MAINE REPORTS

91

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

1897—8.

CHARLES HAMLIN

REPORTER

PORTLAND, MAINE

WILLIAM W. ROBERTS

1898

JUSTICES

OF THE

SUPREME JUDICIAL COURT,

DURING THE TIME OF THESE REPORTS.

HON. JOHN A. PETERS, CHIEF JUSTICE.

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.

HON. WILLIAM H. FOGLER.†

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.

*Term expired March 24, 1898.

†Appointed March 25, 1898.

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ASSIGNMENT OF JUSTICES

FOR THE JUDICIAL YEAR 1897.

LAW TERMS.

MIDDLE DISTRICT, at Augusta, 4th 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.

PRESS OF THOMAS W. BURR,
BANGOR, MAINE.

CASES

IN THE

SUPREME JUDICIAL COURT,

OF THE

STATE OF MAINE.

INHABITANTS OF PALMYRA *vs.* SUSAN H. NICHOLS.

Somerset. Opinion November 4, 1897.

Contracts. Indemnity. Paupers. Towns. Agent. R. S., c. 24, § 10.

Held; that a contract under seal, wherein the obligor agreed to release a town from the support of a person named, and to maintain such person through his natural life and pay all doctor's bills and expenses, with the condition that if the obligor indemnified the town from all expenses, costs and damages which might accrue by reason of such person, the contract should be void, and providing also that if the obligor failed to fulfil her obligation, the town should have a right of action against her, is a contract of indemnity merely.

The punctuation of an instrument may be disregarded, if the meaning is clear.

A town may indemnify itself by proper contract against the contingent liability of furnishing pauper supplies to one who at the time of the contract has a pauper settlement within the town, and this, without regard to whether he is in present need or not, or whether he knows that he is receiving pauper supplies or not. *Held;* that the contract in this case, being of such a character, is legal and enforceable.

The overseers of the poor are the agents of the town in matters relating to the care and oversight of the poor, and as such, have authority to take such a contract for the town, without special instructions.

ON MOTION AND EXCEPTIONS BY DEFENDANT.

The facts of this case appear in the opinion.

J. W. Manson and G. H. Morse, for plaintiff.

E. N. Merrill, for defendant.

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

SAVAGE, J. This is an action of covenant broken brought upon the following instrument:

"Newport, Jany. 14th 1895.

Know all men by these presents that I, Susan H. Nichols of Newport Co. of Penobscot and state of Maine. I do hereby agree & obligate myself my heirs and executors that I will release the town of Palmyra, from further support of Enoch H. Clark, & further promise & agree that I will maintain said Clark through his natural life, & pay all Drs. bills & funeral expenses. The condition of this obligation is such that if said Susan H. Nichols shall indemnify the said town of Palmyra from all expenses, costs & damages which may accrue by reason of said Clark. Then this obligation is void, otherwise if said Susan H. Nichols fails to fulfil this obligation said town of Palmyra will sue said Susan H. Nichols or her heirs or executors & recover for the support of said Clark with expenses added thereto.

Susan H. Nichols (Seal.)

Signed sealed in the presence of
Mary J. Kelley & F. L. Brown.

Penobscot ss. Newport Jany. 14th 1895.

Personally appeared Susan H. Nichols & made oath to the above statement to be her free act. Before me

F. L. Brown, Justice of the Peace."

I. The defendant, the verdict being against her, contends that the instrument is so inartificially drawn that it means nothing; in short, that it is not a contract, and has excepted to the construction placed upon it by the presiding justice in his charge to the jury in the following language:—

"I give you this ruling and construe this instrument to be an obligation upon the part of Mrs. Nichols, a contract between her and the town of Palmyra, so far as the instrument shows upon its face, to indemnify the town of Palmyra against all expense that it may subsequently be put to at any time for the relief of the person therein named, Enoch H. Clark, as a pauper."

We think the ruling was correct, and that taking the instrument as a whole, giving due effect to each part, it is clearly to be interpreted as a contract of indemnity. It is indeed unskilfully drawn. The scrivener was evidently not a lawyer. He seems to have tried to draft a bond, but he omitted the penal part. He did however incorporate a condition which is intelligible and clear. It is not difficult to understand what the parties intended by this instrument, and to that intention, as gathered from the instrument itself, it is our duty to give effect. The defendant agreed to "relieve the town of Palmyra from further support of Enoch H. Clark." The condition in the obligation is "that if said Susan H. Nichols shall indemnify the said town of Palmyra from all expenses, costs and damages which may accrue by reason of said Clark, then this obligation is void. Otherwise, if said Susan H. Nichols fails to fulfil this obligation, said town of Palmyra will sue," i. e. shall have the right to sue, "said Susan H. Nichols . . . . and recover for the support of said Clark . . . ." It is here written as it should be read. The punctuation of the instrument may be disregarded, if the meaning is clear. It is an uncertain guide. *State* v. *McNally*, 34 Maine, 210. So, of the use of capital letters to indicate the beginning of new sentences. Unskilled persons are inaccurate in such matters. This is not a contract for support, properly so called, notwithstanding the clause, "I further promise and agree that I will maintain said Clark through his natural life." By doing this, she would, in fact, release and indemnify the town. The contract itself was to be void, if she indemnified the town.

In this connection, the defendant urges that the contract is not enforceable, "because no one is named as obligee in it or bound by it." We think it sufficiently appears that the contract was made with the town of Palmyra.

II. The defendant contends, in the next place, that the contract is void, because neither the municipal officers, nor even the town of Palmyra itself, had authority to make such a contract.

The instructions of the presiding justice to the jury, upon this point, to which exceptions were taken, were, that the instrument

"was a legal contract for the overseers of the poor of Palmyra to make, provided Mr. Clark, at the time it was made, had his pauper settlement in the town of Palmyra;" that in such case, "this was a competent contract for the town, through its municipal officers, the selectmen and overseers, to make with Mrs. Nichols;" that it is not "incumbent upon the plaintiff to show that Clark knew he was receiving pauper supplies at the time, in order that the contract may be made;" "that it was not necessary that Clark should have been in want at the time of making the contract;" and that "the selectmen would be authorized to take a contract from a person competent to make a contract to take care of any pauper for any term of years, or for life, for a sufficient consideration."

We think these rulings are unexceptionable. We have construed this contract to be one of indemnity merely, and these exceptions must be considered in the light of that interpretation. The language of the presiding justice last quoted must be read in connection with his previous instruction that this is a contract of indemnity. It is not a contract for the support of a pauper.

The argument of counsel is largely directed to the point that a "town has no authority to raise money to relieve itself from the possible, contingent or future liability of one of its citizens becoming a pauper, who at the time was not a pauper, nor in want." Conceding this to be so, nothing appears in this case to which such an argument can be directed. This is not a question of the power of a town to raise money. This is not a contract by which the town is to incur, but rather to avert a liability. The contract does not show that any money was paid or required. It is under seal which of itself imports a sufficient consideration. The defendant, from motives of family pride, or kindness, may have been willing to enter into a contract to indemnify the town against the expense of the support of Clark, who was her brother, but that matters not.

The naked question is, can a town indemnify itself by proper contract against the contingent liability of furnishing pauper supplies to one who at the time of the contract has a pauper settlement within the town, and this without regard to whether he is in

present need or not, or whether the person affected knows that he is receiving pauper supplies, or not. We see no good reason why it cannot. On the other hand, to do so, must in many cases be the exercise of a wise business discretion. It is true that the power is not prescribed by statute in terms, but towns possess many incidental powers which are not defined by statute. It is their duty to "relieve persons having a settlement therein, when on account of poverty, they need relief." R. S., c. 24, § 10. Such relief will cause expense. Towns have an interest in preventing such expense, and this interest exists whether the persons concerned are now chargeable, or may become chargeable hereafter. Towns as well as individuals may be prudent and far-seeing. In matters like this, they may properly avert or prevent liability. *Dennett* v. *Nevers*, 7 Maine, 399; *Augusta* v. *Leadbetter*, 16 Maine, 45. The Supreme Court of Vermont, in a case involving the power of a town to take a bond of indemnity, like the contract in the case at bar, said, "where the subject matter of the contract is the appropriate business and interest of the town, the court discovers no reason why the contract with the town, suitably framed to secure that interest, should not bind the signers, as fully, as if made to an individual concerning his interest." *Pawlet* v. *Strong*, 2 Vermont, 442, affirmed in *Williston* v. *White*, 11 Vermont, 40.

The contract here being within the proper exercise of municipal authority, the only question remaining is whether the overseers of the poor were authorized to take it, without instructions from the town. We think they acted within the scope of their power. Overseers of the poor have the care and oversight of the poor, and in the discharge of their duties, they are the authorized agents of the town. Necessarily, they may transact a variety of business, incidental to their general powers. To prevent the town from becoming subjected to expense for pauper supplies on account of one who has his legal settlement in their town seems not only lawful but meritorious. *Peru* v. *Turner*, 10 Maine, 185; *Unity* v. *Thorndike*, 15 Maine, 184. Moreover the town has adopted this contract and brought suit upon it.

It is the opinion of the court that the exceptions should be overruled. The defendant has not pressed her motion for a new trial.

Motion and exceptions overruled.

GEORGE R. MCNALLY *vs.* EDWIN C. BURLEIGH, and others.

Kennebec. Announced October 16, 1897.

Libel. Privileged Communication. Damages.

Where the words published by the defendants in their newspaper concerning the plaintiff, both personally and in his official capacity, are clearly libelous, a verdict for the plaintiff will be sustained if the words are untrue and unprivileged.

To be privileged, the words must be published without actual malice, in an honest belief of their truth, and with such belief based upon reasonable or probable cause after a reasonably careful inquiry.

In this case it appeared that the publication complained of was the work of a reporter of the defendants' newspaper, and that his motives and conduct were really in question. There was some evidence tending to show that the reporter was hasty and somewhat unfriendly to the plaintiff; that his belief was influenced by his feelings rather than by his judgment; and that his investigation of the affair as published was rather superficial and more for the purpose of making a sensation than to ascertain the truth. The jury believed this testimony and the court consider that the finding was not unquestionable error.

The plaintiff was a public officer and was severely libelled in that capacity by the defendants' newspaper,—an influential and leading newspaper in the state, having a wide circulation. Upon a motion for a new trial upon the ground that the damages ($896.37) were excessive, *held;* that the plaintiff was entitled to the opinion of the jury on the question of the damages caused him by the libel; and the court declined to set the verdict aside.

ON MOTION BY DEFENDANTS.

This was an action on the case for libel and in which the plaintiff, who was a deputy sheriff, claimed that the defendants who were proprietors and publishers of the newspaper, called the Kennebec Journal, had falsely and maliciously accused the plaintiff with being guilty of and committing two crimes, viz: the crime of voluntarily suffering Foster Nelson, a prisoner in his custody, as a

deputy sheriff, to escape, and the crime of bribery, in receiving money as a deputy sheriff, from said Nelson, as an inducement for omitting to perform his official duty, by allowing said Nelson to escape from plaintiff's custody.

The case was tried to a jury, sitting in Kennebec county, who returned a verdict for the plaintiff of $896.37.

W. H. McLellan; John McCarty, for plaintiff.

H. M. Heath and C. L. Andrews; Forrest Goodwin; Jos. Williamson, Jr., and L. A. Burleigh, for defendants.

PER CURIAM. The words published by the defendants in their newspaper concerning the plaintiff, both personally and in his official capacity, were clearly libelous, if untrue and unprivileged. The jury found they were untrue, and in this finding the defendants, though denying its correctness, frankly concede they should acquiesce.

To be privileged, the words must have been published without actual malice, in an honest belief of their truth, and with that belief based upon reasonable or probable cause after a reasonably careful inquiry. The jury found against the defendants on this issue, but this finding the defendants vigorously and confidently attack as being so much against the evidence as to show the jury to have been unmistakably wrong.

The publication was really the work of a reporter for the defendants' newspaper. His motives and conduct were really in question. We find some evidence tending to show that the reporter was hasty and somewhat unfriendly to the plaintiff, that his belief was influenced by his feelings rather than by his judgment, and that his investigation of the affair was rather superficial and more for the purpose of making a sensation than to ascertain the truth. The jury believed this testimony and we do not feel warranted in saying that the finding was unquestionable error.

The defendants also strenuously contend that the damages ($896.37) are excessive. They claim that the prior standing and character of the plaintiff were so low, he could not have suffered

more than nominal damages. The plaintiff's standing and character were in issue on this question of damages and the jury found he had enough to be injured to the extent named. The plaintiff was a public officer and was severely libelled in that capacity by an influential newspaper of wide circulation, one of the leading newspapers of the state. The plaintiff was entitled to the opinion of the jury on the question of the damages caused him by the libel. We do not feel justified in this case in setting that opinion aside.

Motion overruled.

SAMUEL H. ROGERS *vs.* WILLIAM H. HAYDEN.

Sagadahoc. Opinion November 5, 1897.

Contract. Usage. Price.

The meaning of a contract cannot be varied by local usage unless it be uniform, reasonable and known to the parties, so that they may be presumed to have contracted with reference to it.

A usage that might nearly double the quantity of goods sold is unreasonable.

The plaintiff contracted to deliver on or near the premises, where defendant was building a cellar wall, certain stone at an agreed price per cubic yard. He claimed, among other things, that by reason of a local usage the stone were to be measured as solid wall after they had been laid. The defendant claimed that the contract price was by the cubic yard of the stone measured when delivered. *Held;* that the contract fixed the price per cubic yard delivered, and not as solid wall after the stone had been laid.

ON MOTION BY DEFENDANT.

This was an action on the case to recover payment for building stone sold by the plaintiff to the defendant, under a verbal contract.

The plaintiff claimed payment for 102 cubic yards, 17 cubic feet two-faced stone at $3.75 per cubic yard and ten cubic yards, 12 cubic feet one-faced stone at $2.35 amounting to $409.42. The defendant contended that he owed the plaintiff for 58 cubic yards, 12 cubic feet, 724 cubic inch two-faced stone at $3.50 per cubic

yard, and eight cubic yards, 26 cubic feet, 1162 cubic inch, at $2.35 per cubic yard amounting to $225.72.

Plaintiff recovered a verdict of $407.53.

S. L. Fogg, for plaintiff.

G. E. Hughes, for defendant.

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

HASKELL, J. Assumpsit for the contract price of stone sold and delivered. The contract was to deliver on or near the premises where defendant was building a cellar wall certain stone at an agreed price per cubic yard. The plaintiff claimed the contract included certain two-faced stone at $3.75 per cubic yard and that by reason of a local usage the stone were to be measured as solid wall after they had been laid. The defendant claimed the contract price was $3.50 per cubic yard measured when delivered. The verdict was for plaintiff, manifestly including the quantity measured as masonry. Defendant asks to have it set aside as against evidence and because it is excesssive.

The contract fixed the price per cubic yard delivered. That meant cubic yards of stone, not of masonry. That meaning cannot be varied by local usage, unless it be uniform, reasonable and known to the parties, so they may be presumed to have contracted with reference to it. *Marshall* v. *Perry*, 67 Maine, 78; *Schooner Reeside*, 2 Sum. 567. The measure in the wall was over 102 cubic yards, on the dump about 58. Certainly a usage that might nearly double the quantity of goods sold must be unreasonable. Better have honest measure and fair price.

Motion sustained.

THOMAS COWAN, JR. *vs.* UMBAGOG PULP COMPANY.

Franklin. Opinion November 15, 1897.

Negligence. Master and Servant. Defective Machinery. Fellow-Servant. Jury. R. S., c. 82, § 86.

The master is not responsible to the servant for an injury caused by the negligence of a fellow-servant.

It is the duty of the master to provide good and sufficient machinery for the servant to operate, and to exercise reasonable care in keeping it so; but the master is not liable for injuries occasioned by machinery which has become defective and unsafe, whether rendered so by a fellow-servant or otherwise, unless he knew, or ought to have known, its defective and unsafe condition.

It is not error for the presiding justice to impress upon the jury the propriety of coming to an agreement, and of harmonizing their views. This is a discretionary power to be exercised wisely by the presiding justice.

Exceptions will not be sustained when it does not appear that the jury were sent out a third time in consequence of their disagreement; nor where it does not appear that they were sent out at all after the first time on account of difficulties not stated when they first came into court.

ON MOTION AND EXCEPTIONS BY PLAINTIFF.

This was an action of the case to recover damages for personal injuries received by the plaintiff while operating machinery of the defendants.

Plea general issue. Verdict for defendants.

The plaintiff introduced evidence tending to prove that one Roderick, a foreman in charge of a crew operating grinders in the defendant's mill, plugged a certain pipe supplying water which furnished power, or pressure, to one of the pockets of the grinder operated by the plaintiff, and that the plugging of this pipe rendered the machine operated by the plaintiff unsafe and dangerous to operate; and that the injuries sustained by the plaintiff resulted, or may have resulted, from the condition of the machine rendered unsafe and dangerous to operate by this act of Roderick. The plaintiff had been at work in this mill as grinder about five months prior to the accident. Upon this point the presiding

justice instructed the jury as follows: "Every servant, every laborer, every operative in a mill like this assumes all the risks which may arise in the way of injury or accident from the negligence of any fellow-servant. And it is immaterial that the fellow-servant may not be of the same grade as himself. While they are in the same common employment, laboring to accomplish the same general purpose, under the same head, they are fellow-servants, although not in the same grade or the same degree of authority. The one whose duty it is to repair machinery is not in contemplation of law, a fellow-servant with the one who operates that machinery. It is not in controversy here that Mr. Roderick was a fellow-servant with this plaintiff. He was an operative in the mill, foreman, indeed, of the crew; but it is immaterial that he held a higher position as operative than the plaintiff. He was an operative, although foreman of the crew. He was a fellow-servant in the eye of the law with this plaintiff, and the company would not be responsible for any injury to the plaintiff caused by the negligence of Mr. Roderick, as a fellow-servant. If, therefore, you find that without authority he invaded the province of another and negligently, without authority, made a change in the machinery, that would be the negligence of a fellow-servant so far as this plaintiff is concerned, and the defendants would not be liable for the consequences of that neglect of which Mr. Roderick himself was guilty, unless you find that the defendant's servants whose duty it was to make repairs were also guilty of a want of diligence in not discovering it before the accident occurred: because the defendants will be responsible for any want of diligence or due care or caution on the part of those whose duty it is to make repairs, and the company would be liable for the consequences of any such want of diligence or care, provided there was no want of care, no fault on the part of the plaintiff. So you will understand, if you find that this was a negligent, unauthorized act of Roderick in making this change in the machinery, the defendants would not be liable for any injury caused by that, if the injury was caused by it, unless you find further that there was also negligence on the part of those whose duty it was to make those repairs in not dis-

covering it before the accident; and as bearing on that, it has been called to your attention by counsel that it appears from Roderick's own testimony that he did not inform any of those whose duty it was to make repairs on the machinery that he had made that change."

The case was given to the jury between five and six o'clock in the evening. At the opening of court at nine o'clock the next morning the jury came in and reported that they had not yet agreed. Thereupon the presiding justice read from the case of *Commonwealth* v. *Tuey*, 8 Cushing, 1, made some remarks of his own and sent them back for further deliberation.

At a few minutes before noon a written communication was received by the presiding justice from a member of the jury. Whereupon he called the jury into court and addressed and instructed them as follows: "I have received an inquiry from a member of the panel whether it is the duty of one juror to violate his conscience and sense of justice by voting with the majority for the sake of uniformity in this case. I have not so instructed the jury and such was not the purport of the matter read from the decision in Massachusetts. Of course, every juror has a right to his conscientious convictions. The purport of the instructions was that, on open-minded conference with his fellows, every juror should endeavor to bring his sense of justice and his convictions in harmony with that of the majority. The purport also may be said to be that he should be careful not to mistake power of will, or pride of opinion, for conscience and sense of justice; and that, as I said before, by good natured and open-minded conference with his fellows, he should endeavor, as far as practicable, to bring his own views into harmony with the majority, on the principle that all men usually know more than one man, and that he ought to give due deference to the opinions of the majority. I do not know, of course, how the jury stand on this matter. I only give these general replies to the questions that have been propounded."

The jury again retired to their room and in a few minutes returned with a verdict of not guilty, which verdict, without polling the jury, the presiding justice immediately ordered to be recorded.

No request was made to the court by either party, or by any member of the jury, that the jury should be polled.

To these instructions and orders the plaintiff took exceptions.

S. Clifford Belcher, for plaintiff.

Whether Roderick was a fellow-servant, a question for the jury.

If a machine is rendered unsafe and dangerous to operate, even by a fellow-servant, and injuries are received in consequence, the condition of the machine is the proximate cause, and the employer is not relieved from his liability, simply because machine was rendered unsafe by fellow-servant. *Shanny* v. *Androscoggin Mills*, 66 Maine, 420; *Guthrie* v. *Me. Cen. R. R. Co.*, 81 Maine, 572, (579); *Bigelow* v. *Reed*, 51 Maine, 325, (332); *Marble* v. *Worcester*, 4 Gray, 395.

Undue pressure was put upon the jury to induce them to agree.

It is no part of a juror's duty, under his oath, to endeavor to bring his views into harmony with the majority.

Jury should not have been sent out a third time. R. S., c. 82, § 86.

Under the circumstances, the jury should have been polled.

Jos. C. Holman; O. D. Baker and F. L. Staples, for defendant.

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

SAVAGE, J. Action to recover damages for personal injuries suffered by the plaintiff while operating machinery in the pulp-mill of the defendant.

One Roderick, a foreman in charge of a crew operating the grinders in the defendant's mill, plugged a certain pipe supplying water which furnished power or pressure to one of the pockets of the grinder operated by the plaintiff, who was the defendant's servant. It is claimed that the plugging of this pipe rendered the machine operated by the plaintiff unsafe and dangerous to operate, and that the injuries sustained by the plaintiff resulted from the condition of the machine so rendered unsafe and dangerous to operate by this act of Roderick.

We must hold, in accordance with well-settled rules of law, that Roderick was the plaintiff's fellow-servant; *Doughty* v. *Penobscot Log Driving Co.*, 76 Maine, 143; *Dube* v. *Lewiston*, 83 Maine, 211; that the plaintiff assumed all the risks which might arise from the negligence of any fellow-servant, though the latter might not be of the same grade as himself; and that the defendant is not responsible to the plaintiff for any injury caused by the negligence of Roderick, as a fellow-servant. *Lawler* v. *Androscoggin R. R. Co.*, 62 Maine, 463; *Conley* v. *Portland*, 78 Maine, 217. The jury were correctly so instructed.

But the counsel for the plaintiff claims that "if a machine is rendered unsafe and dangerous to operate, even by a fellow-servant, and injuries are received in consequence, the condition of the machine is the proximate cause, and the master is not relieved from liability, simply because the machine was rendered unsafe by a fellow-servant."

Assuming this to be a correct statement of the law, we think it is not applicable to this case, unless it also appears that the master was at fault in not discovering and amending the unsafe and dangerous condition of the machine, after it was rendered so by Roderick. The case does not disclose what the plaintiff's contention was upon this question of fact. If we assume that this question was in issue before the jury, we must also assume that appropriate instructions were given. *Lewiston* v. *Harrison*, 69 Maine, 504. In fact, the jury were instructed that "the defendant would be responsible for the consequences of any want of diligence or due care or caution on the part of those whose duty it was to make repairs, but that it would not be responsible for the negligent and unauthorized act of Roderick, unless there was also negligence on the part of those whose duty it was to make repairs in not discovering the dangerous condition before the accident." The instructions were full, accurate and apposite. It is the duty of the master to provide good and sufficient machinery for the servant to operate, and to exercise reasonable care in keeping it so. *Shanny* v. *Androscoggin Mills*, 66 Maine, 420. But the master is not liable for injuries occasioned by machinery which has become defective

and unsafe, whether rendered so by a fellow-servant or otherwise, unless he knew, or ought to have known, its defective and unsafe condition. *Hull* v. *Hall*, 78 Maine, 114.

The plaintiff complains that undue pressure was put upon the jury by the court to make them agree. It is not error for the presiding justice to impress upon the jury the propriety of coming to an agreement, of harmonizing their views. *Emery* v. *Estes*, 31 Maine, 155; *Virgie* v. *Stetson*, 73 Maine, 452; *State* v. *Rollins*, 77 Maine, 380. It is a discretion to be exercised wisely by the presiding justice. A careful examination of the proceedings in this case discloses no abuse of that discretion.

The plaintiff claims that the jury were sent out a third time in violation of R. S., c. 82, § 86. But it does not appear that they were sent out a third time "in consequence of their disagreement," nor does it appear that they were sent out at all after the first time, "on account of difficulties not stated when they first came into court."

The motion for a new trial is not relied upon.

Motion and exceptions overruled.

STATE *vs.* HENRY B. PETERS.

Kennebec. Opinion November 17, 1897.

Sales. Delivery. Place. C. O. D. Butterine.

Delivery to the carrier designated by the consignee is a delivery to the consignee, subject to the vendor's lien.

An indictment for the illegal sale of goods in Kennebec county will not be sustained where the evidence of the sale shows that it took place in another county.

A, at Augusta, wrote the company of which the respondent was general manager at Portland, asking for quotation of price of butterine; also, how soon it could be shipped upon receipt of order. The respondent answered giving quotation, and saying, "If we receive your order at once, same will be shipped in car from Chicago Thursday, arriving here (Portland) a week from Monday." Thereupon, A, at Augusta, gave the following order: "You

may ship me via American Express C. O. D. as soon as possible three 40 pound tubs butterine (Lincoln flats colored) same as I have been using at 14 c." The respondent did not answer, but filled the order by delivering the butterine in question to the American Express Co. at Portland, to be sent C. O. D. to A. The American Express Co. delivered the butterine to A. at Augusta.

The state claimed that the respondent's reply to A's letter of inquiry was an offer to sell butterine, and that A's order was an acceptance of the offer, and having been written and mailed at Augusta, the sale was made at Augusta. *Held;* that respondent's letter was not an offer to sell, but that A's order was an offer to buy, and that it was accepted and the sale completed at Portland by the delivery of the butterine to the American Express Co. as directed.

Also; that this result follows, although the butterine was ordered to be sent and was sent "C O. D.;" and although the seller, as soon as the butterine was delivered to the consignee, attempted to attach it to secure a prior debt.

State v. *Intoxicating Liquors*, 73 Maine, 278, affirmed.

ON EXCEPTIONS BY DEFENDANT.

In this case the respondent was indicted in the Superior Court, Kennebec county, for selling butterine contrary to section 3, c. 128, R. S., prohibiting the sale and manufacture of adulterated butter.

When the case was closed for the state, the respondent submitted his cause without evidence, and seasonably asked the court to instruct the jury that, upon all the facts of the case, the sale alleged in the indictment did not take place in the county of Kennebec, and that it was therefore the duty of the jury to render a verdict of not guilty. The presiding justice declined to so rule, and a verdict of guilty was thereupon rendered.

The facts appear in the opinion.

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

The jury in this case found that the sale was made in Kennebec county; and might have so found because of the fact that all the terms of the sale were so complete in this contract that the ownership then and there passed despite of the fact that the goods were to be delivered to an express company as a C. O. D. package.

If the title passed to the vendee when the contract was accepted, then the sale was made in Augusta, and the respondent was liable.

When the shipper reserves any power or authority over the

goods, or exercises any such power or authority other than his lien for payment or right of stoppage in transitu, it is evidence that he reserves the jus disponendi, and that the sale took place at the point of delivery by the common carrier. This is evidence to be taken into consideration by the jury in connection with all the circumstances of the case; and if the jury are satisfied that the shipper did, in fact, reserve the jus disponendi, then as a matter of law the sale takes place at the point of delivery to the purchaser by the common carrier, and the common carrier is the agent of the seller. This is a question of fact for the jury.

H. M. Heath and C. L. Andrews; *F. H. Harford*, for defendant.

The indictment is for a sale. A mere contract to sell or an executory agreement for sale would not be a completed offense. It is incumbent upon the government to prove an executed sale.

The contract of sale was completed in Portland. *Jenness* v. *Mt. Hope Iron Co.*, 53 Maine, 20; *Cumberland Bone Co.* v. *Atwood Lead Co.*, 63 Maine, 167; *Milliken* v. *Pratt*, 125 Mass. 374; *McIntire* v. *Parks*, 3 Metc. 207; *Orcutt* v. *Nelson*, 1 Gray, 536.

Delivery: — *Garbracht* v. *Com.*, 96 Pa. St. 449, (42 Am. Rep. 550); *Boothby* v. *Plaisted*, 51 N. H. 436, (12 Am. Rep. 140); *Sarbecker* v. *State*, 65 Wis. 171, (56 Am. Rep. 624); *Garland* v. *Lane*, 46 N. H. 245; *Woolsey* v. *Bailey*, 27 N. H. 217; *State* v. *Hughes*, 22 W. Va. 743; *Pearson* v. *State*, 66 Miss. 510; *Brechwald* v. *People*, 21 Ill. App. 214; *Merchant* v. *Chapman*, 4 Allen, 362; *Dolan* v. *Green*, 110 Mass. 322; *Brockway* v. *Maloney*, 102 Mass. 308; *Fly* v. *Webster*, 102 Mass. 304; *Tracy* v. *Webster*, 102 Mass. 307; *Frank* v. *Hoey*, 128 Mass. 264; *Finch* v. *Mansfield*, 97 Mass. 89.

Where the duty of the seller is to send the goods to the buyer, the general rule is that delivery to a common carrier is equivalent to a delivery to the buyer himself, and particularly is this so if the carrier to whom the delivery is made has been designated by the buyer; carrier in that case is deemed the agent of the buyer and not the agent of the seller. Where the seller, however, is to pay the freight, the carrier is the agent of the seller and delivery

is not complete until the goods reach the purchaser. *Berry* v. *Palmer*, 19 Maine, 303; *Torrey* v. *Corliss*, 33 Maine, 333; *Wing* v. *Clark*, 24 Maine, 366; *Banchor* v. *Cilley*, 38 Maine, 553; *Ramsey & Gore Mfg. Co.* v. *Kelsey*, 55 N. J. L. 320, (22 L. R. A. Book 22, page 415, and cases cited in note). Delivery to an agent or to a third person selected by the purchaser is delivery to the purchaser himself. *Johnson* v. *Stoddard*, 100 Mass. 306; *Waldron* v. *Romaine*, 22 N. Y. 368; *Wade* v. *Hamilton*, 30 Ga. 450; *Haug* v. *Gillett*, 14 Kan. 140; *Ranny* v. *Higby*, 5 Wis. 62.

Place of sale:—*Atl. Phos. Co.* v. *Law*, (S. C.) 23 S. E. Rep. 955; *Kline* v. *Baker*, 99 Mass. 253; *Abberger* v. *Marran*, 102 Mass. 70; *Dunn* v. *State*, 82 Ga. 27; *Terrett* v. *Bartlett*, 21 Vt. 184; *Sullivan* v. *Sullivan*, 70 Mich. 583; *Mack* v. *Lee*, 13 R. I. 293; *Dame* v. *Flint*, 64 Vt. 533; *Shriver* v. *Pittsburg*, 66 Pa. 446.

Sales C. O. D.:—*State* v. *Karl*, 43 Ark. 353, (51 Am. Rep. 565); *Com.* v. *Fleming*, 130 Pa. St. 138, (5 L. R. A. 470); *Crook* v. *Cowan*, 64 N. C. 743; *Pilgreen* v. *State*, 71 Ala. 368; *Brechwald* v. *People*, 21 Ill. App. 213; *State* v. *Flanagan*, 38 W. Va. 53, (22 L. R. A. 430 and 45 Am. St. Rep. 838). For cases apparently holding the converse see Book 22, L. R. A. p. 426, where it is suggested that these decisions to the contrary may be partly reconciled by determining who directed the shipment.

Rule in Maine:—*Barry* v. *Palmer*, 19 Maine, 303; *Wing* v. *Clark*, 24 Maine, 366; *Torrey* v. *Corliss*, 33 Maine, 333; *Banchor* v. *Cilley*, 38 Maine, 553; *White* v. *Harvey*, 85 Maine, 214; *State* v. *Intoxicating Liquors*, 73 Maine, 278.

SITTING: EMERY, FOSTER, HASKELL, WHITEHOUSE, STROUT, SAVAGE, JJ.

SAVAGE, J. The only question presented by the exceptions in this case is whether, upon all the facts in the case, the sale of butterine alleged in the indictment did or did not take place in the county of Kennebec.

From the undisputed facts it appears that on December 14, 1896, one McLaughlin, then residing in Augusta, wrote to the

Portland Beef Company, of which concern the respondent was manager, the following letter:—

"Old Orchard, Me. Dec. 14th, 1896.

Portland Beef Co.

Gentlemen.

Quote me price of Butterine, the same I have used the past two seasons (Lincoln flats colored). Upon receipt of order how soon can you ship me three (3) tubs, C. O. D. American Express? An early reply will oblige,

Respy yours,

C. E. McLaughlin."

The respondent on the same day answered as follows:—

"Portland, Me. Dec. 14th 1896.

Mr. C. E. McLaughlin, Old Orchard,

Dear Sir:

Replying to your letter of Dec. 14th, quote you 3 40 lb tubs butterine 14 c. If we receive your order at once same will be shipped in car from Chicago Thursday, arriving here a week from Monday.

Yours respectfully,

H. B. Peters."

On the following day, McLaughlin wrote this letter to the Portland Beef Company:—

"Old Orchard, Me. Dec. 15th, 1896.

Portland Beef Co.

Gentlemen,

You may ship me via American Express, C. O. D., as soon as possible 3 40 pound tubs Butterine (Lincoln flats colored), same as I have been using, at 14 c.

Very Resp'y,

C. E. McLaughlin,

Old Orchard."

Although McLaughlin's letters were dated "Old Orchard" for reasons of his own, they were in fact written and mailed at Augusta. To the last letter the respondent made no reply, but on

December 24, 1896, he delivered the three tubs of butterine ordered to the American Express Company at Portland, to be sent C. O. D. to McLaughlin at Old Orchard. Subsequently by direction of McLaughlin, with the consent of the respondent, the butterine in question was reshipped from Old Orchard to Augusta by the express company, and there delivered to McLaughlin upon payment of the price and the transportation charges.

It is contended on the part of the state that these transactions constituted a sale of the butterine at Augusta. It is strenuously claimed that the respondent's letter of December 14 was an offer or proposal to sell McLaughlin three forty-pound tubs of butterine at fourteen cents a pound, and that McLaughlin's letter of December 15, written and mailed at Augusta, was an acceptance of that offer. Hence it is argued that the sale was made at Augusta.

If the state is right in its premises, it is also right in its conclusion. If we regard the respondent's letter as an offer, the acceptance of that offer completed the trade, accomplished the sale, struck the bargain, and in accordance with well-settled principles of law, such a sale would be deemed to have been made at Augusta, the place where the offer was accepted.

But the trouble with the position of the state is, that the respondent's letter of December 14 cannot be considered as an offer or proposal. It was simply an answer to McLaughlin's letter of inquiry of the same date. McLaughlin asked for a quotation of prices, and how soon the butterine could be shipped on receipt of an order. The respondent gave the desired information, nothing more. The most that can be said is that it contemplated a possible offer by McLaughlin to buy, if the price and time of delivery were satisfactory. If after this, the respondent had refused to fill McLaughlin's order of December 15, he could not have been held liable for a breach of contract to sell. The letter of the respondent contained no undertaking whatever to sell. *Howard* v. *Maine Industrial School*, 78 Maine, 230; *Smith* v. *Gowdy*, 8 Allen, 566.

In McLaughlin's letter of December 15, we find the first offer. It was an order, an offer to buy. His proposition to buy was accepted by the respondent, by delivering the butterine ordered to

the carrier designated by the consignee. This constituted the sale. The delivery was at Portland, and not at Augusta.

But the state contends that, taking the transaction as a whole, it is evident that the vendor did not intend to part with the title to the butterine, until it was paid for by the consignee to the carrier; that from the fact that the butterine was shipped "C. O. D.", which means to "deliver upon payment of the charges due the seller for the price, and the carrier for the carriage of the goods," *State* v. *Intoxicating Liquors*, 73 Maine, 278, the jury would be authorized to find that the vendor reserved the jus disponendi until payment. And authorities to this effect are cited. But such is not the law in this state, in the absence of controlling circumstances; and there was nothing in the order, or in the acceptance and the shipment of the butterine in this case, to take it out of the general rule touching the shipment of goods on order C. O. D. The delivery to the carrier designated by the consignee was a delivery to the consignee, subject to the vendor's lien. The language of Mr. Chief Justice PETERS in *State* v. *Intoxicating Liquors*, supra, is full and expressive upon this point: "The contract stands upon the simple rule of the common law. The seller was entitled to his price, and the buyer to his property as concurrent acts. The title passed to the vendee when the bargain was struck. Any loss of the property by accident would have been his loss. The vendor had a lien on the goods for his price. The vendor could sue for the price, and the vendee upon a tender of the price, could sue for the property." We adhere to this rule.

It further appears that after the butterine was shipped, the Portland Beef Company, represented by the respondent, attempted to attach it at Old Orchard, and did attach it at Augusta, after McLaughlin had paid the C. O. D. bill, to secure an old debt due from McLaughlin. From the evidence it is claimed that an inference may be legitimately drawn, and that the jury were authorized to find, that it was not the intention of the respondent to part with the title until the butterine was paid for; that the respondent shadowed the goods so that they could be attached as soon as they became the property of McLaughlin by payment. We think

otherwise. The acts of the respondent in the attempt to secure the old bill show rather an intention to attach as soon as the vendor's lien was removed by payment. It would have been fruitless to attach before.

There is no evidence in the case which would warrant the jury in finding that the sale of the butterine took place at Augusta. The jury should have been so instructed, as requested by the respondent, in substance. The presiding judge declined to so instruct, and the jury were permitted to find that the sale did in fact take place in Augusta, a finding which had no evidence to support it.

Exceptions sustained.

JAMES NOLAN *vs.* WALLACE W. CLARK.

Androscoggin. Opinion December 9, 1897.

Gaming. Margins. Agent. R. S., c. 125, § 8.

Gambling and betting in margins on the future price of corn are prohibited by the statutes of this state; and the money so lost may be recovered by the loser in an action commenced within three months thereafter.

The plaintiff obtained a verdict in an action to recover money so lost and the defendant moved for a new trial. The court overruled the motion and considers that it is satisfied with the conclusion reached by the jury, notwithstanding the forms of sale and purchase were observed by the parties.

The defendant denied his liability to the plaintiff upon the ground that he was not the principal, and asserted that he was but the agent of the Metropolitan Stock Exchange, and that all he did was in that capacity. The plaintiff claimed that he dealt with the defendant as principal, and had no knowledge of any agency, if any existed, and denied that there was any such agency in fact. The court instructed the jury, who found for the plaintiff upon this issue, that where a party deals with another, and that other lets it be known that he is a mere agent of a party, and is in fact an agent of a disclosed principal, then the party seeking redress for any acts or contracts of that agent, that are within the scope of his authority, it must be against his principal not against the agent. That even if a party is agent of a principal and that person's name is not disclosed, but the agent deals as though he was the principal without disclosing an agency to the party dealing with him, then the party desiring redress has an election to sue either the agent or principal

when he finds out who he is. If it is not till after the transaction he can sue either. *Held;* that the finding of the jury must have been either that no agency existed, or if it did exist, that the plaintiff was not informed of it, but dealt with the plaintiff as principal; *also;* that upon either ground the defendant is personally responsible to the plaintiff.

The court admitted in evidence the daily statements of transactions between the defendant and the Metropolitan Stock Exchange and furnished to the former by the latter which had reference to the plaintiff's dealings with the defendant; but it excluded like statements referring only to transactions with other parties. *Held;* that the excluded statements had no tendency to prove an agency.

Held; that the defendant is not entitled to an instruction to the jury that they may find an agency of the defendant from one piece of evidence alone, thereby excluding the effect of other and contradictory evidence upon the question of agency. It is the province of the jury to determine facts from all the evidence, and not from one detached portion.

ON MOTION AND EXCEPTIONS BY DEFENDANT.

This was an action on the case brought under R. S., c. 125, § 8, to recover the sum of six hundred and fifty dollars which the plaintiff claimed he had lost to the defendant in certain gambling transactions, and consisting of betting in margins on the future price of corn. The declaration contained a count for each loss thus sustained by the plaintiff.

The first count in the declaration is as follows:—

In a plea of the case, for that whereas on the first day of August, in the year of our Lord, one thousand eight hundred and ninety-five, at Lewiston, in said County of Androscoggin, the plaintiff, by wagering, gambling and betting with the defendant, lost to the said defendant the sum of thirty dollars, and then and there paid and delivered the same to the defendant.

And the plaintiff avers that three months have not elapsed since said first day of August.

Whereupon, the plaintiff says that an action hath accrued to him by virtue of the statute in such case made and provided, to sue for and recover the same of the said defendant in an action on the case; yet the defendant, though requested, hath not paid the said sum, but wholly refuses so to do.

Also, for that the said plaintiff, on said day and at said Lewiston, gambled with the defendant by betting with the defendant

the sum of thirty dollars that the market price of three thousand bushels of September corn, so-called, being then forty-three cents per bushel, would thereafter advance, on or before September 5, 1895, while the defendant bet that the market price of said corn would decrease to forty-two cents a bushel on or before said 5th day of September.

And the plaintiff further avers that said betting was in the form of ostensible buying, by the plaintiff, of the defendant, of three thousand bushels of September corn at forty-three cents a bushel, to be delivered on or before said 5th day of September, but that in reality the defendant did not intend to sell and deliver, nor did the plaintiff to buy and receive, said corn, but that said thirty dollars was so deposited with the defendant as security to cover the margin of one cent a bushel on said three thousand bushels of corn, and that said transaction was in truth and in fact a gambling on the future price of corn between the plaintiff and defendant.

And the plaintiff further avers that thereafter, upon the same day, the market price of corn decreased from forty-three cents a bushel to forty-two cents a bushel, and thereby the plaintiff lost his said thirty dollars to the defendant, and then and there paid and delivered the same to him.

And the plaintiff avers that three months have not elapsed since said first day of August.

Whereupon, the plaintiff says that an action hath accrued to him by virtue of the statute in such case made and provided, to sue for and recover the same of the said defendant in an action on the case; yet the defendant, though requested, hath not paid the said sum, but wholly refuses so to do.

Plea, general issue.

Verdict for plaintiff in the sum of six hundred and eighty-six dollars and eighteen cents, which is the entire amount sued for, with interest from the date of the writ.

The plaintiff claimed and introduced testimony tending to show that in August, 1895, he had four transactions with the defendant by which the plaintiff purported to buy of the defendant eight thousand bushels of corn, to be delivered at a future date, and paid

to the defendant a margin of one cent a bushel each time corn fell one cent a bushel; that in fact the transactions were a gambling in margins on the future price of corn, that there were in fact no purchases of corn, that the plaintiff did not intend to buy or receive the corn and the defendant did not intend to sell or deliver the corn, that the defendant was not the owner of any corn, and did not have in his possession or have the ability to deliver said corn to the plaintiff, but that both parties intended and understood the transactions to be a mere betting on margins; that if the market price of corn went up, the defendant should pay the advance to the plaintiff, and if the market price of corn went down, the plaintiff should lose to the defendant the sums advanced by him on such colorable purchase of corn, which are the sums sued for; that the parties contemplated no other transactions whatever, and that in such gambling transactions the plaintiff lost to the defendant the sum of six hundred and fifty dollars.

The testimony introduced by the defendant tended to show that he was acting at the time alleged as the agent of the Metropolitan Stock Exchange of Boston with which his office in Lewiston was connected by a private wire; that the said agency was communicated to and known to the plaintiff, but this was denied by plaintiff; that as such agent he executed orders for stocks and grain for customers who had the privilege and option of buying or selling said stocks or grain at the the prices quoted in said Metropolitan Stock Exchange; that the defendant as such agent was prepared at all times to deliver to said customers, in the manner stated in the testimony, the stock certificates or the grain either in bulk or by ware house receipts, so-called; that his commission for executing said orders was one eighth of one per cent; that on the day following the close of each day's business he remitted to the Metropolitan Stock Exchange the sum received by him from customers on account of their transactions, reserving and saving out therefrom for himself merely his commission of one eighth as is indicated by defendant's exhibits; that in all of the transactions alleged in the plaintiff's declaration the defendant as such agent was at all times able and prepared to deliver to the plaintiff either the corn itself in

bulk or the ware house receipts for the same in the manner stated in the testimony, and that he so notified the plaintiff; that the defendant understood the transactions with the plaintiff to be real business transactions, and that in the four transactions described in the plaintiff's testimony the defendant delivered to the plaintiff four contracts specifying the nature of the transactions, as appears in the evidence.

The defendant offered to introduce in evidence the daily statements of the transactions between his office and Boston office of the Metropolitan Stock Exchange mailed to him by the Metropolitan Stock Exchange, for the entire period covered by the plaintiff's alleged transactions, of like character to those admitted but in reference to transactions with other parties, for the purpose of showing his invariable custom and method of transacting business, and also for the purpose of showing his said agency. The court admitted only such of said statements as contained particular reference to the plaintiff's alleged transactions and excluded the remainder.

The defendant's counsel requested the presiding justice to give to the jury the following instruction, which was refused:

"If the jury are satisfied from the testimony that Clark remitted to the Metropolitan Stock Exchange the money received from Nolan, saving out only his commission of one eighth, they will be justified in finding that Clark was not the principal but the agent of the Metropolitan Stock Exchange."

To which rulings, and refusal to instruct the jury, the defendant excepted.

H. W. Oakes, for plaintiff.

If neither party expects any delivery of stocks at any time, and both parties understand that only money is to be paid from one to the other according to changes in the market price, the arrangement is a mere wager upon changes in prices and is illegal. *Rumsey* v. *Berry*, 65 Maine, 570; *O'Brien* v. *Luques*, 81 Maine, 46; *Dillaway* v. *Alden*, 88 Maine, 230, and cases cited. See also notes to 1 L. R. A. 141; 1 L. R. A. 665; 3 L. R. A. 679.

It does not necessarily depend upon the form of the contract as to the determination of whether it was bona fide or otherwise,

because, as our courts have said, that efforts are often made to give such a bet the appearance if not the nature of a business transaction, when in truth and in fact they are but the cover to wagering transactions, transactions which are illegal in law. *Sprague* v. *Warren*, 26 Neb. 326; 3 L. R. A. 679.

The fact that a sale of grain for a future delivery was closed before the day of delivery is evidence of the character of the transaction as a mere speculation in prices. *Scott* v. *Brown*, 54 Mo. App. 606.

Exceptions:—The statements of account are res inter alios, merely heresay, so far as the plaintiff is concerned. Whar. Ev. (2d Ed.) § 173; *Gains* v. *Hasty*, 63 Maine, 361; *Robinson* v. *Litchfield*, 112 Mass. 28; *Brooks* v. *Acton*, 117 Mass. 204; *Carter* v. *Fitz*, 124 Mass. 269; *Wesson* v. *Washburn Iron Co.*, 13 Allen, 95. Defendant's custom, if any, not brought home to plaintiff's knowledge. *Pierce* v. *Whitney*, 29 Maine, 188.

Requested instructions must be complete, and the omission of a single necessary qualifying word is fatal. *Marshall* v. *Oakes*, 51 Maine, 308; *Colby* v. *Wiscasset*, 61 Maine, 304; *Springer* v. *Hubbard*, 82 Maine, 299; *Duley* v. *Kelley*, 74 Maine, 556; *Snow* v. *Penobscot*, 77 Maine, 55; *Grank Trunk* v. *Latham*, 63 Maine, 177; *Tower* v. *Haslam*, 84 Maine, 86.

R. W. Crockett, for defendant.

A contract of sale is not a wagering contract, as between seller and purchaser, unless both of them understand that no delivery is to be made.

If there is evidence to show that the buyer employs the seller as a broker to make purchases of shares for him, with the agreement or understanding on the part of both that no shares should actually be delivered, but that the seller, as broker, shall either make bargains to that effect with the other party or parties to the transactions, or, that at any rate, that he should protect the buyer from being called on to make or accept any actual deliveries of shares, then the seller would probably be found to be a participator in an illegal contract, and would be debarred from recovering for his commissions or for moneys advanced by him for the further-

ance of such illegal contract. But a mere expectation on the part of the seller and of the buyer that the latter will be willing to adjust the transactions on the basis of receiving or paying differences when there is no agreement or understanding to that effect, or to the effect that the former will protect the latter from being called on to make or accept any actual deliveries of shares, is not sufficient to render the contract illegal; and the seller's participation as a broker in making sales for the buyer under that expectation would not debar him from recovering for his commissions or for moneys advanced to him for the buyer in aid of the transaction. *Harvey* v. *Merrill*, 150 Mass. 1, and cases cited; *Barnes* v. *Smith*, 159 Mass. 346–7.

The decisions agree upon the principle that the contract is not illegal unless the nullifying understanding is mutual and made apparent. An understanding on the part of one party, merely, that the stock is not actually bought or sold does not of itself make the contract illegal. The minds of both parties must meet in the illegal understanding, and unless this meeting can be affirmatively shown the contract must be held to be legal, valid and binding.

If the seller has within his control the shares of stock or the ware house receipts, and has the ability to deliver them to the purchaser when called for, the contract is not illegal. *Alden* v. *Dillaway*, 88 Maine, 230; *Rumsey* v. *Berry*, 65 Maine, 570; *Pratt* v. *Telephone Co.*, 141 Mass. p. 228; *Mann* v. *Bishop*, 136 Mass. 495.

Defendant was not the principal, but an agent. *O'Brien* v. *Luques*, 81 Maine, 46.

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

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

STROUT, J. In August, 1895, plaintiff had four transactions with defendant, by which plaintiff purported to buy of defendant eight thousand bushels of corn, to be delivered at a future date, and paid to defendant a margin of one cent a bushel each time corn fell in price one cent a bushel. He claims that the transaction was in

fact a gambling in margins on the future price of corn, and that an actual purchase and sale were not intended or in contemplation by the parties. He seeks to recover back the money paid, under provision of R. S., c. 125, § 8. Defendant claimed that the transaction was one of legitimate business, and so understood by the parties. Upon this contention much evidence was introduced, and it was submitted to the jury, under appropriate instructions, to which no exception is taken, to find whether the transaction was in fact a legitimate business one, contemplating an actual purchase and sale, by both or either of the parties, or whether it was a gambling on the future price. The jury found it to be a gambling and not a business transaction.

Upon a careful examination of all the evidence, notwithstanding the forms of sale and purchase were observed, we are satisfied with the conclusion reached by the jury. It would be unprofitable to review the evidence in this opinion.

The defendant resisted plaintiff's claim upon another ground. He asserted that he was not the principal, but the agent of the Metropolitan Stock Exchange, and that all that he did was in that capacity; and that out of the moneys received by him, he retained as his commission one eighth, and remitted the balance daily to his principal in Boston; and that if plaintiff had any claim under the statute, it was against the Metropolitan Stock Exchange, and not against the defendant. Plaintiff claimed that he dealt with defendant as principal, and had no knowledge of any agency, if any existed, and denied that there was any such agency in fact.

Upon this issue, much evidence, both oral and documentary, was introduced. The court instructed the jury that "where a party deals with another, and that other lets it be known that he is a mere agent of a party, and is in fact an agent of a disclosed principal, then the party seeking redress for any acts or contracts of that agent that are within the scope of his authority must be against his principal, not against the agent." "That even if a party is agent of a principal and that person's name is not disclosed, but the agent deals as though he was the principal, without disclosing an agency to the party dealing with him, then the party

desiring redress has an election to sue either the agent or principal when he finds out who he is. If it is not till after the transaction he can sue either." The court carefully called the attention of the jury to the evidence bearing upon the question, whether defendant was or not in fact an agent of the Metropolitan Stock Exchange, and acting in that capacity in his dealings with plaintiff; and whether such agency, if it existed, was known to plaintiff, or whether plaintiff understood he was dealing with the defendant as principal. The evidence upon this issue was conflicting, but the jury found for the plaintiff; and under the instructions, that finding must have been either that no agency existed, or if it did, that plaintiff was not informed of it, but dealt with defendant as principal. Upon either ground defendant would be personally responsible to plaintiff. We see no sufficient cause to disturb the verdict. The motion for a new trial must be overruled.

In regard to the exceptions, the daily statements of transactions between defendant and the Metropolitan Stock Exchange, which had reference to plaintiff's dealings, were admitted; but like statements, referring only to transactions with other parties, were excluded. The excluded statements had no tendency to prove an agency. They purported to be transactions between the defendant and the Metropolitan Exchange as two principals. They were directed to defendant, and stated "our transactions with you to-day are as follows:" then came a detailed statement. No word of agency appears, or is suggested by the papers. The defendant was not prejudiced by their exclusion. They tended to corroborate plaintiff's claim, rather than that of defendant.

The requested instruction was rightly refused. It asked an instruction that the jury might find an agency of defendant from one piece of evidence alone, excluding the effect of other and contradictory evidence upon that question, and was therefore misleading. It is the province of the jury to determine the fact from all the evidence, not from one detached portion. The instructions given to the jury were full, and amply protected the rights of the defendant.

Motion and exceptions overruled.

WILLIS A. ADAMS, Petr. for Mandamus,

vs.

RALPH R. ULMER and INHABITANTS OF SOUTH THOMASTON.

Lincoln. Opinion December 9, 1897.

Way. Mandamus. Clerk. Waters. R. S., c. 18, § 23. Spec. Laws, 1880, c. 239; Act of Congress, Sept. 29, 1890.

On appeal to the county commissioners a town way had been located by them in South Thomaston, which crossed navigable tide-waters. The Legislature of 1880 had authorized a bridge over tide-waters at that place. South Thomaston failed to build the bridge, and thereupon the county commissioners, on due proceedings, appointed the petitioner an agent to build it. The way on land was constructed principally by the voluntary act of individuals without charge. The agent caused the bridge to be built; rendered his account to the county commissioners which was duly allowed, and judgment entered against "the inhabitants of the town of South Thomaston and against the real estate situated in said town of South Thomaston, whether owned by such town or not," for the sum of four thousand three hundred and ninety-two dollars and four cents, being the cost of the bridge, and the charges and expenses of the agent. The county commissioners ordered a warrant of distress to issue for the amount. All the proceedings were in accordance with law. The respondent, clerk of the county commissioners, refused to issue a warrant of distress. Upon a petition for mandamus asking that he be compelled to do so, *held;*—

(1.) That the clerk, as a ministerial officer, was bound by law, to obey the order and judgment of the county commissioners—that judgment appearing to be regular, and upon a matter within the jurisdiction of that board. That he cannot justify a refusal, by showing mistake or misjudgment of the commissioners, nor raise the question of the sufficiency of the bridge, which had been accepted by the commissioners.

(2.) That the five years in R. S., c. 18, § 23, within which the town cannot affect by any action the location of a town way by county commissioners, commenced to run on August 13, 1892, when the proceedings and judgment of the commissioners were affirmed by the Supreme Court; and that the attempted discontinuance of the way by South Thomaston on May 16, 1896, was premature and inoperative.

(3.) That the permission of the Secretary of War to build the bridge over navigable tide-waters was not necessary. The act of Congress of September 29, 1890, which prohibits the erection of a bridge in navigable waters, without permission of the Secretary of War, excepts from its operation bridges,

the construction of which has been previously authorized by law. This bridge was authorized in 1880.

(4.) That the bridge is wholly within the town of South Thomaston.

(5.) That the petitioner is the proper party in whose favor the warrant of distress should issue.

ON REPORT.

The case appears in the opinion.

True P. Pierce, for petitioner.

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

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

STROUT, J. A petition for a town way in South Thomaston, had been presented to the selectmen of the town, who refused to locate, and thereupon a petition was presented to the county commissioners to locate the same way, upon the ground that the selectmen had unreasonably refused to locate. Upon this petition, the county commissioners, on the third day of December, 1890, located the town way as prayed for, and as described in the petition. An appeal was taken to the Supreme Judicial Court, and on the thirteenth day of August, 1892, the proceedings and judgment of the county commissioners were wholly affirmed by that court. All the proceedings thus far appear to be in accordance with law, and no objection is made, except that it is claimed that a part of the located way is in St. George.

The location included a bridge across navigable tide-waters. Such bridge was authorized by the Legislature of 1880, by chapter 239 of the special laws of that year. South Thomaston failed to open the way and build the bridge during the time limited therefor, and on May 21, 1896, on proper petition, the county commissioners ordered "that said town way and bridge be opened, built and made passable," and appointed Willis A. Adams, the present petitioner, agent "to open, build and make passable said town way and bridge," and ordered South Thomaston to pay into the county treasury of Knox county, the expense of the proceeding, taxed at sixty-three dollars and fifty cents. A copy of this adjudication

was duly mailed to the selectmen of South Thomaston, on July 29, 1896. Willis A. Adams, the agent, filed in the clerk's office a copy of the contract made by him for the construction of the bridge upon the way, and on the same day, the clerk of the county commissioners mailed by registered letter to the assessors of South Thomaston, a certificate of the filing of the contract for building the bridge, the time for its completion, October 6, 1896, and the amount to be paid therefor, to-wit, four thousand two hundred dollars, which certificate was received by one of the assessors of South Thomaston on the same day.

The contract for the bridge, dated July 8, 1896, was made with the Wrought Iron Bridge Company, of Canton, Ohio, and by its terms was to be completed in "ninety days from the date of this agreement." The bridge was built, and on the twenty-seventh day of October, 1896, it was approved and accepted by the county commissioners. On the same day the account of the agent Adams was presented to the county commissioners, and notice duly given to South Thomaston. On February 15, 1897, at a session of the county commissioners, judgment was entered against South Thomaston in favor of Willis A. Adams, agent, for the sum of "four thousand two hundred dollars, the amount due the Wrought Iron Bridge Company, contractor with the said agent for the building of the said bridge upon the said town way, and the bill of the said Willis A. Adams for superintendence, as allowed by the county commissioners, for the sum of one hundred and ninety-two dollars and four cents, ... and that after the clerk shall have entered up such judgment, he shall transmit a certificate of the rendition thereof to the assessors of the said town of South Thomaston," and after twenty days thereafter, if the amount remained unpaid, he shall "issue a warrant of distress upon the judgment . . . . according to the provisions of the statute in reference thereto." The record concludes, "that Willis A. Adams [duly appointed agent] recover against the inhabitants of the town of South Thomaston, and against the real estate situated in said town of South Thomaston, whether owned by such town or not, the sum of four thousand three hundred and ninety-two dollars and four cents." A copy of

this judgment was served upon one of the assessors of South Thomaston on the same day, by the sheriff.

The respondent, who is clerk of the courts for Knox county, and ex-officio clerk of the county commissioners, refused to issue a warrant of distress, in accordance with the judgment and direction of the commissioners, and the petitioner seeks by this process to compel him to do so.

In issuing a warrant of distress, under the judgment and order of the county commissioners, the clerk acts ministerially. It is his duty to execute the direction of the commissioners, if they had jurisdiction of the subject matter, and their proceedings are regular in form. It is his duty to extend the formal record of their doings. Errors of the commissioners, anterior to their formal judgment and record, can be corrected under proper process instituted for that purpose. Their clerk cannot do so by refusing to execute the judgment. In this case, the commissioners had undoubted jurisdiction. Their judgment and record were regular in form. Their clerk cannot justify his refusal to obey their order by showing mistake or misjudgment of the commissioners. If, in auditing the charges of the agent, the commissioners have allowed illegal fees, as claimed by respondent, advantage of that cannot be taken in defense to this petition. Nor can the clerk, in this proceeding, raise the question of the sufficiency of the bridge, which had been accepted by the commissioners.

It is claimed in defense, that prior to the appointment of the agent, the town had discontinued the way. The location by the commissioners was on December 3, 1890; the attempted discontinuance by the town, on May 16, 1896. Revised Statutes, c. 18, § 23, provides that "when a town way has been laid out, graded or altered by the commissioners, their proceedings cannot be affected by any action of the town within five years." Whether this way was legally discontinued or not, depends upon the question whether the five years began to run from the original location, December 3, 1890, or from the time when the proceedings and judgment of the commissioners were affirmed by the Supreme Court, August 13, 1892. If the former is the true date, the way

had been discontinued before the appointment of the agent, and his appointment was invalid. If the latter date is the true one, the town was premature in its vote to discontinue, and it being within five years prescribed by the statute, was inoperative. It is earnestly contended that the five years began to run from December 3, 1890.

The appeal vacated the location by the commissioners, and arrested all further proceedings thereunder, until the final adjudication by the Supreme Judicial Court. R. S., c. 18, § 48; *Coombs* v. *Co. Com.*, 71 Maine, 240; *Winslow* v. *Co. Com.*, 31 Maine, 446. Until then the land cannot be entered upon, nor any right to damages accrue to its owner. R. S., c. 18, §§ 7, 20. Section eight of the same chapter provides for an appeal from the assessment of damages "at any time before the third day of the regular term succeeding that at which the commissioners' return is made" to the term of the Supreme Judicial Court first held in the county more than thirty days after expiration of the time for appeal. But this court held in *B. & M. R. R.* v. *County Commissioners*, 78 Maine, 170, that this provision applied only when there was no appeal from the location. If there was an appeal, then the claimant for increased damages could file his notice of appeal within sixty days after final decision in favor of the way, and file his complaint at a term of this court held more than thirty days after that. After this decision, the Legislature of 1887, ch. 181, changed the statute to conform to it.

Upon a decision by the appellate court, approving the location of the way, the commissioners are required to carry it into effect as if made by themselves. R. S., c. 18, § 50. By § 4 of the same chapter, the commissioners were required in their report of a location, to state when the way was to be opened, but that time must necessarily date from the final establishment of a located way. Prior to 1862, the location of a town way by county commissioners was final. In that year an appeal was given. Chapter 123. The then existing statute prohibiting towns from any action affecting "the proceedings" of the commissioners, within five years, was carried into the revision of 1871, without alteration; but in 1875,

c. 25, the section was amended, by adding the word "graded" after the words "laid out", and as thus amended it stands in the revision of 1883. After the determination of the appeal, the commissioners have further "proceedings" to carry into effect the judgment. These proceedings were arrested by the appeal, but are not concluded till the appellate court has rendered its decision. The statute forbids the town doing any act affecting "the proceedings" of the commissioners.

Construing all these provisions in the light of the apparent intention of the Legislature, it is evident that § 23, limiting the power of the town, refers to the proceedings which terminate in a final location and legal establishment of the way. As this did not occur till August 13, 1892, the action of the town, within five years thereafter, was invalid, and did not discontinue the way. *Coombs* v. *Co. Com.*, supra.

It is objected that the bridge being over navigable tide-waters, and possibly an obstruction to navigation, its existence was illegal, unless permission was had from the Secretary of War. No such permission was had.

By c. 239, of special laws of Maine of 1880, authority was given for the location and establishment of a bridge, at this particular place, over tide-waters. This court has repeatedly held that the Legislature might authorize the construction of a bridge over navigable tide-waters, although navigation might thereby be impaired. *Rogers* v. *K. & P. R. R.*, 35 Maine, 323; *State* v. *Freeport*, 43 Maine, 198; *State* v. *P. & K. R. R.*, 57 Maine, 402; *State* v. *Leighton*, 83 Maine, 419. So held in *Massachusetts Commonwealth* v. *Proprietors of New Bedford Bridge*, 2 Gray, 347. Under like authority from the State, wharves and docks are built and maintained. It is undoubtedly true, that a large majority of the bridges over navigable tide-waters, and wharves and landings in them, in this state, have been erected and are maintained, without any express authority from the United States.

By the modern law of nations, the territorial jurisdiction of a state extends seaward to the distance of a marine league. See authorities cited in note to Gould on Waters, p. 9. In England

this jurisdiction was vested in the Crown. At the time of the revolution, when the people became sovereign, the respective states succeeded to the title of the Crown in the tide-waters within their territorial limit. The powers thus acquired by the states were those which in England, and in this country previous to the revolution, could have been exercised by the King. *Martin* v. *Waddell*, 16 Peters, 367. This sovereignty of the state over tide-waters for a marine league from the shore, still resides in the state. It was never surrendered to the United States, but was restricted by the Constitution of the United States, only so far as the admiralty jurisdiction of the United States Courts, and the power to regulate commerce with foreign nations and among the states, was conferred upon the general government. Neither of these is absolutely exclusive of state authority. The commerce clause of the Constitution is the only one that can affect the question here involved, and that does not render nugatory state legislation which affects commerce, but does not interfere with then existing regulations of Congress upon the same subject. *Wilson* v. *Blackbird Creek Marsh Co.*, 2 Peters, 245. It is true, that under the power to regulate commerce, given it by the constitution, Congress has the right, by appropriate laws, to so regulate the construction of bridges that navigation shall not be unnecessarily obstructed; but as stated by the Court in *Hamilton* v. *Vicksburg R. R. Co.*, 119 U. S., 281, "until Congress intervenes in such cases, and exercises its authority, the power of the state is plenary. When the state provides for the form and character of the structure, its directions will control except as against the action of Congress, whether the bridge be with or without draws, irrespective of its effect upon navigation."

In *Gilman* v. *Philadelphia*, 3 Wall. 725, the court say, "the national government possesses no powers but such as have been delegated to it. The states have all but such as they have surrendered. The power to authorize the building of bridges is not to be found in the Federal Constitution. It has not been taken from the state. It must reside somewhere. They had it before the constitution was adopted, and they have it still." "It must

not be forgotten that bridges which are connecting parts of turnpikes, streets and railroads, are means of commercial transportation, as well as navigable waters, and that the commerce which passes over a bridge may be much greater than would ever be transported on the water it obstructs. It is for the municipal power to weigh the considerations which belong to the subject, and to decide which shall be preferred, and how far either shall be made subservient to the other. The states have always exercised this power, and from the nature and objects of the two systems of government they must always continue to exercise it, subject however in all cases to the paramount authority of Congress, whenever the power of the states shall be exerted within the sphere of the commercial power which belongs to the nation."

This doctrine has been repeatedly affirmed by that court. *Pound* v. *Turck*, 95 U. S. 462; *Cardwell* v. *American Bridge Co.*, 113 U. S. 205; *Hamilton* v. *Vicksburg R. R.*, supra; *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 8.

We do not find that Congress acted upon the general subject of bridges over navigable tide-waters, prior to the act of July 5, 1884. By that act, it was provided that if an existing bridge or one thereafter built, proved an obstruction to free navigation "by reason of difficulty in passing the draw opening or the raft span of said bridge, by rafts, steamboats or other water craft," the Secretary of War might require the owners "to cause such aids to the passage of said draw opening or of said raft span . . . . to be constructed, placed and maintained . . . . in the form of booms, dikes or other suitable and proper structures for the guiding of said rafts, steamboats and other water craft safely through." It will be noticed that this act recognized the rightful existence of the bridge, and only required a construction which would interfere as little as practicable with the navigation; and that both the bridge and the navigable water were of public use,—the bridge perhaps of the greater public use. Both were intended to be enjoyed, but the one should not unnecessarily injure the other. The water craft could not insist upon absolute and uninterrupted navigation, requiring the removal of the bridge, but must enjoy its right, subject to the

necessary partial interruption and inconvenience which a suitable bridge would occasion. By the act of August 11, 1888, which applies particularly to navigable rivers, it was provided that if by any bridge or pier therein, the current was changed so as to produce caving of the banks, the Secretary of War might require the owners to repair the damage, or by some means to be indicated by the secretary, prevent the injury. The act does not treat the bridge as a nuisance, but treats it as lawfully existing. Following this action of Congress came the act of September 19, 1890, which prohibits the building of any wharf or bridge in any navigable waters without the permission of the Secretary of War, "in such manner as shall obstruct or impair navigation," etc.; but the act provides that this prohibition shall not apply to "any bridge, bridge draw, bridge piers and abutments, the construction of which has been heretofore duly authorized by law." The bridge in question was authorized to be built by the Legislature of Maine in 1880. At that time Congress had not acted upon the subject, and under the authorities cited, the state then had full power to authorize its construction. The act of Congress, in effect, is a consent that bridges before authorized by the state, may be built and maintained without objection from the federal government. The same act provides that if "the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may be hereafter constructed over any of the navigable water ways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats or other water craft" after notice and hearing, he may require the owners "so to alter the same as to render navigation, through or under it reasonably free, easy and unobstructed." This act is a full expression of the will of Congress. It does not authorize the Secretary of War to require the removal of a bridge, nor to take any action, unless it is "an unreasonable obstruction." It recognizes, by implication, the right of a state to authorize the maintenance of such bridge, though of necessity some obstruction to

navigation, but requires it to be so constructed as not to be an "unreasonable obstruction." The act is in line with the decision of the Supreme Court of the United States, in *Mississippi & Missouri R. R. Co.* v. *Ward*, 2 Black, 485, where it was claimed that a bridge obstructing navigation was a nuisance, but the court applied the test, was it "an unreasonable obstruction."

The act of 1890 was amended in 1892, but the amendment is not material here; though it is significant that in that amendment, Congress excepted from its operation bridges, the construction of which had been previously authorized by law. Section 10 of the act of Sept. 19, 1890, prohibiting obstruction to navigation, excepts bridges, piers, etc., erected for business purposes, "whether heretofore or hereafter erected."

The consent of the Secretary of War was not necessary to the lawful construction of this bridge, and it is not subject to removal under any existing act of the federal government. The only question that can be raised, in behalf of water navigation, is whether, while it may be some obstruction, it is so constructed as to be an "unreasonable obstruction." If it is, its construction must be changed; if it is not, it has the right to exist as it is.

Whitehead v. *Jessup*, 53 Fed. Rep., 707, cited by respondent, was the case of a private bridge over navigable water, not connected with any public way, and in which the public had no rights, and was not authorized by any legislative authority. It was rightly held to be a nuisance. This case has no application to a bridge erected under legislative authority for public use.

The case affords no evidence that the waters at this place have been, or are likely to be, used to any important extent for purposes of navigation; and from its location, and the position of the shore and adjacent islands, depth of water and width of passage, it may be fairly presumed, that no craft that cannot safely pass under the bridge, will have occasion to navigate there.

It is also objected that a part of the bridge is in St. George. The act of 1863 setting off a part of St. George to South Thomaston, so far as important to this question, gives the boundary as "along the shore around Elwell's Point and still along the shore to

the southerly line of South Thomaston and including Seal Harbor or Spruce Head Island and Burnt Island, lying on the west side of Muscle Ridge channel." Elwell's Point is admitted to be in South Thomaston, and so is Spruce Head Island. The bridge is from Elwell's Point to the island, a distance of 448 feet, including the approaches to the bridge. In including the island as a part of South Thomaston, the Legislature undoubtedly intended to include the water in the narrow passage between the island and main land. There are large industries upon the island, requiring means of transportation by a bridge, the expense of which should be borne by South Thomaston. It can hardly be supposed that the Legislature, when it annexed the island to South Thomaston, intended to leave a narrow space between it and the main land in another town, but geographically detached from it. The rule that grants by the state are to be taken most strongly against the grantee does not apply. The Legislature made no grant. It simply changed the boundaries of two towns, both created by the state. This objection was first made in the answer to this petition. In the carefully drawn written remonstrance presented by the selectmen to the county commissioners, it was not raised, or alluded to in the most distant manner. It is surprising that the selectmen, if they regarded the present contention as valid, should have omitted it in their remonstrance, because, if true, it was a perfect defense, and ousted the jurisdiction of the county commissioners. A town way must be located in one town, and cannot be in two. This objection is without merit.

It is also objected that the records of the commissioners do not show the whole way has been made passable; but the evidence is, that all that part of the way upon land had been opened and built before the bridge was completed. It is true this was done by the residents without cost to the town, and was by agreement with the commissioners. The public has obtained its entire town way, and South Thomaston cannot complain that it has been relieved of the cost of grading. So the deflections from the location in the graded road, made for convenience or saving of cost, and not complained of by the public, cannot excuse the town from liability to pay for the

bridge. The commissioners appointed an agent to build the bridge, and open the way. The agent found the way graded, and the bridge the only missing link, which he supplied. No objection is perceived to this. We have carefully examined the record of the commissioners, and although several technical objections to it are made, we regard them all as untenable. It would be unprofitable to discuss them in detail.

It is true, that before the commissioners had made their return and entered judgment against South Thomaston, they ordered a warrant of distress to issue, and it was issued; but before anything was done in execution of the warrant, the commissioners discovered that it had been prematurely issued, and recalled and revoked it, as it was their right and duty to do. Having been improvidently issued, it was invalid, and did not afford the foundation for an alias. Then they entered up a proper judgment, under their hands, in favor of the agent and against South Thomaston, and directed their clerk to extend the record in due form; and in that judgment the commissioners ordered their clerk to issue a warrant of distress according to the statute, if the judgment was not paid within twenty days after the transmission of the certificate of the rendition thereof to the assessors of South Thomaston. Thereupon the clerk made a record in due form and transmitted a copy of it to the assessors, under the seal of the court of County Commissioners, duly attested by him, which was received by the assessors on February 15, 1897. All these proceeding appear to be regular and in accordance with law.

The commissioners made return of their doings and judgment, in writing, under their hands, as required by law, and their clerk duly extended the record. The commissioners ordered a warrant of distress to issue to the petitioner, as agent, for the cost of the bridge and his expenses for superintendence and for procuring the allowance of his account.

The petitioner is the proper party in whose favor the warrant of distress should issue. He was the contractor for the bridge, and should collect from the town, and pay the builders.

The board of County Commissioners is a court, having a seal

and clerk. Their judgments are extended and recorded by their clerk. When the clerk issues a warrant of distress in accordance with the judgment and order of the commissioners, it is issued by that court, as required by statute. Their clerk is their hand; and his ministerial act in execution of their order is, in law, their act.

It results that it was the duty of the respondent, as clerk of the commissioners, to issue a warrant of distress, in accordance with the judgment and order of the county commissioners.

This case was reported to the law court by consent of parties, "to be heard upon the petition, objection and evidence documentary and otherwise", and "the law court is to decide the case upon the pleadings and such evidence as is legally admissible and to make such orders and decrees as the rights of the parties require." Under this agreement, the parties evidently contemplated that the law court should treat the pleadings as an alternative writ and return, and have thereby waived the right to an alternative writ, and authorized the court to issue the final peremptory writ.

No damages are claimed, and none are awarded.

Peremptory writ of mandamus to issue as prayed for.

PIERRE COTE *vs.* BATES MANUFACTURING COMPANY.

Androscoggin. Opinion December 10, 1897.

Contract. Wages. Forfeiture. Stat. 1887, c. 139, § 4.

It is provided by the statute of this state that employers engaged in manufacturing or mechanical business may contract with their employees, that a week's notice of intention to quit work shall be given. In such case, the employer is required to give notice of intention to discharge the employee; and on failure, shall pay to such employee a sum equal to one week's wages.

In this case the defendant claimed that the plaintiff quit work without giving and working the week's notice, and retained one week's wages. The plaintiff claimed that he was discharged without notice, and that he was entitled to recover the week's wages due, and another sum equivalent to a week's wages as a forfeiture of defendant.

Held; that the facts of the case do not support the claim of forfeiture by either party; and that the plaintiff is entitled to recover the amount due him when he quit work, for labor before then performed.

ON REPORT.

This was an action brought against the Bates Manufacturing Company under the statute of 1887, c. 139, § 4, as follows:

"It shall be lawful for any person, firm or corporation engaged in any manufacturing or mechanical business, to contract with adult or minor employees to give one week's notice of intention on such employee's part, to quit such employment under a penalty of forfeiture of one week's wages. In such case, the employer shall be required to give a like notice of intention to discharge the employee; and on failure, shall pay to such employee a sum equal to one week's wages. No such forfeiture shall be enforced when the leaving or discharge of the employee is for a reasonable cause. Provided, however, the enforcement of the penalty aforesaid shall not prevent either party from recovering damages for a breach of the contract of hire."

The action was to recover $7.14 wages due the plaintiff from the defendant, and a like amount $7.14 equivalent to one week's wages as a forfeiture under the above statute.

The facts are stated in the opinion.

M. L. Lizotte, for plaintiff.

W. H. White and S. M. Carter, for defendant.

Notice of a proposed reduction would not excuse this plaintiff from doing what he had expressly agreed to do.

A proposed reduction in wages would not be binding upon the plaintiff unless he assented to it.

His clear duty under his contract with the company, if he did not wish to work at the proposed reduction, was to give the company notice, and then without doubt he would have been entitled to recover his compensation at the old rate up to the expiration of his notice.

The general rule of law governing this class of cases is stated in the following cases:

Noon v. *Salisbury Mills*, 3 Allen, 340; *Partington* v. *Wamsutta*

Mills, 110 Mass. 467; *Naylor* v. *Fall River Iron Works*, 118 Mass. 317; *Preston* v. *American Linen Co.*, 119 Mass. 400.

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

STROUT, J. Plaintiff was a weaver in defendant's mill, receiving fifty cents per cut. His contract, which was in writing, provided that he should give one week's notice of his intention to quit, and work that week; and that if he quit without giving and working such notice, he should forfeit one week's wages. The statute imposes a like forfeiture by a corporation for the discharge of its laborer, without one week's notice of its intention. On Saturday, May 16, 1896, defendant owed plaintiff for two week's work, amounting to $14.28. On May 11, defendant gave notice of a reduction in pay of weavers to forty-eight cents per cut, to take effect on Monday, May 18. Plaintiff says he first knew of this on May 16. On Monday, May 18, plaintiff went into the mill, but did not start his loom, and he, with others, refused to work at the reduced rate, and left. He says he was willing to work his notice at the old price, but understood that if he worked longer, he would only be paid at the reduced rate. He was not told that if he gave notice, and worked the week, he would receive the old price. He went back on the following Wednesday and worked one week, for which he was paid at the rate of forty-eight cents per cut, and was also paid seven dollars and fourteen cents, for one week's work previously done, the company retaining an equal amount as forfeited, on the ground that he left without giving the required notice.

This action is brought to recover the amount withheld, and also a like amount as forfeiture under the statute, for discharging him without notice. The case fails to show legal ground for recovery of forfeiture, as defendant did not attempt to discharge plaintiff.

As to the week's unpaid wages, whatever might have been the legal right of plaintiff to recover at the old rate, if he had given notice on the 18th and worked his week, the plaintiff had good reason to suppose that he would not be so paid, and was therefore justified in leaving. If defendant intended to pay fifty cents per

cut, for the time of the week's notice, it could very easily have so informed the plaintiff. But failing in this, and the reply of the superintendent to a remonstrance of the weavers, that the old price would not be restored, fairly gave the weavers to understand that only forty-eight cents per cut would be paid after May 18. Acting upon this inference, warranted by all the circumstances, the plaintiff was justified in leaving, and incurred no forfeiture thereby.

He is entitled to recover the week's wages withheld.

Judgment for plaintiff for seven dollars and fourteen cents, and interest from date of writ.

INHABITANTS OF WOODSTOCK *vs.* INHABITANTS OF CANTON.

Oxford. Opinion December 11, 1897.

Verdict. Practice. Exceptions. Pauper.

Where in the trial of a cause after the plaintiff has introduced his testimony, the defendant does not contradict it in any material point, and the evidence will not authorize a verdict for the defendant, *held;* in such case the presiding justice may order a verdict.

In this case it clearly appears from the testimony introduced by the plaintiff, which was not contradicted in any material point, that the pauper had gained a settlement in the defendant town by five years continuous residence therein. *Held;* that the evidence would not authorize a verdict for the defendant; and exceptions will not lie to the order of the court in directing a verdict to be returned in favor of the plaintiff.

The case appears in the opinion.

H. C. Davis and J. S. Wright, for plaintiff.

J. P. Swasey, for defendant.

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

STROUT, J. Exceptions to a direction by the presiding judge to the jury, to return a verdict for the plaintiff.

The only question in controversy was whether the pauper,

George W. Howe, had acquired a settlement in Canton, by five years continuous residence therein, without receiving pauper supplies. It was admitted that Howe, prior to March, 1883, had his settlement in plaintiff town. He was married on September 30, 1882, while living at Mechanic Falls, and resided there with his wife for about four months after the marriage. Differences arose between them, and she left him and went to her father's in West Minot, taking with her all her goods. Both Howe and his wife testify that the separation was believed by each to be final. Howe says that within two or three days after his wife left him, he gave up his house, disposed of what little furniture he had, except a chamber set and a few chairs, which he stored in Woodstock, but not in the house he had occupied, gave up his job, and left Mechanic Falls "for good", and went to Canton about March 1, 1883, in response to a request from Mr. Hayford to work upon the railroad as a brakeman, and occasionally as fireman. He immediately obtained employment on the railroad, and retained that employment continuously till the middle of May, 1888, actually living and making his home in Canton. He says, when he went to Canton, he intended to remain if he got work. He had no intention of returning to Woodstock. He intended to remain an indefinite period of time, if he had employment. Obtaining employment in Canton, and in fact remaining there for more than five consecutive years, with no intention of removing therefrom, constituted a residence within the meaning of the statute, and conferred a pauper settlement in that town. *Warren* v. *Thomaston*, 43 Maine, 421.

For nearly two years after George W. Howe went to Canton, his wife was living in another town; then she returned to him in Canton and lived with him there till they removed in May, 1888. While the wife was living apart, her husband contributed nothing to her support, and made no provision for her. She had deserted him, as both believed, permanently. He made his home in Canton. He had the right to determine his place of residence. His wife could not change it, against his will, by living apart from him

in another town. *Bangor* v. *Frankfort*, 85 Maine, 128. *Richmond* v. *Vassalboro*, 5 Maine, 398.

The residence of the wife is evidence of the domicile of the husband, but if she has abandoned him, he may establish his domicile elsewhere. *Burlington* v. *Swanville*, 64 Maine, 86.

Upon the testimony introduced by the plaintiff, which was not contradicted in any material point, it clearly appeared that the pauper had gained a settlement in defendant town, by continuous residence therein from March, 1883, to May, 1888, making that his home. The evidence would not authorize a verdict for defendant. In such case, the presiding judge may order a verdict. This court said in *Heath* v. *Jaquith*, 68 Maine, 438, "It would be but an idle ceremony to submit the case to the jury by instructions authorizing them to find for a party, when he has introduced no evidence which would authorize it, and when, if they find a verdict in his favor, it would be the duty of the court to set it aside because there was no evidence sufficient to support it."

Exceptions overruled.

LEWISTON CO-OPERATIVE SOCIETY, NO. 1,

vs.

GEORGE THORPE, Appellant.

Androscoggin. Opinion December 11, 1897.

Arrest. Corporation. Set-Off. R. S., c. 113, § 2.

A debtor about to leave the state may be arrested in certain cases as provided in R. S., c. 113, § 2; and where a corporation is the creditor in such proceeding, the oath required by the statute must be that of some officer, or some other agent or attorney. *Held;* that the president of the corporation is competent, as representing the corporation to take such oath; and that his oath so taken is to be regarded as the oath of the creditor corporation, within the meaning of the statute.

The defendant was a stockholder in the plaintiff corporation. Its by-laws provided that "on and after six months from the date of organization of the

society, shares may be withdrawn at their par value on demand, or if the board of directors shall require, after thirty days' notice has been given; provided that no share shall be withdrawn at the expense or to the detriment of the remaining shareholders." The corporation was organized for the purpose of buying and selling "food, fuel, clothing and other necessaries of life, and to carry on the business of general dealers in merchandise." The defendant bought at the plaintiff's store goods amounting to $41.34, which was sued for in this action. He claimed to set off the amount of shares held by him, being forty dollars. He had asked to withdraw his shares about March, 1896. Suit was brought June 18, 1896. On April 13, 1896, the directors voted "to allow no more withdrawals for the present or until further action of the board." Under this vote plaintiff refused to allow defendant to withdraw his shares. *Held;* that the set-off cannot be maintained; *also*, that the action of the directors was in line of their authority, and appears to have been warranted by the condition of the corporation.

The defendant as a stockholder was interested in the venture, and the plaintiff was in no sense indebted to defendant. His capital, represented by his shares, must take the chances of the business. He could not withdraw it, if in the judgment of the directors, it could not be done with safety to the business. He must pay his indebtedness in aid of the business.

ON REPORT.

This was an action on account annexed to the writ to recover the sum of $41.34 for groceries and provisions.

Date of writ, June 18, 1896. Plea, general issue with brief statement as follows, to wit:

That he claims to set off against the plaintiff's claim the sum of forty-one dollars due him from said plaintiff according to the following account:

Lewiston Co-Operative Society No. 1.

To George Thorpe, Dr.

1896.

Jan. 18. To amt. due in shares held by George Thorpe in the Lewiston Co-operative Society No. 1, as per account stated $40.00

To interest on same to June 1896, 5 mos. 1.00

$41.00

The defendant was arrested on a capias writ by the plaintiff, the writ being returnable to the Lewiston Municipal Court.

In that court the defendant filed the following motion to dismiss the action:—

STATE OF MAINE.

Androscoggin, ss. Lewiston Municipal Court.

Lewiston Co-operative Society No. 1 vs. George Thorpe.

And now comes the said defendant and moves that the plaintiff's writ be quashed and that said action be dismissed, because he says that the service of said writ being by arrest, there was no sufficient affidavit indorsed upon said writ prior to said service to justify said service or to give this court jurisdiction.

And defendant further prays for his costs.

By SAVAGE & OAKES, his Attorneys.

[AFFIDAVIT ON WRIT.]

I, William Widdall, President of the Lewiston Co-operative Society No. 1—a corporation duly established by law, the within named creditor, make oath and say, that I have reason to believe and do believe that George Thorpe, the within named debtor is about to depart and reside beyond the limits of the state, and to take with him property or means of his own exceeding the amount required for his immediate support, and that the demand named in the within process, or the principal part thereof, amounting to at least ten dollars, is due to the within named creditor.

WILLIAM WIDDALL, President.

Androscoggin ss. June 18, 1896.

Subscribed and sworn to by the above named William Widdall, who also made oath that he is president of the within corporation.

Before me, FRANK A. MOREY, Justice of the Peace.

The foregoing motion was overruled by the court, and judgment having been rendered in favor of the plaintiff for the amount sued for, the defendant thereupon appealed to this court sitting at nisi prius.

After the evidence was drawn out before the jury in the court below, the case was reported to the law court. The parties stipulated that the law court should determine first the question arising above, on account of lack of jurisdiction, by reason of the defective affidavit, etc; and if the motion should be sustained, then judgment was to be rendered for the defendant. If the motion should

not be sustained by the law court, then that court was to render such judgment as the legal rights of the parties might require, upon so much of the evidence as the court should find to be legally admissible.

The other facts appear in the opinion.

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

H. W. Oakes, for defendant.

The application of the defendant to withdraw his shares having been made March 29th, he became entitled to his money at that time, if at all; no further notice of thirty days having been required of him under the by-law, his right to it would vest at that time, and would not be affected by the vote of April 13th.

The defendant claims that by reason of what had occurred, this, which was originally in the form of shares, had ceased to retain that nature and had become a contract for the payment of money from the plaintiff to the defendant; that all the conditions existed which the by-laws of the plaintiff required in order to enable the defendant to demand his money; and that the mere assertion of the directors of the existence of the contingency named in the by-laws or their mere vote not to allow withdrawals, cannot bar the defendant's right to have his claim allowed as a demand capable of set-off against the claim sued upon.

Affidavit on writ:—William Widdall was not the "creditor." The certificate does not show him to be either the "agent" or "attorney" of the corporation.

But it is urged that the certificate shows him to be the president, and that it may be implied that the president is the agent or attorney of the corporation.

No such implication is allowed under our decisions. "The court cannot take anything by intendment or supply deficiencies in a matter which the legislature deemed material." *Whiting* v. *Trafton*, 16 Maine, 398; *Mason* v. *Hutchings*, 20 Maine, 77; *Bailey* v. *Carville*, 62 Maine, 524; *Sargent* v. *Roberts*, 52 Maine, 591; *Proctor* v. *Lothrop*, 68 Maine, 256.

The form of the affidavit does not show that he even assumed to act as agent or attorney.

Words similar to those used by him have again and again been held simply as descriptive of the person, and not declaratory of agency. *Fogg* v. *Virgin*, 19 Maine, 352; *Chick* v. *Trevett*, 20 Maine, 462; *Fiske* v. *Eldridge*, 12 Gray, 474; *Haverhill M. T. Ins. Co.* v. *Newhall*, 1 Allen, 130; *Barlow* v. *Cong. Soc. in Lee*, 8 Allen, 460; *Tucker Mfg. Co.* v. *Fairbanks*, 98 Mass. 101; *Sturdivant* v. *Hull*, 59 Maine, 172; *Rendell* v. *Harriman*, 75 Maine, 497.

If this affidavit is defective, the defect is jurisdictional, and the action must be dismissed. *Bailey* v. *Carville*, 62 Maine, 524; *Sawtelle* v. *Jewell*, 34 Maine, 543; *Shaw* v. *Usher*, 41 Maine, 102; *Furbish* v. *Roberts*, 39 Maine, 104.

SITTING: PETERS, C. J., FOSTER, HASKELL, WISWELL, STROUT, JJ. SAVAGE, J., having been of counsel, did not sit.

STROUT, J. To justify arrest upon mesne process, on contract, the statute requires "the creditor, his agent or attorney" to make oath to a belief in the facts enumerated in the statute. The oath, in this case, was made by the president of the plaintiff corporation. It is objected that this was not a compliance with the statute. A corporation can only act by its officers. If the creditor is a corporation, the oath must be that of some officer, or some other agent or attorney. The act of the president, in the business of the corporation, and within the scope of his authority, is the act of the corporation. For the purpose of the creditor's oath to authorize arrest, we regard the president, in taking the oath, as representing the corporation; and the oath so taken is to be regarded as the oath of the creditor corporation, within the meaning of the statute. The motion to dismiss is overruled.

Defendant was a stockholder in plaintiff corporation. Its by-laws provided that "on and after six months from the date of organization of this society, shares may be withdrawn at their par value, on demand, or if the Board of Directors shall require, after thirty days' notice has been given; provided that no share shall be withdrawn at the expense or to the detriment of the remaining

shareholders." The corporation was organized in 1883, for the purpose of buying and selling "food, fuel, clothing and other necessaries of life, and to carry on the business of general dealers in merchandise."

Defendant bought at plaintiff's store goods to amount of $41.34, which is sued for in this action. He claims to set off the amount of shares held by him, being forty dollars. Thorpe asked to withdraw his shares about March, 1896. Writ was dated June 18, 1896. On April 13, 1896, the directors voted "to allow no more withdrawals for the present or until further action by the board." In accordance with this vote, plaintiff refused to allow defendant to withdraw his shares.

The action of the directors was in line of their authority under the by-laws, and appears to have been warranted by the condition of the corporation. The defendant had stock in the corporation, an interest in the venture. The success or even continuance of the business might be endangered or ruined, if share holders, at pleasure, could withdraw the capital by them contributed to the enterprise. Plaintiffs were in no sense indebted to defendant. They had a right to require payment from defendant for goods purchased by him. His capital, represented by his shares, must take the chances of the business. If the corporation, in the honest judgment of the directors, could safely allow him to withdraw his capital, it could be done; but until then, he was one of the principals in the enterprise, to stand or fall with them. He must pay his indebtedness in aid of the business.

Judgment for plaintiff.

JOSEPH A. STEVENS *vs.* BENJAMIN B. THATCHER, and another.

Penobscot. Opinion December 13, 1897.

Indians. Treaties. Attachment. R. S., c. 81, § 26.

The incorporation of territory within the boundaries of the state into a town, county, or other political division is a purely political act; and such power of incorporation by the state is unaffected by any stipulations in the Indian treaties between Massachusetts and the Penobscot Indians of June 29, 1818, and between Maine and the same Indians August 17, 1820.

White Squaw Island in the Penobscot river above Old Town lies west of the centre line of the river at ordinary pitch of water. It is therefore within the territorial limits of the riparian town of Argyle on the west side of the river.

Held; that a certificate of attachment of bulky personal property attached upon White Squaw Island should be filed in Argyle, and not in Greenbush, the oldest adjoining town.

AGREED STATEMENT OF FACTS.

This action was trover for a certain lot of peeled hemlock logs. Plaintiff, as a deputy sheriff of Penobscot County, on the 6th day of July, 1896, attached the logs upon a writ Augustus B. Clifford vs. Jos. E. Clifford, requiring him to make the attachment to secure and enforce the labor lien of said Augustus B. Clifford. All of the logs when attached were in two rafts on the east shore of White Squaw Island and between said island and the centre line of Penobscot river at ordinary pitch of water, at or near the place as shown on a plan.

Within five days after the attachment, the officer duly filed a copy of his return thereof in the office of the town clerk of the town of Greenbush, where it was duly recorded.

No copy of his return was filed or recorded in the town of Argyle and no keeper was put on the logs.

The writ was in due form to enforce a log-lien claim and was duly entered at the return term thereof in the Bangor Municipal Court, where said writ was returnable. While the action was pending in said court, and after ten days from the date of said attachment, and before rendition of judgment against the logs, they

were purchased of one I. W. Bussell, who claimed to be the owner of them, by the defendants who had no knowledge of the attachment, and were taken into possession by the defendants.

The Penobscot River flows on both sides of said White Squaw Island.

The locality where said logs were when attached and the distances from the Greenbush shore to the centre line of said river, thence to and across said island and from said island to Argyle shore, are shown by a plan in the case.

Said White Squaw Island is one of the islands in Penobscot river above Old Town, belonging to the Penobscot tribe of Indians, and the shore is leased by the agent of said tribe to Penobscot Lumbering Association and was so leased at date of said attachment.

It was agreed that in determining the question of the validity of filing and recording the attachment in Greenbush, the acts incorporting said Greenbush and Argyle, and all the treaties with said Indians, the state plan of said island, recorded in Penobscot registry of deeds, may be used as evidence for the consideration of the court.

If the court should find the attachment as made and recorded in said Greenbush is valid, the defendants were to be defaulted, otherwise plaintiff to be nonsuited.

W. C. Clark, for plaintiff.

White Squaw Island and its leased shore was an unincorporated place, with Greenbush the oldest adjoining town in the county; and, therefore, Greenbush is the town in which to file and record the attachment. R. S., c. 81, § 26.

Any grant, individual or corporate, by the state, of land on banks of the river, opposite White Squaw Island, in what are now Greenbush and Argyle, must be limited in proprietorship to and by the limits of the prior grant to the Indians. *Morrison* v. *Keene*, 3 Maine, 474.

By this original grant to the Indians, of this island, they took limits to the Greenbush bank of the river on one side and to the Argyle bank on the other.

The construction that the proprietorship of Argyle and Greenbush extends to the thread is negatived, first, by the words of the treaty, "they shall have, enjoy and improve all the four townships described as aforesaid, and all the islands in Penobscot river above Old Town;" secondly, by the last two sentences of the treaty of 1818: "It is further agreed by and on the part of said tribe, that said commonwealth shall have a right at all times hereafter to make and keep open all necessary roads, through any lands hereby reserved for the future use of said tribe. And the citizens of said commonwealth shall have a right to pass and repass any of the rivers, streams and ponds, which run through any of the lands hereby reserved for the purpose of transporting their timber and other articles through the same."

The Indians therefore took the dry land, the shore and the water as it flows, to the bank across stream upon either side of the island, including, of course, the rafting place where these logs were attached.

There is nothing in act incorporating either town named that shows intention to interfere with the proprietorship limits of White Squaw Island.

Proprietorship limits of the Indians:—*Storer* v. *Freeman*, 6 Mass. p. 438; *Morrison* v. *Keene*, 3 Maine, 474; *Perkins* v. *Oxford*, 66 Maine, 545, and cases cited; 3 Kent Com. 4th ed. pp. 411, 412.

The Penobscot Indians are a nation.

J. F. Gould, for defendants.

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

EMERY, J. White Squaw Island in the Penobscot river above Old Town is said, in the statements of facts, to lie west of the centre line of the river at ordinary pitch of water. It is therefore admitted by the plaintiff to be within the territorial limits of the riparian town of Argyle on the west side of the river, unless it has been reserved or excluded from the act of incorporation of the town of Argyle by virtue of some prior Indian treaty.

The only "Indian Treaties" cited by the plaintiff are, that between Massachusetts and the "Penobscot Indians" June 29, 1818, and that between Maine and the same Indians August 17, 1820, both of which are printed in Acts and Resolves of 1843 page 253 et seq. In these treaties it was stipulated that the Penobscot tribe of Indians "should have, enjoy and improve . . . . all the islands in the Penobscot River above Old Town." The plaintiff contends that this stipulation debarred the legislature from afterward including any of these islands (including White Squaw Island) within any incorporated town. This contention cannot be sustained.

The treaties cited cannot be held to have exempted the Penobscot Indians or their lands from the political jurisdiction and power of the state. Notwithstanding any treaties with Indians upon the territory of Maine, the political jurisdiction of the state includes every person, and every acre of land within its boundaries. *State* v. *Newell*, 84 Maine, 465. The incorporation of any territory within those boundaries into a town, county, or other political division is a purely political act, and such power of incorporation is unaffected by any stipulations in the treaties cited.

Those treaties secured property rights in White Squaw Island to the Penobscot Indians, but the incorporation of the territory of the island with other territory into a town does not deprive the Indians, or any other owners of lands within those limits, of any property rights. The Indians can "have, enjoy and improve" their island, notwithstanding its inclusion within the limits of Argyle.

It follows that the certificate of attachment of bulky personal property attached upon White Squaw Island should have been filed in Argyle, instead of Greenbush, the oldest adjoining town. This not having been done, the plaintiff acquired no title or right against the defendants, the purchasers of the logs.

Plaintiff nonsuit.

FRANCOIS X. MARCOTTE *vs.* CHARLES V. ALLEN.

Androscoggin. Opinion December 13, 1897.

Payment. Fraud. Ignorance of Law. Offices. Fees. Nonsuit.

Whenever a payment made in ignorance of the law is induced by the fraud or imposition of the other party, and especially if the parties are not upon an equal footing, an action to recover it back is maintainable.

For a public officer, whose fees by law are to be paid by the city, and are paid by the city, to receive fees to which he knows he is not entitled, and which he knows are being paid to him by a party ignorant of the law, who would not pay if he knew the law,—and not to inform him that he was not bound to pay, is fraudulent, and such officer should restore the money which he cannot conscientiously retain.

In this case the court *holds* that the admission of the defendant, and the evidence introduced by the plaintiff, if true, bring the case within this rule.

In deciding whether an order directing a nonsuit is correct, the court must assume that the plaintiff's evidence is true.

ON EXCEPTIONS BY DEFENDANT.

The facts are stated in the opinion.

J. G. Chabot, for plaintiff.

W. H. Newell and W. B. Skelton, for defendant.

Counsel argued on the facts: The defendant was city clerk; the plaintiff was an undertaker; the law of the state provides that before burial an undertaker must have a certificate from the city clerk; the plaintiff alleges that he sent his agent to the city clerk for the several certificates, and the agent says he paid the city clerk or his clerk twenty-five cents for each permit; the plaintiff says he never went himself for the certificates; the agent says that the city clerk never demanded the money from him, and never refused to issue the certificates. The plaintiff says he would not have paid the fees if he had known the law. In other words, if his story is entitled to credit, he knew all the facts and if he paid the money at all, paid it because he did not know the law, and says distinctly that he would not have paid the money if he had known the law.

Money paid under mistake of law cannot be recovered back:— *Norton* v. *Marsden*, 15 Maine, 45; *Silliman* v. *Wing*, 7 Hill, 159; *Peterborough* v. *Lancaster*, 14 N. H. 382; *Champlin* v. *Laytin*, 18 Wend. 407; *Painter* v. *Polk County*, 81 Iowa, 242, (25 Am. St. Rep. 489); *Badeau* v. *United States*, 130 U. S. 439.

