to the tenancy than to the effects of their acts by operation of law. Were these words to have the enlarged meaning contended for by the plaintiff, not even the death of the parties, or the use of the premises for immoral purposes, would terminate the tenancy.

This construction of the statute seems to have been recognized as correct in *Smith* v. *Grant*, 56 Maine, 255, (1868), although the precise point decided was that replevin was not the proper process by which to oust the tenant and his family; also in *Robinson* v. *Deering*, 56 Maine, 359. So in Massachusetts, *Howard* v. *Merriam*, 5 Cush. 565; *Curtis* v. *Galvin*, 1 Allen, 215; *Rooney* v. *Gillespie*, 6 Allen, 74; *Pratt* v. *Farrar*, 10 Allen, 519; *Emmes* v. *Feeley*, 132 Mass. 346.

Our attention has been called to the case of *Young* v. *Young*, 36 Maine, 133, in which it was held that the tenancy at will was not terminated by alienation. The tenancy at will in that case was such by statute and not so at common law. See *Esty* v. *Baker*, supra, in which *Young* v. *Young* is commented upon and distinguished.

The case at bar is one of a tenancy at will at common law, and possesses all the qualities and incidents and is subject to all the limitations of such a tenancy.

It is the opinion of the court that the plaintiff's tenancy at will was determined by the lease from Mousam Lodge to Cushman prior to the eviction complained of.

Judgment for defendant.

WILLIAM FREEMAN *vs.* EUNICE D. LEIGHTON.

Washington. Opinion August 17, 1897.

Deed. Description. Flats. Upland.

Under the colonial ordinance of 1641-7, concerning flats, conveyances of the uplands are commonly expected to convey the adjoining flats.

But the proprietor of the upland and adjoining flats or shore has "the propriety" of both, and hence may convey the whole or any part of his "propriety." He may convey the uplands alone and retain the flats, or convey the flats alone and retain the uplands.

In an instrument of conveyance of land bordering upon tide water, a description of the boundary lines as running "to the shore," and "thence by the shore and upland to the first bound," operates to sever the shore from the upland and to exclude it from the conveyance.

ON REPORT.

This was a writ of entry to recover one-sixth part of a piece of sea shore and flats lying in Milbridge. It was admitted that William Freeman, father of the plaintiff, on July 6, 1837, owned the shore and flats claimed by the plaintiff, together with the upland connected therewith. That on July 6, 1837, Freeman, senior, conveyed to Solon Turner and Nathaniel Pinkham the following described premises: "Beginning at the Southeast corner of

the James Wallace lot, on the west side, and near the mouth, of Narraguagus river; thence running west one hundred and sixty-eight rods; thence south two hundred and seventy-six rods; thence east to the shore one hundred and ninety-two rods; thence northerly by the shore and upland to the first bound." The shore extends the whole length of the last described line. The premises in controversy are the shore and flats, between the upland and low water marks of the described lot. Defendant claimed to own the shore and flats under the above deed through mesne conveyances, and the plaintiff by descent from his father.

The parties agreed that if this deed from Freeman to Turner and Pinkham conveyed the shore and flats, the plaintiff was to become nonsuit, otherwise case to stand for trial.

Geo. E. Googins and William Freeman, for plaintiff.

H. H. Gray, for defendant.

When upland is conveyed without the flats, it must be by clear and unequivocal description in the conveyance excluding the flats. The owner of the upland adjoining tide water prima facie owns to low water mark; and does so in fact unless the presumption is rebutted by sufficient proof. *Montgomery* v. *Reed*, 69 Maine, 510, 514; *Doane* v. *Willcutt*, 5 Gray, 328, 335.

The following terms have been held to convey to low water mark: "By the sea or beach," "by the sea or shore," "by the sea or flats." *Doane* v. *Willcutt*, 5 Gray, 328; *Saltonstall* v. *Proprietors, etc.*, 7 Cush. 195.

Counsel also cited: *King* v. *Young*, 76 Maine, 66; *Babson* v. *Tainter*, 79 Maine, 370; *Stevens* v. *King*, 76 Maine, 197; *Pike* v. *Monroe*, 36 Maine, 309; *Mayhew* v. *Norton*, 17 Pick. 357; *Jackson* v. *B. & W. R. R.* 1 Cush. 575, 579; *Storer* v. *Freeman*, 6 Mass. 435, 440.

The first call in the description, beginning at low water mark, the third call "to the shore" might naturally be presumed to mean low water side of the shore, and hence by that call we are taken to low water mark.

The last call in the deed, "thence by the shore and upland to

the first bound", would not conflict with this position if it were not for the word "upland".

If the call read "thence by the shore to the first bound", there would be no contention that the deed did not convey to low water mark and thus convey the flats.

The word "upland" is repugnant to and inconsistent with the rest of the description. When there is a conflict in terms or in the parts of a description, there are rules of law which aid in a construction of the conveyance. Ambiguous words are to be construed most favorably to the grantee. Boone, R. Prop. § 304; *Esty* v. *Baker*, 50 Maine, 325, 331, and cases.

Where the two inconsistent parts of the description are equally balanced the grantee may choose that which is most favorable to him. 2 Am. & Eng. Ency. p. 498, and cases cited; *Esty* v. *Baker*, 50 Maine, 331; *Melvin* v. *Proprietors, etc.*, 5 Met. 27, and cases cited. The first part of the description usually prevails over the latter part, if both appear in the premises of the deed. 2 Am. & Eng. Ency. p. 498.

If then, starting at low water mark in the first call and running to low water mark in the third call, we reject the inconsistent and repugnant word "upland" the last call will be, "thence by the shore to the first bound" and the flats pass by the deed. If however we reject the words "near the mouth of Narraguagus river" we have no starting point as the call also locates the "South East corner of the James Wallace lot" at the same point, and hence our deed would be of no effect. If we should attempt to give effect to both of the inconsistent parts of the description, and also say that the third call only extends to the high water side of the shore, we should have an impossible description and the lines could not be made to meet, for the call "thence by the shore and upland" could never reach the first bound at low water mark. But if the inconsistent word "upland" be rejected the description is plain and the flats are included. *Parks* v. *Loomis*, 6 Gray, 467, 471, 472; 2 Am. & Eng. Ency. of Law, p. 498, and cases cited.

If the parties did not intend to convey the flats it does not seem

that they would have commenced at low water mark, and thence run west 168 rods, and thus include in their measurement twenty-five or thirty rods of flats; but would have commenced their measurement at the upland, which they could just as well have done.

The presumption would naturally be also that in the third call, "thence east to the shore 192 rods", that they again measured across the flats, the difference in the length of the side lines probably being the difference in the width of the flats at the two points.

From the cases cited and the general well-known rules for the construction of deeds, it seems that the word "upland" must be rejected in order that the intention of the parties must prevail.

If the intention of the parties is considered obscure, then the first call must govern; the deed must be taken most strongly against the grantor and most favorably for the grantee; the presumption that the flats belong to the owner of the upland stands unrebutted, and the title to the flats held to have passed by the deed from the ancestor of the plaintiff and to be now in the defendant.

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

EMERY, J. It is true, as contended by the defendant, that the colonial ordinance of 1641–7 concerning flats evidently intended their annexation to the adjoining upland in ownership. The language of the ordinance is: "It is declared that in all creeks, coves and other places about and upon the salt water where the sea ebbs and flows, the proprietor of the land adjoining shall have propriety to low water mark," etc. The flats are thus made in a measure appurtenant to the adjoining upland. Conveyances of the upland are commonly expected to convey the adjoining flats.

But the proprietor of the upland and adjoining flats or shore has the "propriety" of both, and hence may convey the whole or any part of his "propriety." He may convey the upland alone and retain the flats, or convey the flats alone and retain the upland. This is a familiar proposition enunciated in numerous decisions

from *Storer* v. *Freeman*, 6 Mass. 435, to *Brown* v. *Heard*, 85 Maine, 294. The question, therefore, often arises, as in this case, whether the language used in the conveyance of the upland shows an intention to exclude and retain the adjoining flats or shore.

The land, the subject matter of this conveyance, is situated upon the west side of the river, a river in which "the sea ebbs and flows." The grantor declared in terms that the south line should extend east "to the shore." He then declared that the next line, the east line, should extend northerly "by the shore and by the upland," to the first bound.

He thus fastened this last line to the eastern edge of the upland and the western edge of the shore. He drew it between the upland and the shore. The court cannot draw it in any other place or direction. This line, drawn by the grantor and accepted by the grantee, separates the shore from the upland and excludes it from the conveyance.

The defendant reminds us that this last line is declared to run to the "first bound," which he urges is on the east or river side of the shore, and hence that the last line must run on that side of the shore to reach the first bound. Even if it were true that the first bound is on the river side of the shore, which fact does not appear, the line in question is too firmly wedged between the upland and the shore, by the explicit language describing it, to be wrenched away by the description "first bound" as the end of the line. The "first bound" must be held to be the first boundary line, to which line or "bound" the last line extends, hitting it at a point between the shore and the upland.

Action to stand for trial.

FAIRFIELD SAVINGS BANK, In Equity,

vs.

LUMBER SMALL AND HOWARD W. DODGE, Executor.

Kennebec. Opinion September 15, 1897.

Equity. Interpleader. Evidence. Savings Bank Deposit. Gift. Delivery. R. S., c. 47, § 99; c. 82, § § 93, 98.

A savings bank brought a bill in equity asking that the husband, on the one side, and the executor of the will of his deceased wife, on the other side, be required to interplead respecting the ownership of a deposit standing on the books of the bank in the name of the wife. Both contending parties filed their respective answers, each claiming the deposit as his own.

Held; that the existence of all the essential conditions upon which the equitable remedy of interpleader depends having been satisfactorily established, the bill was properly sustained and a decree of interpleader duly entered.

By agreement of the parties, the answers filed were to be taken as the pleadings of the contending parties.

Held; that at the time of the trial, the real contestants for the funds were the husband, on the one side, and the executor, on the other; and that thereafter the original plaintiff, the savings bank, occupies the position of a mere stakeholder, neither having nor claiming any interest in the subject matter. The remedy of the bank is exhausted by the decree that the claimants do interplead with each other, and it is then "wholly without the controversy."

Held; that the husband is not a competent witness under the statute, (R. S., c. 82, § 93) and that his deposition cannot be considered in determining the question of the ownership of the fund, pending between himself and his wife's executor.

When it appears that the evidence fails to disclose any indication, aside from the fact of the deposit itself standing in the name of the wife, on the part of the husband to make an absolute gift of the money so deposited with his wife, but on the contrary, the inference is irresistible from the subsequent conduct and declaration of the parties, that it was mutually understood by them to be his money, and subject to his control the same as other money deposited in his own name, *held;* that the deposit is the property of the husband.

Also; the fact that the wife prior to her death had access to the receptacle in which her husband's papers were kept, and took the book into her personal custody without his knowledge, does not constitute a delivery of the deposit book to the wife.

Held; that, in this case, there is an absence of proof of both the intent to give and of any delivery to complete a gift.

ON REPORT.

This was a bill of interpleader, brought by the Fairfield Savings Bank against the defendants, to determine the ownership of a deposit in that bank. Both defendants claimed the fund and after a decree, requiring the defendants to interplead, was made in the court below, the case was reported to this court to be heard on bill and answers of the defendants and the testimony.

The deposition of one of the defendants, Lumber Small, was offered in evidence below, and was objected to as inadmissible under the statute. The parties agreed that the question of its admissibility should be determined by the law court.

The case is stated in the opinion.

Edmund F. and Appleton Webb, for defendant Small.

S. S. and F. E. Brown, for defendant Dodge.

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

WHITEHOUSE, J. The Fairfield Savings Bank brings this bill in equity asking that Lumber Small, on the one side, and Howard W. Dodge, executor of the will of Olive C. Small, the deceased wife of Lumber Small, on the other side, be required to interplead respecting the ownership of a deposit of $786.76 standing on the books of the bank in the name of Olive C. Small.

It is alleged in the bill that at the time of the decease of Olive C. Small, on the fifteenth day of May, 1896, she had in her possession deposit book No. 2384, issued by the plaintiff bank, showing an account of deposits and withdrawals, kept in her name from 1887 to 1895, with a balance of $786.76 in favor of the depositor; and that this money was claimed by Lumber Small, the surviving husband of Olive C., as his property, on the ground that it was his money when deposited in the bank; and that it was only placed in the name of his wife in trust for himself, for the reason that he already had deposits in the same bank in his own name to the full limit of $2,000 allowed by law.

Thereupon the contending parties filed their respective answers,

Lumber Small claiming the deposit as his own in accordance with the representations in the bill, and Howard W. Dodge claiming it as a part of the estate of Olive C. Small.

The existence of all the essential conditions, upon which the equitable remedy of interpleader depends, having been satisfactorily established, the bill was properly sustained and a decree of interpleader duly entered. By agreement the answers filed were to be taken as the pleadings of the contending parties. Upon these pleadings, which duly presented the issue between the contending parties, the evidence was taken by the presiding justice and reported for the consideration of this court. The cause is now ripe for a decision upon the merits of the controversy between Lumber Small and the representatives of the estate of his wife, Olive C. Small, upon so much of the evidence as shall be deemed legally admissible. *Farley* v. *Blood*, 30 N. H. 354; *Atkinson* v. *Manks*, 1 Cowen, 691; *Savings Bank* v. *Fogg*, 83 Maine, 374.

In support of his contention the deposition of Lumber Small, who was ninety-two years of age, and unable to attend court, was offered in evidence, and excluded; but by consent of counsel it was subsequently made a part of the report, to be considered if held admissible by this court.

It is the opinion of the court that Lumber Small was not a competent witness under our statutes, and that his deposition cannot be considered in the determination of the question pending between himself and the representative of his wife's estate. Section 93 of chap. 82, R. S., providing that no person shall be excluded from testifying by reason of his interest in the result of the suit, is expressly declared by section 98 of that chapter to be inapplicable to cases "where, at the time of taking testimony, or at the time of trial, the party prosecuting, or the party defending, or any one of them, is an executor or an administrator," etc. It has been seen that, at the time of the trial, the real contestants for the fund in this case are Lumber Small, on the one side, and the executor of the will of Olive C. Small, on the other. This is the obvious and necessary result of the operations of a bill of interpleader. One of the principal elements involved in the remedy is

that the original plaintiff must occupy the position of a mere stake-holder, neither having nor claiming any interest in the subject matter. He must be entirely indifferent between the conflicting claimants, and be ready and willing to pay the money in dispute to the one found to be rightfully entitled. With the result of their dispute he has no concern. His remedy is exhausted by the decree that the claimants do interplead with each other, and he is then "wholly without the controversy." 3 Pom. Eq. § § 1320–1325, and cases cited.

But it is contended that the substance of the testimony which Lumber Small might be expected to give in support of his claim, as stated in the interpleading bill and in his answer, fully appears in the direct testimony of other witnesses and in the inferences to be drawn from the circumstances disclosed.

Lumber Small has had three wives, all of whom are deceased. By the first wife he has six children now living, but no children by either the second or third wife. It appears from the evidence that Olive C. Small, the third wife, had no property of her own at the time of her marriage with Lumber Small, and never afterwards acquired any in her own right. In November, 1891, Mr. Small made provision for the support of himself and wife, Olive C., by conveying to her brother, Geo. F. Rowe, a farm with other property in Benton, of the estimated value of $1200 or $1500 in the aggregate, and taking from Rowe a bond secured by a mortgage of the same property, for the maintenance of himself and wife during their lives. Under this arrangement Mr. and Mrs. Small both lived in the family of her brother until November 28, 1895, when Mr. Small became dissatisfied and went to live with his daughter, Mrs. Parkman, in Unity. Mrs. Small remained in her brother's family and received her support there until her death.

It appears from the copies of the accounts on the books of the Fairfield Savings Bank and from the deposit books in the case, that Lumber Small commenced to make deposits in that bank in his own name December 3, 1873, first receiving deposit book No. 459, and has kept an account there from that time to the present. In January, 1886, the amount of his deposits was $1980.86, and,

with the dividend added, on the first day of May following, $2020.87. It was in this state of his account that on January 6th a deposit of $200 was made on a separate account, evidenced by deposit book No. 2098, with the caption "Olive C. Small in account with the Fairfield Savings Bank." On this account three other deposits were made within six months following, aggregating, with the dividend, $411.06, which was all withdrawn on November 5 of the same year, and that account closed. On the same day he closed the account standing in his own name on book 459, by withdrawing the entire balance of $1908.27, and opened a new account in his own name by depositing $1319.33, receiving deposit book No. 2236.

But November 1, 1887, this account again reached a total of deposits and dividends of $1960.88, and on October 6, while this account was thus near the maximum limit for any one depositor, he again opened an account in the name of Olive C. Small, and deposited $300 on that account as shown by deposit book No. 2384, which is the one here in question. The amount of this account was increased by two other large deposits, to $2,000 May, 1886, and reduced by subsequent withdrawals to $786.76, the amount now in controversy. In the mean time the account in his own name, under the effect of numerous deposits and withdrawals, fluctuated between $2,000 in May 1888, and $1881 in June 1895, when there was a withdrawal of $800.

It appears from the testimony of Charles Rowell, who was treasurer of the bank from August, 1887, to 1894, comprising the entire period of the deposits and withdrawals on the account in question, that he issued this deposit book in the name of Olive C. Small and delivered it to her husband; that Lumber Small afterwards brought the book to the bank, and made all the deposits and withdrawals on that account; that he had no acquaintance with Olive C. Small, and that all the business was done with her husband. Her signature does not appear upon the books of the bank.

Mr. Pratt, Rowell's predecessor as treasurer of the bank, died before this controversy arose.

From this evidence alone it is not difficult to discover the relation of cause and effect between the fact that the account in his own name equaled or exceeded the limit of $2,000, at the dates above named, and the opening of a new account in the name of his wife at the corresponding periods. It is true, that the statute (R. S., c. 47, § 99,) provides that savings banks shall not receive from any one depositor, directly or indirectly, over $2,000, and that "no interest shall be paid to any one depositor for any amount of deposit exceeding said sum." But it is established beyond question by all the evidence that every deposit made in the name of Olive C. Small was the money of Lumber Small at the time it was deposited; and whatever effect any such evasion of the law respecting the limit of the individual deposit might have upon his right to recover either principal or interest from the bank, it cannot of itself operate to confer any title upon Olive C. Small. Her right to the deposit must depend upon proof of an intent on the part of Lumber Small to make an absolute gift of the money to her, and of the delivery requisite to effectuate such intent. *Brabrook* v. *Savings Bank*, 104 Mass. 228; *Parkman* v. *Savings Bank*, 151 Mass. 218; *Savings Bank* v. *Fogg*, 83 Maine, 374. It is a matter of common knowledge that when a depositor's account in his own name has reached the maximum limit allowed by law, he often opens a new account in the name of some other member of his family, but in fact for his own benefit; and in such a case evidence that he had thus deposited the full amount allowed in his own name "is admissible as offering a possible explanation of the form adopted other than the intention to make a gift." *Parkman* v. *Savings Bank*, 151 Mass. supra.

In the case at bar, careful examination of all the evidence, aside from the fact of the deposit, fails to disclose any indication whatever of a purpose on the part of Lumber Small to make an absolute gift of this money to his wife; but, on the contrary, the inference is irresistible from the conduct and declarations of both parties, for more than seven years after the deposit was made, that it was mutually understood by them to be his money, subject to his management and control to the same extent as the money deposited in his own name.

It does not appear from the testimony of treasurer Rowell that any declaration of a gift to the wife was made at the time of the deposit, but it affirmatively appears that Lumber Small continued to have possession of the deposit book in question and to exercise dominion and control over the account, personally making all the deposits and withdrawals precisely the same as he did respecting the accounts and deposit books standing in his own name.

G. F. Tarbell, a disinterested witness, states that in May, 1895, at the request of Mr. Small, he prepared a draft of a will to be executed by him; that he was present when it was shown to Mrs. Small, and that she objected to it because it contained no provision in her favor, saying that all she wanted was a maintenance out of the property, but she had no property whatever, and if her brother, Mr. Rowe, should give up the farm and leave her, she would have nothing but the place. No reference was made by either of them to the money deposited in her name. His only reply was that he considered the arrangement made with Mr. Rowe sufficient for her support; but he consented to have a provision inserted in the will that a certain amount of personal property should be held by the executor of the will in trust for her support if required, and with that she then seemed satisfied.

But her subsequent helplessness from rheumatism appears to have been the occasion for renewed anxiety in regard to her means of support, and thereupon, apparently without the knowledge of her husband, she removed the bank book in question from the trunk or basket in which it had been kept, and thereafter held it in her own custody.

Martha A. Parkman, the daughter of Lumber Small, testifies that she had a conversation with her step-mother, Mrs. Small, a short time before she died, in relation to the bank book, as follows: "I told her there seemed to be a bank book that father was very much worried over. I asked if she would tell me about it so I would understand it. She said she would. She said father put some money into the savings bank and took out a book in her name. . . . . He wanted the book one day—called for it. She told him she could keep it just as well,—it would be just

as safe with her as it would with him. Now, she says, I will tell you why I kept it—because these people (meaning George Rowe, and his wife, with whom she was then living), never had anything of their own in the world until they came there . . . . and they are liable to get through, make way with what he has earned. And she says if your father should die before I do, what would become of me; and if I die before he does, there is his book . . he will find it just as he left it." In this interview there was no suggestion on the part of Mrs. Small that she ever understood that the deposit was made or intended as a gift to her, and her excuse for holding it in her custody was not placed upon that ground. It is true that Mrs. Parkman, as an heir of Lumber Small, is interested in the result of this suit; but equally significant if not more important testimony upon this feature of the case is given by Mrs. Rowe, the wife of Geo. Rowe, with whom Mrs. Small was living. She was called as a witness by the other side, and on cross-examination testified as follows on this point:

"What did Mr. Small leave for? I don't know what he left for. I think he got mad because she wouldn't let him have the book—all I know about he left for. He wanted to lend some money, and she wouldn't let him have the book to keep it. And she said: You have made your will and you have left nothing for me, and says: I don't know what might happen to George and his family, and I think I will keep it myself." . . .

"What did he say?

"He said he wanted the book, and if she didn't give it up in such a time he would send somebody after it. . . . . That was when he left, November 28, 1895.

"And he claimed the money to be his and she claimed she would hold the book and make the most of it? Yes sir.

"What did she do with it?

"I took care of it—put it away for her."

After this colloquy and after her husband went to live with his daughter, it is true that Geo. F. Rowe, claiming to be acting for Mrs. Small, made an ineffectual attempt to draw money from the bank on this account, and about a month before her death, Mrs.

Small appears to have signed a will bequeathing this money to her brothers and sisters; but from all the evidence it is impossible to resist the conclusion that this deposit was never intended as an absolute gift to Olive C. Small.

Again, "to constitute a valid gift inter vivos the giver must part with all present and future dominion over the property given. He cannot give it and at the same time retain the ownership of it. There must be a delivery to the donee. . . . . There must be an intention to give, and this must be carried into effect by an actual delivery." *Robinson* v. *Ring*, 72 Maine, 140. See also *Northrop* v. *Hale*, 73 Maine, 66; *Savings Bank* v. *Merriam*, 88 Maine, 146.

In this case there is no evidence that Lumber Small ever delivered this deposit book to his wife to be retained as her property. The fact that she had access to the receptacle in which his papers were kept, and took the book into her personal custody without his knowledge, does not constitute such delivery. No act is shown to have been done by him for the purpose of passing the title to her. There is an absence of proof of both the intent to give and of any delivery to complete the gift.

It is, therefore, the opinion of the court that the deposit in question is the property of Lumber Small.

Decree accordingly.

CHARLES W. MULLEN *vs.* PENOBSCOT LOG-DRIVING COMPANY.

Penobscot. Opinion September 20, 1897.

Log-Driving Company. Corporation. Waters. Dams. Constitutional Law. Spec. Laws, c. 407, 1846; 86, 1847; 243, 1849; 379, 1864; 59, 1869; 214, 1876; 262, 1883.

By the act incorporating the Penobscot Log-Driving Company, passed in 1847, the Legislature in terms authorized and in effect required the company to "drive all logs and other timber that may be in the West Branch of Penobscot River between Chesuncook Dam and the East Branch to any place at or above the Penobscot boom where logs are usually rafted." At that date the only rafting place was, and ever since has been, at the Penobscot boom, and no one then expected there ever would be any other. To enable the company to successfully perform the imperative and responsible duties imposed on it, the legislature granted to it the superior and controlling use of the waters of the West Branch for its purposes. To that end it was authorized to clear the river of any obstructions to log-driving; to maintain dams and booms and other necessary erections; to create flowage upon lands of private owners, and pay for any injury caused thereby, under the exercise of the power of eminent domain; and to adopt modes and methods generally by which it could collect together great masses of water, and control and utilize them for driving all the logs in that branch of the river together.

An unbroken practice of this kind continued until 1895, when the plaintiff had a quantity of pulp-logs in the West Branch, below Chesuncook Dam and above the East Branch, which he intended to have driven down to Montague, not a place where logs are usually rafted, situated some distance on the main river above the Penobscot boom. He claimed that he was entitled to a head of water through the gates of Chesuncook Dam to drive his logs in advance of the company's general drive, while the company claimed that it had the right to drive his logs with its own.

Held; That the company was not obliged to drive the plaintiff's logs; nor had it the right to drive them without the owner's consent, inasmuch as Montague was not at the time a usual rafting place for logs.

Held, also; That the plaintiff was not entitled to any portion of the stores or reserves of water at the time already accumulated within the dams of the defendant company, and that the company could not be required to release any portion of the same through its gates or works for the benefit of the plaintiff.

Held, further; That the plaintiff was not entitled to draw through the company's dam what would be the natural run of the river, so long as the company was retaining it for the acquisition of stores of water, provided it

needed the same or would be likely to need the same for driving its own logs.

It is too late in the history of the question in this State to contend that the State has not the constitutional power to grant superior, or even exclusive privileges, in the use of its public rivers either to persons or corporations.

ON REPORT.

This was an action on the case in which the plaintiff claimed damages from the defendant corporation, chartered by the State of Maine to improve the navigation of Penobscot river, and its tributaries, to facilitate the driving of logs. The plaintiff claimed that he was injured by withholding of the water needed to drive his logs; that he was entitled by law to enough of the water stored by the dams of the defendant corporation to drive his logs. He also claimed that he was entitled to the use of the natural flow of the river; and, in an additional count, charged the defendant corporation with depriving him of water for his drive in a needless and unreasonable manner.

The defendant by its pleadings claimed that, under the provisions of its charter, it was alone entitled to drive the logs in question; that the plaintiff had no right to drive his logs at this place, although admitting that Montague, the destination of the plaintiff's logs and which place of destination was made known to the defendant, was not a place where logs were usually rafted within the meaning of the provisions of its charter; and also admitting that such of the plaintiff's logs as it took into its drive it did not deliver at said Montague.

The defendant further claimed that it was entitled to the natural flow of the river for driving purposes to the exclusion of the plaintiff; and that it was entitled to the use of all the water in the river stored by its dams for driving purposes to the exclusion of the plaintiff.

Upon the reading of the writ, and the pleadings in the case, and after admissions by the defendant that Montague, the place of destination of plaintiff's logs, while above the Penobscot boom, was not a place where logs were usually rafted within the meaning of the provisions of defendant's charter, and that such of plaintiff's logs as were in its drive it did not deliver at Montague, though

plaintiff himself there stopped such of his logs as he could, the justice presiding reported the case to the full court to see if the action was maintainable, and upon what grounds maintainable, before an expensive trial upon the facts. The case was then submitted to the full court upon the following propositions: If the action can be maintained by proof upon the count in the writ alleging damages for being deprived of the natural run of water in the river, or if maintainable upon the count in the writ which declares for damages sustained by the plaintiff by the defendant's refusal to allow them the use of the waters kept in reserve by the defendant's dams, then the action was to stand for trial. Or, if the court should be of opinion that the action may be maintained under the other count of the writ declaring for damages in general terms, but covering, perhaps, no more than the causes alleged in the other two counts, then the action was to stand for trial. And if, in the opinion of the court, the action was not maintainable upon either of the counts in the writ, then the plaintiff to be nonsuit.

All the public and private and special acts of the legislature touching the subject to be regarded as facts proved in the case.

The facts are stated in the opinion.

C. F. Woodard, for plaintiff.

Independently of legislation the plaintiff at common law had the right to drive his logs, and was entitled to the reasonable use of the natural run of the water for the purpose of driving his logs. *Moor* v. *Veazie*, 32 Maine, 343, 356; *Pearson* v. *Rolfe*, 76 Maine, 380, 384–388. The defendant, by the provisions of its charter, was not given the exclusive right of navigation.

Rules of construction of legislative acts: *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659, 666; *Davis* v. *Log Driving Co.*, 82 Maine, 346, 350; *Improvement Co.* v. *Brown*, 77 Maine, 40, 41.

The provisions of defendant's charter do not cover such a case as this. The language "to any place at or above the Penobscot boom, where logs are usually rafted" was not inserted without a purpose. Hence the legislature said, not all the logs and other timber that might be in the West Branch of the Penobscot river, but only all the logs and other timber that might be in the West

Branch of the Penobscot river destined for Penobscot boom, or some other place where logs are usually rafted.

It would require the clearest and most unequivocal language, on the part of the legislature, to show that it intended to deprive the public of the use of the public highway such as is the West Branch of the Penobscot river for the purpose of driving logs and lumber, that being practically the only use of which said public highway ever has been or is capable, especially in view of the rule of construction already stated.

That the legislature had no such intention, and did not suppose that no one, other than the defendant, had the right to drive logs and lumber in the West Branch of the Penobscot river, is shown by other action of the legislature not far removed in point of time. Act approved June 22, 1847, (North Twin Dam Company,) and Act approved August 2, 1847, and by which that dam was made free to the public generally without the payment of tolls. Defendant's exclusive claim, under its charter, is incompatible with the act relating to the North Twin Dam. *McPhetres* v. *Moose River Log Driving Company*, 78 Maine, 329, 335.

Weymouth v. *Penobscot Log Driving Co.*, 71 Maine, 29, was a case that involved the duty of the defendant to drive all logs and timber, and not its right to the exclusive navigation of the river as against other parties. That case did not undertake to declare that the legislature had the power to confer upon the defendant the exclusive right to navigate a public highway, as against other parties seeking to exercise the right of navigation, in such public highway.

The exclusion of the plaintiff from the right to drive his logs in the West Branch of Penobscot river, a public highway, was beyond the power of the legislature. *Moor* v. *Veazie*, 32 Maine, 343, 356.

The claim that the legislature had the power to exclude the public from this common right of navigation cannot be justified on the ground that the right to have logs driven by the defendant company was substituted for it. If the defendant company should drive any logs it would have to be paid for so doing. The legisla-

ture cannot deprive one of the right to drive his own logs with his own labor, and compel him to employ and pay some one else to drive his logs. This would be to deprive one without compensation of the inherent right to labor on his own property. To compel one to hire and pay another for doing what he might do himself, and to take from him the right to do it himself, furnishes no equivalent or compensation for the right taken away.