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

SAVAGE, J. The plaintiff is an undertaker. The defendant is city clerk of the city of Lewiston. The plaintiff sues in this action for money had and received to recover back fees paid to the defendant for three hundred and seventy-six "burial permits," issued under the provisions of Public Laws of 1891, c. 118, as amended by Public Laws of 1895, c. 154. At the conclusion of the plaintiff's evidence, the presiding justice directed a nonsuit, to which ruling the plaintiff excepted.

By statute, the fees of city clerks for issuing burial permits are to be paid by the cities and towns, and it was admitted that "the defendant was paid his legal fees by the city of Lewiston for all the burial permits mentioned in this action prior to March, 1896."

Assuming, as we must, that the plaintiff's evidence was true, the case discloses the following facts. The plaintiff paid the money sued for to the defendant, as fees for burial permits issued by him. A fee of twenty-five cents was paid each time the plaintiff had occasion to require a permit. The plaintiff did not know that the statute required the city to pay the city clerk for his services in issuing permits, nor that the defendant was being paid by the city for the same. The defendant received and kept the money, and did not inform the plaintiff that the city was bound to pay, or was paying his legal fees. The evidence does not show that the defendant demanded pay of the plaintiff as a prerequisite to the issuing of the permits, but the defendant's predecessor in office asked the plaintiff to pay for such permits, which he did, and he "supposed it was the same rule, and paid him [the defendant] right along." From these facts it can hardly be inferred that the

defendant thought these payments were gratuities, and we are satisfied that he must have known that the plaintiff paid these fees because he supposed he was bound to. It is clearly a case of payments made in ignorance of the law, and the defendant relies upon the well-settled rule that voluntary payments, made with full knowledge of all the facts, but under a mistake or through ignorance, of the law, cannot be recovered. *Norris* v. *Blethen*, 19 Maine, 348.

The defendant is a public officer, and though he did not expressly demand the payment of these fees he took them knowing that the plaintiff was acting upon a mistaken view of his legal rights. The parties did not stand upon a level. The defendant was in a position where the plaintiff was justified in relying upon his conduct. A public officer must deal fairly with the public. Some courts have sustained actions like this on the ground of public policy. In *American Steamship Co.* v. *Young*, 89 Pa. St. 186, the court said of the relations between a public officer and the public:—"He and the public who have business to transact with him do not stand upon an equal footing. It is his special business to be conversant with the law under which he acts, and to know precisely how much he is authorized to demand for his services; but with them it is different. They have neither the time nor the opportunity of acquiring the information necessary to enable them to know whether he is claiming too much or not, and as a general rule, relying on his honesty and integrity, they acquiesce in his demands." See *Mayor of Baltimore* v. *Lefferman*, 4 Gill, 425; 45 Am. Dec. 145, note; *Walker* v. *Ham*, 2 N. H. 238; *Stevenson* v. *Mortimer*, Cowper, 805.

But without deciding that this action is maintainable on the ground of public policy, we think it can be maintained upon another ground. Whenever a payment made in ignorance of the law, is induced by the fraud or imposition of the other party, and especially if the parties are not upon an equal footing, an action to recover it back is maintainable. *Stover* v. *Poole*, 67 Maine, 217; *Silliman* v. *Wing*, 7 Hill, 159; *Bank of U. S.* v. *Daniel*, 12 Pet. 32. This court has declared in *Freeman* v. *Curtis*, 51 Maine, 140,

and in *Jordan* v. *Stevens*, 51 Maine, 78, that when one, who himself knows the law, and knows another to be ignorant of it, takes advantage of his ignorance, it may be regarded as fraud. His very silence may be fraudulent. *Downing* v. *Dearborn*, 77 Maine, 457. For a public officer, whose fees by law are to be paid by the city, and are paid by the city, to receive fees to which he knows he is not entitled, and which he knows are being paid to him by a party, ignorant of the law, who would not pay if he did know the law,—and not to inform him that he was not bound to pay, is fraudulent, and such officer should restore the money which he cannot conscientiously retain. To hold otherwise would be a reproach to the law.

It is the opinion of the court that the admission of the defendant and the evidence introduced by the plaintiff brought the case within this rule, and that the order directing a nonsuit was erroneous.

Exceptions sustained.

STATE *vs.* WALLACE SIMPSON.

Kennebec. Opinion December 16, 1897.

Evidence. Docket Entries. Prior Conviction. Jurisdiction. R. S., c. 120, § 5. Waterville Mun. Court. Spec. Laws, 1880, c. 220.

It is a settled rule in this state that when the record in a case has not been fully extended, the docket entries may be read to the jury in support of the allegation of a former conviction; but as there is no presumption in favor of the jurisdiction of an inferior court of limited statutory jurisdiction, the docket entries from the records of such a court cannot be accepted as sufficient proof of a former conviction of larceny without further evidence, that the court had jurisdiction of the particular offense of which the respondent was convicted.

The respondent was indicted in the Superior Court for Kennebec county as a common thief. To prove a former conviction of larceny in the Municipal Court of Waterville, the docket entries of that court were introduced, it appearing that no extended record had been made in that case. Neither the original complaint, nor a duly certified copy of it, upon which the conviction was based in the Municipal Court of Waterville, was offered in evidence.

Held; that in the absence of prima facie evidence that the court had jurisdiction of the offense charged, the docket entries alone are not sufficient to establish the former conviction alleged in the indictment.

ON EXCEPTIONS BY DEFENDANT.

This was an indictment for larceny by night in a dwelling-house, under R. S., c. 120, § 2, with an allegation of a previous conviction of larceny as principal, so that the sentence might be given for a common thief, under § 5 of said chapter, if the respondent were convicted.

To prove the alleged former conviction of the defendant in the Municipal Court of Waterville, the following testimony was given by Frank K. Shaw:

Q. You are the judge of the municipal court of the city of Waterville?

A. Yes, sir.

Q. Have you the records of your court with you?

A. I have.

Q. Will you turn to the record of No. 3626? Have you that record with you?

A. I have.

Q. Is it a record of conviction?

A. Yes, sir.

Q. Will you read it?

A. "3626. State vs. Wallace Simpson. Larceny. Complainant, A. L. McFadden. Date, Dec. 30, 1895. Same day, prisoner arraigned. Plea, guilty. Sentenced to be imprisoned fifteen days in jail at hard labor and to pay the costs of prosecution $6.69. In default of payment of costs, fifteen days additional imprisonment. Committed."

Neither the original complaint, nor any copy of the same, was put into this case. The defendant's counsel, at the close of the charge of the presiding justice, insisted that to establish a former conviction, as alleged in this indictment, it was incumbent on the government to show what was the complaint in the municipal court upon which the conviction was based; and asked the court to instruct the jury that there was not sufficient evidence in the case

to support the allegation of prior conviction. This instruction the presiding judge refused to give. The jury returned a general verdict of guilty. To the foregoing refusal to give the requested instruction, the defendant excepted.

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

The vital question is whether there was a former conviction of larceny as principal; and for the purpose of showing this fact there is no other record than what was introduced, and according to the authorities such record is sufficient to establish this fact. By recurring to the record introduced to show former conviction, it appears that the judgment was rendered on the defendant's plea of guilty; so that the fact of such conviction is established by proof, which, he, at least, cannot very well controvert. The only attempt so to do is by a technical objection of the most unsubstantial form. The former case was one within the jurisdiction of the Municipal Court of Waterville, (see *Treat* v. *Maxwell*, 82 Maine, 79,) and its only records are the docket entries, which are much more complete than ninety-nine out of every one hundred of the inferior court dockets. If such objections should avail, the only result would be to nullify the statute regarding this offense of becoming a common thief, if the first or former conviction was in an inferior court.

When their proceedings show upon their face that they have jurisdiction, a prima facie case of jurisdiction is established. *Foss* v. *Edwards*, 47 Maine, 150.

When, however, the jurisdiction of such tribunals is fully made to appear, the recitals in their records touching any matters legitimately before them are conclusive. *Foss* v. *Edwards*, supra; *Paul* v. *Hussey*, 35 Maine, 97.

S. S. Brown, for defendant.

There was no evidence in this case that the defendant had been previously convicted of the crime of larceny, and the requested instruction should have been given. *State* v. *Lamos*, 26 Maine, 258.

The statute on which this indictment is based calls for a former conviction, and, of course, a conviction proven by legal and

sufficient evidence. No such conviction can be established without showing what the complaint was. The original complaint, or a properly attested copy of it, is the best evidence. The statement of the recording officer expressed in the single word "larceny" cannot be sufficient.

Nothing is to be presumed in favor of the jurisdiction of these inferior courts. Their convictions, where the rights of a person, as in this case, are involved, must show their jurisdiction by a proper complaint. The meaning and bearing of this word "larceny" in this connection is a matter of mere speculation. If it was placed in this record to express the recording officer's opinion as to what the proceeding was, that would be no evidence. The record is what is called for. The recording officer's construction of the papers, or what they import, is not evidence. *English* v. *Sprague*, 33 Maine, 440. The complaint is a part of the record, and a very important part of it.

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

WHITEHOUSE, J. This was an indictment against the respondent for the crime of larceny committed on the twenty-eighth day of January, 1897, with an allegation of a prior conviction in the Municipal Court of Waterville, and an averment of the legal conclusion, based upon Sect. 5, Chap. 120, R. S., that the respondent was a common thief.

In support of the allegation of a former conviction of larceny, the state introduced without objection the following docket entries from the records of the Municipal Court of Waterville, it appearing that no more extended record had been made in the case, to wit:—"State v. Wallace Simpson. Larceny. Complainant, A. L. McFadden. Date Dec. 30, 1895. Same day, prisoner arraigned. Plea, guilty. Sentenced to be imprisoned fifteen days in jail at hard labor and to pay the costs of prosecution $6.69. In default of payment of costs, fifteen days additional imprisonment. Committed." Aside from proof of the respondent's identity, no other

evidence was introduced to substantiate the averment of a prior conviction.

But at the close of the charge of the presiding judge, the defendant's counsel requested an instruction that it was incumbent on the government to show what the complaint was in the Municipal Court upon which the conviction was based, and that there was not sufficient evidence in the case to support the allegation of a prior conviction. The presiding judge refused to give this instruction, and the jury returned a verdict of guilty. The case comes to this court on exceptions to this refusal to give the requested instruction.

It is settled law in this state that, when the record in a case has not been fully extended, the docket entries may be read to the jury in support of the allegation of a former conviction. The docket is deemed to be the record until a more extended record is made, and the same rules of imported verity apply to the docket entries as to the completed record. *State* v. *Neagle*, 65 Maine, 469, and cases cited; *State* v. *Hines*, 68 Maine, 202.

But this rule of evidence is not decisive of the question here presented. Such docket entries from the records of a superior court of general jurisdiction are undoubtedly accepted as sufficient proof of a legal conviction without further evidence that the court had jurisdiction of the particular offense of which the respondent was convicted. Such a court is presumed to have jurisdiction to give the judgment it renders until the contrary appears. All intendments of law in such cases are in favor of its acts. But a different rule prevails in regard to inferior courts of special and limited authority. "As to them there is no presumption of law in favor of their jurisdiction; that must affirmatively appear by sufficient evidence or proper averment in the record, or their judgment will be deemed void on their face." *Galvin* v. *Page*, 18 Wall. 364. "The acts of these two classes of courts," says Mr. Freeman, "have been properly likened to the acts of general agents and the acts of special agents. The former are to be regarded as valid in all cases to the extent that all persons relying upon them need show nothing beyond the general grant of authority, while the latter to be bind-

ing, must first be shown to fall within the limits of a special or restricted grant." Freeman on Judgts. § 517. See also §§ 123, 124; Lawson Presump. Ev. p. 27. With respect to "courts of special and limited jurisdiction whatever may be their grade, the facts necessary to jurisdiction must be shown." 2 Wharton's Ev. § 1308. See also an interesting discussion of this subject in 2 Smith's Leading Cases, 1008 (9th Ed.); *State* v. *Hartwell*, 35 Maine, 159; *State* v. *Hall*, 49 Maine, 412; *Treat* v. *Maxwell*, 82 Maine, 79.

The Municipal Court of Waterville is an inferior court of limited statutory jurisdiction. It appears from the act establishing that court (Chap. 220, Spec. Laws of 1880) that the judge has "jurisdiction in all cases of simple larceny where the property alleged to have been stolen shall not exceed in value the sum of twenty dollars, and power to award sentence upon conviction by fine not exceeding twenty dollars, or imprisonment in the county jail, with or without labor, for a term not exceeding ninety days." But in 1891 it was extended to cases where the value of the property shall not exceed fifty dollars. The act declares, it is true, that it "shall be a court of record and have a seal," but it is not thereby elevated to the grade of those superior courts that are entitled to the benefit of the presumption omnia rite acta respecting jurisdiction. It must be admitted that there is no clearly defined test by which to determine in all cases whether a court belongs to the one class or the other, but as stated in Smith's Lead. Cases, supra, "if the court is one possessing common law or equity powers, even though conferred by statute, the court will be one of general and superior jurisdiction, and its judgment will be supported by the presumption attending the judgments of superior courts. . . . . If on the other hand, the court is one of limited or limited statutory jurisdiction, the court will be regarded as an inferior one and the effect of its judgments will be limited in certain respects. . . . . The tendency of modern decisions seems to be toward doing away with the distinctions pointed out; but, for the present, the distinctions seem to be too well grounded in the cases to be successfully attacked."

It appears from the docket entries in the present case that the sentence actually imposed by the judge was within the scope of his power to award sentence for simple larceny when the property alleged to have been stolen shall not exceed in value the sum of fifty dollars. But in the absence of the original complaint, or of any copy of it, there is no prima facie evidence, even, to show that the property alleged to have been stolen was found or alleged not to exceed in value the sum of fifty dollars. The respondent's plea of guilty to a complaint for the larceny of property alleged to be of greater value than fifty dollars, would confer no power upon the court to award sentence as upon conviction, but only to require him to recognize for his appearance at the Superior Court. The respondent's plea would be no waiver of the objection to the jurisdiction of the court over the offense charged. "Neither in this way, nor in any other, can the court be given a jurisdiction which on other principles it would not be competent to exercise." 1 Bishop Cr. Proc. § 123.

In the absence of prima facie evidence that the court had jurisdiction of the offense charged, the docket entries are not sufficient to establish the former conviction alleged in the indictment.

Exceptions sustained.

STATE *vs.* WALLACE SIMPSON.

Kennebec. Opinion December 16, 1897.

Indictment. Pleading. Place. R. S., c. 120, § 5.

It is a familiar principle that courts of law are bound to take judicial cognizance of the territorial divisions of the state into counties and towns, and the relative situation of the towns with respect to counties.

In criminal pleading it is sufficient to state an offense to have been committed in a given town without adding the county in which the same is situated, there being no other town of the same name in the state.

Held; in this case, that the original complaint upon which the former conviction was based in the Municipal Court of Waterville, contains a proper alle-

gation that the alleged crime was committed in Kennebec County, and hence fulfilled all of the requirements of law in regard to the allegation of place; and such complaint is adequate to give that court jurisdiction of the offense therein charged.

See *State* v. *Simpson*, ante, p. 77.

ON EXCEPTIONS BY DEFENDANT.

This was an indictment under R. S., c. 120, § 2, against the defendant for being a common thief. The indictment sets forth a larceny specifically described therein, and alleges a former conviction of the defendant for the crime of larceny in the Municipal Court of Waterville. The object of setting forth this former conviction was to obtain on this indictment a conviction of the defendant for being a common thief, as provided in R. S., c. 120, § 5.

A general verdict of guilty was returned by the jury. The docket entries of the Municipal Court were introduced and when the original complaint from the Municipal Court was offered, the defendant's counsel objected to its introduction as the basis of the proceedings in the Municipal Court, which resulted in the conviction of the defendant there, because that complaint contained no allegation that the defendant committed the alleged crime of larceny in Kennebec county, and hence there was nothing in the complaint to show that the Municipal Court had any jurisdiction of the alleged offense for which it was alleged, in this indictment, that this defendant had been previously convicted.

The original complaint introduced in evidence by the government is of the following tenor:

"STATE OF MAINE.

KENNEBEC SS. To Frank K. Shaw, Clerk of our Municipal Court of Waterville, in the County of Kennebec,

Lynn W. Rollins of Waterville, in the County of Kennebec and State of Maine, on the twenty-sixth day of March A. D. 1895, in behalf of said State, on oath Complains, That on the twenty-fifth day of March A. D. 1895, with force and arms, at Waterville, Wallace Simpson, of Winslow, in the County of Kennebec aforesaid, one carriage robe of the value of five dollars of the goods and

chattels, property and moneys of Lynn W. Rollins then and there in the possession of the said Lynn W. Rollins being found, 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."

To the ruling of the presiding judge, admitting said complaint in evidence, the defendant took exceptions.

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

S. S. and F. E. Brown, for defendant.

The records of these Municipal courts like those of trial justices must show affirmatively that the magistrate has jurisdiction in all cases wherein they undertake to act. Nothing is to be presumed. It must appear that the crime charged was committed in the county where the magistrate undertakes to act. Bishop Crim. Law, § 360. Unless the record shows jurisdiction, there is no presumption that the magistrate had jurisdiction. *Green* v. *Haskell*, 24 Maine, 180; *State* v. *Jackson*, 39 Maine, 291. When the complaint was offered by the County Attorney as the basis of the alleged former conviction, we objected to it. It did not show any jurisdiction in the Municipal court to entertain a consideration of the offense and hence, we say, it could not be properly admitted to support the allegation of a prior legal conviction of the crime of larceny. As a complaint before a Kennebec county magistrate it was simply void. It forms no part of a record of a legal conviction.

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

WHITEHOUSE, J. In this case, as in *State* v. *Simpson*, ante, p. 77, the indictment was for larceny with an allegation of a prior conviction in the Municipal Court of Waterville, and an averment of the legal conclusion, resting upon Sect. 5, Chap. 120, R. S., that the respondent was a common thief.

But in this case, to substantiate the averment of a prior conviction, the government introduced the docket entries from the records of the Municipal Court of Waterville, showing a prior con-

viction of the respondent for larceny, and also the original complaint upon which such conviction was based.

The defendant's counsel contended that this complaint contained no allegation that the larceny charged was committed in the County of Kennebec and hence afforded no evidence that the Municipal Court of Waterville had jurisdiction of the offense. The presiding judge ruled otherwise and a verdict of guilty being returned the defendant took exceptions.

The complaint is somewhat inartificial in its structure, but it may properly be held to fulfill all the requirements of the law in regard to the allegation of place.

It appears from an inspection of the original complaint, as well as of the copy before the court, that the pleader was careful to place a comma after the word Winslow in the phrase "Wallace Simpson of Winslow," and also after the word Waterville in the phrase "at Waterville," indicating an intention on his part to make the clause "in the County of Kennebec aforesaid" qualify the antecedent phrase "at Waterville" as well as that "of Winslow"; and if the two phrases had been transposed so as to read "Wallace Simpson of Winslow, at Waterville, in the County of Kennebec aforesaid," such an analysis would have been clearly in harmony with the rules of syntax, and all doubt and uncertainty in regard to the meaning would have been removed.

But it is unnecessary to rely upon this grammatical construction of the language of the complaint. "In most of our states," says Mr. Bishop, "the names of the minor localities, such as townships, cities and the like, and the counties in which they are located, are parts of the public law; and, where they are, the allegation of the place, omitting the name of the county, carries with it that of the county." 1 Bish. Crim. Proc. § 378. And such is the law in this state. In *Martin* v. *Martin*, 51 Maine, 366, the court say: "Courts of law are bound to recognize the territorial divisions of the state into counties and towns. In criminal cases it is sufficient to state an offense to have been committed in the town of S. without adding the county in which the same is situate, to give the court jurisdiction; the courts take judicial cognizance of the towns

created by law. *Vanderwerker* v. *The People*, 5 Wend. 530; *Goodwin* v. *Appleton*, 22 Maine, 453; *Ham* v. *Ham*, 39 Maine, 263; *State* v. *Jackson*, Id. 291." See also *State* v. *Powers*, 25 Conn. 48. "It is customary," says Mr. Bishop "to write the name of the state in the margin, in connection with the name of the county. But the name of the state need not appear either in the margin or in any other part of the indictment." 1 Bish. Cr. Pr. § 383. See also *Com.* v. *Quin*, 5 Gray, 478; *State* v. *Wentworth*, 37 N. H. 196.

In the case at bar, however, the words "State of Maine," appear in the caption of the complaint, and "Kennebec ss" on the left hand margin. The court could take judicial notice that the city of Waterville is situated in the county of Kennebec, there being but one town of that name in the state of Maine.

It is the opinion of the court that the complaint should be deemed adequate to give that court jurisdiction of the offense therein charged.

Exceptions overruled.

JOHN G. DUNNING *vs.* MAINE CENTRAL RAILROAD COMPANY.

Penobscot. Opinion December 20, 1897.

Railroad. Fire set by Engine. Negligence. Evidence. R. S., c. 51, § 64.

In the trial of an action for damages by fire, alleged to have been communicated by a locomotive engine, when the question at issue is whether as a matter of fact the fire was caused by any locomotive, evidence that other fires were caused by the defendant's locomotives, at about the same time and in the same vicinity, is relevant and admissible for the purpose of showing the capacity of locomotive engines to set fires by the emission of sparks or the escape of coals.

That other engines of the same company, under the same general management, passing over the same track at the same grade, at about the same time and surrounded by the same physical conditions, have scattered sparks or dropped coals so as to cause fires, appeals legitimately to the mind as showing that it was possible for the engine in question to do likewise. Such testimony is illustrative of the character of the locomotive, as such, with respect to the emission of sparks or the dropping of coals.

And this rule is applicable although, before the testimony was admitted, defendant's counsel claimed that the plaintiff had already identified the engine as one drawing a certain train, which was true; and gave notice that the engine drawing that train would be fully identified by the defendant, and although the defendant subsequently identified the engine by number.

This rule is also applicable although, before the evidence was admitted, defendant's counsel expressly admitted the possibility of an engine setting fires.

It does not lie in the power of one party to prevent the introduction of relevant evidence of the other party by admitting in general terms the fact which such evidence tends to prove, if the presiding justice in his discretion deems it proper to receive it. Parties as a general rule are entitled to prove essential facts and present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight. *Held;* that exceptions do not lie to the admission of relevant evidence under such circumstances.

The testimony of a witness that he saw fire in a pile of sleepers beside the railroad track, soon after a locomotive had passed, is admissible and should not be afterwards stricken out upon motion, although upon cross-examination he testified that he didn't know how the fire caught or how long it had been burning, though "it couldn't have been there a great while." The weight of the evidence is for the jury.

So in regard to the testimony of a witness who testified that he saw a fire soon after an engine had passed, though his statement upon cross-examination respecting the time he saw the fire was inconsistent with his testimony first given.

So in regard to the testimony of a witness who testified that he saw certain fires two or three days after the fire in question, although a witness for the defendant recollected these fires as having occurred between two and three months later. *Held;* that whatever the facts may have been, these are questions which cannot be settled upon exceptions. It is for the jury to consider, in view of all the testimony, whether the witnesses are credible and reliable. The court cannot exclude the testimony of a witness because it is inconsistent or inaccurate.

Thatcher v. *Maine Cent. R. R. Co.*, 85 Maine, 502, affirmed.

On Motion and Exceptions by Defendant.

This was an action on the case to recover for the loss of the ice houses, and other property therein, formerly belonging to the Katahdin Ice Company, and situate in Bangor between the track of the defendant company and the Penobscot river at High Head. The case was tried to a jury in the court below, sitting in Penobscot county; and it was agreed that the case should be submitted to the jury upon the single question of the defendant's liability,

with the understanding that if there was a verdict for the plaintiff, it was to be heard by Mr. Justice WISWELL in damages.

The first count in the declaration is as follows:

In a plea of the case, for that the said plaintiff at Bangor aforesaid on the 27th day of May, 1896, owned and was possessed of certain property, to-wit, the ice-houses formerly belonging to Katahdin Ice Company, and lying and being in Bangor aforesaid, between the track of said Maine Central Railroad Company and the Penobscot River at "High Head," so-called, and the boiler-house connected therewith, all being of the value of twenty thousand dollars, and also of certain machinery, tools and appliances consisting of engine, boiler, elevator, shafting, belts, runs, rigging, and ice-tools, all being of the value of three thousand dollars, and also of a large quantity of ice stored in said houses, to-wit, twenty thousand tons of ice of great value, to-wit, of the value of twelve thousand dollars, all of which said buildings and property were then and there of the total value of thirty-five thousand dollars, and were then and there lawfully placed and stored on land of said plaintiff and adjoining the railroad of said Maine Central Railroad Company, and were then and there, and for a long time before had been, situated and deposited there, and were such property as said Maine Central Railroad Company had an insurable interest in and could have procured insurance thereon, and then and there said Maine Central Railroad Company, so chartered by the laws of said State did own and operate a railroad adjoining said premises and property of said plaintiff, and did then and there run and use by its servants and agents a locomotive engine and cars attached thereto, and on said day at said Bangor while said locomotive engine was being run and used and operated on said railroad by said corporation, said property of said plaintiff was injured and destroyed by fire communicated by said locomotive engine so being run and used by said corporation.

And said plaintiff avers that his said property above named and so situated as above was totally destroyed at said time and place by said fire, and that the sole cause of said fire and such injury and

destruction of his property was the fire communicated by the locomotive engine, so being used and run by said corporation.

The jury returned a verdict in favor of the plaintiff and the defendant filed a general motion for a new trial and also took exceptions.

From the defendant's bill of exceptions it appears that the plaintiff's counsel in his opening of the case had claimed that the fire which caused the damage, which is sued for in this case, had been communicated by the locomotive of the defendant company which drew what was known as the Dexter & Dover train that left Bangor on the afternoon of May 27th, 1896, at 4.30 P. M.

Frank William Robinson, whose deposition was introduced by the plaintiff, testified that on the afternoon of May 27th he left his house, which was near the ice house that was destroyed, about 5 P. M. local time or 4.30 standard time in the afternoon of that day, and going up the track towards the station in Bangor he met a locomotive drawing the Dover & Dexter train, and that at about the time he got up to the city he heard the alarm of fire caused by the fire in question.

William H. Quine, a witness for the plaintiff, had testified that he saw an engine drawing the Dexter & Dover train go by ten or fifteen minutes before this fire in the ice house was discovered.

Margaret S. McCormick, a witness for the plaintiff, had testified that she saw the Dexter & Dover train go by between half past four and twenty-five minutes of five, and that the fire in the ice house was discovered at five minutes after five.

Philip P. McCormick had testified that it was fifteen or twenty minutes, more or less, after the Dexter train went out that the fire in the ice house was first discovered.

It was claimed throughout the case by the plaintiff that this fire was caused by the particular locomotive which drew the Dexter & Dover train leaving Bangor on that particular day at 4.30 o'clock in the afternoon.

Plaintiff's counsel offered testimony tending to show that at various times shortly before and after the fire in the ice house, constituting the cause of action in this case, other fires were seen

on, or in the immediate vicinity of, the track, and that other engines of the defendant corporation by emitting sparks, cinders or coals, spread fire.

This testimony was not at first admitted, but after the introduction of the testimony hereinbefore stated as to the identity of the engine, which it was claimed on the part of the plaintiff set this particular fire, the presiding justice, against the objection and subject to the exception of the counsel for the defendant, ruled for the purposes of this trial, that for the purpose of showing the capacity of locomotives used by the defendant company to cause fires, and for the purpose of showing the possibility that this fire was caused as claimed by the plaintiff, he would admit testimony tending to show that, at various times about the time that this fire was caused and in that vicinity, engines of the defendant corporation by emitting sparks, cinders or coals spread fire; and that fires were seen on, or in the immediate vicinity of, the track immediately after, shortly after the passage of locomotives of defendant company.

Defendant's counsel thereupon gave notice that the engine drawing this train would be fully identified and that it appeared already that the plaintiff had identified that engine as drawing that particular train, and that he in behalf of the defendant admitted the possibility of engines setting fires; but the presiding justice admitted the testimony, saying further that he thought the evidence should be of such a character as to show that these fires were caused by locomotives of the defendant company, not merely that there were other fires at other times in the immediate vicinity of the track, but that sparks were emitted, or that coals were emitted, or shortly after the passage of other locomotives, other fires were seen upon the track or along the track.

To this ruling and the admission of such testimony defendant took exceptions.

John Lee, a witness called by the plaintiff, was asked the following question: "Have you at or about the time of this fire on the 27th day of May last, seen any fires about in the vicinity of the ice houses and contiguous to the track immediately or soon

after the passage of any locomotives of the Maine Central Railroad?"

This question objected to by counsel for the defendant, was admitted subject to his objection and exception; whereupon the witness answered:—

"Yes, sir, I have seen fires," and went on to state that he saw one that very afternoon that the fire in the ice house took place, and that it was in a pile of sleepers at the southerly end of High Head cut.

This same witness upon cross-examination testified that he did not know how this fire in the sleepers caught; he did not know how long it had been burning when he saw it, and that he did not know anything about it except that he saw it. He subsequently said that it could not have been there a great while when he saw it, as he judged from the headway it had. This witness further testified that he left the stable on that day at one o'clock local time or half-past twelve standard; that it took him about fifteen minutes to go from the stable to the ice houses; that immediately upon his arrival they went to work loading up the teams; that they loaded up four teams that afternoon and that it ordinarily took to load all the teams some two hours more or less. He said that he saw this fire in the sleepers after they commenced to load, and that he could not say whether it was while they were loading the second team or the first team when he saw it, or the third or the fourth team.

It was admitted that a train left the Maine Central station at 1.40 standard in the afternoon of that day. At the close of this witness's testimony and after said cross-examination, counsel for the defendant asked that this testimony relating to this fire in the sleepers be stricken out, whereupon the court ruled that it might stand subject to objection.

To the admission of the aforesaid testimony and the allowing it to stand defendant excepted.

Thomas E. Smullen, a witness called by the plaintiff, was asked: "Did you ever notice cinders along the track," and answered, "Yes, sir," and was further asked, "Now, within a few days or

weeks of the fire at the ice house, have you seen other fires in the vicinity of the ice house near the railroad track and shortly after the passage of the locomotive within a short time before," to which he answered, "Yes, sir," and the defendant's counsel objecting, the court said "all of this is subject to the general objection."

To the admission of this testimony defendant excepted.

Charles M. Stewart, a witness called by the plaintiff, subject to the same general objection on the part of the defendant, was allowed to testify in relation to other fires, and testified particularly as to a lot of fires, thirteen different fires, he said, found on the sleepers of that section of the railroad in one day.

To the admission of this testimony defendant excepted.

Defendant subsequently identified this particular engine drawing the Dexter & Dover train as engine No. 95, and showed that the engines in use on this particular railroad were built by different builders, of different sizes and different classes of construction, and further showed particularly in relation to the great number of fires on one day in the sleepers testified to by Charles M. Stewart, that they were caused by another locomotive, No. 162, which had defective grate bars allowing the dropping of coals on to the sleepers, the engine being a new one and not having been fully fitted for its work. Defendant further showed that the cinders which are taken from the locomotives as they accumulate are loaded on cars and distributed along the shoulders of the roadbed in this vicinity.

After all this testimony on the part of the defendant had been introduced, and at the close of the testimony in the case, defendant's counsel renewed his motion to strike out this evidence regarding other fires which had been objected to, but the court overruled the motion; to which overruling of the motion and allowing the testimony to stand the defendant excepted.

A full report of the evidence in the case and a full copy of the charge of the presiding justice to the jury as bearing upon the points of the exceptions were made a part of the bill of exceptions.

Among other instructions given by the presiding justice to the jury are the following:—

"Now, there has been certain other testimony introduced in this case, to some extent guarded evidence has been offered, as you very well remember, tending to show that other locomotives, or locomotives generally of this road, at about the time of the fire and in that vicinity, did scatter fire by the emission of sparks, or the escape of coals, or in some way that fire has escaped from other engines and set fire to other inflammable material along the line of the track. That was offered, gentlemen, and admitted for but one single purpose; . . . . it was admitted for the purpose of showing the capacity of locomotive engines to set fire by the emission of sparks or the escape of coals, to show the possibility that such things might happen from the engines that were in general use by this company, this defendant company, at this point; and it is not competent for any other purpose, and will not, I am sure, and cannot have any other bearing in your minds."

Charles P. Stetson and John R. Mason, for plaintiff.

Charles F. Woodard, for defendant.

The possibility of a locomotive causing fire was expressly admitted, and when admitted, evidence to prove what was expressly admitted could only have been desired for the purpose of exciting prejudice against the defendant and should have been excluded. *Smith* v. *Old Colony R. R. Co.*, 10 R. I. 22, 27, 28; *Ross* v. *The Boston & Worcester R. R. Co.*, 6 Allen, 87; *Gibbon* v. *Wisconsin Valley R. R. Co.*, 58 Wis. 335, (13 Amer. & Eng. R. R. Cases, 469).

When the particular engine is known and designated it is not competent to show generally that the defendant's engines have caused fires at other times and places. *Ireland* v. *Cincinnati, etc., R. Co.*, 79 Mich. 163, 165; *St. Louis, etc., R. R. Co.* v. *Jones*, 59 Ark. 105, (26 S. W. Rep. 595).

Where the injury complained of is shown to have been caused, or, in the nature of the case, could only have been caused, by sparks from a locomotive which is known and identified, the evidence should be confined to the condition of that engine, its management, and its practical operation. Evidence tending to prove

defects in other engines of the company is irrelevant, and should be excluded. *Henderson, Hull & Co.* v. *Phila. & Reading R. R. Co.*, 144 Penn. St. 461, (22 Atl. Rep. 851).

"The evidence as to what were the condition and repair of engines, other than those in use upon the defendant's road on the night of the fire, and from which, if from any, the fire must necessarily have been communicated to the plaintiff's buildings, was incompetent and inadmissible. That sparks or even coals might have been emitted at other times from other engines employed upon the road, had no legal tendency to prove that the engines employed upon this particular occasion emitted either sparks or coals. To have rendered the evidence competent, it should have been confined to the same engines, operated in the same manner and in the same state of repair, or to other engines conceded to have been of the same construction, to have been used in the same manner and in the same state of repair. . . . . It might be suggested, that, under the instructions of the court, the testimony objected to, though incompetent, was also immaterial, and therefore its improper admission furnishes no ground for setting aside the verdict; but we think it was well calculated to prejudice the minds of the jury against the defendant." *Boyce* v. *Cheshire R. R. Co.*, 42 N. H. 97, 100.

Counsel also cited:—*Hubbard* v. *Androscoggin & Kennebec Ry. Co.*, 39 Maine, 506; *Parker* v. *Portland Pub. Co.*, 69 Maine, 173.

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

SAVAGE, J. Action on the case to recover for the loss of property by fire alleged to have been communicated by a locomotive engine of the defendant corporation. The case comes up on a motion for a new trial, and on exceptions. The entire evidence and the charge of the presiding justice are made a part of the bill of exceptions. The plaintiff's claim is based solely upon the statute, R. S., c. 51, § 64, which provides that "when a building or other property is injured by fire communicated by a locomotive

engine, the corporation using it is responsible for such injury." No question of negligence on the part of the defendant is involved. The principal, if not the only, issue of fact submitted to the jury was whether the fire which occasioned the loss of the plaintiff's ice house was, in fact, communicated by one of the defendant's locomotives. The plaintiff relies upon circumstantial evidence. The defendant claims that the circumstances proved are not sufficient to raise a legitimate inference that the fire was communicated by one of its engines.

The evidence introduced by the plaintiff shows, we think, that on May 27, 1896, the Dover and Dexter train drawn by one of the defendant's engines passed the plaintiff's ice house at 4.35 o'clock P. M.; that about fifteen or twenty minutes later fire was discovered burning on the roof of the ice house which inclined towards the railroad, at a point about fifty-five feet from the railroad track, and somewhat higher than the level of the track, but lower than the top of the smoke stack of the engine; that when first discovered, the fire had burned over a space about two feet square; that when an attempt was made immediately afterwards to beat it out with a stick, it was scattered to other parts of the roof; that there was no appearance of fire within the building until after the fire burned through the roof; that on that day no ice had been taken from the building, the ice house engine had not been run, and no fire had been made or used within the building; that two or three workmen had been employed about the building during the day, one of whom was the watchman; that he finished work and left the building five or ten minutes before the passing of the Dover and Dexter train; that when he left, there was no appearance of fire in or about the building; that no person had been seen upon or about the roof that day; that the season was very dry, the roof was dry and the shingles old; that a strong wind was blowing towards the ice house from the railroad; that in the vicinity of the ice house, the railroad track, in the direction the Dover and Dexter train was going, had an up grade of forty-one feet to the mile; that locomotive cinders were seen about the track at about the time of the fire, and that sparks were seen coming

from a locomotive, but whether it was from the locomotive in question does not appear. There is no evidence that the fire was communicated by any of the defendant's engines, unless it was by the one drawing the Dover and Dexter train.

Against the objection of the defendant, the plaintiff was permitted to introduce evidence to show that at various times about the time that this fire was caused and in that vicinity, engines of the defendant corporation, by emitting sparks, cinders or coals, spread fires, and that fires were seen on, or in the immediate vicinity of the track, shortly after the passage of defendant's engines, of such a character as to show that they were caused by such engines; and the admissibility of testimony of this class is the principal question raised by the defendant's exceptions. Before the testimony was admitted, the defendant's counsel claimed that the plaintiff had already identified the engine as the one drawing the Dover and Dexter train, and gave notice that the engine drawing that train would be fully identified by the defendant, and the defendant did subsequently introduce evidence that the engine which drew that train was No. 95. Also, before the testimony concerning other fires was admitted, the defendant's counsel expressly admitted the possibility of engines setting fires; and he now claims that because of this admission, the testimony, even if otherwise relevant and admissible to show such a possibility, should have been excluded. We do not think so.

It does not lie in the power of one party to prevent the introduction of relevant evidence by admitting in general terms the fact which such evidence tends to prove, if the presiding justice in his discretion deems it proper to receive it. Parties as a general rule are entitled to prove the essential facts, to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight. No exception lies to the admission of relevant evidence under such circumstances.

To return to the principal question. In the case of *Thatcher* v. *Railroad Company*, 85 Maine, 502, a case similar to the one now under consideration, this court said, respecting evidence tending to

show other fires communicated by the locomotives used on the defendant's railroad at different times about the same time that the plaintiff's lumber was destroyed by fire and in the same vicinity: "We think its competency, where the issue is whether the fire was communicated from a locomotive, is clearly established by courts of the highest authority. It tends to show the capacity of the inanimate thing to set fires along the road, and when a fire is discovered soon after a locomotive has passed and there is no evidence tending to show that it might have been caused in some other way, it authorizes the inference that it was caused by the locomotive." The learned counsel for the defendant claims that the rule, so stated, is subject to modification, and that it is applicable only when the engine alleged to have caused the loss is not identified. He claims also, that the case of *Thatcher* v. *Railroad Company* itself recognizes such a modified rule. But that case merely recognizes that "there are several authorities declaring that to be the rule," and further says, that as "neither the plaintiff nor any of his witnesses were able to identify the locomotive by name or number," the evidence, when admitted, was "clearly within the modified rule." So that even if the modified rule was the correct one, the defendant in that case had no good ground of complaint. This was not a recognition of the modified rule, as the law in this state.

The defendant's counsel further contends that as the admissibility of the evidence in the Thatcher case was finally sustained on the ground that at the time it was offered the particular engine had not been identified, so that in any event, the case was brought within the modified rule claimed by the defendant, therefore the broader rule stated by the court,—and which we have quoted,—should be regarded as obiter dictum; and we are asked to reconsider the whole question.

It may well be doubted whether the evidence in this case on the part of the plaintiff, as to the identity of the engine, is sufficient to bring the case within the modified rule contended for. It is true, that during the trial, the defendant gave notice that it would fully identify the engine, but proof of identity from the defendant at that time would be of little service to the plaintiff to enable him

to investigate the character, or the previous history, as to fires, of that particular engine, if he was to be limited by the modified rule; and neither the notice that proof would be made, nor the fact that it was made subsequently by the defendant, can affect the question we are discussing. The engine was not identified, on the part of the plaintiff, by name or number, but only as the engine which drew the Dover and Dexter train that day. There was no mark upon it, known to the plaintiff, by which he could identify it elsewhere. He identified the train. Was he bound to know that the same engine hauled the Dover and Dexter train each day? The defendant says this engine was No. 95. True. No. 95 is the same identical engine day after day, but the engine drawing the Dover and Dexter train may be identical day after day, and it may not be. It would be manifestly difficult, if not impossible, for an injured party who could identify an engine only by the train it drew on a particular occasion, to obtain any information which, within the modified rule, would be of any service to him, except such as the servants of the railroad company were willing to communicate. And the authorities seem to be to the same effect. *Thatcher* v. *Railroad Company* is in point. In *Grand Trunk Railway* v. *Richardson*, 91 U. S. 454, the trains were identified, but the court declared that the locomotives were not. So in *Diamond* v. *No. Pac. Ry. Co.*, 6 Montana, 580, (29 Am. & Eng. Railroad Cases, 117); *Piggott* v. *Eastern Counties Railway*, 3 M. G. & S. 228; *Koontz* v. *Oregon Ry., etc., Co.*, 20 Oregon, 3, (43 Am. & Eng. Railroad Cases, 11.) In many cases where the modified rule has been applied, the engines have been identified on the part of the plaintiff by name or number. *Inman* v. *Elb. Air L. R. R. Co.*, 90 Ga. 663, (35 Am. St. Rep. 232); *Ireland* v. *Cin., etc., R. R. Co.*, 79 Mich. 163; *Phila., etc., R. R. Co.* v. *Schultz*, 93 Pa. St. 341; *Erie Railway Co.* v. *Decker*, 78 Pa. St. 293. In *Henderson* v. *Phila., etc., R. R. Co.*, 144 Pa. St. 461, (27 Am. St. Rep. 652) cited by defendant's counsel, four trains had passed within an hour, the engine of one of which was identified by the plaintiff by number, the others not. It was unknown which engine, if any, caused the fire. The court gave the modified rule as applicable in case of

unidentified engine, and the broader rule, as stated by LIBBEY, J., in *Thatcher* v. *Railroad Company*, as applicable in other cases, saying "Where the offending engine is not clearly or satisfactorily identified, it is competent for the plaintiff to prove that the defendant's locomotives generally, or many of them, at or about the time of the occurrence, threw sparks of unusual size, and kindled numerous fires upon that part of their road, to sustain or strengthen the inference that the fire originated from the cause alleged."

But without regard to the question of identity, upon a careful reexamination of the decided cases, we are satisfied that the rule stated in *Thatcher* v. *Railroad Company* is supported by reason, and by the great weight of authority. We think that when the question at issue is whether, as a matter of fact, the fire was caused by any locomotive, other fires caused by defendant's locomotives, at about the same time and in the same vicinity, may be given in evidence for the purpose of showing the capacity of locomotive engines to set fires by the emission of sparks or the escape of coals. It is admissible as "tending to prove the possibility, and a consequent probability, that some locomotive caused the fire," language from *Grand Trunk Railway* v. *Richardson*, 91 U. S. 464, which has often been cited with approval. To show a possibility is the first logical step. That other engines of the same company, under the same general management, passing over the same track at the same grade, at about the same time, and surrounded by the same physical conditions, have scattered sparks or dropped coals so as to cause fires, appeals legitimately to the mind as showing that it was possible for the engine in question to do likewise. The testimony is illustrative of the character of a locomotive as such, with respect to the emission of sparks or the dropping of coals. If the possibility be proved, other facts and circumstances may lead to a probability, and then to satisfactory proof. A simple enumeration of some of the authorities which sustain these views may be useful. *Sheldon* v. *Hudson River R. R. Co.*, 14 N. Y. 218; *Field* v. *N. Y. Cent. R. R. Co.*, 32 N. Y. 339; *Diamond* v. *No. Pac. Ry. Co.*, 6 Mont. 580, (13 Pac. Rep. 367); (29 Am. & Eng. Railroad Cases, 117); *Piggott* v. *Ea. Counties Ry. Co.*, 3 M. G. & S. 229; *Koontz*

v. *Ore. Ry., etc., Co.*, 20 Oregon, 3, (43 Am. & Eng. R. R. Cases, 11); *Chicago, etc., Ry. Co.* v. *Gilbert*, 52 Fed. Rep. 711; *Campbell* v. *Mo. Pac. Ry. Co.*, 121 Mo. 340, (42 Am. St. Rep. 530); *Smith* v. *Old Colony, etc., R. R. Co.*, 10 R. I. 22; *Annapolis, etc., R. R. Co.* v. *Gantt*, 39 Md. 124; 1 Thompson on Negligence, 163.

The defendant has reserved exceptions to the admissson of certain testimony as to other fires, which it claims does not fall even within the rule we have declared. In one instance a witness testified to seeing fire in a pile of sleepers beside the railroad track soon after a locomotive had passed. This was admissible, and if on cross-examination the witness testified that he didn't know how the fire caught, or how long it had been burning, though "it couldn't have been there a great while," this does not render his testimony any the less admissible. The weight of it was for the jury.

It is claimed, in regard to one witness who testified to seeing a fire soon after an engine passed, that his statements on cross-examination respecting the time he saw the fire were inconsistent with his first testimony; and in regard to another witness who testified to seeing certain fires two or three days after the day of the ice-house fire, that a witness for the defendant recollected these last fires as having occurred between two and three months later, and hence too remote in time to be fairly within the rule.

Whatever the facts may have been, these are questions which cannot be settled upon exceptions. The testimony in chief as given by the witnesses was admissible. It was for the jury to consider, in view of all the testimony, whether the witnesses were credible and reliable. The court cannot exclude the testimony of a witness because it is inconsistent or inaccurate.

In considering the motion for a new trial, we do not think it profitable to extend this opinion by an analysis of the evidence. Many of the salient points have been stated already. The defendant introduced much testimony respecting engine No. 95, and upon other matters, to show the improbability that the fire was caused by its engine. The evidence was wholly circumstantial. Giving to the circumstances their due weight, we cannot say that the jury

were not authorized to conclude that the fire was communicated by the defendant's locomotive.

Motion and exceptions overruled.
Cause remanded for hearing in damages, as stipulated by the parties.

MILTON G. SHAW, and others, Appellants,

vs.

COUNTY COMMISSIONERS.

Piscataquis. Opinion December 27, 1897.

Way. Committee. R. S., c. 18, § 44.

Upon an appeal from the decision of county commissioners in locating a highway, the appellate court may appoint a member of the committee in the place of a member thereof who dies or declines to act, if seasonably done.

ON EXCEPTIONS BY APPELLEES.

The case is stated in the opinion.

H. Hudson and A. M. Robinson, for appellants.

W. E. Parsons, for appellees.

SITTING: PETERS, C. J., HASKELL, WHITEHOUSE, WISWELL, JJ. SAVAGE, J., did not sit.

HASKELL, J. Motion to dismiss an appeal from the decision of county commissioners on petition to locate a highway in an unincorporated township, because the committee was appointed too late.

The appeal was seasonably entered at the February term, 1896, when a committee was appointed. One of the committee died the following vacation, and another was appointed in his place at the next term. During the ensuing vacation that appointee declined the appointment, and another was appointed in his place at the next term, February term, 1897, when a motion to dismiss was filed and overruled and exceptions taken. A warrant to the

new committee was issued during the following vacation, and this case was entered in the law court upon the exceptions in the following July, before the committee could have acted and returned their report to court. The case was still pending and in progress, for that committee must act and report at the second succeeding term or not at all, and it would be awkward to have the authority of such committee adjudged void by the law court while they necessarily must act under the apparent authority given them by their warrant. This case is, therefore, prematurely brought up. It should have rested below until the coming in of the report of the committee, when all questions could be considered and a final judgment entered which could be reviewed once for all by the law court that cannot well consider a case piecemeal. *Phillips* v. *Co. Com.*, 83 Maine, 541; *Millett* v. *Co. Com.*, 81 Maine, 257.

Inasmuch as the authority of the committee is ample and their appointment regular, we are pleased to decide the question; although if our decision were to be otherwise we could not justly do so and leave a committee required to act and incur expense with their authority revoked and no case existing where their fees and expenses could be considered.

Revised Statutes, c. 18, § 44, gives an appeal to the next Supreme Judicial Court and provides:—"If the appeal is then entered, not afterwards, the court may appoint a committee of three disinterested persons, who shall be sworn, and if one of them dies, declines or becomes interested, the court shall appoint another in his place; . . . . they shall view the route, hear the parties, and make their report at the next or second term of the court after their appointment."

Statutes are intended to be operative, and not inoperative. This statute intended a committee that could act, and limited the time of their report to the second term after their appointment. That appointment was finally and legally made at the February term, 1897. It could not have been made at an earlier day. There was no unnecessary delay, no inaction that the parties could have avoided. The appointment was within the express terms of the statute.

Exceptions overruled.

JOSEPH LEWENBERG *vs.* JOHN H. HAYES.

Penobscot. Opinion December 27, 1897.

Waiver. Estoppel. Sales.

The vendor of goods, sold for cash to a tradesman to be put on sale, is estopped from claiming them in the hands of an innocent purchaser, because the cash price has not been paid.

Equitable estoppel may be asserted as a defense in actions at law.

ON EXCEPTIONS BY PLAINTIFF.

This was an action of replevin of merchandise, in which the plaintiff claimed that he had never parted with his title. The defendant claimed to have purchased the merchandise in good faith, for a valuable consideration, of one Fred A. Dubay, who at the time had the goods in his possession.

The case was heard by the presiding justice without a jury, with leave to except. There was no conflict of testimony, and the court ruled pro forma, as matter of law, that upon the evidence the defendant was entitled to judgment.

The court also ruled pro forma that if the plaintiff had parted with the title to the merchandise to the said Dubay, then he could not, in this action of replevin, be heard to question the bona fides of the sale by said Dubay to the defendant.

The plaintiff thereupon took exceptions to these rulings.

J. F. Gould, for plaintiff.

When goods are delivered with the expectation of immediate payment, and this has not been done, the vendors have the right to retake possession of the goods. *Merrill Furniture Co.* v. *Hill*, 87 Maine, 22; *Hotchkiss* v. *Hunt*, 49 Maine, 213; *Ballantyne* v. *Appleton*, 82 Maine, 573; *Peabody* v. *Maguire*, 79 Maine, 572, and cases cited.

F. H. Appleton and H. R. Chaplin, for defendant.

1st. That when a sale is made in which the condition is that the whole or part of the price must be paid on or before delivery,

if the goods are delivered without payment, it is presumed that the condition precedent was waived, and the title passes absolutely to the vendee on the delivery of the goods. Tiedeman, Sales, § 217; *Peabody* v. *Maguire*, 79 Maine, 572, and cases there cited.

2nd. To rebut the presumption that title does pass, plaintiff must by some act or in some legal way prove his intention not to have title pass. He must disclose his intention not to waive.

An undisclosed intent not to waive the condition is not sufficient. *Upton* v. *Sturbridge Cotton Mills*, 111 Mass. 446.

The plaintiff does not prove one act on his part or any of his servants or agents till the time this replevin suit was brought, viz: October 10, a month and six days after the bulk of the goods were delivered.

We should distinguish between a sale upon condition and a delivery upon condition.

The facts here show a sale upon condition, viz: that one-half should be paid down in cash. The plaintiff was under no obligation to deliver the goods till one-half was paid in cash, and he had abundant means at hand to compel such payment. He could have shipped the goods C. O. D. He could have consigned the goods to himself and retained title and in many other ways have retained possession till he was paid, or he might have notified Dubay that notwithstanding the delivery of possession, the plaintiff retained the title. This he did not do and did not protect himself as he might have done. He made a delivery and no condition whatever was attached to that delivery, and the law will presume that prepayment of the one-half cash was waived until the contrary is proved by competent testimony. Tiedeman, Sales, § 217; *Peabody* v. *Maguire*, 79 Maine, 572.

This is not a question between vendor and vendee, but between the vendor and an innocent purchaser from the vendee. *Smith* v. *Dennie*, 6 Mass. 262. In that case the court held that eight days was too long a time for the vendor to wait before he enforced the condition even against an attaching creditor.

The defendant is an innocent purchaser and this plaintiff by his own neglect to protect his rights put it into the power of Dubay to

impose upon defendant. Where one of two parties must suffer, the loss should fall upon the one who has been negligent of his own rights to the detriment of the other.

Waiver: *Farlow* v. *Ellis*, 15 Gray, 229.

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

HASKELL, J. Plaintiff sold one Dubay certain merchandise, half cash, half in thirty days, and delivered the goods without exacting the cash. The goods were shipped from Boston, September 4th, and were received in usual time by Dubay and by him sold to defendant October 1st, and they were replevied during the month of October.

The delivery without exacting the cash payment was evidence that the same had been waived, and if it had, the title passed to Dubay and his vendees. He had ordered goods August 27th, and September 16th, both before and after the bill in question, and they were shipped upon the same terms. From the whole transaction a jury might infer that plaintiff did not intend to insist upon the cash payment. He knew Dubay was a tradesman and would immediately put the purchased goods on sale. Perhaps a waiver may fairly be inferred, but waiver is a matter of fact when it is to be inferred from evidence, for the court says so in *Robinson* v. *Insurance Co.*, 90 Maine, 389. This case was tried by the sitting justice below, who ruled as a matter of law, there being no conflict of testimony, that defendant was entitled to judgment.

Now this ruling was incorrect, unless the defense can be sustained upon some other ground than waiver, and we think it can. The plaintiff is a merchant in Boston. His vendee a tradesman in Maine. The goods were sold with the knowledge that they were to be put on sale, and the plaintiff allowed the tradesman to expose the goods for sale as if he owned them, and the defendant, an innocent purchaser, bought them relying upon the apparent authority of the tradesman to sell them. Here the plaintiff, by his own inaction, allowed the defendant to assume that the trades-

man had the title to them and might lawfully dispose of them. The defendant had a right to rely upon such apparent authority, and may invoke an estoppel against the plaintiff's claim that he had not waived the cash price, and had not parted with title to the goods. The plaintiff allowed the defendant to be deceived, and he cannot now be permitted to take advantage of his own fault. Merely intrusting goods to another, without knowledge that they were to be put on sale, would not raise an estoppel; *Staples* v. *Bradbury*, 8 Maine, 181; but knowledge that they are to be put on sale and acquiescence in allowing them to be so exposed is equivalent to authority to sell them and well may raise an equitable estoppel, that is matter of law, and a defense now favored both at law and in equity. *Caswell* v. *Fuller*, 77 Maine, 105; *Milliken* v. *Dockray*, 80 Maine, 82, and cases cited; *Tracy* v. *Roberts*, 88 Maine, 310.

Exceptions overruled.

STATE *vs.* GEORGE H. T. STEVENSON.

Aroostook. Opinion December 27, 1897.

Indictment. Pleading. Embezzlement. Stat. 1893, c. 241. Mass. Pub. Stat. c. 203, §§ 37, 44.

An indictment for embezzlement under the Statute of 1893, c. 241, must allege the receipt of the property embezzled to have been on some trust and confidence.

ON EXCEPTIONS BY DEFENDANT.

This was an indictment for embezzlement. After trial and conviction of the defendant, he moved in arrest of judgment because of the insufficiency of the indictment. The presiding justice having overruled the motion, the defendant took exceptions to the ruling.

The indictment was found at the April term of this court sitting below, on the fourth Tuesday of April, 1897, at Houlton. The material portions of the indictment are as follows:

The jurors for said state upon their oath present, that George H. T. Stevenson, of Houlton, in said county of Aroostook, at Houlton, in said county of Aroostook, on the nineteenth day of December in the year of our Lord one thousand eight hundred and ninety-six, did receive and take into his possession, certain money of the amount and of the value of ninety-six dollars, and divers promissory notes current as money in said state of Maine, of the amount and of the value of ninety-six dollars, and sundry pieces of gold and silver coin current as money in said state of Maine, of the amount and of the value of ninety-six dollars, and one pension check of the United States of America, payable to the order of William H. Stewart, and indorsed by the said William H. Stewart, for the amount and of the value of ninety-six dollars, and all of the property and moneys of the said William H. Stewart, and all of which property and money was then and there delivered to him, the said George H. T. Stevenson by said William H. Stewart, and that the said George H. T. Stevenson thereafterwards, on said nineteenth day of December, in the year of our Lord one thousand eight hundred and ninety-six, with force and arms the said money, promissory notes, gold and silver coin and check, so as aforesaid delivered to him and by him had, received, and taken into his possession, then and there unlawfully and feloniously did embezzle and fraudulently convert to his own use, without the consent of him the said William H. Stewart, the said money, promissory notes, gold and silver coin and check, being then and there the subject of larceny: Whereby, and by force of the statute in such case made and provided, said George H. T. Stevenson is deemed to have committed the crime of larceny, and so the jurors aforesaid, upon their oath aforesaid, do say that the said George H. T. Stevenson, then and there in manner and form as aforesaid, the said money, promissory notes, gold and silver coin, and check, of the property and moneys of the said William H. Stewart, 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.

(MOTION IN ARREST OF JUDGMENT.)

And now after trial and verdict of guilty, and before judgment the said George H. T. Stevenson comes, etc., and says that judgment ought not to be rendered against him, because he says that said indictment and the matters therein alleged in the manner and form in which they are stated are not sufficient in law for any judgment to be rendered thereon, and the said indictment is bad, defective and insufficient in the following particulars:—

First: That said indictment contains no description of the act complained of and no averment of any crime.

Second: That no crime known to the law is set forth in said indictment.

Third: That said indictment does not state the purpose for which the property, money, goods and so forth, mentioned in said indictment, were delivered to said respondent.

Wherefore, he prays that judgment on said verdict may be arrested and that he may be hence dismissed and discharged.

Dated this 11th day of May, A. D. 1897.

GEORGE H. T. STEVENSON.

Motion in arrest of judgment overruled pro forma, and indictment adjudged sufficient.

Wallace R. Lumbert, County Attorney, for State.

Counsel cited: *State* v. *Walton*, 62 Maine, 106; *State* v. *Lynch*, 88 Maine, 195; *State* v. *Knowlton*, 59 N. H. 36; *State* v. *Goulding*, 44 N. H. 204; *State* v. *Gove*, 34 N. H., 310. *Commonwealth* v. *Smart*, 6 Gray, 15, was an indictment drawn against carriers and other persons to whom property is delivered and was decided in 1856 and therefore before the statute of 1857 was enacted in Massachusetts.

It is fair to presume that our statute was passed not only for the purpose of protecting society against embezzlement, but also to do away with the necessity of that technical accuracy of statement that the court required in *Com.* v. *Smart*, supra.

Ira G. Hersey, for defendant.

The indictment does not show any facts, circumstances or aver-

ments setting forth any crime. The only fact set forth is that the defendant, on a certain day, received and took into his possession certain property (describing it) which was delivered to him by one Stewart, which of course sets forth no crime. The object and purpose of that delivery, the fiduciary relation or trust, if any, is not set forth. Why this money was delivered; what was to be done with it; the relation of the defendant to the one who is alleged to have delivered it to him is not set forth. Whether he was an agent, an attorney, a bailee, or that he occupied any fiduciary relation, or that there was any trust of any kind established is not mentioned, hinted, or set forth in the indictment. What was to be done with the money or property, or what was done with it, is not set forth. How or in what manner it was embezzled and converted is not set forth. The mere naked statement that this money and property was delivered to the defendant, with the pleader's conclusion that the defendant on the same day embezzled and fraudulently converted the same to his own use, is all there is to this indictment.

Counsel cited:— *Com.* v. *Concannon*, 5 Allen, 506; *Com.* v. *Simpson*, 9 Met. 142; *Com.* v. *Hussey*, 111 Mass. 435; *Com.* v. *Hays*, 14 Gray, 62; *Com.* v. *Butterick*, 100 Mass. 1; *Com.* v. *Smart*, 6 Gray, 15; *State* v. *Mace*, 76 Maine, 66; *State* v. *Learned*, 47 Maine, 431; *Enders* v. *The People*, 20 Mich. 233; *People* v. *Olmstead*, 30 Mich. 439; *State* v. *Smith*, 17 R. I. 373; *Com.* v. *Strain*, 10 Met. 522; *United States* v. *Cruikshank*, 92 U. S. 544; *The People* v. *Albow*, 140 N. Y. 134; *United States* v. *Hess*, 124 U. S. 486; *State* v. *Schund*, 57 N. H. 627; *People* v. *Stark*, 136 N. Y. 541; *Com.* v. *Moore*, 11 Cush. 603; *Com.* v. *Sheedy*, 159 Mass. 55; *State* v. *Thurston*, 35 Maine, 205, (58 Am. Dec. 695); *Com.* v. *Slack*, 19 Pick. 307; *State* v. *Pierce*, 43 N. H. 373; *State* v. *Fitts*, 44 N. H. 623; *State* v. *Fiske*, 18 R. I. 416; *State* v. *Paul*, 69 Maine, 215; *State* v. *Kennison*, 55 N. H. 244; *State* v. *Day*, 3 Vt. 52; *State* v. *Northfield*, 13 Vt. 183; *Barth* v. *State*, 19 Conn. 438; *State* v. *Gary*, 36 N. H. 361; *State* v. *Parker*, 43 N. H. 85; *Hall's case*, 5 Maine, 409; *State*

v. *Philbrick*, 31 Maine, 401; *State* v. *Godfrey*, 24 Maine, 232; *State* v. *Gove*, 34 N. H. 511; *State* v. *Barrett*, 42 N. H. 470.

Every ingredient of which an offense is composed must be accurately and clearly alleged in the indictment or the indictment will be bad, and may be quashed on motion, or the judgment may be arrested before sentence. The rule requiring certainty in criminal pleading has been regarded for ages as one of the great safe-guards of the citizen against oppression and groundless prosecution. *U. S.* v. *Cruikshank*, 92 U. S. 562.

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

HASKELL, J. Indictment under the act of 1893, c. 241, for larceny by embezzling the goods of another. The indictment in substance charges that the defendant "did receive and take into his possession certain money" etc., delivered to him by one Stewart which the defendant "unlawfully and feloniously did embezzle and fraudulently convert to his own use, the same being the subject of larceny, and so did feloniously steal, take and carry away the same, contra pacem, etc.

The defendant was found guilty, and moves arrest of judgment because the indictment does not charge the receipt of the money, etc., in any fiduciary relation, or upon any trust and confidence.

The Attorney for the State contends that such averments are unnecessary under the statute that inhibits, as larceny, the embezzlement of money, goods or property, which may be the subject of larceny, delivered to the defendant.

The act is as follows:

"Whoever embezzles, or fraudulently converts to his own use, or secretes with intent to embezzle or fraudulently convert to his own use, money, goods or property delivered to him, or any part thereof, which may be the subject of larceny, shall be deemed guilty of larceny."

The purpose of the statute is to create a peculiar species of larceny, where the felonious taking is wanting; and all authorities

agree that in such case an indictment for larceny proper cannot be maintained. That is, proof of embezzlement will not support an indictment for larceny. It logically follows, therefore, that an indictment for larceny by embezzlement must distinguish the offense by apt averment, and the distinguishing element is the breach of some trust or confidence. That is the gist of the crime, and therefore must be charged. No authority can be found to the contrary. *State* v. *Walton*, 62 Maine, 106, is cited at the bar, but that case squarely holds to this doctrine. That was an indictment against a public officer. The court says: "The questions are: Was he a public officer? Has he fraudulently converted to his own use money, which he had in his possession and under his control, by virtue of his office? It is set forth in the indictment that the defendant, being a public officer, ... did by virtue of his office and while employed therein receive and have in his possession certain money, etc., and the said money did then and there unlawfully and fraudulently embezzle and convert to his own use, and so did steal, take and carry away the same." *State* v. *Lynch*, 88 Maine, 195, is cited to the point that offenses must be charged in the words of the statute or in language equivalent thereto. Certainly, offenses must always be so charged, but sometimes such averments are not sufficient. One example is where an offense is prohibited, but not defined. There the indictment should charge the elements of the offense as well as the statute inhibition. For instance, a statute might prohibit murder, arson, robbery, or larceny, and would any one contend that an indictment charging those offenses in the words of the statute a sufficient compliance with our constitutional provision that the accused "may demand the nature and cause of the accusation and have a copy thereof? The indictment in this case charges the embezzlement of money delivered to the defendant. Suppose it were paid to him by mistake, and he converted it, should he be held as for larceny? Nothing more is necessarily charged. The very word embezzle implies the moral turpitude of a breach of trust equal to felonious taking. This is not a new question. If it were, customary laxity might say an indictment charging that a defendant did embezzle money

the property of another, and so did steal, take and carry away the same, would be sufficient. In substance, that is all there is of the indictment in this case.

The statute in question was copied verbatim from Massachusetts Pub. Stat. c. 203, § 37. It was first enacted there in 1857, c. 233, and has been in force ever since. It has many times been construed by the Massachusetts court, and it is fair to presume that its construction was intended by our legislature when it was enacted here. To supply the defect of a prior Massachusetts statute, that did not reach the fraudulent conversion of a mere naked deposit of money for safe keeping, the present statute was enacted. *Commonwealth* v. *Hays*, 14 Gray, 62. In that case it is said that these prior statutes were intended to reach the fraudulent taking of money by persons to whom it had been intrusted by their employers and others on trust and confidence where no conviction for larceny could be had for want of taking or asportation, an essential element in that crime, and that to such persons only the statutes apply. *Commonwealth* v. *Stearns*, 2 Met. 343; *Commonwealth* v. *Libbey*, 11 Met. 64; *Commonwealth* v. *Williams*, 3 Gray, 461. In the same case it is further said that the present statute was "intended to embrace cases where property had been designedly delivered to a person as bailee or keeper and had been fraudulently converted by him. . . . . That beyond this the statute was not intended to go," and so it was held that where money was paid by mistake and fraudulently converted, no conviction could be had under the statute, inasmuch as the moral turpitude was not so great as in those cases usually comprehended within the offense of embezzlement, and that the legislature could not have intended to place them on the same footing.

In *Commonwealth* v. *Hussey*, 111 Mass. 432, it is held that "the fiduciary relation essential to characterize the crime is sufficiently expressed by the averment that the property was delivered to the defendant upon the trust and confidence that he would return it to the owner on demand." That was an indictment under the statute in question. Notice the expression, "the fiduciary relation essential to characterize the crime."

In *Commonwealth* v. *Smart*, 6 Gray, 16, an indictment under this same statute, the court say: "The general allegation that the defendant was 'entrusted' with certain enumerated articles, the property of Scott, is too loose and indefinite; since such an averment is equally applicable to a common carrier, and to any other person to whom chattels have been delivered, either to be carried for him, or to be kept, or used, or appropriated to any particular object or service in the manner which may have been prescribed and directed by the owner, or specially agreed upon by the parties. In neither of these particulars is there any discrimination or certainty in the averments contained in the indictment."

In *Commonwealth* v. *Concannon*, 5 Allen, 506, an indictment under the same statute for embezzling a mortgage, it is said: "There is a distinct averment that the deed was delivered to the defendant, and that he took and received it for the purpose of carrying and delivering it to the prosecutor. We cannot see that this does not fully and formally set out the agreement or trust on which the deed was received by the defendant." It was held sufficient.

In *Commonwealth* v. *Simpson*, 9 Met. 138, an indictment under the prior statute for embezzling goods, it was held that a conviction could not be had under an indictment good only as an indictment for larceny. The court say: "The general object of the various statutes in relation to embezzlement, in England and in this Commonwealth, doubtless was, to embrace, as criminal offenses punishable by law, certain cases where, although the moral guilt was quite as great as in larceny, yet the technical objection, arising from the fact of a possession lawfully acquired by the party, screened him from punishment. They were therefore declared crimes punishable by law.

"The purposes of this statute may, as it seems to us, be sufficiently attained, without any infringement of those rules of criminal pleading which require the charge to be particularly and certainly set forth. The defendant should, as far as is reasonably practicable, be apprised, by the indictment, of the precise nature of the charge made against him. This, in embezzlement, so far as

respects the nature of the offense or character of the crime charged, may be easily indicated by setting forth the fiduciary relation, or the capacity in which the defendant acted, and by means of which the property came into his possession, and by charging the fraudulent conversion. Such seems to have been the practice under the English Sts. 21 Hen. 8, c. 7, 39 Geo. 3, c. 85, and 52 Geo. 3, c. 63. See the forms of indictment, in 3 Chit. Crim. Law, (4th Amer. ed.) 961 & seq. Archb. Crim. Pl. (1st ed.) 156.

"The court are of opinion that the two offenses of larceny and embezzlement are so far distinct in their character, that under an indictment charging merely a larceny, evidence of embezzlement is not sufficient to authorize a conviction; and that, in cases of embezzlement, the proper mode is, notwithstanding the statute to which we have referred, to allege sufficient matter in the indictment to apprise the defendant that the charge is for embezzlement. Although the party, in the language of the statute, 'shall be deemed to have committed the crime of simple larceny,' yet it is larceny of a peculiar character, and must be set forth in its distinctive character."

That case was referred to and adopted in *Commonwealth* v. *Pratt*, 132 Mass. 246. It is there held that no judgment for embezzlement can be given unless the indictment directly charge larceny by the phrase "feloniously did steal, take and carry away" as well as set out the nature of the embezzlement that is made larceny by statute. In *Commonwealth* v. *Mead*, 160 Mass. 319, 1894, an indictment under the act in question charges the fiduciary relation. So does *Commonwealth* v. *Parker*, 165 Mass. 526, 1896. All of these decisions were made notwithstanding an existing Massachusetts statute, Pub. Stat. 1882, c. 203, § 44, providing that in such cases "it shall be sufficient to allege generally in the indictment an embezzlement, fraudulent conversion or taking with such intent of money to a certain amount without specifying any particulars of such embezzlement." But they hold that the breach of trust and confidence which is essential to charge embezzlement must be averred as well as proved.

Three things must be averred:—

I. Fiduciary relation.

II. Fraudulent conversion.

III. Larceny in apt phrase.

Unless all of these be proved, no conviction can be had, and it is common learning that all elements of a crime necessary to be proved must be averred.

Under our statute, construed in the light of the Massachusetts cases, from whence we adopted it, there is no escape from holding the indictment in this case insufficient, and the result is supported by reason as well.

Judgment arrested.

CHARLES C. WOODRUFF, in Equity,

vs.

FRANK W. HOVEY, AND SEBASTICOOK AND MOOSEHEAD RAILROAD COMPANY.

Somerset. Opinion December 27, 1897.

Lien. Filing Claim. R. S., c. 91, §§ 30, 32.

The lien of a person furnishing labor or materials in erecting a building, as provided in R. S., c. 91, § 30, will be dissolved unless a sworn claim thereof is filed in the town clerk's office within forty days after he ceases to labor or furnish materials.

In this case the court *holds* that the plaintiff completed his contract, and that his work was accepted by the party with whom he made the contract, on the twenty-second of June, 1896, and that by reason of his failure in not filing his claim for a lien in the town clerk's office until September 8, he did not seasonably secure his lien.

A lien once lost cannot be recovered by subsequent work.

ON REPORT.

This was a bill in equity brought by Charles C. Woodruff against Frank W. Hovey and the Sebasticook and Moosehead Rail-

road Company to establish a lien on a round house and the lot upon which it is situated in Pittsfield Village.

The bill alleges that on the ninth day of May, 1896, the said Woodruff entered into a contract with the railroad company and the said Hovey to build a round house on the land described, they being owners thereof, furnishing all the labor and material for the same for the sum of eleven hundred dollars; that while erecting said round house he entered into a further contract for additional work and material therein described; that the building and extra labor and material were satisfactory and accepted; that the last labor was performed on the seventh of August, 1896, and that within forty days after that date, he filed his lien claim with the town clerk; that there is now due him ten hundred and fifty-eight dollars and twenty-two cents, and then prays that a lien may be established, etc.

The bill was dated and filed September 9, 1896.

Woodruff further claimed that, from the time he took the contract down to the filing of the bill, he supposed that the Sebasticook and Moosehead Railroad Company owned the land. He made the contract with them alone, but first saw Mr. Hovey and told him he was going to build the round house and asked him if the company owned the land, and Mr. Hovey said they did, for which reason Mr. Hovey was made a co-defendant with a purpose of claiming that he was estopped to deny a joint liability, the record title to the land standing in his name; but later it was discovered that while the record title was in his name, the real title never was, and an amendment was made, to be allowed if necessary and proper.

The amendment discontinues as to Mr. Hovey as co-contractor and sets up instead that he had wrongfully obtained a void deed of said land and by recording same made a cloud on the title, and prays that he be ordered to release or convey same. These allegations were denied by Mr. Hovey.

The answer to bill of the defendant Hovey states that he does own the land, but never made the contract with complainant and never promised to pay him; that the work was completed long before July 11th, 1896, and that Woodruff did not file his lien claim or bring his suit seasonably; that Woodruff was to wait for

his pay until certain bonds were sold and the railroad completed to Harmony; that said bonds have never been sold or road completed.

He also alleged that the statement of the lien claim filed in the town clerk's office was defective.

The answer of the Sebasticook and Moosehead Railroad Company claims that payment was not to be made until certain bonds were sold and the road to Harmony completed, which has never been done. It admits indebtedness for building the round house, but claims that all extra work has been paid for. It also claims that the round house was completed on or before July 11th, 1896, and that said claim was not filed within forty days; that the statement of the lien was defective as filed with town clerk.

J. W. Manson and G. H. Morse, for plaintiff.

Counsel argued:—(1.) That a mechanic's lien can attach to a round house and land of a railroad company in this state as a matter of law.

(2.) That Woodruff did such labor and furnished such material for the railroad company as were essential to give him a lien.

(3.) That for all the purposes of this hearing the railroad company owned the land and building.

(4.) That if the railroad company did not own the land, the owners did consent to the building in such a way as to create a lien.

(5.) That had it been necessary to file a lien claim within forty days after the labor was performed, it was done.

(6.) That the railroad company being owners of the land and making the contract with Woodruff, it was not necessary to file a lien claim at all if suit was brought within ninety days, and that it was so brought.

(7.) Hovey, having represented to Woodruff that the company owned the land and knowing that Woodruff had a right to a lien, by misrepresenting the true condition of things, is estopped to deny his joint liability under the first bill filed.

(8.) Or if the ground taken in the sixth claim is not sound, that Hovey never having had title, but fraudulently obtaining a record title, should discharge same.

Liens on railroad buildings:—No exception in our statute.

A building built for a railroad company is as clearly within the spirit and letter of the statute as any other building. Its object was to furnish a protection to those who expended their labor and material in improving the property of others.

"Is there anything in public policy that requires or should permit railroads to be built at the expense of defeating this object? If there is, we fail to perceive it, and shall recognize no such policy till the Legislature enacts it into a positive law." *Hill* v. *Lacrosse & M. R. R. Co.*, 11 Wis. 21. This was an action to enforce a lien on a depot.

This is the doctrine invariably followed in New England. *Platt* v. *N. Y. & Boston R. Co.*, 26 Conn. 544; *Botsford* v. *New Haven, Middletown & Willimantic R. R. Co.*, 41 Conn. 454; *Boston, Concord & Montreal R. R. Co.* v. *Gilmore*, 37 N. H. 410.

If the railroad was not the owner and could not be so considered, they certainly had an interest in the land enough to subject it to a mechanic's lien, especially since the claim is made under a bill in equity. The statute states "on any interest that such owner has in the same." The railroad company had a contract for the sale and purchase of this land. It was such an interest as could be attached. R. S., c. 81, § 56; *Wise* v. *Tripp*, 13 Maine, 9; *Houston* v. *Jackson*, 35 Maine, 520. They had, after making the contract, gone on the land and made expenditures, giving them the right of specific performance. *Green* v. *Jones*, 76 Maine, 563.

The word "owner" should mean any person who has any contractual interest in land, whether by deed or mortgage, or otherwise, which could be enforced by attachment, either by legal or equitable attachment. *Choteau* v. *Thompson*, 2 Ohio St. 125, is especially in point; also *Hickox* v. *Greenwood*, 94 Ill. 268; *Wagar* v. *Brisco*, 38 Mich. 587; *Keller* v. *Denmead*, 68 Penn. St. 449; *Atkins* v. *Little*, 17 Minn. 342; *Sheckwell* v. *Carpenter*, 27 Iowa, 119; *Rollin* v. *Cross*, 45 N. Y. 766; *Lyon* v. *McGuffey*, 45 Am. Dec. 676, (4 Pa. St. 126); *Stoner* v. *Neff*, 50 Pa. St. 261; *Appeal of Borough of Eastern*, 47 Pa. St. 265; *Munroe* v. *West*, 12 Ia. 119; *O'Brian* v. *Hanson*, 9 Mo. App. 549.

Having such an interest to which a lien could attach, when it did attach, it would enlarge as the company's title enlarged, and be a lien on the complete title as it became complete. *Kirby* v. *Tead*, 13 Met. 149.

Consent of owners: *Shaw* v. *Young*, 87 Maine, 271.

Filing of claim: No interest of third parties intervened. If one is obliged on account of the owner to suspend work for more than thirty days, he should not be deprived of his lien. Jones on Liens, § 1439; *Gordon* v. *Torrey*, 15 N. J. Eq. 112.

Frank W. Hovey and Forrest Goodwin, for defendant Hovey.

Counsel argued that the bill should be dismissed: (1.) Because the claimant waived his lien by giving credit beyond the statutory time for bringing an action to foreclose his lien. (2.) Because the railroad company could not subject the land to a lien without the consent of Thomas N. Drake the owner, and there was no consent. (3.) Because he did not seasonably file notice of his lien claim in the town clerk's office. (4.) Because the building was erected for railroad purposes and is not subject to a lien. (5.) Because he has intermingled lien claims with non-lien claims. (6.) Because of a variation in the contract alleged as to the time when the contract price was to be paid, and the proof offered. (7.) Because the complainant expressly waived his lien on July 18th, and thereby induced Mr. Hovey to invest his money in this property. Amendment not allowable because of variance in proof and introducing new matter. *Whittemore* v. *Merrill*, 87 Maine, 456; *Garrison* v. *Hawkins*, (Ala.) 20 So. Rep. 427; *Perry* v. *Watts*, 3 Man. & Gr. 775; *David* v. *Preece*, 5 Ad. & El. N. S. 440; *Tufts* v. *Lexington*, 75 Maine, 516; *Clarke* v. *Gray*, 6 East. 564; *Penny* v. *Porter*, 2 East. 2; 1 Smith L. C. Part 2, p. 1436; *Addis* v. *Van Buskirk*, 24 N. J. L. 218; *Cleaves* v. *Lord*, 3 Gray, 66, 71; *Bush* v. *Connelly*, 33 Ill. 447; *Eaton* v. *Malatest*, (Cal.) 28 Pac. Rep. 54; *Dingley* v. *Greene*, 54 Cal. 333; *McAuley* v. *Carter*, 22 Ill. 53; *Burkhart* v. *Resig*, 24 Ill. 529.

Bill does not allege contract was made with owner's consent. *Cross* v. *Thcharmy*, 39 Ore. 763; *Davis* v. *Alford*, 94 U. S. 546;

Farnham v. *Davis*, 79 Maine, 283. Owner is the person holding the legal title. 15 Am. & Eng. Ency. p. 57; *Belden* v. *Cushing*, 1 Gray, 576; *Howard* v. *Veazie*, 3 Gray, 233; *Worden* v. *Hammond*, 37 Cal. 61; *Thaxter* v. *Williams*, 14 Pick. 49; *Tompkins* v. *Horton*, 25 N. J. Eq. 284; *Hayes* v. *Fessenden*, 106 Mass. 228; *Donahy* v. *Clapp*, 12 Cush. 440; *Dustin* v. *Crosby*, 75 Maine, 75; *Steele* v. *Argentine Mining Co.*, (Idaho,) 42 Pac. Rep. 585; *Rollin* v. *Cross*, 45 N. Y. 766.

Consent:—*Lyon* v. *Champion*, 62 Conn. 75; *Hayes* v. *Fessenden*, 106 Mass. 228.

Filing of lien claim:—*Durling* v. *Gould*, 83 Maine, 134; *Wescott* v. *Bunker*, Id. 504, 506; *Cole* v. *Clark*, 85 Maine, 336. No lien on railroads and other public property. 31 Am. & Eng. Corp. Cases, 296, note; *Foster* v. *Fowler*, 60 Pa. St. 27; *Comrs. of Buncombe County* v. *Tommey*, 115 U. S. 122; 34 Am. & Eng. Corp. Cases, 135, note; *King* v. *Alford*, 9 Ont. 643, S. C. 24 Am. & Eng. Corp. Cases, 331; *Breeze* v. *Midland R. R. Co.*, 26 Grant's Chan. (U. C.) 225; *Skrainka* v. *Rohan*, 18 Mo. App. 340.

One single lien cannot cover several distinct contracts or alterations made at different times, and independent of each other, so as to entitle claimant to a lien judgment for the whole. 15 Am. & Eng. Ency. p. 142, and cases cited; *Baker* v. *Fessenden*, 71 Maine, 292; *Bank* v. *Buffinton*, 97 Mass. 498; *Hinchley* v. *Greany*, 118 Mass. 597; *Copeland* v. *Copeland*, 28 Maine, 539; *Stevens* v. *McNamara*, 36 Maine, 117; *O'Connor* v. *Courant River R. R. Co.*, (Mo.) 20 S. W. Rep. 16.

Cases of non-lien:—*Truesdell* v. *Gay*, 13 Gray, 311; *Pennock* v. *Hoover*, 5 Rawle, (Pa.) 291; *Watts-Campbell Co.* v. *Yuengling*, 125 N. Y. 1.

Extra work:—*Lee* v. *Brayton*, 18 R. I. 232; *Mulrey* v. *Barrow*, 11 Allen, 152.

When work held completed:—*Franksburg* v. *Smith*, 34 Minn. 403; *Franklin St. Meth. Church* v. *Davis*, 7 S. E. Rep. 245; *Cole* v. *Uhl*, 46 Conn. 296; *Frost* v. *Sullivan*, 43 Cal. 896.

Waiver of lien by giving credit beyond time of construction: 15 Am. & Eng. Ency. p. 104; *Scudder* v. *Balkam*, 40 Maine, 291;

Mehan v. *Thompson*, 71 Maine, 492; *Pickett* v. *Buttock*, 52 N. H. 354; *Wilson* v. *Douglass*, 66 Md. 99.

Lien once lost cannot be revived: *Darrington* v. *Moore*, 88 Maine, 569; *Baker* v. *Fessenden*, 71 Maine, 292; *Farnham* v. *Davis*, 79 Maine, 285; *Cole* v. *Clark*, 85 Maine, 336; *Nichols* v. *Culver*, 51 Conn. 177.

Estoppel: *Hinchley* v. *Greany*, 118 Mass. 597; *Storrs* v. *Barker*, 6 John. Ch. 166; *Bank* v. *Buffinton*, 97 Mass. 498; *Copeland* v. *Copeland*, 28 Maine, 539; *Stevens* v. *McNamara*, 36 Maine, 178.

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

HASKELL, J. Bill in equity to enforce a mechanic's lien upon a building and the land on which it stands. Assuming that all other facts necessary to support the bill have been proved, which it is unnecessary to here decide and which we do not decide, the plaintiff has failed to prove one fact necessary to sustain the action, and that is that his lien was seasonably enforced.

Plaintiff contracted with defendant railroad company, in writing, on the 15th of April, 1896, to construct a round house for the company according "to plans furnished by the chief engineer of the company and to the satisfaction of said engineer," for the sum of $1100. The specifications are given, but the plans are not sent up with the case. Both are said to be silent upon the point now in issue, and therefore of no consequence. Plaintiff began work May 13th, and on the 10th or 11th of June the plaintiff says the engineer came while he was on the roof putting on the last wire to hold the smoke stack. "I says, 'Have you looked the building over? Are you satisfied with it as far as it has gone? and he says: I am going up the line and I might as well accept the job now as any time. I have got all the confidence in the world in you that you will go ahead and finish it up according to agreement. He says: Now if you will go ahead and finish it up and do what you have got to do here as well as you have done what you have done, I will accept the job,' and he wanted to know how long it

would take me to finish up, and I told him two or three days perhaps, I can't tell exactly." Conversation then followed about the doors, and plaintiff was told that they were a part of his job, and that as they were a little short he would have to put on a wider flap at the bottom that was to drop down over the track. Plaintiff says, "Look here, now, I can go ahead probably and finish this all up except round this track, and when is this track going to be put in here? He says: Lancaster (the president of the company) is anxious to have this building and the track will be right in here."

Plaintiff worked his couple of days, hung the doors, put on the flaps and quit on the 13th. The only remaining work was to put in a few additional screws, some hasps to hold up the flaps and cut notches in them for the track. On the 22d of June plaintiff saw Lancaster and turned over the keys to him. By the terms of the contract the plaintiff agreed "to take all risk of damage by fire or any cause whatever until said house is completed and accepted by said engineer." Now the job was accepted on the 10th or 11th, with plaintiff's assurance that he could complete it in two or three days. In that time he did substantially complete it, and on the 22d delivered the building to the railroad company. That was when the contract work ended and the contract was completed. The contract price then became due and payable. The parties must have so understood the transaction. If a few trifles remained to be done, like sawing the notches in the flaps and turning a few additional screws into the hinges and putting on a couple of hasps, that could all have been done inside an hour, either the defendant waived it as contract work, or relied upon its being done in the future as present compliance with contract work. It is incredible that either party then supposed the contract price would not become payable until such work had been done, or that any lien for contract work could not be enforced before.

After this, it became known that the railroad company was in financial trouble, and after the lapse of more than forty days from the acceptance of the contract work when the lien had already lapsed for non-enforcement, the plaintiff, on the 7th of August,

went down to the round house ex mero motu, sawed the notches in the flaps, turned in a screw or two more in the hinges and put on some hasps to hold up the flaps and then, on September 8th, made oath to his lien claim, filed the same with the town clerk on the 9th, and on the same day filed this bill to enforce the lien.

Nothing can be plainer than that the trifling work plaintiff performed on the seventh was for the purpose of reviving a lien that he had already lost.

A lien once lost cannot be revived by additional work. *Cole* v. *Clark*, 85 Maine, 336; *Darrington* v. *Moore*, 88 Maine, 569.

Bill dismissed.

WILLIAM E. MURDOCK, In Equity,

vs.

JOHN N. BRIDGES, and others.

Penobscot. Opinion December 27, 1897.

Executed and Void Trusts. Statute of Wills.

The plaintiff on July 15th, 1896, received from one Ann Banks $1200, and at the same time took from her a writing of the following tenor:—

"To whom it may concern: This is to certify that I have this day appointed W. E. Murdock to look after my property and pay all my honest debts, and after that to keep in trust all of my personal property, and to look after my husband, Nathan E. Banks, the rest of his days, and to pay his honest debts with the balance of my personal property, and after his death, the balance shall go to the people who have cared for me, as W. E. Murdock shall think best."

Under this authority plaintiff paid for Ann Banks one hundred dollars, leaving a balance of $1100 principal in his hands. Ann Banks died August 1st, 1896, and Nathan E. Banks died on the 28th of the following October, leaving a small estate. *Held;* that the plaintiff is a trustee of an executed trust, and holds the fund which he received from Ann Banks in trust for her heirs at law, to be paid to her administrator for distribution.

Also; that a trust was created by said writing for two purposes; first, to pay the debts of the cestui que trust, and second, to provide for her husband.

Also; that the remaining purpose of the distribution in the plaintiff cannot be exercised, because it is an attempted disposition of property among a class of persons wholly uncertain, to be selected by the plaintiff and distributed among them as he may choose; and as a testamentary disposition of property it must fail for not complying with the statute of wills. As a trust, it must likewise fail for want of certainty and because it is a pure benevolence and not a charity.

Held; that a decree of interpleader, under these circumstances, is not required, and the defendant's demurrer is therefore well taken.

On Report.

This was a bill of interpleader filed April 6th, 1897, by William E. Murdock of Springfield, in the county of Penobscot, against John N. Bridges, administrator of the estate of Ann Banks late of said Springfield, deceased, and against Lewis Thornton, Rosetta A. Thornton and Katherine Hebb. The material portions of the bill are as follows:—

First. That on the fifteenth day of July, A. D. 1896, Ann Banks, then of said Springfield, since deceased, paid over and delivered to the said plaintiff, William E. Murdock, twelve hundred dollars in cash, and at the same time executed and delivered to him written instructions in the following words, to wit: "To whom it may concern: This is to certify that I have this day appointed W. E. Murdock to look after my property and pay all my honest debts, and after that to keep in trust all of my personal property, and to look after my husband, Nathan E. Banks, the rest of his days, and to pay his honest debts with the balance of my personal property, and after his death, the balance shall go to the people who have cared for me, as W. E. Murdock shall think best." Which said written instructions in court to be produced, will more fully appear.

Second. That the said Ann Banks died on the first day of August, A. D. 1896. That afterwards, to wit, on the twenty-eighth day of October, 1896, the said Nathan E. Banks died, leaving personal property valued at six hundred and forty-eight dollars and fifteen cents, as will appear by an inventory duly filed in the office of the probate court, for said county of Penobscot. That on the third day of December, 1896, the said defend-

ant John N. Bridges, was duly appointed administrator of the estate of the said Ann Banks, and that on the thirtieth day of December, 1896, the said plaintiff, William E. Murdock, was duly appointed administrator of the estate of the said Nathan E. Banks.

Third. That he, the said William E. Murdock, has paid on account of the said Ann Banks since her decease, from the twelve hundred dollars held in trust as aforesaid, the sum of one hundred dollars, leaving a balance still in his hands of eleven hundred dollars.

Fourth. That the legal heirs of the said Ann Banks are Lillian J. Lowell, of Bridgewater, John G. Potter and James M. Potter, both of Monticello, and all in the county of Aroostook, Henry E. Potter of Fort Leavenworth in the state of Kansas, and Mary J. Donahue and Jennie Donahue both of Lowell, in the commonwealth of Massachusetts.

Fifth. That the persons who cared for the said Ann Banks prior to her death and during her last sickness, were the said defendants, Lewis Thornton, Rosetta A. Thornton, and Katherine Hebb, who insist that by the written instructions given to the said plaintiff by the said Ann Banks, at the time she paid over and delivered to him said twelve hundred dollars, the balance ought to be paid to them, as the said William E. Murdock shall think best.

AMENDMENT OF BILL.

The said complainant further says that it is his judgment, and he decides that the said respondents Lewis Thornton, Rosetta A. Thornton and Katherine Hebb are the only persons who cared for said Ann Banks in accordance with the terms of said instrument of trust; and that it is his judgment, and he decides that the balance of the personal property, now in his hands, should be equally divided among said respondents, Lewis Thornton, Rosetta A. Thornton and Katherine Hebb.

Sixth. That the said John N. Bridges, as administrator of the estate of the said Ann Banks, has demanded payment from the plaintiff of the said sum of eleven hundred dollars, and insists that said sum belongs to him as administrator of the estate of said Ann

Banks. That the said John N. Bridges has brought a suit at law against the plaintiff, claiming said sum as administrator of the estate of the said Ann Banks, on account of which the plaintiff is exposed to great risk and danger of trouble and expense, and litigation, and that various claims have been and may be preferred against him on behalf of some of the other persons hereinbefore mentioned. That the plaintiff has no interest in the matter in controversy, between the several defendants, and is ready and willing to pay the said sum of money to such of said defendants, if any, as shall be found legally entitled to receive the same; but by reason that they persist in their several adverse claims, the plaintiff is advised that he cannot safely proceed in the matter without the direction and judgment of this court sitting in equity.

Wherefore, the plaintiff prays that the several defendants may be decreed to interplead touching their respective rights in order that the plaintiff may be informed to whom said sum of money now in the hands of said plaintiff, ought to be paid; that the plaintiff may have leave to pay the same into court, which he offers to do for the benefit of such of the parties as shall be found or decreed to be entitled thereto; and that the said John N. Bridges be restrained by the order and injunction of this Honorable Court from commencing or prosecuting any suit at law or in equity against the plaintiff, for the recovery of the said sum now held by him as aforesaid, etc.

The respondents, Lewis Thornton, Rosetta A. Thornton, and Katherine Hebb, appeared and answered. The respondent Bridges appeared and demurred generally to the bill. By agreement, the prayer for the injunction was withdrawn, and the case was reported to the law court upon the demurrer alone. At the argument before the law court the parties agreed, at the bar of the court, that the court might order an interpleader, if the case should require it, regardless of the form in which the case came into the law court.

The facts in this case, as presented by the plaintiff, are as follows: Ann Banks, a short time before her death, deserted by her relatives, and knowing that her husband did not have sufficient

property with which to care for himself, called the complainant, Mr. Murdock, to her bedside, and paid over and delivered to him twelve hundred dollars in cash, at the same time executing and delivering to him written instructions directing the disposition not only of the money paid him, but of any other property which she possessed. Her property at that time consisted wholly of money and other personal property. She owned no real estate. The written instructions are incorporated in the bill. Soon after the death of Mrs. Banks, her husband Nathan E. Banks died, possessed of a few hundred dollars of personal property in his own right. A very small amount of the money paid over to Mr. Murdock by Mrs. Banks has been paid out, so that nearly the entire amount which he received still remains in his hands. A demand has been made upon the complainant Mr. Murdock, by the respondent John N. Bridges, who is administrator of the estate of Mrs. Banks, and who claims the money in Mr. Murdock's hands, as administrator of Mrs. Banks' estate. A demand has also been made upon Mr. Murdock by the other respondents, Lewis Thornton, Rosetta A. Thornton, and Katherine Hebb, who claim the money in his possession, being the only persons who cared for Mrs. Banks, and being the persons designated by Mr. Murdock as entitled to receive the balance in his hands. On the third day of December, 1896, the respondent John N. Bridges was appointed administrator of Mrs. Banks' estate, and later on commenced an action at law against the complainant, Mr. Murdock, to recover the balance in his hands for the benefit of Mrs. Banks' estate.

E. C. Ryder, for plaintiff.

Interpleader:—*Atkinson* v. *Manks*, 1 Cow. 691; Sto. Eq. Pl. §§ 291, 297, a; Dan. Chan. Pl. and Pr. *1572; *Williamson* v. *Salmon*, 45 N. J. Eq. 257; Am. & Eng. Ency. Law, Vol. 11, p. 494, and cases cited; Id. Vol. 7, p. 496; *Safe Deposit Co.* v. *Huntington*, 89 Hun, 465; *Crane* v. *McDonald*, 118 N. Y. 468; *Order of the Golden Cross* v. *Merrick*, 163 Mass. 374; 3 Pom. Eq. § 1322; *Cobb* v. *Rice*, 130 Mass. 231; *Brock* v. *Southern Ry. Co.*, 44 S. C. 444; *Warington*, v. *Wheatstone*, 1 Jac. 202; *Fowler* v. *Lee*, 8 Gill & Johns. 358; *Nash* v. *Smith*, 6 Conn. 421.

Gift valid:—*Marston* v. *Marston*, 21 N. H. 491; *Hill* v. *Stevenson*, 63 Maine, 364; *Dole* v. *Lincoln*, 31 Maine, 422; *Stone* v. *Hackett*, 12 Gray, 227; *Blanchard* v. *Sheldon*, 43 Vt. 512; *Thompson* v. *Thompson*, 2 How. (Miss.) 737; *Bump* v. *Pratt*, 84 Hun, 201; *Gilman* v. *McArdell*, 99 N. Y. 451; Perry, Trusts, § 586; *Day* v. *Roth*, 18 N. Y. 448; *Borneman* v. *Sidlinger*, 15 Maine, 429; *Dresser* v. *Dresser*, 46 Maine, 48; *Bath Savings Institution* v. *Hathorn*, 88 Maine, 122; *Norway Savings Bank* v. *Merriam*, 88 Maine, 146. A trust in personal property may be created by parol and it is valid, though without consideration, and though unknown to the beneficiary. *Buck* v. *Swazey*, 35 Maine, 41; *Frost* v. *Frost*, 63 Maine, 399; *Cobb* v. *Knight*, 74 Maine, 256; *Williams* v. *Haskins' Estate*, 66 Vt. 378; *Mize* v. *First National Bank*, 1 Mo. App. 99; *Penfold* v. *Mould*, L. R. 4 Eq. 562; *Meek* v. *Kettlewell*, 1 Hare, 464; *Frazier* v. *Perkins*, 62 N. H. 69.

Trust valid:—Sto. Eq. Jur. §§ 964, 979, a; *Power* v. *Cassidy*, 79 N. Y. 609; *Hellman* v. *McWilliams*, 70 Cal. 449; *Tilden* v. *Green*, 130 N. Y. 29.

P. G. White, for Bridges.

Such an attempted disposition of the money was clearly testamentary in its character, and was void for non-compliance with the statute in regard to the execution of wills. *Sherman* v. *New Bedford Savings Bank*, 138 Mass. 581; Lewin, Trusts, p. 58; 1 Perry, Trusts, § 97.

If the contention of the complainant be sound, this woman stript herself of all her property, gave it in trust for the benefit of others and left herself, during the remainder of her life, wholly unprovided for,—a most irrational, unnatural, and improbable act for her to do, especially in the view of the fact, that the alleged beneficiaries of the residue were not relatives but strangers.

Such a proposition is borne out neither by the natural meaning of the language used nor by the probabilities of the case; both plainly show that it was her purpose to retain the money as her own while she lived, and that Murdock was to be her agent, merely, to look after it for her.

As such agent, he was accountable to her, and to no one but her. There was no privity between him and the alleged donees. They were neither parties nor privies to the transactions, nor does it appear that they ever had any notice of it till after her death.

This agency the settler might have revoked as readily as she conferred it, and her death did revoke it. Hence the money in the hands of the complainant remained the property of the intestate, and now belongs to her estate.

The complainant was merely the agent of the donor; he is now the debtor of her estate. A bill of interpleader will not lie in such a case. An agent or debtor cannot be converted into a trustee by the fact that a claim has been made upon him for the money in his hands, by a third party, without regard to whether the claim has any foundation or not; for, it is said, that his possession is the possession of his principal. Sto. Eq. Jur. § 817; Dan. Chan. Pl. & Pr. 1757; *Carr* v. *Nat. Security Bank*, 107 Mass. 47.

M. Laughlin, for Lewis and Rosetta Thornton and Katherine Hebb.

If any part of the trust can be sustained, the demurrer must be overruled; the provision for payment of her debts and the care of her husband is legally sufficient to create a trust. *Speakman* v. *Speakman*, 48 N. J. Eq. p. 136. If the latter part of the trust fails for any reason, then it will be declared a resulting trust for the heirs at law; but a court of equity still controls the trust. *Dole* v. *Lincoln*, 31 Maine, 422; *St. Paul's Church* v. *Atty. General*, 164 Mass. 197; Perry, Trusts, § 159. Many elements of uncertainty that appear in other reported cases are not to be found in this case.

The instrument of trust may mean (1) that persons who took care of Ann Banks should be entitled to the fund in such proportions as trustee might decide; or (2) that trustee might select the objects of bounty out of those who might have cared to some extent for Ann Banks, and then decide how the fund should be distributed among those persons. If the trustee had not selected, the court might easily determine through a master or otherwise, who did care for Ann Banks. Perry, Trusts, §§ 253–255. The

trust will be enforced, having been perfectly created, if the relation of trustee and cestui que trust has once been established. *Cobb* v. *Knight*, 74 Maine, 253, p. 257, citing Perry, Trusts, § 104. The trust, and the contemporaneous delivery of the money, were a trust "pure and simple", and not a gift, causa mortis or inter vivos. *Savings Bank* v. *Merriam*, 88 Maine, 146; *Savings Institution* v. *Hathorn*, Id. 122.