All the cases show that the owners of such dams are bound to furnish to the public, to any one having occasion to use them, the reasonable use of all the facilities furnished by such dams upon the terms prescribed by the legislature. All the acts show that they were to facilitate the transportation of logs and lumber generally down the rivers, and without any limitation as to the parties by whom the transportation should be conducted. *Improvement Company* v. *Brown*, 77 Maine, 40, 42; *Lewiston Steam Mill Co.* v. *Richardson Lake Dam Co.*, 77 Maine, 337, 339. Under the doctrine in the last named case, the public generally became entitled to the use of the dam upon the payment of tolls, and everybody having occasion to use the facilities of the dam were entitled to its reasonable use upon the payment of tolls. The water stored by it had been for the use of the public before, upon payment of tolls. After it was paid for, the public had the same right to use it, and without toll. After the defendant became voluntarily the owner of said dam, the plantiff had the right to a reasonable use of all its facilities, that is, to the water accumulated by said dam, the stored water held back by it, for driving purposes.

F. H. Appleton and H. R. Chaplin, for defendant.

First. The state may authorize a corporation to stop the natural flow of a river and to erect dams on the river and store water therein. Second. It may give a corporation the exclusive right to navigate a river. *Wilson* v. *The Black Bird Creek Marsh Co.*, 2 Peters, 251, approved in *State* v. *Leighton*, 83 Maine, 419; *Bailey* v. *P. W. & B. R. R. Co.*, 4 Harrington, 389, (44 Am. Dec. 593); *Treat* v. *Lord*, 42 Maine, 560; Wood on Nuisances, § 472.

A public way on land or water may be discontinued by authority of the legislature. *Conn. River Lumber Co.* v. *Alcott Falls Co.*, 65 N. H., 290; *Spring* v. *Russell*, 7 Maine, 273; *Lee* v. *Pembroke Iron Co.*, 57 Maine, 481; *Treat* v. *Lord*, supra; *Pound* v. *Turck*, 95 U. S. 459. In *Treat* v. *Lord*, supra, the court says: "The right to control, abridge, or even destroy the public easement in a stream for the passage of logs, exists in the state by virtue of its sovereignty or right of eminent domain." When the right to use a highway is taken away from the public generally, it may be done without compensation. *Lee* v. *Pembroke Iron Co.*, supra. The state also has the right to give to any one person, or corporation, the exclusive right of navigation. *Moor* v. *Veazie*, 31 Maine, 360; Idem, 32 Maine, 343, and approved by the U. S. Supreme Court in 14 How. 568.

The practical operation of North Twin Dam is as follows: Water is stored during the spring freshet in the dam at Chesuncook and to some extent at North Twin. The logs to be driven from the headwaters of the West Branch are all gathered in Chesuncook Lake; then the gates at Chesuncook are hoisted, the logs are run out and the water, which at that time flows from the Chesuncook Dam with the logs, runs down the West Branch and is used to fill North Twin Dam. The filling of the North Twin Dam causes the water stored there, when the dam is full, to flow back some ten or twelve miles. When the logs that are run out of Chesuncook reach the water which flows back from North Twin, then the dam at Chesuncook is closed, and the logs are driven upon the North-Twin-stored-water into North Twin Dam. When the logs reach North Twin Dam, that dam is supposed to be full, and Chesuncook Dam is full less what was used to run the logs down into North Twin Dam, plus what water has run into the Chesuncook Dam since it was shut down; then the gates at North Twin are hoisted, the drive run out of North Twin, and by a judicious use of the stored water in the two dams, the logs are run into the boom.

By this means a two year's drive is converted into a one year's drive. Without the dam at North Twin, and its use as above stated such a thing would be impossible.

Pulp-logs and pulp-mills were not known at the time of granting the defendant's charter. If the condition of things has changed since the charter was granted, no rights which the company had can be taken away from the company by the change, and if the company to-day has rights which it ought not to have, or if individual owners of logs have not the rights which they ought to have, the remedy is the legislature. The plaintiff could sort his logs at his own expense at Montague if he saw fit, and if any legal doubts exists as to his right to do this, he must seek redress from the legislature. Exactly the same condition of affairs exists on the Kennebec river, which fact is a complete answer to the criticism of the plaintiff.

If the plaintiff could claim the natural flow of the West Branch at any time he wanted it, any other person who wanted to drive his own logs on the West Branch could claim the natural flow of the West Branch at such time as he might want it; and a sufficient number of persons having such right to the natural flow of the river could prevent the storing of any water in such dam, thus rendering the dam of absolutely no value whatever.

The right to maintain a dam, necessarily carries with it the right to store water therein and such stored water, in a dam built under legislative authority for driving purposes, belongs to the owners thereof, just as the stored water in a mill dam belongs to the owners thereof, as was held by this court in *Pearson* v. *Rolfe*, 76 Maine, 386, for both structures are alike legalized and protected by the statutes of the state.

If the contention is sound, that under the act of 1847, the stored water in the North Twin and Chesuncook dams is free to the public in a reasonable manner, then it is free not only to the log driver, but to every mill owner and manufacturer on the river, and the exclusive use of the water for driving purposes vested under the act of 1846 in the defendant company is taken away, and the power to accomplish the purposes for which it was incorporated is taken away at the same time, and thus the defendant's charter is to that extent annulled.

The doctrine of a reasonable use in the public, can never obtain

where there is an exclusive use of the same thing already vested in some person or corporation. With the obligation to drive all logs within its limits, it follows that the exclusive right to use all water within its limits for driving purposes belongs to the defendant.

The plaintiff's construction makes the logs driven by the company bear all the expense of maintaining the driving apparatus on the West Branch; thereby holding out an inducement for every log owner not to put his logs into the West Branch drive—thus practically, tending to put the driving back where it was before the Penobscot Log-Driving Company was chartered.

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

PETERS, C. J. The plaintiff had certain pulp-logs that had been driven out of a stream tributary to the West Branch of the Penobscot River, at a place below the Chesuncook dam, a structure maintained by the defendant corporation on the West Branch for the purpose of creating a head of water for driving logs; and, designing to have his logs driven down the West Branch as far as Montague, where there was a mill for manufacturing such logs into pulp, he desired to drive them along in advance of the main body of logs to come down the West Branch, knowing that, if his logs became mixed with those logs, many of them would necessarily be carried into Penobscot boom, some miles below Montague, there being no booms and gap for the separation and sorting of logs at the latter place,—the Penobscot boom being the place of destination of logs generally coming down all the branches of Penobscot river. Having a scarcity of water for driving his logs in the manner and at the time desired by him, the plaintiff claims that he was by law entitled to water enough from the stores reserved within the corporation dam for effectuating his purpose. And that is the principal question presented here.

It cannot reasonably be questioned that the legislature intended to impose important responsibilities on the company and to grant to it powers and privileges commensurate with the responsibilities

and duties to be by it assumed; and that, to enable it to perform the duties of its trust effectually, it conferred upon the company, if not an exclusive, certainly a superior and prior right to the use of all the head of water available on the river for the purpose of driving logs. The company has no stock and can declare no dividends. It represents the public and not individuals.

There was great reason for such legislation. Experience had demonstrated that a combined drive of all the logs in that branch of the river and its tributaries could be successfully made by a use of all its waters combined, when separate drives by a separation and division of the same water would as a rule result in failure. It was apparent that logs could be driven more cheaply and expeditiously together. Further, individual owners could not afford to improve the navigation of the river while the company could. Under the old experience some owners would get their logs to the exclusion of others, and thereby useless competitions and strifes were engendered. Under the new experience all owners get their logs alike. And the new system has stood the test of time, for just half a century, successfully and well.

A glance at some portions of the acts affecting the company will illustrate the legislative intent in relation to the exclusiveness of both the duties and powers belonging to the company. All of such acts are enumerated in the special plea or brief statement filed by the defense, there being fourteen of them in all.

Section one of its charter, approved August 10, 1846, describes what its active duties shall be: "Said company may drive all logs and other timber that may be in the West Branch of Penobscot river *between the Chesuncook Dam* and the East Branch, to any place at or above the Penobscot boom, where logs are usually rafted, at as early a period as practicable. And said company may for the purpose aforesaid, clear out and improve the navigation of the river between the points aforesaid, remove obstructions, break jams and erect booms where the same may be lawfully done, and shall have all the powers and privileges and be subject to all the liabilities incident to corporations of a similar nature."

Section three of the charter informs the owners of logs of their

duties as follows: "Every owner of logs or other timber which may be in said West Branch, between said Chesuncook dam and said East Branch, or which may come therein during the season of driving and intended to be driven down said West Branch, shall on or before the fifteenth day of May, in that year, file with the clerk a statement in writing, signed by such owner or owners, his or their authorized agent, of all such logs or timber, the number of feet board-measure of all such logs or timber, and the marks thereon; and the directors or one of them shall require such owner, or owners, or agents, presenting such statement to make oath that the same is, in his or their judgment and belief, true, which oath the directors or either of them are hereby empowered to administer. And if any owner shall neglect or refuse to file a statement, in the manner herein prescribed, the directors may assess such delinquent or delinquents, for his or their proportion of such expenses, such sum or sums as may be by the directors considered just and equitable."

By a special act, approved July, 1849, the jurisdiction of the company was extended to the head of Chesuncook lake instead of at the foot of the lake as before, and certain additional duties were imposed on the company by the act, which are as follows: "Section 1. The Penobscot Log Driving Company may drive all logs and lumber between the head of Chesuncook lake and the East Branch, instead of between the Chesuncook dam and the East Branch, and with all the powers, rights and privileges, and under the same conditions, limitations and restrictions, as is provided in the act, to which this is additional; and may assess according to the provisions of said act, a sum not exceeding twenty-five cents for each thousand feet, board measure, in addition to the sum of sixty-two and one-half cents, as provided for in the fourth section of said act, for the purpose of paying the expenses of driving said logs and lumber across said lake.

"Section 2. The said Corporation may, and it shall be their duty to build all the boom or booms which may be necessary above the lake, but not to impede the navigation of the same."

By an act, approved March 2, 1864, the duties of the company

are defined and limited in a certain respect, as follows: "Section 1. Said Company shall adopt as the basis of their assessments the boom scale of the Penobscot Boom, or what shall be equal to that scale, to be determined in all cases of doubt by the Directors.

"Sec. 2. Said Company shall be under no obligation to drive any logs coming into the Chesuncook lake at any other point than from the main West Branch, unless seasonably delivered to them at the head or outlet of said lake."

Again, by an act approved February 11, 1869, the powers of the company are enlarged, as follows: "Section 2. Said Company may make contracts for driving or assist in driving logs outside of the limits of the Company, on the Penobscot waters; and for any sum due for such driving, the same lien shall exist and be enforced in the same manner as is provided for other logs.

"Sec. 3. Said Company may build or assist in building, and keep in repair any steamboat or other craft, that in their opinion or in the opinion of the Directors may be advantageous in facilitating the progress of the drive, the expense of which may be apportioned upon the logs of different years as they may think proper."

Still again, by act approved January 28, 1876, the duties of the company were in part defined, as follows: "Section 2. Said Company shall be under no obligation to drive any logs coming into the Chesuncook lake at any other point than from the main West Branch or the Caucomgomoc stream, unless seasonably delivered to it at the head or outlet of said lake, or at the mouth of said stream."

By an act approved February 24, 1883, in order that the company might increase its supplies of water, and for other purposes, it was further provided, as follows: "Sec. 1. The Penobscot Log-Driving Company may build and maintain a dam across the outlet of each of the lakes Caucomgomoc, in the County of Piscataquis, and Millinocket, in the County of Penobscot, to raise a head of water on each of said lakes for log driving purposes only. Said corporation may take land on which to build each of said dams, and may flow contiguous lands. For land taken, and

for land flowed, the parties may agree upon the damages, but if the damages are not mutually adjusted, the owner, or party injured, may be compensated in full by the payment of such sums as may be determined by the commissioners to be appointed by the supreme judicial court in and for the county where the land is situate, etc., etc., etc."

Now there was an obstacle, in the way of a complete control of the river by the defendant company, in the existence, within its limits under its amended charter, of a company owning a dam at the outlet of Chesuncook lake with a right of collecting a toll on all logs passing over such dam. The company could not purchase the dam having neither money nor the means of raising money to buy it with, as it was empowered to assess logs only for the legitimate and necessary expenses of driving the logs. But a scheme was hit upon to allow the toll to continue until the owners should be reimbursed for the balance due on its cost, with expenses and interest, and the dam then to become the property of the log-driving company. And so the legislature provided, among other details, by chapter 86 of the Laws of 1847, certain rights for the owners of Chesuncook Dam, "upon the further condition that if said corporation shall collect the sum in tolls as provided in the second section of this act, under and by virtue of this act, it shall be in full compensation to said corporation for their said dam, and then the same shall become the property of the Penobscot Log-Driving Company, and be free to the public without the payment of toll." The same act contains precisely the same provisions as to the North Twin dam situated on a lower lake, the defendant company to have and own the same when the owners should receive compensation for their outlay by collection of the tolls prescribed by the legislature. The words in this act, "and shall be free to the public without the payment of toll" was an awkward way of saying that the franchises of such corporations should be terminated, but the words are without special significance in this connection. The legislature takes the property in these dams from those corporations and gives it to the Penobscot Log-Driving Company, for the purpose for which the company has been for well

nigh fifty years using such dams. For that period have both the dams been kept constantly in repair and been many times rebuilt by the log-driving company. No toll is demanded or received for logs passing them. No West Branch drive can be made without the stores of water held in reserve by such dams.

It is plainly manifested by the foregoing quotations from the statutes that the legislature intended to impose upon the defendant company the duty of including in its drives all logs of all owners in the West Branch waters; and it is just as strongly manifested that the legislature also intended that the company should possess the exclusive control and management of the waters of the river, so far as necessary to enable it to successfully execute the obligation resting upon it, an obligation in some respects partaking of the character of a public trust. The permission of the state was to take all the water for the purpose of driving all the logs. There can be no doubt that the company would be liable in damages for negligence in omitting to drive any owners' logs; and it has been so decided in *Weymouth* v. *Pen. Log-Driving Co.*, 71 Maine, 29. No occasion has hitherto arisen requiring any decision of the question whether the company is entitled to drive the logs of an owner against his consent, and for the reason that no owner has ever had any motive to reject the benefits of having his logs driven by the corporation. And in the present case the plaintiff would have had no such motive could his logs have been left at Montague instead of in the boom at Oldtown.

But it is argued, in behalf of the plaintiff, that the state does not possess the right to create a monopoly in the use of any of the public waters in favor of this corporation. It is, however, too late in the history of that question to set up such a contention now. The state represents all public rights and privileges in our fresh water rivers and streams, and may dispose of the same as it sees fit. The principle is settled in no state more firmly than in this. *Parker* v. *Cutler Milldam Co.*, 20 Maine, 353; *Lee* v. *Pembroke Iron Co.*, 57 Maine, 481; *Treat* v. *Lord*, 42 Maine, 560; *Moor* v. *Veazie*, 32 Maine, 343; Same case 31 Maine, 360; *Veazie* v. *Moor*, 14 How. (U. S.) 568; *Brooks* v. *Cedar Brook etc. Imp.*

Co., 82 Maine, 17; *State* v. *Leighton*, 83 Maine, 419; Gould. Waters, (2d. ed.) § 36, and cases.

In view of the foregoing considerations, it is contended in behalf of the defendant company that the plaintiff can have no standing in court for the reason that the company had the right to take his logs and include them with the mass of logs in the main West Branch drive. While that would undoubtedly be the rule as far as any logs are concerned which may come legitimately into the possession and under the control of the company, the court is of opinion that the same rule should not apply as to the plaintiff's logs whose place of destination was Montague instead of the Penobscot boom. As the company were allowed or required to drive all logs and timber "to any place at or above the Penobscot boom where logs are usually rafted," and as Montague is not such rafting place and logs cannot be stopped there when the main drive is passing that point, the interpretation is that these logs never came within the possession or jurisdiction of the company for the purpose of being driven under the authority of its charter. Nor could the company be compelled to receive and drive logs not bound for the Penobscot boom. It might be otherwise should the company establish a rafting place at Montague. Undoubtedly there was no expectation in 1847, when the log-driving company was incorporated, that logs would ever be driven down Penobscot river whose place of destination would be other than the Penobscot boom, and the changes of the present day could not have been anticipated. Possibly changes in legislation may be necessary to meet such changes of business, such as will be just and equitable.

What then were the rights of the plaintiff in the waters of the West Branch, with logs in his possession below Chesuncook dam whose place of destination was Montague? He undoubtedly possessed such common-law right of passage for his logs as had not been granted to the Penobscot Log-Driving Company by the state, such and so much use of the water as would not hinder or prevent the company from its enjoyment and use of all the water necessary for its purposes under its prior and privileged right thereto.

The plaintiff was under no circumstances legally entitled to

more than the natural flow of the stream. That would be the extent of his common-law right, and he was not included in the statutory right granted by the legislature. *Pearson* v. *Rolfe*, 76 Maine, 380; *Foster* v. *Searsport Spool-wood and Block Co.*, 79 Maine, 508; *Stratton* v. *Currier*, 81 Maine, 497. Therefore, he had no right to require the defendant to provide him with any part of the stores of water which it had in reserve within its dam or dams, unless he was entitled to the natural flow and it became necessary to use some of the reserved stores in order to create a flow equal to the natural run or flow. And if the dam was full and overflowing then he got the full natural flow. The natural amount of water may flow over a dam as well as under it or through its gates. It is not just or equitable for log owners outside of the company to claim to use without compensation its stores of water which have cost many thousands of dollars to produce. And if one person after another should have the privilege of tapping such stores, it would soon deprive the company of all power to perform its most imperative obligations.

But the plaintiff was not entitled even to the natural flow, or to draw from the reserves of water in order to create what would at the time and place be equivalent to the natural flow, so long as the company needed or would be likely to need the same water for driving its own logs to market. The defendant's right was the superior right. The plaintiff's right was secondary and conditional. Such is the inevitable effect of the grants to the company by the legislature. The stores of water are accumulated by using the natural flow until the necessary head is obtained. It was not that the defendant company would not let the water down when it needed its use itself, but the plaintiff desired the use and advantage of it in advance of the use of it by the company.

Upon the question whether the company could safely spare any of its accumulated stores of water in order to supply the plaintiff's logs with what would be equivalent to the natural run, all circumstances affecting the situation should be carefully considered, both present and prospective. Certain geographical facts should be taken into the calculation. It is generally known that the West

Branch drive usually consists of about fifty millions feet of lumber; that the drive has to travel in the crookedness of the river eighty or ninety miles after being turned over Chesuncook dam before it reaches its destination within Penobscot boom; that the drive starts late in the season because it is detained in the lake until the last contributory drives come into the lake from the streams and brooks above; that the drive arrives usually in the drought of summer, scarcely ever earlier than some time in August, depending entirely for its success in reaching Penobscot boom upon the accumulations of water held back by the dams at the outlets of several lakes; that all the sources of water are not always enough for successful driving, portions of the drive being not infrequently left on the way for the want of sufficient water; that the company sometimes finds it necessary to send water along in advance of its drive to clear the river of obstructions caused by drives of logs from the other branches of Penobscot river that have become crippled and stuck for want of sufficient freshet to move them along; and that for the causes named, as well as other reasons that might be named, the duties of the company to the public are responsible in the extreme in bringing such mass of logs to the possession of their many owners with safety.

Action to stand for trial.

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

Franklin. Opinion October 26, 1897.

Dower. Assignment. Practice. R. S., c. 103, § 22.

When the report of commissioners selected to set out dower on a writ of seizin, under R. S., c. 103, § 22, is not accepted because of irregularities of procedure disclosed therein, it is not error for the court to re-commit the report to the same commissioners to set out dower anew, in accordance with law.

In such case, the commissioners act by virtue of their original appointment and under their original oaths.

When the commissioners set out to the demandant certain parcels of land "as and for dower," it is held to have been a sufficient assignment.

It is not necessary that the writ of seizin to set out dower should contain specific directions to the commissioners. Their duties are prescribed by law. It would be inconvenient, not to say impossible, to incorporate them all in the writ of seizin.

See *Skolfield* v. *Skolfield*, 88 Maine, 258; *Same* v. *Robertson*, Ibid.

ON EXCEPTIONS.

This was an action of dower. Upon a return of the report by the commissioners, who were selected to set out to the plaintiff her dower in certain lands described in the writ, and attached to the writ as part of the officer's return, the defendant made objections to it. These objections were overruled by the court and the defendant took exceptions. The writ of seizin, the commissioners' report as amended by them in accordance with the decision of the court in 88 Maine, 258, and the officer's return on the writ were made a part of the bill of exceptions.

The case appears in the opinion.

J. C. Holman, for plaintiff.

The exceptions show no specific objections to the report, but are of a general nature and should be overruled for that reason alone. *Comstock* v. *Smith*, 23 Maine, 202; *Emery* v. *Vinall*, 26 Maine,

295; *White* v. *Chadbourne*, 41 Maine, 149; *Howard* v. *Kimball*, 65 Maine, 326.

H. L. Whitcomb, for defendant.

If the doings on the writ of possession, in the first instance, were any bar to a renewal of the writ, scire facias should have been brought, and a new writ obtained. *Walker* v. *Gilman*, 45 Maine, 30.

To all intents and purposes it was a new assignment. The commissioners took a new oath as the officer states in his return, and the tenant should have been entitled to a voice in the selection of the commissioners, the same as at the first assignment.

It should appear from the report of the commissioners, or the officer's return, that they set out to her as dower, such a part of the land as will produce an income, equal to one-third part of the income which the whole estate would now produce, if no improvements had been made upon it since the alienation, or the decree of divorce. *Carter* v. *Parker*, 28 Maine, 509.

The case does not show whether they assigned one-third the number of acres, one-third the value at the time of assignment, one-third the value at the time of the divorce, what would yield an income equal to one-third of the whole income at the time of the divorce, or at the time of the assignment.

In all cases, some time is fixed for the return of an execution, and the general law is three months from the time of completing the levy. R. S., c. 76, § 16. At the February term, 1896, the entry was made: "Report re-committed to set out dower *anew* in accordance with the requirements of law." That writ was returned into court at the June term, 1897,—nearly three years after it issued.

The first execution should have remained in court, and an alias should have issued. *Belcher* v. *Knowlton*, 88 Maine, 93. The report of the commissioners was not re-committed for the purpose that errors might be corrected, but was re-committed "to set out dower anew, in accordance with the requirements of law."

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

SAVAGE, J. Exceptions to the acceptance of the report of commissioners selected to set out dower to the demandant on a writ of seizin. The writ issued July 17, 1894, and it contained a mandate that it should be returned to the term of the court then next to be held on the fourth Tuesday of September, 1894, and the writ was accordingly so returned. Exceptions to the acceptance of the report of the commissioners were then taken, and those exceptions were sustained by this court, 88 Maine, 258.

In the opinion in that case, it was suggested that the irregularities which had been complained of, and which had proved fatal, could be "corrected on a new assignment." At the February term of the court, 1896, the report of the commissioners was "re-committed to set out dower anew in accordance with the requirements of law," and upon the same writ of seizin, the same commissioners, being newly sworn, made a new assignment. Their report thereof, attached to the return on the writ, was returned into court at the June term, 1897. The report was accepted, and the tenant excepted.

I. The tenant claims that the writ of seizin having been returned in accordance with the mandate contained therein, after the first assignment, was functus officio; that the new assignment should have been made upon an alias writ of seizin; or if the doings on the writ of seizin, in the first instance, were a bar to the renewal of the writ, that scire facias should have been brought and a new writ obtained, and therefore, that all the proceedings now complained of are void. The counsel for the tenant bases his reasoning upon supposed analogies between writs of seizin, and executions and writs of possession.

We are unable to concur in this view. We see no objection to the course which was pursued in this case. Writs of execution, and writs of possession which are likewise writs of execution, are final judicial processes, and upon being properly served and returned take effect, without further order or action of the court.

The statute fixes the time when they shall be made returnable. Alias executions and writs of possession issue at any time after former ones have been returned, as a matter of course. R. S., chap. 82, § 140; *Belcher* v. *Knowlton*, 89 Maine, 93. Unlike the service of executions and writs of possession, the doings of commissioners under a writ of seizin, to set out dower, have no efficacy until accepted and approved by the court. Writs of seizin, in this respect, are more analogous to warrants to commissioners to make partition. An assignment of dower is, in effect, a species of partition. The report of the commissioners in either case must be returned to the court for further judicial action. The statute prescribes no time within which a writ of seizin must be returned. Necessarily it must be returned to a term of the court.

The writ in this case was originally made returnable to a term certain, and it was so returned. But the assignment of dower was void because of irregularities in procedure on the part of the commissioners. Their report instead of being accepted was re-committed. This court is of opinion that the court at nisi prius had power to re-commit the report, to the end that an assignment might be made in accordance with law, the same as it has power to re-commit the report of commissioners appointed to make partition, for the correction of errors in their prior proceedings. *Ware* v. *Hunnewell*, 20 Maine, 291. One would virtually be a new assignment, as the other would be a new partition.

The tenant complains that by this proceeding he was deprived of a voice in the selection of the commissioners, the same as at the first assignment. The answer is that the report was re-committed to the same commissioners, one of whom had been selected by the tenant. They were to act by virtue of their original appointment, and under their original oaths. But were it otherwise, the complaint of the tenant is unfounded, because it appears by the return of the officer that the tenant did select one of the commissioners, in this proceeding, and as a matter of extra precaution probably, the commissioners were sworn anew.

II. The tenant further complains that it should appear from

the report of the commissioners, or from the officer's return, that they set out to the demandant as dower, such part of the land as would produce an income equal to one-third part of the income which the whole estate would now produce, if no improvements had been made upon it since the demandant's decree of divorce. *Carter* v. *Parker*, 28 Maine, 509.

But the commissioners did set out the parcels described in their report to the demandant, "as and for her dower," and this has been held a sufficient assignment. *Skolfield* v. *Robertson*, 88 Maine, 258. In this latter case the court said: "The term dower is one very well understood by laymen; and when the appraisers set out a part of the tract, as and for dower, the necessary implication follows, that they adjudged it would produce one-third of the income of the whole lot subject to dower."

III. Finally, the tenant complains that the writ of seizin gave the commissioners no directions whatever. This was not necessary. The writ directed the officer to cause the demandant's dower "to be assigned and set out to her by three disinterested persons to be appointed by the plaintiff, defendant and officer as in the levy of an execution on land." The duties of such commissioners are prescribed by law, and it would be manifestly inconvenient, not to say impossible, to incorporate them in the writ of seizin. There certainly can be no greater necessity for such directions in a writ of seizin, than there is for directions to appraisers in a writ of execution.

Exceptions overruled.

CITY OF AUBURN, Appellant,

vs.

UNION WATER POWER COMPANY, Petitioner.

Androscoggin. Opinion October 29, 1897.

Waters. Great Ponds. Colonial Ordinance. Constitutional Law. Taking Water for Public Use Without Compensation. Spec. Laws, 1891, c. 82.

It is a rule of law peculiar to this State and Massachusetts, under the Colonial Ordinance of 1641-7, that all great ponds,—that is, ponds containing more than ten acres—are owned by the State.

The legislature may permit towns and cities to take water from great public ponds and lakes, for the domestic use of their inhabitants, without being liable to pay damages to those who want the water for the use of mills.

This right to the use of water for domestic purposes is primary, and the right to its use as a mechanical power is secondary.

It is sometimes said that there mnst be no diversion of the waters of a stream; that the riparian proprietors above must allow the water to flow on in undiminished quantities to the riparian proprietors below ; but this is not a correct statement of the law. The true rule is that there must be no unlawful or unreasonable diminution or diversion of the water.

Held; that the diversion and consumption of water from great ponds and lakes, for domestic purposes by the public, is neither unlawful nor unreasonable.

Held; that the right of the people living in the vicinity of our great ponds and lakes to a reasonable amount of their waters for domestic purposes is sustained by the rules of the common law of this state, as well as by reason and the principles of natural justice.

The court affirms these principles here only of great ponds and lakes, the titles to which are held by the State for the use of the public under the Colonial Ordinance of 1641-7. It does not declare or attempt to define in this case the rights that appertain to wells, springs, rivulets or small ponds.

While private property can not be taken for public use without compensation, the waters of great ponds and lakes are not private property.

Wilson Pond is a great pond. Its supply of water is fifteen millions of gallons daily. Of this quantity the city of Auburn now uses probably half a million of gallons daily,—about one-thirtieth of the entire supply. Allowing that in the future the inhabitants of the city will consume one million of gallons

daily, leaving fourteen-fifteenths of the water to flow on to the works of the Union Water Power Company, *held;* that this is not an unconscionable or unreasonable division of the water.

Under an act of the legislature (Priv. and Spec. laws 1891, c. 82,) the city of Auburn was empowered to take water from Wilson Pond sufficient for domestic purposes, etc. The Union Water Power Company claimed a superior and paramount right to the entire water of the pond, "including all the natural flow of the same;" and that, if any portion of the water was diverted by the citizens of Auburn for domestic purposes, the company would be entitled to damages. *Held;* that the claim can not be sustained.

Held; that the Union Water Power Company has not become entitled to the whole of the water of Wilson Pond by adverse use. Its prior use of the water has no element of adverseness in it; and the governmental powers of the state are never lost by mere non-use.

In this case, the city of Auburn is the only party that has a charter from the legislature. The Union Water Power Company, organized as a corporation under the general law of the state, and having created a storage of water by dams, etc., in Wilson Pond, has neither asked nor obtained from the legislature any property rights or special privileges in the waters of the pond.

Held; that the Union Water Power Company has no such rights in the waters of that pond as entitles it to damages from the city of Auburn for the taking of water from that pond for domestic purposes.

Water for use as a mechanical power is important and should receive reasonable protection; but water for domestic use, and by which the health and cleanliness of the people, and protection against fires, are to be secured, is also important.

Held; that when water for both purposes is drawn from the same public fountain, neither of the parties should be required to pay damages to the other.

Watuppa Reservoir Co. v. *Fall River*, 147 Mass. 548, approved.

ON REPORT.

This was an appeal of the city of Auburn from the award of the county commissioners assessing damages to the Union Water Power Company of Lewiston, in the sum of $24,500 for the taking by the city of Auburn of water for public purposes under the provisions or chapter 82 of the Private and Special Laws of the State of Maine of 1891. The fourth section of the act authorized the taking and provides that, in any case in which damages are to be allowed, if the city and the landowner were unable to agree upon the damages to be paid for such taking, application should be made to the commissioners of the county of Androscoggin, "who shall cause such damages to be assessed in the same

manner and under the same conditions, restrictions, limitations and rights of appeal as are by law prescribed in the case of damages for the laying out of highways so far as such law is consistent with the provisions of this act."

The case was submitted to the law court on report, the parties stipulating that if the Union Water Power Company was not entitled to damages, judgment should be rendered in favor of the city as the appellant, but that if it should be determined by the law court that the Union Water Power Company was entitled to damages, then the amount of such damages should be determined at nisi prius.

The petition of the Union Water Power Company, praying for an assessment of damages represented that "it is the owner of certain water rights, water sources and easements in the waters of Wilson Pond, so-called, situated in Auburn in said county, and of certain lands and rights of flowage around said pond, and the outlet stream thereof, and also of certain lands, dams, water power, water rights and privileges upon said outlet stream, and of the right to hold, accumulate and store the waters of said pond by means of said dams, and to draw off the same by means of gates and sluices in said dams:

"And said company, also, says that it is the owner of an extensive system of dams, canals, water rights and privileges on the Androscoggin river at said Lewiston, and of certain lots of land at said Lewiston, situated on the main canal of said company at said Lewiston, and known as the 'Mill Site' lots, and which lots by the terms of the conveyances thereof to said company can only be used for manufacturing purposes; and said company says that the value of said lots for manufacturing purposes depends upon the quantity of water and water power capable of being furnished by the Androscoggin river at said Lewiston. And said company owns and controls all the rights of flowage on both sides of the Androscoggin river above said dam at said Lewiston to the point and beyond where the outlet stream from said Wilson Pond flows into said Androscoggin river, and it has the right to hold and store the waters of said river by means of its dams at said Lewiston in

the same manner and to the same height at which it and its predecessors in title for a long time hitherto have done.