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

HASKELL, J. The plaintiff on July 15th, 1896, received from one Ann Banks $1200, and at the same time took from her a writing of the following tenor:—

"To whom it may concern: This is to certify that I have this day appointed W. E. Murdock to look after my property and pay all my honest debts, and after that to keep in trust all of my personal property, and to look after my husband, Nathan E. Banks, the rest of his days, and to pay his honest debts with the balance of my personal property, and after his death, the balance shall go to the people who have cared for me, as W. E. Murdock shall think best."

Under this authority plaintiff paid for Ann Banks one hundred dollars, leaving a balance of $1100 principal in his hands. Ann Banks died August 1st, 1896, and Nathan E. Banks died on the 28th of the following October, leaving a small estate.

I. What is the legal effect of the writing given to the plaintiff by Ann Banks? It is contended that it creates a trust with power of distribution in the plaintiff, who now proposes to execute the same. It does create a trust for two purposes. First, to pay the debts of the cestui, and second, to provide for her husband. Both these purposes have been performed. Can the remaining purpose of distribution be exercised by the plaintiff? It is an attempted bestowal of property upon a class of persons, wholly uncertain, to be selected by plaintiff and is to be distributed among them as he may choose. As a testamentary disposition of property it must fail for

not complying with the statute of wills. As a trust, it must likewise fail for want of certainty and because it is a pure benevolence and not a charity. Suppose the plaintiff had died before attempting to appoint the distributees. Could a court invest a new trustee with power for the purpose, or exercise the power itself? The power attempted to be given was personal, and would have perished with the person. It is not a charity, nor does it even name a certain class of distributees. It says, "to the people who have cared for me as W. E. Murdock shall think best." A more uncertain class of distributees could not be thought of. They are not supposed to be kindred, nor even those who have performed services for which a compensation would be due, for all debts were to be paid, and have been paid, but persons who have been most meritorious in their attentions to the donor, in the opinion of the plaintiff. It is wide open to favoritism and fraud, and obnoxious to a court of equity that favors the equal distribution of estates among kindred, where no charity or particular person, or classes of persons, are named.

This is an executed trust with a power of disposal unexecuted, and the question is whether the power be valid.

In *Fox* v. *Gibbs*, 86 Maine, 87, a testator bequeathed the residue of his estate to trustees, to be by them distributed "for the causes of education and learning, for the promotion and assistance and growth of benevolent and charitable associations and objects, etc., within the county of Cumberland." These trustees were to exercise the power, selection and distribution within the scope of the trust. It was objected that the trust was void from uncertainty, but the court say that it is settled otherwise in this state. It was further objected that the trust was void because the trustees might use the funds for benevolent purposes that were not charitable. The court says; "This objection must be fatal to the validity of the bequest, if such was the intention of the testator. Trusts cannot be upheld which are devoted to mere benevolence or liberality or generosity." The trust was upheld because it was a charity, and not for benevolence that was not charitable.

Trusts of this sort, are usually defined by the words, "benev-

olent" or "charitable." Now benevolent is a word of much broader significance than charitable, and may include what are not charities; and the courts invariably inquire into the meaning of the testator or donor, and if the meaning implies a charity, the trust stands, otherwise not. In this cause neither word is used, therefore such inquiry need not be made. But the language used clearly implies a benevolence, not a charity. It is a kindness to persons who have cared for the donor, not a compensation. The trustee is to name such persons and apportion the fund among them. It is purely good will, a benevolence, as much as if that word had been used. It does not relieve suffering or poverty or distress, or go in aid of education or religion, or of any object known to the law as a charity.

In *Chamberlain* v. *Stearns*, 111 Mass. 267, a trust solely for benevolent purposes is held void. In that case many cases are cited and classified.

In *Nichols* v. *Allen*, 130 Mass. 211, the residue of an estate was bequeathed to executors "to be by them distributed to such persons, societies or institutions as they may consider most deserving," and the court held the trust not a charity and too indefinite to be executed, and that the kindred took by way of resulting trust. The court says: "Two general rules are well settled: 1st. When a gift or bequest is made in terms clearly manifesting an intention that it shall be taken in trust, and the trust is not sufficiently defined to be carried into effect, the donee or legatee takes the legal title only, and a trust results by implication of law to the donor and his representatives, or to the testator's residuary legatees or next of kin. *Briggs* v. *Penny*, 3 DeG. & Sm. 525, and 3 Macn. & Gord. 546; *Thayer* v. *Wellington*, 9 Allen, 283; *Sheedy* v. *Roach*, 124 Mass. 472. 2d. A trust which by its terms may be applied to objects which are not charitable in the legal sense, and to persons not defined, by name or by class, is too indefinite to be carried out. *Morice* v. *The Bishop of Durham*, 9 Ves. 399, and 10 Ves. 521; *James* v. *Allen*, 3 Meriv. 17; *Chamberlain* v. *Stearns*, 111 Mass. 267." Many cases are reviewed in the opinion that need not be mentioned here.

"That a gift should be charitable, there must be some benefit to be conferred upon or duty to be performed towards the public at large, or some part thereof, or an indefinite class of persons. A bequest for the aid or benefit of defined persons is not a charity, but a trust only, as a gift to be distributed among certain poor families named, or certain persons identified in the bequest." *Bullard* v. *Chandler*, 149 Mass. 540.

Norris v. *Thompson's Executors*, 19 N. J. Eq. 307, is a case very like the one at bar. A testator directed that his wife might by will devise a certain residue of her estate to such benevolent, religious or charitable institutions as she might think proper. There the power was conferred by will. Here by written declaration. There it was held to be void, because too indefinite and not for charity. A devise or trust for benevolent objects, not charities, is void. *Morice* v. *The Bishop of Durham*, 10 Ves. 522; *James* v. *Allen*, 3 Merivale, 17; *Ellis* v. *Selby*, 1 Myl. & Cr. 286; *Williams* v. *Kershaw*, 1 Keen, 227, note; *Kendall* v. *Grange*, 5 Beav. 300; *Vesey* v. *Jamson*, 1 Sim. & S. 69; *Brown* v. *Yeall*, 7 Ves. 50, note; *Ommanny* v. *Butcher*, Turn. & Russ. 260; *Adye* v. *Smith*, 44 Conn. 60.

In this case the plaintiff is a trustee of an executed trust, and holds the fund as a resulting trust in favor of the donor's heirs at law, and it should be paid to her administrator for distribution. This result does not call for a decree of interpleader, and the defendants' demurrer is therefore well taken.

Bill dismissed.

IN RE, REPORT OF THE RAILROAD COMMISSIONERS ON THE RAILROAD CROSSING IN THE TOWN OF OLD ORCHARD, AT TEMPLE AVENUE.

York. Opinion December 27, 1897.

Way. Easement. R. R. Crossing. R. S., c. 18, §§ 27, 36.

If a highway is located along and over a prescriptive way, the public easement in the prescriptive way becomes merged in the public easement in the highway.

The prescriptive way is extinguished by the location of the highway; and if the highway is afterwards discontinued, the easement of the public in the prescriptive way is not thereby revived or restored.

And this is true, although the town within which the highway was located never took possession of the land to build or repair the way, and failed for six years to open the highway.

Where the presiding justice accordingly ruled, as a matter of law, that the public had lost its right of crossing the track of the Boston & Maine railroad company at the place where the Old Salt-road, so-called, formerly was, and where the highway was laid out by the county commissioners, and discontinued in 1894; and it appeared that the Old Salt-road was a public way established by adverse use for over twenty years; and it also appeared that the highway which was located, and afterwards discontinued, was laid out substantially along and over the Old Salt-road, *held;* that the ruling was correct.

ON EXCEPTIONS BY BOSTON AND MAINE RAILROAD COMPANY, AND BY SILAS W. MILLIKEN AND FRANK W. NUTTER, REMONSTRANTS.

The case is stated in the opinion.

Geo. F. and Leroy Haley, for petitioners.

J. W. Symonds, D. W. Snow and C. S. Cook, for B. & M. Railroad.

So long as there is either a public or private crossing at Old Salt-road, the decision of the railroad commissioners as to the crossing at Temple Avenue has no effect; and no permission was

granted by them to cross at grade so long as the Old Salt-road exists as a public or private way.

What the railroad seeks to avoid, in this proceeding, is a serious danger to itself and to the public arising from two grade crossings within fifteen hundred feet of each other in a densely crowded place filled with a summer population at a sea side resort. The ruling may have the effect to establish these two grade crossings contrary to the intention of the railroad commissioners.

H. Fairfield and L. R. Moore, for other remonstrants.

The inequity of this matter is this: Here was a road which the land owners and dwellers had a right to use. It had not been located by town or county officers; therefore it could not be discontinued by either, nor could it be closed by the Boston & Maine Railroad. It gave all interested a way to travel. It was valuable to those living on the road and to those owning land thereon suitable for development.

A highway is located in its general line, and then is discontinued. The public and land owners continue the use of the old road, when suddenly appears this ruling of the court declaring that there is no road there. The land owner asks where his old road is, which no one had power to discontinue. He is answered that it merged into the highway. But where is the highway? Oh, that has been discontinued. Well, how am I to get to my house says A. There is no answer. The new road, a quarter of a mile away, furnishes no access. He has none. He has lost his old way and has none in its place. That's the inequity of this proceeding.

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

SAVAGE, J. From the admissions and testimony in this case, it appears that there existed in the town of Old Orchard, prior to the construction of the Boston & Maine Railroad in 1872, a way known as the "Old Salt-road." It is admitted that this way was then "a public way established by adverse use for over twenty years, twenty-five feet wide." This way was crossed by the Bos-

ton & Maine Railroad, and the railroad company "planked between and outside the rails, built and graded the approaches, and have maintained them ever since at the crossing of the railroad and the Salt-road." This crossing has been traveled by the public ever since the construction of the railroad the same as the old road had been traveled before. But the railroad commissioners have never fixed the manner and conditions of this crossing.

The county commissioners, by due proceedings which were closed in 1887, located a highway "over the general line of the Salt-road." It is admitted that "no portion of the old public way known as the Salt-road was outside of the limits of the highway as laid out by the commissioners in 1887, at the railroad crossing, but while the highway was laid out substantially over the public way known as the Salt-road, there were some places where the Salt-road in its windings was outside of the limits of the highway as laid out."

By due proceedings which were closed in 1894, the county commissioners discontinued the highway laid out by them in 1887, and located a new highway crossing the Boston & Maine Railroad at Temple Avenue, fourteen hundred and sixty-five feet from the Old Salt-road crossing.

The selectmen of Old Orchard petitioned the railroad commissioners to determine the manner and conditions of crossing the railroad track at Temple Avenue in the new highway, under the provisions of R. S., chap. 18, § 27, as amended. The railroad commissioners, it seems, were in doubt whether there is now a legal crossing at the Old Salt-road, but intimated that if such is the fact they would be unwilling to allow another crossing so near it. They assumed, however, that by the discontinuance of the old highway in 1894, there is "no legal crossing of the Boston & Maine railroad by the highway at what is known as the 'Old Salt-road'," and they "decided to grant the prayer of the petition, and report the matter to the court."

At the hearing upon the acceptance of this report of the railroad commissioners, it appeared also that the town of Old Orchard never opened or constructed the highway located in 1887; that the town

resisted all efforts to compel it to do so; that the owners of land adjoining did build or repair some portions of it; that the prescriptive way was passable at the time the highway was located over it, and that the public continued to travel upon it down to the time of the hearing, the same as it had done before the highway was located. Thereupon, the presiding justice ruled "as a matter of law, that the public has lost its right of crossing the track of the Boston & Maine Railroad Company at the place where the Old Salt-road, so-called, formerly was, and where the highway was laid out by the county commissioners and discontinued in 1894," and therefore accepted the report of the railroad commissioners.

The correctness of this ruling is the only question presented by the exceptions. We think the ruling was correct. The highway was located along the general line of the prescriptive way, and at the railroad crossing, which is the point in question, the latter way was entirely within the location. Along the prescriptive way the public had an indisputable right to travel; the public had the same right, no more, no less, in the highway. Can the public have two equivalent but separate and distinct rights of travel over the same land at the same time? We think not. The public easement in the prescriptive way was merged in the public easement in the highway. The prescriptive way was extinguished by the location of the highway. *Hancock* v. *Wentworth*, 5 Met. 446. See also *Chadwick* v. *McCausland*, 47 Maine, 342. Counsel in support of the exceptions denies the authority of *Hancock* v. *Wentworth*, supra, for the reason that the town of Old Orchard never opened or built the located highway, while in the case of *Hancock* v. *Wentworth* the way was opened and built. It is contended that the new location could not extinguish the old easement until the town took possession to build or repair, and that if the town failed for six years to open that highway, it would be discontinued by virtue of the statute, R. S., chap. 18, § 36; and that the original easement would remain in the public. In other words, it is claimed that the location would not take effect so as to extinguish the easement in the prescriptive way until the way was opened and built. We think otherwise. The location of a highway is a

definite judicial act. It is made a matter of record. The time of location is certain. The rights of the public and the duties of the town become fixed from that time. The precise time of opening and building a way is, within certain limits, a matter of municipal convenience and discretion. The opening and building adds nothing to the legal effect of the location. It is true that the payment of land damages is postponed until the land "has been entered upon and possession taken for the purpose of construction or use." But this does not control the legal effect of the location. Until possession is taken by the town, the land owner is not disturbed in the beneficial use of his property. The statute does not give the town any option about building. It is presumed that a highway duly located will be opened and built. So far as concerns the question under consideration, the way became a highway at the time of its location. It had a legal existence from that time. The location, ex proprio vigore, extinguished the prior easement. *Ballard* v. *Butler*, 30 Maine, 94; *Mussey* v. *Union Wharf*, 41 Maine, 34. Were the rule otherwise, it may well be questioned whether, in a case like this, where the way is actually open and passable, and is used by the public for the purposes of travel at the time of location, any formal technical act of opening is necessary. *Heald* v. *Moore*, 79 Maine, 271.

It is contended that the result at which we have arrived works a hardship upon the public as well as upon the owners of the land adjoining the prescriptive way; that whereas before the various proceedings of the county commissioners, both the public and the land owners had certain rights in the old way, now they have none, in either the old or the new. Very true. But it is to be presumed that those who were injured in their property by either the location or discontinuance of the highway have received damages therefor. *Heald* v. *Moore*, supra. And the public, by which, in its organized capacity, the highway was first located and then discontinued, will be supposed to be content with such avenues for travel as its own tribunals have afforded.

It is the opinion of the court that the exceptions should be overruled.

Exceptions overruled.

ALMIRA BARTLETT *vs.* JOHN BAYBUTT.

Kennebec. Opinion December 31, 1897.

Superior Court of Kennebec County. Jurisdiction. Trespass q. c. R. S., c. 77, § 67; Stat. 1891, c. 104.

The Superior Court for Kennebec county has neither original nor appellate jurisdiction of an action of trespass quare clausum, irrespective of the question whether the title to real estate is involved or not.

AGREED STATEMENT.

The facts are stated in the opinion.

The statute c. 104 of Act of 1891, under which the defendant claimed that the Superior Court for Kennebec county had jurisdiction of his appeal to that court is as follows:—

"Within said county, said superior court has exclusive jurisdiction of civil appeals from municipal and police courts, and trial justices, exclusive original jurisdiction of actions of scire facias on judgments and recognizances not exceeding five hundred dollars; of bastardy trials, and of all other civil actions at law not exclusively cognizable by municipal and police courts, and trial justices, where the damages demanded do not exceed five hundred dollars, except complaint for flowage, real actions, and actions of trespass quare clausum; and concurrent original jurisdiction of proceedings in habeas corpus, and libels for divorce."

C. F. Johnson, for plaintiff.

S. S. and F. E. Brown, for defendant.

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

STROUT, J. The question presented is whether the Superior Court for Kennebec county had jurisdiction of the case.

The action is trespass quare clausum, brought before the Municipal court of Waterville, where judgment was rendered for plaintiff. Appeal was taken and entered in the Superior Court. No

question of title to real estate was involved. Chapter 104, of the laws of 1891, amending § 67, of c. 77 of the Revised Statutes, provides that within Kennebec county the Superior Court should have "exclusive jurisdiction of civil appeals from municipal and police courts and trial justices," and certain other exclusive and concurrent jurisdiction, but excepted "complaints for flowage, real actions, and actions of trespass quare clausum." The same section which conferred jurisdiction of civil appeals, excepted from the jurisdiction actions of trespass quare clausum, eo nomine, irrespective of whether the title to real estate was in question or not.

This exception must be applied to civil appeals in actions of trespass quare clausum. The Superior Court has no jurisdiction of that class of actions. Any other construction would involve the absurdity of giving that court jurisdiction of actions of trespass quare clausum which came there by appeal, and denying the jurisdiction if the action was originally brought there. It was the manifest intention of the legislature, that the Superior Court should not have jurisdiction of any action of that kind.

Appeal dismissed with costs.

BENJAMIN D. BOWDEN *vs.* MICHAEL DUGAN.

Somerset. Opinion January 1, 1898.

Lien on Animals. Mortgagee. Tender. Trover. R. S., c. 91, § 41.

A mortgagee of animals may subject them to a lien for feeding or sheltering them under R. S., c. 91, § 41, by his consent.

The defendant, a livery stable keeper, claimed to hold a horse against the plaintiff, who had a chattel mortgage thereon, by virtue of the statute R. S., c. 91, § 41, for its keeping, etc. The plaintiff denied that the defendant had such a lien because the feeding and sheltering were not furnished "by virtue of a contract with or by consent of the owner." It appeared that the horse had been left with the defendant by the mortgagor on January 18, 1896, and that subsequently the defendant notified the plaintiff of his claim. On March 9, the plaintiff replied: "The horse is holden for his feed, you can proceed legally to get your pay from the horse." *Held;* that the horse was there-

after held by the defendant by virtue of the plaintiff's consent; and that the defendant had a valid lien for all food and shelter after March 9; but that the defendant acquired no lien, as against the plaintiff, before that day.

The defendant refused to surrender the horse to the plaintiff until the whole bill for its keeping was paid, including the time for which he had no lien as well as that for which he had a lien. *Held;* that the plaintiff was thereby excused from making a tender of the amount secured by the valid lien, and could maintain an action of trover without proof of such tender.

On Report.

The case is stated in the opinion.

By agreement of the parties the law court was to determine the amount of damages, if judgment should be rendered in favor of the plaintiff.

J. W. Manson and G. H. Morse, for plaintiff.

No lien at common law: *Allen* v. *Ham*, 63 Maine, 532. Under the statute no lien except by mortgagee's consent; and he is considered, in such cases, to be the owner. *Small* v. *Robinson*, 69 Maine, 425; *Howes* v. *Newcomb*, 146 Mass. 76. Consent may be either express or implied; but it means something more than knowledge. *Hayes* v. *Fessenden*, 106 Mass. 228; *O'Conner* v. *Hurley*, 147 Mass. 147. A mortgagor of chattels cannot give a lien upon them as against a mortgagee without his implied or express consent. *Field* v. *Roosa*, 159 Mass. 132; *Ingalls* v. *Vance*, 61 Vt. 582. Defendant made his claim of a lien wrongful for two reasons; first, because he had no claim until plaintiff knew the horse was in his stable, and second, because the price demanded was $2.00 per day, which was more than was due him according to his testimony given afterwards.

Lien lost: *Hamilton* v. *McLaughlin*, 145 Mass. 20.

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

The horse was fed and sheltered by consent of the owner, the mortgagee being considered the owner. *Howes* v. *Newcomb*, 146 Mass. 76. In that case the court say, that if upon all the circumstances surrounding the transaction indicating the expectation of the mortgagee as to the management of the mortgaged horses by the mortgagor, he may be presumed to have understood that the

mortgagor would take them to a stable keeper to be boarded, and no objection was made, such consent should be implied.

In *Lynde* v. *Parker*, 155 Mass. 481, the following instructions were sustained: "In order that the defendant may have a valid lien as against this plaintiff for the keeping of the horse, the defendant must show, by the fair preponderance of the evidence, that the horse was boarded by its owner at the defendant's stable by the consent, express or implied, of the plaintiff; that if the plaintiff believed, and had reason to believe, that the owner of the horse was not himself keeping the horse, but was boarding him at some livery stable in Malden, and the plaintiff made no objection, the jury would be authorized to find (it not being in dispute that the owner was boarding the horse at the defendant's livery stable) that the horse was boarded at the defendant's stable in Malden by the consent of the plaintiff, even although the plaintiff did not know at which particular livery stable in Malden the horse was being boarded."

Counsel also cited:—*Hilton* v. *Merrill*, 106 Mass. 528; *Davis* v. *Humphrey*, 112 Mass. 309; *Hammond* v. *Danielson*, 126 Mass. 294.

A rule as to implied consent as strong as that of the Massachusetts court is not needed in order for the defendant to obtain judgment in this case.

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

SAVAGE, J. Trover by plaintiff, a mortgagee, against defendant, a livery stable keeper, for the conversion of a horse. One Redman, the mortgagor, left the horse in question with the defendant, January 18, 1896. Subsequently, the defendant learned that the plaintiff was owner or mortgagee of the horse, and wrote to him (date not certain) as follows:—

"Mr. Bowden. We have your horse here with about $20.00 board due. Call for horse any time. Pay what due. Mr. Redman left him here."

The defendant claims also to have written plaintiff at another time, and to have telephoned to him. About March 9, 1896, the plaintiff replied as follows:—

"Mr. Dugan.

Dear Sir:

"The horse left with you as you say I presume I hold a bill of sale on to secure the payment of a note yet due so I cannot legally take him but as the horse is holden for his feed you can proceed legally to get your pay from the horse."

Subsequently, in March or April, and again in July, prior to the purchase of the writ, the plaintiff made demands on the defendant for the horse, and the defendant refused to deliver him to the plaintiff. Thereupon this action was brought, and we are urged to hold that such refusal to deliver was a conversion.

The defendant claimed to hold the horse against the plaintiff by virtue of a lien. He bases his claim upon R. S., ch. 91, § 41: "Whoever pastures, feeds or shelters animals by virtue of a contract with or by consent of the owner; has a lien thereon for the amount due for such pasturing, feeding or sheltering," etc. The plaintiff denies that the defendant had a lien, and says that the defendant's claim for feeding and sheltering the horse did not arise "by virtue of a contract with or by consent of the owner," in this case, the plaintiff himself. We think otherwise. We think, after the plaintiff wrote to the defendant, March 9, "the horse is holden for his feed, you can proceed legally to get your pay from the horse," that the horse was held by the defendant by virtue of the "consent" of the plaintiff, mortgagee, qua owner; and that the defendant had a valid lien for all food and shelter furnished after March 9. We are also of the opinion that the defendant acquired no lien, as against the plaintiff, for food and shelter furnished before that day.

At this point, the plaintiff claims that the defendant waived or lost his lien for keeping and sheltering the horse after March 9, by refusing to surrender him, on demand, without the payment also of the sum due for keeping and sheltering before March 9. On the

other hand, the defendant claims that this action is not maintainable without proof of a tender of what was reasonably due for the keeping and sheltering for which he had a valid lien. And this is the issue.

What are the facts? It is not claimed that any tender was made. One witness for the plaintiff testified that in the month of March, or the first of April, 1896, he went to see the defendant in the interest of the plaintiff; that he told defendant he had come to get the horse; that defendant said he would give up the horse if witness would pay what was due, "some forty odd dollars;" that "he should not give the horse up to any one till the bill was paid." The amount of the "bill" makes it clear that it covered the entire time from January 18. Another witness testified that defendant said, on the same occasion, "he should hang on to the horse until he got the amount due," "he would not give it up to any one unless this amount was paid." The defendant says he told plaintiff's agent that he "would keep the horse till somebody paid his board." We are satisfied from the evidence that defendant's "bill" was for the whole time, both before and after March 9; that he insisted upon the payment of that for which he had no lien as well as that for which he had a lien, and that he refused to surrender the horse until the whole bill was paid.

It is the opinion of the court that, by this refusal, the plaintiff was excused from making tender of the amount secured by the valid lien, and can maintain this action without proof of such tender. The law, in a case like this, requires no useless ceremonies. The plaintiff was not compelled to tender what the defendant said he would not receive. *Mattocks* v. *Young*, 66 Maine, 459; *Brown* v. *Lawton*, 87 Maine, 83. The defendant "made no distinction between what occurred before and what occurred after the notice to the plaintiff, but demanded the whole in one sum and as one debt." *Hamilton* v. *McLaughlin*, 145 Mass. 20.

The language of some of the cases seems to indicate that if a person who has a lien upon property sets up a claim to it, distinct from and independent of his lien, he will be deemed to have waived his lien. *Munson* v. *Porter*, 63 Iowa, 453; *Jones* v. *Tarleton*, 9

M. & W. 675; *Kerford* v. *Mondel*, 5 H. & N. 931. But a rule which is sufficient for the proper disposition of this case, and which is satisfactory to us, is that "the demand for the whole as one debt, and the refusal to deliver the property unless the whole was paid, was a refusal to deliver the property upon the payment of the amount which had accrued after the notice, and to accept a tender of that, and rendered a tender of it unnecessary." *Hamilton* v. *McLaughlin*, supra, and cases cited. The last case cited is, in all essential particulars, precisely like the case at bar.

The defense fails. What were the damages? The testimony respecting the value of the horse was somewhat conflicting. Upon the whole, we think the entry should be,

Judgment for plaintiff for forty dollars.

WALTER B. GOULD *vs.* JOHN H. FORD, and others.

Penobscot. Opinion January 1, 1898.

Poor Debtor. Bond. Approval. Disclosure. Fees. Adjournment. R. S., c. 113, §§ 5, 24, 28, 30, 42.

When the justices approving a poor debtor's bond are not selected according to the directions of the statute, it cannot be treated as a statute bond, and can only be held good at common law.

There is no provision of the statute which makes the payment of fees to the justices, or any formal organization, a pre-requisite condition to the exercise of the power to adjourn, expressly conferred upon the justices sitting in a poor debtor disclosure by R. S., chap. 113, §§ 5, 28 and 42.

Where a citation was operative in bringing all the parties interested in a poor debtor disclosure to the place of disclosure at the time appointed in the forenoon, and in procuring the attendance of the justices requisite to constitute the court, *held;* that an adjournment was sufficiently regular that secured the reassembling of the court and the reappearance of the parties and their attorneys at the time specified for an adjourned session in the afternoon session. *Also;* it appearing that it was done by unanimous consent of all present, *held;* that no injustice or inconvenience was occasioned by it and there is no substantial reason for declaring it irregular or unauthorized.

In fulfilling the conditions of a poor debtor bond, good only at common law, the debtor is not required to perform any other of the statute provisions than those named in the bond.

In this case the court *holds*, that the debtor submitted himself to examination before two justices of the peace and of the quorum, and took the oath prescribed, as the result of a legal citation for that purpose; and that he has performed one of the alternative conditions of his bond according to its terms and requirements.

On Report.

This was an action on a six months poor debtor bond, the plaintiff claiming a forfeiture because the poor debtor's oath was administered by two justices who, as is claimed, had no jurisdiction to grant to the principal debtor his discharge. The following facts were found by the justice presiding, the case having been referred to the court:—

The citation, to appear at the time and place of disclosure, was duly served upon the creditor, who appeared accordingly with counsel and a justice who was selected by him to act for the purpose of such disclosure.

After the parties got together within the hour after the time prescribed by the notice, there being present the debtor and creditor and their respective counsel, and also the two justices selected by the parties, and after an examination of the citation and the officer's return thereon, some one remarked that the funeral of the late Judge Dutton would occur at eleven o'clock (the persons above named having met at ten o'clock) and that the members of the bar were invited to attend, when it was remarked that an adjournment might be made for that purpose, after an organization was effected. Thereupon the attorney for the debtor said "we will consider this an organization," and no one objected to it or said a word to the contrary. And then the attorney for the creditor remarked that "the counsel for the parties had the power to assent to an adjournment and that he was always ready to adjourn either for the marriage or burial of a brother lawyer"; and so without further words or action, the disclosure was adjourned until two o'clock in the afternoon for the purpose of attending the funeral.

Promptly at two o'clock all the same parties were present at the

place where they met in the forenoon, excepting the creditor and his attorney, who however came in about thirty minutes later.

On their reassembling, the justice for the creditor was paid his fees and those of the justice for the debtor were arranged satisfactorily by the debtor's attorney, and the proceedings were announced to be in readiness for hearing the disclosure, when the attorney for the creditor announced that the justices had no jurisdiction in the premises, in his opinion, because the disclosure was adjourned in the morning without any authority therefor before the court of disclosure was duly organized; and he withdrew his justice and said he was not authorized to act for him, and that the proceedings were in his judgment utterly void. Whereupon the justice for the creditor, under the advice of the creditor's attorney, declined to further act, and refused to pay back the fees which had been prepaid to him. And thereupon both the creditor and counsel, as well as the justice selected by the creditor, went away.

After the creditor's attorney had withdrawn the creditor's magistrate and refused to participate in the hearing, the debtor proceeded to the house of a deputy sheriff of the county, a resident of Ellsworth, but found that he was in Bar Harbor, and would not return until the next day, and as there was no other deputy then living in Ellsworth who could be called in to select a new justice, the justice selected by the debtor adjourned the proceedings until the next forenoon at ten o'clock A. M., when the deputy sheriff's presence was secured, and he selected a justice for the creditor; when the two justices thus constituting the court heard the disclosure of the debtor, administered the statutory oath, and granted him a discharge; the proceedings being conducted as indicated by the records and papers put in evidence at the trial.

The defense pleaded the disclosure and discharge of the debtor as regularly obtained; and claimed that the damages should be chancered and that actual damages, or nominal damages only, be recovered, if the actual disclosure and discharge be irregular in any way, and the court should find that the plaintiff was entitled to recover any damages.

A. W. Weatherbee, for plaintiff.

M. Laughlin and D. E. Hurley, for defendants.

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

WHITEHOUSE, J. This is an action on a poor debtor's bond given to obtain the principal defendant's release from arrest on execution.

It is provided by sections 24 and 42 of chap. 113 R. S., that such a bond may be approved in writing by two justices of the peace and quorum, one to be selected by the debtor and the other by the creditor, his agent or attorney, and in the event of the creditor's neglect or refusal to make a selection, one may be selected by the officer.

In this case the sureties on the bond appear to have been approved in writing by two "disinterested justices of the peace and of the quorum," but there is nothing in their certificate of approval or elsewhere in the bond to indicate by whom either of these justices was selected. As it does not appear that the justices approving the bond were selected according to the directions of the statute, it cannot be treated as a statute bond, and it can only be held good at common law. *Smith* v. *Brown*, 61 Maine, 70, and cases cited. It has, indeed, been contended with much force of reason, that the act of the creditor in accepting such a bond and bringing a suit upon it, ought to be deemed a waiver of the statutory method of approval, or sufficient to estop the creditor from asserting that it is not a statute bond; but in this state the court appears to have adopted the opposite view, and the question must now be deemed res judicata.

One of the alternative conditions of this bond is that if the debtor within six months from its execution "shall cite the creditor before two justices of the peace and of the quorum and submit himself for examination agreeably to chap. 113 of the Revised Statutes, and take the oath prescribed in the thirtieth section of that chapter, then this obligation to be void."

It is contended in behalf of the defense that, upon the statement of facts and records submitted in this case, the debtor is shown to have performed this condition of the bond according to its precise terms and requirements.

It appears from the records in the case that, within the six months named in the bond, the debtor duly cited the creditor before two justices of the peace and of the quorum, submitted himself to examination, "made a full disclosure of the actual state of his affairs and of all his property, rights and credits, answered all proper interrogatories in regard to the same and complied with all other requirements of the statute regulating poor debtors," and thereupon took the oath prescribed in section 30 of chap. 113 of the Revised Statutes. But it is argued on the part of the plaintiff that, although this record would seem to show a full compliance with the literal requirements of the bond, the justices who signed the record had no jurisdiction of the matter at the time they heard the disclosure and administered the oath, and that these proceedings were therefore void.

It appears from the statement of facts that the time fixed in the citation for the examination was ten o'clock in the forenoon, and that within an hour after that time the debtor and the creditor both appeared with their respective counsel, and each selected and procured the attendance of a justice to hear the disclosure; that "after an examination of the citation and the officer's return thereon" but before the justices had actually received their fees for services, by the unanimous consent of parties, attorneys and justices, the disclosure was adjourned until two o'clock in the afternoon of the same day for the purpose of attending the funeral of a member of the bar; that at the time and place to which the adjournment was taken, the parties and their attorneys and the justices selected were again present, the appropriate fee was paid to the justice selected by the creditor and payment to the other justice duly guaranteed. But the attorney for the creditor then objected to the jurisdiction of the justices on the ground that the adjournment from ten o'clock until two was taken before the court was duly organized and was therefore without authority in law; and under the advice of the creditor's attorney, the justice selected by the creditor refused to act further, and with the creditor and his attorney withdrew from the place of the hearing. Thereupon the justice selected by the debtor adjourned the proceedings until ten

o'clock in the forenoon of the next day, when a justice for the creditor was selected by the officer in accordance with § 42 c. 113, R. S., and the disclosure heard and the oath administered by the two justices then constituting the court, as already stated.

Section 28 of c. 113, R. S., declares that "the examination shall be before two disinterested justices of the peace and quorum . . . . who may adjourn as provided in section five, and shall examine the citation and return, and if found correct shall examine the debtor on oath," etc. Section five provides that the justices may adjourn from time to time if they see cause, and if either of them is not present at the adjournment, the other may adjourn to another time."

It will be perceived that in section 28, the mention of the right to "adjourn as provided in section five" precedes the specification of the duty to "examine the citation"; but in this case the only examination of the citation made by these justices, or before these justices, appears to have been made immediately after their selection on the first morning, and before the first adjournment. The justices then present, selected by the debtor and creditor as required by the statute, were "disinterested justices of the peace and of the quorum," legally qualified and competent to act in the matter. There is no provision of the statute which makes the payment of fees to the justices or any formal organization a pre-requisite condition to the exercise of the power to adjourn, expressly conferred upon "the justices" by sections five, twenty-eight and forty-two. It is entirely competent for the justices to assent to delay in the arrangements for the payment of their fees, or to waive such payment altogether. In this case the justice selected by the creditor promptly appeared at the time and place to which the adjournment was had and accepted the fees tendered him. The creditor and his attorney, and the justice selected by the debtor were also present, and the debtor again appeared to make his disclosure. The citation had been operative in bringing all the parties interested to the place of disclosure at the time appointed therefor in the forenoon and in procuring the attendance of the justices requisite to constitute the court. The adjournment

was sufficiently regular to be effectual in securing the reassembling of the court and the reappearance of the parties and their attorneys at the time specified for the afternoon session. The "justices" regularly selected and legally in attendance adjourned as they were authorized to do by the express language of the statute. It was done by unanimous consent of all present. No injustice or inconvenience was occasioned by it, and no substantial reason has been suggested for declaring it irregular and unauthorized.

The afternoon session must therefore be deemed a legal one. But under the advice of the creditor's attorney the justice chosen by the creditor refused to participate in the examination and withdrew from the room. It would seem that the contingency specified in section 42, chap. 113, had then arisen and that the creditor then, "neglected and refused to procure the attendance of a justice." If so, the justice chosen by the debtor was then authorized to adjourn not exceeding twenty-four hours to enable the debtor to procure the attendance of another justice. This course was pursued and the disclosure proceeded to the final result already stated. It thus appears that the debtor submitted himself to examination before two justices of the peace and of the quorum and took the oath prescribed, as the result of a legal citation for that purpose.

It is unnecessary to determine whether upon the doctrine respecting the withdrawal of one of the justices, laid down by a majority of the court in *Ross* v. *Berry*, 49 Maine, 434, this proceeding could have been held a legal performance of the condition of the defendant's bond, if it had been a statute bond; for it has been seen that the bond in suit is not a statute bond and is only good at common law. And it has been held in numerous cases in this state that in fulfilling the conditions of a poor debtor's bond, which is good only at common law, the debtor is not required to perform any other of the statute provisions than those named in the bond. *Clark* v. *Metcalf*, 38 Maine, 122; *Flowers* v. *Flowers*, 45 Maine, 459; *Bank* v. *Lord*, 49 Maine, 99; *Ross* v. *Berry*, Id. 434; *Bell* v. *Furbush*, 56 Maine, 178; *Smith* v. *Brown*, 61 Maine, 70.

In the case at bar, there was full compliance on the part of the debtor with one of the alternative conditions of a common law

bond; and the language of the court in *Bell* v. *Furbush*, supra, is peculiarly applicable here: "The debtor did cite the creditor, did submit himself to examination in accordance with the terms of his bond, before two justices and take the required oath; and the bond not being a statute bond, it matters not according to the cases above cited that the requirements of the statute were disregarded in their selection and proceedings. It is a satisfaction to remark that there are no apparent equities with the creditor. He declined to hear the proffered disclosure, and sought to work a forfeiture of the bond by a resort to technicalities. For want of technical accuracy in the outset in the taking of his bond, the effort proves unavailing."

Judgment for defendants.

JOHN F. CUSICK *vs.* RALPH W. BARTLETT.

Cumberland. Opinion January 1, 1898.

Corporation. Directors. Stock. Unpaid Subscription. Trust. Estoppel.

A director must exercise the power with which he is intrusted for the common interest of all the stockholders, and not for his private interest.

A director may sell his stock freely. But a board of directors may not sell all the property and business of the corporation under the guise of a sale of their stock, and thereby receive the entire proceeds of the sale of the corporate property to their own private use.

In an action to recover an unpaid subscription to the capital stock of a corporation, organized under the laws of Maine, the plaintiff, a director in the corporation, alleging that the claim (no certificate of stock having been issued) had been assigned to him by the corporation at the same time of a sale by its directors of all the business and property of the corporation to another company, and the proceeds of the sale not being paid into the treasury of the corporation but received by the plaintiff for his own benefit,—and the defendant getting nothing, *held;* that the plaintiff's acts were in entire disregard of the rights of the defendant as a stockholder, and as to the defendant, they were fraudulent; *also;* that the claim assigned cannot be enforced, and that the plaintiff gained no rights against the defendant by virtue of the assignment.

In this case, the directors and treasurer of the corporation owned all the stock that had been issued. *Held;* that while the principal trade was a sale, in form, of all the issued stock to another company, it was, in substance, the sale of all the business and property of the corporation, (except the choses in action assigned to the plaintiff,) accompanied with a delivery of all the corporate property to the purchaser.

The court finds that, for the following among other reasons, upon the facts reported, there was a sale of all the property and business of a corporation, rather than a mere transfer of its capital stock:—The purchaser understood that it was purchasing all the stock of the corporation, and as such purchaser took and used accordingly all the property of the corporation; it obtained the good-will and trade of the corporation and carried out all its contracts; it made no further use of the corporation, whose organization, business and books were not kept up; the treasurer, the plaintiff, after the sale did not know what had become of the property of the corporation; and failed to pay into the treasury the proceeds of the sale, a portion of which arose from a sale of the plaintiff's other property which he was thereby enabled to sell at the same time.

Held; that the defendant, not being cognizant of the proposed trade for the sale of the corporation's assets, cannot be estopped from avoiding the assignment on the ground that, having a full knowledge of the facts, he allowed the corporation to receive the benefits of the contract.

On Report.

This was an action of assumpsit to recover the sum of two thousand dollars. The declaration sets out in substance that on the first day of June, 1895, the defendant, Ralph W. Bartlett, subscribed for thirty shares of the capital stock of the New England Milk Company, which thirty shares amounted at par value to three thousand dollars; that the defendant only paid one thousand dollars on this subscription, leaving a balance unpaid of two thousand dollars; that on the ninth of November, 1896, the said New England Milk Company for value received assigned the defendant's unpaid subscription for stock to the plaintiff, John F. Cusick, and that by virtue of this assignment the defendant became liable and promised to pay to the plaintiff the sum of two thousand dollars on demand.

To the plaintiff's declaration the defendant pleaded the general issue, with a brief statement of special matters of defense, and filed as a set-off a claim against the corporation.

A summary of the evidence reported is as follows:—

For some time previous to June 1st, 1895, John F. Cusick, the plaintiff, had been a student in the office of Ralph W. Bartlett, the defendant, a Boston attorney. There was at this time in Boston a combination of milk companies called the New England Dairy Association and more commonly called the Boston Milk Trust. A large part of the business of this Boston Milk Trust was bringing in milk from the country and selling it to local dealers, both wholesale and retail, in the city. Cusick, previous to his entering Mr. Bartlett's office, had for many years been engaged in the milk business in Boston, and while he was studying in the defendant's office, the matter of establishing a business in competition with the milk trust was frequently talked over, and sometime in May, 1895, it was practically decided by the plaintiff and defendant to start such a business. Cusick, the plaintiff, went to Connecticut to make arrangements with farmers for a supply of milk, and it being necessary, in order that he might have credit with the farmers, that money should be on deposit, Mr. Bartlett gave Mr. Cusick on May 31st, 1895, the sum of one thousand dollars to deposit for this purpose, and Cusick putting with it three thousand dollars of his own, deposited the whole four thousand dollars in a Connecticut bank under the name New England Milk Company.

On June 1st, 1895, Mr. Bartlett, Mr. Cusick and one James O'Bierne, a friend of Mr. Cusick's, came to Portland and organized a corporation, under the laws of Maine, called the New England Milk Company, the object of the corporation being to carry on the business of milk contractors in and about Boston. The capital stock of the company was fixed at ten thousand dollars, divided into one hundred shares, with a par value of one hundred dollars each. At the meeting of incorporators a subscription list was opened. The plaintiff, John F. Cusick, subscribed for thirty shares of stock, amounting at par value to three thousand dollars, the defendant subscribed for the same amount, and Mr. O'Bierne subscribed for ten shares. The three thousand dollars deposited by Mr. Cusick in the bank was considered a payment of his subscription, and the one thousand dollars of Mr. Bartlett's deposited in the bank was

considered a part payment of his subscription. The usual business was transacted at this organization meeting. A code of by-laws was adopted, and a board of officers elected as follows:—President, John F. Cusick, the plaintiff; treasurer, Ralph W. Bartlett, the defendant; and directors, John F. Cusick, Ralph W. Bartlett and James O'Bierne. Mr. Cusick was to act as business manager of the concern, and the three persons above named were the only persons interested.

The enterprise was very slow in getting under way. The idea was to have a special car run from Connecticut into Boston every morning with the milk. This car could not be obtained at once. All the milk, that came in, came in as freight on other cars and was all used by Mr. Cusick in his private business. The business was in such a confused state that Mr. Cusick himself could not tell whether it was done in the name of the New England Milk Company or in his own name. Mr. Bartlett was not satisfied with this confused state of affairs. There were frequent disputes between the parties interested, and especially between Mr. Cusick and Mr. Bartlett; and at a director's meeting, held on September 18th, 1895, Mr. Bartlett becoming dissatisfied with the way the company was managed, and with the whole matter, tendered his resignation, and announced his determination to withdraw absolutely from the company. His resignation was tabled, and the meeting adjourned with an agreement between Mr. Cusick, Mr. O'Bierne and Mr. Bartlett that they would meet again in the evening and talk the matter over. In the evening they met as agreed. The testimony as to what took place at this meeting is conflicting. Bartlett and another witness present both testify that he still insisted upon withdrawing from the company, and refused absolutely to go on with it in any capacity. They say an understanding was arrived at, and agreed upon by Mr. Cusick, Mr. O'Bierne and Mr. Bartlett that Mr. Bartlett might withdraw from the company. No stock had ever been issued to Mr. Bartlett up to this time, although stock had been issued to Mr. Cusick and Mr. O'Bierne. It was claimed that Mr. Bartlett agreed not to call for any stock in the company, and the one thousand dollars that he had paid in was to

be considered a loan to be paid back to him. Mr. Bartlett says the balance of his subscription was not to be demanded of him as a subscription, but he agreed that, if it was needed, he would loan it to the company upon notes indorsed by Cusick and O'Bierne, and he was to continue to work with the company as treasurer and help them along until some one could be found to take his place.

Mr. Bartlett did not see the plaintiff again until the latter part of December, 1895. After the director's meeting of Sept. 18th, 1895, above referred to, Mr. Cusick, the plaintiff, went to Connecticut to see about obtaining milk, was taken sick with typhoid fever and did not get out to attend to business until late in December. In the meantime Mr. Bartlett, although he was unfamiliar with the milk business, kept up the work and did all that he could to keep the company going. He testifies that he considered, and understood, that, as between himself, Mr. Cusick and Mr. O'Bierne, who were the only persons interested in the company, he was released and out of the company, but no one having been found to fill his place, he kept at work as treasurer and in fact ran and managed the whole business during Mr. Cusick's illness.

When Mr. Cusick did get out in December, Mr. Bartlett expected that the matter of his leaving the company would be arranged as talked in September. But Mr. Cusick and Mr. O'Bierne then took an entirely different stand. At times they would deny that they had ever reached any agreement with him about his withdrawal from the company. Sometimes they would treat him as a stockholder, and at other times as though he had no interest whatever in the company, so that he could not tell what their real position was. He continued, however, to draw checks as treasurer, and to act for the company in this capacity until shortly after July 21st, 1896. Up to this time no one had been interested in the company except Mr. Cusick, Mr. Bartlett and Mr. O'Bierne. On July 20th, 1896, Mr. Cusick transferred a share of his stock to his brother, W. H. Cusick, and on July 21st, at an adjournment of the annual meeting of the stockholders, Mr. Bartlett's name was dropped from the board of officers and a new board was elected as follows:—James O'Bierne, president; John

F. Cusick, the plaintiff, treasurer; and James O'Bierne, John F. Cusick and W. H. Cusick, directors. From this time on Bartlett had nothing further to do with the company's affairs except that in some matters he continued to act as counsel for it.

About November 1st, 1896, it came indirectly, and by chance, to Mr. Bartlett's attention that certain negotiations were being carried on between Mr. Cusick, the plaintiff, and one George O. Whiting, the head man of the Boston Milk Trust, in regard to the disposal of the property and business of the New England Milk Company. Mr. Bartlett inquired of Mr. Cusick in regard to the matter and was told that there were no such negotiations pending; that the only negotiations Mr. Cusick had on hand were for the sale of his private milk route, but upon further inquiry Mr. Bartlett's suspicions were confirmed. George O. Whiting, above-named, and F. G. Holcombe, attorney for the Elm Farm Milk Company, one of the corporations in the Milk Trust, testified that during the month of September and October the Elm Farm Milk Company, through George O. Whiting and Mr. Holcombe, were negotiating with Mr. Cusick in regard to the purchase, as they expressed it, of the New England Milk Company. They desired to buy, and proposed to buy, the property, assets, business, good-will, and everything else of the New England Milk Company. At the same time they were incidentally considering the purchase of Mr. Cusick's private milk route,—Mr. Cusick finding it necessary to dispose of this route if he was going to part company with the New England Milk Company. The purchase of this private milk route was apparently made one of the conditions, or part of, the sale of the New England Milk Company.

Mr. Cusick and Mr. Whiting went over and estimated the value of the private milk route, and of the property and business of the New England Milk Company, and, as Mr. Whiting testifies, agreed upon thirteen thousand dollars as a lump sum for the whole business. Mr. Whiting, however, insisted that he would not take the New England Milk Company unless it was free from debt. The proposition of Mr. Whiting and the Elm Farm Milk Company was to buy the property and business of the New England Milk

Company. This was the original plan, but it was found undesirable by Mr. Cusick to go through the "machinery" of getting authority from the stockholders of his company for a sale of the company's property and business. He decided not to try to transfer the property of the company to the Elm Farm Milk Company, but he represented to Mr. Whiting and to Mr. Holcombe that there were only seventy shares of stock issued, or that could be issued by the New England Milk Company, and that this stock was all held by himself, Mr. O'Bierne and his brother, Mr. W. H. Cusick; that instead of transferring the property and business to the Elm Farm Milk Company they would transfer all of this stock, and in that way the Elm Farm Milk Company would be taking the whole concern. The lump sum of thirteen thousand dollars, which had been agreed upon as the price for the property and business of the New England Milk Company, and Mr. Cusick's private milk route, was then divided on paper into seven thousand dollars for the seventy shares of stock of the New England Milk Company held by Mr. Cusick and his friends, and six thousand dollars for Mr. Cusick's private milk route. As has already been stated, one of the conditions of the trade was that all of the debts of the New England Milk Company were to be assumed by Mr. Cusick, and a bond was taken from him by the Elm Farm Milk Company to the effect that he would pay these debts, and the last act of the three directors of the New England Milk Company, Mr. Cusick, Mr. O'Bierne and Mr. W. H. Cusick, who were all interested in this transaction, was to hold a directors' meeting and authorize Mr. O'Bierne, the president of the company, and Wm. H. Cusick, a director, to effect for the company, and in its name, a general assignment to John F. Cusick of all the bills receivable of the New England Milk Company upon consideration that he pay the company's indebtedness. According to Mr. Cusick's testimony this agreement, or assignment, was part and parcel of the deal of selling out the company. The contract was executed in an unusual and peculiar way. The by-laws of the company provided that no contracts, notes or other obligations should be valid unless signed by the president and treasurer. This contract or assignment of

the bills receivable to Mr. Cusick, which is the assignment upon which the plaintiff in this case bases his right to recover, was not executed by the president and treasurer, as required by the by-laws, but by the president and W. H. Cusick, a director. No ratification of the assignment, or of its execution, was ever had in any way by the corporation or its stockholders, or by any board of directors other than the directors who signed the contract, and who were all interested personally in the deal.

Through all these negotiations with the Elm Farm Milk Company, the testimony of Mr. Holcombe and Mr. Whiting is, that Cusick never told them that Mr. Bartlett was in any way interested in the stock of the New England Milk Company, or that he was owing the company any balance of an unpaid subscription for stock. On the contrary, they say that Mr. Cusick represented that the seventy shares of stock which he, Mr. O'Bierne and W. H. Cusick held, comprised all of the stock of the company outstanding, and that by the purchase of it, the Elm Farm Milk Company would be acquiring the New England Milk Company as thoroughly as by a transfer of its property. Mr. Bartlett was not recognized in any way as a stockholder in the New England Milk Company throughout these dealings and this transaction. He knew in the beginning that such negotiations were on foot, although Mr. Cusick attempted to conceal this fact from him by stating that the only deal on foot was the sale of his private milk route. This was not disputed by Mr. Cusick. A few days later Mr. Bartlett inquired of Mr. Holcombe what had been done and Mr. Holcombe told him that he did not think the deal would go through. He did not know that the deal had been carried out until a month or more after it was accomplished, when he learned of the matter accidentally; and at about the same time he learned of the accomplishment of the deal, Mr. Cusick began this proceeding to collect by virtue of the assignment, obtained as above stated, two thousand dollars which he claimed was unpaid on Mr. Bartlett's subscription.

Robert Treat Whitehouse, for plaintiff.

The subscription agreement was legal in form. *Ken. & Port. R. R. Co.* v. *Jarvis*, 34 Maine, 360; *Ken. & Port. R. R. Co.* v.

Palmer, 34 Maine, 366; *Penob. R. R. Co.* v. *Dummer*, 40 Maine, 172; *Skowhegan, etc., R. R. Co.* v. *Kinsman*, 77 Maine, 320.

All conditions prescribed by law were complied with. Morawetz, § 56; *Penob. R. R. Co.* v. *Dummer*, 40 Maine, 173; *Chaffin* v. *Cummings*, 37 Maine, 76.

It was not necessary for certificates to be issued to the defendant in order to render him liable as a stockholder. Morawetz, § 56; *Chaffin* v. *Cummings*, 37 Maine, 76.

Defendant's evidence wholly fails to establish facts claimed by him in regard to release. Even if there had been a release it was waived by the defendant. *Penob. R. R. Co.* v. *Dunn*, 39 Maine, 587.

The assignment is not avoided by the failure of the treasurer to sign it as required by the by-laws. The tendency of modern courts is not to regard themselves as bound by provision in statutes, charters or by-laws prescribing that corporate contracts shall be signed by certain officers. Cook on Stock, etc., § 325.

The by-law in question does not apply to any contracts expressly authorized by the board of directors. *Barnes* v. *Ontario Bank*, 15 N. Y. 155, (1859); *Morrill* v. *C. T. Segar Mfg. Co.*, 32 Hun, 543, (1884).

Even if the assignment were not legally executed it would not be void but voidable only at the election of the corporation. Thompson's Commentaries, §§ 5286, 5291.

The approval of the corporation is presumed and the contract stands till avoided by the corporation and the latter has never elected to avoid. *Wallace* v. *Long Island R. R. Co.*, 12 Hun, 46; *Union Pacific R. R. Co.* v. *Credit Mobilier*, 135 Mass. 367; *Duncomb* v. *New York, etc., R. R. Co.*, 22 Hun, 133.

When a contract intra vires and free from fraud is approved in effect by a majority of its stockholders, it cannot be avoided at the instance of a minority stockholder. Cook on Stock and Stockholders, § 684; Morawetz, § 477.

Even if the defendant had a right to avoid the contract, the corporation and the defendant with full knowledge of the facts allowed the company to receive and retain the benefits of the contract and

they are estopped to avoid it. Thompson's Commentaries, § 5286, § 5291, § 5303, and authorities there cited; *Kelley* v. *Newburyport R. R. Co.*, 141 Mass. 499; *Rolling Stock Co.* v. *R. R. Co.*, 34 Ohio, 450; *Jesup* v. *Ill. R. R. Co.* 43 Fed. Rep. 483; *Twin-Lick Oil Co.* v. *Marbury*, 91 U. S. 591.

It was entirely within the power of the board of directors to assign all the accounts and rights of action of the corporation in consideration of the payment of all its debts. Morawetz, § 573; *Sargent* v. *Webster*, 13 Met. 497.

The contract containing the assignment is not avoided by the fact that it was made between the corporation and one of its directors.

There is no principle of law or equity which should prevent a corporation contracting with a director where there is a quorum of directors on the other side of the contract and it is done in good faith. Thompson's Commentaries, § 4059; Morawetz, § 527; *Rolling Stock Co.* v. *Railroad*, 34 Ohio, 450, (1878); *Jesup* v. *Illinois Cen. R. R. Co.*, 43 Fed. Rep. 483, (1890); *Metrop. Tel. Co.* v. *Dom. Tel. Co.*, 44 N. J. Eq. 573, (1888); *Flagg* v. *Manhattan Ry. Co.*, 10 Fed. Rep. (N. Y.,) 433, (1881). (Contra.) *Railway Co.* v. *Blaikie*, 1 Macq. H. L. Cases, 461, (1852); *Stewart* v. *Lehigh Valley R. R. Co.*, 38 N. J. Law, 523, (1875). (Distinguished.) *E. & N. A. Ry. Co.* v. *Poor*, 59 Maine, 277, (1871); Beach on Private Corporations, § 402; Cook on Stockholders, § 652; *Colliery Co.* v. *Black*, 37 L. T. 74, (1878).

Contracts of a director with the corporation will be upheld when free from actual fraud. *Combination Trust Co.* v. *Weed*, 2 Fed. Rep. 24, (1880); *Hubbard* v. *Investment Co.*, 14 Fed. Rep. (Mass.) 675, (1882); *Barr* v. *Plate Glass Co.*, 51 Fed. Rep. 33, (1892); *Twin-Lick Oil Co.* v. *Marbury*, 91 U. S. 589; *Pneumatic Gas Co.* v. *Berry*, 113 U. S. p. 322, (1884); *Leavenworth* v. *Chicago, etc., Railway Co.* 134 U. S. 688, (1889); *Stock Bank* v. *U. S. Pottery Co.*, 34 Vt. 148, (1861); *Saltmarsh* v. *Spaulding*, 147 Mass. 230; *Harts* v. *Brown*, 77 Ill. 230, (1875); *Smith* v. *Townsend*, 27 Md. 388; *Pairo* v. *Vickery*, 37 Md. 467; *Cumberland Co.* v. *Parish*, 42 Md. 686; *Smith* v. *Skeary*, 47 Conn. 47; *Conyngham's Appeal*,

52 Pa. 474; *Ashurst's Appeal*, 60 Pa. 304; *Watts' Appeal*, 78 Pa. 320. *County Court* v. *Baltimore*, 35 Fed. Rep. 167; *Garrett* v. *Burlington Plow Co.*, 20 Iowa, 697; *Bank* v. *Flour Co.*, 41 Ohio St., 352; *Hancock* v. *Holbrook*, 40 La. An. 53.

According to the most extreme view a contract even with a majority of directors would not be held void but only voidable at the election of the corporation. *Aberdeen Ry. Co.* v. *Blaikie*, 1 Macq. 461; *Railway Co.* v. *Magenay*, 25 Beavan, 586; *Flanagan* v. *R. R. Co.*, L. R. Eq. 116; *Michaud* v. *Girod*, 4 How. (U. S.) 503; *Koehler* v. *Iron Co.*, 2 Black, (U. S.) 715; *Wardell* v. *Railroad Co.*, 103 U. S. 651; *Thomas* v. *Brownville R. R. Co.*, 109 U. S. 522; *Hubbard* v. *New York Co.*, 14 Fed. Rep. 675; *Bill* v. *Tel. Co.* 16 Fed. Rep. 14; *Meeker* v. *Winthrop Iron Co.*, 17 Fed. Rep. 48; *Europ. & No. Am. R. R. Co.* v. *Poor*, 59 Maine, 277; *Kelley* v. *Newburyport R. R. Co.*, 141 Mass. 499; *Gardner* v. *Ogden*, 22 N. Y. 327; *Butts* v. *Wood*, 37 N. Y. 317; *Coleman* v. *Second Ave. R. R. Co.*, 38 N. Y. 317; *Cumb., etc., R. Co.* v. *Sherman*, 30 Barb. (N. Y.) 553; *Duncomb* v. *R. R.*, 22 Hun, 133; *Stewart* v. *R. R. Co.*, 38 N. J. Law, 523.

The plaintiff had a perfect right to sell his stock to a competing company whether he knew that the latter intended to wind up the New England Co. or not. Thompson's Commentaries, § 2300; Cook on Stockholders, § 386; Beach, Corp. § 613; *Barnes* v. *Brown*, 80 N. Y. 527, (1880); *Rice* v. *Rockefeller*, 134 N. Y. 174, (1892); *Moffatt* v. *Farquhar*, L. R. 7 Ch. Div. 59; *Trisconi* v. *Winship*, 43 La. An. 45.

C. A. Hight, for defendant.

Assignment void because not executed as required by the by-laws. Morawetz, Corp. §§ 500, 582; Beach, Corp. 321; Cook, Stock, etc., § 725. By-Laws binding on corporation. *Came* v. *Brigham*, 39 Maine, 38.

Again in *Cummings* v. *Webster*, 43 Maine, 197, the court said:— "The by-laws of the company made in pursuance of their charter are equally as binding on all their members, and others acquainted with their method of business, as any public law of the State."

In *Robbins* v. *Mfg. Co.*, 75 Ga. 238, it was held to be settled

law, that the agents of a corporation must observe all the formalities which are required by the charter of the company to be observed in a corporate transaction; and if they act in a manner not authorized by the company's charter, their acts will not be binding; and when the charter of the company requires a contract to be executed in a particular way, the contract will be invalid unless executed in the manner prescribed. The case further holds that such terms are not only directory, but they are mandatory, and even a majority are not at liberty to disregard them, since they constitute a part of the fundamental agreement between the shareholders. See also *Bank* v. *Erwin*, 31 Ga. 376; *Dane* v. *Young*, 61 Maine, 160; *Blanchard* v. *Association*, 59 Maine, 202; *Wetherly* v. *Society*, 76 Ala. 567; *Gillett Rec.* v. *Phillips*, 13 N. Y. 114; *Gillaway* v. *Hamilton*, 68 Wis. 651; *Badger* v. *Ins. Co.* 103 Mass. 244; *Whitney* v. *Ins. Co.*, 129 Mass. 241; 2 *A. & E. Enc. of Law*, pp. 709–710; *Hotchin* v. *Kent*, 8 Mich. 526.

The law does not allow directors to manipulate and manage, buy, sell and dispose of the property and assets of the corporation for their own gain and to the exclusion or to the detriment of the interests or rights of any individual shareholder; and it is further established as a settled rule of law that whatever a trustee, agent or director cannot do directly and openly he cannot do by indirect and roundabout means. Morawetz on Corporations, §§ 516, 517, 524; Spelling on Private Corporations, §§ 428, 429, 432; Beach on Pri. Corporations, § 240, et seq.; Cook, Stock & Stockholders, § 653; 17 Am. & Eng. Enc. of Law, pp. 91, 123; Meecham on Agency, Chap. 2, §§ 461, 462, 463. The two leading Maine cases are: *Railway Co.* v. *Poor*, 59 Maine, 277; *Clay* v. *Towle*, 78 Maine, 86.

"Selling the entire corporate property to another corporation, or, what is in practical effect the same thing, leasing it for 999 years, is such a fundamental change as releases a dissenting subscriber. If this cannot be done with the authority of the Legislature, so as to bind a dissenting stockholder for stronger reasons, it cannot be done without authority of law." Thomp. Com. on Corp. § 1295.

A corporation must show performance in good faith of agreement on its own part before it can recover from a subscriber. A corporation cannot vary the conditions of the contract without consent of a subscriber. *Railroad* v. *Veazie*, 39 Maine, 571, pp. 580, 581; *Railroad* v. *Ayers*, 56 Ga. 230; *Middlesex Turnpike Cor.* v. *Locke*, 8 Mass. 268; *Same* v. *Swan*, 10 Mass. 385; *Kean* v. *Johnson*, 9 N. J. Eq. 407; *Black* v. *Canal Company*, 24 N. J. Eq. 455; *H. & N. H. R. R. Co.* v. *Croswell*, 5 Hill, 384; *Union Locks* v. *Towne*, 1 N. H. 44.

The mutual consent of all the stockholders of the company, the promises on their part that the defendant should not be called upon for his subscription, and the further actions of the officers of the company in representations which they made, and in dealings which they entered into without in any way treating him as a stockholder, amounted to a release between the defendant and plaintiff, if not between the corporation itself and the defendant. Cook Stock, etc., (3d Ed.) § 168.

The assignment upon which the plaintiff relies, was obtained through a breach of the trust duties which the plaintiff and all the other directors of the New England Milk Company, by virtue of their office, owed to said corporation and to the defendant, if he was a stockholder in said corporation. The assignment was obtained in fraud of this defendant, and this suit is in furtherance of said breach of trust and said fraud. *People* v. *Township Board*, 11 Mich. 222; Morawetz, Corp. (2nd. Ed.) § 524; *E. & N. A. Ry. Co.* v. *Poor*, 59 Maine, 277.

A subscription for stock is a mutual undertaking. The corporation undertakes to do certain things in consideration of the promises of the subscriber to take and pay for stock, and if it appears in a suit by the corporation to collect a subscription that the corporation has failed to perform its part of the agreement, or has made some material change in the conditions, without the consent of the other party, it cannot then call upon the subscriber for the fulfillment of his subscription promise. *Old Town, etc., R. R. Co.* v. *Veazie*, 39 Maine, 571, and cases supra.

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

SAVAGE, J. Action to recover the sum of two thousand dollars, the balance claimed to be due on defendant's subscription for thirty shares of the capital stock of the New England Milk Company, a corporation organized under the laws of this state. The plaintiff alleges that this claim has been assigned to him by the corporation. The defendant sets up several defenses, technical and substantial, only one of which, however, do we find it necessary to consider.

An examination of the evidence reveals the following material facts. The corporation in question was organized in June, 1895. The plaintiff and defendant were both among its promoters and incorporators, and they, with one O'Bierne, constituted its first board of directors. The purposes of the corporation were to carry on a general dairy business, and to buy and sell milk and cream. The par value of the shares was one hundred dollars each, and the capital stock was fixed at one hundred shares.

At the organization, the plaintiff and the defendant each subscribed for thirty shares, and O'Bierne, ten. The plaintiff paid his subscription in full, three thousand dollars. The defendant paid one thousand dollars on his subscription, and this suit is brought to recover the balance, which it is admitted has not been paid. Subsequently other shares of stock were issued and paid for. And on November 9, 1896, the date of the alleged assignment of this claim by the corporation to the plaintiff, there had been issued in all seventy shares of stock, all of which had been paid for, and all of which were then owned by the plaintiff, O'Bierne and one W. H. Cusick. The only other interest in the capital stock, at that time, was the defendant's interest, by virtue of his subscription for thirty shares of the stock, and his payment of one thousand dollars upon his subscription. But no certificate of stock had ever been issued to the defendant for any amount.

After the corporation was organized, it engaged in the milk business, buying milk in Connecticut, transporting it to Boston,

and there selling it to milk dealers. By contract with a railroad company, it had a special car for the transportation of its milk. The business was continued up to the date of the assignment, and the plaintiff testified that it amounted to $75,000 a year. During all the time that the corporation was engaged in business, the plaintiff owned and operated a private milk route, for the sale and distribution of milk in Boston, on his own account, and he purchased part of his milk from the New England Milk Company. The defendant continued to be a director of the corporation until July 21, 1896, when a new board of directors was elected, consisting of the plaintiff, O'Bierne and W. H. Cusick. These gentlemen continued to be directors until the assignment of this claim was made in the following November. Dissensions arose between the plaintiff and defendant respecting the management of the corporation, which fact is only important as throwing some light upon the transactions which followed.

In September or October, 1896, negotiations were entered into between the directors of the New England Milk Company and the managers of the Elm Farm Milk Company, a rival milk company, doing business in Boston, looking to a withdrawal of the former from business.

This result was accomplished by a series of contracts entered into by the interested parties, November 9, 1896, to take effect as of November 1. The plaintiff, O'Bierne and W. H. Cusick were all the directors of the New England Milk Company, and owned all the capital stock of the company which had been issued, and which was all of the capital stock except the defendant's interest. O'Bierne and W. H. Cusick transferred their thirty-five shares of stock to the plaintiff, (but whether as the result of a sale or for convenience merely does not appear), and the plaintiff sold and transferred these with his own thirty-five shares, seventy shares in all, to the Elm Farm Milk Company for seven thousand dollars. The plaintiff, who was general manager of the New England Milk Company, delivered all of its tangible assets, consisting of a milk shed, cans, separator, boiler and other articles used by it to the Elm Farm Milk Company; the plaintiff also sold his private milk

route in Boston to the same purchaser for six thousand dollars; the plaintiff assumed the liabilities of the New England Milk Company, and gave an indemnifying bond; and the New England Milk Company, in pursuance to a vote of the plaintiff, O'Bierne and W. H. Cusick, as directors, assigned to the plaintiff all debts and claims due to the corporation. It is under this assignment that the plaintiff derives his title to the claim in suit. The defendant contends that this assignment is void, because it was not executed in conformity to the by-laws of the corporation; he further contends that it is void as to him, because it is fraudulent. For the purposes of this case, we assume, but do not decide, that the execution of the assignment was legal.

This brings us directly to a consideration of the other defense, which raises the simple question whether this assignment gave the plaintiff a good title to the claim sued, so as to enable him to enforce it against the defendant.

The various contracts of November 9th were all component parts of one transaction, one trade, and were all contrived and agreed upon to accomplish one purpose. We cannot consider the assignment alone. We must look to all parts of the transaction, as well as to its purpose. In form, the principal trade was a sale of all the issued stock of the New England Milk Company; in substance, it was the sale of all the business and property of the corporation, except the choses in action assigned to the plaintiff. Nothing was left for the corporation. Even its good will was lost. Such we cannot doubt was the real intention of the parties. Such was the purpose of the purchaser, and that purpose, we think, was understood, and its accomplishment aided, by the plaintiff.

The plaintiff claims, indeed, that the transaction was in this respect merely a sale of stock. But the evidence satisfies us that it was adopted as a convenient, though perhaps not a strictly lawful mode of transferring to the purchaser the property of the corporation. We think this was intended by the parties. The purchaser understood that it was buying all the stock of the corporation in which any one had an interest, and as sole stockholder, it took and used the property of the corporation. It took possession of the property,

as directed by the plaintiff; it carried out the contracts with the milk producers; it continued to run the special car; it obtained the good-will and trade of the corporation. The plaintiff, who was its treasurer, and after the sale of stock, the only officer of the corporation, ceased to exercise any care or control over its property, and claimed at the trial of this case that he did not know, of his own knowledge, what had become of it. The purpose of the transfer of the stock is evident. It was to wind up the business affairs of the corporation, and take it out of the field of competition. The New England Milk Company was merged in,—or rather was swallowed up by—the Elm Farm Milk Company, its competitor. Since then the former has possessed only a theoretical existence. It has possessed no assets. It has had no good-will. It has transacted no business. It has kept no books of account. It has had no directors, and no corporate meetings. It has apparently descended to the realm of shades of departed corporations. The purchasers of its capital stock had no use for the corporation after it had been sold out of business.

Now, it needs no argument to show that by these combined transactions in which the plaintiff participated, and by which he gets his title to this claim, the value of the capital stock which the defendant is asked to pay for here, was utterly destroyed.

Although the tangible corporate assets of the New England Milk Company all passed into the possession of the Elm Farm Milk Company, and although the business and good-will of the former company passed to the latter, the New England Milk Company received nothing out of the trade. But the plaintiff was enabled thereby to sell his stock at par, and to sell his private milk route for six thousand dollars; and in addition he now seeks to recover two thousand dollars on a subscription for stock in the wrecked corporation, which was rendered worthless by the acts of the directors, in which he participated. By resorting to the sale of stock as a means of transferring the corporate property,—and that is what was really done,—the proceeds of the sale went into the pockets of the plaintiff, who then also held the stock of his associates, and not into the treasury of the corporation. The plaintiff

received the entire benefit of the trade, whatever it was, and the defendant has got nothing. On the other hand, if the corporate property had been sold, in form, as it was in effect, to the Elm Farm Milk Company, the proceeds would have gone into the treasury of the New England Milk Company, and would have inured to the benefit of all the stockholders proportionately, to the defendant as well as to the plaintiff. For the defendant, though he held no certificate, was a stockholder. *Chaffin* v. *Cummings*, 37 Maine, 76.

An examination of the actual results of the transaction show this in even a clearer light.

The book-keeper of the corporation, a witness for the plaintiff, testified that on November 1, 1896, the cash on hand was $349.79; bills considered good amounted to $4,781.94. These items, amounting to $5,131.73, came to the plaintiff by assignment. The proceeds of the sale to the Elm Farm Milk Company were $7000, and if the unpaid subscription of the defendant, $2000, was an asset, as the plaintiff claims it was, the total assets of the corporation amounted to $14,131.73. There is besides an item of doubtful accounts, $2,547.87, which we do not take into account. Prior to November 9, 1896, all of these assets belonged to the corporation, and the defendant had a right to have their value, which it seems amounted to the sum of $14,131.73, if he paid the balance of his subscription, or $12,131.73, if he did not, applied to the purposes of the corporation. The liabilities amounted to $8,529.72. After payment of the debts, there would have remained, in the one case $5,602.01 for all the stockholders, or $3,602.01 in the other case. The defendant would have been entitled to thirty-hundredths of the former sum or ten-eightieths of the latter, according to whether he had paid the balance of his subscription or not. The defendant not having paid, the plaintiff received the net sum of $3,602.01. The defendant, although he had contributed one-eighth of the capital stock, received nothing. So far as the defendant is concerned, it is immaterial in what proportions the retiring stockholders received the money, relatively to each other, if the plaintiff was acting for

them, nor whether the plaintiff by assuming the bills payable and taking the bills receivable was a gainer or loser. We have only to consider the nature and effect of the plaintiff's acts so far as they affect the defendant's rights. The plaintiff now seeks to recover $2000 more of the assets for his own use, and this, if allowed, will make a total amount of $5,602.01 received, in one way and another, by the plaintiff, out of the trade; while the defendant will have a minority holding of thirty shares in a corporation which the plaintiff and his associate directors have stripped and made derelict.

In view of the circumstances of this case, may the plaintiff be permitted to recover? We think not. The acts of the plaintiff on November 9, the sale of his stock, the delivery of the corporate property to the purchaser of the stock, the obliteration of the business and good-will of the corporation, were all for his personal benefit, and in entire disregard of the rights of the defendant as a stockholder. These acts were a breach of the trust duties which the plaintiff as a director owed to the defendant as a stockholder; as to the defendant, they were fraudulent. The plaintiff did not use towards the defendant that good faith which the law, as well as good morals, requires of a director of a corporation. A director may sell his stock freely. That is his right. But a board of directors may not sell all the property and business of the corporation under the guise of a sale of their stock, and thereby receive the entire proceeds of the sale of the corporate property to their own private use. Nothing can be plainer than this. The proposition is elemental that a director in dealing with corporate matters must exercise the power with which he is intrusted for the common interest of all the stockholders, and not for his private interest. To hold, in this case, that the plaintiff may recover on a subscription for stock which he himself has rendered of no value, would be as much as to say that a director may stab a stockholder with one hand, and at the same time pluck him with the other.

The plaintiff claims that the defendant was cognizant of the trade proposed with the Elm Farm Milk Company, and with full knowledge of the facts allowed the corporation to receive the bene-

fits of the contract, and that therefore he is estopped to avoid the assignment. But the evidence fails to show that the defendant was informed of all the facts, or how his rights were affected, until weeks after the trade was consummated. Besides, he is not seeking to avoid anything the plaintiff has done under the assignment. He is simply resisting the attempt of the plaintiff to enforce it against him. This is the first opportunity he has had to resist. He is not estopped. The plaintiff gained no rights against the defendant by virtue of the assignment.

As the plaintiff cannot recover as assignee, we do not consider the account in set-off filed by the defendant, which is against the assignor, the New England Milk Company.

Judgment for defendant.

ARTHUR L. STEWART, and another,

vs.

WILLIAM R. PATTANGALL, and others.

Washington. Opinion January 1, 1898.

New Trial. Real Action.

In a real action the question to be determined was the location upon the face of the earth of the dividing line between the southeastern and southwestern quarters of township No. 19 Middle Division in Washington county. The line was described by the commissioners who made the partition as "beginning at a pine stake three miles distant from the easterly line and two and one-half miles from the south line of the township and running south 2° 15′ west to the south line of the township." The jury returned a verdict in favor of the defendants, and the plaintiffs move to have this verdict set aside as against the evidence, and on the ground of newly-discovered evidence.

Held; that the question of fact which the jury were called upon to settle was neither complex nor difficult. They heard the witnesses and saw the sections of trees with the "spots" exhibited, and they could hardly fail to comprehend the true relation and force of the evidence. Even if there now appeared to be a greater weight of evidence in favor of the plaintiffs, that fact would not necessarily authorize the court to set aside the verdict of the jury; but a careful examination of all the evidence reported discloses a clear preponderance in support of the conclusion reached by the jury.

Newly-discovered evidence that does not seem to be of such vital importance as to induce the belief that a different result would have been reached if it had been presented at the trial, is not sufficient to grant a new trial. The same result follows where it is fairly to be inferred, from the circumstances disclosed, that by the exercise of proper diligence this evidence might have been seasonably procured.

ON MOTIONS BY PLAINTIFFS.

The case appears in the opinion.

H. H. Gray and F. I. Campbell, for plaintiffs.

W. R. Pattangall, for defendants.

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

WHITEHOUSE, J. This was a real action brought to determine the location of the dividing line between the southeastern and southwestern quarters of township No. 19 Middle Division in Washington county.

It appears that a partition of the township was made in 1850 between John B. James and Moses G. O. Emery, by which the commissioners appointed for that purpose set out to James two separate lots of land called the northwestern and southeastern quarters; but from the admeasurements and boundaries of these two quarters as stated and described in the report of the commissioners, it does not appear that the westerly line of the southeastern quarter and the easterly line of the northwestern quarter were designed to be a continuous line from the northern to the southern boundary of the township, or that the lots thus laid out for James' half interest were anywhere contiguous to each other. But it is admitted that the plaintiffs had title to the southwesterly quarter up to the line on the east then established by the commissioners and that the commissioners' line was the western boundary of the southeastern quarter owned by the defendants; and the question to be determined was where upon the face of the earth was the line described by the commissioners as "beginning at a pine stake three miles distant from the easterly line and two and one half miles from the south line of the township and running south 2° 15′ west to the south line of the township."

The jury returned a verdict in favor of the defendants, and the plaintiffs move to have this verdict set aside as against the evidence and on the ground of newly-discovered evidence.

It is the opinion of the court that both motions must be overruled. The question of fact which the jury were called upon to settle was neither complex nor difficult. They heard the witnesses and saw the sections of trees with the "spots" exhibited, and they could hardly fail to comprehend the true relation and force of the evidence. The issue was submitted with instructions to which no exceptions were taken. Even if there now appeared to be a greater weight of evidence in favor of the plaintiffs' contention, that fact would not necessarily authorize the court to set aside the verdict of the jury; but a careful examination of all the evidence reported discloses a clear preponderance in support of the conclusion reached by the jury.

Nor does the newly-discovered evidence seem to be of such vital importance as to induce the belief that a different result would have been reached if it had been presented at the trial. Furthermore, the plaintiffs introduced no testimony tending to show that this newly-discovered evidence could not have been obtained at the trial by the exercise of reasonable diligence on their part. On the contrary, it is fairly to be inferred from the circumstances disclosed that, by the exercise of proper diligence, it might have been seasonably procured.

Motions overruled.

FRED O. HAMLIN *vs.* FRANK DRUMMOND.

Kennebec. Opinion January 3, 1898.

Novation. New Trial. Statute of Frauds.

Novation, in the law of contracts, implies the substitution of a debtor, of a creditor, and of a new contract. It is never presumed, but must always be proved.

Held; that the Statute of Frauds does not apply to a case of novation, where the discharge of the original debtor also works a discharge of the substituted debtor's debt to him in consideration of the substituted debtor's promise to pay the same to the creditor. The new promise is still to pay his own debt, but to a substituted creditor, and works a complete novation.

When a question of fact has been submitted to a jury, who saw the witnesses, observed their manner, and could best judge of the truthfulness of their testimony and apply its meaning to the facts in dispute, and the law court from a reading of the evidence cannot say that the finding by the jury is erroneous, *held;* that a new trial will not be granted.

ON MOTION BY PLAINTIFF.

This was an action of assumpsit upon account annexed tried to a jury in the Superior court, for Kennebec county, and brought to the law court on the plaintiff's motion to set aside the verdict rendered against him at the trial.

The case appears in the opinion.

Harvey D. Eaton, for plaintiff.

Novation is subject to all the rules concerning contracts in general. 16 Am. & Eng. Enc. of Law, 862.

The case does not show "a full discharge of the original debt, by express terms of agreement, or acts of the parties with clear intention" to that effect. *Cuxon* v. *Chadley*, 3 B. & C. 591.

Counsel also cited: 2 Whar. Cont. §§ 855, 858; *Owen* v. *Bowen*, 4 C. & P. 93; *Lee* v. *Porter*, 18 Mo. App. 377; *Kelso* v. *Fleming*, 104 Ind. 180; *Scott* v. *Atchison*, 36 Tex. 76; Pollock Cont. (2nd Ed.) 189; *Conquest's Case*, 1 Ch. D. 334, 341.

S. S. and F. E. Brown, for defendant.

SITTING: FOSTER, HASKELL, WHITEHOUSE, STROUT, SAVAGE, JJ.

HASKELL, J. Assumpsit for the service of a stallion, $35 "to warrant." The evidence seems to justify the finding of a compliance with the warranty so that the amount charged "for service" became due and payable from the defendant.

The defendant sets up "novation." He says that plaintiff agreed to take another man as paymaster, in consideration that he, defendant, should exchange his mare, then with foal, for a horse then owned by the other, who, in consideration thereof promised to pay defendant's debt to the plaintiff. He did so exchange, and the jury found a novation.

I. It is contended by plaintiff, that the stranger received no consideration for such promise, if he made one, and therefore it was not binding upon him, and could not work a discharge of the defendant's debt to plaintiff; and that such promise would be void under the statute of frauds as a promise, not in writing, to pay the debt of another.

Novation is a word foreign to the common law and has its natural meaning only in the civil law. It implies the substitution of a debtor, of a creditor, and of a new contract. It is never presumed, but always must be proved. The most frequent novation is the substitution of a new debtor, and his promise to pay the debt must be a valid and binding promise to work a discharge of the old debtor; and, were it not for the statute of frauds, it would seem that the discharge of the old debtor would be a sufficient consideration to make valid the new promise, and it would logically follow that if the new promise be in writing so as to comply with the statute of frauds, such promise would be valid. But where the discharge of the original debtor also works a discharge of the substituted debtor's debt to him in consideration of the substituted debtor's promise to pay the same to the creditor, the statute does not apply, for the new promise is still to pay his own debt, but to a substituted creditor, and works a complete novation. *Dearborn* v. *Parks*, 5 Maine, 81; *Brown* v. *Attwood*, 7 Maine, 356; *Rowe* v.

Whittier, 21 Maine, 545; *Cutler* v. *Everett*, 33 Maine, 201; *Maxwell* v. *Haynes*, 41 Maine, 559; *Perkins* v. *Hitchcock*, 49 Maine, 468; *Goodwin* v. *Bowden*, 54 Maine, 424; *Stewart* v. *Campbell*, 58 Maine, 439; *Heaton* v. *Angier*, 7 N. H. 399; *King* v. *Hutchins*, 28 N. H. 580; *Winslow* v. *Locke*, 60 N. H. 580; *Crowfoot* v. *Gurney*, 9 Bing. 372.

So in the case at bar. If the defendant owed the plaintiff $35, and he accepted a stranger as a substituted debtor, who engaged to pay the debt, in place of boot that he was to pay the defendant in the exchange of horses, he, the stranger, thereby really engaged to pay his own debt due the defendant by paying it to the plaintiff for the defendant's use, so that it was a valid promise, not to pay the debt of another, but his own debt, that worked the discharge of defendant's debt to the plaintiff. It was a perfect novation.

II. Whether such contract was made is a question of fact, and has been submitted to a jury, who saw the witnesses, observed their manner, and could best judge of the truthfulness of their testimony and apply its meaning to the facts in dispute, and the jury found that a novation had been proved. We cannot say to the contrary from reading the evidence. The plaintiff denies the novation. Both the other parties swear to it. The jury has settled the fact, and we dare not disturb the verdict.

Motion overruled.

EDWARD STETSON, and others,

vs.

SPRAGUE ADAMS, and others.

Piscataquis. Opinion January 3, 1898.

Deeds. Monuments. Plans.

Of monuments in deeds. The lines of a survey, if ascertainable, govern plans.

It is well settled in this state that a survey once placed upon the face of the earth must control a plan that is made from it, although the plan when placed upon the earth would locate the line elsewhere.

The plaintiffs and defendants were owners of adjoining townships, and the controversy was over the dividing line between them. The plaintiffs contended that it should be located where the plan by which these townships were conveyed would locate it when placed upon the face of the earth. The defendants contended that the line was not where the plan would now locate it, but where it was in fact located by an actual survey from which the plan was made, and the jury found in favor of the defendants' contention. Upon a motion for a new trial, *held;* that the law makes the line where the survey marked it upon the ground; and therefore the verdict ought not to be disturbed.

Exceptions to a refusal of the court to give instructions to the jury, substantially declaring a doctrine adverse to the rule laid down above, will be overruled.

ON MOTION AND EXCEPTIONS BY PLAINTIFFS.

This was a real action tried to the jury in Piscataquis County and involved the question of the division line between township 4, range 8, and township 4, range 9. The jury returned a general verdict for the defendants and also, under the direction of the court, made the following special findings:—

QUESTIONS FOR THE JURY.

1. Did Samuel Weston, acting under his instructions from the committee for the sale of eastern lands in 1794 run or cause to be run upon the surface of the earth a line across the territory within the east and west boundaries of the two townships four, as and for the range line betweeen range 8, and range 9?

Answer, Yes.

2. From all the evidence in this case, does it appear to the jury where across said territory, the said western line, if any, was run?

Answer, Yes.

3. At what distance from the present north line of the ninth range (measuring south on the west line of township four in said range) did the said western line cross the west line of township four in said range?

Answer, Five miles two hundred and ninety-five rods.

(Plaintiffs' exceptions.) The plaintiffs' counsel requested the justice presiding to give to the jury the following instructions which were not given except as appears in the charge itself.

First: The rule that monuments govern is not however inflexible, but like other rules it must yield to exceptions. The only reason given, or which can be given, why monuments are to control the courses and distances in a deed is that the former are less liable to mistakes. If then it appears that no mistakes can reasonably be supposed to have been made in this case, no reason remains for the application of the rule.

Second: Where lines are laid down on a map and plan, and are referred to in a deed of land, the courses, etc., on such plan are to be regarded as the true description of the land as if they were expressly recited in the deed.

Third: Line to be run straight unless otherwise described.

Fourth: Monuments govern only when certain or can be made so.

Fifth: As the deeds of the plaintiffs and the deeds of the defendants both called for and referred to the Rose & Holman plan, which plan was made by the authority of the Legislatures of the Commonwealth of Massachusetts and the State of Maine, under the Act of Separation, through the services of the commissioners specially appointed by the Legislature of said States to make a plan and report as to where the dividing lines between ranges 8 and 9 were north of the Waldo patent, the decision of said

commissioners, appointed by said Legislature in ascertaining, determining and marking upon the face of the earth the common line between townships in the 8th and 9th ranges north of the Waldo patent, is conclusive as shown by the plan and report of such commissioners and the line actually adopted by them.

Sixth: If the line run from the million acre purchase to the Penobscot River or so far as it was run from the million acre purchase toward the river by O'Niel was never adopted by Weston as the true line on the face of the earth as dividing the 8th and 9th ranges north of the Waldo patent, then the spots made by O'Niel in 1794 on the line he, O'Niel, run, are of no binding force, and the plaintiffs are entitled to recover in accordance with the line laid down on the Weston plan of 1794 and referred to in his letter of May 1st, 1801, and in accordance with the line adopted by Rose & Holman in their report and plan made under the Act of Separation in 1822.

The case is stated in the opinion.

Among other instructions to the jury touching the evidence arising from surveys and plans the presiding justice said:—"A man may have a lot of land and lay it out with a surveyor, running lines, laying out streets, putting down stakes, making roads and parks, and then afterwards endeavor to make a plan of them from what has been done. It is a picture of what has been done. Now the plan is the picture, it is the guide, it is the finger-post; but what controls is what was done really upon the surface of the earth, the lines as they were run, the stakes as they were put down. The bounds as they were made are the controlling bounds, even though they may vary from the plan, and even though the plan may have been accurate in locating them. What is the reason of this? It is for certainty, gentlemen, in order to have certainty in regard to boundaries; that they be not continually changing; that there shall not always be disputes arising as to where they are. Where the boundaries are first, especially where the lines are first run, there they stay. You see at once, taking this tract with your knowledge of affairs, that it would be almost a

miracle if two men should start at different times to run a line across a broken country, through a forest, and should run exactly the same course and make the same distance. A third surveyor might go on and try it, and he would perhaps make the distance a little longer or a little shorter or a variation in the course; so that we cannot have and the law does not permit that there shall be a continual running or re-running of lines, but says where it is first run, if that can be found, that shall stand, and all subsequent purchasers must be bound by that. Plans are very useful in showing us what was done, but they are only evidence and not conclusive. The real question is, if there was a previous work, where was that work done? But, gentlemen, I should say this, I think, that sometimes we may be satisfied that the plan was intended to represent, and does represent, what was done before; that it represents lines that were actually run; but we find it impossible to now tell where they were run;—all the marks, all the evidence, everything has been swept away, and we do not have enough to indicate to us anything about where it was run, and we cannot tell. It does not appear where it was run; we are without information. Now in such cases, gentlemen, we must do the best we can. All we have left is the plan, and the plan must then control. We must act as if nothing had been done at all, and endeavor ourselves to take the plan and run out a new line, the old one, if there was one, having completely disappeared. In such case the first line afterward run is the controlling line.

. . . . If nothing had been done before the plan was made, and, if the plan was to indicate only what is to be done hereafter, or after the plan was made, and we were now to do it for the first time, as the plaintiffs contend, then it is conceded, I believe, that a line midway between the north line of the ninth (9th) range and the south line of the eighth (8th) range would be south of the line in dispute and would throw this land into plaintiffs' township. But, gentlemen, defendants contend that the plan indicates that it was made from surveys theretofore made, and, as I have said, I think the evidence will compel us to so find. Then the question is, can we find out what surveys were theretofore made, and can

we find out where they were made across this township, if they were made? We have evidence in this case of a survey made by one Samuel Weston in 1794. It is conceded, I believe, that Samuel Weston had instructions from the committee of Massachusetts. You may remember that the Commonwealth of Massachusetts had a committee appointed having entire charge of eastern lands, and under its direction surveys were made and lands sold. It is conceded, I believe, that Samuel Weston, by a commission dated May 1, 1794, was directed to proceed to this territory and to lay off three ranges between the east line of the Million Acres and the Penobscot river, north of the Waldo Patent, and he was instructed by that, as you will see, to lay off the three ranges and to run out the range lines and the township lines. It is conceded, I also understand, that he in fact did, not personally going over the ground himself, but through his agents and employees, he being the managing man and having authority, of course, to appoint others under him, cause to be run under this commission a line from the Million Acres to the Penobscot river, now known as the north line of range nine (9); that he did that through his brother. It also, I think, is conceded that he did run a line from the Million Acres to Penobscot river now known as the south line of range eight (8), and also that he ran, or caused to be run, more or less of the lines between the townships; that he ran these, or caused them to be run, on the surface of the earth, actually sent men with the proper instruments over the surface of the earth to run the lines and mark them out upon the surface of the earth. But, gentlemen, did Samuel Weston, under that commission in 1794, run or cause to be run upon the surface of the earth the range line between range nine (9) and range (8), and did he run it, or cause it to be run, on the surface of the earth across township four (4)? Did he run that line, or cause it to be run in 1794 across township four (4), a line as and for the range line between the townships? That will be the first question for you, and, instead of asking you to return a general verdict at first, I shall ask you to answer some questions.

"That line, if run, and if we can tell where it was run, and today find where it was run, controls. Therefore, as I have said,

there are three questions: First, was the line run across that township; second, can we now tell where it was run, because, if we cannot, then it is as though never run; and, third, how far from the north line of range nine (9) was that line run?

"I will say again, to make it clear, what I have already said in another connection, that although we may be satisfied that a line was run, yet, if we cannot tell now where it was run, it is as if it never had been run, so far as we are concerned; because the duty of the defendants will be to show not only that it had been run, but to show where it had been run—show us the place. I will consider these questions together largely in going over the evidence.

"Starting with the conceded fact that Weston ran some lines in that neighborhood and that he was there to run out the ranges and the townships, we would look first to his field-notes to see whether or not he ran this range line between eight (8) and nine (9) and where he ran it, that is, what he says he found and what he did in the way of making monuments as he went along; but unfortunately, gentlemen, we have not those field-notes. All we have from Samuel Weston are two documents, first, a plan that he made, and, second, a letter that he wrote in 1801 to the commissioners, or to somebody, in relation to this survey. That is all we have from him. His plan indicates one thing in favor of the defendants, and that is that a line was run, because we find upon his plan a line drawn between ranges eight (8) and nine (9) from the Million Acres to the Penobscot River. That line appearing upon his plan is evidence that a line was run, the presumption being that he put down what he did. On the other hand, gentlemen, it seems to afford a bit of evidence in favor of the plaintiffs, in that it indicates a line which runs parallel with the north line of range nine (9) and the south line of range eight (8), coming out at the river at a place that has been described to you upon the plan where there are three islands marked. But you must understand that the plan is only evidence either way. . . . .

"To resume for a moment, the defendants do not profess to show you any of the old spots of Weston on that township, and they have undertaken to tell you why they would not appear there; but

they say that the existence of the spots to the west of the township and of the spots to the east of the township should show you, not only that Weston did cross that township, but that he crossed in that line,—in a line that would range with the spots on either side. To repeat my illustration, if you had the problem to determine whether a man walked across a piece of bare ice where he left no tracks, if you followed his steps through the snow down to the bare spot, and directly opposite you find his steps in the snow on the other side, defendants argue that you should infer from that that he walked across in that line between the two tracks, and they ask you to infer here that not only did Weston's man cross the tract, but that he crossed it in that line; and they claim that that line is now marked on the west line of the township by a stake that you have heard described. . . . . ."

J. B. Peaks, *P. H. Gillin*, *C. P. Stetson*, for plaintiffs.

Rose & Holman acting under the authority of the highest tribunal in each state determined that the plaintiffs' township was equal in acreage to the defendants' township, and that the line which they laid down making them equal should be adopted. "Towns are created and their territorial limits defined by the legislature alone and no other authority can change them." *Westbrook* v. *Deering*, 63 Maine, 231; *Ham* v. *Sawyer*, 38 Maine, 37.

In *Lisbon* v. *Bowdoin*, 53 Maine, p. 324, the court says: "That the validity or efficacy of the proceedings of the commissioners in establishing lines between towns appointed by virtue of the Revised Statutes, chap. 3, § 30, must be determined on the facts appearing in the reports."

If this be true, then every act of Rose & Holman and the commissioners indicate that the plaintiffs are entitled to come down to the line, as we claim it should be, one mile and eleven rods. If the decision of commissioners appointed under Revised Statutes is conclusive on parties and towns as to the line established by them, the lines established by commissioners appointed directly by an act of the Legislature rests upon even higher ground, their authority is delegated direct. The authority of commissioners appointed under chap. 3, § 43, Revised Statutes, is secondary.

The notes of the commissioners under the Act of Separation give these townships equal acreage. The field-notes of Holman make them of equal acreage. The return of all the commissioners as appearing in the Laws of Maine for 1822 and 1823 make them of equal acreage, and the plan of Rose & Holman make them of equal acreage. Hence the defendants are precluded by the acts of the commissioners under authority of the Legislature of both states from attempting to hold more territory than they are entitled to hold in accordance with the Rose & Holman plan, and the court should have so instructed the jury. Even if the commissioners erred in ascertaining where the true line was, it is held in the case of *Lisbon* v. *Bowdoin*, supra, quoted in *Bethel* v. *Albany*, 65 Maine, 200, that there is no power to reject it, simply because it may be possible that they may have erred in their judgment in ascertaining the true line.

The sixth requested instruction should have been given to the jury. If Weston never accepted the line as run by O'Niel, the plaintiffs are entitled to recover in accordance with the plan of Weston. It is a well-established principle of law, if an agent or servant of a party does an act outside the scope of his authority, delegated to him by his principal, if the principal does not acquiesce in or accept what his agent or servant has done, that it is an unauthorized act and has no binding force upon any one.

The deeds of the plaintiffs and the deeds of the defendants all refer to the Rose & Holman plan; none of them call for monuments. Where a grant of land is made with reference to a plan, the survey actually made at the time if it can be ascertained is to govern, but if no survey was made or if it cannot be ascertained and no natural monuments marked on the plan upon the line exist, the extent of the line is to be settled by the length of line given on the plan according to its scale exactly measured. *Heaton* v. *Hodges*, 14 Maine, 66. This principle is affirmed in *Chandler* v. *McCard*, 38 Maine, 564; in *Wellington* v. *Murdough*, 41 Maine, p. 281; also in *Erskine* v. *Moulton*, 66 Maine, p. 276.

In the case at bar the familiar principle of law as laid down in *Mosher* v. *Berry*, 30 Maine, p. 83, applies, "that where there is an

overrun of land between certain boundaries made to grantees in severalty without intermediate monuments, that the surplus or overrun is to be equally divided."

F. H. Appleton, *H. R. Chaplin; H. Hudson*, for defendants.

Exceptions: First four requests for instructions not applicable to issues, although true in the abstract. They may all be found in *Davis* v. *Rainsford*, 17 Mass. 207.

Where the facts show that there are two established points and the plan shows a straight line between the two points and there has been no actual survey of the lines between such points, a straight line would be in conformity to law and the plan would govern; but when between two established points a line has been actually run on the surface of the earth, straight or otherwise, which differs from the line as delineated on the plan, the line upon the earth controls and the legal proposition that a line is to be run straight unless otherwise described has no application at all to the question involved.

The fifth request is based upon a false assumption of fact. The deed from the state of Maine to the plaintiffs, was based upon the Weston survey and plan. The Rose & Holman plan is based on the Weston survey and plan. As the Rose & Holman plan was made from what actually existed upon the face of the earth prior to the making of said plan, the law in this state is clearly established that such monuments as were made upon the face of the earth must control, and not the plan. The request, therefore, should not have been given. See cases below.

The principle enunciated in the case of *Williams* v. *Spaulding*, 29 Maine, 112, is the rule of law which we contend governs this case, and in which it was held, that where a plan is made intending to delineate a previous survey and there proves to be a variance between the survey and the plan, and a conveyance is made containing a reference to the plan, the grantee will hold according to the survey. The survey is the original work, and when actually made, in the forests, marked trees designate the lines, corners and numbers of the lots. Each lot is clearly indicated upon the face

of the earth. When the plan is intended to represent this work, but differs from it, the error is to be corrected by reference to the original to which the plan as a copy must yield.

In *Bean* v. *Bachelder*, 78 Maine, 184, the plan was merely a picture. The survey was the substance. The plan was not made to show where the lots were to be hereafter located, or how they were to be hereafter bounded. It was made as evidence of work that had been before located and bounded. The lot actually surveyed, bounded by the lots actually run, was the lot intended to be conveyed. The plan was named in the deed rather as a picture indicating the location and lines of the lot. Still, the actual boundaries rather than the picture boundaries were to be sought for. The picture might not be wholly accurate. See *Ripley* v. *Berry*, 5 Maine, 24. In *Pike* v. *Dyke*, 2 Maine, 216, the court say: "Whatever by this location was included in number 11, passed by that designation: as much as if the exterior bounds of the location had been specified with precision, and with reference to known existing monuments. Where lots have been granted designated by number, according to a plan referred to, which has resulted from an actual survey, the lines and corners, made and fixed by that survey, have been uniformly respected in this state, as determining the extent and bounds of the respective lots. It would be impossible to relax this rule without producing the greatest confusion and uncertainty in almost every part of the country."

This case was cited and approved by the court in *Bean* v. *Bachelder*, 78 Maine, 186. See also *Esmond* v. *Tarbox*, 7 Maine, 61; *Williams* v. *Spaulding*, 29 Maine, 112; *Erskine* v. *Moulton*, 66 Maine, 276.

In *Brown* v. *Gay*, 3 Maine, 129, the court say: "The original locations by the surveyor, as far as they can be found, are to be sustained; and if any variance appears to exist between them and the plan, the locations actually made control the plan."

SITTING: FOSTER, HASKELL, WHITEHOUSE, STROUT, SAVAGE, JJ.

HASKELL, J. Writ of entry tried upon the general issue. The verdict was for defendants, and plaintiffs move for a new trial because it is against law and evidence. Plaintiffs and defendants are owners of contiguous townships, and the controversy is over the dividing line between them. Plaintiffs own township 4 in the ninth and defendants township 4 in the eighth range of townships, said ranges extending west from the Penobscot river to the "Million Acres" on the Kennebec. Range 6 having already been surveyed, Massachusetts commissioned Samuel Weston, in 1794, to survey three ranges north thereof, divide them into townships of six miles square and run and spot the lines. On the 7th of the following November, Weston returned to the secretary's office a plan of his work, showing the line between ranges 8 and 9 to intersect the Penobscot, at "Three Islands." His field-notes have not been preserved. The plaintiffs contend for the range line as shown upon the plan, but the defendants assert that the survey placed it a mile or more further north.