"And said company says that it and its predecessor in title have heretofore made perpetual leases and conveyances of water and water power to certain individuals and corporations at said Lewiston and Auburn, all of which leases and conveyances are now in full force, and said company is bound by the terms and obligations thereof to furnish and supply the quantity of water and water power specified in said leases and conveyances:

"And said company says that heretofore all the flow of water from said Wilson Pond ran through said outlet stream to said Androscoggin river, and from thence commingling with the waters of said river into the mill ponds and canals of said company at said Lewiston; and that said company, as the owner of the dams, water rights and privileges at the outlet of said Wilson Pond, has the right to have the natural overflow of said pond flow through said outlet stream without any dimunition or diversion thereof, and that as the owner of the lands, water power, water rights and privileges on the Androscoggin river at said Lewiston, it is entitled to the full benefit of the natural flow of said pond into said river as the same has heretofore forever been accustomed to flow:

"And said company alleges that it has the right to raise and store the waters of said pond by means of said dams at the outlet thereof to the present height of said dams, and to draw off all of said stored waters, from time to time, by means of the gates and sluices in said dams through said outlet stream for the use and benefit of its lands, mill sites, water power and privileges at said Lewiston, and to enable it to furnish and supply its said several lessees and grantees with water and water power as it has for a long time heretofore been accustomed to do; and that it has the right to manage and control, accumulate and draw off the waters of said pond by means of said dams, gates and sluices, for its own use and benefit and in such manner as it has heretofore for a long time done.

"And said company further alleges that it has heretofore for a long time used, managed and controlled all the waters of said

Wilson Pond for its own use and benefit, and accumulated and stored the waters thereof by means of its said dams upon the outlet stream thereof, and drawn off the same through said outlet stream at such times and in such quantities as it deemed necessary for the use and benefit of the water power and privileges owned by it and located on the Androscoggin river at said Lewiston, and that said company has the right to so manage, hold, store, control and draw off the waters of said pond, including all the natural flow of the same, as well as all the stored waters thereof through said outlet stream without any denial, diversion or interruption of the same or any part thereof by the city of Auburn or any person or corporation whatsoever, except so far as the same has heretofore been conveyed by the Franklin Company, its predecessor in title, to the Auburn Aqueduct Company of said Auburn.

"And said company alleges that the entire natural flow of said pond through said outlet stream into said river, and the right to hold, use and draw off all the stored waters of said pond from time to time through said outlet stream is necessary to enable said company to furnish and supply the quantity of water and water power required to operate the various mills, manufacturing establishments and industries located at said Lewiston and Auburn, during all seasons of the year, as the same has heretofore for a long time been done; and that from time to time during each year for a period of more than thirty years hitherto, said company and its predecessors in title have used and drawn the waters of said pond, by means of its dams, sluices and gates upon said outlet stream for the purpose of supplying water and water power at said Lewiston, and that during all said time said pond has been used by said company and its predecessors in title as a reservoir from which to draw in times of drought and shortness of water in the Androscoggin river at said Lewiston:

"And said company alleges that the city of Auburn, acting under and by virtue of the power and authority conferred upon it by chapter 82 of the Private Laws of Maine, approved February 19, 1891, have taken the waters of said pond for the uses and purposes specified in said act, by means of pipes leading from said

pond to various parts of the city, of the dimensions and locations particularly specified in the notice of such taking filed by said city in the registry of deeds for this county, . . . etc.

"And said company alleges that by such taking the city of Auburn has thereby diverted the natural flow of the waters of said pond from said outlet stream and have drawn off the waters accumulated and stored in said pond, as hereinbefore set forth and diverted the same from said outlet stream, and prevented this company from drawing and having the natural flow of the waters of said pond run through said outlet stream, and prevented this company from holding, storing, accumulating, managing and controlling the waters of said pond, and from drawing off the stored waters thereof through said outlet stream as it has the right to do, and has thereby destroyed this company's property rights in the waters of said pond, and the water sources, water rights and easements therein owned by said company, and caused this company great and irreparable injury and damage.

"And in and by the premises your petitioner has been greatly damaged in its property by the taking of and injury to its land, real estate, water and water rights, and by said interference with and injury to the use and management of the water of said pond, to which the petitioner at the time of said taking was legally entitled.

"And your petitioner alleges that it has been unable to agree with said city as to the amount of damages sustained by it in its property on account of the taking of the waters, water sources, water rights and easements as hereinbefore set forth.

"Whereupon, your petitioner applies to this Honorable Court in accordance with the provisions of said act of February 19, 1891, and asks that the damages sustained by it in this behalf be assessed and determined."

An appeal from the award of damages, made by the county commissioners, having been taken by the city of Auburn, a complaint on appeal by the city was duly filed in this court below on the third Tuesday of January, 1896.

The material portions of the appeal are as follows: . . . .

"That your said complainant was aggrieved by said determination and adjudication that the said Union Water Power Company was damaged as aforesaid by the said taking of the waters of said pond.

"First, because said Union Water Power Company was not entitled to any damages.

"Second, because the damages awarded as aforesaid were excessive.

"That said pond is of more than ten acres in area, and is a 'Great Pond' within the terms and meaning of the Colonial Ordinances of 1641 and 1647.

"That your said complainant has purchased and owns a right of way, fifty feet in width, to said pond, together with the perpetual right and easement of laying and maintaining therein the pipe line mentioned and described in said city's notice of taking, etc.

"That the said Union Water Power Company at the time of the said taking of the waters of said pond by the said city of Auburn had no private property, ownership or lawful title in or to the waters of said Great Pond, or any easement of a private nature therein.

"That the acts of said Union Water Power Company in managing and controlling the waters of said pond, accumulating and storing its waters therein and drawing off the same at times and in quantities as it saw fit, as alleged in its said petition, were unlawful and without legislative authority or sanction.

"That the said city of Auburn, in taking said water from said pond at the time and in the manner aforesaid, did not take or do any legal damage or injury to any of the land, real estate, water, or water rights of said Union Water Power Company.

"That your said complainant duly and seasonably appealed from said award of damages of the said county commissioners to the Supreme Judicial Court, held as aforesaid, being the term of said court first held in the county where said pond is situated, more than thirty days after the expiration of the time within which such appeal might be taken, excluding the first day of its session, and filed with the county commissioners for said county of

Androscoggin notice of said appeal before the third day of the regular term of court of said county commissioners succeeding that at which said commissioners' return was made, to wit, on April 12th, A. D. 1895. . . ."

Among other admissions by the parties, it was agreed that the purposes of the Union Water Power Company, organized under the general laws of the state, are as follows:

"Of carrying on business as owners of property, real and personal, consisting of land, mills, factories, dams, canals, water rights and water power and other estate, situated in said Lewiston and at other points upon, adjacent to, or in the neighborhood of the Androscoggin river and its tributaries, and around its sources in both of the States of New Hampshire and Maine; such business to consist in the holding of said property and the purchase of any new or other property of a similar character, or in holding, managing, selling, leasing and otherwise using all of said property in any legal manner for their own profit and advantage, under and in accordance with the laws of said states respectively, and if need be through the agency of any acts of incorporation or organization of companies.

"Also, as owners of such dams and other property to produce or create water power or privileges, and to sell, lease or use the same, and in connection therewith to manage and control the use and flow of the waters of said river in any legal manner for their own benefit, as well as for the public use and benefit, receiving the proper and legal toll or compensation.

"And, also, for the purpose of transacting and carrying on the business of manufacturing cotton or woolen fabrics, or iron or wood, as may be determined by the corporators, by means of water mills in said Lewiston."

N. W. Harris; J. A. Pulsifer; W. W. Bolster; J. W. Symonds, D. W. Snow and C. S. Cook; and A. R. Savage, for city of Auburn.

W. H. White and S. M. Carter; and J. A. Morrill, for Union Water Power Company.

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

WALTON, J. This is a petition for the assessment of damages. It is presented by the Union Water Power Company of Lewiston, and the question is whether, under the circumstances disclosed by the evidence, the company is entitled to damages.

It appears that in 1891, the legislature authorized and empowered the City of Auburn to take water from Wilson Pond sufficient for domestic purposes and the extinguishment of fires and the supply of hotels and livery stables and laundries, and for sprinkling its streets. Priv. and Special Laws, 1891, c. 82.

For water taken under the authority of this act, the Union Water Power Company of Lewiston claims that it is entitled to compensation. The Company claims that it has a superior and paramount right to the entire waters of the pond, "including all the natural flow of the same," and that, if any portion of the water is diverted and used by the citizens of Auburn for domestic purposes, the Company is entitled to damages. The question is whether this claim can be sustained. It is the opinion of the court that, under the circumstances disclosed by the evidence, the claim cannot be sustained.

It is a settled rule of law in this State and Massachusetts that all great ponds,—that is, ponds containing more than ten acres,—are owned by the state. This is a rule of law peculiar to this State and Massachusetts. It is said to have been derived from the Colonial Ordinance of 1641–7. The rule, as stated by Chief Justice Morton, in a recent Massachusetts case, is as follows:—

"Under the Ordinance, the state owns the great ponds as public property, held in trust for public uses. It has not only the jus privatum, the ownership of the soil, but also the jus publicum and the right to control and regulate the public uses to which the ponds shall be applied. The littoral proprietors of land upon the ponds have no peculiar rights in the soil, or in the waters, unless it be by grant from the legislature." *Watuppa Reservoir Co.* v. *Fall River*, 147 Mass. 548.

In the case cited, the Reservoir Company had constructed an expensive dam and had paid large sums of money for flowage rights, and had controlled the waters of the Watuppa pond for nearly sixty years. The legislature then authorized the city of Fall River to take water from the pond for domestic uses and the extinguishment of fires, and all other public uses of the city, without liability to pay any other damages than the state itself would be legally liable to pay. The peculiar wording of this statute in relation to damages was undoubtedly intended to test the authority of the legislature to confer upon towns and cities the right to take water from great ponds for domestic purposes without being liable for damages; and the court so treated it; and a majority of the court held that the authority existed. The majority opinion was by Chief Justice Morton. The minority opinion was by Mr. Justice Knowlton.

We have examined the opinions with care. The minority opinion rests apparently upon the assumption that all of the waters of our great public ponds and lakes are dedicated, primarily, to the use of mills, and that no town or city can take any portion of the waters for domestic purposes without being liable in damages therefor to the owners of the mills. The majority opinion recognizes the right of the people to have pure water for domestic use, and affirms the authority of the legislature to permit towns and cities to take water from great public ponds and lakes for the use of their inhabitants without being liable to pay damages to those who want the water for the use of mills.

We think the doctrine of the majority opinion is correct. It is sustained by reason as well as authority. Water for domestic use is a necessity. Man can not exist without it. Water for the use of mills is a convenience only. And there is no conceivable reason why those who want it for domestic use should be compelled to buy it of those who want it for the use of mills.

In *Philadelphia* v. *Collins*, 68 Pa. St. Rep. 106, the jury were instructed that every individual residing upon the banks of a stream has a right to the use of the water to drink, and for the ordinary uses of domestic life; and that where large bodies of

people live upon the banks of a stream, as they do in large cities, the collective body of the citizens has the same right; and the instruction was held to be correct.

The right to the use of water for domestic purposes is primary, and the right to its use as a mechanical power is secondary; and to the extent that the two rights conflict, its use as a mechanical power must be surrendered. *Evans* v. *Merriweather*, 3 Scam. (Ill.) 492.

True, it is sometimes said that there must be no diversion of the waters of a stream; that the riparian proprietors above must allow the water to flow on in undiminished quantities to the riparian proprietors below. But this is not a correct statement of the law. And the inaccuracy of the statement has often been pointed out. The true rule is that there must be no unlawful or unreasonable dimunition or diversion of the water. The diversion and consumption of water for domestic purposes is neither unlawful nor unreasonable. As said by Mr. Justice DICKERSON in *Davis* v. *Winslow*, 51 Maine, 264, "water, air, and light are the gifts of Providence, designed for the common benefit of man, and every person is entitled to a reasonable use of each. . . . . A reasonable use is the touchstone to which cases of this description must be subjected."

And in another case, Mr. Justice RICE said that this right to a reasonable amount of water for domestic purposes necessarily implies a right to diminish the volume of the water. *Davis* v. *Getchell*, 50 Maine, 602.

A gallon of water withdrawn from Moosehead lake will diminish the quantity that would otherwise flow down the Kennebec river. But, surely, no one will doubt the right of the people who live near that lake to take and use for domestic purposes a reasonable amount of its waters. Nor can any one believe that such a use would be a wrong to the owners of any of the dams across the Kennebec river. The right of the people living in the vicinity of our great ponds and lakes to a reasonable amount of their waters for domestic purposes is sustained by the rules of the common law of this state, as well as by reason and the principles of natural

justice, as the cases cited will show. And it is only of our great public ponds and lakes that we are now speaking. We are not declaring or attempting to define the rights appertaining to wells, springs, rivulets or small ponds. It is only of great ponds and lakes, the titles to which are held by the state for the use of the public, that we are now speaking. And of these great public ponds and lakes, we affirm that by the rules of the common law of this state, the people are entitled to a reasonable portion of their waters for domestic purposes without being obliged to buy it of the owners of mill-privileges. And we affirm further, that, by virtue of the rule of property derived from the Ordinance of 1641–7, as interpreted in this state as well as Massachusetts, the title to all great ponds,—that is, ponds containing more than ten acres,—is in the state, and that the legislature may confer upon towns and cities the right to take water from such ponds for domestic purposes without making such towns and cities liable for the losses thereby sustained by the owners of mill-privileges. Health is of more importance than wealth, and cleanliness is next to godliness; and we hold that the right of the people to an abundant supply of pure water, by which their health and cleanliness may be secured, is paramount to the right of mill-owners to have the water for propelling their machinery; and that, to the extent that the two rights conflict, the latter must yield. Of course, private property can not be taken for public use without making compensation for it. But the waters of great ponds and lakes are not private property. They are owned by the state; and the state may dispose of them as it thinks proper.

Wilson Pond is a great pond. Its supply of water is fifteen millions of gallons daily. Of this quantity Auburn probably uses about a half a million of gallons daily. This is only about one-thirtieth of the entire supply. It is a quantity comparatively so small that its withdrawal from the pond does not perceptibly lessen the size of the stream at the outlet. The quantity used by Auburn will probably be somewhat increased in the future. But there is no probability that the quantity used daily will ever exceed a million of gallons. Auburn is a city large in territory;

but the number of its inhabitants does not exceed fifteen thousand; and a considerable portion of them do not and never can receive their supply of water from Wilson Pond. But allowing that ten thousand of its inhabitants will at some future day receive their water from the pond, and that each one of these inhabitants will consume a hundred gallons daily; then the quantity will be only a million of gallons, leaving fourteen-fifteenths of the water to flow on to the works of the Union Water Power Company as heretofore. Surely, the Union Water Power Company can not complain that this is an unconscionable or unreasonable division of the water.

But we are asked to consider if the Union Water Power Company has not become entitled to the whole of the waters of Wilson Pond by an adverse use. We do not think the use has been adverse. The Company and its predecessors in title have used the water of the pond, or so much of it as has flowed out of the pond through its natural channel and become mingled with the waters of the Androscoggin river; but this has been a rightful use. It has had no element of adverseness in it. It has encroached upon no one's rights, and no one has had a right to suppress it. Such a use can never ripen into a prescriptive title. *Pratt* v. *Lamson*, 2 Allen, 275. And, besides, the authority of the state to control the waters of great ponds, and determine the uses to which they may be applied, is a governmental power, and the governmental powers of the state are never lost by mere non-use. In the Watuppa case (147 Mass. 548) the Reservoir Company has had the entire control and use of the waters of the Watuppa ponds for nearly sixty years. But the court held that the legislature might, nevertheless, confer upon the city of Fall River the right to take water from the ponds for domestic purposes without being liable to pay damages.