Nothing is more firmly established in this state than that, in such case, the survey must govern when its location can be shown; when it cannot be, then the plan may locate it. *Bean* v. *Bachelder*, 78 Maine, 184.

The controverted range line from the Million Acres to the Penobscot is some sixty miles in length and is or intended to be straight, and appears to have been run from west to east. The western end of the line is not in dispute. The eastern end is. On this line, between the second and third tiers of townships divided by it, east from the Million Acre tract, the evidence discloses two ancient beeches, bearing surveyors' marks. One lay upon the ground and bore a surveyor's seal and 1794. Running south 84° east the growth is old, and not far on, a spot from a spruce was cut out and is produced in court, showing by its age to have been made in 1794. Continuing six miles, the line is well marked, sometimes by ancient spots. A poplar bears surveyors' marks

and there are indications of a north and south line. Continuing on for some four miles ancient spots as well as later ones mark the course where a section from a cedar was cut out and is produced. It had four spots upon it of the age of 73, 55, 37 and 31 years, respectively. For nearly a mile farther the old growth remained, and both ancient and new spots mark the line. One was cut from a maple showing 102 years' growth, or as made in 1794. That was within three-quarters of a mile of the Katahdin Iron Works Railroad. From there to the railroad the forest had disappeared and no spots were found. For quite a number of miles further not much remained to bear the ancient mark of a surveyor, although records of more recent surveys were seen. Crossing Schoodic Lake, the marks of surveyors of comparatively recent date, show a line, and a hemlock bore a spot that was cut out and is produced showing a spot made in 1794. Fifty rods further on, a spot was cut from a spruce and produced, made in 1794. Then, across Endless Lake, a spot made in 1794 was cut from a spruce and is produced. Farther on, across east branch of Seboeis, a spot made in 1794 was cut from a beech and is produced. The last four spots were cut east of the township in controversy. The surveyor who cut these spots testifies, that by reversing his course and running north 84° west he struck the two ancient beeches first named, and continuing a short distance found old trees well blazed. He cut out a spot from a hemlock, and produced it, made in 1794. In a short distance further on he cut from another hemlock, and produced it, a spot made in 1794. Further on he cut, and produced, a spot made from a hemlock made in 1794, and still farther a yellow birch, well blazed but illegible, and a stone post. Then came old growth and ancient marks clear through in places to the end of the line.

There was more evidence concerning the cross lines of townships, and all the evidence was much more in detail than here given, but only enough has been recited to show its general trend and significance. This territory had never been surveyed before Weston in 1794, and the living records of time, written in nature, tell of work done that year that cannot be ascribed to any other hand

than his. From the Million Acre tract on a course south 84° east across and far beyond the townships owned by these parties his line had been marked, and has been preserved by nature herself, so there can be no mistake as to where he run his line, although seemingly buried under the moss of a century. That none of Weston's marks exist upon the line within the limits of the townships owned by these parties, for want of trees old enough to preserve them, or from the destruction of trees upon which they were made, cannot shake the certainty that the well known line, both east and west of them, continues across them, although that section of it may have been lost, and although a continuance of the marked line may not strike the Penobscot at Three Islands, or may not have actually been surveyed further east than the last spot found. The jury cannot be said to have erred in finding the Weston survey to have been placed upon a marked line across these townships. But the plaintiffs contend that other considerations overthrow any actual survey that may appear to have been made.

I. Plaintiffs contend that Weston made a mistake in his survey of the line between ranges 8 and 9, and base their contention upon the following facts:—Township 4 in range 7 was granted to Bowdoin college, and some uncertainty having arisen about its north line, that is, the range line between 7 and 8, Massachusetts, in 1801, ordered Weston to make a survey of township 4, range 7, and in his letter of explanation, so far as material to this case, says that he employed his brother to run the north line of range 9, and one John O'Niel to run the south line, that is, the line between ranges 8 and 9, "with particular instructions where to leave the Million Acre line"; that he surveyed from the northeast corner of township 1 in the sixth range up river, marking the corners of townships as he went, to the northeast corner of township one in the ninth range, and awaited the arrival of his brother on the north line of range nine, and that the brother struck the river with his line within six rods of the corner that he had made for him. He says that he came away before O'Niel reached the river as he met with "so many obstacles from low swampy land and

ponds on the line"; that when O'Niel came down river he gave "an account of his voyage," and says that "I rather concluded he had struck the river above my station made for him to come out at." He says O'Niel was a practical surveyor and a man of ability and good understanding, and if anything "rather too nice and curious to have the work performed just so;" that absolute exactness cannot be expected in so broken a country as that is; that so many obstacles from ponds with all their arms, legs, inlets and outlets, swamps, bays, thickets, morasses, mountain cliffs and gullies in so close a succession render it much more difficult to close lines that might often be wished for." The line between ranges 8 and 9 was not re-run, and O'Niel's survey was left as he made it, striking the river further north than the point fixed for him to strike. Nevertheless, there was his survey, marked upon the ground, and there the law makes the line. The re-survey of township 4 in the 7th range does not move the located lines between ranges 8 and 9.

II. Plaintiffs contend that Massachusetts, in 1820, re-surveyed by Greenwood the east half of township 3 range 8, the town next east of defendants, and conveyed the same accordingly; that the survey fixed the northeast corner to the south of the Weston line and where it should have been to strike Three Islands on the Penobscot. But that does not change the Weston survey, and does not purport to. It simply puts the Weston plan upon the earth, puts it where O'Niel did not put it, and therefore cannot change the location of his survey between other townships. Nor can the survey by Gilmore of the other half of township 3 in 1831 ordered by the land agent of Maine, change the O'Niel line, any more than the Massachusetts survey in 1820 can do so. Plaintiffs contend that O'Niel abandoned his line before he reached the Penobscot. Suppose he did. The survey, so far as he did make it, must stand. Weston adopted it. Weston says, in his letter to Massachusetts in 1801 that O'Niel reached the river and above the station, so far as he could judge from O'Niel's account, and excuses the inaccuracy of the result from natural causes, but he nowhere repudiates the survey.

III. Plaintiffs contend that the survey of Silas Holman in 1822 by authority of the commissioner appointed under the act of separation, providing for a division of lands between Maine and Massachusetts, adopted the Weston plan and must control. The parties took their titles under the Holman plan, which is referred to in their respective deeds. The defendants from Massachusetts in 1834, the plaintiffs from Maine in 1863. The deed bounds the defendants northerly by the plaintiffs' township, and the plaintiffs take township 4 range 9, according to survey and plan "in $\frac{1794}{1822}$ by Weston and Lewis and Holman, surveyors." The plaintiffs must recover, if at all, upon the strength of their own title. That title is according to the survey and plan $\frac{1794}{1822}$ by Weston and Lewis and Holman. The Holman, or Holman & Rose plan, for there is but one, purports to have been made from former surveys made by Massachusetts and by order of the commission in 1822. The only surveys by Massachusetts were Weston's in 1794, and Greenwood's in 1820. The only survey by the commission was Holman's in 1822. The plan was composite. It was compiled from two surveys, so that Weston's survey must stand, unless superseded by Holman's. Was it? Holman surveyed from the northwest corner of one in the eighth to the Penobscot, coming out, not where O'Niel's survey struck the river, but where it ought to have struck it, and if Holman's survey be produced westerly, according to the Weston plan, across township two, it would become coincident with Greenwood's survey between the east half of township three in eight and three in the ninth, and also coincident with the surveys made by Gilmore between the west half of these townships in 1831. At the easterly line of plaintiff's land, all the surveys subsequent to Weston's stopped. None of these surveyors found the O'Niel line, because they did not look north far enough to find it. They supplanted it from the Penobscot westerly across townships one and three only. From there on, Weston's survey, the O'Niel line can be traced to the Million Acres, and that, being the only survey, must stand so long as its location can be found. Of course, this view does not give a straight line from the river to the Million Acres. It is straight to the west line of township three,

and then is set over to the north where O'Niel ran through, and then goes straight westerly to its end. Unless the doctrine that a survey shall govern the plan be overturned, no other solution can be given to this case, so long as the verdict stands fixing the O'Niel line upon the face of the earth.

IV. Plaintiffs have six exceptions, but five and six only have been argued and need only be considered. The fifth is to a refusal of a requested instruction in substance that the Rose & Holman plan is conclusive. Of course it is not, against a former survey, as already stated.

The sixth contains a recital of facts that do not fit the case and was properly withheld. No exceptions as to the conduct of the jury have been allowed, but are waived.

Motion and exceptions overruled.

JAMES TAYLOR, and others, in Equity,

vs.

The PORTSMOUTH, KITTERY AND YORK STREET RAILWAY.

EDWARD S. MARSHALL *vs.* SAME.

York. Opinion January 3, 1898.

Nuisance. Street Railway. Public Uses. Damages. Way. Corporations. Const. of Maine, Art. IV, § 14. Priv. and Spec. Laws, 1893, c. 582.

Equity will not enjoin a public nuisance on the application of an individual, either in his own behalf, or in behalf of himself and others of like interest who either do or do not join in the application, unless some special damage to the individual, not suffered in common with the public generally, has been sustained.

The public may regulate by law the use of its public ways in such manner as the legislature may think will best serve the public interest. The kind of use that may be permitted is of no consequence to the abutting land owner. He has been paid his damages for the creation of the way, so that the public

controls its use, and he must take his chance with the rest of the community in which he lives of any inconvenience suffered by reason of the use that the public may see fit to permit.

Where the plaintiffs, as abutting proprietors and owners of the fee in a public way, sought to enjoin the location of a street railway within the limits of a public way, *held;* that the railway company is allowed to share with the public its right of transit over the same, and its location does not create any additional servitude.

Also; that the plaintiffs have suffered no damage from the defendant's occupation in common with the public of some share in the easement acquired by it upon the creation of the way; so that they have no cause for complaint on account of the construction of defendant's railroad, not common to the public in general; and, therefore, have suffered no special damage, and can have neither an action at law nor relief in equity.

In considering such use of public ways for surface transit the court *holds* that; it matters not what the motive power used may be, nor whether the transit be the carriage of passengers, of freight, or the transmission of intelligence, by telegraph or telephone, or of water, gas, or sewage. All these are public uses that the public may permit, regardless of the individual, so long as they do not infringe the statute which defines what the public use may be.

Whether a corporation created by special act of the legislature, instead of being organized under the general law as provided in Art. IV, § 14, of the Constitution of Maine, is a violation of the constitution is a question that does not arise in this proceeding. *Held;* that the State only can inquire into the validity of the charter of the defendant company, it appearing to be a de facto corporation, at least, acting under a charter from the legislature.

Held; in this case, that the municipal officers had properly approved the location of the street railway.

Briggs v. Lewiston and Auburn Horse Railroad Co., 79 Maine, 363, affirmed.

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

ON REPORT.

Bills in equity heard together, upon bills and proofs, in the court below, upon prayers in the bills for a preliminary injunction, to restrain the defendant from constructing its road over and upon the highway leading through York Harbor, where it was alleged the construction of the same would interfere with the plaintiffs' rights as abutting owners, and owners of the fee to the centre of the highway. The preliminary injunction having been denied, the cases were reported to the law court for full and final hearing.

The principal contentions between the parties are stated in the opinion.

G. M. Seiders and F. V. Chase; Frank D. Marshall; James T. Davidson, for plaintiffs.

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

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

HASKELL, J. Bill in equity by the abutting owners of land on a public way to enjoin a railway company from use of the way because such use creates a public nuisance.

Nothing is better settled in this state than that equity will not enjoin a public nuisance on the application of an individual, either in his own behalf or in behalf of himself and others of like interest who either do or do not join in the application, unless some special damage to the individual, not suffered in common with the public generally, has been sustained. Pom. Eq. § 1349, and cases cited. Equity supplements the law, and there is no need of remedy, where there are no damages at law. *Staples* v. *Dickson*, 88 Maine, 362; *Holmes* v. *Corthell*, 80 Maine, 31.

The bill also seeks an injunction because the plaintiffs are not only abuttors but owners of the fee of the way subjected to the servitude incident to public ways, and that the defendant's use is an additional servitude for which they are entitled to compensation that must first be paid before the servitude may be enjoyed; and this is the main controversy in the cause; for, if the defendant's use of the way be no additional servitude, then the plaintiffs' right in the way and its use are merged with those of the public, and the public alone by its laws must define, control and regulate such use.

What servitude then does the public acquire by the taking of land for a public way? It is the right of transit for travelers, on foot and in vehicles of all descriptions. It is the right of transmitting intelligence by letter, message, or other contrivance suited for communication, as by telegraph or telephone. It is the right to transmit water, gas and sewage for the use of the public. It is a public use for the convenience of the public, to be moulded and applied as public necessity or convenience may demand and as the methods of life and communication may from time to time require.

Society changes and new conditions attach themselves. The change evolves new ways of doing things, new methods of communication, new inventions for travel. When the way is constructed the land owner has his compensation, not only for the land taken, but for the damages sustained, although usually benefits are conferred rather than injury inflicted. These damages are assessed as compensation for a surrender of his land to the public use for travel and transit, not only by the methods then applied, and for the volume then existing, but for all time and for such future use as the exigencies of the time may develop.

When the way has been created, the public controls its use, and regulates its repair by laws that the legislature shall enact. Under these laws the use must be governed, for the people have a right to say what use will best subserve their interests. They have now said that ways shall be maintained "so as to be safe and convenient for travelers with horses, teams and carriages." That is now the criterion, and a use that infringes upon that rule becomes an unlawful use, and may be prohibited by public prosecution. That rule may be changed, for the public, by law, may regulate the use of its public ways in such manner as the legislature may think will best serve the public interest.

This doctrine allows the public to control the use of public ways for travel and communication, as it may be pleased, from time to time, to do. The kind of use that may be permitted is of no consequence to the abuttor. He must take his chance with the rest of the community in which he lives. Some cases may seem to work hardship, but it is better so, than to embarrass the convenience of the people, and cripple and annoy enterprises which the present and future may recognize as necessary for the good and happiness of society.

No matter whether the way be used by the lone traveler on foot or on his wheel, by the two-horse chaise or four-wheeled carriage, by the dray, cart or coach, or by cars that may be permitted to run in the street, whether propelled by beast, steam, electricity or any other agency that may be discovered suitable for the purpose. No matter whether the vehicle carries passengers or freight, or

passes intelligence along its contrivance. All these are public uses, and so long as they do not infringe the laws that regulate the use of highways, they cannot be prohibited either by the individual or public prosecutor. Ways must be "safe and convenient." When they are not, by reason of any incumbrance or permitted use, then ample remedy may be had by public action, and such incumbrance or use may be removed or prohibited.

The servitude complained of in this cause, therefore, is a public servitude and lawful, so long as it does not infringe the laws of the state regulating the use of ways. It gains no hold upon the soil of itself, but is allowed a share of the public use. Should that use be extinguished, its rights would be extinguished also. It must exist or fall with the servitude of the public, otherwise the doctrines of this opinion would be illogical. If it gained any vested right in the soil that the public could not extinguish, then, manifestly it has created an additional servitude, and taken land without compensation to the owner.

These doctrines have been discussed in the numerous courts of this country with varied results. It will not be profitable to review them, for we think best to declare a doctrine best suited to the convenience of our people and most consonant with the laws under which we live. We have persistently maintained the right of "free fishing and fowling," free and unobstructed navigation of our rivers, the free taking of ice upon them, the right of eminent domain over and in the waters of great ponds, and we now assert the right of the people to control the use of their public ways as shall best meet their necessities, without vexation from the land owner, whenever growth and discovery show the convenience of applying new methods for public transit. Let a public way once constructed be free for the public use and control as it may choose. Let it be free as the ocean is free, as our rivers are free, and as our great ponds and lakes are free for the use of all the people.

If the reverse of this doctrine be held, the numerous street railways now operating in our state would be crippled, if not destroyed. If every abuttor could enjoin their operation unless his damages were paid, there would be no end of litigation and confusion.

Moreover, it is now too late to invoke such doctrine. We have already decided that a street railway, propelled by electricity, creates no additional servitude. *Briggs* v. *Lewiston and Auburn Horse Railroad Co.*, 79 Maine, 363. Relying upon that doctrine, electricity has become the principal motor for all our street railroads, and it would be unjust to now overturn it, if we were inclined so to do. On the contrary, we deem it best, and most consistent with our laws and polity to affirm it, and further that neither motor, nor kind of traffic to be engaged in make any difference, so long as the use does not violate the requirements of the statute, concerning which we are not called upon to decide at the instance of an individual.

Now it may be said that the location of a street railway, by authority of the legislature, should give it a vested right to remain after the discontinuance of the way. But it must be remembered the legislature only gave a right to share the public easement, and when that shall be extinguished, all the granted right will be extinguished. It may be that the act of the legislature granting a share in the easement gives a vested right therein, that can only be extinguished by the consent of the grantee, or by authority of the legislature granting it. Of this we have no occasion to decide.

The doctrine of this opinion must not be extended too far. Perhaps the fair inference will be that the taking of land for a way only contemplated surface transit. We do not decide otherwise. When elevated systems of transit are introduced, the permanence of their structure and the annoyance and injury may, perhaps, seem fairly to contemplate a further servitude. Of this, too, we have no occasion to decide.

It must be remembered that the use of ways for street car transit can be enjoyed only by the act of the people themselves. Their ballots control, and if they share their use with others who aid in serving the use common to both, it is a public use after all. The public grant the privilege and control its enjoyment. The exercise of such power best serves our people, who are intelligent enough to understand their necessities and comforts.

But the plaintiffs say that the charter of defendant company is void for constitutional reasons. This contention is not open in this cause. The defendant is acting under a charter from the legislature. It is a de facto corporation at least. The State only can inquire into the validity of the charter. But if the contention were open to the plaintiffs, it could do them no good. They have impleaded the defendant as a corporation, and joined no other persons. If it has no corporate existence, who shall be enjoined? The only prayer in the bill is that defendant corporation be enjoined. If there be no corporation, how can it be enjoined? Suppose plaintiffs had sued a dead man, could they have relief?

It is also contended that the proper approval of the location of the road has not been obtained from the municipal officers of the town. We think the evidence shows the reverse. There is no occasion to review it.

How, then, does the cause stand? The plaintiffs as abuttors and owners of the fee of the way, have suffered no damage from the defendant's occupation in common with the public of some share in the easement acquired by it upon the creation of the way, so that they have no cause for complaint on account of the construction of defendant's railroad, not common to the public in general, and, therefore, have suffered no special damage, and can have neither an action at law or relief in equity.

Bill dismissed with costs.

WALTER S. SPAULDING, and another,

vs.

HANOVER S. NICKERSON.

Somerset. Opinion January 4, 1898.

Writ. Trial Justice. Officer. R. S., c. 83, § 32.

It is provided by statute in this state, that no trial justice shall hear or determine any civil action commenced by himself; and every action so commenced shall abate. R. S., c. 83, § 32.

In an action of trover against a constable for attaching the plaintiffs' goods, the officer justified under a writ issued by a trial justice and proof that on the return day of the writ the suit was settled and that the goods were released and turned over to the debtor. The plaintiff in this action claimed that the writ was void under the statute because it was made by the trial justice before whom the action was commenced; and also denied that the officer had the writ in his possession at the time he took the goods. Upon this last issue, the jury made a special finding in favor of the plaintiffs and returned a general verdict in their favor. On motion of the defendant to have the verdict set aside as against evidence, *the court holds;* that the case does not present an exigency which justifies a new trial. Among other reasons sustaining this conclusion the court observes that the plaintiff in the trial justice writ testifies that he did not make out the bill attached to that writ until the month following the attachment; and that he was present at the time of the seizure of the goods by the constable and knew that the goods were not taken on his writ.

ON MOTION BY DEFENDANT.

The case appears in the opinion.

Besides the facts stated in the opinion, it appeared that the defendant claimed that the parties in the trial justice writ settled before the return day and the debtor agreed to take and move his goods from the store, the rent for which was, as the defendant claimed, the cause of action set forth in the writ. Thereupon the defendant claimed that this settlement by the plaintiffs was a waiver of any action they might have against the defendant for attaching their goods, even if the defendant constable did not have in his possession the writ in question when he seized the goods.

The plaintiffs, on the other hand, urged that if the goods had been properly taken upon such a writ, they had nothing to waive; and further that as a waiver to be effectual must be based on a full knowledge of all the facts, there could be no waiver here, because the plaintiffs did not know until after the settlement that the writ was made by the trial justice before whom the action was commenced.

J. W. Manson and G. H. Morse, for plaintiffs.

Forrest Goodwin, for defendant.

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

WHITEHOUSE, J. This was an action of trover brought by the plaintiffs Spaulding and Thompson, part owners of certain goods, for the alleged conversion of them by the defendant.

The defendant pleaded the general issue with a brief statement of three special matters of defense, viz:

1st. That the defendant was a constable and attached the goods on a writ dated October 9, 1895, issued by a trial justice in favor of one Connor for rent of the store and against the plaintiff Spaulding, returnable December 7, and that on the return day the suit was settled, the goods released from attachment and turned over to Spaulding.

2nd. The defendant justified under an execution issued against the plaintiff, Thompson, in 1894.

3rd. The defendant claimed that when he attached the goods on the writ in favor of Connor, Spaulding told him to hold the goods until Connor got his rent.

But the justification under the old execution against Thompson appears to have been abandoned, and the ground of defense mainly relied upon at the trial was the alleged attachment of the goods on the Connor writ.

It appeared that this writ was made by the trial justice before whom it was returnable, and the statute (R. S., c. 83, § 32,) declares

that "every action so commenced shall abate." The plaintiffs accordingly argued that even if the defendant held the Connor writ at the time of the seizure of the goods, it would afford him no protection; but contended, as a matter of fact, that it was not issued until November of that year, more than a month after the seizure was made. Upon this issue of fact, the jury made a special finding that the defendant did not hold the trial justice writ in favor of Connor, at the time he took possession and control of the goods, and returned a general verdict in favor of the plaintiffs. The defendant moves to have the verdict set aside as against the evidence.

Upon the principal issue of fact submitted to the jury the testimony was sharply conflicting and all efforts to reconcile it are attended with difficulty, but after a careful examination of all the evidence and the arguments of counsel, it is the opinion of the court that the case does not present an exigency which justifies a new trial. Connor, the plaintiff in the trial justice writ, testifies that he did not make out the bill attached to that writ until November, that he was present at the time of the seizure of the goods by the defendant, and knew that the goods were not taken on his writ because it had not been made. The plaintiffs both testify that, at the time of the seizure, the defendant stated that he was taking the goods on the old execution against Thompson and never made any mention of the Connor writ until long afterward. On the other hand the trial justice who made and issued the writ, testifies that it was made on the day it bears date, October 9, and the defendant testifies that he had the writ in his possession on that day and took possession of the goods by virtue of an attachment on it. They are corroborated to some extent by Mr. Hovey who states that on the day of the seizure, or the day the goods were moved out, Connor came to his office to have a writ made on his bill for rent, but that he declined to make it and did not personally know when it was made.

But the result reached by the jury did not necessarily require them to believe that the Connor writ was ante-dated, for there was sufficient evidence to authorize them to find that the defendant

took possession and assumed control of the goods on the seventh day of October, two days before the date of the Connor writ.

The defendant's evidence tending to show a final settlement of the entire controversy and a waiver on the part of the plaintiffs of any wrong doing by the defendant in taking the goods without authority, is not so clear and definite, and when compared with the plaintiffs' evidence, is not so conclusive as to warrant the court in disturbing the verdict on that ground.

Motion overruled.

EDGAR L. THOMPSON

vs.

LEWISTON DAILY SUN PUBLISHING COMPANY.

Kennebec. Opinion January 4, 1898.

Libel. Pleading. Colloquium.

In order to render words actionable in a suit for libel, it is not necessary that there should be the same precision and certainty in the language employed to make the charge, as in the allegations of an indictment for the same offense.

If the defamatory words, taken in their natural and ordinary signification, fairly import a criminal charge, it is sufficient to render them actionable.

But upon demurrer to the declaration words alleged to be libelous cannot be pronounced actionable by the court unless they can be interpreted as such with at least reasonable certainty.

In case of uncertainty as to the meaning of expressions of which a plaintiff complains, the law requires the pleader to make the meaning certain by means of proper colloquium and averment.

Held; that the statement in the defendant's newspaper "he has a wife living in the west" construed with reference to all the other averments in the declaration impute with reasonable certainty to the plaintiff the crime of bigamy or polygamy.

When the manifest purpose of such statement is to suggest criminal conduct with respect to the plaintiff's marriage relations, and considered in connection with the averment in the colloquium that "he had been married to Helen M. Thompson, with whom he was then living as his lawful wife in the town of Monmouth," *held;* that it must be regarded as imputing to the plaintiff the crime of bigamy.

The article complained of in this case related to the arrest of the plaintiff upon the charge of murder. *Held;* that the allusion to the "divorce of the second wife now living in Auburn" is calculated to present a contrast between her legal status and that of "a wife now living in the West;" and that the entire article was apparently designed to exhibit his previous record in such a light as to suggest the probability of the truth of the charge upon which he had been arrested.

ON EXCEPTIONS BY DEFENDANT.

The case appears in the opinion.

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

G. W. Heselton and L. T. Carleton, for defendant.

The demurrer should be sustained because (1st.) the declaration does not declare that Thompson knew of the crime charged. (2nd.) In point of law the words fall short of charging the crime of bigamy. (3rd.) The court in an examination of this case, coming before it on a demurrer, must find that it appears upon the whole declaration that the words are clearly defamatory; and if they are ambiguous they cannot be pronounced defamatory. (4th.) Taking the whole article together and considering its scope and purpose—the legal effect of the very words of divorced wife and only by magnifying the true meaning of the words—can a libel be invented; and such a course is contrary to the universal rule governing the interpretation of libels.

It is the duty of the court in an action for a libel to understand the publication in the same manner as others would naturally do. The construction which it behooves a court of justice to put on a publication which is alleged to be libelous is to be derived as well from the expressions used as from the whole scope and apparent object of the writer. *Cooper* v. *Greeley*, 1 Denio, 358; *St. James Mil. Acad.* v. *Gaiser*, 125 Mo. 517, (46 Am. St. Rep. 502).

If the above rule is applied, and the construction is to be derived from the whole scope and apparent object of the writer, when we consider his article, but one thought could have arrested the minds of the reader acquainted with the plaintiff's surroundings and that was, Thompson had had three wives—been divorced by two and was living with the third;—and the writer was giving

the history of the arrest and not intending and trying to write a libel on his family relations. While the different cases reported do not give aid in the determination of the case at bar from similar words, still in principle involved the following seem to sustain this rule. *Adams* v. *Stone*, 131 Mass. 433; *York* v. *Johnson*, 116 Mass. 482; *Chase* v. *Sherman*, 119 Mass. 387; *Young* v. *Cook*, 114 Mass. 38; *Brettun* v. *Anthony*, 103 Mass. 37; *Emery* v. *Prescott*, 54 Maine, 389; *Wing* v. *Wing*, 66 Maine, 62.

Counsel also cited: 13 Enc. of Law, pp. 378, and note, 386; *World Pub. Co.* v. *Mullen*, 43 Neb. 126, (47 Am. St. Rep. 737); Odgers on Libel and Slander, 1st Am. Ed. by Bigelow, p. 85, note to § 94. *Hemmenway* v. *Woods*, 1 Pick. 524 ; *Marsh* v. *Davison*, 9 Paige (N. Y.) 580; *Simpkins* v. *Justice*, 1 Ind. 558; *Griggs* v. *Vickroy*, 12 Ind. 549.

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

WHITEHOUSE, J. This is an action of libel for defamatory matter published in the newspaper of the defendant company concerning the plaintiff. The defendant filed a general demurrer to the declaration. The presiding judge overruled the demurrer and the defendant brings the case to the law court on exceptions to this ruling.

The more material parts of the published article, comprising the special matter alleged to be libelous, with the innuendoes as they appear in the declaration, are as follows:—

"The announcement in yesterday's Sun of the Thompsons' (meaning the plaintiff and his brother) arrest for the murder of J. Augustus Sawyer, caused a surprise to many people in this section of the country, as many people supposed no solution would come. Words of praise were heard for the Sun's enterprise in ferreting out the mystery which has caused so much talk. A resident from near Monmouth remarked that the Sun had done a big thing for that place. 'Why' said the gentleman, 'my folks were afraid, even to this day, to go out of doors alone nights for the fear of being molested'" . . . . "The Thompsons' (meaning the

plaintiff and his brother J. Albert Thompson aforesaid) records (meaning their past conduct or actions) are not of a Sunday School order (meaning that their conduct in the past has not been in accordance with the rules of morality and virtue but has been immoral and in violation of law) Edward Thompson, (meaning the plaintiff) whose true name is Edgar Thompson had lived an eventful life and the authorities (meaning the prosecuting officers of Kennebec county aforesaid) have evidence which will not put him in an enviable light. It is said from other sources that Edward or Edgar Thompson (meaning the plaintiff) has a wife living (meaning that he, the plaintiff, had committed the crime of bigamy and that a person who was then his wife and from whom he has never been divorced, was then still alive and that the said Helen M. Thompson, with whom he is now and was then living, is not and was not then his legal wife but that he is and was then living with her unlawfully) in the west who will probably be secured (meaning that she will be brought to Augusta) as a witness (meaning that she will be summoned to testify as to the character of the plaintiff at the trial of said plaintiff on the said charge of murder.) 'Ed' Thompson (meaning the plaintiff) was divorced by his second wife (meaning the said Abbie E., his first wife, from whom he was divorced as aforesaid) and she is now living in Auburn."

In the colloquium of his declaration the plaintiff avers "that he is and for a long time prior to December 20, A. D. 1895, had been legally married to his wife, Helen M. Thompson, with whom he is now and for several years prior hereto has been living as his lawful wife in said town of Monmouth; that previous to such marriage he was married to one Abbie E. Merriman, and on the 16th day of November previous to his marriage to said Helen M. Thompson, he was legally divorced from her, the said Abbie E. Thompson, and that she, the said Abbie E. Thompson, is now living in Auburn, in the county of Androscoggin and state of Maine; that he has never been married to any other person or persons than the said Abbie E., his first wife, and the said Helen M., his second wife; that he has never committed the atrocious crime of bigamy; that he, said plaintiff was on the eighteenth day of

December, A. D. 1895, arrested and, in company with his brother, J. Albert Thompson, on the 20th day of December A. D. 1895, arraigned before A. G. Andrews, Esq., Judge of the Municipal court of the city of Augusta, within and for said county of Kennebec, on a charge of murder of one J. Augustus Sawyer, and on the said preliminary hearing thereon was discharged as innocent thereof."

It is contended in behalf of the plaintiff that the words "he has a wife living in the west," construed with reference to all the other averments in the declaration are not only capable of imputing, but do clearly impute to the plaintiff the crime of bigamy or polygamy. On the other hand the defendant argues that as there is nothing in the published article to negative the exception found in the statute (R. S., c. 124, § 4,) of "one legally divorced" and "one whose husband or wife has been continually absent for seven years and not known to be living," the words fall short of charging the crime of bigamy and cannot be declared defamatory without magnifying their true meaning.

It is not necessary, in order to render words actionable, that there should be the same precision and certainty in the language employed to make the charge, as in the allegations of an indictment for the same offense. If the defamatory words, taken in their natural and ordinary signification, fairly import a criminal charge, it is sufficient to render them actionable. *Gibbs* v. *Dewey*, 5 Cow. 503; *Miller* v. *Miller*, 8 Johns. 74. Written or printed language, alleged to be defamatory, is in law capable of the same sort of modification by explanatory evidence as oral language; and where, upon trial, the question depends upon evidence to be introduced in connection with the publication, it is properly left to the jury to say whether the language is libelous or not, the same rule prevailing as in similar cases of slander. Odgers on Lib. & Sl. p. 94. Whether or not the language used will bear the interpretation given to it by the plaintiff, whether or not it is capable of conveying the meaning which he ascribes to it, is in such a case a question of law for the court. What meaning the words did convey to the readers is in such a case a question of fact for the jury.

It is not the intention of the writer, or the understanding of any particular reader that is to determine the question. It is rather the effect which the language complained of was fairly calculated to produce and would naturally produce upon the minds of readers of reasonable understanding, discretion and candor, after it has been examined and considered in connection with all other parts of the writing, and in the light of all the facts and circumstances known to them.

But upon demurrer to the declaration, words alleged to be libelous cannot be pronounced actionable by the court "unless they can be interpreted as such with at least reasonable certainty. In case of uncertainty as to the meaning of expressions of which a plaintiff complains, the rule requires him to make the meaning certain by means of proper colloquium and averment." *Wing* v. *Wing*, 66 Maine, 62.

In the case at bar it is the opinion of the court that when the statement "he has a wife living in the west" is considered in the light of the context and of the spirit and purpose of the entire article, and construed with reference to all the facts stated in the colloquium and admitted by the demurrer, it is fairly calculated to convey, and must be held to convey, the meaning which the plaintiff attaches to it. When thus examined, and interpreted according to the natural and popular signification of the words, it clearly imports a charge of bigamy. The communication relates to the arrest of the plaintiff upon the charge of murder. It was published by a newspaper claiming in the same article to have exclusive information in regard to the plaintiff's life and character, and to be entitled to the credit of "ferreting out" a great mystery. It declares that the plaintiff's record is "not of a Sunday School order"; that "Edward Thompson whose true name is Edgar Thompson, has lived an eventful life," and that "the authorities have evidence which will not put him in an enviable light." In the same paragraph follows the gravamen of the matter: "It is said that he has a wife living in the west who will probably be secured as a witness. 'Ed' Thompson was divorced by his second wife and she is now living in Auburn." The popular as well as

the lexical meaning of "wife" is "a woman who is united to a man in the lawful bonds of wedlock." The allusion to the divorce of a former wife is calculated to present a contrast between her legal status and that of a "wife now living in the west," and the entire article was apparently designed to exhibit his previous record in such a light as to suggest the probability of the truth of the charge upon which he had been arrested. The fact that he had been divorced from a wife in the west would have no such tendency. The manifest purpose of the statement was to suggest criminal conduct with respect to his marriage relations; and when it is considered in connection with the averment in the colloquium that he "had been married to Helen M. Thompson with whom he was then living as his lawful wife in the town of Monmouth," it must be regarded as imputing to him the crime of bigamy "with reasonable certainty."

Exceptions overruled.

CHRISTOPHER TOOLE, Assignee,

vs.

SAMUEL R. BEARCE, and another.

Penobscot. Opinion January 5, 1898.

Exceptions. Rule XVIII. Practice. Instructions.

When the presiding justice unqualifiedly allows a bill of exceptions which does not disclose that the exceptions were not seasonably noted, the presumption is that the exceptions were seasonably noted in accordance with the rule.

When the bill of exceptions does not affirmatively show that, but for the rulings excepted to, the finding of the jury might reasonably have been different, the excepting party does not show that he is aggrieved, and hence his exceptions must be overruled.

The presiding justice in his instructions may properly assume even a disputed proposition of fact to be established, if all the evidence thereon can lead to no other reasonable conclusion.

Unless it appears from the bill of exceptions that there was substantial evidence against the proposition of fact assumed by the presiding justice to be established, the exceptions to such ruling or assumption must be overruled.

On Exceptions by Defendants.

This was an action on a contract to recover for certain granite claimed to have been delivered by the plaintiff's assignor to the defendants under a contract, and for damages for the breach of the contract by the defendants, and for prospective profits. The writ contains two counts. The first count sets out specifically a definite, certain and completed contract made between the parties. The second count is the ordinary omnibus count with specifications and quantum meruit. The defendants pleaded the general issue with a brief statement to the effect that the defendants attempted to enter into a contract with the plaintiff's assignor, one Cyrus F. Stackpole; but that in fact the contract was never actually entered into. The contract set out in the plaintiff's declaration provided that all measurements of said granite were to be made after it had been constructed into said walls, head-gates and other improvements. There was evidence tending to show that a certain amount of granite was delivered by the plaintiff's assignor at the Bangor Water Works pumping station, the place of the delivery specified in the contract set out. It was contended for the plaintiff that he was entitled to recover for the granite actually delivered, for that in process of delivery, and for damages for the defendants' breach of the contract, and for prospective profits.

It was contended for the defendants that no actual contract was ever entered into, and that if they were liable at all, they were liable only for such granite as had been actually delivered to them at the pumping station; and that in determining the amount of granite delivered for which they might be liable, the granite was to be measured not as if in the wall, but as it actually measured out of the wall; the point not being raised except as appears in the charge. There was evidence that the measurement of the stone would be some ten or fifteen per cent greater when measured in the wall than when measured roughly out of the wall. Upon this point the presiding justice instructed the jury as follows:

"In considering the agreements as to price $2.75 were to be paid for the dimension; and then you may add to that, if you please, either ten or fifteen per cent for the enlargement of it when measured in the wall, because the agreement of the parties was $2.75 measured in the wall and they all say it amounts to as much as ten per cent better when measured in the wall, than when measured roughly, and the defendants' witness estimated it about fifteen per cent."

To this ruling and instruction the defendants excepted.

There was a verdict of $826.49 for the plaintiff.

G. H. Worster and P. G. White, for plaintiff.

D. J. McGillicuddy, F. A. Morey; J. F. Robinson, for defendants.

SITTING: EMERY, HASKELL, WHITEHOUSE, WISWELL, SAVAGE, JJ.

EMERY, J. I. The plaintiff contends that this bill of exceptions should be rejected by the law court without consideration of its subject matter, because it is not affirmatively stated in the bill that the exception to the instruction complained of was noted before the jury retired with the case. He invokes Court Rule 18 and *McKown* v. *Powers*, 86 Maine, 295, in support of this contention.

It does not affirmatively appear, however, from the bill that the exception was not seasonably noted under the rule as expounded in the case cited. The presumption, therefore, is that it was seasonably noted. *Ellis* v. *Warren*, 35 Maine, 125. Frequently in the trial of a case it will be tacitly understood by the presiding justice and the parties that certain legal points are contested, and that any adverse ruling upon them is to be regarded as excepted to, without a formal noting on the record at the time. If the presiding justice signs a bill of exceptions without qualification or any intimation that the exception was not seasonably reserved, the law court will assume that he and the parties understood it to be seasonably reserved, and will proceed to consider the bill of excep-

tions if it be in proper form,—if the exceptions are presented in a "summary manner,"—that is, "stated separately, pointedly and concisely." *McKown* v. *Powers*, supra, p. 295. The statement in this bill makes the point of the exception sufficiently clear.

II. The plaintiff's assignor negotiated with the defendants for a contract to deliver to them certain stone for a wall. A written memorandum of such contract itself was drawn up but not signed, and the contract itself was found by the jury not to have been perfected. This memorandum specified the price per cubic yard, the measurement to be of the stone after it was placed in the wall. After the preparation of this memorandum and in expectation of its being signed and made a formal contract, the plaintiff's assignor actually delivered to the defendant some stone of the kind contemplated in the memorandum and at the place therein specified. This stone the defendants accepted. The stone was measured by the defendant in the heap before being placed in the wall, and it was admitted that the same stone in the wall would measure some ten or fifteen per cent more than it had measured in the heap.

The presiding justice practically told the jury that there was not sufficient evidence of the completion of the proposed contract, and the jury found that the stone had been accepted. The only other questions for the jury were the quantity and price of the stone actually delivered and accepted.

The presiding justice in his charge plainly and amply instructed the jury that the plaintiff could not recover upon the supposed contract, but only upon a quantum meruit, and that what was a reasonable price was a question for the jury to determine from the evidence. The written memorandum had been admitted in evidence upon this question of reasonable price, and it is not questioned that it was proper evidence to be considered by the jury. It does not appear from the bill of exceptions that there was any other evidence upon that question. It does not appear that during the trial the defendants questioned that the price named in the memorandum and based upon a measurement in the wall was a fair, reasonable price, in case the defendants had accepted the

stone. Indeed, the bill of exceptions seems to intimate affirmatively that the price was not disputed until the presiding justice delivered his charge.

Under these circumstances the presiding justice called the jury's attention to the price named in the memorandum as being based upon a measurement to be made in the wall, and to the undisputed fact that the delivered stone had only been measured in the heap; and to the further undisputed fact, that the same stone measured in the wall would measure ten or fifteen per cent more than in the heap. He then instructed them they could "if they pleased add [to the measurement in the heap] ten or fifteen per cent for the enlargement of it [the stone] when measured in the wall." The exception is to this instruction, and upon the ground that it took away from the jury more or less of the question of reasonable price.

It must be evident that the defendants do not show by their bill of exceptions that they were prejudiced by this instruction. They do not show that there was in the case any evidence from which a jury could have found a different price based upon any other measurement than that named in the memorandum. Unless there was such evidence we must assume that the jury would be governed by the only disclosed evidence, the memorandum. Upon that assumption it was clearly right to instruct them they could, when computing the entire amount to be paid, enlarge the measurement in the heap to its equivalent in the wall, according to the uncontradicted evidence.

It is lawful and often expedient for the presiding justice, in his instructions to the jury, to assume undisputed propositions of fact to be established, and even to assume disputed propositions of fact to be established, when all the evidence in regard to them can lead to no other reasonable conclusion. Such a course will often greatly simplify the issue and enable the jury to concentrate their attention more completely and effectually upon the real dispute to be determined by them. If a party feels aggrieved by such an assumption and wishes it set aside, he should show in his bill of exceptions, that there was, at least, some evidence against the

proposition assumed. The excepting party is always held to show in his bill of exceptions that, but for the ruling complained of, the verdict or judgment might properly have been different. If that does not appear, or if it does appear that in the end the judgment must be against the excepting party, it cannot be truly said that the excepting party has been prejudiced, and his exceptions must be overruled.

In this case had the instructions complained of been withheld, it does not appear that the jury could have adopted any other price or measurement. Their duty was the same with or without the instructions.

Exceptions overruled.

ALMOND H. GOULD, and another,

vs.

BOSTON EXCELSIOR COMPANY.

Piscataquis. Opinion January 5, 1898.

Incomplete Contracts. Parol Evidence. Logs. Scaler.

When the written memorandum of an agreement for the cutting, hauling and driving logs or wood is silent as to the scale and the scaler, and does not import upon its face to contain all the stipulations of the parties as to the subject matter,—oral evidence may be received of an additional verbal stipulation as to the scale or the scaler.

Such a stipulation does not add to, nor subtract from, nor in any way vary the liability of either party under the written memorandum.

ON EXCEPTIONS BY DEFENDANT.

This was an action of assumpsit to recover the sum of $1,821.47 for driving 3235 cords of poplar from Ship Pond Stream to Milo boom, at 75 cents per cord.

Plea, the general issue.

The plaintiffs introduced in evidence a written contract signed by themselves, also a written contract signed by the defendant's agent, of the following tenor:—

BOSTON EXCELSIOR COMPANY.
Manufacturers and dealers in Excelsior and Upholsterers' Supplies.
Julian D'Este, Treas. 26 Canal Street.
Boston, Mass.

Sebec, Me., Mar. 29, '94.

We the undersigned, do hereby agree to take the poplar cut and peeled for the Boston Excelsior by Hoxie Bros. now on landing at Ship Pond Stream and drive and deliver the same in their boom at their dam in Milo Village, Me., in the spring of 1894, for 75 cts. per cord.

We do further agree to deliver all poplar delivered in booms to the Boston Excelsior Co. from other parties on Sebec Lake to the Boston Excelsior Co. at their boom in Milo Village, Me. in the spring of 1894, for 25 cts. per cord.

We further agree to deliver and yard on the landing at Ship Pond Stream (what poplar was left in the woods peeled by Hoxie Bros.) during the summer of 1894, for $1.00 per cord.

We also agree to cut and peel 2,000 (two thousand) cords of poplar, if there be that amount, on land known as the Quarry Tract owned by S. & J. Adams of Bangor, Me., and drive and deliver the same to the dam of the Boston Excelsior Co. in Milo Village, Maine, in the spring of 1895—cutting, peeling and delivering the same at landing on Ship Pond Stream, for $1.50 per cord, and 75 cents per cord for driving the same to the dam of the Boston Excelsior in Milo Village, Maine.

A. H. GOULD.
J. C. DEAN.

BOSTON EXCELSIOR COMPANY.
Manufacturers and dealers in Excelsior and Upholsterers' Supplies.
Julian D'Este, Treas. 20 Canal Street.
Boston, Mass., Mar. 29, '94.

We, the undersigned, agree to pay Gould & Dean the sum of $500.00 (five hundred dollars) when the poplar now landed in Ship Pond Stream is driven out into Sebec Lake (to pay men with) and pay them the balance when the rest of the poplar in is in the Milo boom. We further agree to advance money to pay

men for peeling and yarding poplar on Ship Pond Stream, to be cut as agreed upon land known as the Slate Quarry Tract owned by S. & J. Adams. Also to advance money to pay men for yarding upon Ship Pond Stream such poplar as was left in the woods by Hoxie Bros. in their operation, when same is yarded on stream.

BOSTON EXCELSIOR CO.
By Julian d'Este, Treas.

The evidence tended to show that both contracts were signed and delivered at the same time. The plaintiffs introduced evidence tending to show that a few days prior to the making and signing of the contracts the plaintiffs met Julian d'Este, treasurer and agent of the defendant corporation at Milo; that the trade so made at said Milo is embodied in the contract first above. The plaintiffs offered evidence of certain conversations between themselves and said Julian d'Este, made at the time that the trade was made, that was embodied in the contract first above, tending to show that there was an agreement made as to how and by whom the poplar was to be scaled. The plaintiffs claimed that such talk as to the scaler constituted an independent agreement. The defendant introduced evidence tending to show that the contract first above embraced the whole contract made at Milo between the parties.

Upon this branch of the case the presiding justice gave the jury the following among other instructions:—

"The plaintiffs claim to recover a balance of $1821.47 for services alleged to have been performed under a written contract in driving certain logs on Sebec waters into Milo for the benefit of the defendant corporation. They claim that they drove 1025 cords of the Hoxie lumber and 2210 cords of the new lumber; while the defendant claims that there were 848 cords of the Hoxie lumber and 1745 cords of the new lumber,—making a difference of 177 cords of the Hoxie lumber and 465 cords of the new lumber, a difference of considerable importance to the parties; and, as I have observed before, whether the amount be large or small, of course, the parties are entitled to your best judgment on the facts which they present to you. . . . .

"If a written instrument is silent in relation to any material

point it is competent for them [the parties] to show that they have made outside of that an independent agreement in relation to some matter which does not contradict, vary or modify the written contract.

"The plaintiffs seek to avail themselves of this familiar principle of law.

"A written contract has been introduced signed by the parties specifying what was to be done by the plaintiffs with reference to the Hoxie lumber and the new lumber in respect to the cutting, peeling, hauling, landing and finally driving into Milo. It is not in controversy that this was the understanding and that it was done without fraud or mistake on either side, and contracts have been signed.

"But the plaintiffs say that those contracts were prepared, or signed at all events, by the defendant company in Boston, and that there was an independent and important understanding and stipulation between them which was not embodied in this written instrument, and that is with reference to the manner in which and the person by whom the number of cords should be ascertained; in other words, the agreement upon the scaler. And the plaintiffs say that there was such an independent agreement; that it was well and fairly and fully understood between them and the defendant company that not, indeed, the name of the scaler but that the person that should be designated and furnished by the Adamses of Bangor should be the scaler. The plaintiffs both, as I remember, testify that when the inquiry was raised as to who should be the scaler or how the scale should be made, the agent of the defendant corporation, Mr. d'Este, replied in substance that there would be no trouble about the scale, that Adams would send up and furnish the scaler, and the plaintiffs say that that proposition was acceded to by the plaintiffs, if not expressly in words at that time by saying, "That will be satisfactory to us," or "We accept your proposition, that the scaler furnished by Adams shall be the scaler agreed upon," nevertheless that you ought to infer, and must infer as fair-minded men that by their conduct they did accept the proposition and did act upon it; and when Mr. Adams, or the

Adamses, were notified, they sent up the scaler and he entered upon the discharge of his duties at the several landings where the poplar was being hauled.

"Now this is the position of the plaintiffs. They say in other words that there was a fair agreement upon the person who should scale the lumber, that that person was furnished, as understood and agreed upon, by Adams; that he was in fact, if that inquiry should be opened, a competent person, that he entered upon his duties and discharged them fairly and honestly in the exercise of his best judgment, and therefore they claim that the results of his scale are conclusive upon the parties.

"Well, gentlemen, I may as well say here that there is no dispute between counsel in relation to the law upon that branch of the case. It is familiar and well settled that the scale of a scaler is conclusive upon the parties, who have agreed upon him, in the absence of fraud or manifest mistake."

After verdict for the plaintiffs, the defendant was allowed exceptions to the admission of the evidence introduced by the plaintiffs showing how and by whom the poplar was to be scaled.

W. E. Parsons and J. B. Peaks, for plaintiffs.

No part of the writing covered this collateral stipulation shown by the plaintiffs, consequently evidence of it was admissible, and it was for the jury to determine whether it was proved or not. *Farwell* v. *Tillson*, 76 Maine, 227, 239; 2 Pars. Cont. pp. 553 and cases, 555 and note; *Davenport* v. *Mason*, 15 Mass. 85, and cases; *Neal* v. *Flint*, 88 Maine, 72.

H. Hudson and F. E. Guernsey, for defendant.

In the contract under consideration the language is certain, the contract is complete. The fact that the contract contains nothing in regard to how the poplar is to be scaled or measured does not make such parol evidence admissible as is established by the rule laid down in 1 Greenl. Ev. § 275; *Thompson* v. *Libby*, 34 Minn. 377.

Counsel also cited:—*Warren* v. *Wheeler*, 8 Met. 97; *Doyle* v. *Dixon*, 12 Allen, 578; *West* v. *Kelley*, 19 Ala. 353, (54 Am. Dec. 192); *Black* v. *Batchelder*, 120 Mass. 171.

By the contract the poplar was to be driven to Milo, where in absence of agreement of the parties it was to be surveyed by the sworn surveyor of Milo. R. S., c. 41, §§ 1, 2, 14, 15, 25.

Counsel also cited:—*Chase* v. *Jewett*, 37 Maine, 351; *Haynes* v. *Hayward*, 41 Maine, 488; *Coombs* v. *Charter Oak Co.*, 65 Maine, 384; *Durkin* v. *Cobleigh*, 156 Mass. 108; *Fawkner* v. *Smith Wall Paper Co.*, 88 Iowa, 169, (45 Am. St. Rep. 230); *Russell* v. *Barry*, 115 Mass. 300; *Frost* v. *Blanchard*, 97 Mass. 156; *Knowlton* v. *Keenan*, 146 Mass. 86; *Boardman* v. *Spooner*, 13 Allen, 361; *Adair* v. *Adair*, 5 Mich. 204, (71 Am. Dec. 779); *Cream City Glass Co.* v. *Friedlander*, 84 Wis. 53, (36 Am. St. Rep. 895); *Harrison* v. *McCormick*, 89 Cal. 327, (23 Am. St. Rep. 469); *Barry* v. *Ranson*, 12 N. Y. 462; *Cobb* v. *Wallace*, 5 Coldwell, 539, (98 Am. Dec. 436.)

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

EMERY, J. The defendant had purchased some poplar cut upon the land of Adams and desired to have it driven down the streams to its mill. It also desired to have other poplar on Adams' land cut, peeled and driven. To this end, its agent had some conversations with the plaintiffs with reference to their doing the cutting, peeling and driving. As a result of these conversations the plaintiffs gave the defendant a written memorandum signed by them only, and the defendant at the same time gave them a written memorandum signed by its agent only. These memorandums are printed in full, ante, pp. 215, 216.

The plaintiffs did cut, peel and drive more or less poplar for the defendant under these memorandums and the amount, or number of cords, was the only question before the jury.

It will be noticed that in neither memorandum was it stated by whom the poplar should be scaled, or that it should be scaled at all. The plaintiffs offered to show by parol evidence that, during the conversations prior to the exchange of the memorandums, it was orally agreed by both parties that the poplar should be scaled by a scaler to be sent by Adams, the land owner, and that his

scale should control. Was such parol evidence admissible for that purpose under these circumstances?

It is difficult to reconcile the various decisions upon the general question of when parol evidence of other and oral stipulations may be received where some stipulations are expressed in writing. The cases cited in the majority and minority opinions of the court in *Neal* v. *Flint*, 88 Maine, 72, are evidence of that difficulty.

We think, however, that a safe rule, decisive of this case, may be readily deduced from the great majority of the decisions, viz:— Where the writing or writings, by reason of their brevity, informality or skeleton nature, do not of themselves import that all the stipulations between the parties with reference to the subject matter were intended to be expressed in them,—and where the particular stipulation is of such nature that the omission to express it in the writing does not indicate that it was not agreed upon,—and it in no way conflicts with any written stipulation,—and does not increase the burdens of either party,—parol evidence of such stipulation is admissible. We do not say that all the above conditions must exist before the parol evidence can be received. We only say that where they do exist, the parol evidence is admissible. The justices of this court have been unanimous in support of at least this latter proposition. *Bonney* v. *Morrill*, 57 Maine, 368; *Neal* v. *Flint*, 88 Maine, 72.

In this case there was no formal draft of a contract containing reciprocal stipulations signed by both parties. There were only informal memorandums exchanged relating to time, place and price, and making certain the things usually most in debate and most desirable to have made certain. The poplar under such memorandums would require to be scaled. It would be natural to provide for a scaler. The omission to name him in the memorandum does not indicate that the parties agreed to do without a scaler. The alleged oral agreement that Adams, the land owner, should send the scaler does not add to, substract from, nor in any way vary the duties of either party. It was equally for the benefit of both parties. It was competent for either party to prove the stipulation by parol evidence notwithstanding the writings.

Exceptions overruled.

SAMUEL C. LORD *vs.* HENRY LANGDON.

Sagadahoc. Opinion January 5, 1898.

Malicious Fence. Stat. 1893, c. 188.

By the common law a man may build a fence on his own land as high as he pleases, although by so doing it may obstruct his neighbor's light and air.

But by statute, "any fence or other structure in the nature of a fence, unnecessarily exceeding eight feet in height, maliciously kept and maintained for the purpose of annoying the owners or occupants of adjoining property, shall be deemed a private nuisance."

The gist of an action against a party for maintaining such a structure is that it is "maliciously kept and maintained." The plaintiff must show that malevolence was the dominant motive.

ON MOTION BY DEFENDANT.

The case appears in the opinion.

Frank E. Southard, for plaintiff.

Geo. E. Hughes, for defendant.

SITTING: FOSTER, HASKELL, WHITEHOUSE, STROUT, SAVAGE, JJ.

FOSTER, J. This is an action brought under c. 188 of the Laws of 1893, to recover damages for maliciously keeping and maintaining a structure in the nature of a fence for the purpose of annoying the plaintiff.

The verdict was in favor of the plaintiff, and the case comes up on motion for a new trial.

The parties occupy adjacent lots, on which their respective houses stand, on the east side of High Street in the city of Bath. Sometime in 1894 the defendant built a structure entirely on his own land about two feet from the division fence separating the two lots and four feet from plaintiff's house. It was eight and one-half feet high on the west end, and fourteen feet on the east end, conforming to the grade of the lot, level on top, and as high as the top of the plaintiff's windows.

By the common law a man may build a fence on his own land as high as he pleases, although by so doing it may obstruct his neighbor's light and air. But by the statute, "any fence or other structure in the nature of a fence, unnecessarily exceeding eight feet in height, maliciously kept and maintained for the purpose of annoying the owners or occupants of adjoining property, shall be deemed a private nuisance."

The gist of the action consists in the fact that the structure is "maliciously kept and maintained." To entitle the plaintiff to recover, it must be shown that malevolence was the dominant motive, and without which the fence would not have been built or maintained. So if the height above eight feet is shown to be necessary, there can be no liability, no matter what may be the motive of the owner in erecting it. *Rideout* v. *Knox*, 148 Mass. 368.

Under instructions from the court to which no exceptions are taken, the jury found that the controlling, dominant motive of the defendant was malicious, and that the erection of the fence was done for the purpose of annoying the plaintiff. The evidence satisfies us that the jury were justified in the conclusions to which they arrived, and that the verdict ought not to be disturbed.

Motion overruled.

JOHN A. RHOADES *vs.* ISAAC VARNEY, and others.

York. Opinion January 5, 1898.

Negligence. Master and Servant. Assuming Risk.

Although between joint employers, one of them takes upon himself the function of a workman, the relation of master and servant nevertheless continues to subsist.

Where a defendant standing in the relation of master, knows, or by the exercise of ordinary care ought to know, that the plaintiff is in a place of danger, it is the duty of such defendant therefore to exercise ordinary care on his part so as not to expose the plaintiff to perils that might by the exercise of such care have been avoided.

The servant, though employed in a place of more or less danger, has a right to expect the exercise of due care on the part of his employer.

The servant in assuming the ordinary risks of an employment does not assume a risk which is the consequence of the employer's negligence.

ON MOTION BY DEFENDANTS.

This was an action on the case in which the plaintiff recovered a verdict of $1200 for a leg broken by the defendants' negligence.

The case appears in the opinion.

E. P. Spinney and J. O. Bradbury, for plaintiff.

G. C. Yeaton, for defendants.

When plaintiff, then, put his leg where it was caught by the retreating carriage, he knew, or should have known, the inevitable consequence of his action.

He could and did choose where he would stand. Moreover, he knew the carriage would retreat without notice to him. *Flynn* v. *Campbell*, 160 Mass. 128; *Perry* v. *O. C. R. R.*, 164 Mass. 296; *McLean* v. *Chem. Paper Co.*, 165 Mass. 5; *McCann* v. *Kennedy*, 167 Mass. 23. It was a perfectly obvious danger, in the path of which he voluntarily stood. Counsel also argued:

(1) That defendant did not know where plaintiff's leg was when he reversed and started the carriage back; and if so, of course, had no reason to apprehend any unusual danger; and (2) if he did know this, he was wholly warranted in assuming that the plaintiff himself also knew where it was, and his age, faculties, and experience enabled him to appreciate the danger quite as distinctly as defendant could, and hence that he would seasonably remove it to some safer standing ground. *Inland & S. Coasting Co.* v. *Tolson*, 139 U. S. 551, 558; *Olson* v. *McMurray Cedar Lumber Co.*, 9 Wash. 500, (37 Pac. R. 679.) See other cases in Bailey's Pers. Inj. rel. to M. & S. 1121-1150.

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

FOSTER, J. The plaintiff was employed to attend the "tail-stock" in defendants' saw-mill, and while so doing his leg was

broken by being caught between a projecting point, or head block, of the retreating log carriage and the frame supports of wooden rollers set in the floor and designed to facilitate handling the lumber as it came from the carriage. One of the defendants was the sawyer, stationed near the saw, whose duty it was to operate the carriage, and the negligence which the plaintiff alleges consisted in his "carelessly, negligently, and without notice, starting the machinery operating said carriage" while the plaintiff was in the act of removing the log from the carriage.

The verdict being for the plaintiff, the case comes before this court on the defendants' motion to set the verdict aside because it is not supported by the evidence, and because it is excessive in amount.

The gravamen of the plaintiff's complaint is that his injuries were received through the defendants' negligence in starting the machinery without due warning or notice to the plaintiff so as to enable him, while in the proper performance of his duty, and with reasonable care on his part, to avoid the peril and escape the injuries which he received.

The plaintiff was twenty-five years old, and had had ample experience in the duties and dangers of his occupation, and had been at work about six weeks in the performance of the same duties in which he was engaged at the time of the accident, and, as the evidence shows, during all that time it had been the practice of the defendant to start the carriage back as soon as it was relieved of the log or lumber upon it.

The logs were placed upon the carriage in the rear of the saw, then run past, and if deemed suitable sawed into box boards; otherwise taken off and cut into shingle bolts. When the plaintiff was injured, a log of the latter character had been placed upon the carriage, run past the saw, and the plaintiff was attempting to remove his end of it from the carriage, when the carriage was started back at a velocity of from three to four hundred feet a minute. The contention of the defendants is, that the log had been removed when the carriage was started. This is the principal question of fact upon which the parties are at variance.

It is strenuously asserted in defense that the defendant did not know where the plaintiff's leg was when the carriage was reversed and started back; and that if he did know this, the defendant was warranted in assuming that the plaintiff himself also knew, and that his experience enabled him to appreciate the danger of the situation and to seasonably remove his leg to some safer standing ground.

The evidence is uncontradicted that the defendant was looking at the plaintiff at the time he started the carriage. There is no suggestion that any warning was given, or any other communication between them. The defendant knew, or by the exercise of ordinary care ought to have known, that the plaintiff was in a place of danger, and it was his duty thereupon to exercise ordinary care on his part so as not to expose the plaintiff to perils that might by the exercise of such care have been avoided. Even though the plaintiff was in a position which was more or less dangerous from the very nature of the work and the machinery which was being operated, and demanding care and vigilance on his part, yet he had a right to expect the exercise of due care on the part of his employer. From him he was entitled to expect the care and attention which the superior position and presumable sense of duty of the latter ought to command. And although by an arrangement between the joint employers of this plaintiff, one of them saw fit to take upon himself the function of a workman, the relation of master and servant nevertheless continued to subsist. *Ashworth* v. *Stanwix*, 3 El. & El. 701, (107 E. C. L. 700).

True, the plaintiff in engaging in the employment of the defendants assumed the ordinary risks of such employment, or those of obvious peril. *Haggerty* v. *Hallowell Granite Co.*, 89 Maine, 118. But it is the duty of the employer, implied from the contract of employment, to exercise ordinary care in view of the circumstances of the situation, so that the servant shall not be exposed to dangers that may be prevented by the exercise of such care. Whenever the employer fails in this duty, it is negligence, and he is liable to the servant who has been injured in consequence of such failure of duty, and who is without fault on his part; for the ser-

vant in assuming the ordinary risks of the employment does not assume a risk which is the consequence of the employer's negligence. This doctrine is sustained by numerous authorities, and the principal difficulty arises in the application of the rule to the facts of each particular case. *Mayhew* v. *Sullivan Mining Co.*, 76 Maine, 100, 108; *Buzzell* v. *Laconia Manf. Co.*, 48 Maine, 113; *Shanny* v. *Androscoggin Mills Co.*, 66 Maine, 420.

The question of negligence, even in cases where the facts are undisputed but where intelligent and fair-minded men may reasonably arrive at different conclusions, is for the jury. *Elwell* v. *Hacker*, 86 Maine, 416; *Nugent* v. *Boston, Concord and Montreal R. R.*, 80 Maine, 62, 70. This is not a case where there is not evidence of sufficient legal weight to sustain a verdict, as was the case of *Elwell* v. *Hacker*, supra, where the plaintiff sustained injuries by the fall of a staging which he had built from materials of his own selection, and where there was no evidence that either of the defendants had personally superintended its removal. Nor like the case of *Nason* v. *West*, 78 Maine, 253, 259, where the plaintiff sought to recover for injuries received in entering an oven which fell upon him, the nature and construction of which he was as well acquainted with as the master himself.

Here, the defendant was personally operating machinery which was of a dangerous character. He knew, or ought to have known, the danger to which the plaintiff was exposed in the situation in which he was at that moment engaged, and in which he saw him. It was a duty he owed the plaintiff to look, to perceive, and ascertain when it was proper to recall the carriage. He acted upon his own judgment, not from any signal communicated to him from the plaintiff. The facts do not warrant us in holding that the plaintiff, by his contributory negligence, is precluded from maintaining this action.

Nor do we think the verdict should be reduced. The plaintiff's injuries were severe, the bones of his leg being broken in three places. The injury was such that the fractured limb is somewhat shorter than the other, and this injury is permanent. We do not feel that any reduction in the amount of the verdict is called for in this case.

Motion overruled.

HERBERT L. HILDRETH *vs.* LIZZIE GOOGINS.

York. Opinion January 8, 1898.

Way. Easement.

The defendant claimed a right of way by necessity over the plaintiff's land. The defendant's land bordered on the ocean and over which access to his land could be had. *Held;* that necessity and not convenience is the test of the defendant's claim, there being no evidence that the way by water was unavailable.

Implied grants of this character are looked upon with jealousy, construed with strictness, and are not favored except in cases of strict necessity.

The court instructed the jury that the ocean was a public highway, and to a question by a juror, "whether the ocean was a public highway, if it was not available; and whether it was for the jury to decide whether it is available in the present case," the court replied, "that if there was any evidence as to availability it was for them to decide; but if there was no evidence, they must assume that it was available." They were further instructed "that cases must be decided upon the evidence introduced, and not with reference to any individual knowledge that any juror may have," and the following general instruction was then added, "nothing appearing to the contrary, the ocean is a highway." *Held;* that exceptions do not lie to these instructions.

ON MOTION AND EXCEPTIONS BY DEFENDANT.

The case appears in the opinion.

G. F. and Leroy Haley, for plaintiff.

J. B. Donovan and S. M. Came, for defendant.

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

STROUT, J. The controversy in this case, is whether there is a right of way from the lot of land occupied by the defendant at Old Orchard as tenant of the heirs of William Emery, over and across the plaintiff's land to the street, as appurtenant to defendant's lot. At the trial below the right of way was claimed first by deed, second by prescription, and third by necessity. The evidence failed to sustain either of the first two claims and they are aban-

doned here. But it is strenuously contended that a way of necessity exists from defendant's lot, across that of plaintiff.

Lawrence Barnes on June 15, 1871, owned in one tract the land, part of which is now owned by the plaintiff, and part by the heirs of William Emery. On that day he conveyed to one Seavey that part of the land now occupied by defendant. William Emery derived title under this deed through mesne conveyances. Barnes' deed to Seavey did not contain any grant of a right of way across Barnes' remaining land. Plaintiff derives his title through deed from Barnes to Francis Milliken, dated October 16, 1879, and mesne conveyances. The land owned by the Emery heirs is bounded on one side by the ocean. No access to it from the street can be had, except by the ocean or crossing land of other owners. Under these circumstances it is claimed that the conveyance by Barnes to Seavey implied a grant of a way over and across the plaintiff's lot, then owned by Barnes, as appurtenant to defendant's lot.

"Implied grants of this character are looked upon with jealousy, construed with strictness, and are not favored, except in cases of strict necessity, and not from mere convenience." *Kingsley* v. *Land Improvement Co.*, 86 Maine, 280. In that case it was held by this court, that as free access to the land over public navigable waters existed, a way by necessity over the grantor's land could not be implied. The same rule applies here. Defendant's land borders on the ocean, a public highway, over which access to her land from the street can be had. It may not be as convenient as a passage by land, but necessity and not convenience is the test. *Warren* v. *Blake*, 54 Maine, 276; *Dolliff* v. *B. & M. R. R.* 68 Maine, 176; *Stevens* v. *Orr*, 69 Maine, 324. There is no evidence in the case that the water way is unavailable. The court instructed the jury that the ocean was a public highway, and to a question by a juror, "whether the ocean was a public highway, if it was not available, and whether it was for the jury to decide whether it is available in the present case," the court replied, "that if there was any evidence as to availability it was for them to decide; but if there was no evidence, they must assume that it

was available." They were further instructed "that cases must be decided upon the evidence introduced, and not with reference to any individual knowledge that any juror may have, and I give now the general instruction that, nothing appearing to the contrary, the ocean is a highway."

Exception is taken to these instructions. But they are so clearly in consonance with well-established principles, and the decisions of this court, that it is unnecessary to discuss them. *Kingsley* v. *Land Improvement Co.*, supra. *Rolfe* v. *Rumford*, 66 Maine, 564.

We perceive no reason for disturbing the verdict, upon the motion.

Motion and exceptions overruled.

FRANK G. HASTINGS *vs.* EDWIN F. STETSON.

Lincoln. Opinion January 8, 1898.

Negligence. Malpractice. Damages. Repeating of Instructions.

Upon a motion for a new trial in a case where the jury returned a verdict against the defendant, a surgeon, for alleged malpractice in treating the plaintiff's dislocated shoulder, the court *holds;* that the plaintiff has established, by a fair preponderance of the evidence, that the defendant did not exercise the care and skill which the law requires in diagnosing the injury; and that the long delay before the dislocation was reduced, was the proximate cause of the paralysis, from which the plaintiff suffers; and that the defendant is in fault for that delay.

In estimating damages for such an injury, much must be left to the sound judgment of the jury; and in this case the court is unable to say that the jury erred.

Where a requested instruction that is sound has already been given, and its repetition at the close of the charge, instead of aiding is likely to mislead, *held;* that it may be properly refused.

ON MOTION AND EXCEPTIONS BY DEFENDANT.

The case is stated in the opinion.

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

W. H. Hilton and O. D. Baker, for defendant.

SITTING: FOSTER, HASKELL, WISWELL, STROUT, SAVAGE, JJ.

STROUT, J. This is a suit for alleged malpractice, as a surgeon. Plaintiff was thrown from his carriage in the afternoon of November 6, and suffered a sub-glenoid dislocation of his right shoulder. The defendant, a practicing physician and surgeon, was called, and was in attendance within a very short time thereafter,—examined the patient that evening and the next morning. He then complained of pain in the shoulder and arm, and thought his arm was broken, or out of joint, and so told defendant. The defendant attended the plaintiff till November 18. On the twelfth day after the injury, Dr. Stetson says he discovered that the shoulder was dislocated. He then told the plaintiff that he "had got to give him ether and see what the trouble with the arm was and fix it." The testimony of several surgeons called in the case, is that the sub-glenoid dislocation is easy of detection, that there is no difficulty in its diagnosis. In that dislocation the head of the bone is out of its socket, and rests in the axilla. The effect is a flattening of the deltoid muscle, easily discerned by touch, and the head of the humerus can readily be felt by the hand, in its unnatural position. If the defendant had exercised the care the law requires of a surgeon, he could and ought to have ascertained the fact of dislocation before the lapse of twelve days. The evidence justified the jury in its finding that defendant was guilty of negligence in the case. But he is responsible only for the consequences of that negligence.

The dislocation was reduced on November 20, by another surgeon. Nearly complete paralysis of the arm and hand had resulted before the reduction. The plaintiff claims that this was caused by the head of the humerus resting upon and pressing the brachial plexus, a network of nerves in the armpit, for twelve days; and that the defendant's negligence in failing to reduce the dislocation for that length of time, caused the paralysis. The defendant says the head of the humerus, in that kind of dislocation, does not and can not rest upon the brachial plexus; and that the paralysis was the result of the blow which dislocated the shoulder,—the head of

the bone, in its progress from the socket, lacerating the nerves of motion and sensation which supplied the arm. This contention is the most serious one in the case.

Many experts in surgery and nerve troubles were examined. Some of them say that, in a sub-glenoid dislocation of the shoulder, the head of the humerus cannot rest upon or press injuriously the brachial plexus, that it is an anatomical impossibility,—that an experiment upon a dead body demonstrates this; while others say, that in that dislocation the head of the humerus would rest upon the brachial plexus. All admit that pressure upon a nerve, if of sufficient force and continued for a sufficient time, will produce paralysis of that nerve; that it might result from one day's pressure,—quite certainly in a week. The experiment upon a dead body is not satisfactory. There must be a difference in the action of a living, sensitive muscle, from that of a dead one. It is common knowledge that, in any disturbance of the joints, the muscles have a potent and active action. If one muscle is injured and weakened, an opposing muscle in full power may draw the misplaced bone into a different position from that it would be in, if all the muscles acted with normal force. Some of the experts called by defendant, who have had large and long experience, say that in a sub-glenoid dislocation of the shoulder, the head of the humerus does not ordinarily rest against the brachial plexus; but they admit that it sometimes does, but not frequently. They give the opinion that the paralysis in this case was caused by the original blow,—an injury to the nerves then received;— while others of equal experience, attribute the paralysis to the long continued pressure of the bone upon the brachial plexus, before reduction of the dislocation. All agree, however, that if the original blow caused the injury to the nerves which resulted in paralysis, that result would be immediate upon the injury, or within an hour after it. The preponderance of the evidence is, that the paralysis in this case was not immediate. It appears to have shown itself to some extent a day or two after the injury, and to have progressed from that time forward. Since the reduction of the dislocation, it has improved to some extent. As we understand the experts, the

theory that the original blow caused the paralysis, is based upon the development of paralysis immediately thereafter. If it was developed several days after, that theory would not be entertained by them, but some other cause must be found. In such case, the diagnosis would indicate pressure upon the nerves continued long enough to produce the result. The experts say that "dislocation is comparatively rarely accompanied by nerve injuries," and that paralysis rarely results from a dislocation of this kind. They all agree that the dislocation should be reduced as soon as possible. It is only in extreme cases of effusion of blood, or great inflammation, that delay is excusable. One of the experts says he had seen "three cases where considerable paralysis was experienced from the dislocation being unreduced." Another expert of large experience says he had not seen such a case.

The question appears to be incapable of demonstration. It must rest upon professional opinion, based upon anatomical learning and experience. The experts differ in opinion as to the cause of the paralysis. Those of them who attribute it to the original blow, base their opinion upon the assumed fact that the paralysis immediately followed the injury; but we think the evidence shows that it came on gradually for several days after the injury. If so, some other cause than the original blow must be found. This is in accordance with the opinion of the experts.

Without reviewing the testimony further, the court is of opinion, after a careful examination of all the evidence, that the plaintiff has established, by a fair preponderance of the evidence, that the defendant did not exercise the care and skill which the law requires, in diagnosing the injury; and that the long delay before the dislocation was reduced, was the proximate cause of the paralysis, from which the plaintiff suffers; and that the defendant is in fault for that delay.

We cannot say that the verdict, which was for $1741.66, is too large. The medical witnesses express the opinion, that there will probably be an improvement in the use of the arm, but give little encouragement of a restored use. The plaintiff is fifty-one years old. The right arm is the one paralyzed. The injury occurred on

November 6, 1895. To this time he has no efficient use of the arm and hand. He can flex the fingers, and partially lift the arm. It is extremely doubtful if he will ever regain an important, practical use of the arm or hand. In estimating damages for such an injury, much must be left to the sound judgment of the jury. Their judgment is entitled to respect. In view of all the facts, we are unable to say that the jury erred.

The motion for a new trial must be overruled.

Upon the exceptions. At the close of the charge, defendant requested that the jury be instructed: "That if the plaintiff's own experts admit that the violence of the original accident could account for the plaintiff's paralysis and all the results now upon him equally well with the delay in setting the bone, then the plaintiff has failed upon that branch of the case, and the plaintiff could not in any event recover damages for the plaintiff's paralysis." The presiding judge declined to give the instruction as requested, saying: "That will only complicate it. I think I will not add anything more. I do not refuse that, excepting that it is not necessary. The jury will remember the testimony of the experts and all the testimony in the case."

The request is faulty in limiting it to the testimony of plaintiff's experts, when it should have included that of all. Careful instruction was given to the jury upon the question whether the paralysis was caused by the original blow, or resulted from the delay in reducing the dislocation and a pressure of the head of the humerus upon the brachial plexus. They were instructed that the plaintiff could not recover damages for the paralysis if it was caused by the original blow; that the burden was upon the plaintiff to satisfy them, by a preponderance of the evidence, that the fault and neglect of the defendant was the cause of the paralysis. Their attention was called fully to the testimony of the experts upon each side, their various opinions and reasons therefor; and it was submitted to the jury in a peculiarly lucid manner to determine the fact. The rights of both parties were carefully preserved. So far as the requested instruction was sound, it had already been

given. Its repetition at the close of the charge, instead of aiding, was likely to mislead. It was properly refused.

Motion and exceptions overruled.

DANIEL S. GRAFFAM *vs.* FABIUS M. RAY.

Cumberland. Opinion January 8, 1898.

Probate. Devastavit. Jurisdiction. Suits for Legacies.

The Probate Court has exclusive jurisdiction, subject to appeal to the Supreme Court of Probate, of the estate of decedents, and their final settlement and distribution, including the settlement of the accounts of the personal representative.

The Supreme Judicial Court, as a common law court, does not have jurisdiction in a common law action of negligence brought by a residuary legatee against a former executor for wasting the assets of the estate.

A residuary legatee alleged a devastavit by the defendant, executor of the will, in failing to collect and account for certain debts due the estate and claimed to recover their amount of the defendant in an action at common law in this court sitting below. *Held;* that the action cannot be maintained.

Also; that the plaintiff's remedy, if the defendant is in fault as claimed, is in the Probate Court, and not by suit at common law. The fact that the executor has rendered his final account in probate and resigned does not change the result. He may still be cited into the Probate Court.

The statute right to sue for a legacy does not confer a right upon a residuary legatee to sue for a devastavit for his private benefit.

ON EXCEPTIONS BY PLAINTIFF.

The case is stated in the opinion.

S. L. Bates, for plaintiff.

Both by statute and at common law, the residuary legatee may sue the executor for his legacy without regard to the probate bond or the probate court. "Any legatee of a residuary or specific legacy under a will, may sue for and recover the same of the executor in an action of debt at common law, or other appropriate action." R. S., c. 65, § 31.

And in *Smith* v. *Lambert*, 30 Maine, 137, TENNEY, J., says:—

"Any person having a legacy given in any last will may sue for and recover the same at common law . . . . the statute of 1784, c. 24, early received a judicial construction by the Supreme Judicial Court of Massachusetts, previous to the separation of this state therefrom; and the statute of this State of 1821 and the Revised Statutes are to be considered in connection with this construction, which by a well-known rule of law is regarded as adopted when those re-enactments took place."

In *Farwell* v. *Jacobs*, 4 Mass. 634, Parsons, J., says: "In consequence of these statute provisions [referring to the statute of 1784 and previous acts] legacies have always been recovered by actions at law."

In *Smith* v. *Lambert*, supra, TENNEY, J., says further: "It is no longer necessary that the executor's account in the probate office should exhibit assets liable to a residuary legacy to entitle the one to whom it belongs to receive it."

And in *Cowdin* v. *Perry*, 11 Pick. 503, the court say: "But the question to whom and at what time a legacy or distributive portion under the will is to be paid by an executor, is one of which the judge of probate has no jurisdiction."

"A legatee may bring an action of assumpsit for a legacy which has become due." 32 Conn. 422.

The case *Prescott* v. *Scott*, 62 Maine, 450, decides that even the personal representative of the legatee may sue the personal representative of the executor in assumpsit to recover a part of the legacy which has never been paid over.

If the residuary legatee (as we have already shown) can maintain an action against the executor to recover his legacy, it would seem to reasonably follow that he can maintain an action against the executor for loss to, or destruction of, the legacy through the executor's negligence or fault. And the following decisions seem to sustain this view: "He (the admr. de bonis non) has no recourse against his official predecessor for devastavit or maladministration, the remedy therefor being reserved to the creditors, legatees and distributees directly." *Waterman* v. *Dockray*, 78 Maine, 141.

"In an action against an administrator to recover a legacy of negroes which have already been distributed, the verdict can only be for money." 17 Ga. 141.

An action on the case can be maintained to recover damages for not paying a legacy (for support and maintenance) to the plaintiff. *Farwell* v. *Jacobs*, 4 Mass. 634.

"Neither has it (the Probate Court) power to try a claim against an executor for damages arising out of his acts as such." Woerner's Am. Law of Admrs. pp. 327 and 348.

As this is an action by the residuary legatee, which has no reference to the probate bond, anything that has, or has not, been done in the probate court, must be brought up at the trial of the case, (if either party wishes to bring up anything of the kind.) No such question can be raised on general demurrer.

J. H. and J. H. Drummond, Jr., for defendant.

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

STROUT, J. Plaintiff is residuary legatee under the will of Elias S. Dodge. Defendant was executor of that will. He has filed his final account in Probate Court, and resigned his trust. Plaintiff claims that he was guilty of a devastavit, while in office as executor, in that he failed to collect certain choses in action existing in favor of Dodge, and permitted them to become barred by the statute of limitations. He seeks to recover the amount of these rights and credits in this action at common law, to his own use. The case comes here upon exceptions to a ruling of the court below sustaining a general demurrer to the declaration.

Assuming the defendant to be in default, as we must do on the question as now presented (though the fact is denied in argument) can this action be maintained? We think not.

The Probate Court has exclusive jurisdiction, subject to appeal to the Supreme Court of Probate, of the estates of decedents, and their final settlement and distribution, including the settlement of the accounts of the personal representative. If a devastavit

exists, it is the duty of that court to compel the executor to account for the amount lost to the estate by his fault. The executor is bound to act in good faith, and with reasonable diligence, in husbanding all the assets of the estate. But he is not required, nor would he be justified, in rushing into injudicious suits, where recovery is doubtful, or its expense in excess of the amount to be realized. If a devastavit is alleged, a hearing upon that question should be had in the Probate Court, on settlement of the executor's account. On such hearing, he would not necessarily be charged with the full amount of the uncollected claims. They might be doubtful or subject to set-off, or denied by the assumed debtor. In such case, the uncertainty of recovery, or the expense of suit, might be so disproportionate to the amount of the claim, that it would be unwise to institute suit, and subject the estate to the expense; or the executor might not have funds of the estate sufficient to carry on the litigation. All these questions would be determined by the Probate Court, and the executor charged for such amount as in equity and under the rules of law he was liable for. All these matters are within the exclusive jurisdiction of the Probate Court, and cannot be passed upon by a common law tribunal. The Probate Court is invested with ample power in these respects.

Notwithstanding the resignation of the executor, he can still be cited into the Probate Court, and required to account for the matters claimed, if liable therefor. *Robinson* v. *Ring*, 72 Maine, 143. It can only be done in that court. *Potter* v. *Cummings*, 18 Maine, 58; *Judge of Probate* v. *Quimby*, 89 Maine, 576.

There is no allegation in the writ that the debts and general legacies have been paid, nor that the amounts now claimed will not be needed for that purpose, nor that the estate is solvent. For aught that is disclosed by the writ, there may be nothing for the residuary legatee, in any event. There is no allegation that the present claim of plaintiff to charge the executor with these uncollected sums, was not made, heard and disallowed by the Probate Court on settlement of the executor's account. If it were, and that court rejected the charge, its decree to that effect, unappealed

from, is final and cannot be impeached or inquired into here, as the matter was entirely within its jurisdiction. *Gilbert* v. *Duncan*, 65 Maine, 477; *Sturtevant* v. *Tallman*, 27 Maine, 78; *Pierce* v. *Irish*, 31 Maine, 254; *Simpson* v. *Norton*, 45 Maine, 281; *Decker* v. *Decker*, 74 Maine, 467; *Harlow* v. *Harlow*, 65 Maine, 448.

If the defendant is guilty of a devastavit, as plaintiff claims, the liability is to the estate of Dodge, and not to this plaintiff personally. The funds may be needed to pay debts or general legacies, or administration expenses. The plaintiff is entitled only to so much of the estate as may remain after these superior claims are satisfied; but nothing till then. This court, as a common law court, has no power to marshal the assets, and determine what amount, if anything, remains for the plaintiff. It is true, the statute authorizes any legatee, specific or residuary, to sue for his legacy; but before suit it is necessary that the amount shall have been ascertained, as a basis for the suit. If the legacy is specific or definite in amount, the will affords the necessary basis for suit; if residuary, it should be ascertained by the Probate Court in the first instance, and by appeal to the Supreme Court of Probate, if desired, after payment of all superior claims. Until this is done, the residuary legatee ordinarily has no right of action. Till then it is uncertain whether there will be any residue. In *Hanscom* v. *Marston*, 82 Maine, 295, this court said, "heirs and residuary legatees have no claim against the estate. Their time does not come till the claims have been so far paid, and the estate so far administered, that the court declares a balance to exist for distribution." *Jones* v. *Irvine*, 23 Miss. 361.

But the statute right to sue for a legacy, by no means confers a right upon a residuary legatee to sue for a devastavit for his private benefit. This suit is not for a legacy. It is an attempt to charge the executor in damages for negligence in the execution of his trust,—not for the benefit of the Dodge estate, but for the personal benefit of this plaintiff. No case has been cited, and we have found none, which holds that such an action can be maintained.

In *Waterman* v. *Dockray*, 78 Maine, 141, it is said that an ad-

ministrator de bonis "has no recourse against his official predecessor for devastavit or maladministration, the remedy therefor being reserved to the creditors, legatees and distributees directly." This language is not authority for the maintenance of an action like the present. The parties aggrieved must pursue their legal remedy before the proper tribunal, which is the Probate Court; and if successful, the amount charged against the executor goes to the estate, to be administered by that court according to law. It cannot be recovered by suit at common law, by a creditor or any legatee, for his personal use and benefit.

In *Smith* v. *Lambert*, 30 Maine, 137, a residuary legatee was allowed to recover, although the executor's account had not been fully settled, but administration had proceeded far enough to show an amount to which the residuary legatee was entitled. No question of malfeasance of the executor was involved in that case.

To sustain this action, the court would be obliged to reopen the executor's account, hear evidence upon the question of devastavit or not, and to charge the executor, if found liable, with the amount he should have been charged with in his probate account. All these matters are within the exclusive jurisdiction of the Probate Court. If such hearing could be had in this suit, and if defendant should be held liable to the estate for part or all of the amounts claimed, a judgment for that amount would withdraw it from the estate, and its administration in Probate, and give it to plaintiff personally, possibly to the detriment of other parties. Such result cannot be permitted.

If allowed, it is doubtful if it would bar the Probate Court from citing the defendant, and charging him with the same amounts, to be paid to the administrator de bonis non.

Exceptions overruled.

STATE *vs.* WILLIAM E. ACHESON.

Washington. Opinion January 8, 1898.

Indictment. Pleading. Time. Evidence.

In the trial of an indictment, containing but a single count, the state introduced competent proof of the assault alleged to have been committed on the third day of January, and more specially identified the occasion as the evening of the second Sunday after Christmas, when the defendant's wife was at church. The complainant was then permitted, against the defendant's objection, to give testimony to prove three other subsequent assaults upon her by the defendant. *Held;* that before this testimony of other assaults had been heard, it was not error for the presiding judge to refuse the defendant's request that the prosecuting attorney be compelled to elect upon which assault he would rely, especially as rulings upon such requests are ordinarily within the domain of judicial discretion.

It did not appear, however, that at any later stage of the trial the state expressly elected, or was required to elect, upon which one of the four separate assaults it would rely to substantiate the charge in the indictment. *Held;* that under these circumstances, in justice to the defendant, the state should be deemed to have elected by implication to rely upon the first assault proved, which was alleged to have been committed January third, and identified as the one intended to be described in the indictment.

Evidence of other crimes of a precisely similar nature to that charged and not connected with it, though deemed inadmissible to prove the commission of the act involved in the substantive charge, is yet uniformly received for the limited and specific purpose of aiding to determine the quality of the act, and the legal character of the offense, by illustrating the intent with which the act was committed. But, in this case, the evidence of other assaults appears to have been received, not simply for the secondary purpose of showing the nature and intent of the first one, but as proof of other substantive offenses upon each one of which a conviction might have been had; and in this state of the evidence the jury were instructed that if they were satisfied that on any date while the complainant lived in the defendant's house he was guilty of the charge, it was their duty to convict him. *Held;* that under this instruction upon evidence showing four independent assaults, some of the jury may have been satisfied that an assault was committed on one of the occasions specified, and others, of an assault on a different occasion, and thus a verdict rendered without unanimity respecting either of them.

Held; that the ruling admitting evidence of other similar assaults without explanation of its limited purpose and effect, and the foregoing instruction to the jury upon that state of evidence, were erroneous.

ON EXCEPTIONS BY DEFENDANT.

The case appears in the opinion.

W. T. Haines, Attorney General, *and F. I. Campbell*, County Attorney, for State.

C. B. Rounds, G. M. Hanson, and R. J. McGarrigle, for defendant.

SITTING: EMERY, FOSTER, WHITEHOUSE, STROUT, SAVAGE, JJ.

WHITEHOUSE, J. This is an indictment for an assault with "attempt" to ravish and carnally know a female child under the age of fourteen years. There is but one count in the indictment and the offense is there alleged to have been committed on the third day of January, 1897. In support of the charge the complainant gave testimony tending to show that such an assault was committed upon her on Sunday evening, the second Sunday after Christmas, which was the third day of January, while the defendant's wife was "at meeting." The government then offered to show another independent assault, of the same nature, committed on the complainant four or five days later. The defendant's counsel objected to this testimony, and the following colloquy took place between the court and the counsel:

Court. "What is the ground of the objection?

Counsel. "The ground of the objection is that in this indictment the allegation is of the assault on the third day of January which has already been described. There is no allegation of any other offense at any other time. I simply say this story has been told three times under oath and an election has been made, at a former time, entirely different from this. . . . . We ought to be warned by the indictment what we are to defend. I don't think they should be permitted to put in an accumulation of offenses without the allegation being made that those offenses were meant. . . . . Now one has already been sworn to. I don't think we are to answer to other dates; and as the county attorney states in his opening the most important assault was away on, at some other date.

The Court. "Well, the testimony that the County Attorney has detailed in his opening has already been gone over. You heard her testify to it before.

Counsel. "That ought not to be the essential in this trial.

The Court. "If that be true, I don't think it can surprise the defendant any.

Counsel. "Yes, but we ask it upon another ground, that it is an election, what would be the attempt, perhaps, to prove another assault and he accumulates a mass of assaults.

The Court. "Yes, but he cannot have but one.

Counsel. "Then let him elect.

The Court. "He must tell you before he gets through which one.

Counsel. "Ought he not to tell now so we can be prepared?

The Court. "No, I will admit the evidence in this case and reserve for you an exception. The County Attorney offers evidence of assaults subsequent to this one already detailed and I admit the evidence.

Counsel. "To all that I wish now to object.

The Court. "Yes, but subject to the modification which I shall give before the case closes.

Counsel. "I wish to object to the whole."

Thereupon the complainant was permitted to give testimony tending to prove the commission of three other similar assaults upon her by the defendant on different days specified by her, following January third, and all within a period of about two weeks. But the report of the case does not disclose that there was any subsequent modification by the court of the ruling under which this testimony was admitted. Neither does it show that at any later stage of the trial the government expressly elected, or was required to elect, which one of the four separate assaults thus identified by the complainant's testimony, it would rely upon to prove the substantive charge set out in the indictment. Nor does it appear that there was any further allusion to this question, before the close of the trial, except in the following instruction to the jury in the charge of the presiding judge:

"Now in this case the charge is laid on the third of January last. I have already ruled, and I do now rule to you, that that date is immaterial, and I say to you that, if you are satisfied as I have told you, that the defendant is guilty of this charge at any time during the period when this little girl lived in the family of Mr. Acheson, that will be sufficient. I do not require you to fix the date, nor is it necessary for the state to fix the precise date. If the state has satisfied you by evidence, beyond a reasonable doubt, that on any date while this little child lived in defendant's house, he was guilty of this charge, then it is your duty to convict him."

To this instruction, and to the rulings of the presiding justice admitting evidence of assaults upon other occasions than that alleged in the indictment, and refusing to require the prosecuting attorney to elect upon which one he would rely as the act charged, the defendant has exceptions.

It is an elementary principle in the law of evidence that when a respondent stands charged with the commission of a particular criminal act, evidence that he did a similar thing at some other time is generally deemed irrelevant and inadmissible. The considerations of justice underlying this rule are sufficiently obvious. The admission of such collateral facts in evidence would tend to place the defendant's whole life in issue on the charge of a single act, and oppress him with irrelevant matter of which he had received no notice and which he could not be prepared to meet. Proofs of numerous other crimes similar to that charged may indeed have a tendency to show the accused to be devoid of all moral restraint and "fatally bent on mischief" and thus, in a moral sense, increase the probability of his guilt with respect to the particular offense set out in the indictment, but such evidence does not for that reason become legally admissible when there is no question in regard to the nature of the act charged. Evidence that the defendant's general reputation is bad with respect to that element of character involved in the crime charged, or bad generally as a man of moral worth, might also tend in some degree to lay the foundation for a presumption of guilt; but the rule is firmly established and unquestioned that such evidence cannot be received

until the accused has opened the door by introducing evidence of his good reputation.

But evidence of other crimes of a precisely similar nature to that charged, and not connected with it, though deemed inadmissible to prove the commission of the act involved in the substantive charge, is yet uniformly received for the limited and specific purpose of aiding to determine the quality of the act and the legal character of the offense by illustrating the intent with which the act was committed. "To prove intent," says Mr. Wharton, "similar evidence is pertinent. One blow given to A by B may be accidental; few counsel would have the audacity to claim accident for eight or ten blows given to A by B at successive intervals under varying conditions. One letter sent by A to B demanding money may be ambigious; it may cease to appear so if seen in the light of a series of prior letters demanding money with threats whose purport is unmistakable." 1 Whar. Ev. §§ 31, 32. "The proof of criminal intent and of guilty knowledge" says Mr. Bishop, "not generally admitting of other than circumstantial evidence may often be aided by showing another crime attempted or perpetrated and when it can be it is permissible." 1 Bish. Crim. Proc. § 1126. Familiar illustrations of the doctrine are found in cases of successive cheats and forgeries and in passing counterfeit money to different persons. So when the respondent stands indicted for a single act of adultery, evidence of other acts of adultery complained of is admitted to prove the mutual disposition of the parties, and to illustrate the nature of the intimacy shown by their conduct on the occasion in question; "the reception of such evidence to be largely controlled by the judge who tries the cause, and the evidence to be submitted to the jury with proper explanation of its purpose and effect." *State* v. *Witham*, 72 Maine, 531.

In Bishop's Crim'l Procedure, Vol. 2, § 970, the author says:— "On a trial for assault with intent to commit a rape, an English judge rejected evidence that on a previous occasion the defendant had taken liberties with the same woman. The contrary to this, believed to be the better law, has been adjudged with us:" citing *Williams* v. *The State*, 8 Humph. 585; *State* v. *Neely*, 74 N. C.

425; and *State* v. *Walters*, 45 Iowa, 389. In the latter case the respondent was indicted for an assault with intent to commit rape, and the complainant was allowed to give evidence of a number of other assaults of the same character "some of which occurred some time prior to the finding of the indictment," and the court say: "To the introduction of this evidence we believe there can be no valid objection. In an indictment for an assault with intent to commit a rape, evidence of previous assaults on the prosecutrix, is admissible to show the intent with which the act was committed."

In the case at bar the complainant had given clear and positive testimony of an assault on the third day of January, and further identified the occasion of this first assault by reference to the fact that it was the second Sunday after Christmas, and to the circumstance that it was on the evening when the defendant's wife was "at meeting." Assuming that evidence of the three assaults on subsequent occasions was admissible for any purpose, it was not error for the presiding judge to refuse to grant the defendant's request for an election by the prosecuting attorney before the evidence was admitted. Aside from the fact that rulings upon requests for an election are ordinarily within the domain of judicial discretion, it was not practicable to make an election before it was shown that more than one assault had been committed. But though reminded by the court that, if evidence of other assaults was received, he must elect upon which one he would rely before resting the government's case, the prosecuting attorney failed to give notice of any such election, and no election appears to have been made by him except that implied by his conduct of the trial. He had introduced competent evidence of the substantive charge of an assault laid on the third day of January, and more specially identified the occasion as the Sunday evening when the defendant's wife was absent at church. As Mrs. Acheson only attended church once during that month, it was of course immaterial whether that occasion was on the third, or the tenth, or the seventeenth of January. It was the occasion of the first assault committed upon her, and was manifestly the occasion of the assault intended to be described in the indictment.

Under these circumstances, and in the absence of any notice from the prosecuting attorney that he would rely upon any other assault, in justice to the defendant the state should be deemed to have elected by implication to rely upon the first assault, alleged to have been committed on the third day of January and shown by the complainant's testimony to have been on the Sunday evening stated. 1 Bishop Cr. Proc. §§ 461, 462, and authorities cited. Indeed, some courts go further and hold that when the prosecutor has introduced direct evidence of one act for the purpose of procuring a conviction upon it, that particular act then becomes the act charged; and that when he has thus made his election, he cannot elect again. *People* v. *Jenness*, 5 Mich. 305. Under our procedure, however, it is doubtless within the discretion of the court to permit another election at any time before the defendant is required to introduce his evidence, and if it can be done without injustice to the accused, any time before the case is submitted to the jury. But this judicial discretion must of course be exercised with reference to the special facts of each case. 1 Bish. Crim. Proc. § 461.

In the case at bar, if public justice required a conviction upon each of the four assaults proved by the state's evidence, it was only necessary to frame an indictment with four counts setting out the several independent acts relied upon. The difficulty now is that after the state had proved the particular assault upon which it elected by implication to rely for a conviction under the single count in the indictment, it appears to have introduced evidence of three other similar assaults, not simply for the secondary purpose of showing the nature and intent of the first one, but as proof of other substantive offenses, upon each one of which a conviction might have been had. This evidence was received and remained in the case without any explanation of its limited tendency and purpose. In this state of the evidence, the jury were instructed in the charge that if they were satisfied "that on any date while this little child lived in the defendant's house he was guilty of this charge" it was their duty to convict him. This would have been a correct and appropriate instruction if only one assault had been

proved. But as applied to evidence showing four independent assaults on different days, there is ground for apprehension that it was inadequate and misleading. Under this instruction and upon this evidence, some of the jury may have been satisfied that an assault was committed on one of the occasions specified, and others of an assault on a different occasion, and thus a verdict rendered without unanimity respecting either of the occasions described in the testimony. It is, therefore, the opinion of the court that the ruling admitting evidence of other similar sssaults without explanation of its purpose and effect, and the foregoing instructions to the jury upon that state of the evidence, must be deemed erroneous.

Exceptions sustained.

SOLOMON E. HOPKINS *vs.* NOBLE MAXWELL.

Lincoln. Opinion January 19, 1898.

Conditional Sales. Record. R. S., c. 111, § 5; Stat. 1891, c. 11; Stat. 1895, c. 32.

Where a written agreement dated August 23, 1894, was a conditional sale of personal property, operating a transfer of title if the payments specified in it were made, and until payment was made the vendor retained the title,—no note having been given for the purchase money, nor any express promise of payment made,—*held;* that the agreement was not required to be recorded under the statute existing at its date. (R. S., c. 111, § 5, as amended by stat. of 1891, c. 11.)

Held; that under the Stat. of 1895, c. 32, an instrument like the above would not be valid, except as between the original parties, unless recorded.

ON REPORT.

The case is stated in the opinion.

L. M. Staples, for plaintiff.

C. D. Newell, for defendant.

The paper must be construed to be a mortgage and therefore should have been recorded. R. S., c. 111, § 5; *Hill* v. *Nutter*, 82

Maine, 199. It contains all the elements of a Holmes note, viz: the parties, a fixed and definite sum, and an agreement that the property shall remain the seller's until the conditions are fulfilled. If a conditional sale, yet as to bona fide purchasers, it was valid. *Rogers* v. *Whitehouse*, 71 Maine, 222; Benj. on Sales, p. 28; Story, Cont. § 804. A person cannot rent anything under a lease and at same time own it. Benj. on Sales, §§ 452, 457.

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

STROUT, J. The rights of the parties depend upon the true construction of the following paper:

"Cooper's Mills, Aug. 23, 1894.

Know all men by these presents that I, S. E. Hopkins, this day leased to Weston Darling two team horses, about 13 hundred lbs., color one dark bay, the other red, valued at one hundred and twenty-five dollars. The condition of this lease is such that said Darling is to keep said horses in good condition, and is to have said horses providing he pays said S. E. Hopkins one hundred dollars and interest, twelve dollars every week in cash or grain at the going or market price until the whole sum is paid in full, if said Darling fails in making his payments or any of them, said Hopkins may take said horses and said Darling forfeits what he has paid or may pay and said Darling is not to dispose of said horses in any way until this lease is satisfied, furthermore if said Darling fails in keeping and using said horses well, said Hopkins may take said horses without trespass.

Weston Darling."

Darling sold the horses to defendant, and the plaintiff brings trover. The purchase price was not paid. The jury returned a verdict by consent for eighty-two dollars and sixty cents, and the case was reported to this court for a construction of the paper. It was not denied that defendant converted the horses to his own use.

Defendant claims that the agreement is within R. S., c. 111, § 5, which, as amended by chap. 11 of the laws of 1891, provides

that "no agreement that personal property bargained and delivered to another, for which a note is given, shall remain the property of the payee until the note is paid, is valid, unless it is made and signed as a part of the note; and no such agreement, although so made and signed, is valid, except as between the original parties to said agreement, unless it is recorded like mortgages of personal property." The paper was not recorded.

The statute applies only to cases where a note is given for the purchase money, or an express promise of payment, equivalent to a note. This transaction was a conditional sale, to operate a transfer of title, if Darling made the payments as specified. No element of a note appears. Darling made no promise of payment. No action could be brought against him for the purchase money. He had the option to pay the price and acquire title to the horses, or not. If he did not pay, he never would acquire title. He was not bound to make the payments. True, no rent was reserved; but as Darling was to keep the horses, and lost all right of possession if he failed to make his weekly payments, Hopkins run little or no risk. No title was to pass to Darling until he had made full payment. This agreement was not within the statute. No record was necessary. *Morris* v. *Lynde*, 73 Maine, 89. There is nothing in *Rogers* v. *Whitehouse*, 71 Maine, 222, cited by defendant, in conflict with this. In *Hill* v. *Nutter*, 82 Maine, 199, the agreement contained an express promise of the purchaser to pay the price, and it was rightly held to be within the statute. So in *Nichols* v. *Ruggles*, 76 Maine, 25, the agreement contained an express promise to pay. This element is wanting in the case at bar.

Under chap. 32 of the laws of 1895, an instrument like this would not be valid, except as between the original parties, unless recorded. But this later statute does not apply to this case.

According to the agreement of parties, there must be

Judgment for plaintiff for $82.60, and interest from date of verdict.

ADELAIDE MARCOUX

vs.

SOCIETY OF BENEFICENCE ST. JOHN BAPTIST, OF FAIRFIELD.

Somerset. Opinion January 20, 1898.

Benefit Society. Sick and Death Benefits. Misrepresentations. Age. Intemperance. Forfeiture. Waiver.

The by-laws of the defendant corporation, a religious, social and beneficial society, prohibited the admission of a person more than fifty years of age. A member of the society at the time of his admission, in answer to the question propounded by the president, in accordance with the by-laws, declared that his age was then forty-nine years. He was, in fact, at that time fifty years, nine months and seventeen days old. *Held;* that the declaration of the member in regard to his age was a misrepresentation of a material fact, and that such misrepresentation rendered invalid the contract with the society.

The plaintiff's husband became a member of the St. John Baptist Benevolent Society of Waterville, an unincorporated association, July 15, 1877. The members of this society were incorporated December 21, 1878, under the provisions of R. S., c. 55. The by-laws of the association were adopted by the corporation. April 5, 1887, the members of the Waterville Society, residing in Fairfield, withdrew by consent of the parent society and organized the defendant corporation. The plaintiff's husband was one of these members. The old and the new societies made a "contract and alliance, so that the member of each of the societies should pay at the death of each member the sum of one dollar to his widow, the same as before their separation." At its organization, the defendant corporation adopted the constitution and regulations of the Waterville society, and which are identical with those in force when the plaintiff's husband became a member. These by-laws absolutely prohibited the admission of a person who was more than fifty years old. *Held;* that the defendant corporation assumed the obligations pertaining to the membership of the plaintiff's husband only upon the implied condition that his declaration to the Waterville society, in regard to his age, was true. The defendant corporation continued the contract undertaken by the parent society, and it is liable, in this particular, only when the old society would have been. *Also;* that any fact which rendered the contract invalid, when so adopted, furnishes a good defense by the defendant corporation to the plaintiff's action upon it.

The laws of the defendant society provided that a member while retaining his membership should forfeit temporarily his right to sick benefits if his illness

is due to intemperance, or if he failed to pay the monthly contribution promptly in advance, and in such case, if he afterwards paid, the forfeiture would extend through the month succeeding his payment. These laws further provided that the defendant society should not be liable to a beneficiary for a death benefit, unless the member at the time of his death was entitled to sick benefits. *Held;* upon the facts reported, that there was a forfeiture of the contract in this case upon both grounds, and that therefore the beneficiary cannot recover the death benefit.

Held; that the plaintiff's right under the contract to recover the expenses of worship and burial is contingent upon a valid membership of the deceased. His widow, therefore, is not entitled to recover under this claim, it appearing that her husband's membership was invalid by reason of his age at the time of joining the society.

One cannot be said to waive that which he does not know. *Held;* that the defendant corporation did not waive its defenses by attending the funeral of the deceased, pursuant to a vote of the society, as a body and in uniform. The society did not have any knowledge of the true age of the member until long after his funeral. *Also;* that the attendance at the funeral is not a waiver of the other defenses. While intemperance and failure to make prompt payments work a forfeiture of benefits, they do not work a forfeiture of membership.

On Report.

This was an action of assumpsit against the defendant, a society incorporated for the mutual assistance of its members while living, and the benefit of the members' widows and heirs after their decease.

(Declaration.) In a plea of the case, for that Michel Marcoux of Clinton, in the county of Kennebec, on the thirteenth day of April, A. D. 1887, at said Fairfield, became a member of the defendant society, and the defendant in consideration that said Michel should pay twenty-five cents per month at the meeting of each month and should pay one dollar during the thirty days following a member's death and should pay one dollar in advance, did promise the said Michel to pay the expense of religious services and burial not exceeding twenty-five dollars, and did promise the said Michel to pay to his widow or heirs the sum of one dollar for each member in said society and in the society of Beneficence St. John Baptist of Waterville, Maine, at the time of his decease; that the plaintiff is the widow of said Michel; that said Michel died on the eleventh day of October, 1896. And the plaintiff

avers that, at the time of the decease of said Michel, there were five hundred members in said society, that said Michel had paid all his dues and assessments to the defendant society; that due notice has been given said society of the decease of said Michel. Yet though requested, etc.

Plea, 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 if it promised in manner and form as the plaintiff in her writ has declared against it, it was in consideration of the promise and agreement of the said Michel Marcoux that if his death should be caused by his intemperance or bad conduct, the defendant should be released from the obligation of said promise; and the defendant says that the death of the said Michel Marcoux was caused by his intemperance and bad conduct.

And the defendant further says that its said promise was made in further consideration of the promise of the said Michel Marcoux that he would pay to the defendant society the sum of twenty-five cents as a monthly contribution at each monthly meeting of said defendant society held on the first Sunday of each month, and in the event that he should not pay his said contribution at any monthly meeting, that he would lose his right to receive any benefits from the defendant society, even for the month succeeding the payment of said contribution which he had neglected to pay; and that if he should not be entitled to benefits at the time of his death, his widow or his heirs should not be entitled to receive any.

And the defendant says that the said Michel Marcoux did not pay the contribution due from him to the defendant society at the monthly meeting of said society held on the first Sunday of September, 1896, and did not pay said contribution until the meeting of said society which was held on the first Sunday of October, 1896; that the death of the said Michel Marcoux occurred within one month next after the payment of said contribution due on the first Sunday of September, 1896.

The defendant further says that the said promise, if made, was

made in further consideration of the promise and agreement of the said Michel Marcoux that the statements made by him when he became a member of the Society of St. John the Baptist at Waterville, Maine, were true; that said statements were not true in this, viz: that the said Michel Marcoux declared when he became a member of said Society of St. John the Baptist at Waterville, Maine, that he was not over fifty years of age, but that he was forty-nine years of age; whereas the said Michel Marcoux was then and there more than fifty years of age.

S. S. Brown and F. W. Clair, for plaintiff.

C. F. Johnson and G. G. Weeks, for defendant.

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

SAVAGE, J. The plaintiff, as widow of Michel Marcoux, seeks to recover from the defendant certain benefits which she claims are due to her by virtue of the "Constitution" and "Regulations" of the defendant society, of which her husband is alleged to have been a member in his lifetime. The defendant is a religious, social and beneficial society. It issues no benefit certificates or contracts to its members. It is conceded that its obligations to its members and their beneficiaries are to be found in its by-laws, otherwise called its "Constitution" and "Regulations." In these, we find the following provisions which are material to the decision of this case:—

"The principal object of this society of beneficence is to establish by a monthly contribution made by the members, a fund to help the sick associates, and after their death, for the widows and children." Constitution, Art. II. "No person can be admitted before the age of fifteen nor after the age of fifty." Constitution, Art. III. "The monthly contribution will be twenty-five cents, payable in advance at the regular meeting on the first Sunday of each month." Regulations, Art. XIV. "Any member, when elected, will be obliged to pay his admission fee himself the next month. He must answer the questions made by the president."

Among the questions is the following:—"Tell us, upon your word of honor, that you are not older than fifty." Regulations, Art. XIV. "The society binds itself to pay three dollars a week, excepting the first, to any member who by sickness or accident is unable to work. . . . ." "During the thirty days following the death of a member, every associate must pay one dollar to the Secretary of Finance." "The Secretary of Finance will remit the total amount to the widow of the deceased." "In order that the . . . . widow be entitled to this amount, the member must be entitled to benefits at the time of his death." "At the death of a member, the society will pay the expense of the worship and burial, provided the sum does not exceed twenty-five dollars." "When a member receives benefits, he must pay in advance one dollar to the Secretary of Finances, who will give him a receipt and deposit this money in bank, said money will be paid to the widow or heirs of the deceased." Regulations, Art. XVI. "When the physician or visitor proves that the sickness is due to intemperance or bad conduct, the member will lose all his rights for help from the society." "He who will not pay his contribution at each monthly meeting, will lose his rights to benefits; even for the month succeeding his payment." Regulations, Art. XVII.

I. The plaintiff claims to recover one dollar for each member of the defendant society, at the time of her husband's death, which was October 11, 1896. This claim is made under the provisions of Article XVI of the Regulations, cited above. She also claims to recover of the defendant one dollar for each member of the St. John Baptist Benevolent Society of Waterville, by virtue of a contract or "alliance" between the two societies.

The defendant resists payment, claiming, (1) that Michel Marcoux when he joined the parent society at Waterville was more than fifty years old, though he then represented his age to be forty-nine years, and that the defendant, by reason of facts to be hereafter stated, can take advantage of this misrepresentation, and of the fact that he was then actually more than fifty years old; (2) that Michel Marcoux, at the time of his death, was not

entitled to "benefits," i. e. sick benefits, because his last sickness and death were due to his "intemperance," and because he failed to pay in advance, when due, the monthly contribution due on the first Sunday of September, 1896; so that not being entitled himself to sick benefits at the time of his death, his widow is not entitled to a death benefit.

Plaintiff's husband became a member of the St. John Baptist Benevolent Society, of Waterville, an unincorporated association, July 15, 1877. The members of this society became incorporated December 21, 1878, under the provisions of R. S., chap. 55. The by-laws of the association were adopted by the corporation. April 5, 1887, the members of the Waterville society, residing in Fairfield, withdrew by consent of the parent society, and organized the defendant corporation. Michel Marcoux was one of these members. The old and the new societies made a "contract and alliance, so that the members of each of said societies shall pay at the death of each member, the sum of one dollar to his widow . . . . the same as before their separation." At its organization, the defendant adopted the "Constitution" and "Regulations" of the Waterville society, from which we have taken the foregoing citations, and which are identical with those in force when Michel Marcoux became a member.

These by-laws absolutely prohibited the admission of a person who was more than fifty years of age. It appears that Marcoux at the time of his admission, in answer to the question propounded by the president, in accordance with the by-laws, declared that his age was then forty-nine years. It is satisfactorily proved by an examined copy of the Registry of Births, in the parish of St. Mary, County of Beauce, Province of Quebec, his birthplace, that he was born September 28, 1826, and that he was, therefore, fifty years, nine months and seventeen days old, when he joined the Waterville society. The declaration of Michel Marcoux made to the Waterville society, in regard to his age, was a misrepresentation of a material fact; and that such a misrepresentation rendered invalid the contract with the parent society is well settled. *Swett* v. *Citizens' Mutual Relief Society*, 78 Maine, 541.

But the plaintiff earnestly contends that even if this is so, as to the Waterville society, still her husband's membership in the defendant society was valid, because he became a member of it, at its organization, and was a member when it adopted its Constitution and Regulations, and therefore was not affected by the provision relating to age. We do not think so. The solution of the question does not depend alone upon the effect of the adoption of its by-laws by the defendant. Marcoux was received as a member by the defendant upon the assumption that his membership in the Waterville society was valid, and therefore, upon the necessary implication that he was not more than fifty years old when he joined that society. The defendant assumed the obligations pertaining to his membership only upon the implied condition that his declaration to the Waterville society, in regard to his age, was true. Virtually, the defendant continued the contract undertaken by the parent society, and it is liable, in this particular, only when the old society would have been. In the language of *Swett* v. *Relief Society*, supra, "any fact which rendered the contract invalid, when so adopted, furnishes a good defense by the defendant to the plaintiff's action upon it."

Further, the defendant is not liable to the widow for the death benefit, unless the member was "entitled to benefits at the time of his death. Regulation, Art. XVI. The word "benefits" clearly refers to sick benefits. The laws of the defendant society provide that a member while retaining his membership shall forfeit temporarily his right to sick benefits, if his illness is due to "intemperance," or if he fails to pay the monthly contribution promptly in advance, and in such case, if he afterwards pays, the forfeiture is extended through the month succeeding his payment. It is not objected that these rules are not reasonable and enforceable. It is claimed that Marcoux at the time of his death was not entitled to "benefits," and that inasmuch as he was not entitled to sick benefits, for both of these reasons, therefore the plaintiff, by virtue of the regulation above cited, is not entitled to the death benefit. The proof is plenary that on the day before his death, he became intoxicated, and while in that condition, he attempted to drive his

team from Fairfield village to his home in Clinton. While on the way, being unable to steady himself in the wagon, he rolled out over the wheel, and on to the ground. He was fatally injured and died in about twenty-four hours. The accident was due to his intoxication. Under these circumstances, was he entitled to "benefits" at the time of his death? We think not. By his own conduct he had incurred the forfeiture. When "the sickness is due to intemperance, or bad conduct, the member will lose all his rights for help from the society." Regulations, Art. XVII.

Still further, it is conceded that Marcoux's monthly contribution, due in advance on the first Sunday of September, 1896, was not paid to the secretary of the defendant until the following day. As we construe the laws of the defendant, this failure would have debarred him from sick benefits, "for the month succeeding his payment," and as the term "month" as used in defendant's by-laws extends from the first Sunday in one month to the first Sunday in the next, he would not have been entitled to benefits during the month beginning the first Sunday of October, that being the month succeeding the one in which he made his belated payment. But he died during that month. It is unnecessary to elaborate further. Marcoux not being entitled to sick benefits at the time of his death, his widow is not entitled to the death benefit.

II. The plaintiff also claims to recover twenty-five dollars for the expenses of worship and burial. The by-laws do not make the payment of this sum contingent upon anything except the membership of the deceased, but it is necessarily contingent upon a valid membership. We have already held that Marcoux's membership was invalid by reason of his age at joining. His widow, therefore, is not entitled to recover under this claim.

The plaintiff claims that the defendant has waived its defenses. It appears that the defendant society in pursuance to a vote, attended Marcoux's funeral as a body and in uniform, and it is contended that this was a recognition of the validity of his membership, and that it is evidence of a waiver, on the part of the society, of any objections on account of any invalidity of his membership.

Without considering what would be the effect in a case like this of an intended waiver, we do not find that there was in fact any waiver;—certainly not as to the effect of the misstatement of age, for it does not appear that the society had any knowledge of the true age of Marcoux until long after his funeral. One cannot be said to waive that which he does not know. Nor was the attendance at the funeral a waiver of the other defenses. Intemperance and failure to make prompt payment did not work a forfeiture of membership, but of "benefits." In all other respects, the rights and privileges of membership continued, and the society might well extend to the memory of the deceased such tributes as it saw fit, without waiving any defense it might have to an action like this.

Judgment for the defendant.

STATE *vs.* CALVIN W. ALLEN, and another.

Cumberland. Opinion January 22, 1898.

Practice. Plea in Abatement. Verification.

The rules of practice in our courts in reference to the necessity of verification to pleas of abatement are only an affirmance of the common law doctrine, as modified by 4 and 5 Ann. c. 16, § 11, (in 1705) and which has become the common law of this State by adoption.

Such verification is necessary not only in civil actions, where a plea in abatement is filed, but in criminal proceedings also.

In a judgment upon a demurrer to a plea in abatement as an issue of law, not upon an issue of fact found upon such a plea, the entry must be that the respondent answer over.

ON EXCEPTIONS BY DEFENDANTS.

This was the case of a plea in abatement, filed by the defendants, to an indictment found against them by the grand jury of the Superior Court in Cumberland county. A demurrer to the plea was sustained by the presiding justice and the defendants thereupon took exceptions to the ruling of the court.

The material portions of the plea in abatement are as follows:

"because they say that Emery Rich of the town of Standish in said county of Cumberland who served as a member of the grand jury impaneled at this term of this Honorable Court and was present at the finding of said indictment was never legally a member of said grand jury in that no due and legal notice was given of the place of holding the meeting required to be held for the drawing of a grand juror for said term of court from said town of Standish. And this the said respondents are ready to verify."

Geo. Libby, County Attorney, for State.

Plea in abatement is defective and bad because it is not set forth and alleged therein that said Emery Rich did serve and act in finding and returning said indictment into the Superior court at the September term thereof, A. D. 1896, as one of the grand jurors by whom said indictment was so found and returned as aforesaid.

Because it is not set forth and alleged in said plea that said Emery Rich was not duly and legally qualified to serve as one of the grand jurors at said term of said court.

Because the plea itself as a whole does not show the defect, if any exists, upon which the respondents base their claim that said Emery Rich was not duly and legally a member of said grand jury.

That said plea in abatement is defective and bad because it is not alleged therein that said Emery Rich himself participated in the finding of said indictment, although the ingenious counsel for the defense has sought to remedy this defect by stating in his brief or argument that the respondents so pleaded in abatement.

Because it is not set forth and alleged in said plea that the writ of venire facias with the officer's return thereon is defective or irregular in any particular.

Because the writ of venire facias with the officer's return thereon, showing the defect or omission, if any exists, upon which the respondents pray judgment of said indictment and that the same may be quashed, is not set forth and made a part of said plea in abatement.

Because it is not alleged in said plea that the same is true in substance and in fact.

Chas. P. Mattocks, for defendants.

Plea sufficient: In a criminal case a plea in abatement is sufficient, if it is free from duplicity and states a valid ground of defense in language sufficiently clear not to be misunderstood. The strictest technical accuracy, such as is sometimes required in dilatory pleas in civil suits, will not be exacted. *State* v. *Flemming*, 66 Maine, 142.

In some of the states it has been held that, while a plea in statement is proper in case of a grand juror not having the necessary qualifications, but is not proper where the defect is in the manner of drawing, the contrary doctrine must be considered as settled in this State. *State* v. *Symonds*, 36 Maine, 129; *Com.* v. *Parker*, 2 Pick. 550; *U. S.* v. *Hammond*, 2 Woods, (C. C.) 197, and cases cited.

Whether the plea in abatement in the present case is properly drawn is another question. It might have alleged that Emery Rich was not only present but participated in the finding of the indictment, but the allegation that he "served as a member of the grand jury" and "was present at the finding of said indictment" is sufficient. His presence as a member vitiates the indictment. The plea offered to prove that Emery Rich was present and acted as a grand juror, but the county attorney did not deny this allegation but admitted it by his demurrer.

A person drawn as a grand juror without any notice to the inhabitants of the town . . . . has no authority to act as such. *State* v. *Clough*, 49 Maine, 573; *State* v. *Symonds*, 36 Maine, 129; *State* v. *Lightbody*, 38 Maine, 200.

To aid careless deputy sheriffs and other officers, the legislature enacted (R. S., c. 82, § 89) that "no irregularity in the venires, or drawing, summoning, or impaneling jurors, is sufficient to set aside a verdict, unless the party objecting was injured by the irregularity; or unless the objection was made before the return of the verdict."

This statute has been construed in *State* v. *Neagle*, 65 Maine, 468, (1875), but it must be remembered that this amendment relates to the disturbing of a verdict.

In *Com.* v. *Smith*, 9 Mass. 107, the authority of which is doubted in *Com.* v. *Parker*, 2 Pick. 563, the attorney for the Commonwealth filed a replication setting forth that notwithstanding the defect in the qualification of one of the grand jurors, a sufficient number of grand jurors (12) convened in the finding of the indictment, which has not been set out by the government in the case at bar.

The presence of one grand juror not legally a member of the grand jury vitiates an indictment. Bacon's Abridg. Tit. Juries; *Dovey* v. *Hobson*, 6 Taunt. 460.

The manner of drawing grand jurors is as much a necessity in order to secure impartiality and justice, as any part of the proceedings connected with a criminal trial. *Stokes* v. *State*, 24 Miss. 623. It is essential that they should be selected, impaneled and sworn according to law.

There is no certainty that the indictment was found by twelve legal persons. It does not appear how many grand jurors sat, because the county attorney shut off that question by his demurrer. Even if more than twelve jurors were present at the finding, the incompetent man may still have been one of the twelve who alone voted the bill. *Barney* v. *State*, 12 Smedes & M. 68; *State* v. *Brown*, 10 Ark. 78; *State* v. *Duncan*, 7 Yerg. 271; *Kitrol* v. *State*, 9 Fla. 9; *Com.* v. *St. Clair*, 1 Gratt. 556; *State* v. *Cole*, 17 Wis. 674; *Finnegan* v. *State*, 57 Ga. 427; *Wilburn* v. *State*, 21 Ark. 198.

The presence of one not a member of the grand jury during its sessions invalidates the indictment. *State* v. *Bowman*, 90 Maine, 363, and the irregularity may be taken advantage of by plea in abatement.

It is left entirely to the discretion of the trial judge whether he shall admit a plea in abatement not sworn to or supported by other evidence. This seems to imply that the facts in a case like the present may be proven by a sworn affidavit, or other evidence, or the judge may admit the plea without any evidence offered by the respondent. If the counsel for the state questions the statements contained in the plea, he can deny them or admit the facts

by demurring; but the fact of the plea being filed without verification is not demurrable under our statute. The statute itself has provided another penalty.

If, however, it is claimed that the matter set up is dehors the record, and that for this reason verification is required, we reply that all proceedings in the impaneling of the grand jury and the mode of their selection are matters of record in the court in which the proceedings are had and not only a general record but a record in each case. This exact point was decided in *Parker* v. *People*, (Colo.) 4 Lawyer's Reports Annotated, 803.

An indictment itself, when found by a grand jury and presented to and received by the court becomes a part of the records of the court. *U. S.* v. *McKee*, 4 Dill. 1.

It is clear that, in the present case, the presiding justice held that all the matters set up in the plea in abatement were matters to be determined by the inspection of the record, and for this reason allowed the plea in abatement to be filed without verification.

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

FOSTER, J. A plea in abatement was filed by the respondents therein setting forth that a member of the grand jury, who was present and served at the term of court at which the indictment was found, was never legally a member of the grand jury in that no due and legal notice was given of the place of holding the meeting required to be held for the drawing of a grand juror for that term of court from the town of Standish.

To this plea a demurrer was filed by the county attorney for Cumberland county, and joined by the respondents. The court overruled the demurrer and adjudged the plea bad, to which rulings exceptions were duly filed.

The only question for consideration is in reference to the sufficiency of the plea.

A rule of court in reference to practice in the Superior court of

Cumberland county, like that in the Supreme court, provides that pleas in abatement "if consisting of matter of fact not apparent on the face of the record, shall be verified by affidavit."

This plea sets forth facts which are "not apparent on the face of the record," and should therefore be verified by affidavit that the plea is true in substance and in fact. Such plea is bad if it has no verification, or a defective one. *Fogg* v. *Fogg*, 31 Maine, 302; *Bellamy* v. *Oliver*, 65 Maine, 108.

It is unnecessary to consider the other objections raised as to the sufficiency of the plea, if this one is fatal. We think it is.

But the defense claims that the rule to which we have referred applies only in civil actions, and not in criminal proceedings. But reason and authority are against this position.

The rules of practice in our courts in reference to the necessity of verification to pleas of abatement are but an affirmance of the common law doctrine, as modified by 4 and 5 Ann. c. 16, § 11, (in 1705) and which has become the common law of this state and Massachusetts by adoption. *Monroe* v. *Luke*, 1 Met. 459, 463.

At common law in England, where the defendant pleaded a foreign plea, he was obliged to make oath of the truth of the matter therein alleged, but not so in case of a plea to the jurisdiction, or plea in abatement. But by 4 and 5 Ann. c. 16, § 11, it was enacted that "no dilatory plea shall be received in any court of record, unless the party offering such plea do by affidavit prove the truth thereof, or show some probable matter to the court, to induce them to believe that the fact of such dilatory plea is true." And this statute was held by the English court of King's Bench to apply not only to civil but to criminal cases as well. *Rex* v. *Grainger*, 3 Burrows, 1617. In that case the plea was set aside for want of an affidavit to verify it. *Com.* v. *Sayres*, 9 Leigh, (Va.) 722; Archbold's Pl. and Ev. in Criminal Cases, Abatement; 1 Bish. Crim. Prac. 480, and notes; 1 Chit. Pl. 462; Stephen, Pl. 87; 1 Whart. Cr. Law, Special Pleas, "Abatement." It was necessary that such affidavit, or verification, should state that the plea was true in "substance and fact,"—not merely that the plea is a true plea (2 Strange, 705), and if there was no affi-

davit, or it was defective in any particular, the plaintiff might treat the plea as a nullity, or move the court to set it aside. *Rex* v. *Grainger*, supra; *Richmond* v. *Tallmadge*, 16 Johns. 307; 1 Tidd Pr. 588.

And such is the doctrine of our own court,—a survival of the old English rule as modified by Statute of 4 and 5 Anne. *Bellamy* v. *Oliver*, 65 Maine, 108; *Fogg* v. *Fogg*, 31 Maine, 302.

In *State* v. *Ward*, 64 Maine, 545, and *State* v. *Flemming*, 66 Maine, 142, both criminal proceedings, where pleas in abatement were filed, the proper verifications to the pleas were there made, not only in compliance with the common law, but with the rule of court.

Judgment being upon demurrer to a plea in abatement as an issue of law, not upon issue of fact found upon such plea, the entry must be that the respondents answer over. *Baker* v. *Fales*, 16 Mass. 147, 157; *Whitford* v. *Flanders*, 14 N. H. 371; Bouvier Law Dic. Abatement.

Exceptions overruled.
Respondents to answer over.

MARGARET A. MORSMAN *vs.* CITY OF ROCKLAND.

Knox. Opinion January 22, 1898.

Way. Defect. Proximate Cause. Damages.

In an action to recover damages sustained in consequence of an injury received through a defect in a highway, the question whether the fright or misconduct of the horse which was driven by the plaintiff is such as to be regarded as the direct, proximate cause of the injury, is to be determined by the extent of such misconduct.

It may in a remote degree bear upon or even influence, though not in a legal sense be said to cause it.

If a horse well broken and adapted to the road, while being properly driven, suddenly shies or starts from the direct course, he is not in any just sense to be considered as escaping from the control of the driver, or becoming unmanageable, if he is in fact only momentarily not controlled.

And if while thus momentarily shying or swerving from the direct course he comes in contact with a defect in the highway, and an injury is thereby sustained, such conduct of the horse cannot be considered as the proximate cause of the accident, though it may be one of the agencies through which it was produced, and therefore a recovery may be had for such injury.

The plaintiff recovered in this case a verdict of $700 for damages sustained by her through a defective highway in the city of Rockland,—the defect being the want of a sufficient railing,—and the circumstances under which the injury was received, on the first day of May, 1895, are set out in the following manner in her declaration:—"And there was not, on said first day of May A. D. 1895, and had not been for a long time before, to wit; for one year before, any sufficient railing, nor in fact any railing whatever, or other protection for travelers on and along said bank or on and along the pond-side of said highway where said bank was located; that said highway at said point was narrow and teams meeting at that point to pass each other were forced very near said bank and in case of any sudden starting of the horse of the traveler on the pond-side of said highway at such passing was dangerously defective; that the said defendants had reasonable notice of all said defective condition, want of repair and want of sufficient railing, the municipal officers and highway surveyors of said city of Rockland having had actual notice of same at least twenty-four hours before the plaintiff received the injuries hereinafter set forth on the first day of May A. D. 1895; that the plaintiff on said first day of May A. D. 1895, was traveling over and along said highway in a good, safe and suitable wagon, drawn by a kind and well-broken horse, with a safe and suitable harness, driving said team herself in a careful and prudent manner, and the plaintiff was then and there in the exercise of ordinary care; that through said defect and want of repair and want of sufficient railing of said highway the said team she was driving while passing a loaded lime cask team was precipitated over said bank into the water of said pond, and the plaintiff was thereby thrown upon the rocks and ground thereon with great force, wounding and bruising her breast, head and neck and other parts of her body, rendering her unconscious, and nearly drowning her, making her sick and lame for weeks and from which she has not recovered, etc., ..." *Held;* that the verdict should not be disturbed on account of excessive damages.

ON MOTION BY DEFENDANT.

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

S. T. Kimball, city solicitor, for defendant.

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

FOSTER, J. Action to recover damages for an alleged injury to the plaintiff by reason of a defect in a highway in the city of Rockland.

The defect alleged was the absence of a sufficient railing along the easterly side of Chicawaukee pond, along which the highway passes. The plaintiff in passing over this highway met a loaded lime cask team, and in passing the same her horse took fright at the barrels and immediately backed over the bank, precipitating horse, carriage and plaintiff into the pond, and inflicting the injuries of which she complains.

There was no railing on the side of the highway, and the distance from the easterly wheel rut to the edge of the bank was about eighteen inches. The bank is nearly perpendicular, and about four and a half feet above the water, and then it drops off so that the bottom of the pond at that point is eight feet below the surface of the road. In going over the bank into the pond the wagon was turned completely over, bottom side up, and the plaintiff beneath it in the water.

The defense set up was that the fright of the horse was the proximate cause of the injury; the plaintiff's contention on the other hand being that the want of a sufficient railing was the proximate cause, and the fright of the horse was but momentary, and not of sufficient duration to be entirely freed from the control of the driver, and therefore not such a contributing cause as to relieve the city from its responsibility occasioned by the defective condition of the highway.

We think the plaintiff's position is correct.

The law of causal connection in this class of cases has been so thoroughly considered by our court in the cases of *Spaulding* v. *Winslow*, 74 Maine, 528; *Aldrich* v. *Gorham*, 77 Maine, 287; *Perkins* v. *Fayette*, 68 Maine, 152; *Moulton* v. *Sanford*, 51 Maine, 127; *Clark* v. *Lebanon*, 63 Maine, 393; *Cleveland* v. *Bangor*, 87 Maine, 259; and *Carleton* v. *Caribou*, 88 Maine, 461, that a reference to the decisions is all that is necessary. These authorities, as well as others of like nature in Massachusetts, all agree that the contributory fault to be sufficient to bar a recovery against a town or city for a defective highway must be something more than a mere condition, agency, or occasion of it,—it must be one of the efficient and proximate causes of the accident.

This distinction is clearly drawn in *Spaulding* v. *Winslow*, supra, where Chief Justice PETERS says: "Here, then, must be the proper distinction. If the hole or the horse's fright at the hole, was the proximate cause of the injury, the plaintiff cannot recover. If it by chance became merely an agency through which another defect operated to produce the injury, then he can recover."

The same distinction is observed in *Aldrich* v. *Gorham*, supra, wherein it is said that if any other efficient, independent cause, for which the town is not responsible, contributes directly to produce such injury, then the town is not liable.

Whether the fright or misconduct of the horse is such as to be regarded as the direct, proximate cause of the injury, in this or in any given case, is to be determined by the extent of such misconduct. It may in a remote degree bear upon or even influence, though not in a legal sense be said to cause it. Consequently, by the decisions, not only of our own State, but of Massachusetts, it is the settled doctrine, that if a horse well broken and adapted to the road, while being properly driven, suddenly shies or starts from the direct course, he is not in any just sense to be considered as escaping from the control of the driver, or becoming unmanageable, if he is in fact only momentarily not controlled; and if while thus momentarily shying or swerving from the direct course he comes in contact with a defect in the highway and an injury is thereby sustained, such conduct of the horse could not be considered as the proximate cause of the accident, though it may be one of the agencies or mediums through which it was produced, and therefore a recovery may be had for such injury. *Aldrich* v. *Gorham*, supra; *Spaulding* v. *Winslow*, 74 Maine, 534; *Titus* v. *Northbridge*, 97 Mass. 258; *Stone* v. *Hubbardston*, 100 Mass. 55; *Bemis* v. *Arlington*, 114 Mass. 508; *Wright* v. *Templeton*, 132 Mass. 50.

In this case the fright of the horse was sudden, the loss of control but momentary, the accident immediately following. In no just sense was the fright of the horse the proximate cause of the accident. It was merely an agency, which induced, influenced the accident, a medium or inducement through which another and independent defect produced the injury. The efficient, proximate

cause of the injury was the want of a sufficient railing at the place of the accident.

Nor do we think the verdict should be disturbed on account of the damages being excessive. The evidence is such as may well have warranted the jury in determining the amount of their verdict.

Motion overruled.

JOHN E. FICKETT *vs.* LISBON FALLS FIBRE COMPANY.

Androscoggin. Opinion January 22, 1898.

Negligence. Defective Machinery. Assuming Risk. Proximate and Remote Cause.

In an action brought by the servant against the master, for an injury received while employed in the service of the latter, if the plaintiff knew and appreciated the danger which was the cause of the injury, then he might be held to have voluntarily assumed the risk. But mere notice that there was some danger without appreciating the risk will not of itself preclude the plaintiff from recovering.

Disobedience of a rule, even if such rule is known and understood by the servant, must have contributed to the injury in order to preclude a plaintiff from recovering.

There must be a causal connection between the disobedience of the rule and the injury received.

In this case, the causal relation between the alleged contributory negligence of the plaintiff at the time of the accident in the disobedience of this rule, assuming that he had knowledge of it, and the injury received, was a question of fact submitted to the jury under instructions to which no exceptions have been presented to the court.

This causal connection, and whether such disobedience to the rule contributed to produce the injury, were questions of fact for the jury under appropriate instructions upon all the facts and circumstances of the case.

The contributory negligence of the injured party that will defeat a recovery, must have contributed as a proximate cause of the injury.

If it operated only as a remote cause, or afforded only an opportunity or occasion for the injury, or a mere condition of it, it affords no bar to the plaintiff's action.

ON MOTION BY DEFENDANT.

This was an action of tort in which the plaintiff alleged he was injured by defective machinery while employed by the defendant in its pulp-mill.

The case appears in the opinion.

H. W. Oakes, for plaintiff.

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

SITTING: PETERS, C. J., FOSTER, HASKELL, WISWELL, STROUT, JJ. SAVAGE, J., did not sit.

FOSTER, J. The plaintiff recovered a verdict of $2037.50 for personal injuries received by him while in the defendant's employment. The defendant asks this court, upon motion in the usual form, to set that verdict aside.

The plaintiff's duty was to enter the blow-pits, after the pulp was cooked and blown into these pits from the digesters, and there by means of large hose wash down the pulp. It was in one of these blow-pits that the plaintiff received the injuries of which he complains.

In order to understand just how the plaintiff got hurt, it is necessary to state something of the process by which the pulp is manufactured.

The wood, which is cut into small chips, is placed in large digesters where it is cooked in steam and sulphurous acid from ten to eighteen hours. After being cooked, the pulp is discharged or blown out by means of a valve near the bottom of the digester, through a pipe seven inches in diameter and twenty-two feet in length, known as the blow-pipe, into the blow-pit. The pulp, mixed with hot water and acid, leaves the blow-pipe with great force and strikes an iron plate upon the side of the pit opposite the end of the pipe and is thus broken up and distributed throughout and over all parts of the pit. After being discharged into this the pulp remains until cool, about two hours being required for that purpose. Cold water is thrown upon the pulp as soon as discharged into the pit by means of sprinklers for the purpose of cooling and cleansing it of acid. After it is cooled sufficiently the

pulp is washed by the use of water, from the pit into the stuff chest below where it remains until needed for the next process.

The blow-pit in which the plaintiff was injured was a small room stoutly constructed of planks but large enough to hold two cooks of pulp. There was an entrance door in the side of the pit opening from the room in which the digester was located. Along the inside of the pit was a plank walk, about two feet wide, resting on brackets about four and a half feet from the floor of the pit, upon which the workmen stood while washing the pulp from the pit to the stuff chest. Upon and across this plank walk and about seven feet to the right of the entrance door was the iron blow-pipe. Just beyond the blow-pipe was a lever which was raised for the purpose of letting water into the pit after the pulp had sufficiently cooled, to aid in washing it into the stuff chest.

Upon the morning the plaintiff was injured, a bolt in the valve near the bottom of the digester that furnished the pulp for the pit in question was broken, allowing a portion of the valve to drop on one side a very little, and the effect of this was to permit the escape of steam through the blow-pipe into the blow-pit under a pressure of eighty pounds to the inch, which pressure continued until it was reduced by shutting off the steam from the digester. This injury to the valve also allowed the hot acid to flow into the pit, and as the evidence shows, a pool was formed under the end of the blow-pipe.

The plaintiff claims that, having no knowledge of any injury to the valve, and as was his duty, he entered the blow-pit in order to wash the pulp, and was proceeding along the plank walk to hoist the slide at the other end of it, and that when he reached the end of the blow-pipe he was, by force of the steam escaping from it, blown off into the hot pulp and acid, and thereby received severe scalds and burns upon his legs and arms.

The defense sets up negligence on the part of the plaintiff, and asserts that he went into the pit after standing by the valve, on his way to the pit, and learning that there was trouble with it; that when he went into the pit he disobeyed one of the rules of the defendant company in not shovelling off the pulp from the walk

before commencing his work of washing; and that he walked across the plank into the pulp in the blow-pit, then into the pool of acid, and so received his injuries.

But we do not feel, from a careful examination of all the evidence, that these contentions on the part of the defense are sustained. To be sure, there was more or less conflict in the evidence on these several positions, but we see no reason for saying the jury must have erred in deciding in favor of the plaintiff. From the plaintiff's statement it appears that on that morning he went to the mill about seven o'clock, rung in his registry, inquired what room he should go into and was told to go into No. 3, and then he went back, changed his clothes, took down the door to the blow-pit and went into it to do his work.

The evidence from the superintendent and another witness is that they were standing near the digester looking at the defective valve, when the plaintiff approached, and went into the pit. Without analyzing the testimony of the witnesses, we feel confident that the plaintiff had not, before entering the blow-pit, received such notice of any defect in the valve as would lead him to suppose that there was any unusual danger to be encountered in the blow-pit. He certainly did not appreciate it. The defense strenuously contends that he knew the valve was leaking, and that it was not safe to enter the blow-pit. Had the plaintiff known and appreciated the danger, then he might be held to have voluntarily assumed the risk. But the mere notice that there was some danger without appreciating the risk will not of itself preclude the plaintiff from recovering. *Mundle* v. *Hill Manufacturing Co.*, 86 Maine, 400. It is not claimed that any word of warning was given to the plaintiff by those standing near the defective valve as he came up and passed by into the blow-pit.

It is also urged that in the disobedience of one of the rules of the company by the plaintiff he can not recover. The rule required that the plank-walk inside the blow-pit should be shovelled off, and the defense insists that had the plaintiff observed this rule, and stayed on the walk long enough to shovel it off, he would have avoided all danger. The plaintiff denies ever having any

knowledge of this rule. But disobedience of a rule, even if such rule is known and understood, must have contributed to the injury in order to preclude a plaintiff from recovering. There must be a causal connection between the disobedience of the rule and the injury received. *Ford* v. *Fitchburg Railroad Co.*, 110 Mass. 240; *Whittaker* v. *D. & H. C. Co.*, 126 N. Y. 544, 551. The causal relation between the alleged contributory negligence of the plaintiff at the time of the accident in the disobedience of this rule, even assuming that he had knowledge of it, and the injury received, was a question of fact submitted to the jury under instructions to which no exceptions have been presented to the court.

Assuming that the plaintiff had knowledge of the rule, and that there was a disobedience of it, and that in a certain sense it contributed to produce the accident, still it was a question for the jury, under appropriate instructions upon all the facts and circumstances of the case, whether it contributed to the accident in a legal sense so as to bar the plaintiff's recovery. The contributory negligence of the injured party that will defeat a recovery must have contributed as a proximate cause of the injury. "If it operated as a remote cause, or afforded only an opportunity or occasion for the injury, or a mere condition of it, it is no bar to the plaintiff's action." *Pollard* v. *Maine Central R. R. Co.*, 87 Maine, 51.

With the uncertainty as to whether this rule was ever known to the plaintiff, and whether it had any causal relation between its disobedience, if known, and the injury, we are not inclined to say that the jury have erred in their decision upon this question.

The other point in defense, that the plaintiff walked over the plank-walk into the pulp and pool of acid, and thus received his injuries through his own carelessness, was strongly controverted by the plaintiff, and with this conflicting evidence it became a question of fact peculiarly within the province of the jury to decide; and, as they have determined in favor of the plaintiff, we can not say they erred.

The jury have found that there was negligence on the part of the defendant, either with respect to the nature of the apparatus

or the care of it, or in a failure to give proper warning of danger to the plaintiff which caused his injuries.

It is conceded that on the morning of the injury there was trouble with the valve of No. 3 digester, and that the attention of the general manager was called to its condition. Two bolts had become broken, and this produced a small opening in the valve against which was a pressure of eighty pounds to the square inch, allowing steam and acid to pour through the valve, thence through the twenty-two foot pipe into the blow-pit where the plaintiff was injured.

It is conceded that the plaintiff was burned by this hot acid and steam which was forced through the break into the blow-pit. Had the pit been in its ordinary condition the plaintiff could not have been injured. The plaintiff contends that there was nothing unusual, to all appearances, when he entered the pit. But the defense claims that with the rush of steam through the blow-pipe with sufficient force to blow the plaintiff from the walk, there was sufficient to put him upon his guard, and that this fact is inconsistent with the plaintiff's statement that there was no unusual appearance on entering the pit. But here again the question of contributory negligence was one of pure fact for the jury. The evidence on these controverted points was more or less conflicting. The jury might well believe that the danger which the plaintiff encountered was known to the employer and not to the plaintiff,—that the general manager and vice-principal being present and having knowledge of the defective condition of the valve, owed a duty to the plaintiff of informing him of the danger he was likely to encounter in going into the pit. However this may be, it is evident that the defective condition of the valve was the cause of the plaintiff's injuries. It is not necessary to go into details in relation to the evidence bearing upon the different contentions of the parties. It is sufficient to say that upon the whole evidence we think the verdict ought not to be disturbed.

The damages, while quite large, are not so out of proportion to the injuries received as to require any modification by this court. The injuries received were very severe, rendering the plaintiff a cripple for life.

Upon careful investigation of the whole evidence, notwithstanding the very able and analytical argument of the counsel for the defendant, we feel that the jury were not governed in their decision by any such degree of bias, passion or prejudice as will warrant this court in setting their verdict aside.

Motion overruled.

JACOB COHEN *vs.* ANTHONY O. MANUEL.

Penobscot. Opinion January 22, 1898.

Innkeeper. Pedler. License. Stat. 1889, c. 298. R. S., c. 27, § 7.

The want of a license to peddle does not bar a pedler from recovering against an innkeeper for the value of goods lost while in the keeping of the innkeeper, though the goods were intended for sale without license.

When an innkeeper directed his guest to take his horse and cart to a livery stable which belonged to the innkeeper, but was not connected with the inn, and the guest did so, and put the horse and cart into the care of the innkeeper's hostler, *held;* that this constituted a delivery to the innkeeper for safe custody, and that the property was infra hospitium.

ON EXCEPTIONS BY DEFENDANT.

The case is stated in the opinion.

P. G. White, for plaintiff.

J. B. Peaks and E. C. Smith, for defendant.

The plaintiff cannot recover unless protected by a license, because he was performing acts forbidden by statute. *Harding* v. *Hager*, 60 Maine, 341. Burden of proof on plaintiff to show license. *State* v. *Churchill*, 25 Maine, 306. In *Lord* v. *Chadbourne*, 42 Maine, 439, the court cite *Robinson* v. *Howard*, in note 7 Cush. 611, that an action cannot be maintained upon a note given to the payee in payment for goods bought of him by the defendant, for the purpose of being carried about from place to place and exposed for sale, by the defendant, contrary to statute. If a man who sells goods to a pedler knowing they are to be sold in violation of law, can not recover for the price simply because he

knew they were to be sold in violation of law, much more can not a man who is selling such goods in violation of law recover for their loss against an innkeeper.

Plaintiff surrendered his common law remedy against the innholder by violating the statute against hawkers and pedlers. *Norcross* v. *Norcross*, 53 Maine, 163; *Stanwood* v. *Woodward*, 38 Maine, 192. To hold otherwise would be to give the pedler, who was violating the statute, his common law remedy against the innholder while at the same time denying the innholder who has no license, the common law remedy of the lien upon the goods of the pedler who is his guest.

Plaintiff was not a guest within the meaning of the law, so far as his goods were concerned, and can not recover for their loss. The innkeeper accepted the goods as bailee only, and is liable only for negligence. He is not obliged at common law to receive a guest with a stock of goods, carried for sale, even with a license. *Arcade Hotel* v. *Wiatt*, 44 Ohio St. 33, (58 Am. Rep. 788); *Neal* v. *Wilcox*, 4 Jones' Law, 146, (67 Am. Dec. 266); *Burgess* v. *Clements*, 4 Maule & S. 306; *Pettigrew* v. *Barnum*, 11 Md. 434, (69 Am. Dec. 219); *Carter* v. *Hobbs*, 12 Mich. 52, (83 Am. Dec. 762.)

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

SAVAGE, J. This is an action on the case, wherein the plaintiff claims to recover of the defendant, an alleged innkeeper, for the loss of his goods while he was a guest at the defendant's inn. The plaintiff was a pedler and stopped at the defendant's inn, and while his peddle-cart was in the defendant's stable, it was broken open and the goods in question were stolen therefrom. By their verdict for the plaintiff, the jury, under instructions to which no exceptions were taken, have settled that the defendant was an innkeeper, that the plaintiff was a traveler, and a guest at the defendant's inn, and that the goods were lost while the plaintiff was defendant's guest.

The defendant contends that the plaintiff being a pedler, and

the goods lost having been merchandise carried by him for the purpose of sale, is not entitled to recover unless he shows affirmatively that he was licensed as a pedler under the provisions of the Public Laws of 1889, c. 298; the defendant also contends that under the circumstances of the case, he is liable, if at all, only as bailee, and not as innkeeper.

I. The defendant's bill of exceptions states that "there was evidence tending to show that at the time of the loss, the plaintiff was traveling from town to town, and from place to place in the town of Brownville, selling said goods and chattels, in violation of section 1, chapter 298, of the Public Laws of 1889, unless the plaintiff had a license from the secretary of state so to do. There was no evidence from either plaintiff or defendant as to whether the defendant had a license or not."

The defendant requested the presiding justice to instruct the jury that "an innkeeper is not liable for the loss of merchandise carried by a pedler for the purpose of sale, who stops at said inn, unless such pedler has a license to peddle under the laws of the state." This instruction was refused.

There was no evidence in the case that the plaintiff did have or did not have a license, and the defendant claims that the burden to show a license was on the plaintiff. But we do not consider or decide this question, because if, as we hold, the want of a license does not preclude the plaintiff from recovering, the matter of the burden of proof is immaterial.

We think that the plaintiff is not debarred from maintaining this action, though he may have had no license as a pedler.

The defendant relies upon the principles stated in *Lord* v. *Chadbourne*, 42 Maine, 429; *Mohney* v. *Cook*, 26 Pa. St. 342, (67 Am. Dec. 419,) and other cases. It is true, in the language of *Lord* v. *Chadbourne*, supra, that "the common law will afford no aid to a party whose claims can be successfully enforced only by a violation of its principles, or in direct contravention of a statutory enactment." It is true, in the language of *Mohney* v. *Cook*, supra, that "there are cases wherein an injured party will be remediless, because of his own fault, even when the

fault does not contribute to the accident. A vessel engaged in the slave trade, piracy or smuggling and injured by another, or the keeper of a gambling house injured in his business by a neighboring nuisance, could have no remedy. Not, however, because the persons are out of the protection of the law for these offenses, nor because their illegal business brought them to the place of danger; but because their business itself, with all its instruments, is outlawed. Prohibited contracts, prohibited trades, prohibited things receive no protection." Among such prohibited contracts is the sale of intoxicating liquor intended for illegal sale in this state. *Wasserboehr* v. *Boulier*, 84 Maine, 165; the sale of hay pressed and baled and not branded; *Buxton* v. *Hamblen*, 32 Maine, 448; the sale of lumber not surveyed and marked, *Richmond* v. *Foss*, 77 Maine, 590; the sale of hoops not culled, *Durgin* v. *Dyer*, 68 Maine, 143.

All such sales are expressly, or by implication, forbidden by law. So a party has been held remediless who seeks to enforce a contract made on Sunday. *Towle* v. *Larrabee*, 26 Maine, 464. And he who suffers an injury arising from his violation of the Sunday law, so-called, is equally without remedy. *Wheelden* v. *Lyford*, 84 Maine, 114.

The language in *Lord* v. *Chadbourne*, and in *Mohney* v. *Cook*, above cited, is a correct statement of a general proposition. How inapplicable it is to the case at bar can easily be seen when we look at the questions which were decided in these cases. In the former, the precise question decided was that under the provisions of the statute of 1851, c. 211, § 16, no action whatever could be maintained for intoxicating liquors or their value. Intoxicating liquors were thus practically outlawed. Trespass against a wrong doer even could not be maintained. But when the statute was modified the rule was modified accordingly, and it was thereafter held that trespass would lie for the unauthorized conversion of intoxicating liquors, even though they were intended for illegal sale in this State. *Hamilton* v. *Goding*, 55 Maine, 419; *Bliss* v. *Winslow*, 80 Maine, 274; *Adams* v. *McGlinchy*, 66 Maine, 474. In *Mohney* v. *Cook*, supra, the question actually decided was that a party who

erects an obstruction in a navigable stream, and thereby occasions an injury to another, cannot, in an action for such injury, set up as a defense, that the plaintiff was unlawfully engaged in worldly employment on Sunday, when the injury occurred.

It will be seen in the illustrations which we have given, that a remedy has been refused, because the plaintiff's right of action was directly connected with, or grew out of, a violation of law. But it is not unlawful for a pedler, with or without license, to put up at an inn. The plaintiff did not lodge at the defendant's inn as a pedler, but as an individual. As a property owner merely he intrusted his property to the defendant's safe keeping. It was not unlawful for him to eat, drink and be sheltered in an inn, nor to deliver, or offer to deliver, his money and other property to the innkeeper for safe custody. If his property consisted of merchandise carried by him for the purpose of sale, without a license, in violation of law, it was none the less property. A pedler may lawfully care for and protect his property. If he exposes it for sale, or sells it, without license, he may be fined. No penalty attaches to the merchandise itself. It cannot be seized or forfeited. It is neither contraband nor outlawed. The rights and liabilities which exist between the innkeeper and his guest, who is a pedler, are created by law, and grow out of the relation between them, and are in no degree dependent upon the purpose of the owner to sell the goods at some future time, without license. It is, therefore, the opinion of the court that even if the plaintiff had no license to peddle, that fact would not constitute a defense to this action, and that the requested instruction was properly refused.

II. The evidence tended to show that the defendant's stable, where the plaintiff's peddle-cart was kept, was a livery stable, unconnected with the inn, and known by the plaintiff to be so. The defendant directed the plaintiff to take his horse and cart to the stable. The plaintiff did so, and there put them into the care of the defendant's hostler. The defendant requested that the jury be instructed that "an innholder is not liable for the loss of merchandise, carried by a pedler, who stops with said innholder, which

is left by such pedler in a livery stable known by said pedler to be a livery stable, and not connected with said inn." This request was refused, and we think correctly refused.

The defendant does not claim that an innkeeper may not be liable for the loss of the merchandise of his guest, under some circumstances, but he insists that when the plaintiff left his cart in the livery stable "not connected" with the inn, the defendant's liability, at the most, was that of bailee, and not that of innkeeper. As the stable belonged to the defendant, and was used by him for putting up the team of his guest, we understand the expression "not connected," as applied to the stable, to mean that the stable was not physically attached to the inn, that it stood in a different place.

By the statute law of this state, R. S., c. 27, § 7, an innkeeper is not liable for goods such as it is claimed were lost in this case, except upon delivery, or offer of delivery by the guest to the innholder, his agent or servants, for safe custody. The plaintiff put up at the defendant's inn. He thereby became a guest. He had a horse and peddle-cart. He was directed by the defendant to take them to the stable. He did so. He put them into the care of the defendant's hostler. This constituted a statutory delivery to the defendant. It is clear that the delivery was "for safe custody," and in this respect, this case is unlike the cases cited by the defendant, where a pedler took his merchandise to a separate room to show and sell, *Neal* v. *Wilcox*, 4 Jones' Law, 146, (67 Am. Dec. 266); or where one procured from the landlord a lot in which to keep his hogs and horses for the purpose of showing and selling them, *Burgess* v. *Clements*, 4 Maule & Selwyn, 306; or where one had a room especially for the purpose of keeping or selling his goods, *Carter* v. *Hobbs*, 12 Mich. 52.

When the plaintiff's goods were thus delivered to the defendant for safe custody, they were infra hospitium. Though the defendant directed them to be placed in a stable "not connected" with his inn, his liability was not modified or discharged. It was his stable. It was the place he selected in which to keep the goods safely. That the place was not connected with the inn does not

control. *Hilton* v. *Adams*, 71 Maine, 19. It was a single transaction,—the putting up at the inn, and the delivery of the goods to the defendant. We cannot doubt but that the defendant received the plaintiff's goods as an innkeeper. *Norcross* v. *Norcross*, 53 Maine, 163, and cases cited; *Clute* v. *Wiggins*, 14 Johns. 175, and note to same case, 7 Am. Dec. 449. The refusal of the presiding justice to give the requested instruction was right.

The defendant waives his other exceptions.

Exceptions overruled.

WALTER A. WOOD, and another,

vs.

LEROY FINSON, and another.

Hancock. Opinion January 24, 1898.

Evidence. Relevancy. Exceptions.

Oftentimes when the issue is whether a particular contract was made between the parties, and the evidence is conflicting as to what the contract was, it is competent for a defendant to show the value or character of the property which he was to receive as compared with that in the contract claimed by the opposite party, as tending to show the improbability of the contract as alleged by such party.

In this case, while the fact of whether there had been insurance effected on previous sales or not, might not be conclusive as to what was done in this particular instance, it was admissible on the question of probability or improbability of the contract being as claimed by the plaintiff.

Testimony should not be excluded as irrelevant, which has a tendency, however remote, to establish the probability or improbability of the fact in controversy.

A special finding by the jury may render objections to the admission of evidence unavailable, when the objections might otherwise be tenable.

Exceptions will not be sustained unless it is shown affirmatively that the excepting party has been aggrieved by the ruling complained of.

See *Wood* v. *Finson*, 89 Maine, 459.

ON MOTION AND EXCEPTIONS BY DEFENDANTS.

This was an action of assumpsit brought by the plaintiff, who was an oil merchant in Boston, against the defendants to recover the value of certain oil purchased of him during the years 1894 and 1895 all of which is admitted to have been paid for except the item of October 4, 1894, for twenty barrels of kerosene oil amounting to $87.28.

The verdict was for the plaintiff for the sum of $95.50.

In addition to a general motion, the defendants took exceptions to the admission of testimony at the trial and which are stated in the opinion of the court.

The justice presiding at the trial, in his charge to the jury, instructed them, inter alia, as follows:

"Now, in the first place, was there any agreement made between Carlow, or an agreement entered into, in the course of business transactions with the defendants, that insurance should be put upon all goods which would include these particular goods? Well, you heard the testimony of the two defendants upon that point, and they say so. Now, if there was such an agreement and it had not been cancelled or superseded, then it would hold good. Then the question arises, what authority had Carlow to make such an arrangement. Well, if he was a general sales-agent, he had a right to enter into contracts of sale, conditions of sale, arrangements about sale, including the delivery and shipment of goods. If he had no authority, it would not affect the defendants unless they knew that he had none, because the presumption is that the party who has a right to solicit orders and make sales, has a right to do whatever pertains to such things, the right to make prices, the right to make conditions, the right to do whatever the owner could do, or might do under the same circumstances. Now it is not material to this case whether he informed the defendants that he had a right or not to make such arrangements, except just in this way, if they did not know that he had any such authority, or if the plaintiffs did not know that he made any such contracts or bargain as a part of the business or contracts with these defendants, that would not affect the defendants, but it might bear on the question whether he would be likely to make an arrangement which he had

no express authority to make between him and his principal. Now, was there such an arrangement made? You will understand that it is immaterial whether the plaintiffs knew it or not that their agent had overstepped his authority—if he did—because the defendants would have the right to rely on such an arrangement made with such an agent under such circumstances. If you find there was such an understanding and that it applied to future contracts the defendants were to make right along until some other arrangement was made, why, the plaintiffs would be bound by it unless released by some other consideration.

"That is one defense set up by the defendants. Another is that they made an arrangement with Mr. Emery himself by which they should be considered released from the obligation to pay for the twenty barrels that were lost. Now, in the first place, had Mr. Emery a right to make such a contract? As a part of the sale of the goods, had he a right to release this indebtedness for the lost goods?

"I feel that I must say to you from the opinion of the court which has been rendered in this case, [89 Maine, 459] that he had, if he was a general soliciting agent, because whether he had authority to act or not, if the defendants had no notice that he had not such authority they would have a right to presume and assume that he had; that is, that in making a contract for the sale of goods, he could make the whole contract; he could enter into the bargain for the sale of the goods in consideration that this release was to inure for the benefit of the defendants.

"If the defense makes out its position on either question the verdict must be for the defendants. If the plaintiffs should have insured and the compensation for the property was thereby lost, the plaintiffs cannot recover. Or, if you find there was no such insurance in this particular instance on the theory that Mr. Emery is correct, then the plaintiffs would recover unless the defense prevails on the second point, and that is the relinquishment of the claim for the continuing of the business."

In addition to instructions as to the general verdict, the presiding justice submitted to the jury two special questions, namely:

"Was there an understanding between the parties, that all goods shipped by vessel by the plaintiffs to the defendants should be insured by the plaintiffs for the benefit of the defendants, not waived in this case?"

"Did or not the Mr. Emery, the plaintiffs' agent, agree to cancel the plaintiffs' claim for the lost goods on the consideration that the defendants would continue purchasing goods of the plaintiffs?"

Both these special questions were answered by the jury in the negative. And a general verdict was rendered for the plaintiff.

To the rule of the presiding justice admitting the testimony hereinbefore stated, the defendant seasonably excepted.

H. E. Hamlin, for plaintiff.

O. F. Fellows, for defendants.

SITTING: EMERY, FOSTER, HASKELL, WHITEHOUSE, STROUT, SAVAGE, JJ.

FOSTER, J. Assumpsit by the plaintiffs, oil merchants in Boston, to recover of the defendants, traders in Bucksport, the value of twenty barrels of kerosene oil, to be delivered free on board vessel in Boston.

Plaintiffs made the sale through one Emery, a general traveling salesman and agent of theirs. The plaintiffs had previously employed one Carlow as their salesman and agent, who had repeatedly sold the defendants burning oil. Emery succeeded him, and made sale of the oil in suit.

The defense set up that the contract of sale called for insurance of the oil by the plaintiffs, instructions having been given, as the defendants claim, to Carlow always to insure oil shipped to them by vessel, and that from a failure to do so in reference to this order sold by Emery, the defendants lost its value, the oil having been lost at sea.

Numerous exceptions are taken to the admission of certain questions and answers in relation to the authority of the two agents, and instructions received by them from the plaintiffs. Also in relation to sales previously made by Carlow, and whether or not insurance was placed on those.

It is claimed that this evidence in relation to other transactions was too remote, irrelevant, and therefore not admissible. We think it was admissible. Oftentimes, when the issue is whether a particular contract was made between the parties, and the evidence is conflicting as to what the contract was, it has been held competent for a defendant to show the value or character of the property which he was to receive as compared with that in the contract claimed by the other side, as tending to show the improbability of the contract being as alleged by the plaintiff. *Nickerson* v. *Gould*, 82 Maine, 512; *Upton* v. *Winchester*, 106 Mass. 330; *Norris* v. *Spofford*, 127 Mass. 85; *Parker* v. *Coburn*, 10 Allen, 82. So evidence of a person's poverty and bad credit has been held admissible on the issue of whether goods were sold on the credit of such person or of a third party, as bearing on the improbability of the plaintiff's making the sale on his credit. *Lee* v. *Wheeler*, 11 Gray, 236. So in this case, while the fact of whether there had been insurance effected on previous sales or not, might not be conclusive as to what was done in this particular instance, it was admissible on the question of probability or improbability of the contract being as claimed by plaintiff. It was in accordance with this principle that the court, in *Trull* v. *True*, 33 Maine, 367, held that "testimony cannot be excluded as irrelevant, which would have a tendency, however remote, to establish the probability or improbability of the fact in controversy." See also *Tucker* v. *Peaslee*, 36 N. H. 167, 168; *Huntsman* v. *Nichols*, 116 Mass. 521, where it was held that, although the authenticity of the note in suit was the only issue, yet the business transactions between the parties had some bearing upon the probability of the indorsement having actually been made by the defendant, and were therefore admissible in evidence.

One of the principal points of contention by the defense was that there was a contract or understanding that all goods shipped by vessel by the plaintiffs to the defendants should be insured. The exceptions in part relate to the admission of evidence bearing upon the authority of the agents, and instructions to them from the plaintiffs.

But even if the defendants' objections were tenable, the special findings of the jury have rendered them unavailing. The jury, upon special findings, have decided that there was no understanding between the parties that goods shipped by vessel to the defendants should be insured for the benefit of the defendants. If there was no such understanding, then, whether the plaintiffs did or did not give authority to their agents to enter into any such contract, is of no consequence. The charge of the presiding judge was that if there was any such understanding,—"if the plaintiffs should have insured, and the compensation for the property was thereby lost, the plaintiffs cannot recover."

And so far as the exceptions relate to the inadmissibility of any evidence coming from the plaintiffs as to Emery's having no authority to cancel the plaintiffs' claim for the lost goods in consideration of the defendants' continuing to purchase goods of the plaintiffs, the special finding of the jury has settled all objections upon that point, inasmuch as they have said that there was no such agreement. Hence authority, or lack of authority, became immaterial.

Therefore the exceptions cannot be sustained, because to be sustained it must be shown affirmatively that the excepting party has been aggrieved by the ruling complained of. *Bryant* v. *Knox & Lincoln R. R. Co.*, 61 Maine, 300; *State* v. *Pike*, 65 Maine, 111; *Soule* v. *Winslow*, 66 Maine, 447.

Exceptions and motion overruled.

JOSEPH FOYE *vs.* BENJAMIN M. TURNER.

Kennebec. Opinion January 26, 1898.

New Trial. Newly-Discovered Testimony.

In an action to recover for services alleged to have been performed for the defendant, in administering treatment at the Ensor Institute for Liquor and Morphine Habits to nineteen patients at five dollars each, the plaintiff recovered a verdict.

The plaintiff and his wife had been in the employment of the company for some time prior to the alleged contract with the defendant, who was a physician employed also by the company.

A motion for a new trial in addition to the usual grounds, was supported by newly-discovered evidence, and which might have had a material bearing in the case had it been adduced at the trial. *Held;* that a new trial be granted, it appearing, among other reasons, that, without fault of the defendant or his counsel, it was not discovered and produced at the trial.

ON MOTIONS BY DEFENDANT.

The defendant claimed a new trial upon the following grounds, besides those stated in the opinion, and which are stated in his motion and based upon newly-discovered testimony:

"The defendant avers that since said trial, and by reason of the publicity caused thereby, he has discovered new and material facts, tending to show the falsity of the plaintiff's testimony given in said trial, which he expects to prove by the witnesses hereinafter named, being advised by said witnesses that they will so testify, and that said newly-discovered evidence is as follows:

1. He expects to prove by William H. Fisher, Esq., and by Melvin S. Holway, Esq., both of Augusta, in Kennebec County and State of Maine, that said Joseph Foye, in the month of December, A. D. 1895, having been duly summoned appeared before said Holway, as a Disclosure Commissioner, and did then and there submit himself to an examination under oath concerning his estate and effects, under the provisions of chapter 137 of the laws of 1887 as amended by chapter 313 of the laws of 1893; and that in said

examination and disclosure said Foye stated that there was nothing due to him from any person; and being particularly interrogated as to his services performed at the Kennebec Ensor Institute in Gardiner, and whether there was anything due him for said services, he declared there was nothing due him therefor, and that no one was indebted to him for said services.

2. He expects to prove by said Fisher and Holway that said Joseph Foye was again summoned and did appear before said Holway on the 18th day of September, A. D. 1896, to submit himself to examination under oath concerning his estate and effects, under the provisions of the law before referred to, and in his disclosure said Foye did again declare that there was nothing due and owed to him by any person; and he particularly denied that there was anything due him for his labor or services performed at the said Kennebec Ensor Institute at Gardiner, and that there was anything due him from this defendant. . . . ."

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

A. C. Stilphen, for defendant.

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

FOSTER, J. This case was tried at the Superior Court for Kennebec County, and a verdict for $98.80 rendered in favor of the plaintiff.

The suit was on account annexed to recover $95 "for administering your treatment at the Ensor Institute for Liquor and Morphine Habits, at five dollars apiece, for the following persons," then follows a list of names of nineteen persons.

The plaintiff and his wife had been in the employment of the company for some time prior to the time of the alleged contract with the defendant, who was a physician employed by the company.

The defendant denies that any such promise as is set up by the plaintiff was ever made, and denies that he ever employed the plaintiff to administer "his treatment," or any treatment, to the

persons named; and claims that whatever the plaintiff did in administering whatever treatment was administered to such persons, was done by the plaintiff in performing only such duties as devolved on him by virtue of his employment by the company, and only the same duties he had been performing for a long time prior to the date of the alleged special promise or contract on the part of this defendant. Defendant furthermore claims that any talk he made with plaintiff was only in the nature of a gratuity, or gift, not enforceable in law, and also that in any event the plaintiff can recover no such sum as he now has undertaken to sustain by this verdict, and furthermore that no promise was made to plaintiff by way of gift or otherwise to pay him anything except conditionally.

A careful examination of the evidence satisfies us that a new trial ought to be granted.

The motion, in addition to the usual grounds, is supported by newly-discovered evidence, and which might have had a material bearing in the case had it been adduced at the trial. It seems to be no fault of the defendant, or his counsel, that the same was not discovered and produced at the trial.

For these and other reasons not necessary to be particularly stated, we believe that justice will be best subserved by granting another trial.

Motion sustained.
New trial granted.

CATHERINE H. ATHERTON

vs.

BRITISH AMERICA ASSURANCE COMPANY.

Androscoggin. Opinion January 25, 1898.

Insurance. Ownership. Increase of Risk. Fraud. R. S., c. 49, § 20.

A policy of insurance contained a provision that it should be void if the subject of insurance be a building on ground not owned by the insured in fee simple.

But the statute provides that erroneous descriptions of value or title by the insured shall not prevent a recovery upon the policy unless the jury find that the difference between the property as described and as it really existed contributed to the loss, or materially increased the risk; and that a breach of any of the terms of the policy by the insured do not affect the policy unless they "materially increase the risk."

In a suit upon the policy the question of enhanced risk is properly one for the jury rather than the court.

Fraud and false swearing imply something more than some mistake of fact, or honest misstatements on the part of the insured.

They consist in knowingly and intentionally stating upon oath what is not true, or the statement of a fact as true which the party does not know to be true, and which he has no reasonable ground for believing to be true.

ON MOTION BY DEFENDANT.

The case appears in the opinion.

Tascus Atwood, for plaintiff.

H. W. Oakes, for defendant.

SITTING: PETERS, C. J., FOSTER, HASKELL, WISWELL, STROUT, JJ. SAVAGE, J., having been of counsel, did not sit.

FOSTER, J. Action upon a policy of insurance against fire upon the plaintiff's one-story frame building and addition, a soda fountain and appurtenances thereto, and upon her stock in trade, consisting of tobacco, cigars, fruit, confectionery, etc.

The verdict was for $291.85, and the case comes before the court on a motion to set the verdict aside, and four grounds are urged in support of the motion.

First. That contrary to the conditions of the policy, the building insured was on ground not owned by the plaintiff.

Second. That fireworks were kept upon the premises.

Third. That the plaintiff was guilty of fraud and false swearing.

Fourth. That the fire was caused by the direction and procurement of the plaintiff.

It is true that the policy provides that it shall be void if the subject of insurance be a building on ground not owned by the insured in fee simple. In this case the building was on leased land and was not owned in fee simple by the plaintiff.

But the statute (R. S., c. 49, § 20,) provides that erroneous descriptions of value or title by the insured shall not prevent a recovery upon the policy unless the jury find that the difference between the property as described and as it really existed contributed to the loss, or materially increased the risk; and that a breach of any of the terms of the policy by the insured do not affect the policy unless they "materially increase the risk."

In a suit upon the policy the question of enhanced risk is properly one for the jury rather than the court. *Sweat* v. *Insurance Co.*, 79 Maine, 109; *Gilman* v. *Insurance Co.*, 81 Maine, 488, 496; *Bellatty* v. *Insurance Co.*, 61 Maine, 414; *Rice* v. *Tower*, 1 Gray, 426, 430. In reference to the keeping of fireworks upon the premises, the evidence discloses that only a small amount was kept in a zinc lined ice-chest. The testimony was sufficient, we think, in warranting the jury in coming to the conclusion that the defendant failed in its burden of showing that this fact materially increased the risk.

Whether the plaintiff was guilty of fraud and false swearing was also a question addressed to the judgment of the jury, and by their verdict they have negatived that fact.

Fraud and false swearing imply something more than some mistake of fact or honest misstatements on the part of the assured. They consist in knowingly and intentionally stating upon oath what is not true, or the statement of a fact as true which the party does not know to be true, and which he has no reasonable ground for

believing to be true. *Linscott* v. *Insurance Co.*, 88 Maine, 497; *Dolloff* v. *Insurance Co.*, 82 Maine, 266; *Claflin* v. *Insurance Co.*, 110 U. S., 81.

Nor do we think the verdict should be disturbed upon the ground, as claimed in defense, that the plaintiff procured the fire to be set.

The evidence was conflicting upon this point,—and that relied upon by the defense came from two boys who certify that they set fire to the building, claiming they were hired to do so by the plaintiff. Both are confessed criminals. Their history is anything but good. One admits that at a previous trial he lied under oath. Their testimony is contradictory, inherently vicious, and if believed would show that the plaintiff hired two boys to burn a building, one of whom was a stranger to her, and that although she would want great care exercised, she proceeded to give them each three drinks of whiskey, and left more for them. It is hard to believe that an intelligent jury could be justified in crediting such a story coming from such a source. The jury saw not only the plaintiff upon the stand, but also the two boys, and heard their story. They repudiated the testimony of the boys, and gave credence to that of the plaintiff. The truth or falsity of the charge set up in defense was peculiarly for the consideration of the jury. We do not think their verdict should be disturbed.

Motion overruled.

GEORGE W. LANE *vs.* CITY OF LEWISTON.

Androscoggin. Opinion January 25, 1898.

Way. Defect. Notice. Road Machine. Contributory Negligence.

The plaintiff's horse became frightened at a road machine or steam roller, which was being propelled by steam in repairing a street under the direction of the street commissioner of the city of Lewiston, and the plaintiff sustained severe injury by being thrown from his carriage in consequence of the fright of his horse.

A city or town is bound by law to keep its streets and highways safe and convenient for travelers, and to accomplish this duty it has the right to use such instrumentalities as may be proper and necessary for that purpose.

There can be no liability on the part of a city or town for using the means necessary and proper for carrying out its duty in making streets or highways safe and convenient, when notice of such use has been brought home to the traveler before an injury has occurred in consequence of such use.

Such obstructions, while they may necessarily impede travel over the street to a greater or less extent, cannot constitute a defect within the meaning of the statute, and neither can the legitimate and proper use of such appliances afford any ground for a recovery.

The notice of use which it is the duty of the city or town to give to the traveler is sufficient when the traveler sees and apprehends the danger in season to avoid it.

Such knowledge on the part of the traveler is notice to himself, for no one needs notice of what he already knows.

ON REPORT.

This was an action on the case to recover damages for an injury to the plaintiff on June 18, 1896, while driving easterly along Pine Street in the city of Lewiston, caused by the fright of his horse at a road machine being propelled by steam westerly along the street, under the direction of the street commissioner of the city of Lewiston, and being used in repairing the street. The plaintiff claimed that the evidence showed the machine with its puffing, escaping steam and motion, frightened his horse, so that he ran away and threw the plaintiff upon the street and severely injured him. The plaintiff further claimed that it was customary to place a bar across the street at either end when the steam roller was being

used, to prevent people from traveling along the street in proximity to the machine, and to warn them of the danger; and on this particular day nothing of the kind was done to stop travel on the street while the machine was being used, and that the street was left open and the public had no notice until they were in the street too late to turn back.

W. H. Newell and W. B. Skelton, for plaintiff.

Any obstruction in the traveled way which endangers public travel, whether it be a structural defect, a want of repair, or an object, if it has been allowed to remain there for a sufficient length of time, constitutes a defect for which the city is liable.

In this particular case no previous notice to the city is necessary, because it was placed there by the street commissioner of the city.

The real question is whether the street, with this machine in operation, was reasonably safe and convenient for travel, and whether it would frighten an ordinarily safe and well-broken horse.

It was placed there under the orders of the street commissioner. It was dangerous, and the street commissioner knew it. He was accustomed to place bars across the street to keep people from passing along the street with teams while it was in operation. The very fact that he was accustomed to do this shows that he understood the danger it offered to travelers. And the very fact that he did not cause it to be done this time shows that the defendant, acting through him, was negligent.

Counsel argued: (1.) This machine in operation, as it was, was a defect.

(2.) That it was placed there by the defendant acting through the street commissioner.

(3.) That the plaintiff did not know it was there in use prior to the time of the accident.

(4.) That there was no contributory negligence on the part of the plaintiff.

(5.) That the plaintiff was seriously injured solely through the negligence of the defendant acting through its servants and agents.

Harry Manser, city solicitor, for defendant.

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

FOSTER, J. Action on the case to recover damages for an injury to the plaintiff while driving easterly along Pine Street in the city of Lewiston, caused by the fright of his horse at a road machine, or steam roller, which was being propelled by steam westerly along the street under the direction of the street commissioners of the city of Lewiston.

The case comes before the court on report, and two questions only need be considered in determining the rights of the parties. First. Was the steam roller, under the circumstances, a defect for which the city is responsible in this action? Second. Was the plaintiff himself in the exercise of due care at the time the accident occurred?

Both of these questions, we think, must be answered in the negative.

The machine was in operation at the time for the purpose of repairing one side of the street, leaving the other side open and unobstructed for the passage of travelers upon it. This appliance is one of the most modern and useful in building and maintaining permanent and durable streets. The city is bound and obliged by law to keep its streets safe and convenient, and this is one of the instrumentalities obtained by the city at large expense for that very purpose. Certainly there can be no liability on the part of a city or town for using the means necessary and proper for carrying out its duty in this respect, where notice of such use has been brought home to the traveler before an injury has occurred in consequence of such use. Such obstructions, while they may necessarily impede travel over the street to a greater or less extent, cannot constitute a defect within the meaning of the statute, and neither can the legitimate and proper use of such appliances afford any ground for a recovery. To be of any use whatever the machine must be operated, and the necessary noise and motion attendant upon its operation cannot in a legal sense constitute a defect, especially where the traveler has reasonable notice of any danger that might

be occasioned by reason of the same, but does not use due care to avoid it.

The doctrine here enunciated is supported by the decisions of our own court, and it is only necessary to refer to *Morton* v. *Frankfort*, 55 Maine, 46, where the court say: "Towns are not liable for injuries occasioned by such obstructions as are nesessarily erected on highways in order to repair them, provided reasonable measures are taken to notify travelers of their existence. Such obstructions are not in any proper sense defects. They are the necessary means to a lawful end,—means necessary to the performance of a duty imposed by law,—and when reasonable notice of their existence is given, create no liabilities on the part of towns for injuries occasioned by them. To hold towns liable in such cases would be to impose a penalty, not on their negligence, but on the means necessary to the performance of a legal duty. The law, rightly administered, will lead to no such absurd results."

But it is contended that reasonable notice was not given, and that there were no fences or safe-guards erected to prevent travelers passing upon the street and encountering such dangers.

The evidence shows that the plaintiff turned into Pine Street from a cross street at least one hundred feet below the point where the roller was stationed. It was in broad daylight, with nothing to obstruct his vision, and the roller was in plain sight as he himself admits. He proceeded to pass up the street, approaching and passing the roller, and when he got "near the machine" his horse became frightened, ran up street and against a tree throwing the plaintiff out and producing the injuries of which he complains. He was well acquainted with the nature of the roller, and had seen it in operation before the time when the accident occurred. It was his duty to have exercised due care, and without which, even though the defendants may have been at fault, he cannot recover. *Mosher* v. *Smithfield*, 84 Maine, 334; *Merrill* v. *North Yarmouth*, 78 Maine, 200.

He saw the machine when at least one hundred feet distant from it, and with his knowledge of its operations he saw fit to take his chances and undertake to approach and pass it. The result was

unfortunate, but the city can not be held responsible for the injuries which he received. No notice was necessary when he saw and apprehended the danger in season to have avoided it. Such knowledge on his part was notice to himself. No one needs notice of what he already knows.

Suppose it is found necessary to repair a highway by removing a defective or unsafe bridge over a stream and replacing it with a new structure? This duty is imposed upon the town; they are obliged by law to do it. If a traveler approaches in broad daylight, and, with the knowledge that the bridge is removed, undertakes to cross the chasm, he takes his chances, and if he sustains damage the town surely could not be held responsible. His knowledge of the danger is equivalent to prior notice on the part of the town.

But it is claimed in this case that when he turned into Pine Street and was within one hundred feet of the roller there was not sufficient opportunity for him to turn round, and hence he was obliged to proceed in the direction of the roller. The evidence does not satisfy us that he had not sufficient opportunity to change his direction of travel upon a street the width of that one. From a careful examination of the evidence we are satisfied that by the proper exercise of due care on his part this accident might have been avoided, but having failed in that respect and taken his chances he must abide the result.

Judgment for defendant.

BERTHA L. WHITMORE, Admx.,

vs.

ORONO PULP AND PAPER COMPANY.

Penobscot. Opinion January 26, 1898.

Sales. Lease. Caveat Emptor. Nuisance.

The common law rule of caveat emptor is still in force in this state and applies to the lease as well as to the sale of property.

The owner of private property, unaffected by any public use, owes to a prospective lessee or his servant no duty of exercising ordinary care to ascertain and apprise him of unknown defects in the property to be leased, where such prospective lessee has equal opportunity to ascertain the defects.

Machinery or fixtures which are harmless when at rest and dangerous only when in use are not nuisances per se as between a lessor and a lessee or his servant.

Nugent v. *B. C. & M. R. R.*, 80 Maine, 62, distinguished.

ON MOTION AND EXCEPTIONS BY DEFENDANT.

The plaintiff in this action is the administratrix of the estate of her husband, who was in the employ of the Bangor Pulp & Paper Company, the lessee of the defendant company, and was injured, while so employed, by the explosion of a digester in its mill and afterwards died from the effects of the injury. The plaintiff had previously brought an action for the same injuries against the Bangor Company and recovered a judgment, but the judgment was unsatisfied as that company became insolvent.

The defendant company is the lessor of the mill under a lease dated October 1st, 1892, by which it leased its mill and property to the Bangor Pulp & Paper Company for the term of twenty-five years with the right, after ten years, to purchase; the lessee was to keep the mills and property insured and it was provided in the lease that: "Said lessee shall keep the property substantially in repair." The lessor had no right to inspect any secret process which the lessee should use.

The Bangor Company lessee went into possession of the premises

on the first day of October, 1892, and was operating the mills at the time of the accident on October 11th. The writ alleged that the defendant company knew, or ought to have known by the exercise of due diligence, when it leased the mill that the digester which exploded was in a weak and dangerous condition; and that the injury came from want of care on the part of defendant company in leasing the mill with defective digesters.

The defendant company denied these allegations. It claimed that there was no testimony on part of plaintiff that defendant company knew that the digesters were in an unsafe condition; and further claimed that the only testimony as to its unsafe condition was the pieces of the digester picked up after the explosion showing corrosion of the metal, and the testimony of an expert that they indicated that these pieces were pitted and corroded to a considerable extent. The defendant company offered testimony showing that the digesters were purchased of manufacturers of the highest standing; were of the highest cost and were carefully examined both at the time of the purchase and from time to time during use —the last examination being in September before the explosion and report made in writing that they were in good condition; they had been in use only about eighteen months, and the company was assured that they would be good for ten or fifteen years; was assured and believed that they were in good and safe condition, and there was nothing to lead them to believe that they were unsafe.

The verdict was for the plaintiff; the defendant moved that the verdict be set aside as against law and evidence and alleged exceptions to the rulings of the presiding justice.

The exceptions were to those parts of the following rulings and instructions of the presiding justice that are included in brackets:

"I will rule on another point that they [defendants] make, and that is, [they offer a judgment against another company, the Bangor Pulp & Paper Co., as a bar or estoppel here; and I rule against that proposition, and that need not trouble you at all.] As a legal proposition I rule that if that judgment remained in no part satisfied, nothing appearing more than that they recovered judg-

ment and took out an execution, getting no value with it, [that it is not a bar to this action,] that while the other company has been held liable, this company may also be held liable if the evidence satisfies you. But I say this, that you should not be influenced the least in the world in your consideration of the questions here, by the fact merely that another judgment was recovered against another company. You are not to give judgment here because there was judgment in another case."

"Now the defense set up by the defendants is this: They say they were not operating the mill at that time. That is, when the accident happened on the 11th, they were not in possession, and therefore they are not liable for what was done by the other company. But the plaintiff invokes the principle which I shall rule, if you are satisfied of it, to be sufficient to enable him to recover against these defendants. That is, if they were the owners of this property and had been conducting the business there, and using the digesters until the digesters in question became dangerous to use and knew that fact, or they did not take, in the use of it, due and ordinary care and then leased the same premises to the Bangor Company to be used in the same way, with a continuation of the same business,— the defendants, the lessors receiving rent and compensation for the use of the property,— they might be as liable as the Bangor Company would have been had the accident occurred on the first day of October, when the defendants were in possession. That is, they are liable for what took place afterwards unless the dangerous condition, or condition of the nuisance, did not exist when they sold it, although it existed ten days afterwards.

"I find authority enough to sustain the ruling prima facie; that is, for you to sustain it until the full court overrules it, and I give the ruling that the plaintiff should satisfy you that it was a dangerous condition, amounting to nuisance, which existed when the lease was made, rendering the defendants liable. Now it is on this principle, Mr. Foreman: Supposing your neighbor erects a nuisance, some building, amounting to a nuisance, on his own premises, to your injury, and then he sells it to somebody else. Both parties might be liable, the first man for creating the nuisance,

the lessor, and the second the lessee, for continuing the nuisance. They might each be liable; not jointly, but separately; one party for putting in the nuisance and the other party for continuing the nuisance.

"Now what is a nuisance? Lord Coke, in his blunt way, said it was doing anything illegal to the injury of another, by way of trade. The modern, general definition is, that a man who uses even his own property, real property or personal property unreasonably, or unwarrantably, or unlawfully, to the injury of another, not having a right to do it, is guilty of nuisance; and, if it be a dangerous thing besides being noxious and disagreeable, then it is otherwise an offense. If it be dangerous to life by its continuance in use, then it is even more a nuisance, or more emphatically a nuisance.

"The plaintiff claims that here were premises dangerous to use, such as could not be legally or warrantably used, because, in the situation in which things were, it would be dangerous to other persons.

"The counsel for the defendant says that could not be extended to the lessee or employee of the lessee. There is some question about it, but I rule, for the purposes of this trial, that the employee, such person as the deceased was—he could not protect himself if I should rule as the defendant claims,—so I rule, for the purposes of this trial, that [if the defendants are liable on all other grounds, the rule can be so applied as to make them liable to this employee although in the service of the lessee under such an instrument as is produced here, which is a lease or contract] under certain conditions."

"The plaintiff alleges negligence, and, therefore, he must prove negligence. The burden of proof is on him to prove negligence. It does not follow at all that they are guilty merely from the accident happening. It does not follow that anybody was in fault merely from the existence of the accident, because it may be an inevitable accident for which nobody is responsible. And that is the defense here—that this must be regarded an inevitable accident for which no one at all was responsible. The way to get at

what negligence may be is to define the correlative terms of ordinary care. [The duty which rested upon the defendants was that of ordinary care.] Not of extraordinary care, if distinction is to be made between the two kinds of care, or between negligence and extraordinary negligence. But, certainly, it is true, as claimed by the plaintiff, that what would be ordinary care must depend upon the circumstances. What would be ordinary care in some circumstances would not be in other circumstances. The more the exigency, the greater the danger and risks at stake, the more care to make ordinary care."

P. H. Gillin and C. J. Hutchings, for plaintiff.

Prior judgment not a bar: *Cleveland* v. *Bangor*, 87 Maine, 259, and cases cited.

Liability of lessor: An owner being out of possession and not bound to repair is not liable for injuries to a third party received in consequence of his neglect to repair. But where a nuisance existed when the property was leased to the tenant, the landlord may be held liable. The tenant is liable for the nuisance thus retained by him, even though the nuisance was on the premises when leased to him. And both landlord and tenant, under the circumstances, are jointly and severally liable for the continuance of the nuisance, supposing the nuisance to be on the property when leased, or to be put there with the landlord's connivance. Wharton on Negligence, 2nd Ed. § 817; *Oxford* v. *Leathe*, 165 Mass. 254; *Tomle* v. *Hampton*, 129 Ill. 379; *Clifford* v. *Atlantic Cotton Mills*, 146 Mass. p. 49; *Daley* v. *Savage*, 145 Mass. p. 40; *Nelson* v. *Liverpool Brewery Co.*, 2 C. P. D. 311; *Saltonstall* v. *Banker*, 8 Gray, 195; *Timlin* v. *Standard Oil Co.*, 126 N. Y. 414, (22 Am. St. Rep. 845, and cases); *Jackman* v. *Arlington Mills*, 137 Mass. 277; *Nugent* v. *B. C. & M. R. R.*, 80 Maine, 62.

The liability does not arise upon any action of contract, but upon the obligation which the landlord owes the tenant not to expose him to danger of which the landlord knows, or could know by reasonable care. Nor is it done away with by the fact that the parties examined the premises and the tenant did not discover the defect. *Hines* v. *Wilcox*, 96 Tenn. 148 (33 S. W. Rep. 914);

Stenberg v. *Wilcox*, *Ib.* p. 163, and citing Wood L. & T. 2nd. Ed. p. 1297.

Counsel also cited: *Scott* v. *Simons*, 54 N. H. p. 426; *Samuelson* v. *Cleveland Mining Co.*, 49 Mich. 170; *Joyce* v. *Bliss*, 15 R. I. p. 558; *Albert* v. *State*, 66 Md. 325; *Burbank* v. *Bethel Steam Mill Co.*, 75 Maine, p. 383.

C. P. Stetson and C. J. Dunn, for defendant.

SITTING: EMERY, HASKELL, WHITEHOUSE, WISWELL, SAVAGE, JJ.

EMERY, J. The defendant company, the Orono Pulp and Paper Company, constructed and for a few years up to October 1, 1892, operated a pulp mill in Orono. On that day it leased its mill and plant to another and distinct corporation, the Bangor Pulp and Paper Company, for twenty-five years. This latter company, the lessee, took possession of the leased property on the same day and for some little time thereafter operated it as a pulp mill on its own account. By the terms of the lease the Bangor Company, the lessee, was to have the exclusive possession of the property and was to keep it in substantial repair, the lessor reserving the usual right to enter upon and view the premises at times convenient to the lessee. The lessor made no stipulation as to the condition of the property.

The plaintiff's intestate, Austin J. Whitmore, had entered into the employ of the lessee, the Bangor company, and was in its employ, upon the premises thus leased and operated by it, on the 11th day of October, 1892. On that day one of the digesters, a large cylinder of deoxydized bronze and an essential part of the machinery of the mill, exploded while Mr. Whitmore was at work near it in the line of his duty. He was so severely injured by the explosion that he died a few weeks afterward. The explosion resulted from the inability of the digester to resist the usual pressure of steam injected into it in the course of the business of the mill.

For this injury the plaintiff, as administratrix, first brought an

action against the Bangor company, the lessee operating the mill and plant, and her husband's employer, counting upon the negligence of that company, and recovered judgment upon the ground that that company had not exercised due care in examining into and ascertaining the real condition of the digester which in fact was too weak to withstand the steam pressure used. By reason of the insolvency of that company the plaintiff has not been able to collect any part of that judgment.

The plaintiff thereupon brought this action against the lessor of the mill and plant, the Orono Pulp and Paper Company, counting upon its neglect of its duty in the matter of the faulty digester. The defendant company did not construct the digester, but purchased it from a reputable manufacturer of digesters. In selecting, purchasing and setting up this digester, it is not questioned that the defendant company exercised due care. At the first it was sufficiently strong. It was weakened after a time by the peculiar and continued action of the necessary chemicals upon the particular metal of which it was composed. This action was wholly confined to the interior of the closed cylinder, and was invisible from the outside.

Granting, that at the time of the execution of the lease and the change of the possession and control of the premises from the lessor to the lessee, the digester was then in fact too weak for its purpose, it does not appear from the evidence that any officer or agent of the lessor company was actually aware of that condition of the digester, or that knowledge of it could have been obtained, except by actual examination of the interior or by inference from sufficient technical learning as to the peculiar action of the particular chemicals upon the particular metal. The outward visible indications all were that the digester was as strong as ever.

The defendant company did not make the necessary examination, before or at the time of leasing, and did not possess the requisite technical learning to make the correct inference without examination; but there is no suggestion of fraud or concealment in the matter. It may be that this omission and ignorance were a breach of a duty owed by the defendant company to its own employees or

servants, but that proposition alone will not sustain the plaintiff's action. A person may owe a duty to one individual, or class, which he does not owe to another. The duty may depend wholly upon the relation between the parties. The plaintiff must, therefore, maintain the proposition that the defendant owed to the servants of its lessee the duty of making the requisite examination, or of possessing the requisite technical learning, and communicating the results before turning the plant over to the lessee. Whether the law of this state supports that proposition is the question presented.

It should be noted, at the outset, that the defendant company is not a public corporation, engaged in a public business, enjoying public franchises and owing special duties in consequence thereof. It is a private corporation, transacting a purely private business, and dealing in this instance with another private party. Hence, the rules and principles applied to owners of railroads, wharves, elevators, public halls, etc., do not necessarily govern this case. Again, the plaintiff's intestate was not upon his own premises, nor upon any public road or place at the time of the explosion, but was voluntarily upon the leased premises under a contract with the lessee only. Hence, the doctrines of the law of liability for nuisances to strangers or the public are not necessarily applicable. It should be further noted that the lessee engaged to make repairs,—that the lessee had as much ability and opportunity as the lessor to ascertain and guard against the actual condition of the digester before accepting and using it, and subjecting the plaintiff's intestate to the consequent danger. Indeed, the plaintiff recovered her judgment against the lessee for this same injury upon that very ground, that the lessee by reasonable effort could have done, and yet did not.

It is not questioned that under such circumstances the lessor owes no more or other duty to the lessee's servants or assigns, than he does to the lessee himself. If his duty or freedom from duty to the lessee is made plain, his duty or freedom from duty to the lessee's servant is equally plain. The discussion, therefore, may be confined to the duty of the lessor to the lessee.

Under such circumstances as have been disclosed and stated in this case, does the owner of property, unaffected by any public use, owe to his prospective lessee the duty to actively exert ordinary care at the time of the lease to find out and apprise him of unknown defects which the lessee can equally well find out for himself?

The development of the law has not yet progressed so far in this State. Here the common law rule of caveat emptor is still in force, and is applied to the lease as well as to the sale of property. It was early said in *Hill* v. *Woodman*, 14 Maine, 38, (42, 43) that, in the absence of express stipulations as to the condition of the premises, the lessee took them for better or worse, at least when he had sufficient means for ascertaining their condition. In *Libbey* v. *Tolford*, 48 Maine, 316, it was explicitly declared to be the law that there is no implied obligation upon the lessor,—to see that a leased building is safe, well built or fit for any particular use,—that a leased house is reasonably fit for habitation,—or that leased land is fit for the purpose for which it is taken. In *Gregor* v. *Cady*, 82 Maine, 131, the owner was held bound to effectually repair where he assumed and began to repair, but it was declared (p. 136) he was under no obligation to repair, and that "the tenant, on the principle of caveat emptor and in the absence of any fraud upon the part of the landlord, takes them [the leased premises] in the actual condition in which he finds them for better and for worse." In *McKenzie* v. *Cheetham*, 83 Maine, 543, the defendant had leased the second story of a dwelling-house with a defective landing for a stairway which was the only means of ingress and egress for the second story. The plaintiff had made a social call upon the tenant, and on leaving fell through the defective landing. The court held that the defendant owed no duty to the tenant or to his caller, the plaintiff, as to the defective landing upon the premises, even though the landing was essential to the reasonable use of the leased tenement. It was again iterated (pp. 548, 549) that "the law, in the absence of any fraud or concealment on the part of the lessor, leaves the lessee to the operation of the maxim caveat emptor and he takes the premises as he finds

them for better or worse"; and many authorities were cited. The court also necessarily decided that the lessor owed to no one on the premises under the lessee any more duty than he owed to the lessee himself.

So stands the law in this state to-day, well known and hitherto acted upon. Any desired change or extension of it should be asked of the legislature and not of the court.

The case of *Nugent* v. *B. C. & M. R. R.*, 80 Maine, 62, rightly understood, is no departure from the former decisions of this court. The defendant railroad company, the owner of the railroad, had not leased it to the Portland and Ogdensburg R. R. Company, the plaintiff's employer, nor had it in any way turned over the whole plant to the latter company. It had simply permitted the Portland and Ogdensburg Company to run through freight trains over a part of its tracks. It retained the possession and control of its tracks, station houses, platforms, etc. The plaintiff, a brakeman in the employ of the Portland and Ogdensburg Co., was injured in the line of his duty, through the defective construction of a station awning on the defendant's road. It was conceded that upon the above facts, the defendant company having control of the station house, awning, platform, etc., and inviting the plaintiff to pass and repass in the line of his duty as such brakeman, owed him the duty of so constructing and maintaining the awning as not to be dangerous to him. But after this arrangement with the plaintiff's employer, and while it was in force, and before the injury, the defendant company leased its entire road including stations to the Boston and Lowell Railroad Company, which latter company completely took over and operated the entire road, agreeing to assume all liability for injuries, etc.

The plaintiff was injured while the lessee was in possession under that lease. It was contended by the defendant company that such lease and transfer of possession freed it from what otherwise would have been its duty and liability to the plaintiff. The court held that they did not. That was the point of the decision.

The decision in the Nugent case, supra, is really based upon the proposition that the owner of a railroad, or other property affected

by a public use, with which the public have business relations, owes a duty to all persons who lawfully come upon the property, to make and keep the property safe for all such persons,—and cannot avoid that duty by merely leasing the property and retaining rents. That proposition as before stated does not include this case of property of a purely private nature, with which the public has no business relations.

It is true, as urged by the plaintiff, that the learned justice writing the opinion in the Nugent case also adduced as an additional support for the judgment the responsibility of a lessor in some cases for the condition of the demised premises, but this was not necessary for the decision and was not intended to be applied to a case like this. The same justice afterward wrote the opinion in *McKenzie* v. *Cheetham*, supra, re-affirming the doctrine of the earlier cases.

The plaintiff, however, advances another and distinct proposition,—that the weak digester was a nuisance, allowed to become and remain so by the owner prior to and at the time of the lease, and hence that the owner must answer as for a nuisance. This proposition cannot be assented to. Some things may be nuisances per se under all circumstances and as to all persons;—other things are nuisances only under certain circumstances and as to certain persons. A slaughter-house may be a nuisance as to the owner's neighbors but none at all as to his employees in the business. What may be a nuisance as to others may not be a nuisance as to one's lessee, and here we are dealing with lessee and lessor.

To constitute any particular thing a legal nuisance per se, (apart from statute nuisances) as between lessor and lessee and the servants of the lessee, the thing itself must work some unlawful peril to health or safety of person or property,—as defective cesspools, imperfect sewers and drains, walls and chimneys liable to fall, unguarded excavations, etc. A fixed, inert mass of metal upon a solid foundation upon one's own land like this digester, was not in itself dangerous to anyone. The employees of the lessee could have worked around and near it without any danger from it, to person or health, so long as it was let alone. The danger arose

only when the lessee, the employer, began to make use of the digester without first ascertaining its tensile strength and gauging the applied force accordingly. Indeed, the plaintiff has once alleged, and recovered judgment upon proof, that the misconduct of the lessee caused the peril and injury complained of. This is inconsistent with her present contention that the digester was a nuisance per se as to her intestate, the lessee's employee.

The question of what is a nuisance upon leased premises was considered at some length with citation of authorities in *McCarthy* v. *York County Savings Bank*, 74 Maine, 315. It was there held that a discharge pipe insufficient to vent the water flowing into a bowl from a faucet, so that the water overflowed the bowl and caused damage, was not a nuisance as to the tenant. See also *Brightman* v. *Bristol*, 65 Maine, 423; *Burbank* v. *Bethel Steam Mill Company*, 75 Maine, 373; and *Leavitt* v. *Bangor & Aroostook R. R. Co.*, 89 Maine, 509, though those were not cases between lessor and lessee.

We have hitherto confined our citation of authorities to the decisions in this state, thinking they sufficiently showed our law to be against the plaintiff's contentions. She has, however, cited cases from other states, of which one or two notably support her contentions. *Stenberg* v. *Wilcox*, 96 Tenn. 163, (34 L. R. A. 615) and *Hines* v. *Wilcox*, 96 Tenn. 148, (34 L. R. A. 824.) As to these cases, the learned editor of the L. R. A. series says they are a new departure in the law,—that they transfer to the landlord a duty which has heretofore rested upon the tenant, the duty of taking active care to find out unknown and unsuspected defects. As we have said above, we think it is for the legislature not the court to make this transfer of duty if thought desirable.