The Watuppa case was embarrassed by the fact that both parties had charters from the legislature. The Reservoir Company had been chartered as early as 1826, and granted the right to construct a reservoir dam that would raise the water two feet higher than it had before been raised, and to draw off the water in such quantities and at such times and in such manner as it should judge

proper. And under authority of this charter the corporation had expended large sums of money and had had the entire use and control of the waters of the ponds for nearly sixty years when the authority to Fall River was granted to take water from the ponds for domestic purposes. And the Reservoir Company claimed that it had thereby become invested with property rights in the entire waters of the ponds of which it could not be divested without compensation. Upon this question the court was divided, three judges holding that the Resevoir Company was entitled to damages and four judges that it was not.

We are embarrassed by no such question. In this case, only one of the parties has a charter from the legislature, and that party is the city of Auburn. The Union Water Power Company is a self-created corporation, organized under the general law. It has no charter from the legislature. It has never asked for and has never obtained from the legislature any property rights or any special privileges in the waters of Wilson Pond. It has no property rights in the waters of the pond which are taxable in the city of Auburn, and we think it has no such rights in its waters as entitles it to damages from the city of Auburn. See *Water Power Co.* v. *Auburn*, ante, 60.

The state's ownership of great ponds, and the authority of the legislature to permit water to be taken from such ponds for domestic purposes without the payment of damages, were affirmed in *Fay* v. *Salem and Danvers Aqueduct*, 111 Mass. 27.

No reason is perceived why the same doctrine should not prevail in this state. The Colonial Ordinance of 1641–7 is in force in this state; and it is settled law that by virtue of it, the title to all great ponds is vested in the state. The right of the people to a sufficient quantity of water for domestic purposes is incontrovertible. And when, by permission of the legislature, this supply is taken from ponds which are owned by the state, no reason is perceived why the takers should be required to pay damages to persons or corporations who do not own the water. If water is taken from wells, or springs, or small ponds, or small streams, which are owned by private persons or corporations, of course,

compensation must be made. But, if taken from great ponds, which are owned by the state, no reason is perceived why damages should be exacted. Water for use as a mechanical power is important, and should receive reasonable protection. But water for domestic use, and by which the health and cleanliness of the people, and protection against fires, are to be secured, is also important. And when water for both purposes is drawn from the same public fountain, no reason is perceived why either of the parties should be required to pay damages to the other.

Tested by the rules of the common law, which require a reasonable use, and, in case of conflict, a just and fair division of water, and the claim of the Union Water Power Company must fail. Tested by the rules of law derived from the Colonial Ordinance of 1641–7, and the result is the same. No property rights of the Union Water Power Company have been invaded by the city of Auburn. The water which the city of Auburn is using is a donation from the state. The claim of the Union Water Power Company that it is entitled to the entire waters of Wilson Pond is not sustained by the evidence; and it is the opinion of the court that its claim to recover damages must be rejected.

Petition dismissed. No costs for either party.

IN MEMORIAM.

HONORABLE DANIEL F. DAVIS.

At the Supreme Judicial Court, held at Bangor, April Term, 1897, Hon. L. A. EMERY, Justice presiding:

On the first day of May, 1897, by permission of the court, the afternoon session was devoted to memorial services in honor of the late Hon. Daniel F. Davis, member of the Penobscot Bar, and former Governor of the State of Maine, who died at Bangor, January 9, 1897.

A committee of the Bar, consisting of Messrs. Bailey, Hamlin and Wilson, reported the following resolutions at a meeting of the Bar held in the morning of May 1, which were unanimously adopted:

Whereas, we, the members of Penobscot Bar, desire to place on record our deep sense of loss in the death of our brother, Daniel F. Davis, and to give expression to our high appreciation of his character as a lawyer, citizen and friend, be it

Resolved; That his death removes from our number a highly honored and distinguished member, conspicuous for his attainments as a lawyer, his ability as an advocate, his dignified and courteous bearing toward bar and court, his attractive and agreeable companionship in social intercourse, and his probity and uprightness in every relation of life.

Resolved; That we recall with pride his distinguished service to the state as her chief magistrate in an eventful period of her history, and hold in grateful remembrance his loyal and patriotic service to the country in her time of peril.

Resolved; That we extend to his bereaved family, our sympathy and condolence in their great loss, and that a copy of these resolutions be forwarded to them as a token of our regard.

Upon the adjourned hour of the Court in the afternoon, Mr. Bailey offered the resolutions, and moved their acceptance.

REMARKS OF C. A. BAILEY, ESQ.

It is with mingled feelings I speak to-day of one who for so many years was my devoted friend and business associate. Conscious of a great personal loss, I find it difficult to escape from its oppressive shadow; but I take satisfaction in referring to a life which in those years of intimate relationship revealed so much to admire and love.

Brother Davis was of sturdy New England stock. His ancestry was of colonial lineage and Puritan antecedents. His parents were adherents of the church known as the Christian church, his father being a minister of that faith.

He was born in Freedom, in Waldo county, September 12, 1843, where his father was then ministering to a little church. The family afterward became established in Stetson, in this county, where he passed through youth to early manhood.

The circumstances of the family made frugality and industry on the part of all its members a necessity. The farm on which they lived and the religious home were the training school in which the sturdy elements of character possessed by Bro. Davis were nurtured and developed.

He was a thoughtful, studious boy. He read such books as were available, principally history and biography, and his mind was early imbued with the sentiment that life was opportunity too serious to be dissipated in aimless endeavor. He eagerly availed himself of every means within his reach for mental improvement. What his mind received was thoughtfully reviewed and considered and became a ready part of his mental equipment. This characteristic of assimilating what he read was the great educating force which developed the striking mental power he possessed.

He was a strong, athletic youth, quick and demonstrative in action, possessed of impulsive spirit over which, however, he early gained the mastery, giving him a perfect self-control, the secret of that delightful equanimity of mind and temper which was the charm of his after-life.

He was just passing from youth to manhood, when at the call of the country, he entered the army, serving in the First Maine

cavalry, that imperial regiment whose unsurpassed record for heroic achievement, is now historic. It was in the severity of this service that his robust constitution was tested beyond its limit, and he returned at the close of the war with infirmities from which he was never afterward entirely free.

I have dwelt upon these antecedent facts as explaining in a large degree the characteristics afterward more fully developed in his professional and public life.

Upon his return from the army, he took up academic study for a time, and then entered the office of Hon. Lewis Barker, then in Stetson, where he prepared himself for admission to the bar, taking his examination in this county at the October term, 1868, and immediately settled for practice at East Corinth. Here he entered upon what he believed to be his life work, and he gave himself to it with unreserved zeal.

His appearance in every cause was characterized by self-possession and courage. He had a winsome manner and an attractive face, and every movement indicated energy and self-reliance. These qualities made him self-assertive, not offensively so, but in that higher sense whereby his personality became a force to be reckoned with in every cast of events wherein he was a factor. At the same time no undue estimate of himself was ever manifested. He had that perfect poise of character which always left its agreeable impression upon the observer. He was unostentatious, simple and sincere. His frankness invited confidence, and assurance followed so swiftly that no one who trusted him ever had occasion to doubt his absolute good faith.

He advanced with marked rapidity in the profession. He attracted the notice of bar and court, by the ability he displayed in the trial of causes. As an advocate he was forceful and effective. His mind marshalled with alertness the facts adduced in evidence, and his naturally fluent speech often became eloquent, as he urged with cumulative effect the salient points of a case upon the attention of the jury. His more than ordinary success attracted a rapidly increasing clientage, and although living in a purely pastoral community, remote from those centres of activity, commonly

supposed to be storm-centres of litigation, it was not long before business regardless of the locality where it originated, was drifting his way, seeking the man whose retired place could no longer conceal him.

It was from this quiet country home that he was swept, almost with the suddenness of a tidal wave, into the candidacy for the highest office in the gift of the people of the state. His rising popularity had taken him into political life to a limited extent, first as the representative of an admiring constituency in the lower House of the State Legislature, thence in response to a widening popular demand he had entered the Senate, serving two terms to which he had been successively elected.

In these fields of public service he was as readily conspicuous as in the more private walks of life, and the popularity which had before been local, manifestly became state-wide. At the state convention in 1879, although previously unnamed, he was by one of the most remarkable instances of rapid concentration of sentiment, at a time when his chosen life work had hardly passed its formative period, and while yet an exceptionally young man to be crowned with such distinction, nominated for the high office of governor of the state.

The never-to-be-forgotten campaign which followed and the turbulent scenes preceding his inauguration are part of the history of the state and require no further mention in this place. He administered the affairs of state with dignity and firmness, and retired at the expiration of his term with the respect of an appreciative people.

His term in the gubernatorial office had so rudely interrupted his business, that upon his return only the wreck of it remained, and a new start practically became necessary. For this he chose this city as the field; and it was at this period that my association with him in business began. It was soon evident, however, that the inexorable demands of distinction which had been so early thrust upon him, as well as its penalties, made the way to an adequate business, under existing conditions of legal practice, too slow and uncertain, and a more promising field was opened to him

in the purchase and operation of timberlands. To this his attention was at once directed; and the practice of law was gradually allowed to become secondary in his consideration.

From this time forward to the end, his life was one of great activity. He gave himself unreservedly to business. His days were filled with toil. He denied himself recreation and could not be induced to take sorely needed rest. He worked because he loved to work. He worked not for aggrandizement but that he might more completely fill the measure of blessing for others; and however multiplied his own cares might be, he could always lend a helping hand to those seeking his favor.

He had faith in mankind. His confidence was inspiring, and many a man went from his presence with a higher conception of his own manhood because of the faith he reposed in him.

"In him belief and acts were one,
The homilies of duty done."

His sympathy for suffering was quick and responsive. There was no taint of selfishness in his nature. His generosity often outran the measure of his duty, but the gratitude of hearts made happier by his benefactions was to him more than gain.

He was true and steadfast to friends. Toward them his faithfulness knew "no variableness, neither shadow of turning." The humblest acquaintance of his early boyhood was as cordially greeted by him when governor, as when their lives moved in the same plane. It was this freedom from affectation, this generous and sincere fellowship, which so endeared him to the common people from whom he refused to be divorced by any conventional barrier of circumstance or station.

He had a forgiving disposition. He cherished no resentments, however keenly he may have felt the injustice of others toward himself. Hatred and ill-will found no place in a heart uniformly kind and tender. He judged with the broadest charity the motives of all. He was slow to condemn, even where lapses of conduct invited criticism, always making allowance for the unequal moral endowment of men and the forces by which they are overborne.

He was tolerant of the opinions of all who differed from him,

and could readily yield his own when shown that they were wrong. He was always hopeful. No shadow of despondency was traceable in his disposition. His burdens he bore manfully, and met every phase of discouragement with a resolute and determined purpose. A deep religious faith pervaded his life, the heritage of a godly ancestry. He was bound to no church, but reverenced sincerity of belief wherever found, regardless of creed or dogma. He lived in the conviction of God's love for all his children, and in the certainty of the immortal life, and in that faith he died.

The state mourns him as one of her first citizens; this county and city will remember him as an upright, whole-souled and lovable man; and this bar will ever cherish the memory of his kindly, agreeable and generous companionship.

REMARKS OF THE REPORTER OF DECISIONS.

It was my good fortune to have enjoyed a pleasant and wholly agreeable friendship and acquaintance with our eminent brother. He was truly a lovable man. The recollection of his fine qualities will outlive all words of eulogy; and yet it is fitting that in this forum, where the true ambition of his life found its best expression, we should recall and seek to perpetuate in our records something of those qualities which endeared him to us and the community where the larger part of his life was spent.

I am fully persuaded that, could we know his preference, he would choose his brethren of the Penobscot Bar to speak the last words in honor of his memory after the state, that he served and honored, had paid its proper ceremony at his grave, and by deserving and appropriate tributes placed its touching and kind estimates of him as a public servant and chief executive upon our legislative records.

I desire to second the motion that has been made asking that the resolutions, which have been read, may be duly recorded. I believe they contain a just estimate of his character, and worthily express the entire sentiment of the bar.

The impressiveness of this occasion is emphasized in an unusual degree when we recall the many times our deceased brother, coming here from his varied and pressing labors, joined with us so

often in similar services. He was fond of his associates of the bar, and loved to cherish their good names. He ever lived up to and practiced that wise maxim, "de mortuis nihil nisi bonum."

I unhesitatingly say that Gov. Davis possessed a high degree of intellectual ability. It could not well be otherwise when we consider his progress and position at the bar. Coming to us with what may be called a rather meager preparation, as compared with that of the present times, he soon became engaged in the trial of important cases and easily sustained himself. Among those controversies I remember him contending alone thus early, in a pauper case, with the Nestor of the Piscataquis bar, a leader in this bar, and his preceptor. The verdict that he won was the occasion of the latter remarking: "That boy of mine has got the real Anglo-Saxon grit; there is no doubt about his being able to take care of himself in this place."

He had a good deal of power with the jury. Dealing fairly and never harshly with witnesses he never encountered parties, the court, or the jury with anything but an imperturbable good nature. His attitude and bearing to the court were models of propriety. To his opponent he was always honorable and fair-dealing. He kept his agreements with counsel with punctilious fidelity. He loved the excitement of a trial. It spurred him on to the exercise of his best powers. He quickly seized upon the strong points of his case and fought it out on the merits. Leaving to others the minor issues, he stuck to the main questions. He was successful in this form of litigation. All these things imply and include a good power of statement. That he had; and as he loved short English words, he would often state an issue to the jury in colloquial speech which would be remembered by them better—if we can judge by their verdicts—than when clothed in more classical words. Hence I have known him to avoid long and sounding words ending in "osity" and "ation." He did not hesitate to use a pat phrase when it suited his purpose—sometimes pronouncing it in the manner of N. E. provincialism. And it told with the jury. He knew how to make the best of his knowledge of the law, for he displayed good common sense and sound judgment.

Doubtless, in later years, he may have regretted the diversion from his chosen profession that carried him into the chief executive chair of the state and other business pursuits, for he found within the walls of the court house congenial employment and ample scope for his ability, followed by success that was satisfactory in its results and rewards. On the other hand, it is within my knowledge that the change, and the outdoor life accompanying it, gave respite from the disease that seized him in its relentless and fatal grasp, when a mere lad he gave his early years to military service on southern battlefields.

The fusing and harmonious blending of his character, the genial and sunny temperament, the plain and unaffected intercourse with his fellowman, the love of his profession, the confidence of his associates, the affection of the people and their pride in his elevation in public life, his absolute belief in the indestructibility of the Union, the genuine American citizen,—these all remind us how a nation has gathered this week about the mausoleum of her great citizen in the metropolis of the nation, to give its final salute to her immortal dead. The fame of her great general has become the country's priceless heritage.

Like others of English ancestry this unalloyed product of New England will be known as a soldier, lawyer and statesman. To us, his survivors, his memory will be forever green; and we will remember him as the frank, genial and honorable lawyer.

Remarks of P. H. Gillin, Esq.

Ex-Governor Davis is dead; his personality, his presence, his warm hearted hand-clasp, his genuine good fellowship are but memories; the real substance is forever gone, wrapped in the mysterious night of death; and yet the shadows of his life and labors linger with us like the scent of roses in a broken vase, ushering him phantom-like into our presence.

> "Like a shadow, thrown softly and sweetly
> From a passing cloud, Death fell upon him."

When those of us, who have been here for a series of years, bring to mind the many occasions when we have been called upon

to pay the last tributes of esteem and affection to departed members of the Penobscot bar, we should pause to consider whether the ends which we pursue here or in other fields of activity are worth the toil, energy and anxiety which we contribute to them, especially when even the largest successes bring but transient satisfaction, and the joy of triumph and the eagerness of struggle and controversy are alike ended in sudden extinguishment.