On the other hand many courts in late decisions adhere to the long established rule of caveat emptor. In *Jaffe* v. *Harteau*, 56 N. Y. 398, a boiler defective in construction exploded. In *Edwards* v. *N. Y. & H. R. R. R. Co.*, 98 N. Y. 249, a gallery defective in construction fell. In *Doyle* v. *Union Pacific Ry. Co.*, 147 U. S. 414, a house was too weak structurally to resist snow slides known to the lessor to be recurrent and dangerous. In

Tuttle v. *Gilbert Mfg. Co.*, 145 Mass. 169, a floor defective in construction fell. In *Bowe* v. *Hunking*, 135 Mass. 380, a stair-tread had been sawed. The lessor knew of the sawing but supposed the tread sufficient. In *Kern* v. *Myll*, 94 Mich. 477, a well had been used as a cess-pool and thus had become offensive. In *Burdick* v. *Cheadle*, 26 Ohio St. 393, (20 Am. Rep. 767,) fixtures put up by the lessor were structurally defective and fell. In *Wilson* v. *Treadwell*, 81 Cal. 58, a stairway was defective. In *Texas & Pacific R. R. Co.* v. *Mangum*, 68 Texas, 342, a defective platform fell. In *Fellows* v. *Gishubler*, 82 Wis. 639, an unsafe awning fell upon a guest. In *McConnell* v. *Lemley*, 94 La. Ann. (34 L. R. A. 609,) a defective gallery fell upon a guest. In *Johnson* v. *Tacoma Cedar Lumber Co.*, 3 Wash. 722, defective machinery in a mill gave way. In all these cases, it appearing that the lessor was unaware of the defects, it was held that he was not liable to the lessee or his servants for the injury occasioned by them.

Motion and exceptions sustained.

STATE *vs.* RICHARD ELA.

Sagadahoc. Opinion January 26, 1898.

Indictment. Pleading. Perjury. R. S., c. 122, §§ 4, 5.

While the statute relating to indictments for perjury requires only the allegation of materiality, yet if the recited testimony in an indictment for perjury is clearly not material, *held;* that the indictment will be bad.

When such an indictment alleges a thing to be material, and shows on its face that it is not material, *held;* that the allegation of materiality, although in the words of the statute, cannot save the indictment.

In an indictment for perjury, the common law requires that there must be some proceeding, matter or thing to which the oath was taken; and such an indictment must set forth the issue in which an alleged false affidavit was made, as well as the character and the jurisdiction of the court or magistrate. *Held;* that an indictment for perjury is bad which fails to set forth the issue between the parties in which the affidavit was made or does not show the materiality of the testimony.

The defendant was indicted for making a false affidavit to the effect that he had made a careful search among his own papers, etc. The indictment contained no assignment of perjury of any part of the affidavit, but charged the whole to be false and the whole to be material. *Held;* that it cannot all be false. If no search was made then it is true that nothing was found. If search was made, and the papers were found, which the defendant denied, then the affidavit was true in part and false in part. *Held;* that the allegation of falsehood in its entirety is contradictory.

Several assignments may be made, and if one is sustained by the proof, a conviction may follow; but each assignment must be specific.

The defendant was indicted for making a false affidavit and the perjury assigned in one clause was as follows:—"I cannot take a single step in making more definite account." The indictment further showed that the defendant was not a party to the proceeding,—being the settlement of an account in probate,—and therefore could not render an account. *Held;* that the indictment is bad. There is no allegation in this count from which the court can see its materiality to the issue, whatever it was, then pending.

ON EXCEPTIONS BY DEFENDANT.

This was an indictment for perjury, containing three counts, found by the grand jury of this court sitting below at Bath, County of Sagadahoc, on the third Tuesday of August, A. D. 1895. The indictment is as follows:— . . . . "that Richard Ela of Cambridge, in the County of Middlesex and Commonwealth of Massachusetts, on the first day of April in the year of our Lord one thousand eight hundred and ninety, at Bath, in the said county of Sagadahoc, before William T. Hall, judge of the court of probate, within and for the said county of Sagadahoc, then and there having competent authority to administer oaths, appeared as a witness in a proceeding in which Alfred Ela and Lucia Ela were parties then and there being heard before a tribunal of competent jurisdiction, to wit: said court of probate, and then and there committed the crime of perjury by testifying as follows:

"I (meaning the said Richard Ela) have made careful search among my own papers and those of Lucia Ela, and have been unable to find a single book or paper referring in the least to the matter, except the papers on file in the probate court here and a paper, 'Cambridge, Nov. 27, 1882. In consideration of one dollar to me in hand paid, I hereby release Lucia Ela of Cambridge, from all claims of every nature which I have against her as guardian.

Witness my hand and seal, Alfred Ela, (seal).' And one other paper in two parts preliminary to above. I (meaning the said Richard Ela) cannot take a single step, (meaning any action whatsoever) in making more definite account. Which said testimony was material to the issue then and there pending in said proceeding, and was untrue and false, as the said Richard Ela then and there well knew, against the peace of the said State and contrary to the statute in such case made and provided."

"And the jurors aforesaid upon their oath aforesaid do further present that Richard Ela of Cambridge in the county of Middlesex and Commonwealth of Massachusetts on the first day of April, in the year of our Lord one thousand eight hundred and ninety at Bath, in the said county of Sagadahoc, before William T. Hall, judge of the court of probate, within and for the said county of Sagadahoc, then and there having competent authority to administer oaths, appeared as a witness in a proceeding in which Alfred Ela and Lucia Ela were parties, then and there being heard before a tribunal of competent jurisdiction, to wit: said court of probate, and then and there committed the crime of perjury, by falsely, willfully and corruptly swearing, upon oath, then and there taken before the said judge then and there presiding, in the proceeding aforesaid, to the truth of the contents of a certain writing signed by the said Richard Ela, dated Bath, Maine, April first, A. D. 1890, and purporting to be an affidavit, which said writing was then and there used in said proceeding, and which said writing was as follows: Bath, Maine, April 1, 1890. I have made careful search among my own papers and those of Lucia Ela, and have been unable to find a single book or paper referring in the least to the matter except the papers on file in the probate court here, and a paper, 'Cambridge, Nov. 27, 1882. In consideration of one dollar to me in hand paid, I hereby release Lucia Ela of Cambridge, from all claims of every nature which I have against her as guardian, witness my hand and seal, Alfred Ela (seal)', and one other paper in two parts preliminary to above. I cannot take a single step in making more definite account. Richard Ela."

"Wherein, in said writing, the statement: 'I have made care-

ful search among my own papers and those of Lucia Ela and have been unable to find a single book or paper referring in the least to the matter except the papers on file in the probate court here, and a paper, 'Cambridge, Nov. 27, 1882. In consideration of one dollar to me in hand paid, I hereby release Lucia Ela of Cambridge, from all claims of every nature which I have against her as guardian. Witness my hand and seal, Alfred Ela (seal)', and one other paper in two parts preliminary to above, was material to the issue then and there pending in said proceeding, and was untrue and false, as the said Richard Ela then and there well knew, against the peace of the said State and contrary to the statute in such case made and provided."

"And the jurors aforesaid upon their oath aforesaid do further present that Richard Ela of Cambridge in the county of Middlesex and Commonwealth of Massachusetts on the first day of April in the year of our Lord one thousand eight hundred and ninety at Bath, in the said county of Sagadahoc, before William T. Hall, judge of the court of probate, within and for the said county of Sagadahoc, then and there having competent authority to administer oaths, appeared as a witness in a proceeding in which Alfred Ela and Lucia Ela were parties then and there being heard before a tribunal of competent jurisdiction, to wit: said court of probate, and then and there committed the crime of perjury by falsely, willfully and corruptly swearing, upon oath then and there taken before the said judge, then and there presiding, in the proceeding aforesaid to the truth of the contents of a certain writing signed by the said Richard Ela, dated Bath, Maine, April first, A. D. 1890, and purporting to be an affidavit which said writing was then and there used in said proceeding and which said writing was as follows:

Bath, Maine, April 1, 1890.

I have made careful search among my own papers and those of Lucia Ela and have been unable to find a single book or paper referring in the least to the matter except the papers on file in the probate court here, and a paper 'Cambridge, Nov. 27, 1882, in consideration of one dollar to me in hand paid, I hereby release

Lucia Ela of Cambridge from all claims of every nature which I have against her as guardian. Witness my hand and seal, Alfred Ela (seal) and one other paper in two parts preliminary to above. I cannot take a single step in making more definite account, Richard Ela.'

"Wherein in said writing, the statement: 'I cannot take a single step in making more definite account,' was material to the issue then and there pending in said proceeding, and was untrue and false as the said Richard Ela then and there well knew, against the peace of the State, etc."

The defendant demurred to the indictment, and the demurrer having been overruled he was allowed his bill of exceptions, in which it was stipulated that he might plead over if the exceptions should be overruled.

Grant Rogers, County Attorney, for State.

Charles A. True, for defendant.

SITTING: EMERY, FOSTER, WHITEHOUSE, STROUT, SAVAGE, JJ.

STROUT, J. This indictment contains three counts. The first charges oral perjury in testifying before the Probate Court. The other two charge perjury in swearing to the truth of a paper signed by the defendant. The first count follows substantially the form given in R. S., c. 122, § 4, which was held good in *State* v. *Corson*, 59 Maine, 139. It charges that the testimony was material to the issue then pending. But the count alleges that the parties to this proceeding were Alfred Ela and Lucia Ela. The testimony complained of was, that the defendant had made search among his own papers and those of Lucia Ela, and found no book or paper relating to the matter, except two mentioned. It does not appear how a search by a stranger for papers could be material to an issue between two other parties. Defendant was not a party to the proceeding in court. Why should he search for papers, among his own or those of another party? Of what consequence could it possibly be to the litigant parties whether he searched or did not search, whether he found or did not find papers desired by them?

To constitute perjury the testimony must be material to the issue. While the statute requires only the allegation of materiality, yet if the recited testimony is clearly not material, the indictment defeats itself. It alleges a thing to be material, and shows on its face that it is not material. The allegation of materiality, though in the words of the statute, in such a case cannot save the indictment. This count is therefore bad.

The other two counts relate to an affidavit of defendant and are drawn under R. S., c. 122, § 5. The form there provided has been held insufficient by this court in *State* v. *Mace*, 76 Maine, 64. The remedial statute of 23 George 2, c. 11, has not been adopted in this state. *State* v. *Hanson*, 39 Maine, 339.

These counts therefore must be sustained, if at all, at common law. By the common law, "there must be some proceeding, matter or thing to which the oath was taken; and by the common law the indictment must set it forth, so as to exhibit its character and the jurisdiction of the court or magistrate." *State* v. *Hanson*, supra; *Com.* v. *Knight*, 12 Mass. 274.

It must also set forth enough of the issue between the parties to show the materiality of the testimony. *Com.* v. *Johns*, 6 Gray, 275; *People* v. *Fox*, 25 Mich. 492; *Com.* v. *Byron*, 14 Gray, 31; *Beecher* v. *Anderson*, 45 Mich. 552. See form of indictment at common law in Archbold's Cr. Pr. & Pl. vol. 2, p. 967. Nothing appears in either of these counts from which the court can see what the issue was from which to judge of the materiality of the affidavit.

The second count contains no assignment of perjury of any part of the affidavit, but charges the whole to be false and the whole to be material. It cannot all be false. If no search was made, then it was true that nothing was found. If search was made, and papers were found, which the affiant denied, then the affidavit was true in part and false in part; but the allegation is of falsehood in its entirety, which is contradictory. It does not inform the defendant whether the alleged fact of search or of not finding is to be relied on. There should be an assignment of the perjury, when part of the paper is or must be true, so that the defendant may be informed

of the specific charge he is to answer. Several assignments may be made, and if one is sustained by the proof, a conviction may follow, but each assignment must be specific.

It is stated in the affidavit that no book or paper was found "referring in the least to the matter", except those stated. Whether any paper referred to a particular matter, was in the nature of opinion, and cannot be assigned as perjury. *Com.* v. *Brady*, 5 Gray, 78. To what matter reference was had does not appear in the affidavit, and is not alleged in the indictment. To be sustained, the indictment must negative the matter sworn to which is alleged to be false, by special averment. That averment should be as to such parts as the prosecutor can falsify, admitting the truth of the rest. Archbold's Cr. Pr. & Pl. vol. 2, p. 965, and note; Wharton's Precedents, vol. 2, p. 577.

The third count in addition to charging the falsity of the affidavit generally, assigns the perjury in one clause, "I cannot take a single step in making more definite account," and alleges its materiality and falsity. The phrase may refer to an account being rendered or to be rendered to the probate court, in settling some estate. But the indictment shows that the defendant was not a party to the proceeding. He therefore could not render an account; he had no authority to do so. If he attempted it, the court would not be authorized to receive it. He was a stranger to the proceeding. The statement was literally true. It was immaterial to the issue between the parties, whether this defendant could render an account, or furnish the data for one. It was not his duty to do either. If it referred to an accounting by himself to the parties or either of them, it was matter of opinion. *Com.* v. *Brady*, supra. There is no allegation in this count from which the court can see its materiality to the issue, whatever it was, then pending.

Exceptions sustained. Indictment quashed.

SETH STERLING *vs.* INHABITANTS OF CUMBERLAND COUNTY.

Cumberland. Opinion January 29, 1898.

Officer. Fees. Liquor Warrants. R. S., c. 27, § 60.

An officer whose fees are fixed by statute for the service of criminal process is not a creditor of the county, and has no right of action therefor.

The service of such person is in obedience to law, and there is no contract, express or implied, between him and the county.

It is the duty of the county commissioners to audit and allow such fees as are legal and order them paid from the county treasury. The law gives no appeal from their decision, and the officer cannot create one by suit to recover his claim.

Held; that the compensation of sheriffs, and deputies acting under their directions, especially charged with the enforcement of the liquor law under R. S., c. 27, § 60, is fixed by statute as follows, viz: a per diem of two dollars, travel six cents per mile and incidentals that are just and reasonable. There is no other fee or compensation for the service of a warrant, and therefore none can be allowed.

ON REPORT.

This was an action of debt brought by the plaintiff to recover from the defendant county the statutory fee of fifty cents for the service of each search warrant enumerated in the plaintiff's declaration. The plaintiff was a regularly appointed and duly commissioned deputy sheriff for the county of Cumberland. All of said warrants were legally issued, directed to the plaintiff and committed to him for service by the judge or recorder of the Municipal Court of the city of Portland, a court having jurisdiction in criminal cases in said county. The plaintiff seasonably made service of each of said warrants and of other similar warrants, and made immediate return thereof. Upon all warrants served the plaintiff returned memorandum of his fees, which in every case included fifty cents for the service of the warrant. Bills of cost were taxed by the court, including in each case fifty cents for service of the warrant, and duly certified as provided by statute. Upon all warrants served by the plaintiff where liquor was seized and the respondent arrested and in all appealed cases the fee for service of

warrants, fifty cents each, was allowed and paid. Upon all warrants served by the plaintiff where liquor was seized and no arrests made costs including fifty cents for the service of each warrant, were taxed by the recorder of said Municipal Court and certified to the county commissioners. In cases where no liquor was seized and no person arrested, costs were taxed on the original warrants and the warrants themselves presented to the commissioners by the recorder. The county commissioners examined and corrected the bills of cost, including the fees of the plaintiff, and refused to order to be paid out of the county treasury the fee of fifty cents for the service of each of the warrants named in the plaintiff's declaration, viz: 503 warrants by him served where liquor was seized and no person arrested, and 857 warrants served by him where no liquor was seized and no person arrested.

Seth L. Larrabee, for plaintiff.

The per diem compensation provided in R. S., c. 27, § 60, is given "for services under this section." The original statute (1872, ch. 62, § 2) says "under the provisions of this law." The service of precepts is not made the duty of sheriffs and their deputies by that law, or that section, but was made such by ch. 80, § 10, which had been the law of the state many years before the law of 1872 was enacted. The law of 1872 did not add anything to the duties of sheriffs and their deputies relating to the service of warrants, nor restrict nor modify their duties in that regard, nor in any way change or limit their right to the fee of fifty cents prescribed for the service of a warrant by the law of 1825. The law of 1872 imposed upon sheriffs and their deputies additional duties. It required them to "diligently and faithfully inquire into all violations of law" and to "institute proceedings against violations or supposed violations of law and particularly the laws against the sale of intoxicating liquors, etc." It is also expressly provided additional compensation for such additional duties, otherwise officers would have been required to contribute their time and labor in executing that law gratuitously.

The per diem compensation, the extent of which is placed at the discretion of the county commissioners, is for diligent and faithful

"inquiry into all violations of law" and the institution of proceedings against "violations or supposed violations of law." If it is to take the place of all compensation for executing warrants it must extend to the whole field of the criminal law.

Fees for service of warrants taxable under R. S., c. 116, § 5.

Chas. A. True, for defendants.

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

HASKELL, J. Debt by a deputy sheriff to recover of the county fees for the service of liquor warrants disallowed by the county commissioners.

I. The action cannot be maintained. An officer whose fees are fixed by statute for the service of criminal process is not a creditor of the county, and has no right of action therefor. His fees are payable from the treasury only upon warrant of some judicial tribunal or auditing board empowered to audit and allow such fees and order them paid from the treasury. If every officer, state witness, or juror, could sue for and recover fees, regardless of control by the court, public business would be embarrassed and confusion might ensue that would be intolerable. The service of such person is in obedience to law, and there is no contract, express or implied, between him and the county. *Clark* v. *Clark*, 62 Maine, 255. In the case at bar the law required the plaintiff to return his fees to the Municipal Court of Portland, and as the case there ended, that court, not being authorized to draw warrants upon the county treasurer, could only certify them to the county commissioners, whose duty it was to audit and allow such as were legal and order them paid from the county treasury. The law gives no appeal from their decision, and the plaintiff cannot create one by suit to recover his claim. The most he could do would be to apply to the Supreme Judicial Court, that has supervisory jurisdiction over all inferior courts, for the correction of any erroneous action of the commissioners apart from the exercise of judgment and discretion.

II. The plaintiff was a deputy of the sheriff, especially charged with the enforcement of the liquor law under the act of 1872, now § 60 of c. 27, R. S. That statute charges such officers with diligent and faithful inquiries into violations of law, and directs them to institute proceedings by "promptly entering a complaint before a magistrate and executing the warrants thereon issued or by furnishing the county attorney promptly and without delay with the names of alleged offenders and of the witnesses."

The statute further provides: "For services under this section, sheriffs and their deputies acting under their directions shall receive the same per diem compensation as for attendance on the Supreme Judicial Court, and the same fees for travel as for the service of warrants in criminal cases, together with such incidental expenses as are just and proper, bills for which shall be audited by the county commissioners and paid from the county treasury."

Nothing can be plainer than that for all services under this statute the compensation fixed by it shall be in full satisfaction thereof. Now what does the statute require? 1. Diligent inquiry into all violations of law. 2. The institution of proceedings against offenders by complaint to magistrates and the execution of process granted by them. 3. Promptly informing county attorneys who offenders are and giving them the names of witnesses. For doing this, what shall be the compensation? Two dollars a day and six cents a mile for travel and also incidental expenses that are just and proper, and the county commissioners are made the arbiters to determine the whole matter, and order payment from the treasury. These are all the fees allowable for such services. The legislature considered them adequate, and when they are not can provide compensation that is. All this plaintiff could tax is per diem two dollars, travel six cents a mile and incidentals that are just and reasonable. There is no other fee or compensation for the service of a warrant, and therefore none can be allowed. After receiving all the compensation above provided, the plaintiff sues to recover $680 for the service of warrants. On 503 warrants liquor was seized and no person arrested. On 857 warrants no liquor was

seized and no person arrested. These fees should not have been taxed and they were properly disallowed by the commissioners.

Plaintiff nonsuit.

CYNTHIA YORK *vs.* JOHN MURPHY, and another.

Aroostook. Opinion January 31, 1898.

Equity. Chattel Mortgage. Redemption.

Upon a bill in equity to annul a chattel mortgage or to redeem the same if found valid, and heard on demurrer, it appeared that the mortgage had not been recorded, as required by law, in the town where the mortgagor resided. *Held;* that the mortgage was invalid as against the plaintiff who had purchased the chattel of the mortgagor; and the mortgagees have no title thereunder.

The mortgagees had previously replevied the same chattel from a bailee of the plaintiff. *Held;* that the plaintiff has a perfect defense at law to the replevin suit, and has no need of relief in equity.

Held further; if the plaintiff's defense to the replevin suit shall fail from facts not disclosed in her bill, inasmuch as foreclosure proceedings have been enjoined and security has been given therefor, she may hereafter be allowed to amend her bill as a bill to redeem upon payment of costs of this suit, and tender of mortgage debt with interest and costs of foreclosure.

ON EXCEPTIONS BY PLAINTIFF.

Bill in equity, heard on bill and demurrer.

The facts in this case as set forth in the bill, filed August 7, 1896, are substantially as follows: The plaintiff bought a horse on May 16, 1896, of one Frank J. Stairs, then a resident of Washburn, Aroostook County, having been informed and believing that the horse was the property of said Stairs and free from incumbrance. And thereupon she hired the horse out to one Fred O. York. The defendants on May 28 following, replevied him from her lessee, York, under a writ returnable to the September term, 1896, Aroostook county, and which suit is still pending.

The defendants claim said horse under a mortgage to them from said Stairs to secure $47.25, dated January 14, 1896. This mortgage was recorded in Caribou, the town in which the defend-

ants lived, but was not recorded in Washburn, the town in which said Stairs, the mortgagor, resided at the time the mortgage was given.

The plaintiff further alleged that on June 10, 1896, following the replevin suit of May 28, the defendants published a notice of foreclosure of the mortgage in a newspaper printed in said Caribou, which notice was recorded in said Caribou where the mortgage was recorded, on June 29, 1896, and that the right of redemption would expire, and the foreclosure become absolute on August 10, 1896, if said mortgage was properly recorded.

She further alleged that if she should pay to the defendants the amount of the mortgage, she would be without remedy to recover it back if it should be finally determined by the court that said mortgage was not properly recorded, and therefore not valid as against her; and that if valid, the right of redemption would expire before any court would sit in which the question could be tried and determined. Also that she has no alternative but to pay said mortgage whether void or valid, before said foreclosure becomes absolute, or to ask this court sitting in equity, to suspend by order and injunction the foreclosure aforesaid, and to enjoin the prosecution of said replevin suit until the validity of said mortgage can be tried and determined under her suit in equity.

She further alleged that the mortgage, although not recorded in the town where the mortgagor lived at the time it was given, still is recorded in the town adjoining, where the mortgagees live; and that the existence of such mortgage, supported by such a record which said mortgagees then claimed to be in the town of said mortgagor's residence, as further supported by their replevin suit, constituted a serious cloud upon her title which should be removed by the decree of this court.

Nevertheless, if this court, upon full hearing in equity, should hold said mortgage to be properly recorded, and valid as against her, she offers to pay the amount due on said mortgage; and, in this latter alternative, she brings this bill to redeem said mortgage. A preliminary injunction was issued August 8, 1896, a bond having been duly approved.

D. D. Stewart and F. M. York, for plaintiff.

Chattel mortgages redeemable in equity: *Bennett* v. *Butterworth*, 12 How. 367; 2 Sto. Eq. Jur. § 1031.

If this plaintiff should pay, or tender to these defendants the amount of the mortgage, her act of payment would deprive her of all right to litigate the question; would estop her from denying the validity of their mortgage because she had conclusively admitted it by paying it. And there would be no remedy for her at law by which the money thus paid could be recovered back, in case she could subsequently show that the mortgage was not rightfully recorded, and therefore invalid as against her. Such payment would be held at law to be voluntary, and not under any species of legal duress, and could not therefore be recovered back. *Fellows* v. *School Dist.* 39 Maine, 559.

Counsel also cited: Bouv. Law Dict. 597; *Eaton* v. *McCall*, 86 Maine, 350, 351; *Freeman* v. *Carpenter*, 147 Mass. 23, 24; *Boston Iron Works* v. *Montague*, 108 Mass. 248, 254; *Titcomb* v. *McAllister*, 77 Maine, 357; *Dwelley* v. *Dwelley*, 143 Mass. 509, 516.

W. P. Allen, for defendants.

Counsel argued that the demurrer should be sustained (1) because the issue is purely one of fact for a jury to determine; (2) the complainant has a plain, adequate and complete remedy at law; (3) because there were replevin suits pending involving the same matter; (4) the complainant is asking advice from the court; (5) the complainant was bound to investigate the title before buying; (6) the complainant was bound to investigate the residence of the mortgagor, Stairs, at the time of the execution of the mortgage and elect whether to redeem or defend her title in the replevin suit; (7) it is not plain that she would be benefited by equity proceedings; (8) the substance of the bill is of too trivial value to be worthy of the dignity of the court.

One of the objections which may thus be taken is that the value of the subject of the suit is too trivial to justify the court in taking cognizance of it; or as the phrase usually is, that the suit is unworthy of the dignity of the court. Sto. Eq. Pl. § 500.

In Massachusetts the equity court refused to take cognizance of a bill under one hundred dollars. *Chapman* v. *Banker & Tradesman Pub. Co.*, 128 Mass. 478.

Again, the bill charges no fraud, nor trust, nor mistake even, but concerns only a money debt of about fifty dollars. In the absence of fraud, trust or mistake, a court in equity should not enjoin an action at law involving a mere money claim of less than $100.

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

HASKELL, J. Bill in equity to annul a chattel mortgage and if found valid to redeem the same. The bill was dismissed on demurrer below and the cause comes up on exceptions.

The bill charges that the mortgage was not recorded in the town where the mortgagor resided, and the demurrer admits the fact. Of course, as to this plaintiff, an innocent purchaser of the property, the mortgage is invalid, and the defendants, the mortgagees, have no title to the property thereunder, and in their replevin suit against a bailee of the plaintiff, she has a perfect defense at law, and has no need of relief in equity. Act of 1895, c. 39; *Bachelder* v. *Bean*, 76 Maine, 517; *Milliken* v. *Dockray*, 80 Maine, 82.

But, if the plaintiff's defense to the replevin suit shall fail, from facts not disclosed in her bill, inasmuch as foreclosure proceedings have been enjoined and security has been given therefor, she may hereafter be allowed to amend her bill as a bill to redeem upon payment of costs of this suit, tender of mortgage debt with interest and costs of foreclosure.

Exceptions overruled.
Bill retained for amendment.

EDWARD S. SNOW *vs.* WILLIAM N. ULMER.

Knox. Opinion January 31, 1898.

Chattel Mortgage. Description. Date.

A mortgage of chattels, described as in a store, covers only such property as was in the store at the date of the mortgage, although the mortgage may be actually executed at a later day. The date given becomes a part of the description of the property.

ON REPORT.

The case appears in the opinion.

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

The mortgage did not become operative as a conveyance until it was actually delivered to the plaintiff, which was either on the afternoon of the 19th, or at the latest, on the morning of the 20th of November, long before which time the tea in controversy was in the store, and thus covered by the mortgage. While the date written in the mortgage is prima facie its date, the date of its delivery is the time when it first became effective as an instrument of conveyance. *Egery* v. *Woodward*, 56 Maine, 45.

W. H. Fogler and M. A. Rice, for defendant.

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

HASKELL, J. Trover against an attaching officer by a mortgagee, and the only question involved is whether the goods attached were covered by the mortgage.

Now, as said by plaintiff, a mortgage takes effect from the time of its delivery, regardless of its date. *Egery* v. *Woodward*, 56 Maine, 45; *Jones* v. *Roberts*, 65 Maine, 273. This mortgage was delivered after the goods had been deposited in the debtor's store and before the attachment. But it is contended that the description of the property mortgaged did not include the goods attached. The mortgage was dated November 18th, and executed, delivered

and recorded November 19th, after the goods had reached the store that morning. They were not in the store November 18th, at the date of the mortgage, which describes the property: "All the stock, fixtures and merchandise in the store No. 273 Main Street, in said Rockland."

The record held out that property only in the store at the date of the mortgage was conveyed. The date became a part of the description of the property mortgaged, and it can make no difference that the mortgage was not executed until the next day, or the next week, or the next month, or the next year, when it may have actually been delivered and recorded. It would then only cover property described in it, and the description is, of goods actually in the store at its date, not of goods afterwards put there, and its date was before the goods were put in. The doctrine of this opinion logically follows from our own cases, although neither one of them exactly fits the contention here raised. *Sawyer* v. *Long*, 86 Maine, 541; *Stirk* v. *Hamilton*, 83 Maine, 524; *Griffith* v. *Douglass*, 73 Maine, 532; *Chapin* v. *Cram*, 40 Maine, 564.

The case of *Partridge* v. *White*, 59 Maine, 564, is substantially in point. It was there held that a mortgage of goods "now in my store" covered only goods then there, inferentially at the date shown upon the face of the mortgage and the record thereof.

Judgment for defendants.

THEODORE BRAGDON *vs.* JOHN D. BLAISDELL.

Hancock. Opinion January 31, 1898.

Deed. Covenant. Partition.

The plaintiff, Bragdon, and defendant, Blaisdell, were each owners of separate wharves, and the defendant was the owner of a quarry. The defendant conveyed the quarry to the plaintiff by quitclaim deed containing the clause: "It is also agreed and made a part of the condition and consideration of this deed that all stone taken from the above described lot shall be shipped from said Bragdon's wharf and landing, except that all stone which for any reason cannot be shipped as aforesaid, the same shall be shipped over J. D. Blaisdell's wharf and no other." At the same time, the plaintiff conveyed one undivided half of the quarry, by quitclaim deed containing the above clause, to the defendant. Thereafterwards partition of the quarry was had, and the defendant, by himself and lessees, shipped stone from his part of the quarry, so held by him in severalty, from his own wharf when they might have been shipped from the plaintiff's wharf, who sued to recover damages therefor, as a breach of the defendant's covenant above mentioned. *Held;* that the agreement in question was meant to apply to the management of the quarry so long only as it remained common property; and that the partition having severed the title, and cancelled the agreement, the action cannot be maintained.

Also; that the agreement has none of the elements of covenants that run with the land; and a future grantee would hold the land free of it.

ON REPORT.

The case is stated in the opinion.

H. E. Hamlin and H. Boynton, for plaintiff.

The land conveyed was bound by the covenant to have its stone product shipped over the wharves of the respective parties. The covenants run with the land; and the clause in question is not a condition subsequent upon breach of which forfeiture could be claimed and entry made. These covenants were inserted in the deeds for the express purpose of giving the parties a right of action for damages in case of breach. Such restrictions are to be fairly and reasonably interpreted according to their apparent purpose. A restrictive covenant runs with the land if created for the benefit of the land conveyed, or of that of which the grantor remains the

owner, and intended to be annexed to such land. 1 Jones, Law of R. P. etc. §§ 647, 648, 735, 784, 816; *Jeffries* v. *Jeffries*, 117 Mass. 184; *Attorney General* v. *Gardiner*, Id. 492; *Ayling* v. *Kramer*, 133 Mass. 12; *National Bank* v. *Segur*, 39 N. J. L. 173; 2 Wash. R. P. (5th Ed.) p. 316.

It makes no difference that Blaisdell did not sign the latter deed. He accepted it according to its terms and the land was already bound by the deed of the whole. 2 Wash. on R. P. (5th Ed.) p. 299; *Burbank* v. *Pillsbury*, 48 N. H. 475; *Kellogg* v. *Robinson*, 6 Vt. 276; *Atlantic Dock Co.* v. *Leavitt*, 54 N. Y. 35; *Finley* v. *Simpson*, 22 N. J. 311.

Before the partition the covenant was binding upon the whole land undivided; after the partition it was still binding upon the whole land in its divided interests between Blaisdell and Bragdon.

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

SITTING: EMERY, FOSTER, HASKELL, WHITEHOUSE, STROUT, SAVAGE, JJ.

HASKELL, J. The plaintiff and defendant were each the owners of separate wharves, and the defendant was the owner of a quarry. The defendant conveyed the quarry to the plaintiff by quitclaim deed, containing the clause:

"It is also agreed and made a part of the condition and consideration of this deed that all stone taken from the above described lot shall be shipped from said Bragdon's wharf and landing except that all stone which for any reason can not be shipped as aforesaid, the same shall be shipped over J. D. Blaisdell's wharf and no other."

At the same time, the plaintiff conveyed one-undivided half of the quarry, by quitclaim deed, to defendant, containing the clause above quoted. Thereafterwards, partition of the quarry was had to be held by the plaintiff and defendant in severalty; and defendant, by himself and lessees, proceeded to ship stone from his part of the quarry, so held by him in severalty, from his own wharf when they might have been shipped from plaintiff's wharf, who

sues to recover damages therefor, as a breach of defendant's covenant before mentioned.

The action is covenant broken. Plaintiff can not sue on the covenant in his deed to defendant because he did not sign and seal the deed. The remedy, if any there be, is assumpsit and not covenant. *Baldwin* v. *Emery*, 89 Maine, 496; *Maine* v. *Cumston*, 98 Mass. 217; *Locke* v. *Homer*, 131 Mass. 93. Nor is it plain how plaintiff can maintain his action on the covenant in defendant's deed to him for want of a breach thereof. By that deed the plaintiff took the whole title to the quarry, and he might deliver the stone upon his own wharf as he pleased. Any covenant that he might do so would seem to have been unnecessary, and inoperative, and become merged in his fee.

But assuming that both deeds were contemporaneous and became effectual as an indenture, so that the covenants were mutual and each party was bound to the other thereby, what was their purpose, and what is their scope and effect? Did they attach to the land either as a condition subsequent or covenant real that ran with it? It cannot be both, and it can hardly be held a condition.

The supposed covenant recites: "It is also agreed and made a part of the condition and consideration of this deed" that stone from the quarry shall be shipped from plaintiff's wharf when feasible. When considered with the whole transaction apparent from the deeds themselves, they fairly negative any such intention of the parties, and that intention must govern. *Bray* v. *Hussey*, 83 Maine, 329. The strongest words of condition will not work a forfeiture of the estate unless they were so intended to operate. The absence of a clause for re-entry may signify that no condition was intended, when its presence may make such intent plain. *Post* v. *Weil*, 115 N. Y. 361; *Avery* v. *N. Y. Cent. R. R. Co.*, 106 N. Y. 142; *Clement* v. *Burtis*, 121 N. Y. 708; *Countryman* v. *Deck*, 13 Abb. 110; *Hoyt* v. *Kimball*, 49 N. H. 322; *Episcopal City Mission* v. *Appleton*, 117 Mass. 326; *Stanley* v. *Colt*, 5 Wall. 119.

Nor does a consideration named as a condition always imply one. *Laberee* v. *Carleton*, 53 Maine, 211; *Ayer* v. *Emery*, 14 Allen,

67; *Martin* v. *Martin*, 131 Mass. 547; *Morrill* v. *Wabash Ry.*, 96 Mo. 174; *Rainey* v. *Chambers*, 56 Tex. 17; *Risley* v. *McNiece*, 71 Ind. 434; *Portland* v. *Terwilliger*, 16 Oreg. 465.

If the words raise a doubt whether a condition or covenant be meant, they are always to be construed as a covenant. Jones on Real Property, § 635, and numerous cases cited. Moreover, if the clause, which is the same in both deeds, were considered a condition, it would apply to the whole quarry. The supposed condition does not attach to the land. For illustration see *Jewell* v. *Lee*, 14 Allen 145. A future grantee would hold the land free of it. No other reasonable construction can be given to it. It is not for the benefit of and in aid of a title, but, if anything of a nature that attaches to the soil, a servitude or incumbrance upon it, a fee on condition that any future conveyance of the title would become subject to. It does not purport to be an incumbrance, a claim upon the land, nor does it subject the land to any easement, servitude or right against the owner. It is the personal agreement of tenants in common to ship stone quarried from the common land at a particular wharf.

What did the parties mean by the clumsy method taken to serve their respective interests? Plaintiff had a wharf, and defendant had a wharf and quarry. For some reason, he wanted plaintiff to become half owner in the quarry, and plaintiff wanted the first chance of the business of the quarry for his wharf. To accomplish that result, deeds were made, containing an agreement for the purpose. Clearly the parties contemplated a continued common ownership in the quarry, and perhaps joint operations in working it, preference being given to plaintiff's wharf. The agreement rather related to a joint operation, to business, than to the title to the land. The parties meant to give plaintiff's wharf the benefit of their operations in the quarry to the extent of its capacity and then use the defendant's wharf. They did not contemplate partition in severalty. Their agreement does not fit such a condition. So long as the quarry was held in common, the agreement was sensible; but when held in severalty, it became impracticable. Unless it attaches to the land qualifying the estate, it cannot be made effec-

tive as a personal covenant of the parties after partition, without complications and burdens little thought of when it was made. It has none of the elements of covenants that run with the land. They follow the title, not by assignment, but by conveyance of the land. They are ordinarily in aid of the title, not in derogation of it. They usually strengthen it, not weaken it. It can, therefore, be considered neither a condition, nor a covenant real that runs with the land, follows the title. Nor is it a limitation upon the estate conveyed, creating a servitude in favor of the wharves. The parties became tenants in common of the quarry and owned in severalty their respective wharves, neither of which appears to be contiguous to the quarry. It is unlike the cases that limit or restrict the use of the land conveyed or cast some additional burden upon it,—as the building of fences or maintaining partition walls. They attach to the land by imposing a duty upon the owner or by restricting his use. *Newell* v. *Hill*, 2 Met. 180; *Bronson* v. *Coffin*, 108 Mass. 175.

Nor is it a stipulation to remove incumbrances or the like as in *Pike* v. *Brown*, 7 Cush. 133, and *Baldwin* v. *Emery*, supra, 89 Maine, 496. It is but a personal agreement between tenants in common as to the management of the common property, and when the property ceases to be held in common it has no application. This is the only reasonable construction that can be given to it. The parties, perhaps, did not contemplate a change of the conditions between them. They had no idea of a partition of the land, or they never would have created their common interests as they did. Changed conditions many times arise not in contemplation of parties where they attempt to agree as to their interests, that, although unforeseen, cause such agreements to become absurd, or burdensome and unreasonable. In such cases, where it fairly appears that it was not intended that a contract should apply to such changed conditions, the reasonable and proper construction of it is that it does not apply. So in this case, we think the agreement in question was meant to apply to the management of the quarry so long only as it remained common property, and that when partition ensued, it became functus officio, inoperative. It

had served its intended purpose, and by partition, it was denuded of subject matter upon which it could operate. We, therefore, consider that partition severed the title and cancelled the agreement.

Judgment for defendant.

SAMUEL M. LIBBY *vs.* CHARLES H. HALEY, Appellant.

Androscoggin. Opinion February 1, 1898.

Reasonable Time. Waiver. Estoppel.

Where facts are clearly established or are undisputed or admitted, a reasonable time within which an act should be done is a matter of law; but, under other conditions, is a matter of fact for the jury; and so also is waiver. In the latter case, *held;* that it is not error to submit both questions to the jury, or for the court below to refuse to decide either one as matter of law.

The defendant sold on August 22, a horse to the plaintiff, with an alleged warranty of soundness. The plaintiff attempted a rescission and sued for the purchase money, and claimed that he returned the horse for the purposes of rescission in a few days thereafter, and introduced testimony tending to prove the fact. The defendant said that the rescission was some two weeks after the sale, or not until September 8th, and introduced evidence tending to prove it. *Held;* that the court below properly instructed the jury that the rescission must be made within a reasonable time; and exceptions do not lie to a refusal to rule that September 8th was not within a reasonable time.

Estoppel raises an issue of law, but waiver an issue of fact. Waiver is the voluntary surrender or abandonment of a right; but if the conduct misleads, and deceives, then the law declares an estoppel upon him who caused the mischief and thereby misled and deceived the adverse party.

Held; that the defendant was not entitled to the following instruction to the jury: that if the plaintiff from September 8th, when the horse was tendered to the plaintiff and refused, continuously used the horse in his business for driving and work until the trial, he thereby waived his right to rescind the sale. This was a question for the jury, for waiver is a matter of fact.

ON EXCEPTIONS BY DEFENDANT.

The case appears in the opinion.

R. W. Crockett, for plaintiff.

W. H. Newell and W. B. Skelton, for defendant.

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

HASKELL, J. The defendant sold the plaintiff a horse, presumably with a warranty of soundness. For breach of this warranty the plaintiff attempted a rescission, and sues for the purchase money. The sale was August 22. The plaintiff claimed that he returned the horse for the purposes of rescission in a few days thereafter, and introduced testimony tending to prove the fact. The defendant says that it was some two weeks, not until September 8th, and introduced evidence tending to prove it. The court below properly instructed the jury that the rescission must be made within a reasonable time, and refused to rule that September 8th was not within a reasonable time. To this refusal the defendant has exception.

What is a reasonable time within which an act must be done may be a question of law. "Where the facts are clearly established, or are undisputed, or admitted, reasonable time is a question of law. But where what is a reasonable time depends upon certain other controverted points, or where the motives of the party enter into the question, the whole is necessary to be submitted to a jury, before any judgment can be formed whether the time was or was not reasonable." *Hill* v. *Hobart*, 16 Maine, 168.

In the case at bar, plaintiff and defendant had several interviews between the sale and the rescission September 8th, and plaintiff asserts that he informed defendant of the breach of warranty and wanted to know "what he was going to do about it," and receiving no satisfaction tendered a return. Whether a return September 8th was seasonable would depend upon the intervening facts and circumstances, all of which are disputed, so that it could not be said, without settling the facts, whether the return was seasonable. The question was properly and carefully submitted to the jury, and defendant's exception to the refusal of the court to settle the matter as a question of law cannot be sustained.

The defendant also requested the court below to rule, in substance, that if plaintiff from September 8th, when the horse was

tendered to defendant and refused, to the trial, "continuously used the horse in his business for driving and work" he thereby waived his right to rescind the sale. The request was refused, and defendant has exception. Here again was a question for the jury, for waiver is matter of fact. *Robinson* v. *Insurance Co.*, 90 Maine, 385. No estoppel is claimed, which is matter of law. Sometimes the conduct of a party may show that he not only intended to and did waive his rights, but that the adverse party had been misled thereby, when the law raises an absolute bar to the repudiation of conduct that caused the mischief. This is estoppel, although it may contain all the elements of waiver. But the reverse may not be true, for a party may so conduct as to show an intention to waive his rights, when the adverse party has not been deceived or misled thereby and no estoppel would arise although a waiver may well be found. It seems to me that one difference between waiver and estoppel is that in the former the result was voluntary, while in the latter, the conduct of the party may have been voluntary, but with intention not to lose any existing rights, yet, if such conduct mislead, then estoppel arises. One is the voluntary surrendering of a right, *Stewart* v. *Crosby*, 50 Maine, 134; *Hoxie* v. *Home Ins. Co.*, 32 Conn. 21, and the other is the inhibition to assert it from mischief that it has caused. *Shaw* v. *Spencer*, 100 Mass. 395. The cases do not all recognize this distinction, and apply the doctrines of waiver and estoppel indiscriminately in furtherance of justice. If this distinction, however, be regarded, then it logically follows that waiver is a matter of fact for the jury, to say what did conduct mean. What does it signify? Does it show a voluntary abandonment of some right? If yes, then the party has waived it, and cannot regain it. But if the conduct misleads, deceives, then the law visits the consequences upon him who has caused the mischief, and declares an estoppel.

In the case at bar, no estoppel arises for no one has been deceived, and whether the plaintiff concluded to abandon his claim to a rescission of the sale depends upon the significance of his treatment and use of the property. If he had so treated it as to show an intention to regard it his own, as if had used it for his own benefit

and to the injury of it, or so as to decrease its value instead of merely keeping it, a waiver might be found. But if the keeping of property, like the ordinary use of a horse, that was no more than the good of the animal required, and merely reduced the expenses chargeable to the owner, then no injury to it would follow and no intent to possess it as his own would appear, and no waiver should be found. All these considerations were proper for a jury, and the court below might well refuse to decide the question of waiver as one of law.

Exceptions overruled.

SAMUEL G. DAMREN

vs.

AMERICAN LIGHT AND POWER COMPANY.

SAME *vs.* SAME.

Androscoggin. Opinion February 2, 1898.

Rent. Insolvency. Assignment of Choses in Action. R. S., c. 82, § 130.

Rent in arrear is a chose in action and does not pass by a conveyance of the reversion.

An assignment of rent reserved under a lease gives the assignee an action in his own name only for rent subsequently accruing.

A conveyance of land by assignees in insolvency passes the title held by them at its date.

Under R. S., c. 82, § 130, an assignee of choses in action, not negotiable, may sue in his own name and recover the same, if he shall have filed in court with his writ the assignment, or a copy thereof, and not otherwise.

ON REPORT.

There were two actions reported to the law court upon the same evidence.

The first case was upon a demand for rent under a lease May 7, 1888, given by Charles Gay to the American Light and Power Company, the plaintiff claiming as assignee of the rights of Charles Gay by virtue of three assignments:—First: Assignment by acts

of law under insolvency proceedings in case of Charles Gay, the assignment being dated February 20, 1895. Second: Assignment of the leased premises from Messrs. Wing, White, and Newell, assignees of Gay in insolvency, dated August 8th, 1895, which assignment expressly and in terms, conveys to the assignee all the interest which Gay had in said lease November 20, 1894.

Third: Assignment from said assignees in insolvency to the plaintiff, correcting a clause in the former assignment, and assigning to the plaintiff all claims under said lease which they had in their capacity as such assignees, against said defendant, dated January 17, 1886.

The writ contained three counts. First: One on account annexed, for rent under the lease from November 20, 1894, to August 8, 1895, $1307.50. This count sets out the assignment of January 17, 1896.

Second: Account annexed for rent accruing directly to the plaintiff from August 8, 1895, to November 20, 1895, 3.4 months at $150 a month, $510.

Third: The money counts claiming the total of the sums set forth in the first two counts, $1817.50.

The second suit was for damages for breach of covenant to repair, and the plaintiff in this action claimed to recover the sum of $58.02, the amount paid by him for repairs rendered necessary by the negligence of defendant, such as was covenanted against by defendant in the lease.

The plea to the first suit was the general issue.

To the second suit the defendant plead double and said: First: That the property did not suffer damage and injury by the defendant's negligence. Second: That at the time of the supposed breach of covenant, plaintiff had not succeeded to the title, to which second plea the plaintiff replies that said breach was a continuing one and continued after as well as before he succeeded to the title.

The lease provided that the lessor shall "keep up and maintain the said dam, sluices, gates, water wheel, shafting, gearing and

pulleys in good and efficient repair, saving only for such damages and injury as shall come to the same by reason of the carelessness and negligence" of the lessee.

The lessee covenanted to repair in case of any damage or injury which should arise or accrue by reason of its carelessness or negligence.

The lease provided for payment of rent monthly at the rate of $200 per annum for the buildings and for "each dynamo fifty lights, which lessee should place within and use in said building at the rate of $500 per annum."

The lessor could let surplus power to third parties only upon notice to lessee, giving lessee right to take such surplus in preference.

The rent for each additional dynamo commenced when "set and attached to the driving machinery."

There was no provision for any abatement for any change or disuse of machinery after it was once attached.

The first controversy arose as to the right of the plaintiff to recover any rent whatever, and as to this the defendant claimed, that by reason of the property becoming out of repair either by accident or negligence of the lessor, his rent should be abated.

The second controversy arose as to the amount of rent to be paid, if any.

As to this the plaintiff claimed that it appears by the admission of the general agent of the defendant, that sufficient machinery had been attached to raise the monthly rent to the sum of $150, and that by the terms of the lease, from the time of such attachment, the defendants continued liable for rent to that amount, regardless of any changes he might thereafter make for his own convenience.

The defendant on the other hand contended that by reason of removal of a portion and finally, of all of his machines elsewhere, and ceasing to actually use a proportionate amount of power, his rent would be abated.

Other facts are stated in the opinion.

H. W. Oakes, for plaintiff.

J. A. Morrill, for defendant.

SITTING: PETERS, C. J., FOSTER, HASKELL, WISWELL, STROUT, JJ. SAVAGE, J., did not sit, having been of counsel.

HASKELL, J. Assumpsit for rent. The first count declares for rent from November 20, 1894, to August 8, 1895. The case is on report, to be decided upon so much of the evidence "as competent and legally admissible."

One Charles Gay, being the owner of a building and water power connected therewith, leased the same to defendant. Gay became an insolvent debtor and on the 8th of August, 1895, his assignees conveyed all the right, title and interest which Gay had in the premises when he became insolvent to the plaintiff, including the lease, rent being in arrear from that day to the day of the conveyance. Thereafterwards, on the 17th of January, 1896, the assignees assigned such rent to the plaintiff.

Rent in arrear is a chose in action and does not pass by a conveyance of the reversion. *Winslow* v. *Rand*, 29 Maine, 362; *Burden* v. *Thayer*, 3 Met. 76; *Massachusetts Hospital Life Ins. Co.* v. *Wilson*, 10 Met. 126.

An assignment of rent reserved under a lease gives the assignee an action in his own name for rent subsequently accruing. *Kendall* v. *Carland*, 5 Cush. 75; *Hunt* v. *Thompson*, 2 Allen, 341; *Harmon* v. *Flanagan*, 123 Mass. 288; *Beal* v. *Boston Car Spring Co.*, 125 Mass. 157. No case can be found where an assignee of a lease or of rent reserved has been permitted, at common law, to sue in his own name for rent in arrear at the time of the assignment.

The conveyance of the reversion and of the lease was August 8, 1895. It passed the title that day of estate held by their insolvent on the 20th of November, 1894. It cannot be construed as a grant or assignment, taking effect the previous November, when the debtor was adjudged insolvent. The part of the grant referring to that date was mere description of the estate conveyed. The rent meantime had accrued to the assignees, and payment to them would have discharged the rent. It had become separated from the land, and was a chose in action recoverable only at common law in the name of the assignees. Whether that rent be held as assigned

to the plaintiff under the conveyance of August 8th, or the subsequent assignment of it in the following January, makes no difference as it was a chose in action to be sued for in the names of the assignees in insolvency only.

Under R. S., c. 82, § 130, an assignee of choses in action, not negotiable, may sue in his own name to recover the same, but "shall file with his writ the assignment or a copy thereof." No assignment was so filed in this case, but both the conveyance of August 8th and the assignment of the following January, when offered in evidence, were objected to, and under the stipulations cannot be considered if not legally admissible. This question has been decided in *Bank* v. *Gooding*, 87 Maine, 338, where it is squarely held that such assignments not filed with the writ are not admissible in evidence against objection. The claim sued in the first count cannot, therefore, be recovered in this action.

The second count declares for rent from August 8th to November 20, 1895. On the former date the lease had been assigned to plaintiff, so that rent accruing afterwards may be recovered by plaintiff in his own name. The lease was terminated on the 20th of November, 1895, by plaintiff taking possession for non-payment of rent. The rent was payable monthly on the first day of each month, so that all plaintiff can recover in any event is rent for August, September and October. The November rent had not accrued, and therefore cannot be recovered. *Nicholson* v. *Munigle*, 6 Allen, 215.

The rent reserved in the lease was $200 per annum for a building used as an electric light station, and $500 for each 50 light dynamo. The latter was really a rent for power, to be determined by the amount used.

It is contended by defendant that during this time the premises were suffered to be out of repair by reason of damage from a freshet, whereby the rent should abate.

During the preceding winter and spring, defendant removed its plant for electric lighting elsewhere, keeping these premises as a reserve in case of trouble with its principal plant. The equipment was also diminished, as it could be readily reinforced in emergency.

The lessor had been adjudged insolvent the December previous. In April a freshet is said to have injured the racks and penstock, so that the power could not be used, and each party claims that the same were suffered to remain out of repair by the fault of the other. The testimony is meagre and conflicting and somewhat confused. The defendant did not very much need the active use of the station, and the assignees do not seem to have cared to incur the expense of repair. We cannot say that the premises were injured or suffered to remain out of repair by the fault of defendant. It seems as if the injury was occasioned by a freshet over which defendant had no control, and the non-repair was suffered to continue by common consent, and that, meantime, under the terms of the lease, rent for power should abate.

The rent for the building, however, is made a separate item in the lease, and special provisions are inserted concerning its injury and, meantime, for the abatement of rent. During these three months defendants occupied the building and under the terms of the lease become liable for rent therefor. If there had been a division of the reversion of the premises by the lessor before his insolvency, the building was excepted and therefore is not subject to an apportionment of rent.

Defendant defaulted for $49.98 and interest from date of writ.

From the above discussion of the rights of the parties, it will be seen that no breach of covenant, if available to the plaintiff, has been shown, and therefore in his action for covenant broken the entry must be

Judgment for defendant.

MARY E. BRADLEY, in Equity,

vs.

SHERBURNE R. MERRILL, and others.

Cumberland. Opinion February 3, 1898.

Mortgage. Redemption. Accounting. Interest. Commissions. Repairs. Improvements.

The rule in this state is to allow, in an accounting between mortgagor and mortgagee, a commission on rents collected as compensation for care of the property, procuring tenants, looking after repairs, collecting rents and the like. *Held;* that the allowance of this commission is not prohibited by an express stipulation between the parties in which it was agreed that the mortgagee might deduct from the net rents any commissions that he might have to pay for collections, although it appeared that the mortgagee collected the rents himself, and did not pay anything for collecting.

Compound interest cannot be recovered where the parties do not expressly promise to pay it. If interest be payable at stated periods before the principal falls due, and is not collected, the law will not imply a promise to pay interest upon interest; and, in a suit to collect the debt and interest in arrear, compound interest cannot be recovered. But where the promise to pay compound interest is express, it may be enforced the same as any other contract. It is not usurious. In such case the court will not declare an implied promise, but will enforce one made by the parties.

A bill in equity to redeem land from an equitable mortgage was sustained by the court, and the cause was sent to a master to take an account of the amount due on the mortgage. Upon exceptions to the master's report, *held;* that permanent improvements not necessary for the preservation of the property and made without the mortgagor's consent are to be disallowed; and those necessary for the preservation of the property, and repairs to make the premises tenantable, are to be allowed.

Defendant Hasty built without the mortgagor's consent a house upon the mortgaged premises. *Held;* that as the house itself cannot be considered an improvement, so as to be allowed to the defendant in his account, he is not chargeable for the rent of the house.

In this case the plaintiff sought to redeem the premises from two equitable mortgages, one dated June 5, 1883, to Merrill, securing six thousand dollars, and one dated July 7, 1884, to Lane, securing the sum of five hundred dollars. Lane assigned his mortgage to Proctor, December 10, 1884. Merrill had possession of the mortgaged premises from the date of his mortgage, to the time he sold them to the defendant Hasty, June 17, 1886. Neither Lane

nor Proctor were ever in possession of the premises, and they conveyed their interest to the defendant Hasty, June 17, 1886. During the time Proctor owned the Lane mortgage, he lent the plaintiff certain sums of money upon the agreement that they should be secured by that mortgage. The amount due thereon was subsequently paid by Merrill. The master computed interest on the several sums thus secured by the Lane mortgage to June 17, 1886, and then made that sum a new principal, upon which he computed interest to April 28, 1896, the date of his report.

Held; that the title to both of these mortgages passed to the defendant Hasty, irrespective of the forms of conveyance, and redemption of both is governed by the same rule. *Also;* that the allowance by the master of the amount paid as a new principal is error, and operates to charge interest upon interest,—to which the mortgagor did not assent and cannot be compelled to.

See *Bradley* v. *Merrill*, 88 Maine, 319.

ON EXCEPTIONS BY PLAINTIFF AND DEFENDANTS.

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

This was a bill in equity brought by Mary E. Bradley against Sherburne R. Merrill, John W. Lane, John F. Proctor and Edward Hasty, for the redemption of the house and lot, No. 776 Congress street in Portland, from equitable mortgages.

The bill was sustained and a master appointed to state the account. For a statement of the facts including the agreement with the defendant Merrill that was held to be an equitable mortgage, see 88 Maine, 319. Upon the coming in of the master's report the plaintiff and the defendant Edward Hasty filed exceptions in the court below. These exceptions are stated in the opinion.

J. H. and J. H. Drummond, Jr.; D. A. Meaher, for plaintiff.

In every case where commissions have been allowed, it will be found that the mortgage was silent on the subject. On the other hand, where there is an agreement contrary to the usual rule, that agreement is enforced by the courts and the rights of the parties are controlled by it. Jones on Mortgages, (2nd Ed.) § 1133; *Boston R. R. Co.* v. *Haven*, 8 Allen, 359; *Cazenove* v. *Cutler*, 4 Met. 246–251. In the case at bar the parties agreed that the mortgagee should account for the rents and profits, after deducting any commissions that he may have paid for collecting them. This by clear implication excluded any commissions except such as the mortgagee paid.

If the Lane mortgage was still owned by Proctor, there could be no question what the rule would be; he would be entitled only to simple interest from the date of the last payment of interest to the date of redemption. By the assignment of the mortgage, the assignee succeeds only to his assignor's rights, he takes only his interests and can claim no greater rights nor make it more burdensome for the mortgagor to redeem. He is not in any event entitled to compound interest.

The defendant claiming to be the absolute owner of the premises, should be treated as a wrong doer, acting in fraud of the rights of the mortgagor, and be held to account accordingly. To such wrong doer a different rule is applied than in accountings between mortgagor and mortgagee upon redemption. *Booth* v. *Balto. Steam Packet Co.*, 63 Md. 39; *Bank of Australasia* v. *United Hand in Hand Co.*, 4 App. Cases, 391–408; *Incorporated Soc.* v. *Richards*, 1 Drury & Warren, 334; *Gresham* v. *Ware*, 79 Ala. 192; *Russell* v. *Southard*, 12 How. 139–147; *Canal Bank* v. *Hudson*, 111 U. S. 66; *Stinchfield* v. *Milliken*, 71 Maine, 567–571; *Reed* v. *Reed*, 75 Maine, 264–270; Sto. Eq. Jur. 8th Ed. § 395.

By wrongfully erecting this structure upon the land of the complainant it became part of the realty and belonged to her, together with the rents and profits issuing from it, subject to his mortgages. *Bonney* v. *Foss*, 62 Maine, 248. His position is, in equity, the same as if the structure had been erected by a third person, stranger to the title, and he had collected the rents. *Merriam* v. *Barton*, 14 Vt. 501. Like any person who wrongfully puts improvements upon the land of another, he does so at his peril; he loses all he expends on it, whether it be on account of the original construction or of repairs, and he is liable for any rents or profits arising from it. *Green* v. *Biddle*, 8 Wheat. 1–79; *Bonney* v. *Foss*, supra; *Merriam* v. *Barton*, supra.

The rule for casting interest on mortgage debts, when partial payments have been made, is stated in *Pierce* v. *Faunce*, 53 Maine, 351, to have been conclusively and invariably acted upon. *Whitcomb* v. *Harris*, 90 Maine, 206, and cases cited. And the court has invariably refused to allow a mortgagee to compound interest upon

his debt, although the note secured by the mortgage may have expressly provided for compound interest.

A tender and refusal stopped the running of interest. *Brown* v. *Simons*, 45 N. H. 213; *McNeil* v. *Call*, 19 N. H. 403; *March* v. *The Railroad Company*, 19 N. H. 372; *Tucker* v. *Buffum*, 16 Pick. 46; *Brown* v. *Lawton*, 87 Maine, 86.

It was not necessary to bring the tender into court. *Colby* v. *Stevens*, 38 N. H. 191; *Tucker* v. *Buffum*, supra; *Richards* v. *Pierce*, 52 Maine, 561; *Hubbell* v. *Moulson*, 53 N. Y. 225, (13 Am. Rep. 519); *Bailey* v. *Metcalf*, 6 N. H. 156; *Graham* v. *Linden*, 50 N. Y. 547.

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

The master's report will not be disturbed or set aside or modified without clear proof of error or mistake on his part. *Paul* v. *Frye*, 80 Maine, 26, and cases.

Commissions:—*Ireland* v. *Abbott*, 24 Maine, 155; *Pierce* v. *Faunce*, 53 Maine, 351. It was the net rent and income from which the commissions that he "might have to pay" were to be deducted. What he had to pay was to be deducted from the net rent, not from the rent, or from the gross rent.

This is an equitable proceeding for a single redemption from two claims, the Merrill and Lane mortgages. The master might have made semi-annual rests on the Lane or Proctor claim, and applied all the rents to that, and thereby made the amount due on the two claims larger. He chose, however, to take a middle ground, allow one rest only on the Proctor claim, and instead of applying the rents to the extinguishment of that claim, or to the interest upon it, as he might have done, he favored the mortgagor by applying them on the other, the Merrill claim. This was quite as favorable to the mortgagor as she had any right to claim. Taking into account the two claims and their nature, it was equitable and proper, and was such treatment of the two claims considered as one, as the master had a right to adopt.

The court has decided in the previous decision in 88 Maine, 319, that defendant Hasty is a mortgagee only, and now plaintiff claims that the court in this proceeding here should hold

him to be not a mortgagee but a wrong-doer. The simple statement of the proposition ought to be a refutation of it. In every instance, and in which the title to the property was contested bitterly, and was the principal subject of the controversy, when the claimant has been decreed to account, he has been held chargeable only for the net rents or income; he has been allowed for all reasonable repairs and expenditures. *Howe* v. *Russell*, 36 Maine, 115, p. 127; *Mason* v. *York & Cumb. R. R.*, 52 Maine, 82, p. 104–5; *Whitney* v. *Leominister Savgs. Bk.*, 141 Mass. p. 89.

The contract of the parties fixed the rate of interest and that contract was lawful under the laws of this state. It provided what the rate of interest should be, and how computed, and that it should so continue until the whole sum was paid.

A court of equity will not decide against the plain provisions of law, nor against the plain provisions of the contract of parties made under the provisions of such law and conformable to that law. 2 Sto. Eq. Jur. 13th Ed. § 1549.

In regard to the new structure, a new house, which cost the respondent $3000, built upon the premises in the rear, the respondent must lose it, as it becomes property of the mortgagee. This, in addition to the payment of the costs of court, would seem to be punishment enough for the respondent. It is, however, well settled that although he cannot be allowed for such permanent structure, "he is not chargeable with the increased rents and profits which are directly traceable to the improvements made by him." 2 Jones on Mortgages, 1st Ed. § 1127; *Moore* v. *Cable*, 1 Johns. Ch. 385; *Bell* v. *Mayor, etc., of N. Y.*, 10 Paige Ch. p. 49.

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

HASKELL, J. Bill in equity to redeem land from an equitable mortgage. The cause came before the court and the bill was sustained and decree entered allowing the plaintiff to redeem, and the cause was sent to a master to take account of the amount due on the mortgage according to the opinion of the court in that case.

Upon the coming in of the master's report the court below accepted the same; and as some amounts were allowed in the alternative, it decided which of the same ought to be allowed and also allowed and disallowed certain other items in the accounting, to all of which the parties have exception.

The accounting must be had according to the rules laid down in our former opinion. So far as that has declared them it is conclusive, and they cannot be now considered anew. *Bradley* v. *Merrill*, 88 Maine, 319.

That opinion declares the relation of mortgagor and mortgagee, and allows redemption according to the rules recognized in such cases. Permanent improvements not necessary for the preservation of the property are to be disallowed. Those necessary for the preservation of the property and repairs to make the premises tenantable are to be allowed.

Do the rulings of the court below impinge upon the rule above laid down? One Merrill, under whom defendant claims, held an equitable mortgage. He had agreed to reconvey upon the payment to him of $6000, with compound semi-annual interest at the rate of 7 per cent per annum until paid, together with sums paid for repairs, taxes and otherwise, with interest on the same at the same rate from the time of such payment, and he agreed to account for the net rent and income, "deducting any commission that I may have to pay for collecting the same."

I. The court below allowed five per cent commissions on the rent collected as compensation for care of the property, and to this allowance plaintiff has exception. The rule in this state is to allow a charge of that sort in accounting between mortgagor and mortgagee, and it is equitable to sustain such allowance here. The net rent is ascertained after such allowance. From this it was agreed that mortgagee might deduct any commissions "that I may have to pay for collecting the same." No commissions were paid as he collected the rents himself. We think the allowance by the master was just and reasonable, and that it is not prohibited by the stipulation of the parties. That meant in addition for the care of

the property, procuring tenants, and looking after repairs and the like, any commission paid for collecting rents might also be charged. The amount allowed is $282.90. This exception must be overruled.

II. Defendant has exception to the refusal to compound his interest, as stipulated in the above agreement. It has been uniformly held in this state that compound interest cannot be recovered where the parties do not expressly promise to pay it. If interest be payable at stated periods before the principal falls due, and be not collected, the law will not imply a promise to pay interest upon such interest, and, in a suit to collect the debt and interest in arrear, compound interest cannot be recovered. The cases cited at the bar are all based upon such a statement of facts, and none of them apply to conditions where the promise to pay compound interest is express, but only where it is to be implied for the non payment of money after it becomes due and payable. *Doe* v. *Warren*, 7 Maine, 48; *Bannister* v. *Roberts*, 35 Maine, 75; *Kittredge* v. *McLaughlin*, 38 Maine, 513; *Stone* v. *Locke*, 46 Maine, 445; *Parkhurst* v. *Cummings*, 56 Maine, 155; *Whitcomb* v. *Harris*, 90 Maine, 206.

Where the promise to pay compound interest is express, it may be enforced just the same as any other contract. It is not usurious even. In *Otis* v. *Lindsey*, 10 Maine, 315, the note in suit was given in payment of other notes upon which the interest had been compounded, and it was held that the plaintiff might recover. The new note was an express promise to pay compound interest. In *Farwell* v. *Sturdivant*, 37 Maine, 308, the interest upon a mortgage note that called for interest semi-annually was compounded and a new note given for the amount. In computing the amount due a partial payment had been omitted, and in a bill to redeem, compound interest was allowed upon the express promise evidenced by the new note to pay it. In *Stickney* v. *Jordan*, 58 Maine, 106, a note payable with interest annually, given and payable in New Hampshire, was held to draw compound interest under the laws of that state, and that compound interest might be recovered here.

These authorities indicate that a promise to pay compound interest is valid and enforceable in this state. The court will not declare an implied promise, but will enforce one made by the parties.

In this cause there was no promise by plaintiff to pay either principal or interest, but in consideration of a loan by and the conveyance of land to the grantor of defendant he agreed to reconvey upon the payment of $6000, with compound semi-annual interest at the rate of seven per cent per annum until paid. By what process of reasoning can the defendant be required to reconvey until he shall have received the amount named as a condition precedent to such conveyance? The terms are express. Nothing is left to be implied or inferred. The parties plainly say what their contract was. It is not void under rules of law, and why should it not be enforced? Because the terms of the contract may have been hard is no good reason for disregarding it, even in equity, in the absence of fraud or incapacity to make it. We are compelled to recognize the plain agreement of the parties and therefore sustain the exception to a refusal to compound the interest accruing under its express terms.

III. Merrill had an equitable mortgage. There was a second mortgage upon the property of the same character, when Merrill conveyed to defendant. Merrill paid the second mortgage. He did not redeem, because it created no lien on the property to which his mortgage attached. It was a lien only on the equity of redeem ing Merrill's mortgage, so that, if it be not extinguished altogether, it must be considered as if assigned to Merrill. The title to both these mortgages passed to defendant irrespective of the forms of conveyance, and redemption of both is governed by the same rule. The allowing of the amount paid as a new principal was error and operated to charge interest upon interest to which the mortgagor did not assent and could not be compelled to. It is still an equitable mortgage and subject to redemption. Plaintiff's exception to the ruling below allowing the amount paid on account of the Proctor mortgage to be treated as a new principal upon which

interest should be cast, must be sustained. *Lewis* v. *Small*, 75 Maine, 323.

IV. Defendant built part of a double house upon the mortgaged premises, and plaintiff has exception to the refusal to charge defendant with rent of this house. In the former opinion it was decided that the cost or value of the new house should not be allowed defendant. Now it is claimed that he should be charged for the income of it. If the house itself cannot be considered an improvement so as to be allowed defendant, and he must lose it, on what doctrine of equity can he be charged with its rents? Should he lose both the house and the income of it? A hard doctrine that, for equity to enforce. This exception must be overruled.

V. The question of tender is not open on these exceptions and need not be considered. That, too, was disposed of in the original opinion. Moreover, it seems to have been settled below as matter of fact that there was no tender.

The result of this opinion is that the second exception, noticed in this opinion taken by defendant, and the third exception, noticed in this opinion, taken by plaintiff, be sustained and all other exceptions be overruled.

The alternative sum, $10,346.66, found by the master to be due on April 28, 1896, should be allowed, less $23.42, the amount of interest upon interest improperly allowed upon the Proctor mortgage, leaving the true sum as due on that date to be $10,323.24. From that date to the time of redemption an account should be taken in accordance with the doctrines of this opinion, and unless the parties agree, the cause should be sent to a master for the purpose.

The bill has been sustained with costs for plaintiff, to be recovered if she redeems. *Parkhurst* v. *Cummings*, 56 Maine, 160; *Cushing* v. *Ayer*, 25 Maine, 388.

Exceptions sustained. Master's report accepted for $10,323.24 as due April 28, 1896.

DELIA PERRY, and another,

vs.

FRED P. CARLETON, and another.

Lincoln. Opinion February 4, 1898.

Waters. Fish Weirs. Injunction. R. S., c. 3, § 63.

Revised Statutes, c. 3, § 63, applies 1st to weirs or wharves not built in accordance with c. 3, of the Revised Statutes. Second to weirs erected below low water mark, not removed annually. Third to such as are removed annually, when they obstruct navigation or interfere with the rights of others.

The statute gives the landowner the first right to erect a removable weir abreast his land, below low water mark. When he does not exercise the right, others may. He must either do it, or let his neighbors do it.

The defendants had maintained a removable weir abreast the plaintiffs' land several seasons prior to 1896. Early in that year defendants began to construct their weir. Plaintiffs procured an injunction in this cause against their doing so. They immediately removed their weir and have not used the privilege since. Neither does it appear that plaintiffs have done so. *Held;* that it is the actual use and appropriation that gives the landowner the benefit of the statute to protect his right of fishing, not an unexercised right to the use.

Equity applies the extraordinary remedy of injunction only where the cause is clear. *Held;* that this cause is neither clear, nor have the plaintiffs proved any actual or threatened injury to a vested right; and, moreover, the threatened intrusion has long since ceased;—hence there is no ground for equitable relief.

ON REPORT.

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

The plaintiffs alleged that they are the exclusive owners of a valuable fishing privilege upon the flats at the confluence of the Kennebec and Eastern rivers, in the town of Dresden, which privilege the respondents entered upon in the fishing season of 1896 and used to the exclusion of the plaintiffs and in derogation of their alleged rights and of the rights of their alleged lessee.

The bill prayed for the granting of a temporary injunction, upon the filing of a bond, restraining the respondents from building a weir upon said flats, or in any way, interfering with the complainants' lessee.

The respondent made answer to the bill and defended on two grounds: —

I. That they had built no weir on any flats, whether owned by the complainants, or others, but, on the contrary, they had built their weir for the season of 1896, and for several preceding seasons, entirely below low water mark, as they believed they had a legal right to do. And

II. That their weir was not subject to the restrictive provisions of R. S., c. 3, §§ 60–63, particularly § 63.

From the testimony introduced by the parties it appears that the locus is the peninsula formed by the confluence of the Kennebec and Eastern rivers. The southern end of this peninsula is owned by the plaintiffs, their farm containing about seventy-five acres.

From the lower end of this peninsula, and extending southerly in the Kennebec river, are several hundred acres of flats, the flats being about one and three-quarters miles long and from one-quarter to three-quarters of a mile wide, all of said flats being exposed at low water. On these flats are several valuable shad fisheries, some of which, including the one occupied by these defendants, the plaintiffs and their predecessors in title claim to have used themselves, or leased to others, since 1868.

Beginning with 1893, and in each year since, the respondents have erected a weir on practically the same spot, on the Kennebec side of the peninsula. These weirs are mere temporary structures, being erected about the first of May in each year and used during the months of May and June, and removed immediately after the twenty-fifth of June, because the taking of shad in weirs, after that date, is forbidden by law.

There was evidence tending to show that the plaintiffs had leased this privilege for the season of 1896 to one James A. Robinson, but Robinson had not occupied it, and it was entirely unused when the defendants began the erection of their weir. Robinson, as the alleged lessee of the plaintiffs, forbade the defendants from erecting a weir on this privilege, but showed them no lease, and

neither of the lessors ever intimated to the defendants that they claimed to own, or control this privilege.

A. M. Spear, for plaintiffs.

The real question before the court is, have these plaintiffs any rights under the testimony in this case which § 63 of c. 3, R. S., is bound to protect.

It may be claimed that this section of statute does not apply, as they had no rights by common law below low water mark. But it should be observed that sections 2 and 3 of c. 239, laws of 1883, dealt only with rights below, or as construed in *Donnell* v. *Joy*, 85 Maine, 121, beyond low water mark.

Judge VIRGIN in *Donnell* v. *Joy*, p. 120, supra, in discussing the purpose of the legislature says: "In view of such an obvious mischief, and for the purpose of protecting the owner of flats in the full, practicable enjoyment of his proprietary rights, the legislature took the subject matter in hand, and provided, among other things, in substance, that no one of the public should, upon land whether constantly or periodically overflowed by the tides, in which he had no proprietary interest but over which the State had control, plant a weir the natural operation of which would interfere with the rights of the owners of flats. And to make the statute efficient a penalty of $50 for each offense (statute 1885, c. 334) was provided, not, however, in the nature of a qui tam remedy—giving the penalty in part to whomsoever would sue therefor (Bouv. L. D.), —but wholly to the owner as a compensation for the injury to his proprietary rights. Statute 1883, c. 334."

This statute then was to protect "the owner of flats in the full, practicable enjoyment of his proprietary rights," against one having no proprietary interest.

These plaintiffs did not get the full, practical enjoyment of their proprietary rights in this fishing privilege. If let alone they would have received $25. By the interference of these defendants they lost it.

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

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

HASKELL, J. The contention of the plaintiffs is the sole right to maintain a weir opposite their own land in the waters of the Kennebec, a tidal and navigable river, below the ebb of the tide.

I. At the bar, plaintiffs' counsel abandoned all claim to the exclusive exercise of such right of fishing under the common law. Although the defendants' brief elaborately argues the question and exhaustively cites authorities applicable to their contention, we have no occasion to discuss it, as the plaintiffs' counsel abandons all claim upon that score. Our own cases are *Parker* v. *Cutler Milldam Co.*, 20 Maine, 353; *Duncan* v. *Sylvester*, 24 Maine, 482; *Moulton* v. *Libbey*, 37 Maine, 472; *Preble* v. *Brown*, 47 Maine, 284; *Matthews* v. *Treat*, 75 Maine, 594; *Parsons* v. *Clark*, 76 Maine, 476.

II. Plaintiffs ground their contention upon R. S., c. 3, § 63. That section provides: "No fish weir, or wharf shall be extended, erected or maintained, except in accordance with this chapter; and no fish weir shall be erected in tide waters below low water mark in front of the shore or flats of another, without the owner's consent, under a penalty of fifty dollars, to be recovered in an action of debt by the owner of said shores or flats; but this chapter does not apply to weirs, the materials of which are chiefly removed annually, provided, that they do not obstruct navigation nor interfere with the rights of others."

This and the two preceding sections consolidated various enactments of existing statutes, and to make clear the meaning of § 63 the legislature, by act of 1885, c. 334, entitled "An act to amend and make clear section 63," inserted the words "or maintain" after "erected" in line three, and the words "for each offense" after "dollars" in line four, and repealed all inconsistent acts, declaring the reading should be as in § 63, with above changes. This puts at rest all question about the subject to which the statute applies, viz:—

1st. To weirs or wharves not built in accordance with c. 3, R. S.

2d. To weirs erected below low water mark not removed annually; and

3d. To such as are removed annually when they obstruct navigation or interfere with the rights of others.

In the case at bar, defendants' weir did not obstruct navigation, so the question is, did it interfere with plaintiffs' rights? Defendants say no, for fishing is common below low water, and the plaintiffs have no superior right to fish there, and, therefore, no right of theirs has been interfered with. The plaintiffs say, yes, we had located a weir opposite our own land, and you dispossessed us by building a weir there before we had completed our own. The statute forbids the location of a weir in front of the land of another without his consent, and in awkward phrase, declares itself applicable to removable weirs, if they interfere with the rights of others. Defendants' weir was a removable weir. How did it interfere with plaintiffs' rights? They had no exclusive right of fishing there, but they had a right to build a weir there and then defendants could not invade it. When plaintiffs once appropriated the privilege of building their weir, then neither defendants nor any one else could lawfully dispossess them, any more than they could require them to remove a boat from a place where they were fishing so as to enjoy it themselves. The statute means to give the landowner the first right to erect a removable weir abreast his land. When he does not wish to exercise such right, then, any other person may. He must either use it, or let his neighbor do it.

Were the plaintiffs using this privilege? The evidence shows they were not, unless driving a stake in the river as a mark amounted to such use. The plaintiffs claim in their bill the exclusive right of fishing abreast their land. One of the plaintiffs testifies: "There is a fishing privilege opposite my flats, and we used to consider it a good one. Just before they [defendants] occupied it with their weirs I had leased it to Mr. Robinson here for the fishing season of '96. These defendants occupied the priv-

ilege which I had leased to Mr. Robinson. They did not ask my consent and I never gave it. I protested against their doing it. . . . . I told Mr. Robinson when I leased it to him to say to the defendants that he intended to occupy it, or to do the same as if it was his own."

It appears that defendants had occupied this privilege for three or four years, and that, when they came to build their weir in the spring, they saw a stake near where they intended to build. Robinson testifies: "I went to stick my stake there, I should judge about nine or ten feet from where they started theirs. . . . . After that stake was stuck I saw both the defendants together at the privilege, and I asked them if they were going to build there and they said they were. I says, I have leased this privilege of Mrs. Perry and intend to build myself, and of course we had more or less talk. I can't remember all. I says, I will see whether you will or not."

A preliminary injunction was granted in this cause, and the defendants immediately removed their weir, and there is no evidence that Robinson or any one else occupied the privilege after that.

The plaintiffs had claimed the exclusive right of fishing in the river below the ebb of the tide opposite their flats for many years; not because they were actually using the privilege themselves, but because the right was their property. And we do not feel sure that the claim now set up was made because Robinson actually had marked the spot and intended to appropriate it by building a weir that spring, but only intended to assert the plaintiffs' claim of exclusive right to do so. The defendants had used the privilege for three or four years, and when they begun to build in the spring of '96 they were forbidden to do so by Robinson for plaintiffs, and were immediately enjoined in this suit on bill dated May 7th. They immediately removed their weir and have not used the privilege since. This cause was finally heard in about a year, May 4, 1897. There is no evidence that Robinson or plaintiffs have since used the privilege, and there is a very strong inference that they never intended so to do. It is the actual use and appropriation

that gives the landowner the benefit of the statute to protect his right of fishing, not an unexercised right to do so. Equity applies the extraordinary remedy of injunction only where the cause is clear. This cause is neither clear, nor have the plaintiffs shown any actual or threatened injury to a vested right; and, moreover, the threatened intrusion has been long since abandoned. There is no equitable ground for relief.

Bill dismissed with costs.

JULIA FLYNN *vs.* MARGARET SULLIVAN.

Androscoggin. Opinion February 5, 1898.

Deed. Evidence. Rule of Court XXVI. R. S., c. 82, § 110.

When an office copy of a deed from the registry is read in evidence in a real action, a presumption of its execution and delivery arises; but when this presumption is rebutted by evidence, then further proof of execution must be made, or it fails to serve as proof of a conveyance.

ON MOTION BY PLAINTIFF.

This was a real action in which the plaintiff sought possession from the defendant, her sister, of a lot of land and the buildings thereon situate on Blake street in Lewiston.

Plea, the general issue with a brief statement, also, alleging the further defense of adverse possession. The jury returned a verdict for the defendant.

The facts are stated in the opinion.

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

Mere possession and receiving rents is not evidence of an ouster. *Wass* v. *Bucknam*, 38 Maine, 356.

A possession which gives title must be adverse for all the requisite time, and so notorious that the owner may be presumed to have knowledge that it is adverse. *Morse* v. *Williams*, 62 Maine, 446.

In *Eaton* v. *Jacobs*, 49 Maine, 560, court says, "It is true the evidence was conclusive of the tenant's possession for more than twenty years, but of no claim of ownership in her own right. The motion, then, to set aside the verdict as against the evidence, must be sustained."

If a tenant in common enters in the common property, and takes the whole rents and profits, without paying over any share thereof to his co-tenants, his possession is not to be considered adverse. *Thornton* v. *York Bank*, 45 Maine, 162.

Acts of defendant not even prima facie evidence of adverse possession. *Mansfield* v. *McGinniss*, 86 Maine, 118; *Hudson* v. *Coe*, 79 Maine, 83.

How can defendant claim title by adverse possession when she says that she never executed the deed? She could not all of this time have been claiming title adversely to McCarty because she says she never gave him title. With deed established the evidence precludes the claim of adverse possession against McCarty.

R. W. Crockett, for defendant.

In *Hewes* v. *Coombs*, 84 Maine, p. 434, we find a case very parallel to this. It seems that the plaintiff in that case introduced in evidence a deed from the husband of the defendant to one Hewes the ancestor of the plaintiff. After this sale of land we find the grantor occupying the premises paying the taxes and making improvements, his heirs continuing as he had done. These facts it appears were taken as conclusive evidence of a repudiation of the deed and the open exclusive and adverse possession, continuing for twenty years, by arbitrary rules of law worked a title. In the case under discussion we have an almost similar state of affairs. After the alleged conveyance of 1875 we find our grantor in continual occupation—open, notorious, exclusive and adverse,—we find her from preceding testimony paying the current expenses, making improvements; in fine doing those same things that in the above quoted case consummated a repudiation of title and in time worked a disseizin. And it is a noticeable fact that nowhere in the testimony is there a shadow of a denial of this fact.

"It is better that the negligent owner, who has omitted to assert his right within the prescribed period, should lose his right, than that an opening should be given to interminable litigation, exposing parties to be harassed by stale demands, after the witnesses of the facts are dead, and the evidence of the title lost." *Brackett* v. *Persons Unknown*, 53 Maine, 238.

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

HASKELL, J. Writ of entry to recover land. Plea, nul disseisin. The burden rested upon plaintiff to prove title to the land demanded. To do this plaintiff read in evidence a deed from defendant to Daniel McCarthy, her brother, dated December 14, 1875, and a subsequent deed from his son and sole heir, he being dead, to herself.

The defendant testifies squarely that she did not sign or give the deed. It was signed by mark and witnessed and acknowledged by and before a justice of the peace. Whether the original or a copy of its record was read does not appear. A copy from the record is sent up and we suspect was used at the trial. If the original were read its execution must be proved if denied. If the copy were used, such proof in the first instance would not be required, R. S., c. 82, § 110, Rule XXVI, but it only raised a presumption and served as prima facie evidence of its execution and delivery. If this presumption be rebutted, then further proof of execution and delivery must be made. *Whitmore* v. *Learned*, 70 Maine, 276; *Webber* v. *Stratton*, 89 Maine, 379.

The facts in this case are that either a copy of the record or the original deed was read in evidence without any proof whatever of execution and delivery. Defendant as a witness denies both. Certainly her denial called for more proof than mere production of the document. Her brother had some pork in her cellar that was damaged by water from the street. He asked her for her deed, the deed to her, presumably, to claim damages of the city, and she gave it to him and he returned it in about a year. She occupied,

controlled and repaired the premises ever since she purchased them in 1865. This brother became a pauper and she took him from the poor farm about six years ago and supported him at her house until he died, some three years after. The plaintiff, a sister of defendant, now claims by conveyance from the sole heir of this brother, and the question is whether he had a deed from the defendant, that she denies. She is infirm, nearly blind and well along in years. From her testimony and the circumstances of the case and her continued occupation and control of the property it may well be said that any presumption arising from the production of her supposed deed, without further proof of execution, is fairly rebutted. Plaintiff's chain of title is, therefore, broken.

Motion overruled.

TIMOTHY BERNARD *vs.* DENNIS D. MERRILL, and others.

Androscoggin. Opinion February 5, 1898.

Parent and Child. Guardian. Judgment. Exceptions. New Trial. Negligence.

A father is the natural guardian of his infant children and is, therefore, the proper person to conduct litigation in their behalf, and to control the same as next friend, unless his interests be hostile or he be guilty of some default or neglect.

Any judgment that he may procure belongs to the child, and it is doubtful if he can discharge the same, as that is the duty of a legal guardian.

In law, a father, is a different person individually than when acting for the child and in its stead; and any judgment against him while so acting concludes the rights of the child only, and not those of the father.

Held; that a judgment in favor of the defendants against the child previously recovered by them on the same facts is no bar to an action for the same injury brought by the father subsequently.

Exceptions will not be sustained for refusing to give the jury requested instructions when it appears that they were fully given in the charge.

A new trial will not be granted when the evidence is conflicting and peculiarly within the province of a jury to consider, and their verdict cannot be said to be erroneous.

ON MOTION AND EXCEPTIONS BY DEFENDANTS.

This was an action of tort for loss of services of the plaintiff's minor daughter alleged to have been injured by the defendants' negligence in setting her at work on a machine claimed to be dangerous, without having been instructed by the defendants as to its dangerous character. The defendants pleaded the general issue and brief statement as follows: That this suit ought not to be further prosecuted against them because they say that heretofore the plaintiff in his capacity as next friend to Florence K. Bernard, the person in this suit alleged to have been injured by the fault of the defendants, sued out a writ against them returnable to this court wherein the same negligence and none other was charged against them as in this suit; that he conducted said suit and on the thirtieth day of April, A. D. 1896, on issue duly joined, a verdict was rendered against the plaintiff and judgment was duly rendered thereon May 9, 1896, in favor of them the said defendants, which said judgment remains in full force and not reversed or annulled, etc.

The presiding justice ruled, that the facts set out in the brief statement (which were admitted by the plaintiff) would not be a bar to the present suit.

The defendants also requested the presiding justice to give to the jury certain instructions, and which he declined to do.

These requested instructions are stated in the opinion.

To these rulings and instructions and refusal to instruct, the defendants took exceptions.

Verdict for plaintiff for $612.50.

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

Tascus Atwood, for defendants.

One who though not a party defends or prosecutes an action by employing counsel, paying costs, and by doing those things which are usually done by a party, is bound by the judgment rendered therein. *Stoddard* v. *Thompson*, 31 Iowa, 80.

Says PETERS, J., in *Lander* v. *Arno*, 65 Maine, p. 29: "The general rule is, that a person cannot be bound by a judgment, when he is not a party thereto, unless he had a right to appear and take

part in the trial, and control or help control the proceedings and appeal from the verdict or decree obtained therein."

Tested by the rule above quoted, this plaintiff should be held to be a party and be concluded by the first verdict and not be allowed another "run for luck." Our court is on record to the effect that the rule, that "estoppels must be mutual" shall no longer be a criterion in determining whether or not a former judgment is a bar. *Atkinson* v. *White*, 60 Maine, 396.

The father besides conducting prior suit and being the party as tested by above law was in fact the party in interest. It is his duty to support his minor daughter and therefore any money she might have obtained would benefit him directly.

There are many cases where a person though not a nominal party to the suit shall yet be concluded by it because he has in fact taken the management of the cause. *Jackson* v. *Griswold*, 4 Hill, 530.

If the issue settled by prior judgment was essential in second suit, judgment conclusive. Sections 534, 535 Greenl. Ev.; *Lovejoy* v. *Murray*, 3 Wall. 1; *Robbins* v. *Chicago*, 4 Wall. 657.

Contributory Negligence: — Wood, M. & S. §§ 328, 372–3, 382 and 402; *Nagle* v. *Alleghany Valley R. R. Co.*, 88 Pa. St. 35; *Tucker* v. *N. Y. Cent. & H. R. R. Co.*, 124 N. Y. 308; *Ludwig* v. *Pillsbury*, 35 Minn. 256; *Reynolds* v. *N. Y. Cent. & H. R. R. Co.*, 58 N. Y. 248; *Atlas Engine Works* v. *Randall*, 100 Ind. 293; *Tinkham* v. *Sawyer*, 153 Mass. 485, and cases cited; *Pratt* v. *Prouty*, Id. 333; *Crowley* v. *Pacific Mills*, 148 Mass. 228.

Counsel also cited: — *Wormell* v. *Me. Cent. R. R. Co.*, 79 Maine, 397; *Roberts* v. *B. & M. R. R.* 83 Maine, p. 304; *Shanny* v. *Androscoggin Mills*, 66 Maine, p. 42.

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

HASKELL, J. This is an action by a father for loss of service of his child, an infant, from an injury suffered by the child in the employ of defendant occasioned by his negligence.

The defendant pleaded in bar of the action a judgment in his favor in a suit by the child for the same injury, which was prosecuted by the father as next friend. The bar was overruled below and the defendant has exception.

It is contended that the prosecution of the child's suit by the father comes within the rule given in *Lander* v. *Arno*, 65 Maine, 29, "that a person cannot be bound by a judgment when he is not a party thereto, unless he had a right to appear and take part in the trial, and control or help control the proceeding and appeal from the verdict or decree obtained therein," or, as said by Bigelow, 99, "assumed such right."

The father is the natural guardian of his infant children. It is for him to consider in what way they should be maintained and educated, and to judge what is for their benefit both as regards their persons and estates. He is, therefore, the proper person to conduct litigation in their behalf, and to control the same as next friend, unless his interests be hostile or he be guilty of some default or neglect. *Woolf* v. *Pemberton*, L. R. 6 Ch. Div. 19; *Rue* v. *Meirs*, 43 N. J. Eq. 377.

The next friend, although not liable for costs in this state, *Leavitt* v. *Bangor*, 41 Maine, 458; *Soule* v. *Winslow*, 64 Maine, 518; *Sanford* v. *Phillips*, 68 Maine, 431, may control the prosecution of the suit. Even should the infant employ counsel, who procures the suit dismissed, the entry would be void, because the infant could not appear by attorney as the employment would be null. *Wainwright* v. *Wilkinson*, 62 Md. 146.

The doctrine of these authorities gives a father, except for cause, the right as next friend to control the litigation of his infant children. No matter whether he does or no, he has the right to. Does this right so far make him a party to the suit as to personally bind him by the result? This right, while a personal one, is to be exercised for the child. The suit is the child's suit. Damages recovered belong to the child. It is doubtful if the father, who prosecutes as next friend can discharge the judgment, as it is said his authority is only commensurate with the writ. *Miles* v. *Boyden*, 3 Pick, 219; *Linton* v. *Walker*, 8 Fla. 144; *Perry* v. *Carmichael*,

95 Ill. 519; *Clark* v. *Smith*, 13 S. Car. 585; *Jackson* v. *Combs*, 7 Cow. 36; *Rotheram* v. *Fanshaw*, 3 Atk. 628; *Tripp* v. *Gifford*, 155 Mass. 108; *Johnson* v. *Waterhouse*, 152 Mass. 585. He, in law, is a different person individually than when acting for the child and in its stead, although his right to so act flows from the parental relation. He cannot individually have the fruit of the litigation, although indirectly he may be benefited thereby. The authorities sustain this view. In *Marshall* v. *Rough*, 2 Bibb, 628, a judgment against a man individually concerning the title to land was held no bar to a subsequent suit for the same land by infants prosecuted by him as guardian and next friend. In *Leavitt* v. *Bangor*, supra, it is held that the next friend, who prosecutes the suit, was not a party so as to exclude his wife as a competent witness for the plaintiff.

The rule is very neatly stated by Quain, J. in *Leggott* v. *Grt. Northern Railway Co.*, 1 Q. B. Div. 606: "It must be observed that a verdict against a man suing in one capacity will not estop him when he sues in another distinct capacity, and, in fact, is a different person in law." There, an administratrix sued under Lord Campbell's Act and recovered 500 £ damages for the family of the intestate who lost his life from the fault of defendant. Afterwards she sued for damages resulting to his estate from the same injury, and invoked the former judgment as an estoppel on defendant to deny its liability. The court held no estoppel. That is the reverse of the case at bar, but in principle exactly applies. If the plaintiff be estopped, had he recovered in the former action for the infant, the defendants would now be estopped to deny liability for the injury, for estoppels must be mutual, as a rule. But the doctrine of *Leggott* v. *Railway*, supra, forbids such an estoppel.

Estoppels arise between the same parties when litigating the same subject matter in a subsequent suit in the same right or capacity, and not otherwise. *Stoops* v. *Woods*, 45 Cal. 439; *Bigelow* v. *Winsor*, 1 Gray, 299; *Bartlett* v. *Boston Gas Light Co.*, 122 Mass. 209; *Lord* v. *Wilcox*, 99 Ind. 491; *Rathbone* v. *Hooney*, 58 N. Y. 463.

A good example of estoppel upon persons not parties is found in *Landis* v. *Hamilton*, 77 Mo. 554; *Stoddard* v. *Thompson*, 31 Iowa, 80; *Lovejoy* v. *Murray*, 3 Wall. 1; *Atkinson* v. *White*, 60 Maine, 396.

In *Corcoran* v. *Canal Co.*, 94 U. S. 741, the plaintiff, as the owner of certain bonds secured with others by mortgage to himself as a trustee, was held estopped by judgment to which he was a party as trustee, because he there, as trustee, represented himself as a bondholder. He became bound in common with other bondholders. This case, therefore, is not authority against the doctrine of this opinion. The plaintiff may well maintain his present action. *Wilton* v. *Middlesex Railroad Co.*, 125 Mass. 130.

The defendants have another exception to the refusal of the court below to give a certain requested instruction.

The main issue before the jury was whether the plaintiff's minor child received a personal injury while at work in defendant's laundry wholly from their negligence. She injured her hand in a mangle, and defendants contended, and there is evidence tending to prove their contention, that they had forbidden her to work at the mangle. The presiding justice, at the close of the charge, was requested to instruct the jury that "if they find as matter of fact that Mr. Merrill (one of defendants) forbade her feeding the mangle, it wasn't necessary for him to stop and explain its dangers; that if she returned to the mangle after being expressly forbidden, she took her own chances of injury and would be remediless in a suit by any one in her behalf." The instruction was refused, the court remarking, "I think I have covered all the ground I care to in that matter."

Upon that point, the court, after thoroughly charging upon all other issues in the case, said to the jury: "If you find that the defendants were not negligent, under the rules I have given you, or that Florence (the plaintiff's child) was there (at the mangle) without direction or permission or assent of the defendants, or if you find that she was there with full knowledge from any source of the danger of the machine so that she was properly and fully instructed, or that the accident happened from her own inatten-

tion and carelessness, on either of these grounds your verdict will be for defendant." This instruction fully covered the instruction requested, and need not have been repeated.

The evidence was conflicting and peculiarly within the province of a jury to consider, and their verdict cannot be said to have been erroneous.

Motion and exceptions overruled.

CHARLES S. SANBORN *vs.* ERNEST E. FICKETT.

Kennebec. Opinion February 4, 1898.

Slander. Damages.

The court refused to grant a new trial in an action for slander, brought by a young man of good reputation against a country trader, who discharged the young man from his employ and afterwards accused him of theft; and the plaintiff recovered a verdict of $437.50.

The court cannot say that the verdict is either against the evidence or too large. The jury saw the parties and could best judge what damages would fit the case, and the court cannot discover that they were actuated by prejudice or any other improper motive.

ON MOTION BY DEFENDANT.

The case appears in the opinion.

L. T. Carleton, for plaintiff.

R. W. Crockett, for defendant.

SITTING: EMERY, FOSTER, HASKELL, WHITEHOUSE, STROUT, SAVAGE, JJ.

HASKELL, J. This is an action for slander. The verdict was $437.50. The writ contains four counts. The first count charges the accusation of stealing both goods and money. The second and third counts of stealing money. The fourth count of stealing money more than once.

The defense is that, if the words were spoken, they were spoken

without malice and under a belief that they were true, and in answer to inquiries caused by the defendant and therefore privileged. It is contended that the damages are excessive. Upon these grounds a new trial is asked.

It appears that plaintiff had been at work for defendant some months as clerk in his grocery store in a country village, and was discharged; that one Cunningham who knew of the discharge, thereafterwards went into defendant's store and asked defendant if he thought plaintiff had been taking money from him. Defendant replied, "he did. He knew he had." Cunningham further asked defendant "if he did not think that was a serious charge to make against him. He said it was." Cunningham further asked defendant "if he could not be mistaken. He said no, there was no mistake about it, his accounts were four dollars and some odd cents deficient, and there was no other way but that he took it." . . . . "He said that was not the first; that he had been watching him for some time, and if he let him go in that way he would soon have the whole business." There is no evidence that any other person heard the conversation.

Cunningham doubtless informed plaintiff of defendant's accusation and next day plaintiff, Cunningham and one Boynton called on defendant and Cunningham, plaintiff and Boynton testify, with variation of memory between them, in substance, that plaintiff called upon defendant for an explanation of his charge, or a retraction, and that defendant did neither one, but substantially repeated the accusation made to Cunningham the day before.

If these witnesses be believed, certainly the plaintiff's contention before the jury was sustained. The defendant's first accusation to Cunningham was made without the knowledge or request of plaintiff and was inexcusable, if untrue. The supposed shortage was trifling, and could hardly justify making a charge that would be extremely damaging to the plaintiff, a young man with his living to earn, who appears to have always borne a good reputation. He naturally wanted to have no mistake that defendant had accused him of theft to Cunningham, and therefore the three before mentioned waited upon defendant to make certain whether he meant to

charge defendant with stealing from him. They found out that he did so intend, and therefore this suit was very properly brought. The accusation made to Cunningham, if true, will sustain the action, whether the second interview be privileged or no.

We cannot say that the verdict is either against the evidence or too large. The jury saw the parties and could best judge what damages would fit the case, and we cannot discover that they were actuated by prejudice or any other improper motive.

Motion overruled.

FORREST SANBORN *vs.* WARREN C. GERALD.

Kennebec. Opinion February 4, 1898.

Slander. Evidence. Burden of Proof.

In an action for slander, where the defendant justifies the supposed slander as true, it is error to charge the jury that the defendant must satisfy them by a preponderance of the evidence by clear and convincing proof that the words were actually true in order to exonerate himself from liability for having uttered them.

French v. *Day*, 89 Maine, 441, affirmed.

ON EXCEPTIONS BY DEFENDANT.

This was an action on the case for slander and tried to a jury of the Superior Court for Kennebec county, who returned a verdict for the plaintiff. The defendant took exceptions to the charge to the jury as appears in the opinion.

W. C. Philbrook, for plaintiff.

S. S. and F. E. Brown, for defendant.

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

HASKELL, J. Upon the trial the defendant justified the speaking of words charged to be slanderous as true. The presiding justice charged the jury: "Now the burden of this branch of the

case is upon the defendant. He must satisfy you by a preponderance of the evidence by *clear and convincing proof* that the words were actually true in order to exonerate himself from liability for having uttered them."

Exceptions were sustained to the rule above given in a case from the same court in *French* v. *Day*, 89 Maine, 441. The opinion in that case disposes of this one.

Exceptions sustained.

HARTWELL LOVEJOY *vs.* INHABITANTS OF FOXCROFT.

DAVID GRIFFITH, Executor, *vs.* SAME.

HENRY A. DUNHAM *vs.* SAME.

SUSIE E. GOULD *vs.* SAME.

ANNIE B. EMERSON *vs.* SAME.

Piscataquis. Opinion February 24, 1898.

Towns. Power to borrow money. Debts. Evidence. Burden of Proof. Treasurer. Const. Limit. Art. XXII, Const. of Maine.