"Life is but a day at most,
Sprung from night in darkness lost."

All that men leave behind them which is imperishable is the value of what they have done to make the lives of others better, and the community in which they live conscious of their intellectual and moral worth.

Ex-Governor Davis early in life achieved success as a lawyer, and, in the broad field of politics, he won the confidence of his fellow citizens and they made him chief executive of his own beloved state. For a number of years after he left political life, he devoted himself assiduously to his profession; he was to be found in this court room on one side or the other of many important cases which were tried. Always one of the kindest and most courteous of men, his respect for the court was very marked. I never knew of an instance where he had the slightest difference with a justice of the court in the trial of a cause. He was right at home with the jury; he seemed to know the hearts of men, and without ostentation or any straining for effect, could in his plain and fearless way always seem to reach them. I have heard him repeat more than once, "that the human heart has many strings, and if you touch them rightly, they will vibrate rightly."

His style of arguing a case to the jury was most unique, it was not declamatory, but impressed those who listened to him, and most always the jury, with the justice of the cause he advocated. I have heard him in important cases rise to a great height of true eloquence, combining reason, logic and persuasion. He never dallied with the immaterial or minutiæ, but like the experienced woodsman, struck his blows thick and fast to reach the heart.

I think every attorney who knew him as a practicing lawyer

fully appreciates that he might have stood in the forefront of the bar of this state had he given his entire time to the practice of his profession; but for the last four or five years, he practically abandoned all court work on account of his very large business interests.

The assertion may be made broadcast that in this community he had no enemies, for to put it mildly, he was a most lovable and companionable man. In twelve years of intimate acquaintance, I can truly say that I never saw him angry, and I never heard him speak an unkind word of any person,—it was his fault to clothe the weakness of human nature with the charity of his own heart. It goes without saying, that he was a man able to captivate the esteem and respect of his fellow men; and when once acquainted with him you were conscious, that, while not revealed by any overt act of his, there was in the man a wonderful power when he wished to fully exercise, or utilize it for his own interest, or in the interest of others.

His character, ability and life labors have been most fittingly depicted at length by the gentlemen of the bar who have preceded me. I wish to offer my simple testimony of our departed brother as he appeared to me.

Whether we shall meet him again, we cannot tell, we only know that we shall see him no more on earth; but a faith that will not be uprooted bids us hope,—a faith that antedates the Christian's promise and rests upon the ties that bind us to each other. We are not willing to believe that the heart's affections which brighten, adorn and purify our lives, the love of mother and father and child, of husband and wife, of kindred and friends, are all to be buried in the grave. Humanity revolts at the suggestion. But for this, faith in a future life might perish from among men.

Invading the realms of mythology, we are told that centuries before the dawn of the Christian era, when the new made King of Argos was about to give up his young life in obedience to the order of the Gods, she, whom he loved so fondly, in the wild frenzy of her grief, pleaded with him to tell her if they should meet again. He answered:

"I have asked that dreadful question
Of the hills that look eternal;
Of the flowing streams that lucid flow forever;
Of the stars amid whose field of azure
My rested spirit had trod in glory;
All were dumb; but now, while I thus gaze
Upon thy living face, I feel the love that kindles
Though its beauty can never wholly perish—,
We shall meet again."

Our departed brother's bereaved wife and sorrowing family will ever remember the love that once kindled in the husband's and father's face as he fondly looked upon his household treasures, and remembering will believe that the soul of man, the inexplicable power of human reason, can never die, and that in the realms beyond, across the threshold of which the finite mind of man can not penetrate, they will once more be united with their departed loved one.

Mr. Justice EMERY responded as follows:

While it is true, as has been well said, that our deceased associate, Mr. Davis, was something else than a lawyer, I will refrain from saying that he was more than a lawyer, for I know of no more honorable walk in life than that of a good lawyer. Mr. Davis was, indeed, something else, and perhaps at the expense of his professional career.

My acquaintance with Mr. Davis began a quarter of century ago, when we met as members of the Legislature of the State; but in this place and on this occasion I will only speak of his qualities as a lawyer, as displayed in the legislature and the courts. I cannot say he read deeply and widely in the books of the law. The exigencies of his life left him no time for that. He possessed, however, a native good sense and judgment which served him well instead. He always seemed to appreciate what was reasonable and fair and practical. In legislation, he sought not so much for the symmetrical, the ideal, as for what would work well. So in the courts, he was not so severely logical, but was rather humanly just. He cared more for practical justice than for logical precision.

He was a friend of the court. He was himself always respectful and dignified in his own demeanor toward the court. In all places he was the court's friend and defender.

In practice he was successful, not because of superior learning, but because of his clear, practical mind and his knowledge of humanity. He was not declamatory in argument, but always sought to persuade, to convince. Perhaps his strongest quality with a jury, was his candor. The jury believed he was honest, and was striving not so much for his own side as for the truth. He knew the value of logic,—that fair, reasonable argument was the most convincing, and he always gave the jury credit for enough intelligence to appreciate a fair argument.

As good a man and citizen as he was in the other walks of life, I cannot help regretting he was led away into them. He was a promising lawyer, and bid fair to do the state and society great and good and most distinguished service as a jurist, when he was taken away by the people to fill other stations and perform other duties. He was not allowed time nor opportunity to fully develop himself as a lawyer. Perhaps as citizens we should rejoice in his public service, but as lawyers we may regret he was not left to devote his time and strength to the development of our jurisprudence.

It is fitting that the Bench and Bar should set apart one day to express our sorrow and commemorate his virtues.

The resolutions may be recorded, and the court will now adjourn.

MEMORANDUM.

On the fifteenth day of May, 1897, Honorable CHARLES W. WALTON, senior Associate Justice of this court, retired from the bench upon the expiration of his term of office, having served thirty-five years.

The last opinion of Mr. Justice WALTON is the last case reported in this volume.

His retirement after so long a service, unprecedented in the State, is an event of unusual interest. It recalls how well, during so many years on the bench, he has performed the important and responsible duties of the judicial position; and how much he has contributed to our jurisprudence by the force and ability of his tersely written opinions whose authority is not confined to this State alone as leading expositions of the laws.

His eminent judicial record will cause his name to be remembered with honor, and his legal acumen to be acknowledged with reverence long after all memory of his striking personality shall have faded from the minds of men.

He has had twenty-four associates as members of the court, all of whom, except seven, he now survives. When he went upon the bench, May 14, 1862, the court consisted of eight judges, viz: TENNEY, C. J., APPLETON, RICE, CUTTING, DAVIS, GOODENOW, KENT and WALTON, JJ. Upon them and their successors, numbering seventeen others, labors vast in extent and amount have been cast and well performed.

The Maine Reports show that, not counting cases decided on rescripts and which often required much time and labor, Judge WALTON has prepared and delivered his entire proportion of opinions, and that he has not delivered a single dissenting opinion.

The high appreciation in which Judge WALTON is held by his associates upon the bench is happily expressed in a recent, just tribute of Chief Justice PETERS:

"Judge WALTON has been a most able lawyer in all the places he has occupied at the bar and on the bench. In the latter place he has been a great and shining light, and finishes a career of judicial life which has conferred honor and extraordinary benefits upon his native and much loved State. He will be able for the rest of his life to enjoy the reflection that he has fought the good fight bravely and well, and that the people of the State in their estimation of his character will ever recognize his distinguished public services. May his future years, and many of them, be attended with that freedom from labor and care which will, according to the philosophy of Cicero, make the evening of his life serene and enjoyable."

During all those thirty-five years the court has had its full share of responsibilities and duties of the hour. The country has passed through a civil war; slavery has been abolished and the Union has been preserved; prosperity and peace have returned; inventions have been brought out by the thousands adding to the comfort and convenience of all; pain and space have been annihilated by ether and electricity; education, charity and religion have been brought to every man's door; wealth has accumulated and our population has increased. Amid all these changes, Judge WALTON has borne his full part in deciding all the great questions of law and liberty that have arisen out of them in this court, and so aided in their decision that they are now at rest as finalities.

In his retirement he carries the respect and good will of the bench and bar, and the higher reward that arises from the consciousness of duty well done. C. H.

On the fifteenth day of May, 1897, the Honorable Albert Russell Savage was appointed a Justice of this Court, and took his seat on the bench of the Law Court, sitting at Augusta, for the Middle District, on the last Tuesday of May.

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CORPORATION.

See CHARITABLE ASSOCIATIONS.

Injunction denied against annual dinners given to members of, *Woodbury* v. *Portl. Marine Soc.*, 17.
also, for gift of $15, to a poor member, *Ib.*
officers may decide when trivial amounts involved if acting in good faith, *Ib.*
equity does not stoop to pick up pins, *Ib.*
Subscriber to stock not released, when he consented to change of location, *Lowell* v. *R. R. Co.*, 80.

CORPORATION (concluded.)

Charitable association limited by charter to holding $100,000 in property, *Farrington* v. *Putnam*, 405.
but devise to, in excess sustained, *Ib.*
question of excess a governmental and not a judicial question, *Ib.*
charter is a contract between, and state, *Ib.*
Charter of Penobscot Log-Driving Co., adjudicated, *Mullen* v. *Log-Driving Co.*, 555.
has superior right to waters for its purposes, *Ib.*
not obliged to drive plaintiff's logs, *Ib.*
plaintiff not entitled to stored waters, nor the natural flow if needed by corporation, *Ib.*
state may grant exclusive privileges in the use of public rivers, *Ib.*

COSTS.

Allowed in action for taxes, *Dover* v. *Water Co.*, 180.
On demurrer, *Hare* v. *Dean*, 308.

COVENANTS.

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CRIMES.

See ASSAULT. FISH AND GAMES. PLEADING.

DAMAGES.

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In trover, value at time of conversion, *Ekstrom* v. *Hall*, 186.
plaintiff may remit, in part, when excessive and amounts appear in special findings, *Ib.*
None for taking water from great ponds for domestic use, *Auburn* v. *Water Power Co.*, 576.

DAMS.

See TAXES. WATER COMPANY.

For storage of waters, *Mullen* v. *Log-Driving Co.*, 555.

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DEED.

A. q. c. contained special covenants against grantor's encumbrances, *Bennett* v. *Davis*, 457.

after-acquired title does not inure to grantee, *Ib.*

Plaintiff held three mortgages, *Smith* v. *Sweat*, 528.

they were separate deeds containing similar descriptions under different dates, *Ib.*

the boundaries are true and correct as applied to the times when they were given. *Held;* that they are to be construed as separate instruments and in reference to the facts existing at the times when they were given, *Ib.*

hence they may cover and include different tracts and following a receding line cover more land in one case than in another, *Ib.*

A particular description when definite and certain controls a general reference to another, as a source of title, *Ib.*

when a, gives a boundary by land of another, the true line of the adjoining land is the monument, *Ib.*

and so whether, referred to is recorded or not, *Ib.*

Flats generally go by, of upland, *Freeman* v. *Leighton*, 541.

but they may be severed from upland, *Ib.*

held; in this case, the flats were severed, *Ib.*

the description was, "to the shore," and "thence by the shore and upland to the first bound," *Ib.*

colonial ordinance of 1641–7, *Ib.*

DEFECTIVE MACHINERY.

See NEGLIGENCE.

DELIVERY.

See EQUITY. SALES. TRUSTS.

DOWER.

Report of commissioners to set out, recommitted, *Skolfield* v. *Skolfield*, 571.
power of court so to do affirmed, *Ib.*
commissioners act under original appointment, *Ib.*
certain parcels "set out as for dower," *held;* a sufficient assignment, *Ib.*
writ of seizin need not contain specific directions, *Ib.*

EASEMENT.

See WAY.

ELECTIONS.

City clerk cast the ballot of city council at, of assessor and collector, *Auburn* v. *Water P. Co.*, 71.
court decides not validity of, *Ib.*
meeting of city council, *held;* valid, *Ib.*
it met pursuant to call of the mayor, *Ib.*

ELECTORS.

How taxed when living in unincorporated places, *Sargent* v. *Milo*, 374.
but not for town taxes, *Ib.*

ENTICEMENT.

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EQUITY.

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Will not enjoin annual dinners given to members of charitable society, nor small money gift to a member, *Woodbury* v. *Portl. Marine Soc.*, 17.
does not stoop to pick up pins, *Ib.*

Bill in, for specific performance denied, *Glidden* v. *Korter*, 269.
plaintiff did not have perfect title, and right to deed was contingent, *Ib.*

Practice in, on demurrer, *Ricker* v. *Ry.*, 395.
filing of replication, *held;* waived, *Ib.*
injunction for using words "Poland Springs," denied, *Ib.*
even if they were a trade-mark, not infringed, *Ib.*
R. R. station "Poland Springs," and competing stage line. *Ib.*

EQUITY (concluded.)

Exceptions in, not to be brought to law court before final hearing, *Bath* v. *Palmer*, 467.
exceptions to amended bill, *Ib.*
R. S., c. 87, § 19, gives a certain remedy in, but creates no cause of action when none existed at law, *Hodge* v. *Hodge*, 505.
Bill of interpleader in, sustained, *Bank* v. *Small*, 546.
husband claimed deposit in wife's name, her executor also claimed it, *Ib.*
husband not a competent witness *Ib.*
held; the deposit was the husband's, *Ib.*
there was no intent of husband, who made deposit, to make a gift, and no delivery, *Ib.*
Rule XXII., in, 395.

ESTOPPEL.

See JUDGMENT.

Rule in, stated and applied, *Gas Co.* v. *Wood*, 516.

EVIDENCE.

Presumptions have effect as prima facie proof, until counteracted by, *Jones* v. *Ins. Co.*, 40.
rule applied in case of vacant house destroyed by fire, *Ib.*
when burden of proof shifts, *Ib.*
Exceptions do not lie to immaterial, *Bacon* v. *Steamb. Co.*, 46.
Letter of director to president admissible in, in action of negligence to show notice, *Palmer* v. *Lumb. Assoc.*, 193.
Declarations of agent not admissible in, until agency is proved by other, *Bennett* v. *Talbot*, 229.
declarations admitted in, de bene esse, *Ib.*
held; son was not his mother's agent, *Ib.*
Admissibility may be postponed for further consideration, *held;* not an exclusion of, *Dudley* v. *Paper Co.*, 257.
no exceptions if, not offered again, *Ib.*
Photographs admissible in, *State* v. *Hersom*, 273.
As to, of express and implied contracts, *Saunders* v. *Saunders*, 284.
differs only in form of proof, *Ib.*
son worked for his father after majority, *Ib.*
In elevator case, not admissible to show defendant was insured, *Sawyer* v. *Shoe Co.*, 369.

EVIDENCE (concluded.)

In action to recover taxes assessed to "Saml. J. Bridge, Est. of" not admissible, to show assessors meant the executors of his will, *Dresden* v. *Bridge*, 489.

Husband not competent witness, *Bank* v. *Small*, 546.
he claimed deposit in wife's name, and her executor also claimed it, *Ib.*
both were parties to bill in equity, *Ib.*

EXCEPTIONS.

See ELEVATOR. NEGLIGENCE. PRACTICE.

Do not lie to immaterial testimony, *Bacon* v. *Steamb. Co.*, 46.

Not to a requested ruling equivalent to a non suit, *Auburn* v. *Water P. Co.*, 71. *Dudley* v. *Paper Co.*, 257.
the remedy is by motion, *Ib.*

When, are detached extracts from the charge, *held;* that the whole charge must be examined, *Donnelly* v. *Granite Co.*, 110.

Bill of, what it must show, *Munroe* v. *Whitehouse*, 139.
that from the facts reported the ruling was erroneous, *Ib.*

Will lie to rulings on questions of law only and not to findings upon questions of fact, *Laroche* v. *Despaux*, 179.
bill of, must so show, *Ib.*

Will be overruled when damages are excessive, there being special findings of amounts, and plaintiff remits the excess, *Ekstrom* v. *Hall*, 186.