1. In the absence of special legislative authority a town can borrow money only for the discharge of those duties and liabilities imposed upon it by law.
2. The amount a town can so borrow is strictly limited to the amount necessary for such purpose.
3. The fact that a town officer or agent has borrowed money upon the credit of the town and expended it in the discharge of some town duty or liability does not bind the town to repay the money.
4. To render a town liable to repay money borrowed and expended for it, by any town officer or agent, the town must have previously authorized or subsequently ratified such borrowing by vote in legal town meeting upon a sufficient article in the warrant.
5. When a town officer or agent, authorized to borrow money for the town, has once borrowed the full amount authorized, his power to borrow ceases, and he cannot bind the town to repay any money thereafter borrowed by him under that vote.

6. If, pending the action of a town officer or agent under such a vote, other provision is made doing away with the need of such borrowing the power of such officer or agent falls.

7. A town treasurer, virtute officii, has no authority to borrow money upon the credit of the town for any purpose. He must be specially authorized by vote before he can bind the town.

8. A power and a vote to borrow money for one specific purpose will not sustain a loan to the agent for another and unauthorized municipal purpose even though the money so loaned was actually applied to such purpose.

9. If the town has the authority to borrow and by vote empowers its treasurer under that authority and the treasurer, acting within both the authority and the vote, does borrow and receive the money upon the credit of the town under such authority and vote,—the town is liable to the lender even though the money went not to its use but was embezzled by the treasurer.

10. A town without special legislative authority can borrow money to pay its lawful debts, and can arrange with its creditors for the payment, extension or renewal of such debts, and can evidence such arrangements by new notes or otherwise.

11. Upon the question of the existence of town debts, a report of the town treasurer of the amount of the debts of the town made to a legal town meeting and certified by the selectmen and auditor to be correct, and not questioned by the town, is prima facie evidence against the town of its then indebtedness to that extent.

12. In determining whether the debts or liabilities of a town are up to the constitutional limit of indebtedness, uncollected taxes, the town farm, and other property owned or held by the town cannot be deducted.

13. Where the vote of a town to borrow money does not specify that it is in anticipation of the collection of taxes already assessed and to be repaid out of them, the presumption is that it increases the town's debts or liabilities to that extent, and hence is within the constitutional prohibition.

14. Upon the question whether a town officer or agent had at any given date already exhausted his power to borrow, so that the town would not be liable for his subsequent borrowings, and also upon the question whether the town's indebtedness at any given date exceeded the constitutional limit, the burden of proof is on the town.

15. A list of notes in the handwriting of such officer or agent and purporting to be a list of notes outstanding against the town, is not competent evidence for the town in support of such burden of proof.

On Report.

These were all actions upon promissory notes given by the treasurer of the defendant town and in its name, and all of the same general form. The note in the first action was in the following form:

"$300. FOXCROFT, Feb. 15, 1883.

For value received, we, the inhabitants of the town of Foxcroft, by Elias J. Hale, treasurer thereof, duly authorized by vote of said town to hire money, promise to pay Hartwell Lovejoy, or order, three hundred dollars on demand and interest at four per cent. Payable at the treasurer's office in Foxcroft.

ELIAS J. HALE,
Treasurer of Foxcroft."

"(INDORSEMENTS.)

Foxcroft, Feb. 17th, 1887, rec'd four years' int., $48.00
Foxcroft, Feb. 27th, 1890, rec'd four years' int., $36.00"

Plea, general issue. The defendants also filed a brief statement in which they set up the statute of limitations as a further defense.

The cases are stated in the opinion.

Frank E. Guernsey, for Lovejoy.

A. M. Robinson, H. J. Cross; Frank E. Guernsey, for Griffith and Gould.

J. B. Peaks, for Dunham and Emerson.

W. E. Parsons and H. Hudson, for defendant.

SITTING: EMERY, FOSTER, HASKELL, WHITEHOUSE, STROUT, SAVAGE, JJ.

EMERY, J. These are actions at law by which the several plaintiffs seek to recover judgments against the town of Foxcroft for money delivered to its treasurer, Elias J. Hale, at his instance, and supposed to have been thereby loaned to, and hired by the town itself. The character of some of the arguments for the plaintiffs impels us at the outset to again emphasize the often stated difference between a town and an individual, or corporation, in respect to its pecuniary duties and liabilities.

Towns in Maine, as in the other New England states, are territorial divisions into which the territory of the State is divided by the legislature for political purposes,—for the more convenient and effectual administration of certain functions of political government.

The inhabitants of the particular territory are made a political agency, and particular duties and liabilities for purposes of administration are imposed upon them even without their consent. They are not a voluntary association. They cannot escape the duties and burdens imposed, except by a removal of themselves and their property from the town territory. It is clear that such agencies are subject to such duties and liabilities only as are expressly, or by necessary implication, imposed upon them by the legislature to effectuate the purpose of their creation. The powers of a town over the inhabitants and property within its territory are correspondingly limited to such as are necessary for the efficient discharge of those duties and liabilities;—and even these limited powers are to be exercised upon the citizen and his property only with such precautions and in such manner as may be prescribed by the State. Any effort to exercise any of these powers in any other way would be nugatory. The citizen, the tax-payer, can ignore any action or attempted action not strictly in accordance with the course prescribed. In the case of New England towns, especially, the interests and immunities of the citizen are and must be scrupulously guarded, since his private property can be taken upon a judgment against his town. Such a severe liability requires that the powers and proceedings of towns in New England, at least, should be construed with great strictness in his favor.

It follows that a town cannot assess or borrow money except for purposes strictly within the line of its duty. It can effectually act, even in such cases, only in legal town meeting, called, notified and held in the manner prescribed by law. The particular subject matter upon which action is called for must be distinctly specified in the notice. If any prescribed step is omitted, the inhabitants and hence the town itself are not bound by the result. Whoever deals with a town or its officers must bear in mind these bulwarks about the property of the inhabitants of the town, and make sure before hand, not only that the proposed contract is clearly within the legal powers of the town, but also that such power is exercised in the legal mode.

It should not now, after three-quarters of a century of statehood,

be necessary to cite statutes and decisions in support of the foregoing statement of the nature of the duties and liabilities of a town, and its consequent powers over the property of its citizens, —but for various descriptions of them, see *Thorndike* v. *Camden*, 82 Maine, 39, and cases there cited; *Clark* v. *Tremont*, 83 Maine, 426; *Otis* v. *Stockton*, 76 Maine, 506; *Hurd* v. *St. Albans*, 81 Maine, 343; *Bessey* v. *Unity*, 65 Maine, 342; *Paine* v. *Boston*, 124 Mass. 486; *Carter* v. *Cambridge and Brookline Bridge Props.*, 104 Mass. 236; *Meriwether* v. *Garrett*, 102 U. S. 472; *Bloomfield* v. *Charter Oak National Bank*, 121 U. S. 121; *Marsh* v. *Fulton*, 10 Wall. 676.

It must be apparent, after consideration of the cases cited and of the other cases upon the subject, that a claim against a town cannot be supported and enforced solely upon the general principles of equity and good conscience applied to individuals and corporations. A town is never estopped from invoking the defense of ultra vires. *Syracuse Water Co.* v. *Syracuse*, 116 N. Y. 167.

The cases at bar, however, concern, chiefly if not solely, the power of a town to borrow money, and how that power must be exercised to bind the inhabitants of the town to answer therefor out of their individual property.

That a town, in the absence of statute or constitutional restriction, has power to borrow money for a legal town purpose and within the limits of that purpose, without special statute authority, is now conceded. If money is needed for the performance of a town duty and the state has not commanded an assessment of taxes for it, the majority of the inhabitants of a town acting in a legal town meeting under a sufficient warrant can bind all the inhabitants in determining to borrow part, and even all, of the money rather than raise it at once from taxes. *Clark* v. *School District*, 3 R. I. 199; *Baileyville* v. *Lowell*, 20 Maine, 178; *Belfast Bank* v. *Stockton*, 72 Maine, 522; *Brown* v. *Winterport*, 79 Maine, 305. But this power of a town to borrow money is strictly limited to money necessary for the discharge of its legal liabilities. It is limited in amount as well as in purpose, and it must be exercised by the town in town meeting upon proper warrant, and by vote

either authorizing the act of borrowing before hand, or afterward ratifying the prior act. It is not enough that the money was paid to some town officer and by him used in discharging some legal duty or liability of the town. A highway surveyor cannot borrow money, and expend it on the roads within his jurisdiction, and thereby bind the town to repay the money. There must be legal action in legal town meeting before the town becomes legally liable. Such is now the established law in this state. *Otis* v. *Stockton*, 76 Maine, 506; *Brown* v. *Winterport*, 79 Maine, 305; *Hurd* v. *St. Albans*, 81 Maine, 343. Such is also the law in Massachusetts whence we derived our town system. *Dickinson* v. *Conway*, 12 Allen, 487; *Railroad National Bank* v. *Lowell*, 109 Mass. 214; *Agawam Bank* v. *South Hadley*, 128 Mass. 503; *Brown* v. *Melrose*, 155 Mass. 587. See also *Bloomfield* v. *Charter Oak National Bank*, 121 U. S. 121.

The town treasurer is not the town's financial agent, and has no power whatever, as such, to bind the inhabitants of the town to repay money borrowed by him for the town and used by him in discharging liabilities of the town. He has no more power than a highway surveyor in this respect. He is unlike the cashier of a bank or the treasurer of a trading corporation. He is simply a public officer charged, by law not by the town, with the duty of receiving and guarding the public money and disbursing it upon lawful warrant. See cases last above cited and also *Abbott* v. *North Andover*, 145 Mass. 484.

When, however, a town has the power to borrow money, it may borrow through an agent appointed for that purpose, and may appoint its treasurer such agent. The treasurer's power in such cases is strictly limited, in the first instance to the power of the town, and in the second instance to the terms of the vote of the town meeting. A town cannot borrow upon the credit of its inhabitants more money than it actually needs for the specified purpose; and its agent, whether the treasurer or some other person, cannot borrow more money, nor for any other purpose, than is specified by the terms of the vote. When the need of the town is supplied, or the limit of the vote is reached, the power of the agent

is exhausted, and he cannot bind the town further. All persons proposing to loan money upon the credit of a town should make sure of the town's authority,— of its agent's authority,— and that the authority of each is still in force unexhausted and applicable to the proposed loan. A few cases will illustrate the strictness of this rule. In *Butterfield* v. *Melrose*, 6 Allen, 187, it was held that the treasurer, under a vote authorizing him to borrow money, could not bind the town to pay commissions to a broker. In *Lowell Savings Bank* v. *Winchester*, 8 Allen, 109, the treasurer was authorized by vote to borrow $2,000, and give the town's note therefor. He borrowed $2,000 of one party, and then took a certified copy of the vote to the bank, upon the strength of which the bank in good faith, without notice of the previous borrowing, loaned $2,000, as to the town and took the prescribed town note. *Held*, that the treasurer's authority had been exhausted and that the bank could not recover from the town. In *Benoit* v. *Conway*, 10 Allen, 528, the town voted that the treasurer "be authorized to borrow such sums of money as may be necessary for the adjustment of" a specified tax due the state. The tax was soon afterward adjusted by the town officers in another way, but notwithstanding such adjustment the treasurer subsequently borrowed money of the plaintiff as for the town under that vote. It did not appear that the plaintiff had any notice of the previous adjustment of the tax, yet it was held, that the need for borrowing having passed, the power to borrow had ceased, and that the act of the treasurer was not binding on the town. In *Abbott* v. *Andover*, 145 Mass. 484, the town voted that the treasurer "hire money for the use of the town." *Held*, that such a vote gave him no authority to give a new town note in renewal of an old one. In *Bessey* v. *Unity*, 65 Maine, 342, the town voted "to empower the agent to hire money to furnish men (at a fixed price) to fill quota" (the town's quota of men under a military conscription). *Held*, that it was incumbent upon the plaintiff, who had loaned money under that vote, to show what number of men was necessary to fill the quota, otherwise it could not be known whether the sum loaned was needed and within the power of the town and its agent to

borrow. In *Benoit* v. *Conway*, supra, it was also held that the approval of the accounts of the town's financial agent by its municipal officers or committees did not bind the town. The same was also held in *Porter* v. *Stanley*, 47 Maine, 518.

We have thus at length again stated the narrow limits of the power of a town and of its officers and agents to bind its inhabitants by any contract for borrowed money, and have again cited familiar illustrative cases. We have done so in the hope that hereafter, at least, persons proposing to intrust their money to any town officer or agent upon the credit of the town will understand,—(1) that they cannot safely assume that the town, or its officer, has any authority to bind its inhabitants to repay the loan,—(2) that if such authority does not really exist, still unexhausted and potent in the town and its agents unhampered by any statute or constitutional limitation, or is not exercised in the prescribed manner, or is not made good by subsequent authorized action of the town in town meeting, they cannot recover their money back from the town,—and (3) that in case of such improvidence upon their part, the court cannot weaken or bend the law to save them from the consequences of their improvidence.

On the other hand, the citizen of the town cannot safely rest supine. There is imposed upon him the duty of watchfulness and discreet action in town affairs. The town is not without freedom of action to bind its citizens within the narrow limits of its powers. Assuming the subject matter to be within the powers of the town and to be legally before the citizens in legal town meeting, the majority can bind the town and all its citizens by its action upon that subject matter within the limit of the town's power. What of its legal power to exercise,—to what extent,—when and how to exercise it,—are questions for the town meeting to decide by majority vote, (except of course where the legislature has assumed to predetermine such questions.)

It may be lawfully voted, also, to refer more or less of such questions to the judgment and discretion of officers and agents, and to empower them to bind the town by their action in the premises. While the power of the agent can never exceed the power of the

town, however ample the vote appointing or empowering him may be, and while his acts must be within both the town's power and the town's vote, yet if his acts be within both, then the town and its citizens are bound by them however unwisely broad and liberal the vote. *Veazy* v. *Harmony*, 7 Maine, 91; *Ford* v. *Clough*, 8 Maine, 334; *Bean* v. *Jay*, 23 Maine, 117; *Vose* v. *Frankfort*, 64 Maine, 229; *Canton* v. *Smith*, 65 Maine, 203; *Woodcock* v. *Calais*, 66 Maine, 234; *Bucksport & Bangor R. R. Co.* v. *Buck*, 68 Maine, 81, 85; *Williard* v. *Newburyport*, 12 Pick. 227; *Friend* v. *Gilbert*, 108 Mass. 408; *Campbell* v. *Upton*, 113 Mass. 67; *West Bridgewater* v. *Wareham*, 138 Mass. 305.

When the money is once lawfully borrowed by the town under sufficient authority within any statute or constitutional limitation and has passed into the possession of the officer lawfully authorized to receive it, the lender is not affected by any subsequent misconduct of that agent, or any other town officer, nor by any subsequent mal-administration of town affairs.

The citizens of the town, not its creditors, have the duty of watchfulness over town affairs, town funds and town officers and agents. If they are remiss,—if they choose dishonest or incompetent officers,—if they omit to require ample guarantee,—if they accept their reports without examination,—and the funds lawfully borrowed or raised by taxation are embezzled or wasted, the loss must fall upon the inhabitants, and not upon the creditors of the town. So, if the inhabitants of a town become subject to burdensome liabilities by reason of the recklessness, or worse, of any town officer or agent acting within votes too broadly worded, or too confidingly passed, they should attribute the result to their own lack of wisdom and lack of attention to civic duty, and not to any harshness of the law.

We now come to the consideration of the transactions legally in evidence in the particular cases before us and of the legal rights and liabilities of the parties tested by the principles above stated.

Elias J. Hale, who borrowed the money and signed the notes as treasurer, was annually chosen treasurer of Foxcroft, from 1866 to

1894 inclusive, a period covering all the transactions of the several plaintiffs with him, or the town; and he acted as town treasurer during all that time. It does not appear that he took the qualifying oath of office, or that he gave any bond as such treasurer for many years at least, but that circumstance is immaterial in these cases. The town is not bound in these cases by any of his acts as treasurer virtute officii, but only so far as it lawfully and effectually constituted him its own agent. A vote making the town treasurer eo nomine an agent for any purpose means the actual incumbent of that office acting undisputedly colore officii. The town's neglect to insist upon the official oath and bond does not vacate the office or the agency.

It is not questioned that the annual and special town meetings held during that time were legal meetings, and that the various persons appearing to have acted as selectmen, auditors and committees of the town were such officers, at least de facto. No question is made as to their regular election and qualification.

Soon after Mr. Hale's first accession to the office of town treasurer and before any of the loans in these cases were made to him, the town in regular annual town meeting upon the following article in the warrant, viz:—

"ART. 12.

To see if the town will authorize the Treasurer to obtain money by loan or otherwise, to pay the debts of the town, and to take up securities against the town, and issue new ones instead thereof, or to modify the same, and what conditions the town will prescribe in relation thereto,"

passed the following vote, viz:—

"ART. 12.

Voted to authorize the treasurer to obtain money by loan or otherwise to pay the debts of the town, to take up securities against the town, and to issue new ones instead therefor, or to modify the same, and to obtain the money on the best terms that it can be procured."

This article and this vote were renewed in substantially the same language at each subsequent annual meeting and hence more or

less affect every loan. It is not questioned that the article in the warrant was a sufficient basis for the vote, if the town had so much authority over the subject matter.

The scope and effect of this vote are to be considered. If the town was in debt at each passage of the vote, and had not made sufficient provision otherwise, it had the power to empower an agent to borrow upon its credit, enough to provide for the debt. It could also arrange, through its agent, with its creditors with their consent for an extension of the debt, or its renewal, or for a substitution of new and even different evidences of indebtedness. *Gelpecke* v. *Dubuque*, 1 Wall. 221; *Little Rock* v. *Merchants National Bank*, 98 U. S. 308. All this power was by this vote delegated to the appointed agent, the treasurer. The town practically intrusted to him full discretion as to the management of the debt otherwise unprovided for. He was authorized to obtain money for the debt,— by borrowing on such terms or with such other arrangement as he could make,— to take up such evidences of debt as had been before issued, and issue new ones in their place,— and to modify at his discretion any existing arrangement with any creditor. Under this vote he could borrow to pay an existing debt, or he could continue the debt in such manner and on such terms as he could arrange with the creditor.

If, therefore, at the times of the respective borrowings named in these cases, the town was in debt more than it had made provision for, the treasurer had authority under this town vote to bind the town by such borrowing up to the amount of the debt left otherwise unprovided for. That authority however would lessen and disappear as the debt was reduced and extinguished, and would also disappear with its own execution. *Benoit* v. *Conway*, 10 Allen, 528, supra. Whether such indebtedness of the town existed at the times of the borrowings is evidently the main question of fact in the cases under that vote.

At the annual meeting in 1865 a committee was appointed "to investigate the standing and report the liabilities of the town." This committee reported a loan indebtedness as of March 13, 1865, of over $25,000 and gave a list of notes, etc. This report was

duly filed and remained on file. From that time down to 1894 inclusive the treasurer each year reported in writing the liabilities of the town to be of varying amounts but in no year less than $10,000. All these reports were certified by the auditor and selectmen to be correct, and their correctness does not seem to have been questioned by any inhabitant. Indeed, the report was usually accepted by vote of the town. Provision was usually made each year by taxation for a small proportion of the debt thus reported, but each year at least $10,000 were left unprovided for. These official reports and the official certificates of their correctness formally accepted and remaining so long unchallenged must be regarded as sufficient prima facie evidence against the town of the fact of its indebtedness each year unprovided for of at least $10,000. Against this conclusion the defendant cites *Porter* v. *Stanley*, 47 Maine, 518, and *Farmington* v. *Stanley*, 60 Maine, 476, holding that the official approval of the town treasurer's accounts by the selectmen does not bind the town. We do not here hold that it does. We only hold that facts recited above are evidence, and sufficient evidence prima facie, of the town's financial condition. It is open to the town to contradict that evidence.

The treasurer, therefore, had prima facie authority to borrow each year upon the credit of the town for the payment of debts, not less than $10,000. So far as the loans made by these plaintiffs come under that authority, the plaintiffs have shown a prima facie right of recovery from the town. The next step is to ascertain the status of the several loans.

I. The Lovejoy case.

This plaintiff originally intrusted $300 to Mr. Hale as the borrowing agent of the town and upon the credit of the town, September 29, 1878, and received from Mr. Hale a town note therefor of the same date. Mr. Hale did not specify to the plaintiff for what particular purpose the money was borrowed, and hence it must be assumed that the plaintiff understood it to be borrowed under the record authority. This loan coming within that authority was prima facie binding on the town.

February 15, 1883, Mr. Hale took up this note and gave Mr. Lovejoy a new town note of that date for the same sum but at four per cent interest. Mr. Hale under the vote had authority to do this, and thus renew and extend the debt of the town to Mr. Lovejoy. It is urged by the town that the first note was paid, since the treasurer reported it paid in his account with the town. We are satisfied from all the evidence that the note was not paid, but simply renewed, under the authority given the treasurer to renew town obligations by new notes. *Atkinson* v. *Minot*, 75 Maine, 189.

The town, however, has pleaded the statute of limitations in bar of the note of 1883. To this plea, the plaintiff replies that payments of interest have been made and indorsed upon the note within six years. Such payments were made by the treasurer and by him indorsed upon the note, but were not charged to the town in his account. The town claims that such payments by its treasurer do not of themselves renew the note as against the town, since they were not made out of town funds. But the town owed the principal and interest and had the power to pay, renew, modify, or continue the obligation as it could arrange with its creditor. This power it delegated to its treasurer, empowering him to renew or re-arrange the terms of its obligation as he best could. He did renew by paying interest. That was enough for the plaintiff. He was not bound to see that the money came out of one cash drawer rather than another, or that the treasurer should afterward charge it in his accounts.

II. The Griffith case.

The plaintiff's intestate intrusted $1030 to Mr. Hale as the borrowing agent of the town and upon the credit of the town June 28, 1887, and received the town note therefor of the same date. No special purpose was mentioned. Payments of interest were made by the treasurer and indorsed upon the note within six years. This note therefore is also prima facie binding upon the town, for the reasons stated in the Lovejoy case.

III. The Dunham case.

This plaintiff, in the same manner as the above named plaintiffs, intrusted money to Mr. Hale, and received town notes from him in 1889, 1891 and 1892. October 30, 1892, he surrendered these notes with some additional money to the treasurer and received a new town note therefor for $770 of the same date. Again on November 18, 1892, he intrusted in the same way $200 more to the treasurer and received a town note for that. No special purpose was mentioned for either of these loans, and, as in the Lovejoy case, it must be assumed that the plaintiff loaned upon the faith of the record. These notes are therefore prima facie valid against the town.

Later, February 9, 1893, the plaintiff again loaned to Mr. Hale for the town $200 and received a town note therefor of the same date. This sum however was borrowed and loaned specifically "for school purposes." It was so stated and understood at the time. The validity of this note, therefore, depends upon the authority of the town or its treasurer to borrow money "for school purposes." We can find in the record no such authority. The town does not appear to have needed to borrow money for schools, as it raised money by taxation for them, and nowhere does it appear that the town ever voted to authorize the treasurer to borrow for that purpose, or that it ever in any town meeting ratified such borrowing.

Applying the principles stated at length in the early part of this opinion, the plaintiff has failed to show even a prima facie obligation upon the town to pay this latter note. Whatever the power of the town in the premises, a vote to empower an agent to borrow money for the specific purpose of obtaining money to pay town debts cannot be stretched to include borrowing money for current expenses for which the town had made provision by taxation. The plaintiff was apprised for what purpose and under what authority the treasurer was assuming to borrow his money. He loaned it for that purpose, and upon the strength of that supposed power. That purpose and power proving to be non-existent, the plaintiff

cannot now as against the town invoke another purpose and power which were then ignored.

IV. The Gould case.

In January, 1869, a Mrs. Harriman intrusted to Mr. Hale, as a loan to the town $800, and received a town note therefor on long time at seven per cent interest. It was understood between them that this money was borrowed for the purpose of the town aiding in the construction of the Bangor and Piscataquis Railroad. The town was authorized by the legislature to aid in that construction, and once in 1867, and again in 1868 effectually voted to so aid by a subscription to the stock to the extent of at least $25,000,— and it made the subscription. This bound the town to pay for the stock subscribed for. The town further voted, upon proper warrant articles, to raise the necessary money by loan, and also voted that the treasurer be authorized "to obtain the above amount . . . . for the above purpose, by loan on a time or times not exceeding twenty years, the treasurer to issue notes therefor . . . . as he deems best." It was under this authority and vote that Mrs. Harriman's money was borrowed. The town thereby became prima facie lawfully bound to Mrs. Harriman.

This note was surrendered April 25, 1874, and a new note issued to her by Mr. Hale as treasurer on fifteen years time for the same amount but at a less rate of interest. For reasons already stated this new note was lawfully issued and it renewed or extended the town's indebtedness to Mrs. Harriman. This last note was then transferred to the plaintiff Mrs. Gould, who at its maturity April 25, 1889, surrendered it and received a new note of that date at a still lower rate of interest. On this last note, which is the note declared on, interest was annually paid by the treasurer up to 1894. The original loan was prima facie binding on the town, and its various renewals and extensions were within the purview of the town's annual vote.

V. The Emerson case.

This plaintiff, as in the other cases, loaned $200 June 1, 1893, and received the town note therefor, like the others. This transac-

tion falls within the class of those covered by the annual vote upon the matter of the town debt, and is prima facie an obligation upon the town.

The plaintiff previously in October, and in November, 1889, intrusted $500 and $300 to the treasurer as a loan to the town and received town notes therefor. It was understood, however, by the plaintiff and the treasurer at both times that the money was being hired for the specific purpose of building a common road. Hence these notes do not come within the vote as to debts. They rest on the authority to borrow money for the building the road.

Votes were passed instructing the treasurer to borrow money for that purpose; but, waiving the question of the extent of such votes, the defense now claims that the town itself did not possess the necessary power, and hence that no action of the treasurer, or of the plaintiff, under those votes could bind the town. The constitutional limitation of municipal indebtedness is invoked against any such power in the town. As to this limitation, it appears that the gross indebtedness of the town exceeded the five per cent limit at the time of this borrowing for the road, but the plaintiff contends that from the gross indebtedness should be deducted the uncollected taxes, the town poor-farm, the state bonds held by the town, and other things usually denominated "town assets" and that after this is done, the indebtedness will appear to be considerably within the limit. The constitutional prohibition however, is very sweeping. It prohibits the creation of "any debt or liability, which singly, or in the aggregate with previous debts or liabilities, shall exceed five per centum of the last regular valuation," etc. There is no suggestion in it that anything, uncollected taxes, or town farms, or anything else, may be subtracted from the debts or liabilities. A debt is that which one is bound to pay to another. That the debtor has means with which to pay makes him none the less a debtor until he has paid. Liabilities are the antithesis of assets, and a prohibition against the creation of "any liability" does not imply that liabilities may be created up to the amount of the assets. Again it must be remembered that much of the property and revenues of a town are merely held in trust for the public and are subject to

the control of the legislature. For these reasons, as well as upon authority, it must be held that, inasmuch as the full aggregate of debts and liabilities of the town exceeded the five per cent limit, it had no power to create a debt or liability for the money borrowed to build a road. *Council Bluffs* v. *Stewart*, 51 Iowa, 385; *Baltimore* v. *Gill*, 31 Md. 375; *Law* v. *People*, 87 Ill. 626; *Doon Township* v. *Cummins*, 142 U. S. 366; *Waxahachie* v. *Brown*, 67 Tex. 519; *Appeal of City of Erie*, 91 Pa. St. 398.

The plaintiff again contends that the money was borrowed as a "temporary loan to be paid out of money raised by taxation during the year," and so within the exception in the constitutional prohibition. The first vote was in these words,—"Voted that the treasurer be authorized to hire money not to exceed $1000 to build said road." The second vote was, "Voted that the treasurer be authorized to hire such sums of money as he may deem necessary to complete said road." There is nothing in these votes indicating that the money borrowed under them was to be so paid. On the contrary the article in the warrant upon that subject was passed over without action. There seems to be no way in which the plaintiff can avoid the constitutional barrier against her claim for these loans. Even the gateway of the town's implied liability to refund her money paid into its treasury is closed against her. *Litchfield* v. *Ballou*, 114 U. S. 190.

The defendant, however, opposes to all the claims of each plaintiff two contentions not heretofore noticed in this opinion but which should now be considered.

The first contention is, that through the whole period of these transactions, from the time of the first vote authorizing the treasurer to borrow money to pay town debts, the debts and liabilities of the town exceeded the five per cent limit fixed by the constitution. But in the first and each recurring vote, authorizing the treasurer to borrow money to pay town debts, was a provision for "a loan for the purpose of renewing existing loans," and hence was within the exception in the article of the constitution limiting municipal indebtedness. That article explicitly excepted such loans, or debts, or liabilities. However much the loans to a town

exceeded the five per cent limit on January 2, 1878, when the constitutional limitation took effect, the town was not thereby obliged to tax itself to pay any of them off at once or even at maturity. It could under the proviso continue them along by making new loans for the purpose of renewing them. This process could be continued so long as the town adjudged it desirable. *Opinion of the Justices*, 81 Maine, 602.

Foxcroft was already largely indebted for loans when the constitutional limitation took effect. Though money was appropriated from time to time to reduce this indebtedness, yet for some reason the reduction was in fact small and new loans were constantly required to meet the old loans. The particular loans herein adjudged to be prima facie valid obligations of the town, prima facie appear to be loans made in renewal of existing loans and hence within the constitutional proviso. Whatever may be the fact as to other loans, it has not been shown in these cases that when these loans were made the constitutional proviso could not apply. What can be shown when other loans, if any, are sought to be recovered remains to be seen.

The second contention is, that at the time of each of the various borrowings under the annually recurring vote, authorizing the treasurer to borrow money to pay town debts, the treasurer had already borrowed as much as the vote authorized or could authorize, and hence his authority was exhausted, and the town was not bound by his further borrowings, including the money loaned by these plaintiffs. In considering this contention the preliminary question is, which party has the burden of proof? Must the plaintiff affirmatively prove that the treasurer's authority to borrow was not exhausted, or must the defendant affirmatively prove that it was? The burden is clearly upon the defendant. To hold otherwise is to require the plaintiff to affirmatively prove a negative proposition, and in this case a proposition practically impossible of affirmative proof, the treasurer being dead and his official reports not showing any excess of borrowing at those specific times. The very statement of the question suggests the answer we have given. There is no need of further reasoning. No authority is cited

against it. If authority in support is desired it can be found in *Parker* v. *Supervisors of Saratoga County*, 106 N. Y. 392, (pp. 420, 421,) where the same question arose and the same answer was given. As a corollary of this proposition, so far as the existence of debts to the full amount allowed by the constitution is relied upon as a bar, the burden is upon the town to show such debts, and not upon the plaintiff to show their non-existence.

The remaining question is, whether the evidence in the case sustains this burden of proof thus shown to be upon the defendant town. The counsel for the town at the oral argument frankly admitted, what is true, that the record contained no sufficient evidence in support of their proposition unless the contents of a certain small book in the handwriting of the deceased treasurer, Hale, which book (the original) was exhibited to and left with the court.

The written entries or memoranda of a deceased third person, to be admissible as evidence of matters therein stated, must appear to have been made,— contemporaneously,— in the line of the writer's duty, and as a register of passing events made as they occurred,— the writer being regarded in this respect as a mechanical and self-forgetting registrar. If the entries or memoranda appear to have been made merely for the private purposes of the writer, like a list of assets or liabilities, or written merely to preserve his recollection or views of past matters, they are not admissible. Wharton on Evidence, §§ 238, 243, and numerous cases there cited.

The entries in the book before us clearly fall within the latter category, and are not to be regarded as evidence. The heading on the first page of entries is —"Outstanding notes against the town of Foxcroft March 11, 1867." Under this heading begins a list of notes, with dates, names of payees, and amount. The first date is July 14, 1854, some twelve years before Hale became treasurer and began to make entries. On the tops of the following pages are the words "Town of Foxcroft" only. The contents of the entire book are merely a list of notes, not a register of passing events. There is no intimation that the notes were entered on this

list as they were issued. On the other hand, the ink and the handwriting clearly indicate that the list was made up at wide intervals, a large number of notes of different dates being often placed upon the list at the same time. Again the book was not and does not purport to be a town book, or a town treasurer's book. It was never exhibited to the town or any of its officers. It was a private book, which never came to the knowledge of the town or any one until after his death. The contents were his private memoranda made for his own purposes, and more or less after the event.

We have now considered and determined all the questions presented by the pleadings and the legal evidence before us, and necessary for our judgment.

At the argument, counsel upon both sides called our attention to alleged excessive over-borrowings and defalcations of Mr. Hale as treasurer, and we were reminded of the newspaper accounts, at the time of Mr. Hale's death, of his dealings with the town and the public in the matter of borrowing money. We have, however, as was our duty, ignored all such reports and statements and have based our judgment exclusively upon the legal evidence put into the cases submitted to us. If such over-borrowings and defalcations took place, or if facts existed taking the loans out of the constitutional proviso, they must be proved by legal evidence before the court can consider them in any case.

The judgments to be rendered under this opinion are obviously as follows:—

In the Lovejoy case.— *Defendants defaulted.*

In the Griffith case.— *Defendants defaulted.*

In the Dunham case.— *Defendants defaulted only for the amount of the two notes dated Oct. 30, 1892, and November 1892.*

In the Gould case.— *Defendants defaulted.*

In the Emerson case.— *Defendants defaulted only for the amount of the note dated June 1, 1893.*

GEORGE C. WING *vs.* GEORGE MILLIKEN.

Androscoggin. Opinion February 26, 1898.

Trover. Damages. Tenant in Common. Agent. Servant.

The fact that a plaintiff in an action of trover was tenant in common with others of the property converted, constitutes no legal defense, but is available only in abatement, or apportionment of damage.

In trover it is no defense that the defendant acted as agent or servant of another who is himself a wrong-doer.

The measure of damages ordinarily in an action of trover, is the value of the property at the time of conversion, with interest from the time when the cause of action accrues.

And this rule applies in the present case, where timber was cut from land of plaintiff, and manufactured into spool strips, or squares, which were afterwards converted by the defendant, notwithstanding the lumber thus manufactured had become greatly increased in value on account of the labor bestowed upon it in manufacturing it into spool stock.

The conversion in this case by the defendant was after it was thus manufactured and stacked, and not when the trees were severed from the soil by other parties.

Cushing v. *Longfellow*, 26 Maine, 306; and *Moody* v. *Whitney*, 38 Maine, 177, distinguished.

ON REPORT.

The case appears in the opinion.

J. A. Morrill, for plaintiff.

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

This was not a willful cutting, and the damages to be recovered, if any, are only the value of the timber before any labor was expended upon it.

In *Wooden Ware Co.* v. *U. S.*, 105 U. S. 432, it was held in an action for cutting and carrying away timber, that the rule was, first, where the defendant was a willful trespasser, the full value of the property at the time and place of demand or of suit brought, with no deduction of his labor, or expense; second, where he is an unintentional or mistaken trespasser, or an innocent vendee from such trespasser, the value at time of conversion; or if the conver-

sion sued for was after value had been added to it by the work of the defendant, the value less the cost of such improvements. *Winchester* v. *Craig*, 33 Mich. 205; *Heard* v. *James*, 49 Miss. 236; *Baker* v. *Wheeler*, 8 Wend. N. Y. 505, (24 Am. Dec. 66); *Baldwin* v. *Porter*, 12 Conn. 484; *Nesbitt* v. *St. Paul Lumber Co.*, 21 Minn. 491; *Powers* v. *Tilley*, 87 Maine, 34.

Sedgwick on Damages, p. 522, 3rd edition: "If the conversion were willful, then the value of articles so increased, would be the rule. But this should never be where the act was in good faith; and in such case, the true rule would be to allow the defendant for whatever value his labor had actually conferred on the property." No notice was ever given defendant of plaintiff's claim, nor any demand proved, before suit brought.

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

FOSTER, J. Trover to recover the value of one hundred and fifty thousand feet of sawed birch spool lumber. The lumber in question was cut upon lots 2, 3 and 101, in Franklin plantation, by one George B. Staples who was owner in common with the plaintiff,— the plaintiff's interest being two-thirds undivided of the lots above named. Staples had an interest in other adjoining lands, and the winter's operation amounted to about 1000 cords cut and hauled to Staples' mill in the plantation, and there manufactured into spool strips. It appears that 240 or 245 cords of this amount was cut and hauled from land of which the plaintiff owned two-thirds in common. The cutting by Staples' men upon this land owned in common was unintentional, but wholly without the plaintiff's knowledge or consent.

It is not claimed that there was any conversion by this defendant until it was manufactured into spool stock. There is no testimony that the defendant exercised any dominion or control over the birch until after it had been sawed up and stacked ready for sorting and shipment.

The fact that the plaintiff was tenant in common with others of

the property converted, constitutes no legal defense to this action, and it is available only in abatement, or by apportionment of the damage. *Holmes* v. *Sprowl*, 31 Maine, 73, 76.

The defendant had a contract with Clark & Service of Glasgow, Scotland, to sell them two hundred thousand superficial feet, board measure, of white birch spool bars for export. This company was afterwards reorganized and became incorporated as Clark, Skillings & Co., Limited, and was doing business in Glasgow and in Boston. The new company assumed and signed the contract made by Clark & Service with the defendant. An agent of the latter company by the name of Bryant was sent to the defendant for directions where to find the spool lumber which he was to inspect and bunch under the contract with Clark, Skillings & Co., Limited. The defendant sent him to the place where the lumber was stacked, and put him in charge "to cull it and ship it." Acting as the agent of that company, he inspected, culled and bunched the lumber and took all that was of a quality that complied with the contract which his firm held, amounting in all to 187,627 feet. This agent took his directions from the defendant. It is clear from the evidence that the defendant, when this agent went there, exercised full control and ownership over the spool stock, gave directions what to do, and that prior to that time he had had nothing to do with the lumber.

The testimony further shows that the defendant also sold from the lumber, after it had been culled, to Merrill & Co., of Dixfield, 107,216 feet.

Here then was a conversion by the defendant of the lumber in which the plaintiff had an interest, unless some justification can be shown. No justification is shown by any license or permission from the plaintiff.

It is contended, however, that the defendant was acting as the agent of his brother Charles R. Milliken who had succeeded to the interest of George B. Staples in the birch in which the plaintiff was interested. But if this contention be true, it affords no protection to him. This court has held that in an action of trover, it is no defense that the defendant acted as the agent or servant of

another who was himself a wrong-doer. *McPheters* v. *Page*, 83 Maine, 234. And it is there held that if he has exercised a dominion over personal chattels in exclusion, or in defiance of, or inconsistent with, the owner's right, that in law is a conversion, whether it be for his own or another person's use. *Kimball* v. *Billings*, 55 Maine, 147, 151; *Freeman* v. *Underwood*, 66 Maine, 229, 233. The same doctrine is laid down in other jurisdictions: *Williams* v. *Merle*, 11 Wend. 80; *Coles* v. *Clark*, 3 Cush. 399; *Gilmore* v. *Newton*, 9 Allen, 171; *Courtis* v. *Cane*, 32 Vt. 232. In some of these cases it has been held that an auctioneer, or broker, who sells property for one who has no title, and pays over to his employer the proceeds, with no knowledge of the defect of title or want of authority, is held to be liable for its conversion to the real owner. *Robinson* v. *Bird*, 158 Mass. 357, 360.

The acts of the defendant in reference to this lumber, in causing it to be sorted, culled and bunched, and a large portion of it thereafterwards sold to two different parties by this defendant, constituted acts of dominion and ownership over the same in exclusion, defiance of, or inconsistent with, the plaintiff's interest and ownership therein.

Nor do we think from the testimony as reported that the plaintiff is estopped, by any transactions of his with George B. Staples in relation to the taking of timber from other lands in which they were interested, from maintaining this action against the defendant. From those acts in reference to other logging transactions, even though the plaintiff was interested with Staples therein, there was no such relation of the parties as would authorize any one legitimately to infer that Staples was the plaintiff's agent in reference to this lumber in question, and to deal with him as with one clothed with authority, or to be justified in believing that he had authority to make any disposition of it to the exclusion of the plaintiff's rights. The facts reported create no estoppel as against the plaintiff. This property in question was never, through any act of the plaintiff, placed in the hands of Staples, or this defendant, as bailee or otherwise, for the purpose of being disposed of,

thereby creating an estoppel against the plaintiff from asserting any rights against a bona fide purchaser.

The only remaining question is in relation to damages.

The defendant's acts of dominion and ownership had reference to the 240 or 245 cords of lumber, notwithstanding he participated in the sale of but two lots,—that to Clark, Skillings & Co., Limited, and to Merrill & Co. The whole was culled in order to obtain the amount which was sold to Clark, Skillings & Co., Limited, and the entire quantity was thereby greatly diminished both in quality and value. The remainder, after these sales, was disposed of by Charles R. Milliken to two other parties.

The measure of damages ordinarily in an action of trover is the value of the property at the time of conversion with interest from the time when the cause of action accrues. *Washington Ice Co.* v. *Webster*, 62 Maine, 341, 362; *Johnson* v. *Sumner*, 1 Met. 172, 179; *Glaspy* v. *Cabot*, 135 Mass. 435, 440.

In the present case we are unable to perceive any reason for departing from the general rule, and allowing damages only for the value of the birch when severed from the land, as contended by the defendant.

We have given the question considerable attention, and examined the authorities relied upon in support of the proposition set up in reduction of damages, but we feel that the present case is one where any rule other than the value of the property at the time of conversion does not apply.

It has sometimes been held that where timber has been cut by trespassers, and the trespass was involuntary and not willful, the owner should recover his actual loss, and not the increased value added by the trespasser. Such was the case of *Foote* v. *Merrill*, 54 N. H. 490; but that was an action of trespass quare clausum and not an action of trover, and in the course of the opinion the court say that the plaintiff might have maintained replevin for the timber, or he might "have recovered its full value at the time it was carried away by bringing trover."

Another case from the same court is *Beede* v. *Lamprey*, 64 N. H. 510, which was an action of trover by the owner to recover the

value of two hundred spruce logs cut by the defendant and hauled to his mill, and the court in an elaborate opinion held that the measure of damages was the value of the trees immediately after they were severed from the realty, without any increased value added for transporting them to defendant's mill. There the trespass was not willful, and the cutting over on plaintiff's land was by mistake. But it will be noticed that the suit was against the trespasser, and the court say that "the defendant converted the logs by cutting and severing the trees from the land, and the conversion being complete by that wrongful act, their value there represents the plaintiff's loss," and held that the damages must be according to the usual rule in trover, which is the value of the property at the time of conversion and interest after.

The recent case of *Powers* v. *Tilley*, 87 Maine, 34, was an action of trover against a purchaser of sleepers made from trees cut on the plaintiff's land by a trespasser, and by him manufactured into sleepers, and the rule of damages was held to be the value of the sleepers at the time of their conversion by the purchaser, and no deduction was made for the increased value put upon the trees by the labor of the trespasser before conversion by the purchaser.

The case of *Glaspy* v. *Cabot*, 135 Mass. 435, was an action of tort in the nature of trover, and the same rule was applied. In that case the master of a vessel, which had drifted upon a beach in a damaged condition, sold her, without right, to a person, who after repairing her, getting her off, and taking her into port, sold her hull to another person. The action was by the owner against the latter, and the court there held the measure of damages to be the value of the hull at the time and place of conversion, with interest thereafter. And the court there say, as was said by the court in *Powers* v. *Tilley*, supra, that in replevin for the same property any improvements upon it attach to and go with the property replevied to the owner, and that "the rule of confining the damages to the time of the conversion, with interest from that time, has been adopted in our Commonwealth as the most satisfactory; and many difficulties are avoided which arise under any other rule, when the value of the property is fluctuating, or when

the property has been improved in value or changed in form by the wrongful taker after the conversion and before the trial. In the event of successive conversions, if the value of the property at the time of the first conversion were always taken as the test of damages, then it might often happen that a defendant who had subsequently converted the property could be held to pay more than the property was worth when he converted it. The damages caused by one wrong would be measured by those caused by another."

If we examine the earlier decisions in our own state we find no real conflict with the doctrine here enunciated. The case of *Cushing* v. *Longfellow*, 26 Maine, 306, was an action of trespass de bonis for mill logs, and the plaintiff waived the breaking and entering and the cutting, and there it was held, that the measure of damages was the value as it was the moment after they were severed, and that the plaintiff had no right to select any other place than that where the injury was originally done, although he might have replevied the logs at a later stage after they had become more valuable; and the opinion of the court states he "might have demanded them at another place, of one having them there, and in an action of trover have recovered the value of them there." This, certainly, is in accordance with the general rule of damages, the value at time of conversion.

So in *Moody* v. *Whitney*, 38 Maine, 177, which was trover for mill logs cut upon the plaintiff's land by the defendant, and hauled by him two or three miles, the same measure of damages was adopted, it being held that the plaintiff could not recover the enhanced value of the logs without evidence of a distinct conversion after they were hauled, as if the plaintiff had regained possession, and there had been a subsequent conversion by the defendant. In this case the court recognized and approved the general rule, and held that the conversion by the defendant was at the time of his cutting the timber, and therefore the damages were necessarily the value immediately after it was cut, and had become personal property.

The distinction in these cases to which we have referred, and

the case at bar, should be borne in mind,—the time when the conversion by the defendants took place,—and when that is done, and the rule applied, much of the seeming difficulty in the application of the rule vanishes. The trouble is not in the rule, but in applying it to the facts of each particular case. Facts which may be held to constitute conversion in one case, may so vary in another as to lead the court to conclude that conversion took place at an entirely different time, and with a material difference, therefore, in the amount of damages to be awarded.

In the case at bar the conversion by the defendant was not when the timber was cut or severed from the realty. It was not until after the same had been hauled from the land and sawed into spool timber, and this action is brought for converting that lumber after it was sawed and stacked. Staples who cut the birch from the land was a tenant in common with the plaintiff, not only of the land from which it was cut, but also tenant in common of the birch after it was landed at the mill. There was no interference by the defendant, nor acts constituting conversion by him, till it was sawed. The plaintiff might have brought replevin for the same and thereby have acquired the benefit of whatever labor had been bestowed upon it. Thus cloth made into a garment, leather into shoes, trees squared into timber, and iron converted into bars, may be reclaimed by the original owner in their improved condition. Viner's Abr. Property, (E) pl. 5; *Curtis* v. *Groat*, 6 Johns. 168; *McLarren* v. *Brewer*, 51 Maine, 402. The law neither divests him of his property nor requires him to pay for improvements made without his authority. It is only when the identity of the original material has been destroyed, or its value insignificant compared with the article manufactured from it, that the law is otherwise. *Wetherbee* v. *Green*, 22 Mich. 311, (7 Am. Rep. 653.) To say that the owner may retake the property in an action of replevin in an improved state, as all the authorities hold, and yet that he may not, when he sees fit to resort to an action of trover, recover the equivalent in damages, is a subtlety too refined to be adopted in the ordinary affairs of business transactions, and,

as said by STROUT, J., in *Powers* v. *Tilley*, supra, would relieve trespassers from all loss, and would tend to encourage wrong doing.

We are not unmindful that a somewhat modified rule has been laid down by the supreme court of the United States in the case of *Wooden Ware Co.* v. *United States*, 106 U. S. 432, which was an action of trover for ash timber cut from government lands in the state of Wisconsin by willful trespassers, and sold to purchasers against whom the action was brought. But notwithstanding the doctrine thus modified by the court in that case, and as applied to the facts therein stated, we see no reason for departing from the rule so long established and adhered to by the decisions of our own court, and the courts of other states, in the decisions to which we have referred. As said by the court of Massachusetts in *Glaspy* v. *Cabot*, supra, "the general principle is that damage should compensate the plaintiff for what he has lost. The rule confining the damages to the time of the conversion, with interest from that time, has been adopted in this commonwealth as the most satisfactory; and many difficulties are avoided which arise under any other rule."

From the evidence before us, and with the rule as herein enunciated, we are satisfied that the damages to be recovered by the plaintiff for his two-thirds interest in the property converted, should be $1050.

Judgment accordingly.

STATE *vs.* HENRY W. HOWARD.

Sagadahoc. Opinion March 1, 1898.

Intox. Liquors. Evidence. Examined Copy. Internal Rev. R. S. of U. S. §§ 3232, 3233, 3244.

Upon the trial of a defendant who has been indicted for the illegal keeping and sale of intoxicating liquors, an examined copy of that part of the record of special tax payers, residing in this state which relates to the defendant and his business, may be properly admitted in evidence.

A copy of the entire list of such tax payers is inadmissible, because immaterial, if not prejudicial to the respondent.

When a copy of the "record of special tax payers" in question is examined in the light of the provisions of the statutes of the United States, the figures and abbreviations entered in the several columns become readily intelligible to the jury. It distinctly informs them that a person bearing the respondent's name and carrying on the same business in the same city and street paid a special tax of twenty dollars, the precise amount required of a retail dealer in malt liquors, receiving therefor a stamp with a serial number; and indicates the business on account of which this tax was paid by the letters R. D. M. L.,— obviously the initial letters of the words Retail Dealer Malt Liquors.

Held; that such evidence is admissible under appropriate instructions respecting its application to the defendant in such a case as this; and if the state fails to introduce the regulations of the revenue department or instructions from the collector's office, which might have removed all possible ground for questioning the meaning of any entries in the record, its probative force still remains a question of fact for the jury.

State v. *Lynde*, 77 Maine, 561, affirmed.

ON EXCEPTIONS BY DEFENDANT.

The case appears in the opinion.

Grant Rogers, County Attorney, for State.

Geo. E. Hughes, for defendant.

The state simply offered this paper, without any explanation as to what it was, without any testimony to show to what part of the internal revenue department it referred, for the purpose of proving an indictment charging this respondent with keeping a liquor

nuisance. Without further evidence it was clearly inadmissible to show the payment of a tax that would render this respondent liable under an indictment for keeping a liquor nuisance.

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

WHITEHOUSE, J. This was an indictment against the respondent for maintaining a common nuisance by using a certain tenement, occupied by him, for the illegal keeping and illegal sale of intoxicating liquors.

In support of this indictment the state introduced against the respondent's objection an examined copy of the "record of special tax-payers" kept in the office of the collector of U. S. Internal Revenue at Portsmouth, N. H., for the purpose of showing that the respondent had paid the special tax of twenty dollars imposed by the statutes of the United States upon "retail dealers in malt liquors."

The jury returned a verdict of guilty and the case comes to this court on exceptions to the admission of this evidence.

In *State* v. *Gorham*, 65 Maine, 270, and *State* v. *Wiggin*, 72 Maine, 425, it was settled that the original record kept in the office of the collector of internal revenue, or a copy of the same duly certified by the collector or deputy collector, was admissible in evidence to show the payment of the special taxes assessed upon retail dealers in liquors. In *State* v. *Lynde*, 77 Maine, 561, the admissibility of an examined copy of such record, verified by the sworn testimony in court of the unofficial person who made the examination and the copy, was fully considered in the light of both principle and authority; and for the conclusive reasons there stated, this mode of proving a record, by an examined copy sworn to by any competent witness, was definitely approved and formally adopted in our practice.

But if the grounds of the objection here presented are correctly apprehended, they are in substance, first, that the examined copy in this instance was not a full copy of the entire list of "special

taxpayers" residing in this state; and secondly, that it was so fragmentary and abbreviated in form as to be incapable of conveying any definite information to the jury.

With respect to the first objection, it is manifest that the defendant would have had good reason for objecting to the introduction of records relating to the business of a hundred others whose names might have been known to the jury. Such evidence would be clearly inadmissible because immaterial, if not prejudicial to the cause of the respondent. It is obvious that the accused can only be affected by that portion of the entire book of records which relates to himself and his business. The common practice of proving the record of a marriage, birth or death, by a certified copy of so much of the entire record in the city or town, as relates to the individual in question, is an apt illustration of the rule.

In regard to the second objection, the examined copy introduced contains the printed caption found in the book of records of the internal revenue collector at Portsmouth, viz:— "Record of Special Tax-payers and Registers, Me., District of N. H." and discloses in different columns among other things the name, "Howard, H. W. doing business as Bath Bottling Co.;" "business R. D. M. L."; place Bath, Front St.; "amount of tax $20; serial number of stamp 5775."

It is provided by sections 3232 and 3244 of the Revised Statutes of the United States that every person engaged in or carrying on the business of retail dealer in malt liquors shall pay a special tax of twenty dollars; and section 3233 declares that "every person engaged in any trade or business on which a special tax is imposed by law shall register with the collector or district his name or style, place of residence, trade or business and the place where such trade or business is to be carried on." It is further provided that the payment of this special tax shall be evidenced by an engraved stamp duly numbered.

In the absence of any exceptions to the charge, it is to be presumed that the jury were appropriately instructed in regard to these requirements of the U. S. Revenue laws; and when the copy of the "record of special tax-payers" in question was examined

in the light of these provisions the words, figures and abbreviations entered in the several columns could not fail to become readily intelligible to the jury. It distinctly informed them that a person bearing the respondent's name, and carrying on the same business in the same city and street, paid a special tax of twenty dollars, the precise amount required of a retail dealer in malt liquors, receiving therefor a stamp with the serial number of 5775; and indicates the business on account of which this tax was paid by the letters R. D. M. L.,—obviously the initial letters of the words Retail Dealer Malt Liquors.

In any event, in view of these coincidences tending to identify the defendant and his occupation with the person and business described in the record, the evidence was admissible under appropriate instruction respecting its application to the defendant; and if the government failed to introduce regulations of the revenue department or instructions from the collector's office, which might have removed all possible ground for questioning the meaning of any entries in the record, its probative force still remained a question of fact for the jury.

Exceptions overruled.

FRED ATWOOD

vs.

BANGOR, ORONO & OLD TOWN RAILWAY COMPANY.

Penobscot. Opinion March 1, 1898.

Negligence. Proximate Cause. Railroad.

Generally, it is a defense to an action of tort that the plaintiff's negligence contributed to produce the injury. But, where the negligent acts of the parties are distinct and independent of each other, the act of the plaintiff preceding that of the defendant, it is considered that the plaintiff's conduct does not contribute to produce the injury, if, notwithstanding his negligence, the injury could have been avoided by the use of ordinary care at the time by the defendant.

The contributory negligence of an injured party that will defeat a recovery must be such as proximately contributed to the injury.

A person may recover damages for an injury caused by the negligence of the defendant, although the negligence of the plaintiff first exposed him to the risk of injury, if such injury was proximately caused by the defendant's negligent act, committed after he had become aware of the plaintiff's danger.

If one discovers another to be negligent he must take precautions accordingly, omitting which he is liable to the other for the damages which flow from such new want of care.

In this case the jury found that by the exercise of reasonable and ordinary care and caution on the part of the motor-man a street railway car might have been so managed as to avoid a collision with the plaintiff's team. *Held;* that this finding is peculiarly a question of fact within the province of the jury; and the law court declines to set aside a verdict for the plaintiff.

ON MOTION BY DEFENDANT.

The case is stated in the opinion.

P. H. Gillin and C. J. Hutchings, for plaintiff.

F. H. Appleton and H. R. Chaplin, for defendant.

The care of a traveler must be such as would be exercised by a man of ordinary prudence, who knows that there is danger attending the operation of street cars, who knows that the trains of a company have a prior right of passage and who knows also that he cannot omit precautions on his part upon the assumption that there will be no negligence on the part of the company.

Booth on Street Railways, § 312, and cases cited, and § 315; *Kelley* v. *Hendrie*, 26 Mich. 255; 3 Elliot on Railroads, § 1095, and cases cited; *Adolph* v. *Central Park R. Co.*, 76 N. Y. 530; *Wheelahan* v. *Phila. Traction Co.*, 150 Pa. St. 187.

Failure of a motor-man to exercise ordinary care for the safety of a traveler whom he sees at or on the track unconscious of the approach of the car, will not relieve the latter from the consequences of contributory negligence. *Johnson* v. *Superior R. T. R. Co.*, (Wis.) 64 N. W. Rep. 753.

One who suffers his attention to be directed to the movements of another person and takes no precautions to avoid danger from moving trains cannot recover damages from injuries caused by a collision. 3 Elliot on Railroads, § 1164, citing *Jensen* v. *Mich.*

R. Co., 102 Mich. 176, where the traveler was engaged in conversation with a companion.

Having a right to assume that the plaintiff would get out of the way, the motor-man was under no obligation to slacken his lawful speed until he saw some indication that the plaintiff was in danger. *Dailey* v. *Detroit, etc., R. Co.*, 63 N. W. Rep. p. 73; Booth on Street Railways, p. 414.

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

WHITEHOUSE, J. The plaintiff recovered a verdict of $140.63 for the loss of a horse and injuries to a wagon and harness resulting from a collision with one of the defendant's cars, and the case comes to the law court on the defendant's motion to have the verdict set aside as against the evidence.

The accident occurred on the afternoon of August third, 1896, on Gilman hill in Orono at a point about thirty rods distant from the brow of the hill. The plaintiff was on his way to Orono with a dump cart drawn by two horses, and at the point above named met an acquaintance by the name of Palmer with a hay-rack drawn by two horses on the way to Bangor. The plaintiff and Palmer stopped their teams to talk for a few minutes, and while standing there, according to the plaintiff's testimony the two teams were nearly opposite each other, Palmer's off wheel being in the ditch and the plaintiff's team between Palmer's and the railroad, about six inches from the track. While the plaintiff was thus engaged in conversation with Palmer, neither giving attention to his team nor exercising vigilance respecting the approach of the defendant's cars, one of the electric cars appeared on the brow of the hill, on schedule time. The plaintiff testifies that although he had an unobstructed view, and could have seen the car twenty-five or thirty rods away, he was not in fact aware of its approach until it was within ten rods of his team; that his horses then began to "prance round" and to back; that the sounding of the gong by the motor-man only "made it worse;" that the car was coming down the hill "four times as fast as he ever saw cars running in

Brewer;" and that before he had time to move his team the car was upon him, the collision occurred and the damage was done. The plaintiff accordingly contends that the defendant company should be held responsible for the injury because the car was running at an unusual and dangerous rate of speed, and by reason of the failure of the motor-man to use proper diligence to stop the car after it was apparent that a collision was inevitable.

On the other hand, the defendant insists that the car was running on regular time and at the usual rate of speed; that the motor-man commenced ringing his gong as soon as he saw the team from the brow of the hill; that the horses at first exhibited no signs of being frightened, and that he had a right to assume from the attitude and conduct of the plaintiff that there was no danger in proceeding in the ordinary manner; that as soon as he had reasonable ground to apprehend that the team would be an obstruction on the track, he reversed the power and promptly used all the means at his command to stop the car and prevent a collision. The defendant accordingly contends that there is no just ground of liability on the part of the defendant company; and that the injury resulted from the plaintiff's own negligence in using the highway under such circumstances for the purpose of having a social interview with another traveler, and from his gross inattention and apparent indifference to the movements of the defendant's cars.

It is impossible to resist the conclusion that the plaintiff himself immediately before the collision was not in the exercise of reasonable and ordinary care and caution under the circumstances disclosed by the testimony. Highways are constructed and maintained for the accommodation of travelers, and not as places of resort for business negotiations or social converse. All travelers with teams have equal rights on the highway, but each must exercise his right in a reasonable manner and use the way with due regard to the rights of others. And since highways have been subjected to a new mode of use by the introduction of street railways, a still higher degree of attention, vigilance and prudence is requisite to fill the measure of ordinary care demanded of the traveler. Travelers with teams, and proprietors of street cars still have concur-

rent rights and mutual obligations; but as the cars must run on a fixed track and rapidly acquire a greater momentum, they must to a reasonable extent be allowed the right of way. As stated by the court in *Flewelling* v. *Lewiston & Auburn Horse Railroad Co.*, 89 Maine, 593: "Electric street cars have in a qualified way at least, the right of way as against persons on foot or traveling with carriages and teams in the same manner as ordinary steam railroads have. And all persons passing on foot or traveling by the common methods on the highways should carefully observe the movements of the street cars and leave them an unobstructed passage as well as they can."

On the other hand, it is scarcely less difficult to resist the conclusion that, upon the facts reported, the jury were fairly authorized to find that the defendant's servants in charge of the car, on the occasion in question, failed to exercise that degree of precaution in slackening the speed of the car, which the exigencies of the situation demanded.

It is not in controversy that the plaintiff's team was standing within six inches of the rail of the defendant's road, and in view of the fact that the lateral projection of the car over the wheel and the track is about twice that distance on each side, the team was as certainly an obstruction to the free passage of the car as it would have been if one wheel of the cart had been between the rails. When the car arrived at the brow of the hill thirty rods distant from the team, the motor-man's view of the team was entirely unobstructed. He admits that he saw the team at that point; and if he had observed its relative situation attentively, it must have been apparent to him at once that a collision was inevitable unless the position of the team was promptly changed, or the car seasonably stopped. When twenty-five rods away he did not fail to observe that the plaintiff was absorbed in conversation and apparently unconscious of the approach of the car. If it be conceded that the statement of the conductor was correct, that the car was running at the rate of only seven miles an hour after it went over the brow of the hill, it required only about forty seconds to run a distance of twenty-five rods. Fifteen rods more were

traversed at this rate, and in sixteen seconds more the remaining ten rods would be covered. But the plaintiff made no movement to change the position of his team, being still ignorant of the rapidly approaching car; and still the motor-man did not slacken its speed. It may be true that the horses gave little or no indication of fright up to this time; but if the team remained stationary within "four or six inches" of the track, a collision was unavoidable unless the car was stopped. Under these circumstances, with little more vigilance and caution on the part of the motor-man, it might reasonably have been anticipated that with no change in the speed of the car, an accident would happen either in the way it did occur or in some similar way. But so far as appears the car was allowed to proceed, though on a descending grade, at the same rate of speed at which it had been running during the preceding "three or four hundred feet," until within twenty feet of the team, when, according to the defendant's contention, the horses for the first time showed signs of fright and at once dashed upon the track, and when, too, it is fairly to be inferred from the defendant's evidence it was impossible to stop the car before it struck the horse.

The views of the court respecting the duty of the motor-man under such circumstances are also stated in *Flewelling* v. *Lewiston & Auburn Horse Railroad Co.*, supra, as follows: "But great care must also be observed by conductors and drivers, or motor-men, upon the cars, to see that no injury be caused by themselves to persons or teams. Street railroads are granted very great privileges out of the public right, and their treatment of the public must be reasonable in return; so that when a person or a team, through accident or misjudgment or for any cause, be caught in a position of any peril by coming in collision or close contact with the cars, it is the duty of those who are managing the cars to use all possible effort, by slackening the speed of a car or stopping it altogether, in order to avoid an injury."

It is undoubtedly true that the plaintiff's prior negligence in a certain sense contributed to produce the accident; that is to say, if the plaintiff had not stopped to talk in the street, with his team

stationed so near the track, there would probably have been no collision and no damage. But the contributory negligence of the injured party that will defeat a recovery must have contributed as a proximate cause of the injury. *Pollard* v. *M. C. R. R. Co.*, 87 Maine, 55; Cooley on Torts, 816. "In all cases where negligence on the part of the plaintiff is connected with the cause of injury, the question to be determined is whether the defendant, by the exercise of ordinary care and skill, might have avoided the injury. If he could have done so, the negligence of the plaintiff cannot be set up as an answer to the action." 2 Wood on Railroads, § 319 a; Addison on Torts, 41. So in *O'Brien* v. *McGlinchy*, 68 Maine, 557, the court say: "Generally, it is a defense to an action of tort that the plaintiff's negligence contributed to produce the injury. But . . . . where the negligent acts of the parties are distinct and independent of each other, the act of the plaintiff preceding that of the defendant, it is considered that the plaintiff's conduct does not contribute to produce the injury, if, notwithstanding his negligence, the injury could have been avoided by the use of ordinary care at the time by the defendant." In Bishop's Non-Contract Law, § 66, the rule is thus stated: "It is sometimes very correctly said that if one discovers another to be negligent he must take precautions accordingly, omitting which he is liable to the other for the damages which flow from such new want of care. For however nearly related two several negligences may be, the one cannot bar an action for the other unless it is contributory, and although an unseen position might contribute to an accident a discovered one cannot." See also *Benjamin* v. *Holyoke Street Railway Co.*, 160 Mass. 3; *Glazebrook* v. *West End Street Railway Co.*, 160 Mass. 240.

Under instructions which must be presumed to have been adequate and appropriate in the case before the court, the jury evidently reached the conclusion that by the exercise of reasonable and ordinary care and caution on his part, the motor-man might have so managed his car as to avoid a collision with the plaintiff's team. It was peculiarly a question of fact within the province of the jury to settle, and this court does not feel justified in setting aside their verdict.

Motion overruled.

HARDIN ROADS *vs.* EMELINE R. WEBB, Admx.

Cumberland. Opinion March 4, 1898.

Bills and Notes. Negotiability. Indorsement. Sales. Lex Fori. R. S. 1881 of Indiana, § 5506.

By the law merchant, a note, to be negotiable, must run to order or bearer, be payable in money, for a certain definite sum, on demand, at sight, or in a certain time, or upon the happening of an event which must occur, and payable absolutely and not upon a contingency.

Where notes call for payment of a certain sum, "and attorneys' fees," the latter being uncertain, indefinite, and to some extent contingent, *held;* that this provision renders the notes not negotiable by the law merchant.

Whether promissory notes payable "on or before" a named date are negotiable or not, the court declines to decide.

A statute of Indiana provides that "notes payable to order or bearer in a bank in this state shall be negotiable as inland bills of exchange, and the payee and indorsee thereof may recover as in case of such bills." The Indiana court holds that "so far as the statute places promissory notes upon the footing of inland bills of exchange, it subjects them to the law merchant, and all its incidents."

In an action in the courts of this state by the holder against the payee of such a note payable in Indiana and which the payee had in writing thereon "assigned, transferred and delivered to the plaintiff or order all his right, title and interest" therein, in consideration of a sale of the note by the payee to the holder, *held;* that the transfer being completed by delivery in Indiana, the validity and construction of the contract of the written transfer will be governed by the lex loci contractus; but upon questions of general commercial law like this, this court will apply the rule of lex fori to all matters pertaining to the remedy according to its judgment, and is not bound by decisions of the courts in Indiana.

In a suit by an indorsee against an indorser, the latter may show that the understanding and agreement between the parties was that the indorser should not be holden. The indorser may prove such an express contract by parol evidence, or it may satisfactorily appear from the transaction itself.

Held; that the plaintiff is assignee of a non-negotiable note. The relation of indorser and indorsee did not exist between the plaintiff and the payee, and this action cannot be maintained.

This case being submitted to the law court upon an agreed statement of facts, the court is at liberty to draw such inferences from them as a jury would be authorized to draw. *Held;* that the understanding between the payee and

the plaintiff was that the payee by the aforesaid written transfer should not become liable as indorser; but that the plaintiff purchased the note, and the mortgage securing the same as a commodity, relying solely upon the responsibility of the makers and the mortgage security.

ON EXCEPTIONS BY DEFENDANT AND AGREED STATEMENT.

The case appears in the opinion.

Franklin C. Payson and Harry R. Virgin, for plaintiff.

Exceptions: The declaration contains a special count upon each note, and the money counts. The demurrer being general, if one count be good, the exceptions must be overruled. *Dexter Savings Bank* v. *Copeland*, 72 Maine, 220; *Concord* v. *Delaney*, 56 Maine, 201, 204; *Blanchard* v. *Hoxie*, 34 Maine, 376, *Skolfield* v. *Skolfield*, 88 Maine, 254.

Form of indorsement: 1 Daniel Neg. Ins. (3rd Ed.) § 688; *Adams* v. *Blethen*, 66 Maine, 19; *Markey* v. *Corey*, 66 N. W. Rep. 493; *Maine T. & B. Co.* v. *Butler*, 45 Minn. 506; *Sands* v. *Wood*, 1 Iowa, 263; *Sears* v. *Lantz*, 47 Iowa, 658; 1 Edw. Bills & Notes, § 398; Morton Bills & Notes, (2d Ed.) 109; *Henderson* v. *Ackelmire*, 59 Ind. 540; *Fassin* v. *Hubbard*, 55 N. Y. 470; *Vanzant* v. *Arnold*, 31 Ga. 210; *Dixon* v. *Clayville*, 44 Md. 573; *Shelby* v. *Judd*, 24 Kan. 166; *Mary* v. *Dyer*, (Ark.) 21 S. W. Rep. 1064; Randolph Com. Pap. § 704.

Negotiability: 1 Daniel Neg. Ins. § 868, and cases cited; *Bell* v. *Packard*, 69 Maine, 105; *Milliken* v. *Pratt*, 125 Mass. 374; *Cook* v. *Litchfield*, 9 N. Y. 279.

Contract to be performed in Indiana and interpreted according to its laws: *Lindsay* v. *Hill*, 66 Maine, 212; *Thompson* v. *Reed*, 75 Maine, 404; *Bond* v. *Cummings*, 70 Maine, 125; *Scudder* v. *Union Nat. Bank*, 91 U. S. 406; *Wright* v. *Andrews*, 70 Maine, 86. Notes negotiable in Indiana: R. S., 1881, § 5506; *Melton* v. *Gibson*, 97 Ind. 158; *New* v. *Walker*, 108 Ind. 365; *Pool* v. *Anderson*, 116 Ind. 88; *Depauw* v. *Bank*, 126 Ind. 553; *Davis* v. *McAlpine*, 10 Ind. 137.

Negotiability of note not affected because payable "on or before." *Walker* v. *Woolen*, 54 Ind. 164; *Woollen* v. *Ulrich*, 64 Ind. 120; *Noll* v. *Smith*, 64 Ind. 511; *Glidden* v. *Henry*, 104

Ind. 278; *Smith* v. *Ellis*, 29 Maine, 422; *Mattison* v. *Marks*, 31 Mich. 421; *Lamb* v. *Story*, 45 Mich. 488; *Helmer* v. *Krolick*, 36 Mich. 373; *Jordan* v. *Tate*, 19 Ohio, N. S. 586; *Charlton* v. *Reed*, 61 Iowa, 166; *Curtis* v. *Horn*, 58 N. H. 504, and cases; 1 Daniel Neg. Ins. §§ 43, 44, 45, 45 a; *Bates* v. *Le Clair*, 49 Vt. 229; *Ernst* v. *Steckman*, 74 Penn. St. 13; *Capron* v. *Capron*, 44 Vt. 410; *Cisne* v. *Chidester*, 85 Ill. 523; *First National Bank* v. *Skeen*, 101 Mo. 683; *Albertson* v. *Laughlin*, 173 Penn. St. 525; *Palmer* v. *Hummer*, 10 Kansas, 464; *Buchanan* v. *Wren*, (Tex.) 14 S. W. Rep. 732. Contra: *Richards* v. *Barlow*, 140 Mass. 218, and cases. But see Act of 1888, c. 329.

A stipulation for attorney's fees in a promissory note does not destroy its negotiability: *Stoneman* v. *Pyle*, 35 Ind. 103; *Hubbard* v. *Harrison*, 38 Ind. 323; *Sinker* v. *Fletcher*, 61 Ind. 276; *Garver* v. *Pontius*, 66 Ind. 191; *Maxwell* v. *Morehart*, 66 Ind. 301; *Proctor* v. *Baldwin*, 82 Ind. 370; *Farmers' Nat. Bank* v. *Sutton Mfg. Co.*, 52 Fed. Rep. 191.

Counsel also cited:—1 Daniel Neg. Ins. § 62 a; 1 Randolph Com. Paper, 205; *Sperry* v. *Horr*, 32 Iowa, 184; *Hurd* v. *Dubuque*, 28 Neb. 10; *Dietrech* v. *Bayhi*, 23 La. Ann. 767; *Seaton* v. *Scoville*, 18 Kan. 435; *Overton* v. *Matthews*, 35 Ark. 147; *Gaar* v. *Bank*, 11 Bush, 180; *Nickerson* v. *Sheldon*, 33 Ind. 372; *Trader* v. *Chidester*, 41 Ark. 242; *Davidson* v. *Norse*, 52 Iowa, 384; *Merchant* v. *Moreno*, 7 Fed. Rep. 806; *Adams* v. *Addington*, 16 Fed. Rep. 89.

E. Woodman and T. L. Talbot, for defendant.

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

STROUT, J. This case comes before us upon demurrer to the declaration, and an agreed statement of facts, upon which the court is to render "such final judgment as law and justice will require." The consideration of the demurrer, under this submission, becomes unimportant.

The plaintiff claims to recover from the estate of James Webb,

the defendant's intestate, as indorser of two notes for eleven hundred dollars each, both dated September 29, 1892, now held by plaintiff. The first reads as follows:—

"$1,100.00. Muncie, Ind. Sept. 29, 1892.

On or before one year after date we promise to pay to the order of James Webb eleven hundred dollars with six per cent interest per annum from date and attorney's fees. Value received without any relief whatever from valuation and appraisement laws. The drawers and indorsers severally waive presentment for payment, protest and notice of protest, and non-payment of this note. Negotiable and payable at the Citizens' National Bank of Muncie, Indiana. With eight per cent interest after maturity until paid.

U. S. Gerrells
W. H. Masters."

The second note is of precisely the same tenor, except payable on or before two years.

On the back of each note is the following:—

"For value received I, James Webb, hereby assign, transfer and deliver unto Hardin Roads of Muncie, Indiana, or his order, all my right, title and interest in and to the within note, and the mortgage securing the same.

James Webb."

Both notes were secured by mortgage upon real estate in Muncie, sold by Webb to Gerrells and Masters, through one W. L. Lyons, a real estate and insurance broker at Muncie. This sale was for thirty-three hundred dollars, one-third of which was paid in cash, and the remaining two-thirds by the two notes sued, secured by a mortgage of the same real estate. Soon after the notes were received by Webb, he employed Lyons "to sell the same, and within a few months thereafter negotiated a sale of the notes and the mortgage securing the same, through said Lyons to Hardin Roads of said Muncie, the plaintiff, for the sum of two thousand dollars." During the entire transaction, Webb was a resident and citizen of Maine, and Lyons and Roads were at Muncie, and residents of Indiana. The writing upon the back of the notes was

placed there by Webb, in Maine, as also the written assignment of the mortgage. "Both mortgage and notes were then forwarded by mail by Webb to Lyons, who received payment therefor from the plaintiff at said Muncie, and remitted the same to Webb at Bridgton, Maine."

The papers being delivered to Roads and payment received at Muncie, the contract must be regarded as made in Indiana. The notes were not paid by the makers, and the plaintiff realized on sale of the mortgaged estate six hundred dollars, and claims the balance in this suit.

It is objected that the relation of indorser and indorsee does not exist between the parties, because the notes were not negotiable, by the law merchant; and that the plaintiff is but an assignee of a non-negotiable chose in action, and cannot maintain this suit against Webb's estate.

In Indiana, the negotiability of notes depends upon a statute which provides that "notes payable to order, or bearer, in a bank in this state shall be negotiable as inland bills of exchange and the payee and indorsee thereof may recover as in case of such bills." R. S., 1881, § 5506. Under this statute the Indiana court holds that all notes payable to order, or bearer, in a bank in that state, are, if in other respects they comply with the requirements of the law merchant, negotiable under the law merchant. *Melton* v. *Gibson*, 97 Ind. 158. In *Pool* v. *Anderson*, 116 Ind. 92, it is said that "so far as the statute places promissory notes upon the footing of inland bills of exchange, it subjects them to the law merchant, and all its incidents."

A valid promissory note is not necessarily negotiable. To make it such by the law merchant, it must run to order or bearer, be payable in money, for a certain, definite sum, on demand, at sight, or in a certain time, or upon the happening of an event which must occur, and payable absolutely and not upon a contingency.

These notes were payable "on or before" a named date, and were for a definite sum of money, with interest "and attorney's fees." The later cases in Massachusetts hold that when the time of payment is on or before a certain date, the time of payment is

thereby made uncertain, and for that reason such a note is not negotiable. *Hubbard* v. *Mosely*, 11 Gray, 170; *Way* v. *Smith*, 111 Mass. 523. These cases have been since followed in that jurisdiction, though the earlier case of *Cota* v. *Buck*, 7 Met. 588, held differently. But in other jurisdictions it has been held that these words reserved an option only to the maker to pay before maturity, that payment could not be required till the time specified, nor the note dishonored till then; and therefore it was, in contemplation of the law merchant, payable at a time certain. *Bates* v. *Le Clair*, 49 Vt. 229; *Ernst* v. *Steckman*, 74 Pa. St. 13 (15 Am. Rep. 542); *Albertson* v. *Laughlin*, 173 Pa. St. 525, (51 Am. St. Rep. 777); *First Nat. Bank of Springfield* v. *Skeen*, 101 Mo. 683; *Palmer* v. *Hummer*, 10 Kansas, 464, (15 Am. Rep. 353); *Curtis* v. *Horn*, 58 N. H. 504; *Cisne* v. *Chidester*, 85 Ill. 523; *Woollen* v. *Ulrich*, 64 Ind. 120. The question has not been decided in this State, and we do not now decide it.

A more formidable objection is in the provision for the payment of "attorneys' fees." It is said that if the note should be paid at maturity there would be no attorneys' fees. This is true. But a note which, by its terms, is negotiable under the rules of law, does not lose that characteristic until merged in a judgment. The only infirmity, attending its negotiation after maturity, is that the indorser takes it subject to the same defense that the maker could have made against the original payee. A note cannot be negotiable before maturity and not negotiable after that, by reason of the terms of the note itself. After these notes were dishonored and had been placed in an attorney's hands, his fees commenced to run. How much they would amount to depended upon the service then rendered and to be rendered. But until merged in judgment, they were still negotiable, if negotiable at any time after their creation. Hence arose an uncertainty in the amount due. That uncertainty attached to the notes in their inception, although attorney's fees would not accrue until after dishonor. The notes provided for the payment of such uncertain fees, in case they should accrue, and thus rendered the amount the makers were liable to pay in one event, uncertain. This infirmity destroyed

the negotiable quality of the notes. *Altman* v. *Rittershofer*, 68 Mich. 287, (13 Am. St. Rep. 341.) It has been held in this state that a note payable to order for a sum certain and another sum which is contingent, is not negotiable. *Dodge* v. *Emerson*, 34 Maine, 96. So a note to an insurance company, or order, for a certain sum "and such additional premiums as may become due" on a policy named, is not negotiable. *Marrett* v. *Equitable Insurance Company*, 54 Maine, 537. In that case the additional premiums would be definite, when required; while in the case at bar, the amount of the attorney's fees remains an uncertain quantity until the note should be finally paid. See also *Lime Rock F. & M. Ins. Co.* v. *Hewett*, 60 Maine, 407. These notes fail to contain such definite amount to be paid, as is required by the law merchant, to render them negotiable. It is so held in many states. In *Woods* v. *North*, 84 Pa. St. 409, (24 Am. Rep. 201,) the note was for a specified sum "and five per cent collection fee if not paid when due." The court held it not negotiable. So held in Missouri, *First Nat. Bank of Trenton* v. *Gay*, 63 Mo. 33, (21 Am. Rep. 430); and in Wisconsin, *Morgan* v. *Edwards*, 53 Wis. 599, (40 Am. Rep. 781); in Michigan, *Altman* v. *Rittershofer*, supra; in Minnesota, *Jones* v. *Radatz*, 27 Minn. 240; in Maryland, *Maryland Fertilizing, etc., Co.* v. *Newman*, 60 Md. 584, (45 Am. Rep. 750); in California, *Kendall* v. *Parker*, 103 Cal. 319; in North Carolina, *Bank* v. *Bynum*, 83 N. Carolina, 24, (37 Am. Rep. 604); and in South Carolina, *Carroll County Savings Bank* v. *Strother*, 28 So. Carolina, 504.

It is held otherwise in Indiana, *Stoneman* v. *Pyle*, 35 Ind. 103, (9 Am. Rep. 639,) and in some other states.

It is urged that because this is an Indiana contract, we must apply the doctrine of the Indiana court to it. We do not so understand the law. It is true that the lex loci contractus governs as to the validity and construction of the contract. But the lex fori governs as to all matters pertaining to the remedy. That law governs as to the negotiability of the contract, because upon it depends the question who has a right of action. *Pearsall* v. *Dwight*, 2 Mass. 90. See also *McRae* v. *Mattoon*, 10 Pick. 53;

Warren v. *Copelin*, 4 Met. 597; *Foss* v. *Nutting*, 14 Gray, 485; *Leach* v. *Greene*, 116 Mass. 534.

But if this were not so, yet where the general principles of commercial law are to be applied to a contract, the court of the forum will apply those principles according to its judgment, notwithstanding it may have been held differently where the contract was made.

The Supreme Court of the United States, under the judiciary act of 1789, re-enacted in the Revised Statutes, which provides "that the laws of the several states, except where the constitution and treaties of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply," has uniformly held that it was bound by the decisions of the State court which furnished rules of property, or construed a state statute; yet it was said by that court in *Chicago* v. *Robbins*, 2 Black, 428, that "where private rights are to be determined by the application of common law rules alone, this court, although entertaining for State tribunals the highest respect, does not feel bound by their decisions." That court has ever since adhered to that doctrine. *Norton* v. *Shelby County*, 118 U. S. 440; *Gormley* v. *Clark*, 134 U. S. 348; *Stutsman County* v. *Wallace*, 142 U. S. 306; *Township of Pine Grove* v. *Talcott*, 19 Wall. 677; *Scudder* v. *Union Nat. Bank*, 91 U. S. 412; *Pritchard* v. *Norton*, 106 U. S. 130. It has been so held in Massachusetts, *Richards* v. *Barlow*, 140 Mass. 220; and in Iowa, *National Bank of Michigan* v. *Green*, 33 Iowa, 146.

The statute of Indiana places notes payable in bank, upon the footing of inland bills of exchange. To them the law merchant, with all its incidents, is to be applied. So held in Indiana, in *Pool* v. *Anderson*, supra. The law merchant, by adoption, and the statute of 3 and 4 Anne, c. 9, are part of our common law, which regulate and control the vast transactions in commercial paper. In that domain, we apply the law to subjects affected by it, which are litigated here, having great respect for the decisions of other tribunals, but not controlled by them.

We hold these notes not negotiable. Plaintiff therefore cannot maintain this action.

Another defense is interposed which must prevail, even if it should be conceded that these notes were negotiable under the law merchant. Where a note, negotiable on its face, is indorsed in blank by the payee, the law implies an agreement by the payee, in case the note is not paid at maturity, on proper demand and notice, that the indorser will pay it to the holder. But this implied contract is only prima facie. It may be rebutted. In a suit by the indorsee against the indorser, the latter may show that the understanding and agreement between the parties was that the indorser should not be holden. The law does not imply a contract where an express one has been made. He may prove the express contract by parol evidence, or it may satisfactorily appear from the transaction itself. *Patten* v. *Pearson*, 55 Maine, 39; *Smith* v. *Morrill*, 54 Maine, 52; *Patten* v. *Pearson*, 57 Maine, 431; *Pool* v. *Anderson*, 116 Ind. 92. A note may be sold, as other goods and effects are. In such cases there is no implied warranty of the solvency of the maker. The law respecting the sale of goods is applicable. *Milliken* v. *Chapman*, 75 Maine, 317; *Bicknall* v. *Waterman*, 5 R. I. 43; *Beckwith* v. *Farnam*, 5 R. I. 250. See *Hussey* v. *Sibley*, 66 Maine, 196. If the paper is payable to bearer, it may be sold and transferred by delivery; but if payable to order, it must be indorsed to enable the holder to pursue his remedy in his own name. The usual way to indorse, in such case, is without recourse. But even if indorsed in blank, where the law implies the ordinary liability of an indorser, it is still an open question between the parties to the transaction, whether the actual contract was a sale, the purchaser relying upon the responsibility of the maker alone, or otherwise.

Applying this principle to the facts of this case, it is apparent that the transaction between Webb and the plaintiff was a sale of these notes, by which the purchaser took the notes relying solely upon the responsibility of the makers, and the security of the mortgage, with no claim against Webb as indorser.

Webb was a resident of Maine. The sale of the land to

Gerrells and Masters was effected by a broker in Muncie. It does not appear that Webb had any knowledge of the purchasers or their responsibility. Presumably he did not. He apparently wanted not only to sell the land in the first place, but to relieve himself of all trouble thereafter in connection with it. Shortly after the receipt of these notes, Webb employed the same broker who effected the sale to Gerrells and Masters "to sell the same," in the language of the agreed statement; and within a few months thereafter Lyons "negotiated a sale of the notes and mortgage" to plaintiff. To effectuate the sale, Webb, a business man and presumably familiar with the method of negotiating commercial paper, instead of indorsing the notes in blank, wrote thereon an assignment of his right, title and interest, and made an assignment of the mortgage in substantially the same language employed in the assignment of the notes. He sold them for two thousand dollars, when there was due upon them twenty-two hundred dollars and interest from September 29, 1892, to the time of sale. One note became due September 29, 1893, and the other in September, 1894. The notes were not paid; but the plaintiff does not appear to have called upon Webb as indorser, during his life, which ended November 11, 1895, nor upon his administratrix till October 14, 1896, when the first notice of non-payment was given. Meantime, plaintiff had sold the mortgaged property on August 3, 1895, for six hundred dollars, being himself the purchaser; and on July 8, 1895, had obtained a personal judgment against Masters for the amount of the notes, but collected nothing. Even if the waiver of demand and notice in the body of the notes bound the indorser, this delay on the part of the plaintiff is inexplicable, if he thought Webb liable as indorser. Upon all these facts, a jury would be justified in finding, that the transaction between Webb and the plaintiff was a sale of the notes and mortgage as commodities, for what they were supposed to be worth, the purchaser relying solely upon the responsibility of the makers and the mortgage, with the understanding that Webb was under no liability as indorser. The acts of the plaintiff are inconsistent with any other view. Besides, if Webb desired to obtain money upon the notes, by discount in

the usual way, he assuming the ordinary liability of an indorser, he could readily have done so in his home state. He need not have suffered a loss of more than two hundred dollars in the transaction. He evidently understood that he had sold the notes, and was under no further liability. The language of the transfer of the notes so implies. Its terms are express, and exclude any implied contract differing from it. We think the plaintiff so understood it, from the nature of the transaction, and his long delay in making claim, after dishonor of the notes and failure to collect of the makers, or to realize payment from the mortgage security.

As this case is submitted upon agreed facts, for the judgment of this court, we are at liberty to draw such inferences from them, as a jury would be authorized to draw. And doing so, we arrive at the conclusion, that the understanding between Webb and the plaintiff was, that Webb should not be liable as indorser, but that the plaintiff purchased the notes and mortgage, relying solely upon the responsibility of the makers and the mortgage security. He cannot now call upon Webb's estate to make good any loss he may have sustained. *Patten* v. *Pearson*, 57 Maine, 431, 432.

Judgment for defendant.

TRINITARIAN CONGREGATIONAL CHURCH AND SOCIETY OF CASTINE, Appellant.

Hancock. Opinion March 4, 1898.

Wills. Witness. Attestation. Stat. 1821, c. 38, §§ 2, 8, 10, 11; R. S., 1841, c. 92, § 2; R. S., 1857, c. 74, § 1; Stat. 1859, c. 120, § 1; R. S., 1883, c. 74, § 2.

A witness to a will who is "beneficially interested" under it is rendered incompetent as a witness to the will by the statutes of this state.

In all of its various provisions by statute, it appears to have been the dominant purpose of the legislature, that the witnesses before whom the testator publishes his will, and who by law are made competent witnesses to give their opinion of the mental condition of the testator at the time, though not

experts, should be free from any bias or temptation arising from pecuniary interest in the establishment of the will.

The competency of the witness is to be settled by his situation at the time of attestation, with respect to the subject matter and the contents of the will.

If a will provides a pecuniary benefit to the attesting witness, though dependent upon the happening of an event which may happen, he has a beneficial interest under it, in contemplation of law; and if the subsequent event upon which the interest depends does not happen, that fact does not relate back and restore competency.

The will of Mehitable S. Rogers contained the following bequest, "I give and bequeath the following to Anstres R. Folsom, of Roxbury, Mass. $100 and my personal property. If Anstres R. Folsom decease previous to myself, Mehitable S. Rogers, I give and bequeath the same, viz: $100 and my personal property to Agnes T. Hooper and Martha N. Hooper." Agnes T. Hooper was a witness to the will. *Held;* that she was beneficially interested under it and by statute is an incompetent witness.

AGREED STATEMENT.

This was an appeal from a decree of the judge of probate for Hancock County, disallowing and refusing to admit to probate an instrument purporting to be the last will and testament of Mehitable S. Rogers late of Castine, deceased. The case was submitted to the decision of the full court upon the following agreed statement of facts:

First. That the following is the olograph of Mehitable S. Rogers, to wit:

In the name of God—Amen.

I, Mehitable S. Rogers of Castine, Hancock County, Maine, impressed with the uncertainty of life and desirous of making a just disposition of my property, do make and publish, this my last will and testament.

After paying my debts, I may leave, and burial expenses, I appropriate $150 for fixing the lot in the cemetery and getting a monument for my father's family; I give and bequeath the following to Anstres R. Folsom of Roxbury, Mass. $100 and my personal property, and to the Trinitarian Congregational Church and Society the remaining balance of my estate.

To be given the above mentioned $100 to Anstres R. Folsom, of Roxbury, Mass. and to the Trinitarian Congregational Society and

Church in one year from my decease. If Anstres R. Folsom of Roxbury, Mass. decease previous to myself, Mehitable S. Rogers, I give and bequeath the same, viz. $100 and my personal property to Agnes T. Hooper and Martha N. Hooper.

I appoint Charles H. Hooper as executor of this, my last will and testament.

Signed, sealed and delivered by the said Mehitable S. Rogers as her last will and testament in our presence, who in attestation thereof in her presence and in presence of each other hereto subscribe our names this day.

Oct. 5th, 1893. Mehitable S. Rogers (Seal)

Agnes T. Hooper (Seal)
Ella J. Adams (Seal)
Lucy B. Parker (Seal)

Second. That the Agnes T. Hooper mentioned in the body of said ograph is the same person who appears as a witness thereto.

Third. If, upon these agreed facts, the law court finds that said Agnes T. Hooper was not a legal and proper witness to said will, the appeal is to be dismissed and the decree of the probate court affirmed.

If, however, the law court should find that said Agnes T. Hooper was a legal and proper witness to said will then the case is to be sent back to nisi prius for hearing upon the appeal, both sides to have all rights which they would have had, if the case had not been thus sent to law court on this agreed statement.

Fourth. That Anstres R. Folsom is the only heir at law of said Mehitable S. Rogers.

G. M. Warren, for appellant.

The interest which will disqualify a person from being a witness to a will must be a present, certain, legal and vested interest, not uncertain or contingent. 4 Stark. Ev. 745; *Warren* v. *Baxter*, 48 Maine, 193; *Clark* v. *Voice*, 19 Wendall, 232; *Jones* v. *Larrabee*, 47 Maine, 474; *Sparhawk* v. *Sparhawk*, 10 Allen, 155; *Jones* v. *Tebbetts*, 57 Maine, 572; *Hawes* v. *Humphrey*, 9 Pick. 356.

In *Jones* v. *Tebbetts*, quoted above, APPLETON, C. J., says:—

"The words 'not beneficially interested under the provisions of the will' were inserted in lieu of the word 'disinterested.'" This change, he says, was made "to remove doubts." "It was to enlarge rather than to restrict the rules of 'evidence,' and it is almost a matter of common knowledge that the whole tendency of courts and legislators is to broaden and enlarge the rules of evidence, so that at this age most any one can testify in our courts, but his character, conduct, age, appearance, and relation to the parties are all to be weighed and measured by court and jury."

To be beneficially interested under a will is to be a gainer by and under its provisions. *Smalley* v. *Smalley*, 70 Maine, 549.

Agnes T. Hooper on the day this will was attested would neither gain nor lose by its provisions, all the property of said testator having been disposed of entirely outside of the witness, and therefore the witness had no interest in proving or disproving the will; in other words, she was disinterested and, therefore, qualified and there never has been a day since said will was attested that Agnes T. Hooper has had any interest in proving or disproving said will. In *Sparhawk* v. *Sparhawk*, 10 Allen, 159, the court says:— "It is the fact of a present, existing interest which disqualifies."

H. E. Hamlin, for Anstres R. Folsom.

All the cases cited by the appellant are where the witness sought to be disqualified was an heir at law, receiving under the will less than he would have taken by inheritance, or a resident in a municipality or member of some corporation or society receiving a legacy under the will. In none of them was the witness who was held competent expressly named in the will as a legatee. On the one hand, the disinherited heir at law is held competent, because the will is adverse to his interest; on the other, the member of the society, or the resident in a town, is held competent, because not expressly named as a legatee, but simply having the possibility of benefit as such member or resident.

It must be admitted that Agnes T. Hooper is directly and expressly named in the will as a legatee. She is also a witness to the will. Not as an heir at law disinherited, under the will; nor as a resident in a town receiving a bequest under the will; but she

is a witness and also a direct legatee. The legacy to her is such as makes her "beneficially interested under the will." If the will stands, she might have received a benefit under its terms; not by inheritance from some other party named in the will as a legatee, nor indirectly as a tax-payer or resident in a town named as a legatee, but directly under and by force of the will. If the will had not been made, she would have taken no benefit from the estate.

SITTING: EMERY, FOSTER, HASKELL, WHITEHOUSE, STROUT, SAVAGE, JJ.

STROUT, J. The question is whether Agnes T. Hooper was a competent attesting witness to the will of Mehitable S. Rogers, there being only two other witnesses. The will contained a legacy of one hundred dollars "and my personal property" to Anstres R. Folsom. It then provided that "if Anstres R. Folsom . . . . decease previous to myself, Mehitable S. Rogers, I give and bequeath the same, viz. $100 and my personal property to Agnes T. Hooper and Martha N. Hooper."

The statute of 1821, c. 38, § 2, required a will "to be attested and subscribed in the presence of the testator by three credible witnesses." Section 8 of the same chapter provided that any devise or legacy to an attesting witness should be utterly void, and such person should be admitted as an attesting witness. This section was followed by sections 10 and 11, apparently unnecessary and inconsistent with section 8. By those sections it was provided that an attesting witness who was a legatee, should be regarded as competent, if he released or refused the legacy upon tender thereof, or had been paid its amount before he was called to testify, or died in the lifetime of the testator or before he had received or released the legacy.

In the revision of 1841, c. 92, all these provisions were substantially retained, and a further provision added that "a mere charge on the lands of the devisor for the payment of his debts, shall not prevent any of his creditors whose debt is so charged, from being a competent witness." Under these statutes, a legatee might be an

attesting witness, as by becoming such his legacy became void. Section 2 of the same chapter in the statute of 1841 provided that wills should be attested by "three credible witnesses, or the same shall be void. And if the witnesses are competent at the time of attestation, their subsequent incompetency shall, in no case, prevent the probate of the will, if it be otherwise satisfactorily proved."

In 1856, the common law rule that excluded as incompetent as witnesses in civil suits all persons pecuniarily interested in its result, was, with certain exceptions not material here, abrogated; but the act provided that it should not apply to the attestation of wills. To them, the common law rule remained applicable. Stat. 1856, c. 266.

In the revision of 1857, c. 74, § 1, the witnesses were required to be "disinterested and credible." The provision in the statute of 1841 making void a legacy to an attesting witness, was omitted, as also the provisions as to releasing or refusing a legacy. Under this statute, it was strenuously argued in *Jones* v. *Larrabee*, 47 Maine, 476, that the word "disinterested," excluded as attesting witnesses all persons within the sixth degree of relationship. Although the court held otherwise, the legislature in 1859, c. 120, § 1, for the apparent purpose of removing a doubt, struck out the word "disinterested," and left the requirement "three credible attesting witnesses, not beneficially interested under the provisions of the will."

The statute has not been materially changed since. In the revision of 1883, mere redundancy was avoided, and the enactment now stands "three credible attesting witnesses, not beneficially interested under said will." R. S., c. 74.

In all these various provisions of statute, it appears to have been the dominant purpose of the legislature, that the witnesses before whom the testator publishes his will, and who by law are made competent witnesses to give their opinion of the mental condition of the testator at the time, though not experts, should be free from any bias or temptation arising from pecuniary interest in the establishment of the will. Usually a will is not produced, or its contents known, until after the death of the testator; and public

policy, as well as the protection of interested parties, requires that the testimony to establish the will, should come from the mouths of witnesses to it, who can fairly, disinterestedly, and impartially state the facts as to its execution, and give an honest and unbiased opinion as to the soundness of mind of the testator.

The term, credible witness, is not defined by the statute, but must be construed by the common law rule. By that rule, credible, as applied to a witness, is equivalent to competent. *Warren* v. *Baxter*, 48 Maine, 194. By the common law, any person having a pecuniary interest in the result of the cause, was incompetent as a witness.

By the law now existing and applicable to this case, the witnesses must be competent at the time of the execution of the will. Subsequent incompetency is immaterial, if competent at the time. R. S., c. 74, § 2.

Was Agnes T. Hooper, at the time she attested the will, "beneficially interested" under it? She is named as a legatee, in a certain contingency. If Anstres R. Folsom, the legatee, should decease before the testatrix, Agnes was to take, otherwise not. While she did not take an absolute, certain interest under the will, it would become absolute and certain in an event which might happen. She was not an heir at law of the testatrix. If she had been, and would receive less under the will, if the contingency had happened, than she would receive as heir, she would be competent, as held in *Smalley* v. *Smalley*, 70 Maine, 548, it being against her interest to have the will sustained. So the executor named in the will has been held to be a competent attesting witness, as he takes no beneficial interest under it. *Jones* v. *Larrabee*, 47 Maine, 479. So an inhabitant and tax payer in a town, to which a legacy is given in trust, for purchase of books for a town library, or for charitable purposes, or for the support of schools, has been held competent. *Hitchcock* v. *Shaw*, 160 Mass. 140; *Marston, Petitioner*, 79 Maine, 50; *Piper* v. *Moulton*, 72 Maine, 156. So the prospective heirs at law of a legatee, are competent. They take nothing under the will. *Jones* v. *Tebbetts*, 57 Maine, 572.

"The competency of the witness is to be settled by his situa-

tion at the time of attestation, with respect to the subject matter and the contents of the will." *Sparhawk* v. *Sparhawk*, 10 Allen, 159.

If the legacy had been absolute to Agnes T. Hooper, she clearly would have been an incompetent witness to the will. And, in such case, if she had died before the testatrix, and the legacy had thus lapsed, her attestation would still be invalid. So a limitation over to the witness after failure of issue of the first taker, would be a disqualifying interest.

The true test is, whether the will itself conferred directly or conditionally, a beneficial interest upon the witness. By this will, Agnes T. Hooper was to receive a pecuniary benefit upon the happening of an event, which might happen, and had the interest and hope, at the time of attestation, which such provision held out, to sustain the will. It is argued that the interest to disqualify, must be a certain and vested interest. Suppose an estate were given for life to the father of several children, remainder to his children surviving at his death? The children living at date of the will would not have a certain or vested interest. One or more of them might die before the father, and never acquire any interest in the estate. But it would hardly be claimed that the children were competent witnesses to the will,—that they had no beneficial interest under it, within the meaning of the statute, and no interest to uphold the will.

If the will provides a pecuniary benefit to the attesting witness, though dependent upon the happening of an event which may happen, he has a beneficial interest under it, in contemplation of law; and if the subsequent event upon which the interest depends does not happen, that fact does not relate back and restore competency.