Postponement of admission of evidence, *held;* not an exclusion when reserved for consideration, *Dudley* v *Paper Co.*, 257.
and no, if not offered again, *Ib.*

Bill of, in Superior Court in criminal cases, *State* v. *Hersom*, 273.
may be certified to the Chief Justice, in criminal cases, *Ib.*

Should not be brought to law court in equity case until after final hearing, *Bath* v. *Palmer*, 467.

EXECUTORS AND ADMINISTRATORS

See TAXES.

Office of admr. de bonis non, defined, *Hodge* v. *Hodge*, 505.
when he cannot maintain action, *Ib.*
debt due from person becoming an, becomes assets in his hands, and a question of probate administration, *Ib.*
such debt is not revived by death of, and cannot be sued by a. d. b., *Ib.*
wife was owner of deposit in savings bank converted by her husband after her death, *Ib.*
his admr. not liable to her admr. d. b., at law or in equity, *Ib.*
no remedy in equity under R. S., c. 87, § 19, *Ib.*

EXEMPTED PROPERTY.

See INSOLVENCY. INSURANCE (LIFE.)

FELLOW-SERVANT.

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FENCE.

Becomes boundary of street, after forty years, when records and monuments are lost, *Bradford* v. *Hume*, 233.
so *held* of street 30 feet wide in Eastport, *Ib.*

FISH AND GAME.

Illegal transportation of trout sufficiently alleged, *State* v. *Whitten*, 53.
that trout weighed 4 1-2, no allegation of weight, *Ib.*
penalty assessed accordingly, *Ib.*

Violating, law sufficiently set out, *State* v. *Thomas*, 223.
having, in possession not intended for consumption, *Ib.*

FLATS.

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FORCIBLE ENTRY AND DETAINER

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FRAUD.

See ASSIGNMENT. HUSBAND AND WIFE. HORSE-RACE. SALES.

FRAUDULENT CONVEYANCE.

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GAMING.

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GIFT.

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GRAND JURY.

Stenographer before a, not allowed, *State* v. *Bowman*, 363.
indictment thereby invalidated, *Ib.*
party indicted may take advantage of it, *Ib.*

GREAT PONDS.

See WATER COMPANY.

GUARANTY.

Sufficiency of, given by R. R. contractors, to be adjudged by co. com., *Lowell* v. *R. R. Co.*, 80.
their approval, *held;* not reviewable, *Ib.*

HORSE-RACE.

Defendant liable for trotting premium, *Wellington* v. *Trotting Park*, 495.
parties bound by decision of judges, *Ib.*
fraudulent decision is no bar to an action by owner of horse actually winning, *Ib.*
accepting check for second money, *held;* no bar to action for first money, *Ib.*
plaintiff stated he would credit check on account, *Ib.*

HUSBAND AND WIFE.

Transfer of husband's earnings to wife, *Trefethen* v. *Lynam*, 376.
will be closely scrutinized by court, when creditors will be injured, *Ib.*
wife erected buildings with husband's money, *Ib.*
increment of value may be taken by creditors, *Ib.*
when burden of proof is on wife in such case, *Ib.*
wife not allowed to charge husband with rent, *Ib.*
Case of savings bank deposit in wife's name, *Bank* v. *Small*, 546.
held; deposit belonged to husband, *Ib.*
no evidence of gift or delivery to wife, *Ib.*

INDICTMENT.

Offense of illegal transportation of trout, *held;* sufficiently set out, *State* v. *Whitten*, 53.
that trout weighed 4 1-2, no allegation of weight, *Ib.*
R. S., c. 40, § 54, and Stat. 1895, c. 31, are constitutional, *Ib.*

An, for embezzlement, *held;* insufficient, *State* v. *Carkin*, 142.
failed to charge the gravamen of the crime; the embezzling or fraudulent conversion, *Ib.*

Violating game law sufficiently stated, *State* v. *Thomas*, 223.
having game in possession not intended for consumption, *Ib.*

No, against R. R. in cases of death, *State* v. *R. R. Co.*, 267.
remedy is now civil action, *Ib.*
Stat. 1891, c. 124, repeals remedy by, *Ib.*

INJUNCTION.

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INSOLVENCY.

Exempted property is a personal privilege of a debtor, but he may waive it, *Wyman* v. *Gay*, 36.
assignment of life insurance, *held;* a preference, *Ib*
annual premium was less than $150, *Ib.*
assignee in, entitled to recover, *Ib.*

Fraudulent preference in, bars a discharge, *Huston* v. *Goudy*, 128.
so, when a trader fails to keep proper account books, *Ib.*
held; to be a trader, in this case, *Ib.*

INSURANCE (ACCIDENT.)

Policy required ten days' notice, *Kimball* v. *Acc. Assoc.*, 183.
held; a valid condition, *Ib.*
action failed for want of notice, *Ib.*
policy dated Oct. 11, 1892, not affected by later statutes as to length of notice, *Ib.*
statutes did not invalidate prior contract, *Ib.*

INSURANCE (FIRE.)

Court reviews *White* v. *Phoenix Ins. Co.*, 83 Maine, 279, Id. 85 Maine, 97, *Jones* v. *Ins. Co.*, 40.
case of vacant buildings and burden of proof, *Ib.*

INSURANCE (FIRE) (concluded.)

presumptions in case of non-occupancy when sufficient to sustain burden of proof, *Ib.*
when burden of proof is on company, *Ib.*
held; that action cannot be maintained; the house was vacant for more than a year, *Ib.*

Against fires caused by R. R. Cos., *Leavitt* v. *Ry. Co.*, 153.
liability of R. R. limited, *Ib.*
Stat. 1895, c. 79, is constitutional, *Ib.*
policy issued before act took effect, but the fire was later in date, *Ib.*
principle of subrogation stated, *Ib.*

Case of vacant dwelling-house, *Hanscom* v. *Ins. Co.*, 333.
company estopped from setting up non-occupancy as a defense, *Ib.*
erroneous estimates no cause of forfeiture when loss exceeds amount of, *Ib.*
mortgage delivered after loss, *held;* did not avoid policy, *Ib.*

Frame stable, etc., *held;* within terms of policy, *Robinson* v. *Ins. Co.*, 385.
instructions as to same sustained, *Ib.*
whether there was a waiver of proof of loss, *held;* a question of fact for the jury, *Ib.*

INSURANCE (LIFE.)

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Assignment of, *held*, a preference, *Wyman* v. *Gay*, 36.
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INTEREST.

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Not recoverable upon, after debt is due, *Whitcomb* v. *Harris*, 206.
compound, paid mortgagee, under protest, *Ib.*
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Note at 9 per cent, until paid, carries same rate after maturity, *Bank* v. *Hewins*, 255.

INTOXICATING LIQUORS.

Warrants for searching of, to be served promptly, *State* v. *Guthrie*, 448.
remain in force reasonable time only, *Ib.*
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JUDGMENT.

Becomes an estoppel between same parties when same facts arise again, *Parks* v. *Libby*, 56.
issues must be identical, *Ib.*
issues, *held;* not indentical, in case of log driving, *Ib.*

LABOR UNION.

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LANDLORD AND TENANT.

Owner liable for dangerous entrance to building, *Foren* v. *Rodick*, 276.
Tenancy at will is terminated by alienation by landlord, and tenant not entitled to notice, *Seavey* v. *Cloudman*, 536.
"party" in R. S., c. 94, § 2, means party to the contract, and does not apply, where relation of, does not exist, *Ib.*
"and not otherwise" refer to the acts of the parties to the tenancy, *Ib.*

LEASE.

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LICENSE.

New, required by itinerant vendor, *Wolf* v. *Runnels*, 253.
had packed and removed his goods, but returned in same municipal year, *Ib.*

LIEN.

None on logs where plaintiff hired defendant's horse, harness and sled, *Richardson* v. *Hoxie*, 227.
plaintiff did not cut, haul, raft or drive logs, *Ib.*

LOGS.

See CORPORATION. LIEN. NEGLIGENCE.

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Action will lie for wrongfully inducing servant to break his contract, *Perkins* v. *Pendleton*, 166.

MINORS.

In action for enticing, from parent's custody father and mother are proper plaintiffs, *Hare* v. *Dean*, 308.
action maintained although minor was not living with parents, *Ib.*

MORTGAGE.

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Fixtures annexed to realty passed by, *Ekstrom* v. *Hall*, 186.
buildings erected by third person, and holder of, did not consent, *Ib.*
otherwise, when holder of, consents, *Ib.*
Compound interest not collectible under, *Whitcomb* v. *Harris*, 206.
interest paid on, under protest recovered, *Ib.*
what fees payable on foreclosure of, by publication, *Ib.*
advertising and recording but not attorney's fees, *Ib.*
Plaintiff held a chattel, in an insolvent estate, *Nickerson* v. *Chase*, 296.
his three methods of procedure stated, *Ib.*
held; he had waived his security, *Ib.*

MUNICIPAL OFFICERS.

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NEGLIGENCE.

See EVIDENCE. RAILROADS.

Rule of, in case of common carrier after ceasing to act as such, *Bacon* v. *Steamb. Co.*, 46.
is that of reasonable diligence, *Ib.*
passenger hurt on wharf after landing from boat, *Ib.*
Tow-Boat, *held;* liable for, *Cumb. County* v. *Tow-Boat Co.*, 95.
it ran into a bridge with its tow, *Ib.*
tow-boat, *held;* as responsible agent although vessel towed was in fault, *Ib.*
pendency of action against vessel owner, *held;* no bar to this action against tow-boat Co., *Ib.*
too narrow draw in bridge, *held;* no defense, it not appearing to have contributed to the injury, *Ib.*

NEGLIGENCE (concluded.)

Employers must provide reasonably safe appliances, *Donnelly* v. *Granite Co.*, 110.
cannot employ incompetent persons to provide appliances, *Ib.*
master, *held;* liable for, of servant, *Ib.*
held; not case of, by fellow-servant, but of master, *Ib.*
defective rope broke sustaining platform and could have been discovered before use, *Ib.*
whether, is that of master or servant is a mixed question of law and fact, *Ib.*
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Case of, in a defective boom, *Holway* v. *Machias Boom*, 125.
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Case of, in rafting and delivering logs, *Palmer* v. *Lumb. Assoc.*, 193.
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No action for, against street railway, *Conway* v. *Street Ry.*, 199.
passenger stepped on rolling stone in street, *Ib.*
no causal connection with plaintiff's injury, *Ib.*
reasons why there was no, by railway, *Ib.*
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Plaintiff fell into a cellar, *Foren* v. *Rodick*, 276.
was deceived by sign indicating entrance, *Ib.*
landlord held liable for injury, *Ib.*
conditions of approach to entrance dangerous, *Ib.*

Steam escaped hissing from locomotive, *Boothby* v. *R. R.*, 313.
when plff. and wife were near crossing and horse ran away, killing wife, *Ib.*
questions of, left to the jury who made special findings as to escape of steam, *Ib.*
fee in the crossing was in the R. R. who allowed it to be used, *Ib.*

Plaintiff recovered verdict of $4250, *Sawyer* v. *Paper Co.*, 354.
acts of, charged were defective machinery, want of lights, and retaining incompetent servant, *Ib.*
verdict reduced to $2500, *Ib.*
want of lights, *held;* proximate cause of injury, *Ib.*
no contributory, by plaintiff, *Ib.*

Elevator case, *Sawyer* v. *Shoe Co.*, 369.
certain requested instructions denied, *Ib.*
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NON-SUIT.

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Action to recover for support of insane, *Bangor* v. *Orneville*, 217.
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Support of, regulated by statute, *Davis* v. *Milton Plan.*, 512.
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PAYMENT.

Plaintiff received check for second money awarded his horse in a race, *Wellington* v. *Trotting Park*, 495.
he stated he would credit it on account, *held;* no bar to action to recover first money due him, *Ib.*

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Declaration sustained in action for inducing servant to break his contract, *Perkins* v. *Pendleton*, 166.
Count on account annexed, *held;* good, *Dudley* v. *Paper Co.*, 257.
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Amendment to declaration allowed by inserting an ad damnum, *Hare* v. *Dean*, 308.
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POLAND SPRINGS.

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Sealed verdict affirmed in open court, *State* v. *Webber*, 108.
oral verdict of guilty affirmed at same time, *Ib.*
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Stenographer not allowed with grand jury, *State* v. *Bowman*, 363.
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party indicted can take advantage of it, *Ib.*

Motion and exceptions will not be considered, when it clearly appears action is not maintainable, *Rhoades* v. *Cotton*, 453.

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As to intent, when negatived, *State* v. *Hersom*, 273.

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PROBATE.

Void appointment in, *Hussey* v. *Southard*, 296.
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RAILROADS.

Change of location, *held;* valid, *Lowell* v. *R. R. Co.*, 80.
Stat. of 1893, c. 193, gives, this power, whether chartered or organized under general law, *Ib.*
held; that later act identified the, although it recited wrong chapter, *Ib.*
act of co. com., approving bond, *held;* final, and this act not reviewable, *Ib.*
location of, between two termini, *held;* good and within control of directors, *Ib.*
change of location approved by R. R. comr's did not release original subscriptions to stock, *Ib.*
county consented to changed location, *Ib.*
held; construction was begun within time limited, *Ib.*
Insurance against fires caused by, *Leavitt* v. *Ry. Co.*, 153.
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Passenger from street, stepped accidentally on rolling stone between car and sidewalk, *Conway* v. *Street Ry.*, 199.
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no causal connection with plaintiff's injury, *Ib.*
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duty of conductor of street, defined, *Ib.*
No indictment against, for causing death, *State* v. *R. R. Co.*, 267.
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Steam escaped from locomotive, *Boothby* v. *R. R.*, 313.
when plff. and wife were near crossing and horse ran away, killing the wife, *Ib.*
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fee in the crossing was in the R. R. who allowed it to be used, *Ib.*
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Of towns may be amended, *Bangor* v. *Orneville*, 217.

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Delivery in, when required, *Goodwin* v. *Goodwin*, 23.
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considered consummated although vendor retained possession, sale being bona fide, *Ib.*
vendor sold five cows to vendee and agreed to keep and milk them, *Ib.*

Accidental loss or destruction of property sold, *Dudley* v. *Paper Co.*, 257.
if title passed, loss falls on vendee, *Ib.*
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case of pulp-wood to be delivered on river bank, *Ib.*

Unreasonable delay in shipping goods, *Rhoades* v. *Cotton*, 453.
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order for Memorial day flags given April 28; goods did not arrive until June 1st, *Ib.*

When title may pass without delivery, *Cummings* v. *Gilman*, 524.
same goods sold to two different purchasers, party first getting possession will hold, *Ib.*
apples sold remained with vendor until defendants hauled them away, *Ib.*

SCHOOL DISTRICT.

Devise to, failed, *Brooks* v. *Belfast*, 318.
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SET-OFF.

In an action by partnership to recover firm debt no, of demand against one partner, *Jones* v. *Steamb. Co.*, 120.
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Debt of agent may be, in action by principal when defendant had no knowledge of the agency, *Munroe* v. *Whitehouse*, 139.
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Excessive verdict in, set aside, *Libby* v. *Towle*, 262.

Case of privileged communications, *Bradford* v. *Clark*, 298.
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A later, identified a R. R. Co. eo nomine, although it recited a wrong chapter, *Lowell* v. *R. R. Co.*, 80.
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Held; not to affect prior contracts, *Kimball* v. *Acc. Assoc.*, 183.
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" " 1843, c. 67, Highway, 479.
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In *State* v. *Hersom*, p. 273, for "R. S., c. 75, § 77," read "R. S., c. 77, § 75."

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In *State* v. *Martin*, p. 117, for "admitted" read "omitted" in fourth line of head note.

In *Field* v. *Lang*, p. 455, eleventh line from foot, for "plaintiff" read "defendant."