It is important that the safeguards which the law has thrown around the execution of wills, should not be withdrawn or weakened; and to that end, a will which provides a pecuniary benefit, absolute or contingent, to a legatee, should not be witnessed by such legatee. He is interested, and therefore not credible or competent.

Some of the decisions appear to have gone to the verge of the

law in the matter of attestation, in the effort to sustain wills. But we have found no case, nor been cited to any, in which a legatee upon a contingency such as this, has been held a competent attesting witness. We regard it unwise, and inconsistent with sound public policy and the rights of interested parties, to further extend the exceptions to the common law rule.

The result is, that Agnes T. Hooper was not a legally competent attesting witness, and the will must be disallowed.

Appeal dismissed.

Decree of the Probate Court affirmed.

WILLARD G. HARTLEY, in Equity,

vs.

ARTHUR N. RICHARDSON, and others.

Cumberland. Opinion April 4, 1898.

Lien. Filing of Claim. Expiration. Stat. 1895, c. 30.

While the lien law should be construed favorably to the laborer, the rights of the owner and subsequent grantees should also be respected.

The laborer ought not to be encouraged to leave some trifling matter incomplete, and wait to see if his payment is made, and if that fails, complete any trifling work left, and be allowed to revive and continue his lien, to the detriment of parties, who in good faith, relying upon the records, and the apparent completion of the work of the laborer, pay the contractor, or take a conveyance of the property.

Protection to the laborer should not operate a fraud upon other innocent parties.

The plaintiff undertook to plaster for the defendant Richardson, the houses named in the plaintiff's bill. He began work in July, 1895, and finished his skim coating on the 19th of August then following, took away his staging and tools and vacated the premises, having completed his contract.

On October 7th, following, and more than forty days after he had completed his job as aforesaid, the plaintiff went to the houses with two men, the carpenters then having finished their work upon the same, and patched up any bruises or injuries caused by them to the plastering and sundry trifling imper-

fections in the same left by the plaintiff's men when they vacated the premises on the 19th of the previous August,—for which no extra charge was made or claimed.

More than forty days thereafterwards, to wit, on October 23, 1895, the plaintiff filed with the city clerk his claim for a lien upon the houses and land. *Held;* that his lien therefor had already expired before the claim was filed in the city clerk's office; and that the gratuitous work in October was not fairly a continuation of the original contract, and did not continue or revive the expired lien.

A custom to be binding, must be universal in the locality, and of long existence.

The decision of a single justice upon matters of fact in an equity hearing will not be reversed unless it clearly appears that such decision is erroneous; and the burden to show the error is upon the appellant.

IN EQUITY. ON APPEAL.

This was a suit in equity brought under the provisions of chapter 30 of the statute of 1895, for the enforcement of a lien for labor performed and material furnished in plastering a dwelling-house in Portland.

It came to this court on an appeal from the decree of the justice of this court sitting below who heard the case and dismissed the bill.

It was admitted that the respondents, Gribben, were the owners of the land and of the buildings upon which the lien is claimed, and that the building was erected under a contract between the respondents, Gribben and Richardson.

It appeared that the plaintiff, Hartley, did the plastering of the building under a contract with the respondent Richardson, furnishing all labor and material necessary therefor, which at the contract price, 21 cents per square yard, amounted to the sum of $516.60; credit of $191.60 was given, leaving due a balance of $325, the amount sued for in the bill.

The plastering was begun in July, 1895, and the last work was done and the last material furnished on October 7, 1895, when the patching was completed and the workmen finally left.

The plaintiff filed a sufficient sworn notice of his claim of a lien with the city clerk of the city of Portland, in which the land and building was situated, on October 23, 1895, within forty days of

October 7, 1895, and began this action on October 25, 1895, within ninety days of the 7th of October, 1895.

Other facts appear in the opinion.

A. E. Neal, for plaintiff.

As said by Holmes, J., in *Monaghan* v. *Putney*, 161 Mass. 339, "we cannot lay it down as a matter of law, that the work was only colorable, because of the ulterior purpose, or because what was done was a very trifling matter."

As was ruled in *Worthen* v. *Cleaveland*, 129 Mass. 575, by Gardner, J., where work was done on a cellar wall in October and November when it was supposed that the wall was completed, but where it was found necessary to do some little farther work in the ensuing April in order to render the wall perfect, and it was said, "if the petitioner in the following April, in good faith, worked upon the wall . . . . and if such labor done by the petitioner was with the knowledge and consent and upon the request of the respondent . . . . such labor performed in April would operate to keep alive the petitioner's lien." The full bench sustained this instruction as without error.

In the case of *Conlee* v. *Clark*, Ind. App. 1896, 42 N. E. 762, the plumber notified the owner that the work was completed in May. The owner on moving in discovered that a hot-water pipe was connected with a closet, instead of a tub as it should be, and telephoned the plumber to change it. On June 2, a change was made, the work only taking a short time, for which no charge was made. It was held that the contract was completed June 2, and that the time for filing the lien notice was to be computed from that time.

The contract made and partially performed before the recording of the mortgages will give the lien claim priority to that of the mortgages, the lien attaching at the beginning of the labor, even though part of the labor or material furnished under the contract is subsequent to the record of the mortgage. *Morse* v. *Dole*, 73 Maine, 351.

Counsel also cited: *Gale* v. *Blaikie*, 126 Mass. 274; *Marston* v. *Kenyon*, 44 Conn. 356; *Jones* v. *Swan*, 21 Iowa, 181; *Lindsey*

v. *Gunning*, 59 Conn. 319; *Vito Viti* v. *Dixon*, 12 Mo. 481; *Chapman* v. *Brewer*, 43 Neb. 890; *Howard* v. *Veazie*, 3 Gray, 233; *Nixon* v. *Knights of Pythias*, 56 Kan. 298; *Howard* v. *Robinson*, 5 Cush, 119; *Dunklee* v. *Crane*, 103 Mass. 470; *The Granite State*, 1 Sprague, 277.

Usage: *Jones* v. *Hoey*, 128 Mass. 588.

J. A. and Ira S. Locke, for P. A. and W. L. Gribben, and Me. Wesleyan Board of Education.

H. W. Gage and C. A. Strout, for S. H. and A. R. Doten.

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

STROUT, J. Bill in equity to enforce a mechanic's lien. The justice who heard this cause, and entered a decree, found as matter of fact, that the plaintiff "began work (plastering) in July, 1895, and finished his skim coating on the 19th of August then following, took away his stagings and tools, and vacated the premises, having completed his contract, upon which, at the stipulated price per yard, the sum of $516.60 then became due and payable, and upon which sum he has received a payment of $191. . . . . "That on October 7, 1895, more than forty days after he had completed his job as aforesaid, the plaintiff went to the houses with two men, the carpenters then having finished their work upon the same, and patched up any bruises or injuries caused by them to the plastering and sundry trifling imperfections in the same left by the plaintiff's men when they vacated the premises on the 19th of the previous August, for which no extra charge was made or claimed;" and that this was done "without the knowledge or consent of the mortgagees;" and that there was no substantial providing of materials or labor furnished later than the 19th of August, when the plaintiff's job was complete and his compensation therefor became due and payable." Plaintiff filed in the clerk's office of Portland his claim for a lien upon the houses, on October 23, 1895. The justice thereupon held that plaintiff's lien had expired before the filing of his claim in the clerk's office, and the bill was dismissed. From this decree plaintiff has appealed.

"The decision of a single justice upon matters of fact in an equity hearing, should not be reversed unless it clearly appears that such decision is erroneous." "The burden to show the error falls upon the appellant." "He must show the decree appealed from to be clearly wrong, otherwise it will be affirmed." *Young* v. *Witham*, 75 Maine, 536; *Paul* v. *Frye*, 80 Maine, 26.

The evidence in the case justified the finding. The plaintiff and his men were at work, plastering by the yard. There is no evidence that he had any contract to plaster all of the two houses, or any particular portion of them. For aught that appears, he was at liberty to quit work at any time, and receive payment for the number of yards he had plastered. Richardson, his employer, had no claim upon plaintiff to work longer than he chose and plaintiff was under no obligation to do so. It is true, that he held a contract from Richardson for the conveyance of certain real estate, and that by it, whatever work plaintiff did for Richardson was to be at the price of twenty-one cents per yard, one-fourth part of which was to be retained by Richardson toward payment for the land; but plaintiff did not bind himself by that contract to do any particular amount of, nor any, work for Richardson. His rights and liabilities as to Richardson, in the work on these houses, were those of a day laborer.

He quit work, took away his men and appliances for the work, and left the house cleared for the carpenters, on the 19th day of August, sixty-five days before he filed his claim for lien. He was under no contractual liability to do anything more. He did not promise to do anything more. His work was done. He had no occasion to return to it, nor any expectation of doing so. He allowed his lien to expire by limitation. On October 7, he went to the house and repaired some breaks in the plastering made by the carpenters. He was under no obligation to do this. The repairs were not made necessary by any fault or neglect of the plaintiff or his men, but by the fault or carelessness of the carpenters. It was merely a gratuitous service, for which no charge was made or payment expected. Some other trifling things were done, but no payment was asked or expected. Richardson,

his employer, did not ask plaintiff to do this work, or claim that he was bound to do it. It is apparent, that on October 7, plaintiff had become doubtful about obtaining payment from Richardson, and hence the effort to hold a lien, by tacking this gratuitous work upon that done and completed on August 19. The patching in October was a repair of work before then properly done and completed, and damaged afterward by other parties, for which plaintiff was not responsible. Such repairs "cannot revive a first or suspend the running of the time in which he must enforce the prior lien." *Baker* v. *Fessenden*, 71 Maine, 294.

There was evidence that after the carpenters had left, Gribben, the owner of the building, asked plaintiff to mend the defects the carpenters had caused, and that plaintiff replied "that it was not a part of his work to do that." Gribben then asked him if he would do it for him, and plaintiff said "he would see about it." But he did not go and do it. Three or four days or a week after, Gribben asked him again, and he said he would go, and Gribben says he expected to pay him for it. This is denied by plaintiff. But the credibility of the witnesses and the truth or falsehood of their statements, were for the sitting judge. If he believed Gribben, it was an end of plaintiff's case. Where the evidence is conflicting, the trial judge who sees the witnesses is in the better position to determine the truth. In such case, his decision will not be reversed upon the facts.

Plaintiff claims that there was a custom among plasterers in Portland to repair damages done by the carpenters, as part of their duty as plasterers; and called some witnesses, who with more or less distinctness said there was such a custom. Defendant called Mr. Redlon, a mason and builder in Portland for fifteen years, having had extensive experience. He was asked, "Is it the custom, when the plastering is done by the yard, for the mason to follow the carpenter and finish the bruises and defective places and plastering, as a part of his contract?" and he answered "I should say not." Mr. Snow, another mason and builder in Portland of twenty-three years' experience, says the same. A custom to be binding, must be universal in the locality, and of long existence. *Ulmer* v. *Farnsworth*, 80 Maine, 502.

The evidence utterly fails to show a custom as claimed by plaintiff.

The plaintiff quit work August 19. October 1, Gribben, the owner of the houses, made two mortgages upon them, to raise money to pay Richardson, the contractor and builder. These mortgagees found no lien filed in the clerk's office, and undoubtedly knew that the plaintiff quit the work and removed his appliances, on the 19th of August. Gribben certainly knew this. They had a right to believe that no lien existed.

While the lien law should be construed favorably to the laborer, the rights of the owner and subsequent grantees should also be respected. The laborer ought not to be encouraged to leave some trifling matter incomplete, and wait to see if his payment is made; and if that fails, complete the trifling work left, and be allowed to revive and continue his lien, to the detriment of parties, who in good faith, relying upon the records, and the apparent completion of the work of the laborer, pay the contractor, or take a conveyance of the property. Protection to the laborer should not operate a fraud upon other innocent parties. The case of *Woodruff* v. *Hovey*, ante, p. 116, is in point. In that case, a building accepted by the owner, required some trifling work to be done to complete it. This was done more than forty days after the practical completion of the building, no lien having been filed in the meantime. This court held that such work did not revive or continue the original lien. In this case, the tenements had been accepted by Gribben, the owner; a tenant had gone into one, and was occupying it; and on October 1, after the lien had expired, Gribben raised the money by mortgage to pay the builder, Richardson, the amount due upon the contract, and presumably did pay him, as he makes no complaint. Later he discovered these slight defects, and instead of applying to Richardson to repair them, asked the plaintiff to do so, at his, Gribben's expense. Jones on Liens, § 1446.

Decree below affirmed, with additional costs.

HAMMOND BEEF AND PROVISION COMPANY

vs.

MARTIN W. BEST.

Cumberland. Opinion April 18, 1898.

Insolvency. Discharge. Corporation. Residence. U. S. Const. 14th. Amend. R. S., c. 81, § 19; Stat. 1893, c. 278.

A corporation created by the laws of another state has its residence in such state, and does not gain a citizenship in this state by doing business here, although it occupies a store here, which is managed by clerks and agents residing here, and pays taxes on its stock of merchandise here.

The presumption that the citizenship of stockholders is identical with that of the corporation is one of law, not to be defeated by averment or evidence to the contrary.

A corporation is a "person" within the meaning of the Fourteenth Amendment to the Federal Constitution of the United States and other constitutional clauses.

A debt due a corporation created in another state is not barred by the debtor's discharge in insolvency here,—the creditor not participating in such proceedings, nor accepting a dividend, although all the usual notices to creditors be served on its resident agent in the manner described for service by sections 19 of chapter 81 of the revised statutes; and notwithstanding the act of 1893, providing that no action shall be maintained by any creditor against any debtor, who has received his discharge in insolvency, upon any demand of claim that would have been discharged by insolvency proceedings if proved against such debtor's estate.

AGREED STATEMENT.

This was an action of assumpsit to recover for goods sold and delivered by the plaintiff to the defendant, and was returnable to the Superior Court for Cumberland county, April term, 1897. The parties agreed to the following statement of facts:—

"Hammond Beef and Provision Company, the plaintiff, is a legally organized corporation under the laws of the State of Illinois, being organized and created under and in accordance with the provisions of "An Act concerning corporations," approved April 18th, 1872, and in force July 1st, 1872, and all acts amendatory thereof.

The location of the principal office of said corporation is in Chicago in the County of Cook and State of Illinois. Its capital stock is twenty thousand dollars. The object for which it is formed is: Dealing in meats, provisions and other merchandise. The date of its organization is May 3rd, 1895. Its duration is twenty-five years.

"Said corporation has transacted business in Portland, in the County of Cumberland and State of Maine, from the date of its organization to the date of the writ in this case, and has had a store or place of business in said Portland during said time where it has transacted and conducted business as aforesaid by different agents or managers. Since May 26th, 1896, it has transacted business by its agent or manager, Albert C. Bertch, who is its present agent. Said corporation had paid, prior to the time of the sale and delivery of the goods sued for, one tax to the city of Portland, to wit, in the year 1896, assessed April 1, of that year, on an assessed valuation of three thousand two hundred dollars personal property. The rental of the store in which its business is transacted in said Portland is $177.51 per month. The volume of its business in said Portland has been about one hundred and fifty thousand dollars a year during the time it has done business in said Portland.

"The defendant, Martin W. Best, an inhabitant of this state and resident in Deering in said county of Cumberland, purchased of the plaintiff corporation, in September and October, 1896, at its said place of business in said Portland, goods amounting in value to three hundred and fifty dollars, and was legally indebted therefor on the seventh day of November, A. D. 1896, and said goods have never been paid for. On said seventh day of November, A. D. 1896, said Best, being then an inhabitant of this state and residing in said county, was legally adjudged an insolvent debtor by the Insolvency Court of said county of Cumberland, as appears by the records thereof, of said court. On the seventh day of December, 1896, said defendant, being then such resident and inhabitant, was granted by said court, a discharge under the provisions of section 62 of chapter 70 of the Revised Statutes of Maine and acts amend-

atory thereof and additional thereto, from all his debts and liabilities contracted prior to the commencement of his insolvency proceedings and named in the schedule annexed to his affidavit filed in said court, as appears by the record of said court. His said debt to the plaintiff corporation was among those named in said schedule.

"Said plaintiff corporation had due and legal notice of said insolvency proceedings and took no part in said proceedings, and refused so to do. The defendant was, on the day of the date of the plaintiff's writ, and still is, an inhabitant of this state.

"The plaintiff existed as a corporation as aforesaid at the time of sale and delivery of the goods sued for and ever since, and did, and is still doing business as aforesaid by its agent, having a place of business in Portland in this state."

Clarence Hale and A. F. Belcher, for plaintiff.

Clarence W. Peabody, for defendant.

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

PETERS, C. J. The plaintiff is a corporation created under the laws of the state of Illinois, having its home office in Chicago. Its business is dealing in meats, provisions and other similar merchandise. The corporation ever since its creation has hired a store in Portland where it has transacted a volume of business in its line of about one hundred and fifty thousand dollars a year, employing as its agents or managers persons who are residents of this state. The corporation was assessed on April 1, 1896, on considerable personal property in its possession in Portland. The defendant, a citizen of this state, in September and October, 1896, bought of the plaintiff the bill of goods sued for in this action, and in November afterwards went into insolvency, receiving his discharge regularly in December of the same year. He named the plaintiff's account in his schedule of debts due from him, and the corporation was served with all the notices usual in proceedings of insolvency, but took no

notice of them, and has neither proved its claim nor accepted a dividend on it.

The defendant concedes that, if the plaintiff were a natural person instead of a corporation, and in the same condition that the corporation is, his discharge in insolvency could not be successfully pleaded in discharge of the debt. *Pullen* v. *Hillman*, 84 Maine, 129. But it is contended that the same rule that would be applied to an individual creditor living in a state other than our own should not apply where the creditor is a foreign corporation occupying a store and doing business in this state. We do not see that in principle there is any force in such a distinction. Creditors without any corporate authority, who have their residence out of the state, may hire and occupy stores and sell merchandise within the state, and their debts contracted here not be affected by their debtor's insolvency, and why may not a foreign corporation just as well have the same immunity?

The defense endeavors to set up as the justification for a difference between the rights of the two classes of creditors, creditors incorporated and those not incorporated, a provision of R. S. ch. 81, § 19, which reads as follows: "And in all suits and proceedings at law or in equity against any foreign or alien company or corporation established by the laws of any other state or country, and having a place of business within this state or doing business herein, service of the writ, bill, petition, or other process is sufficient, if made by leaving an attested copy thereof with the president, clerk, cashier, treasurer, director, agent, or attorney of such company or corporation, or by leaving such copy at the office or place of business of such company or corporation, within this state." The argument in behalf of the defendant is that the plaintiff, although a foreign corporation, is subjected to all the provisions of our insolvent laws, just as much as our home corporations are, because it has an established place of business here, in consequence of which a statutory service can be made upon it through its agents in any proceedings against it in our courts. This is a novel proposition which we do not find to have ever been directly presented before. We think, however, that the position as to the effect of the statute in this case

is more specious than correct. A corporation or a person may be amenable to state-jurisdiction for some purposes and not for all purposes. The principle which protects a foreign debt from the insolvent proceedings of the debtor is more comprehensive than any possible effect of a statutory notice, whether regarded as actual or only constructive notice, in legal proceedings against the creditor in our courts. The foreign corporation may under the statute be drawn into court; but when it gets there, all of its legal rights are preserved to it, one of which is that the collection of its debt shall not be barred by insolvency proceedings instituted by its debtor, unless the creditor voluntarily participates therein in some way. It is a defense against such proceedings that the corporation (or individual) is a creditor actually residing in another state—is a citizen of such other state. Such creditor does not become a citizen of this state by being temporarily here or by having a business agent or manager here. The creditor must live and reside here in order to be bound by insolvency proceedings here.

The defendant invokes aid for his position from certain expressions found in judicial opinions to the effect that this rule of exemption would not prevail where the creditor is within the territorial jurisdiction of the state, so that service of process can be made on him; the defendant contending that this corporation comes within such a category. As an illustration of the position which he seeks to maintain, the defendant quotes from the case of *Pullen* v. *Hillman*, supra, a passage in the opinion delivered for the court by Mr. Justice EMERY, as follows: "Ability to serve process within the State is, therefore, the test of the court's power to acquire jurisdiction in any proceeding. If at the beginning of the insolvency proceedings, the process of the court of insolvency could have been served on the plaintiff within the State, the court could have acquired jurisdiction over him by such service. The situation at that time, not at the date of the contract, is the criterion. If the plaintiff was then a citizen of this State, he could have been served with process and subjected to the jurisdiction of the court, although he may never before have been within the State, and although the contract may have been made, and was to be per-

formed in another state. So much will be conceded by the defendant. But it follows, that if the plaintiff was not then a citizen of this State, (at the time of the insolvency proceedings,) no process could have reached him and he could not be subjected to the court's jurisdiction even though for all his life before, he may have resided within the State."

The quoted lines are a part of the argument in the opinion of that case, where the point decided was that the creditor's note was not discharged by insolvency proceedings entered into by the maker in Maine, although the note was given here when both parties resided here, the payee afterwards removing from this state to New York before the insolvency proceedings were commenced. We can have no doubt that the learned justice meant merely that the phase of that case would have been different had service in the insolvency proceedings been made on the creditor while in this state as a resident and citizen here, and not merely as a temporary sojourner; and much less did he intend by his words to imply that service of process on an agent here would be effectual to extend personal jurisdiction over the creditor in this state. His discussion was of a principle and not of forms of procedure. But notwithstanding that different reasons may have been assigned, even if it be so, by judges or jurists, as the origin of or foundation for the doctrine which we espouse in the present case, the doctrine itself has been supported by a long line of leading authorities.

If this corporation was ever a citizen of Maine it was also a citizen of Illinois at the same time, and therefore a citizen of both states simultaneously, and that is a legal impossibility. After some vacillating decisions it is now generally if not universally settled that a corporation is a resident and citizen of the state where it was created, and can never so change its residence as to obtain citizenship elsewhere; and that its stockholders are conclusively presumed to be residents of the same state. These presumptions, although somewhat forced and conventional, are at the same time of logical bearing and absolutely necessary for the protection of business and property, and essential to the proper administration of justice in all the courts of our country both Federal and State. Time has proved this to be so.

In *Saint Louis and San Francisco Ry. Co.* v. *James*, 161 U. S. 545, it is declared that the presumption that the citizenship of stockholders is identical with that of the corporation is one of law, not to be defeated by allegation or evidence to the contrary. In *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, Mr. Justice Gray, after quoting Chief Justice Taney's remark that a corporation must dwell in the place of its creation and cannot migrate to another sovereignty, says this statement has often been reaffirmed by the United States Supreme Court "with some change of phrase, but always retaining the idea that the legal existence, the home, the residence, the domicil, the habitat, the citizenship of the corporation can only be in the state by which it was created, although it may do business in other states where their laws permit." Of course it logically follows that no amount of business done away from home can operate to forfeit the citizenship at home. In our own state there are pertinent decisions on the question. *Hobbs* v. *Manhattan Ins. Co.*, 56 Maine, 417; *Chafee* v. *Fourth Nat. Bank*, 71 Maine, 528. So there are in Massachusetts. *Guernsey* v. *Wood*, 150 Mass. 503; *Phoenix Nat. Bank* v. *Batcheller*, 151 Mass. 589; *Regina Flour Mill Co.* v. *Holmes*, 156 Mass. 11. The same court has also held, by a majority opinion, that a discharge in insolvency under the laws of that commonwealth is not a bar to an action on a debt due to a partnership one member of which never was a resident there, although the two others were residents. *Chase* v. *Henry*, 166 Mass. 577. That case is much more radical than any doctrine necessary to maintain our conclusion in the case at bar.

Another defense is set up to the action depending on the effect to be accorded to the act contained in chapter 278 of our Laws of 1893, reading as follows: "No action shall be maintained in any court in this state against any inhabitant of this state, who has obtained a discharge from his debts under the insolvent laws of this state, upon any claim or demand of any name, kind or nature that would have been discharged by said insolvency proceedings if proved against said estate." Admitting that this court, in *Silverman* v. *Lessor*, 88 Maine, 599, held that this act was unconstitu-

tional as applying to creditors out of the state who are to be regarded as persons, the defendant contends that the plaintiff corporation is not a person within the meaning of the Fourteenth Amendment to the constitution and other constitutional clauses. This view might have had some support in the earlier cases, but is without any influential support at this day. That corporations are persons within the meaning of the first section of the Fourteenth Constitutional Amendment, and that they "may invoke the benefit of those provisions of the constitution which guarantees to persons the enjoyment of property, or afford them the means for its protection, or prohibit legislation injuriously affecting it," has been emphatically affirmed in comparatively recent cases. *Santa Clara Co.* v. *Sou. Pac. R. R. Co.*, 118 U. S. 394, 396; *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181; *Minn. & St. Louis R. R. Co.* v. *Beckwith*, 129 U. S. 26, 28; see, also, *United States et al.* v. *Northwestern, &c., &c., Co.*, 164 U. S. 609.

Defendant defaulted.

STELLA M. TOOTHAKER *vs.* CHARLES B. CONANT.

Franklin. Opinion April 20, 1898.

Slander. Privileged Communications. Honest Belief.

To justify the speaking of slanderous words on the plea of privileged communication it must appear not only that the defendant believed he was speaking the truth, but that there were reasonable grounds which induced such belief.

ON EXCEPTIONS BY DEFENDANT.

The plaintiff having recovered a verdict against the defendant in an action of slander, the defendant took the exceptions which will be found in full below in the opinion of the court.

H. L. Whitcomb, for plaintiff.

B. Emery Pratt, for defendant.

Where in an action for defamation the defense is that of privileged communication, the question for the jury is not whether the

language used was true, or whether the defendant had reasonable grounds to believe it to be true, but whether he honestly believed it to be true, and used it without malice in the reasonable protection of his own interests. *Chaffin* v. *Lynch*, (Va.) 6 S. E. Rep. 474; *Swan* v. *Tappan*, 5 Cush. 104, 110; *Gassett* v. *Gilbert*, 6 Gray, 94, 97; *Bradley* v. *Heath*, 12 Pick. 163, 164; *Sheckell* v. *Jackson*, 10 Cush. 25, 26.

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

PETERS, C. J. The exceptions, in this action of slander, ever so brief, are as follows: "The defendant claimed the words used were privileged, and requested the presiding justice to instruct the jury that the question for them to decide was not whether the language used was true, nor whether the defendant had reasonable ground to believe it to be true, but whether he honestly believed it to be true. This the justice refused to do and instructed the jury that he must have reasonable and probable grounds for his belief or his belief would be no defense. The verdict was for the plaintiff. To which refusal the defendant excepts."

There is nothing to inform us what the alleged slanderous words were, nor what the circumstances were under which the words were spoken. While the phrase "honest belief" may be found in legal opinions which undertake to define privileged communications, the phrase without addition or qualification is not adequate and sufficient as a definition of the law of justification for what would otherwise be regarded as slanderous words. A man may inflict an injury upon another without intending any injury, and still be liable for his unjustifiable act. Malice in the popular sense need not appear in order to sustain an action for slander. Even accidental injuries are actionable unless the person causing the injury be free from all fault. Carelessness which causes an injury is generally a sufficient foundation for an action. But a person may through carelessness or negligence commit a wrongful act, and honestly think or believe he is doing no wrong. And the defend-

ant here, in order to clear himself from the imputation of carelessness, should show not only that he was acting in an honest belief that the story communicated by him was true, but that there were reasonable grounds to induce such belief. Otherwise, an injury might be wrongfully inflicted upon an innocent person and he have no remedy or redress for it. *Bearce* v. *Bass*, 88 Maine, 543, is cited by the defense where the learned justice adopted in his opinion the phrase "honest belief," but he added thereto the words, "such belief being founded on reasonable and probable grounds."

Exceptions overruled.

UNION WATER POWER COMPANY

vs.

RANSOM C. PINGREE, and another.

Androscoggin. Opinion April 21, 1898.

Lease. Water-Rent. Covenant. Recoupment.

The defendants, intending to erect and operate mills for the manufacture of lumber on a lot leased to them by another party, in pursuance of such intention, leased from the plaintiffs a certain measure of water-power, being the right and privilege of taking water for their mills through one of the flumes upon one of the canals appertaining to the water-works belonging to the plaintiffs, situated in Lewiston on the Androscoggin river; the leased premises including flume, water-wheels, shafting and buildings necessary thereto. The lessors were to make all renewals and extraordinary repairs, and the lessees all ordinary repairs, during the term of the lease. Midway in the life of the lease all the leased buildings and fixtures belonging to the lessors, as well as the mills belonging to the lessees, were partially if not totally destroyed by an accidental fire, and renewals and extraordinary repairs became immediately necessary, should the manufacturing business be continued; but none were made. Certain things soon transpired which made it for the interest of both parties not to further continue the lease, and neither party undertook to do anything for the restoration of the property.

It is held to be doubtful, on these facts, whether a covenant to pay rent was binding for any period after the date of the fire, because the premises upon which the lease subsisted were of such a transitory character.

But if rent be recoverable, then the defendants may recoup against the rent for the damages occasioned by a breach of the covenant to repair made by the plaintiffs in the same lease, whether the latter covenant be regarded as an express or implied one.

Nothing appearing to the contrary, the damages sustained by the one party will be presumed to be in amount the same as those of the other, the claim and cross-claim being regarded as equal if not quite alike.

On Report.

This was an action of assumpsit, as permitted under the statutes of Maine, to recover rent due upon a sealed lease between the parties.

The case is stated in the opinion.

W. H. White and S. M. Carter, for plaintiff.

By the common law, in the absence of any stipulation in the lease to the contrary, the duty to repair leased premises is cast upon the tenant, and that too, notwithstanding the premises may be destroyed by flood, fire or tempest. *Hill* v. *Woodman*, 14 Maine, 38; *Libbey* v. *Tolford*, 48 Maine, 316; *Gregor* v. *Cady*, 82 Maine, 136.

The provision in the lease of 1889 that the lessees should make all repairs, only expressed what was their legal obligation in the absence of any provision in the lease to save them from this duty.

Nor is a tenant relieved from his covenant to pay rent by the destruction of the premises by fire unless he saves himself by some stipulation to that effect in the lease. Where a tenant covenants to repair,—casualties by fire or tempest excepted—if he also covenants to pay rent he shall be holden to pay notwithstanding the premises may be burned or blown down. *Hill* v. *Woodman*, supra; *Libbey* v. *Tolford*, supra, and cases cited; *Viterbo* v. *Friedlander*, 120 U. S. 712; *Fowler* v. *Bott*, 6 Mass. 63; *Kramer* v. *Cook*, 7 Gray, 550; *Leavitt* v. *Fletcher*, 10 Allen, 119; Taylor's Landlord & Tenant, § 375.

The only exception to this rule is where the subject matter of the demise is entirely destroyed, in which case it has been held that the lease perishes with it. Taylor's Landlord & Tenant, § 520.

Such was the case of *Waite* v. *O'Neil*, 76 Fed. Rep. 408. In

this case the court found that the landing, which was the subject matter of the lease, "was effectually destroyed by the ravages of the river." Instead of a landing, where boats could load and unload, which was the condition when the lease was made, there remained only a vertical bluff, 60 or 80 feet high. The landing had disappeared from the face of the earth. "Nor was it possible by reasonable effort to make a landing."

It also held in *Stockwell* v. *Hunter*, 11 Metcalf, 448, and kindred cases, that where one leases a room in a building and the building is destroyed by fire, he is relieved of his obligation to pay rent. These cases seem to go upon the ground that there is such a destruction of the land or thing granted as to amount to an eviction.

But no such conditions as these exist in the case at bar. The principal thing granted was the right to take, draw, and use a quantity of water from the canal of the lessor. The fall of this water upon the wheel created the power which, transmitted upon a shaft, turned the machinery in the lessee's factory. The fire destroyed some of the structures and appliances by which this power was transmitted. A week or two of time and the expenditure of a few hundred dollars in money would have restored the premises to as good condition as they were before the fire, so that the tenant could have enjoyed all the uses and benefits of the rights and property conveyed to him by the lease as effectually as at any time before the fire.

There never was an hour when the lessor could not supply the water to turn the wheel, and it was ready and willing and able at all times to fulfill and perform its part of the contract. Of course the lessees did not want the water or the power created thereby until they had some place to use and apply it, but that was not the fault of this lessor. Whenever the lessees saw fit to call for the water the lessor was ready to furnish it.

The agreement of April, 1893, became a separate and independent contract between the parties. Therefore any neglect or omission on the part of the plaintiff to make extraordinary repairs could not affect the original lease or excuse these defendants from

paying the rent reserved in that lease. If the plaintiff was guilty of any laches in keeping any covenant in the agreement of April, 1893, it might under proper circumstances prevent the plaintiff from recovering from the defendants for the compensation agreed upon between them, but it could not affect the original or water lease.

J. A. Morrill, for defendants.

The general principle of liability on the part of the lessee to pay rent according to his covenant does not apply in cases where the land is not leased, or in those cases where the land is considered as the mere incident, and consequently, that the interest of the lessee in it is defeasible upon his ceasing to have the use of the buildings. Frequent examples of the application of this principle are found in the cases of leases of apartments or offices in buildings in cities. *Kerr* v. *Merchants Exchange Co.*, 3 Edward's Chancery, 315, and cases in the note, Book 6, page 672 of the lawyer's edition. Or in the case of a lease of a basement. *Stockwell* v. *Hunter*, 11 Met. 448; *Winton* v. *Cornish*, 5 Ohio, 477; *Graves* v. *Berdan*, 26 N. Y. 498; *Harrington* v. *Watson*, 11 Oregon, 143, (50 Am. Rep. 465.)

It is plain and beyond dispute that the Union Water Power Company by its officers or agents took possession of these ruins after the fire, and that they did it without saying anything whatsoever to the tenants.

It is said in *McGaw* v. *Lambert*, 3 Penn. St., 445: "If the landlord takes possession of the ruins for the purpose of rebuilding without the consent of the tenant, it is an eviction of him. If with his consent, it was a rescission of the lease, and in either case the rent is suspended." And in *Graves* v. *Berdan*, 26 N. Y., 498, it is said that even if the lessee's interest in the demised premises in a case like this was not terminated by the total destruction of the building, it may be doubted whether the lessor could receive rent so long as he failed to give to the demised upper rooms the support necessary to them for special enjoyment.

Counsel also cited: *Prescott* v. *Otterstatter*, 85 Pa. St. 537.

Recoupment: *Holbrooke* v. *Young*, 108 Mass. 83; *Myers* v. *Burns*, 35 N. Y. 269; 1 Wash. R. P. 4th ed. 527.

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

PETERS, C. J. In 1890 the defendants simultaneously obtained from the Franklin Company, a land company, a lease of a lot of land in Lewiston upon which to establish a mill plant for the purpose of manufacturing lumber, and from the Union Water Power Company, a water company, a lease of a certain amount of water privilege sufficient to furnish power with which to carry on the contemplated manufacturing. The leases were for ten years, though that from the Franklin company was sooner terminable upon certain conditions, and that from the Water Power company could be terminated by the defendants at any time when the other lease might from any cause come to an end. The plaintiffs leased to the defendants "the right, privilege and easement of taking, drawing and using from the cross-canal No. 1, so-called, of the Water Power Company, in said Lewiston, through the flume now existing on the northerly side of said cross-canal No. 1, a quantity of water not exceeding one hundred horse-power during every twelve hours of each and every secular day for running machinery and manufacturing purposes upon the premises known as the Mill lot, and leased by the said Pingree & Co. of the Franklin company . . . ." "Also the water-wheels and shafting connected with said flume, and the buildings over the same. Said flume, water-wheels, shafting and buildings to be taken by the said Pingree & Co. as they now exist."

The defendants at once entered into possession of the leased premises and commenced to make changes and improvements therein until in April, 1893, to use the words of plaintiffs' brief, they had "entirely reconstructed the appliances and structures used for conveying the water from the canal to the wheels and for the transmission of the power from the wheels to their factory on the Mill lot." To compose some differences that had meanwhile arisen between the parties, the defendants, for the sum of $3000.00,

in April, 1893, made to the plaintiffs a written sale of these improvements describing the same thus: "The new iron feeder connecting the forbay of the Union Water Power Company on Canal No. One in said Lewiston with the Wheel-house described in the lease from said Union Water Power Company to said R. C. Pingree & Company, which feeder was put in by said R. C. Pingree & Company in 1892. Also the new wheel, gears, boxes, shafting and all other improvements put in said wheel-house by said Pingree & Co. in 1890 as far as the line of the Union Water Power Company land. Also the regulator attached to said wheel and all the pulleys, gearing and appliances connected with the wheel and necessary for the regulator's proper use and operation and which were put in by said Pingree & Company in 1890."

This sale was coupled with a contract between the parties by which it was agreed, among other things, that, in addition to the rent specified as payable under the terms of the lease, the defendants should annually pay another sum which would be equivalent to interest on $3000.00, for the use and enjoyment of the purchased property. In the same agreement it was mutually stipulated that Pingree & Company (defendants) "should make all ordinary repairs upon the machinery and property above described at their own cost and expense, and that the plaintiff company should make all renewals and extraordinary repairs" on the same.

January 29, 1896, the factory and entire manufacturing plant of defendants on the Mill lot were lost by fire, and "practically it may be said that all the appliances and structures for the transmission of power from the wheel to their factory were also destroyed." The loss on the fixtures owned by plaintiffs, but used by the defendants, is computed by the counsel for plaintiffs at six hundred dollars, the counsel on the other side estimating such loss at a considerably larger sum. The defendants did not rebuild their factory, nor make any use of the water power after the fire, but did some manufacturing on the premises for a while afterwards by the use of some steam power borrowed for the purpose. Nor did the plaintiffs ever make the renewals or extraordinary repairs called for by the agreement before named, and without such the defendants

could make no use of any water power on their property. The lease from the Franklin Company became terminated in the season of 1896, and the properties covered by the two leases were abandoned by the defendants before the close of that year. Thereupon the plaintiffs, by their writ dated November 20, 1896, sue for the recovery of a "water-rent" for nine months ending November 1, 1896, amounting to about $600.00, and for one year's rent or interest on the $3000.00, making $150.00 besides.

The defendants contend that they have been absolved from all liability for the payment of rent. There is certainly in equity and justice much reason why they should not be responsible for rent, having had no beneficial use of the leased property after the fire. A possession of the water-power by the lessees before permanent repairs were made would be an impossibility, and it may well be presumed that that portion of the water which the defendants ceased to receive went for the plaintiffs' benefit through other distributions from the same canal. Closing the flume appropriated for the defendants' use would as a matter of course create more pressure in other flumes in the same dam or canal.

There cannot be any doubt that the two papers, lease and agreement, are to be construed as dependent parts of one contract. They together became an entirety. There is a clause in the agreement which prescribes that the lease shall remain in full force and effect, "except so far as any provisions thereof may be inconsistent with the agreement."

The plaintiffs, in excuse for their omission to restore the premises to the condition in which they stood before the fire, assert that they were not requested by the defendants to rebuild. Neither were they notified by them not to rebuild. It was true, no doubt, that the lessees preferred to be released from their covenants unless an extension of their leases could be effected with both companies. And it is also just as evident that the plaintiffs were not inclined to incur the cost of making the extraordinary repairs, unless the lessees obtained an extension of the lease from the Franklin Company, lest by the termination of that lease their own lease might be prematurely ended, and they thereby, if restoration were

executed, have an expensive and to them useless property on their hands. The plain truth is that it appeared to be for the interest of both the lessors and lessees that the lease be at once terminated and the premises surrendered. But it by no means follows, and there is nothing to be seen indicating it, that the defendants would not have succeeded in making the property earn the rent resting on it, had the work of reconstruction been seasonably executed by the plaintiffs. There are also clauses in the lease, not before noticed, which are illustrative of this equitable view of the respective rights of these parties. One such clause is the provision that, if the lessors fail or are unable to furnish and supply the quantity of water needed by the lessees for running their machinery and for their manufacturing purposes, not exceeding one hundred horse-power, then a just and proportional part of the rent reserved shall be abated by the lessors. Another such feature in the lease is that which provides for a surrender of the premises at the end of the term in good order and condition, "inevitable accident excepted"— and this fire for which no cause could be discovered must be imputable to some inevitable accident. These ameliorations of the old harsh and technical forms indicate that rent was not expected unless a reasonable use of the premises were enjoyed.

Upon these facts and considerations it is claimed, in behalf of the defendants, that their covenant to pay rent does not bind them for any period beyond the destruction of the premises by fire because the subject-matter of the demise no longer existed, the water not being a substantial thing as land and the structures which facilitated the use of the power being only incidental to it. In support of this point our attention is called to the fact that only a fragment of the whole water power was leased to the defendants, subject to all superior rights possessed by persons and corporations by virtue of prior leases, and the Water Power Company retaining the general control of its dams, canals and other fixtures in its own hands. The defendants cite cases bearing more or less resemblance to present facts where it has been held that an exception to the rule of liability applied. The position taken strikes us with much

force, but we will not further consider its fitness here as we prefer to place the result on another ground which may be regarded as less questionable.

The defense, looking at the case in another aspect, further contends that the inattention and indifference manifested by the plaintiffs in omitting to raise a finger towards any restoration of the demised premises after the injury thereto by fire, although bound by their covenants to make the same tenantable, constituted a degree of negligence that operates as a constructive eviction or ouster of the defendants, and such as would excuse them from the payment of rent. Much perhaps may be urged on either side of this proposition, but, as some opposing technicality lies in the way of it, while we mention it as casting some light upon the general discussion of the case, we prefer to decide the issue here upon the reasonable rule adopted by Prof. Washburn in his work on Real Property, cited by counsel, where the author says: "Nor would the non-completion of the building be a defense in an action for the rent. But if one is sued upon a covenant for rent, he may recoup for damages occasioned by a breach of other covenants in the same lease, though they are implied ones only." 1 Wash. Real Prop. 5th ed. p. 558. Allowing, then, the defendants to be liable to the plaintiffs for the rent upon the covenant to pay rent, and admitting, as it must be admitted that the plaintiffs on the other hand are liable in damages to the defendants for not keeping their covenant to renew and permanently repair the premises, the claim of the one party must be presumed to be just equal to the claim of the other, or as nearly so as can be reasonably computed. The rule of damages would be the same in this case as if there had been an eviction. "The rents reserved in a lease, where no other consideration is paid, are regarded as a just equivalent for the use of the demised premises. Upon an eviction the rent ceases, and the lessee is thereby relieved from a burden which must be deemed equal to the benefit he would have derived from the continued enjoyment of the property." Bou. Law. Dic. *Eviction.*

It is not denied that a recovery must be had for nine small items amounting to $54.00: For that sum,

Defendants are to be defaulted.

CHARLES E. LITTLEFIELD, and others,

vs.

CITY OF ROCKLAND.

Knox. Opinion April 21, 1898.

Way. Location. Description. Void Taking. Damages.

The city of Rockland undertook to widen and straighten a portion of Sea street, the general course of which is about east and west on a peninsula in Rockland harbor. For that purpose a new northerly line for the street was run at a distance north from the old northerly side line, the city designing to condemn for its use all the land of private owners lying between the two lines, the old and new. The report of the committee, in charge of the alteration, correctly names all the owners over whose land the new line would run, and then declares that the city "takes all the land of the above named owners" between the two lines. The report of the committee certifies the amount of damages sustained by all the different owners thus named, giving either nominal or substantial damages to each owner named. It turns out, however, that there is a small parcel of land, twenty feet by forty feet, entirely embraced within the territory which the city designed to take and perhaps supposed they were taking, belonging to an owner other than those persons named as owners, who is not mentioned by name or otherwise in the report. The new line does not run over this land, which is the locus demanded in the action, nor approach very nearly to it. It does not appear whether the owner knew of the action taken by the city or not, but no appeal was taken by him. If the proceedings be a valid taking of the locus, then the owner loses his entire lot of land without any damages or compensation being awarded him, while having no other adjacent property to be benefited thereby. *Held;* that the locus was not included in the land taken; that if the committee intended to take it they omitted to do so; and that it was not merely an illegal or irregular taking, but not a taking at all.

AGREED STATEMENT.

This was a real action in which the plaintiffs sought to recover a lot of land on Sea street in the city of Rockland and claimed to have been taken by the city as a part of the street, June 2, 1890, and for the purpose of widening the street on its north side.

The case was submitted to the law court upon the following agreed statement of facts:—

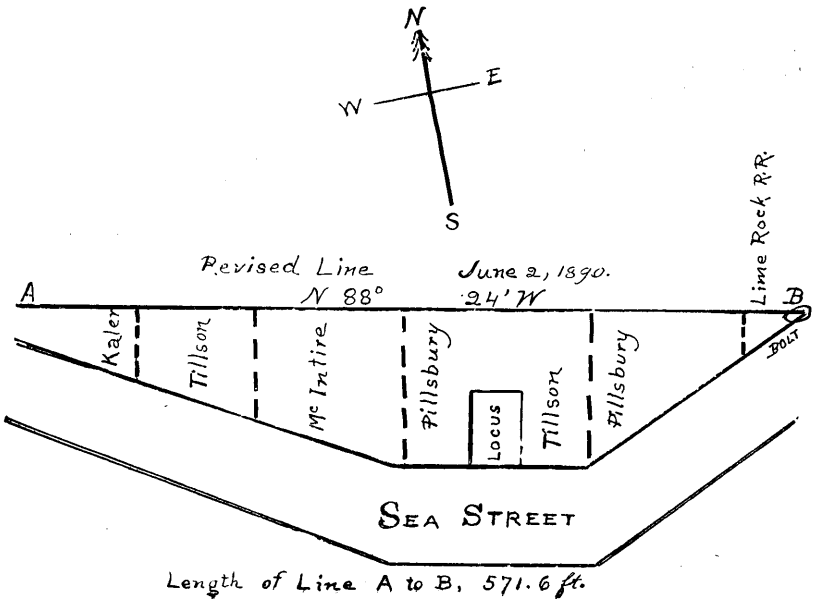
"At the time of the change in the line of Sea street hereinafter

referred to, the lot claimed in the plaintiffs' writ was the property of Robert D. Metcalf, and is now the property of the plaintiffs unless the title was divested by the change in the line of Sea street in said Rockland as shown by the report of the committee on streets upon change of line of Sea street. On the north line of the street as changed, a sea wall some eighteen feet high was erected, and the space between said wall and the old north line of the street was filled in to a level with said wall and street, which includes these premises; said street was constructed and built at once after the adoption of the report of the committee, and has been traveled and used by the public to the extreme northern limit of the street as changed, since constructed and built, to the present time.

"The report of said committee, with the writ, pleadings, and a plan showing the property mentioned in the report and the plaintiffs' lot, make a part of the case."

The case is sufficiently stated in the opinion.

A portion of the plan showing the locus is presented in chalk.



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

Briefly summarized the return of the committee is as follows: In laying out and widening this street they took, and intended to take, the land only of specific individuals. It may be that they intended to describe all of the individuals owning property within the limits covered by the taking. However that may be, they have confined their taking to the individuals mentioned. They have not undertaken to take the land of any other individuals, known or unknown. The lot in controversy was, at the time of the laying out, owned by Robert D. Metcalf, and as the committee, and the city government acting upon the report of the committee, did not take or undertake to take, either by name or otherwise, land owned by Mr. Metcalf, his rights in a valuable piece of property, located in the heart of the city, for which he has received no compensation, and no compensation has been attempted to be paid to him, remained entirely unaffected by the action of the city council in laying out and widening said street, and the plaintiffs are, therefore, entitled to recover.

Rule of strict compliance with all prerequisite conditions and limitations for the exercise of eminent domain: *Wilson* v. *Simmons*, 89 Maine, 254; *Packard* v. *Co. Com.*, 80 Maine, 45; *Southard* v. *Ricker*, 43 Maine, 576; Mills, Em. Dom. § 87; 7 Ency. Pl. & Pr. p. 468.

Return of committee does not show that the notice was published in a weekly newspaper, as required by § 19 of city charter; nor that the last publication was one week at least previous to the time appointed for hearing, etc. *Ladd* v. *Dickey*, 84 Maine, 194.

The return also says, "The last publication in each of said papers to be at least one week previous," etc., not that the last publication in each of said papers having been or being at least one week previous to the time of the meeting, etc. The return states not what had been done, but what was to be done, and nothing appears from the return to show that this necessary jurisdictional fact ever was performed.

S. T. Kimball, city solicitor, for defendant.

The general provisions of the statute R. S., c. 18, §§ 4, 14 and 16, and the charter of the city of Rockland are in harmony, with one exception, namely: the charter requires the committee to "make a written return of their proceedings . . . . containing the bounds and descriptions of the way, if laid out or altered, and the names of the owners of the land taken, when known and the damages allowed therefor." This exceeds the requirements of the statutes by adding thereto "and the names of the owners of the land taken, when known." In *Wilson* v. *Simmons*, 89 Maine, 242, (254,) where identically the same question was involved, the court held that failure to give "names of owners of land taken, when known, and the damages allowed therefor" is a defect in form rather than in substance, and "the defect may well be treated as an irregularity only."

It is not essential that the name of each and every person whose land is taken shall be specifically mentioned, provided the land is included within the general bounds. *Vassalboro, Petrs. for Certiorari*, 19 Maine, 341; *Howland* v. *Co. Com.*, 49 Maine, 143; *Monagle* v. *Co. Com. of Bristol*, 8 Cush. 360; *North Reading* v. *Co. Com.*, 7 Gray, 109.

The decisions of the courts warrant the position that where the specific general lines are explicitly given in the public notice, the land holder is put on his guard; therefore no claim can be set up by the plaintiffs that the words "above named owners," inserted in the report of the committee, served in the least to prejudice the then owner of the property in question.

Public notice was given more than two weeks previous to June 30, 1890, that the committee on highways and sidewalks would be in session for the purpose of altering, etc., the line of Sea Street. *Wilson* v. *Simmons*, supra.

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

PETERS, C. J. The city of Rockland undertook to widen and straighten a section of Sea street, a street located on a peninsula in

Rockland harbor. The design was to widen the street on its northerly side with a varying width so that the new northerly line would be a comparatively straight line, the old line being a circuitous and crooked one. The method was to run a new northerly line at a distance north from the old northerly line, and to take and condemn in behalf of the city all the land of private owners lying between the two lines, the old and new. The duty legally fell upon the committee on highways and sidewalks of the city to perform the service, and they attended to the duty assigned them and made as required by law a report of their doings, which was duly accepted by the city.

So much of the report as is essential to an understanding of the question before us is as follows: "We do determine and adjudge that public convenience requires that said Sea street shall be altered, widened and laid out in accordance with the following courses, bounds, distances and widths.

"Beginning at an iron bolt in the northerly line of Sea street as established by survey of Edwin Rose (said bolt being 145 5-10 feet westerly by said street line from an iron bolt in a stone monument at the corner of Lime street) and running thence about north 88 deg. 24 west (being about 18 deg. 25 min. more northerly than the present street line from same bolt) about ten feet over land of the Limerock Railroad Company, to land owned in common and undivided by the heirs of the late Samuel Pillsbury, deceased, viz.: Mary K. Dinsmore, Fannie E. Hurley, Maud L. Anderson, Grace E. Green, Fannie E. McDermot, William P. C. Pillsbury and Helen L. Clark (the line at said point being about three feet northerly from the present northerly street line); thence on same course about 180 feet more or less over the land of the said Pillsbury heirs, and passing through a house there situated owned by Alexander Hart to land of Davis Tillson (the line at this point being about 62 feet northerly from the present northerly line of Sea street); thence same course over land of said Tillson about 47 feet more or less, to land of said Pillsbury heirs (said line being at this point about 61 feet northerly from the existing northerly line of Sea street); thence on same course over land of said

Pillsbury heirs, about 67 feet more or less, to land of Catharine McIntire (the said line at this point being about 59 1-2 feet from the present northerly line of said Sea street); thence on same course over the land of said McIntire, about 67 feet more or less to land of Davis Tillson (said line at this point being about 51 ft. northerly from the present northerly line of said Sea street); thence on the same course over said Tillson's land, about 167 feet more or less to land owned in common by G. F. Kaler & W. H. Glover, E. K. Glover, Charles L. Smith, Ambrose Mills, and Everett A. Jones, co-partners, (said line at this point being about 15 1-2 feet from the present northerly line of said Sea street); thence still on the same course over said Kaler et al.'s land, about 33 1-2 feet to the southeasterly corner of the mill on land of said Kaler et al. (the whole length of land above described being about 571 6-10 feet); thence deflecting about 8 deg. 46 min. northerly, and running about north 79 deg. 38 min. west about 48 1-2 feet over land of said Kaler et al. to a passage way owned in common by Francis Cobb and John T. Berry (said line being at this point about 6 1-2 feet northerly from the northerly line of Sea street as at present established); thence same course across said passage way about twenty feet to land of John T., F. H. & C. H. Berry (said line being at this point about 5 feet northerly from the northerly line of the said Sea street as at present established); thence same course over land of said Berrys about 114 feet more or less to a point where said line intersects the north line of said Sea street as at present established, being 60 feet by existing street line from an iron bolt which marks the intersection of the northerly line of Sea street with the easterly line of Main street; thence following the existing street line about north 76 deg. 50 min. west, 60 feet to the iron bolt aforesaid. All of the land of the above named owners, lying between the above described line and the northerly line of Sea street as heretofore established, is hereby taken for the purposes above named.

"Reference is made to survey and plan of City Engineer Tripp as part of this report."

It appears upon examination of the plan in the case that the new

line runs over the properties of different private owners just exactly as is declared in the return, so that the return is so far literally true. But this new single line does not of itself enclose any land. In order, therefore, to complete the description of the land to be taken for the purpose of widening the street, the return proceeds further to declare as follows: "All the land of the *above named* owners, lying between the above newly-described line and the old northerly line of Sea Street as heretofore established is hereby taken for the purposes above named." It does not pretend to take all the land between the two lines, but all the land of certain owners between those lines. It takes land not by metes and bounds but by ownerships between certain bounds. The return assesses damages, either nominal or substantial, specifically for all the owners named therein, and for no other owner or person.

Now it turns out that while the new line runs over Tillson's land just as stated there is a small lot of land, twenty feet by forty or forty-two feet, which the new line does not touch, situated on the old northerly line of Sea street but not extending back so far as to the new northerly line by about twenty feet, as indicated by the plan, a lot surrounded by one of the Tillson lots on three sides; and this lot is now owned by the plaintiffs, and at the date of the reconstruction of the street belonged to one who was not mentioned in the return as an owner. It was probably an oversight, and the supposition may have been that the lot was a portion of Tillson's extensive territory in that vicinity, but the language of the report is so explicit that we do not feel justified in concluding that the true owner had any notice that his land had been taken. The question is not whether the locus was taken illegally or irregularly, but whether it was taken at all. Our opinion is that it was not included in the land taken but excluded therefrom. And this result may be very justly influenced in some degree by the fact that the entire lot is absorbed into the limits of the new part of the street, not a trace of it being left behind, and not a cent allowed for it. The then owner had no adjoining land to be benefited by losing this land. All his land was taken if any of it was. It is from the very nature of things impossible that damages

were not sustained. The lot was at least valuable to construct a portion of a street upon. It is to be presumed that the committee would have assessed at least some damages for the owner's loss of an entire property, had they been aware of the existence of his title, and it is more just that the consequences of the mistake should fall on the city than on him. There would seem to be no reason why the city may not condemn the lot now for what they should have paid then, or possibly even for less, as the lot is now, as we understand it, so situated as to be entirely inclosed within and surrounded by land occupied by the street. What was flats is now solid embankment separating the lot in question from the sea.

Counsel for the city of Rockland, in response to the foregoing position upon which we are disposed to rest the decision of the case, contends, and not without much force, that it is evident enough from all the proceedings taken together, including the survey and plan and the vote of instructions passed by the city council, that there was a laying out of the street by general courses and distances, and that the restrictive words all of the land "of the above named owners" may be rejected as being without any special meaning in view of all the facts; and that this interpretation is aided by the finding of the committee that no persons other than those named were entitled to any damages. We think, however, that the owner of the locus might well suppose he was not awarded damages merely for the reason that his land was not specifically taken, and that for such reason he failed to take advantage of his right of appeal. It might reasonably seem to him that for some cause the committee preferred to carry the street around his lot rather than over it. At all events we feel impressed with the belief that the committee really omitted to take and condemn his lot whether they intended to include it in the taking or not. The case cited of *Wilson* v. *Simmons*, 89 Maine, 242, differs from this case in essential respects.

Judgment for demandants.

RUSSELL S. BRADBURY *vs.* J. EDWARD LAWRENCE.

Androscoggin. Opinion April 21, 1898.

Negligence. Jury. Evidence. Injury to Horse.

It is not error for a judge to allow a jury to find that it was not an act of negligence for a man, who hires a strange horse at a livery stable, to hitch the horse out on the road to a tree for an hour or two, although the horse, a very spirited animal, in consequence of his restlessness occasioned by his standing so long, broke from the control of the driver and ran away.

It is not error for the judge to say to the jury, in an action by the owner against the hirer for damages for carelessly managing the horse, in substance, that they had probably had experience with horses and may know that sometimes a safe horse, if not used for a few days, or having been hitched for some time and becoming annoyed by flies, will become restless and uneasy, and be for the time comparatively an unsafe horse though usually perfectly safe and reliable; that that may be within their knowledge, and that they may judge the matter according to their experience with horses and their observation.

ON MOTION AND EXCEPTIONS BY PLAINTIFF.

The case will be found in the opinion of the court.

Geo. C. Wing, for plaintiff.

Exceptions: *State* v. *Bartlett*, 47 Maine, 395; *Douglass* v. *Trask*, 77 Maine, 35; *Page* v. *Alexander*, 84 Maine, 84.

The bailee is presumed to have been negligent and the burden of proof rests on him showing the exercise of such care as was required by the nature of the bailment when the bailor shows, in an action against the bailee to recover damages for an injury to or a loss of goods, that the goods were placed in the hands of the bailee in good condition, and that they were returned in a damaged state. *Cumins* v. *Wood*, 44 Ills. 416, (92 Am. Dec. 189). Counsel also cited *Funkhouser* v. *Wagner*, 62 Ills. 60; *Mooers* v. *Larry*, 15 Gray, 451; *Briggs* v. *Oliver*, 4 Hurl. & C. 403.

Where the cause of injury can easily be traced to the bailee's want of care, then he is liable. *Eastman* v. *Sanborn*, 3 Allen, 594; *Banfield* v. *Whipple*, 10 Allen, 27.

H. W. Oakes, for defendant.

SITTING: PETERS, C. J., HASKELL, WHITEHOUSE, WISWELL, FOGLER, JJ. SAVAGE, J., having been of counsel, did not sit.

PETERS, C. J. In September, 1896, the defendant, hiring a horse and carry-all of the plaintiff, took his wife with two small children on a drive about three miles out from Auburn village for the purpose of calling upon some friends who had a cottage or camp on the side of a highland known as Thorne's Mountain. Near the place he went to visit, and before reaching it, he unloosed the horse from the carriage without removing the harness from his back, and hitched him under a shady tree in a place where he could stand comfortably. During his stay with his friends, not having a view of the horse from their cottage, he went down several times to the horse to see if he was all right, and on the last occasion found he had been rolling and had broken a small strap belonging to the harness. He mended the harness, and, to avoid further risk of the kind, removed the harness entirely from the horse, freeing him from both harness and carriage, and, with a hitch-rope which was placed in the carriage at the stable for his use, securely hitched the animal to the tree again. When the defendant later went to the horse to harness him into the carriage he found him restless and troublesome to control, a restlessness probably caused by annoyance from flies and impatience in waiting at the tree so long a time as he did. The place itself was suitable enough as a place for hitching the horse, and the passage-way to it from the main road was unobjectionable. After considerable delay and difficulty the defendant succeeded in harnessing the horse to the carriage, but the animal was so impulsive and fretted that he finally succeeded in getting away from the control of the defendant, and ran away to the injury of himself as well as to harness and carriage; his own injuries resulting some time later in his death. For the loss sustained by this casualty the plaintiff sues the defendant in this action for negligence.

The general burden of proof is on the plaintiff to prove the alleged negligence, though some burden of explanation or duty of information as a rule first lies on the defendant in such a case.

Buswell v. *Fuller*, 89 Maine, 600. There can be, however, no great question on the facts as to how the accident happened, the jury undoubtedly believing the impressive narrations given by the defendant and his wife in their testimony.

We have no inclination to overrule the decision of the jury as expressed in their verdict. Acts of misjudgment are by no means necessarily acts of negligence. The jury were, no doubt, of the opinion that it was not a careless act to unharness the horse from the carriage, and perhaps found that it was even good management to do so. There were no appearances at the time indicating to the defendant that there would be any risk in the act. Very likely the defendant became afraid of the horse after the struggle to control him proved to be so much of a task. The plaintiff says, "I consider the horse perfectly safe and kind if you are accustomed to driving a horse and handling one." This word handling is an insinuating term in this connection. Stablekeepers should not expect their customers to be as a rule very proficient drivers or trainers of horses. Rarely are men found to be experts in the management of horses. The plaintiff admits he should not have let the horse to a woman because he was a spirited and ambitious animal, while both the defendant and his wife noticed that the horse was nervous and traveled somewhat wildly when they first started out on the road, causing them some apprehension for their safety at the time.

The plaintiff contends that the hiring was to go to Thorne's Corner but that the defendant drove beyond the corner and went further to Thorne's Mountain, being thereby guilty of a conversion of the property. It is enough to say on this point, as the jury must have concluded, that the contention is not supported by the evidence.

The question of the case is, we apprehend, whether the presiding justice committed any error in making these observations in his charge to the jury: "There has been considerable testimony here as to the character of the horse, that he was a good horse and a gentle horse and well broken and a spirited horse, and you perhaps would be satisfied from the testimony that he was a good horse

and an ordinary safe horse, although a spirited horse. And in your experience you probably have, all of you or the most of you, if not all, have had experience with horses and you may know that sometimes even a safe horse and a gentle horse, if he hasn't been used for a few days or if he has been hitched some time and becomes annoyed either by flies or by anything else, will sometimes become restless and uneasy, and for the time, a comparatively unsafe horse, that ordinarily and usually is a perfectly reliable one. That is a matter that might be within your knowledge and you have a right to judge all matters according to your experience and dealing with horses and your observation."

He does not express his own opinion that it was so in the present case, but merely appeals to the jury to exercise their own judgment according to their common knowledge and experience in such matters. It would seem that these remarks by the court were as favorable to the excepting party as to the other, or perhaps more so, as suggesting an excuse for the behavior of the horse rather than an exculpation of any negligent conduct of the defendant. But, however the remarks may be interpreted, there was no transgression of the rule therein, according to the decision of the case of *State* v. *Maine Central R. R. Co.*, 86 Maine, 309, where similar advice was given by the judge to the jury. In that case the jury were allowed to call to their aid "their general knowledge and experience of the characteristics and habits of horses and their liability to become frightened by sights and sounds unusual to them." Uniformity of conduct may be expected in animals because a common instinct controls them, while men in what they do and say are influenced more variously by their eccentricities of disposition. "We may assume as a presumption of fact," says Wharton, "that animals as a general rule will act in conformity with their nature. Thus it is probable that untended cattle will stray; that horses will take fright at extraordinary noises and sights; and that certain kinds of dogs will worry sheep." Whar. Ev. § 1295. The case of *Crocker* v. *McGregor*, 76 Maine, 282, may illustrate the point somewhat.

Motion and exception overruled.

ANNA S. ROTCH, In Equity,

vs.

JOHNSTON LIVINGSTON, and others.

SOPHIA B. THAYER *vs.* SAME.

Hancock. Opinion April 21, 1898.

Way. Easement. Change of Location. Costs in Equity.

A grantee of a road or way of a definite width, without restrictions, can use the entire specified width and is not confined to a road or path of a necessary or convenient width even.

Such a grantee is not restricted to the mere right of passage over the natural surface of the land within the boundaries of the way, but can construct over the entire width a road suitable, in material, grade, surface and other respects, for the convenient enjoyment of grant according to attendant circumstances.

Any one of several owners of such a road or way may, at his own expense at least, fit the way for his own convenient use, but not to materially impede any other owner in his convenient use of the same way.

When all the owners of the easement of such a way have constructed through the middle of the way a narrower road of an agreed grade, material and surface, without stipulating that such road shall not thereafter be widened, a subsequent widening of such road by any easement owner even to the full width of the way, with same grade, material, etc., is, in the absence of qualifying circumstances, a reasonable exercise of his right.

Where the owners of the land and the owners of the easement of a way of definite width and location upon the earth's surface become parties to an indenture, for the declared purpose of changing the location of a part of the way, such indenture will not be construed as abridging or enlarging the extent of the easement originally granted unless such purpose clearly appears from the whole instrument and attendant deeds, etc., even though the words of the grant of the easement in the new location read by themselves might seem to confer a greater or less easement than was originally granted.

In amicable though contentious suits in equity costs will not ordinarily be awarded against either party.

ON REPORT.

These were bills in equity, heard on bills, answers and testimony.

The purpose of the bills, both being alike, was to restrain the defendants from excavating, grading and draining and also building a sidewalk upon a strip of land ten feet wide in front of the plain-

tiffs' premises and being a part of a private way fifty feet in width as originally laid out by the former owners, and known as the "Livingston Road" at Bar Harbor. This ten-foot strip of the plaintiffs' land lies within the fifty-foot locus and between the thirty-foot finished road and the plaintiffs' southern line.

The allegations of the plaintiffs' bill were in substance as follows:

1. That the defendants have not and never had more than mere surface rights, i. e. rights to pass and repass over the natural surface of the ground.

2. That the defendants have not a right of way fifty feet wide but only a right of reasonable width within the limits of the fifty-foot wide Livingston Road, and that thirty feet is a reasonable width and is all that they are entitled to as a way.

3. That in 1893, when the thirty-foot finished road was built, a contract was entered into whereby the defendants agreed that the portion of the way not then wrought should remain intact for the purpose of ornamentation by the land owners.

4. That if there was no such contract, there were certain representations and conduct on the part of the defendants which estop them from disturbing the surface of that portion of the way outside the thirty-foot wrought track.

The defendants answered in substance:

1. That their rights are not confined to the surface but that they have a right to fit the way reasonably for travel.

2. That their way is not one merely of reasonable width. They claim to have a right of way over the whole of the Livingston Road.

3. That there was no such contract as the complainants claim.

4. That there were no such representations or conduct as the complainants rely upon as a basis for an estoppel.

Briefly stated, the case shows that the Livingston Road is a private way fifty feet wide, leading from Main street easterly to the property of the late Charles J. Morrill. The centre line of this road, 1100 feet in length, throughout its extent is the northern

line of land of the defendant Livingston, and is the southern line of three lots, one owned by each of the plaintiffs, and one owned jointly by the defendants How and Bates. All the above named persons together with the defendant John S. Kennedy, and other persons not parties to the suit, have rights of way in this road.

The deeds establishing the way, and under which all the parties claim, provide that the road was to be made and maintained at the joint expense of the parties entitled to use it.

In 1893, Messrs. Livingston and How and Mrs. Thayer and Miss Rotch joined in building a thirty-foot track in the middle of the fifty-foot way. Of the cost of this track Mr. Livingston paid one-half, Mr. How about three-tenths and the plaintiffs about one-tenth each.

In 1891, Mr. Livingston had conveyed a part of his property to the defendant John S. Kennedy and had agreed with Mr. Kennedy to build this way throughout its whole width.

In 1896, Mr. Livingston for the purpose of improving his property and also for the purpose of carrying out his contract with Mr. Kennedy determined to complete the building of the road and so informed the plaintiffs. They were unwilling to join, and Mr. Livingston offered to pay the whole expense. They denied his right. He declared his purpose to fit the remainder of the way for travel. Whereupon the plaintiffs brought these suits asking that the defendants be enjoined.

The material facts are stated in the opinion of the court.

H. E. Hamlin and H. G. Vaughan, for plaintiffs.

L. B. Deasey, for defendants.

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

EMERY, J. These are two similar suits in equity reported to the law court for determination upon the bills, answers and evidence. Some technical objections were at first taken upon either side, but they have all practically been waived in the desire of the parties for the opinion of the court upon the merits, to the consideration of which we at once proceed.

The scene is Bar Harbor, an extensive summer resort containing many beautiful and costly summer residences. The parties are the several owners of a group of such residences, or residence lots, served by a private road now called the "Livingston Road" leading from the highway called "Main Street" or the "Schooner Head Road" about 1100 feet easterly to the "Morrill place" so-called. The controversy is over the respective rights and duties of the parties in both the soil and the use of this private road.

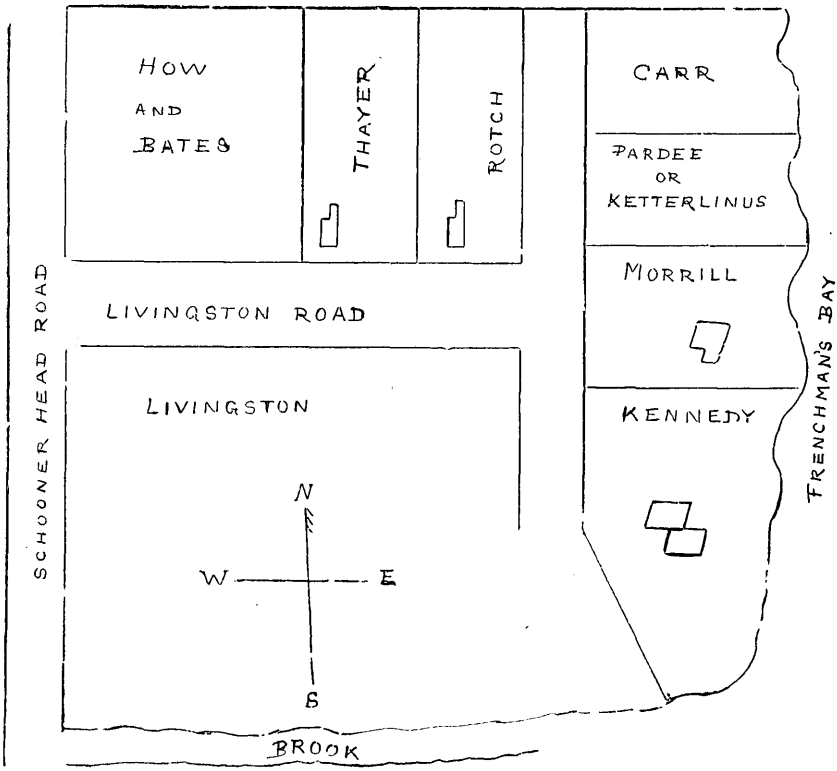
The tract of land formed by the various lots now concerned in these suits was formerly known as the "Snow Farm," bounded on the west by the highway then called the "Schooner Head Road" and now sometimes called "Main Street,"— and on the east by the bay or sea. The first division of the tract was made through mutual partition deeds dated Jan'y 31, 1879, by Messrs. Wigglesworth and Da Costa, the then sole owners in common. Mr. Wigglesworth took the northern and Mr. Da Costa took the southern part of the tract. In these deeds was first created and established by grant the private road afterward called the "Livingston Road," and now to some extent the subject matter of these suits. The divisional line of the partition was declared to be "the middle of a road fifty feet wide to be laid out one-half over the land of each of the parties hereto," and extending from the Schooner Head road easterly 1100 feet to a point which is now near the westerly line of the "Morrill place."

The two dividing parties then in the same deeds mutually reserved and conveyed to each other and the heirs and assigns of each "the right to pass and repass in and over, and to lay drains and water pipes under that part of the granted premises which is included in said proposed road. . . . . the said road, to be made and maintained at the joint expense of the parties entitled to use the same."

A plan of the division showing the outer boundaries, the divisional line, and the proposed private road was made a part of the deeds and was recorded with them. On this plan the proposed road was laid down as "50 ft. wide" and 1100 ft. long.

The track thus divided was in course of time much sub-divided by different and successive conveyances upon each side and to the

east of the road thus established, until in the early part of the year 1892 the various lots and their owners were as roughly indicated upon this sketch, viz:—



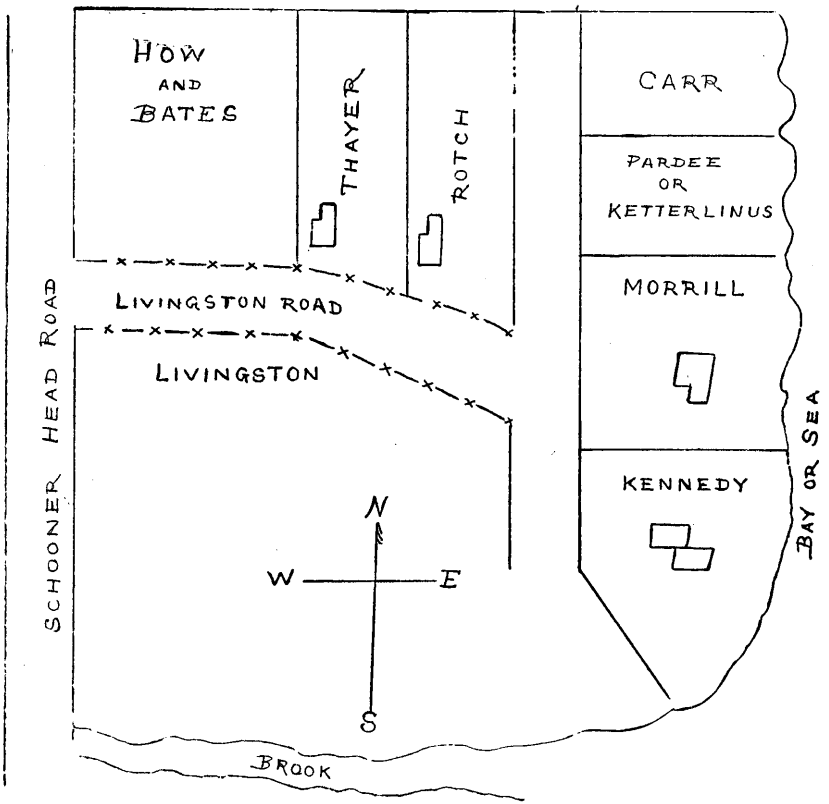
In all these subsequent conveyances the grantor's rights and duties in this private road were transferred to the successive grantees, so that early in 1892 each owner indicated on the foregoing sketch had succeeded to the rights and duties of Wigglesworth and Da Costa as declared in their partition deeds of Jan'y 31, 1879, above referred to. Mr. Livingston, however, had engaged with Mr. Kennedy, his direct grantee, to build the road for him.

At this stage all the parties interested in either the fee or the use of the road became parties to an instrument of indenture drafted and dated March 1, 1892, but not finally executed and delivered

till the summer of 1893. In this indenture were recited:— (1) that the parties thereto were "all the parties interested, either as owners of the fee, or of easements, in a certain way fifty feet wide . . . . extending from the Schooner Head road easterly to land of Chas. J. Morrill, being the same way mentioned in the partition deeds" of Wigglesworth and Da Costa above noted; (2) that the parties had "agreed to change the location of said right of way, in part, to wit: in that part extending easterly from the western line of land of Sophia B. Thayer produced southerly, to the eastern line of land of Anna S. Rotch produced southerly" so that the centre line of such part of the way as was agreed to be changed in location should begin to diverge a little southerly at the western line (extended) of the land of Mrs. Thayer, and strike the eastern line (extended) of land of Miss Rotch sixty-seven feet southerly of the old centre line; (3) that Mr. Livingston (the owner of the land taken to make the above change in location) conveyed to all the other parties and their assigns as appurtenant to their several lots "a right to pass and repass over, and to lay drains and water pipes under, a strip of land fifty feet wide in every part, the centre line of which is described" (as above recited,) but with the stipulation that "said right, privilege and easement, however, shall be held and enjoyed by said parties, [all the other parties] in common with the party of the first part, [Livingston] his heirs and assigns owners and tenants of any lands to which said old way is appurtenant, and in common with any and all persons lawfully entitled to similar rights;" (4) that all easements in the land in front of Mrs. Thayer and Miss Rotch not included in the new location were extinguished. Accompanying this indenture was a plan of the way upon which were placed the words "Right of way 50 ft. wide."

Mr. Livingston owning the land on the south side, and Mrs. Thayer and Miss Rotch severally owning lands on the north side opposite the land of Mr. Livingston, mutually executed deeds in confirmation of this indenture, by which deeds each became the owner of the fee to the centre line of the way in front of his land, that line being described in the deeds as "the centre of a way fifty feet wide created by a deed of indenture," viz:—the one above named. In these deeds it was stipulated "that the way fifty feet

wide lying along the line between the land of each opposite party shall be built and forever maintained and kept in repair at the joint and equal expense of the owners of the" opposite abutting lots. Mrs. Thayer and Miss Rotch had each built a summer residence upon her lot some years before this. As a consummation of these various arrangements, in 1893 the whole way from the Schooner Head Road to the new eastern end was carefully run out fifty feet wide upon the surface of the earth, and the side lines of the way were plainly marked with stone posts and iron bolts at frequent intervals. Release deeds were interchanged by the opposite proprietors in accordance with this running out and marking of the way. The situation at this time at the end of these transactions is roughly indicated upon the following sketch, viz:—



Mr. Kennedy by this time had began to build a costly residence and to make extensive improvements on his lot, and desired to have this road opened and constructed out to the Schooner Head Road, and called upon Mr. Livingston to have it done according to his obligations assumed. Up to this time whatever use of the way was made was simply over its surface without any grading or other road making. The parties interested had one or two conferences upon what sort of a road should be made,—its width, grade, surface and cost. Those bound to build the road finally, in October 1893, made and signed a written contract with a road builder for him to construct a road bed thirty feet wide through the middle of the fifty-feet way, and of a specified character and grade which involved making, among other cuts and fills, a cut about four feet deep in front of the lots of Mrs. Thayer and Miss Rotch. A strip ten feet upon each side of the road bed was to be left intact by the road builder, who was also to leave alone the shrubs and trees on these ten feet strips. The road was built the same fall according to this contract and was paid for by the signers of the contract according to their several obligations. A strip of land ten feet wide upon each of the made road bed was left intact.

In 1895 Mr. Kennedy desired to have the entire fifty feet of width of way made into a road bed, throughout its entire length, and called upon his grantor, Mr. Livingston, to have it done, claiming that to be his right. Mr. Livingston, not questioning Mr. Kennedy's claim upon him, first widened out the road upon the south side next his own land by extending the road bed with the same character and grade over the south ten feet strip. He then proposed at his own expense to widen out the road bed in the same manner over the northern ten feet strip so that the entire fifty feet of width of way should be utilized as a road or street. This would involve disturbing the surface and cutting it down some four feet in front of the lots of Mrs. Thayer and Miss Rotch, and would bring the north side of the wrought road bed ten feet nearer to their residences. Both Mrs. Thayer and Miss Rotch deny the right of Mr. Kennedy or Mr. Livingston even at their own expense to thus widen out the road over the northen ten feet

strip left in front of their lots; and also deny their right to even pass and repass over the surface of that strip. The interposition of the court sitting in equity is invoked.

Each plaintiff bears two distinct kinds of relation to the defendants. Each is the owner of the fee of the ten feet strip in front of her lot, and is also a co-owner with the others of all the rights of way in the entire fifty feet way. Each is at once a land owner, and an easement owner. It will be more convenient to consider these relations separately; and first, that between the plaintiffs as land owners and the defendants as easement owners.

I. *a* As land owners, as the owners of the fee of the ten feet strip in front of their lots, the plaintiffs claim as a postulate that the rights of the defendants in those parts of the ten feet strip, were first created by, and have their sole origin in, the indenture of March 1, 1892, and are limited to such as are expressed in the language of that indenture, viz:—"a right to pass and repass over, and to lay drains and water pipes under, a strip of land fifty feet wide in every part," describing it. From this postulate they argue with logical force and with apposite citation of authorities that the easement of the defendants and the others in front of their lots, at least, is merely a right to pass and repass in some convenient line, or path, or road of convenient width within the fifty feet strip, and is not a right to use the whole fifty feet of width as a road, at least in the absence of any necessity therefor. They liken the easement to a right to pass and repass over a field or a farm where it would be conceded that the right is only of passage in a road of convenient location, grade and width, and is not a right to make the whole field or farm into a road bed. Their conclusion is that the thirty feet road already made fully answers every demand of necessity or reasonable convenience, and confines the rights of the defendants to that road, and frees the ten feet strip, for the present at least, from any easement even of mere passage.

But we cannot accept the plaintiffs' postulate that the sole origin of the defendants' rights in the ten feet strip in front of the plaintiffs' lots is in the language quoted from the indenture of March

1, 1892. The purpose of the indenture is declared by its own words to be,—not to create new rights of way, or to enlarge, abridge or extinguish rights of way already possessed,— but merely to change in part the location of their exercise. This was the evident and sole purpose. The whole way, which was the subject matter of the indenture, was 1100 feet long. The change of location affected only about 400 feet, and that only to a trifling extent. We find in the indenture no purpose expressed or implied to make the easements in the 400 feet less or different from those in the remaining 700 feet. It was still a continuous way 1100 feet long and of uniform width throughout. From the recitals already given from the indenture itself, we think it clear that the limitation or extent of the easement, within both the changed and unchanged location of the way, is to be sought for in the deeds originally creating the way and the easement, and in the subsequent and contemporaneous deeds and acts of the parties, as well as in the indenture changing the location.

In the partition deeds of Wigglesworth and Da Costa, in 1879, it was declared that "a road fifty feet wide" [was] "to be laid out," and that "said road [was] to be made and maintained at the joint expense of the parties entitled to use the same." Upon the partition plan recorded as a part of these deeds the road is laid down and marked "proposed road 50 ft. wide." In the deeds under which plaintiffs claim title, the southern boundary is declared to be "the northern line of a road or way fifty feet wide." To the deed from Wigglesworth to Mrs. Thayer is attached a plan, upon which is shown the way, with the words — "Road to be made 50 ft. at proportional expense of abutters." In the indenture itself the subject matter is described as "a certain way fifty feet wide . . . . being the same mentioned in" the partition deeds. In the deeds between the plaintiffs and Mr. Livingston, executed about the time of the indenture and referring to it and designed to carry out its provisions, the south line is "the centre of a way fifty feet wide" and the parties "agree that the way fifty feet wide lying along the line between (their lands) shall be built and forever maintained."

The parties, to this bill at least, had each of the outside lines of this "road" or "way" marked upon the surface of the earth by a row of stone posts and iron bolts, the two rows of monuments being set fifty feet apart throughout the entire length of the way in both its changed and unchanged location.

The foregoing descriptions of the easement now appurtenant to the various dominant lots or estates, as interpreted by the acts of the parties, show the easement to be not merely "a right to pass and repass over" in some reasonably convenient direction, in some convenient road somewhere within the limits of "a strip of land fifty feet wide." The easement described and granted is clearly a right to "a road (or "a way") fifty feet wide." That "road" or "way" has been actually located and permanently marked, and is in fact fifty feet wide upon the surface of the earth. In the language of the partition deeds, the road has been "laid out" fifty feet wide.

When a public road or way has been "laid out" of a specified width by the proper authority, the public has the right to use the entire width of the whole location to its outermost limits, though the town or other public agency charged with the duty of making a road within the location need not make a wider road than is safe and convenient for travelers. The duty of the town is not co-extensive with the rights of the public. *Stinson* v. *Gardiner*, 42 Maine, 248; *Dickey* v. *Maine Tel. Co.*, 46 Maine, 483; *Parsons* v. *Clark*, 76 Maine, 476, 479.

We think the right of the grantees of a road or way thus "laid out" by deed and actually located on the surface of the earth by the land owners, is as extensive as the right of the public in a road or way "laid out" by proceedings in condemnation for a public way. In the one case the land is granted for a way—in the other the land is taken for a way. The entire width (here fifty feet) is in both cases appropriated for the way, to be used in its whole extent if desired by those for whom the way is "laid out." We see no difference in principle between the rights of the owners of the easement in the two cases.

This similarity of right as to extent of use has been recognized

by the courts. In *Farnsworth* v. *Taylor*, 9 Gray, 162, the land owner had lotted his land and made a plan showing a street 70 feet wide in one place. Forty feet only of this width were afterward taken for a public street, leaving the remaining thirty feet of width still a private way. It was held that the owners of the lots could use the entire width of 70 feet. In *Tudor Ice Co.* v. *Cunningham*, 8 Allen, 139, the grant was of "a right of way . . . . to a street forty feet wide . . . . and in, over, and through said forty feet strip." The court declared the case to be free from all doubt,—that the grantee had a right in the entire space of forty feet width. In *Bartlett* v. *Bangor*, 67 Maine, 460, the land owner had lotted his land and laid out a street for the accommodation of the lots. He afterward sold some of the lots according to a plan showing the street. Later the city laid out a public street over this private street, taking the whole width, and the owner of the fee claimed damages. It was held that he could have no more than nominal damages. The decision necessarily implies that the owners of the easement under the deed had the right to use the entire width of the private street, and were not confined to a mere reasonable path or road. The court quoted the case *In re Lewis Street*, 2 Wend. 472, where it was held that the grantees of a right of way of a specified width have an easement in the way to the full extent of its dimensions. In *Heselton* v. *Harmon*, 80 Maine, 326, the grant was of a parcel of land bounded on the east "by a strip of land thirty-two feet wide reserved for a street and no other purpose." There was no suggestion that the grantee was confined to anything less than the entire width. In *Herman* v. *Roberts*, 119 N. Y. 37, the grant was of a right of way "over the land [of the grantor] . . . . on a line now staked out to be forty feet wide." It was held that the grantee was not confined to any wrought or convenient road, but had a right "to a free passage over such portion of the land enclosed as a way, as he thought proper or necessary to use." See also *Bump* v. *Sanner*, 37 Md. 621; Jones on Easements § 305.

In the cases at bar we must hold that the defendants, and all the other owners of the easement, have under their grant the full

right to use the entire width of fifty feet including the ten feet strip in front of the plaintiffs' lot for purposes of passage at their discretion, and are not limited in such right to what is necessary or convenient. They hold by express grant and not by implication from necessity or convenience.

b The next question is whether the defendants as owners of the easement have the right (at their own expense, not calling upon the other owners for contribution) to change the surface of the ten feet strip and make it into a road by filling depressions—cutting down ridges, etc., etc. The plaintiffs contend that, even if the right of passage is unlimited, the right to change the surface is limited to what is necessary to make a convenient road, and that the present thirty feet road is admittedly ample for all present needs.

In the case of a public way of definite width, whether granted by the land owner to the public or taken by condemnatory proceedings, while of course each individual of the public cannot construct a road to suit himself, it has never been questioned that the town or other public agency charged with the duty of opening and making roads can at its pleasure, in the absence of statutory restrictions, construct the road over the entire specified width. While it need not ordinarily make the road of more than safe and convenient width for travelers, it can in behalf of the public which it represents, make the road the entire width of the grant or location, changing the entire surface therefor, without consulting the land owner. The statute has made provision for damages to the land owner in some cases of change of grade, but that does not interfere with the town's right. We find no cases denying such right to the proper public agency. Its existence seems to be assumed. *Old Colony Railroad Co.* v. *Fall River*, 147 Mass. 455; *Hovey* v. *Mayo*, 43 Maine, 322; *Cyr* v. *Dufour*, 68 Maine, 492; *Briggs* v. *L. & A. Street R. R. Co.*, 79 Maine, 363; *Burr* v. *Stevens*, 90 Maine, 500. In *Wellman* v. *Dickey*, 78 Maine, 29, the town had not acted.

A similar easement granted to a less number than the public, granted to a few determinate persons, is not by that circumstance

abridged in extent. The grant itself is as broad and extensive in the one case as in the other. In either case the grant is of a road way of a specified width. In *Heselton* v. *Harmon*, 80 Maine, 326, above cited, the grantee of the way made the whole width of it into a road, and was held to be within his right. Indeed the right of the grantee of a way of a specified width to fit the entire width for use, seems to be generally conceded. *Appleton* v. *Fullerton*, 1 Gray, 186; *Brown* v. *Stone*, 10 Gray, 61; *Herman* v. *Roberts*, 119 N. Y. 39. If the grant is of the right to use the whole of a specified width of land for a road it follows logically, in the absence of restrictive words in the grant, that the grantee can fit the entire width for use. His right to make a road is as wide as his right to a road so far as width of road is concerned. We do not find any restrictive words in the grant in these cases, and our conclusion is that the defendants have the right to fit the ten feet strip into a suitable road in connection with the road already made.

c The plaintiffs again contend, however, that, even if the defendants and the other owners of the easement have the right to change the surface of the ten feet strip in order to make it into a road, they cannot do so to the extent proposed, cutting it down four feet in front of their lots. They argue that so much cutting is not necessary to fit the ten feet strip into a road and will injure the value and convenient use of their lots—and hence that the easement owner must be content with a less change in the surface. We have no occasion now to determine the general question as to which party, the land owner or the easement owner, can fix the grade and character of a private road, for in these cases a grade and general scheme of road seem to have been agreed upon between the parties, and thirty feet of the width have been fitted to that grade and scheme. The defendants are not proposing to vary that grade or scheme but only to make this remaining ten feet strip conform to it. We think they should not be restrained from proceeding that far. It seems clear that the sides of a road should not be higher than the centre. We may say also that it is not made clear to us that the lots and residences of the plaintiffs would be substantially injured in use or value by cutting down the

ten feet strip to the level of the present wrought road. Their houses and lawns will be less exposed to the passers by, while their own access to the road will not be perceptibly more difficult.

II. We come now to consider the effect of the proposed action of the defendants upon the rights of the plaintiffs as co-owners with the defendants and others in the easement itself. The law does not require unanimity of opinion in the co-owners of a way as to the extent and character of the road to be built. No one co-owner can effectually block the opening, making or improving the common way by objecting to the particular mode or scheme adopted by the others. Each owner can (at least at his own expense as is proposed in this case) use the entire width of the way and can fit it all for use at his reasonable discretion so long as he does not unreasonably impede any other co-owner in his use. This principle is recognized in the cases cited by the plaintiffs. *Killion* v. *Kelley*, 120 Mass. 47; *Kelley* v. *Saltmarsh*, 146 Mass. 585; *Nute* v. *Boston Cooperative Building Co.*, 149 Mass. 465; *Vinton* v. *Greene*, 158 Mass. 426. In all these cases the proposed change was forbidden upon the sole ground of the manifest detriment to the objecting party in his own use of the way. We find no case where the court interfered with the proposed change or use unless it was made to appear that the objecting party would be seriously inconvenienced in his own use of the way.

In the cases at bar the evidence does not show that the plaintiffs' use of the way itself would be substantially abridged or hampered by the proposed widening at the same grade from thirty feet to fifty feet. Their access to the widened road may be a little steeper in grade,—but that is not shown to be appreciably more inconvenient.

III. The plaintiffs, however, take yet another line of defense against the proposed action of the defendants. They claim that, whatever the original rights of the various parties under the deeds, plans, etc., the whole matter of use, width and grade was finally determined and established at the two conferences above noted of the owners of the land and the easements in the summer

and fall of 1893, with the stipulation or understanding that such determination should be final at least until new conditions arose which have not yet appeared;—that by their language and conduct, at and after these conferences, the defendants are estopped from their present proposed action;—that at those conferences the plaintiffs could have successfully insisted upon a narrower and surface road and only gave way upon the assurance of the defendants that the ten feet strip should be left intact for the benefit of the plaintiffs.

There was much discussion in the briefs of counsel as to whether such a stipulation or assurance was properly evidenced under the statute of frauds, and was binding even if properly evidenced. There was also much discussion upon the principles of estoppel. We think, however, we have no occasion here to consider these questions. The burden of proof was plainly upon the plaintiffs to establish the necessary propositions of fact, and upon a careful reading of the evidence with the valuable aid of the exhaustive analysis made by counsel, we are not satisfied that the defendants assented in fact to such a stipulation, or by their language and conduct gave the plaintiffs cause to believe that they so assented. The conferences appear to us to have been of parties, not divided between land owners and easement owners, but of parties all entitled to use the road, some of whom were bound to bear or contribute to the expense of building it. The objections to a wide way and an easy grade seem to have been put mainly upon the ground of the expense. The question principally debated was as to what could be required of the road builders by the road users. The claims of the land owners, as such, were discussed, but incidentally and not with sufficient insistence to make it clear that the defendants understood or should have understood that unless they yielded all claims to the ten feet strip only a narrow surface road would be opened by the land owners. We do not think that the belief of the plaintiffs is well founded. We cannot find that either Mr. Kennedy or Mr. Livingston, or the authorized agent of either of them, said or did anything which would justify the plaintiffs in assuming that either of them intended to or would finally surrender any of his rights in the remaining part of the way.

For the same reason the plaintiffs cannot successfully invoke any of the principles of estoppel. Neither of them has made such expenditures upon the ten feet strip with the knowledge and acquiescence of the defendants as to make it inequitable that they should now assert their rights. One of the plaintiffs, soon after the road was made, put a fence out to enclose the ten feet strip within her lot, but its removal was promptly requested by Mr. Kennedy and his request was complied with.

IV. Mr. Livingston has made a sidewalk upon the south side within the fifty feet way, and is proposing to construct a similar sidewalk upon the northern side after cutting the northern ten feet down to the grade of the road. We have understood the plaintiffs' objection to be solely to the cutting down the strip to that level. We have not understood them to object to the sidewalk if the strip is to be cut down.

Whether or not Mr. Livingston, Mr. Kennedy, or any one or more co-owners of the easement, can require of the other co-owners to assist in widening or improving the road is a question which does not arise in these cases. Nothing is here asked by the defendants of any other co-owner. Mr. Livingston, for himself and Mr. Kennedy his obligee, is proposing to act at his own expense only.

Our conclusion is that the defendants' proposed action so far as shown in these cases is within their legal rights and that both bills must be dismissed; but, since the suits are amicable though contentious and both sides are neighbors and friends, we think no costs should be recovered.

Bills dismissed.

REUBEN RING *vs.* CHARLES C. NICHOLS.

Piscataquis. Opinion April 30, 1898.

Intox. Liquors. Replevin. Libel. R. S., c. 27, § 50.

Intoxicating liquors which have been seized by an officer in accordance with the provisions of the statutes in relation to the seizure of liquors intended for unlawful sale within the state, are in custodia legis and can not be taken from the custody of the officer upon writ of replevin or other process, while the statutory proceedings are pending. R. S., c. 27, § 50.

Intoxicating liquors were seized by an officer without a warrant upon October 18, and a warrant was procured upon the next day. The officer's return upon the warrant states that the liquors were seized upon October 25. *Held;* that the incorrect statement in the officer's return of the day when the liquors were seized does not so affect the legality of the proceedings as to permit the owner of the liquors to maintain a replevin for them against the officer. The point should have been made in the court where the proceedings were pending, when the officer would have been allowed to amend his return in accordance with the fact.

A description of the liquors seized in the libel, monition and notices that is sufficiently specific to notify the owner of the fact of seizure and the identity of the liquors seized, is all that is required.

The following description held to be sufficient: "1 bbl. filled with intoxicating liquors. 1-5 Gal. keg filled with intoxicating liquors. Marked to M. P. Colbath, North West Carry, Moosehead Lake, Maine."

ON EXCEPTIONS BY PLAINTIFF.

The case is stated in the opinion.

J. B. Peaks, for plaintiff.

C. W. Hayes, for defendant.

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

WISWELL, J. On October 18, 1895, the defendant, a deputy sheriff for Piscataquis County, seized at Greenville in that county, without a warrant, a quantity of intoxicating liquors upon the charge that such liquors were intended for unlawful sale in this state. On the following day he made complaint to the judge of the Dover Municipal Court and procured a warrant. On the same day he filed with the magistrate before whom such warrant was

returnable, a libel against the liquors and the vessels in which they were contained, setting forth their seizure by him, describing the liquors and their place of seizure, alleging that they were deposited, kept and intended for sale within the state in violation of law, and praying for a decree of forfeiture thereof. Such magistrate thereupon fixed a time for the hearing of the libel and issued his monition and notice of the same to all persons interested, citing them to appear at the time and place appointed and show cause why such liquors, and the vessels in which they were contained, should not be forfeited.

On October 25th the defendant made service of the libel and monition by posting in two public and conspicuous places, in the town where the liquors were seized, a true and attested copy of the libel and monition, ten days at least before the day upon which it was returnable. Upon the return day the plaintiff appeared as claimant of the liquors and by agreement the hearing was postponed until the third Tuesday of December, at which time by agreement the hearing was again continued until the third Tuesday of January, 1896, at which time the plaintiff moved that the libel be dismissed, which motion was overruled and the liquors, together with the vessels containing the same, were declared forfeited.

On December 11, 1895, while these proceedings were pending, the plaintiff, who, it is admitted, was the owner of the liquors at the time they were seized, commenced this action of replevin to recover the liquors above mentioned. The writ of replevin was served on January 10, 1896, while the proceedings were still pending.

The justice presiding at nisi prius ruled that the action of replevin could not be maintained and the case is here upon exceptions to that ruling. We have no question that the ruling is correct. The liquors were in custodia legis.

By R. S., c. 27 § 50: "Liquors seized as hereinbefore provided, and the vessels containing them, shall not be taken from the custody of the officer by a writ of replevin or other process while the proceedings herein provided are pending; and final judgment

in such proceedings is in all cases a bar to all suits for the recovery of any liquors seized or the value of the same, or for damages alleged to arise by reason of the seizure and detention thereof."

But it is claimed in behalf of the plaintiff that the statute is not a bar to this suit because of certain claimed irregularities in the proceedings. For instance, although the parol testimony and all other records show that the liquors were seized without a warrant on the 18th of October, and that the warrant was procured upon the next day, the officer's return upon the warrant states that the seizure was made upon the 25th day of October and it is consequently claimed that the liquors mentioned in the libel and monition could not be those seized upon the 18th of October. We do not think that this is sufficient to authorize the maintenance of an action of replevin. The point should have been made by the claimant in the court where the proceedings in relation to the disposal of the liquors were pending, and even there it would have been unavailing because the officer would have had a right to amend his return in accordance with the fact. Again it is claimed that the description in the libel, monition and notices was not sufficiently definite and specific so that a person interested in the liquors would be notified with reasonable certainty of the fact of their seizure and of the circumstances under which they were held. The description was as follows:—

"1 bbl. filled with intoxicating liquors. 1-5 Gal. keg filled with intoxicating liquors. Marked to M. P. Colbath, North West Carry, Moosehead Lake, Maine."

We think this was sufficiently specific to notify the owner of the fact of seizure and of the identity of the liquors seized. Moreover, in this case, the owner appeared at the return day of the libel and monition, made claim to the liquors and became a party to the proceedings, although the records do not show whether or not he filed his claim in writing as required by statute.

The proceedings in all respects were, at least, in sufficient conformity with the statutes to prevent the maintenance of this action of replevin commenced and served while the proceedings were pending.

Exceptions overruled.

EDWARD JORDAN *vs.* GUY W. MCALLISTER, Admr.

Penobscot. Opinion April 30, 1898.

Execution. Poor Debtor. Bond. Sheriff. Amendment. R. S., c. 113, §§ 20-40.

An execution debtor, who had given the six months bond provided by statute, voluntarily surrendered himself within the time limited by the bond, to the keeper of the jail to which he was liable to be committed upon the execution. The jailer received him and committed him into jail without receiving or requiring a certified copy of the execution and return, or of the bond, or any written evidence of authority to hold him until discharged by authority of law. The creditor knew of the debtor's commitment and at different times sent sums of money to the jailer for the debtor's board.

After the debtor had been in jail several months, and after a change in the office of jailer, he was discharged by a justice of this court upon habeas corpus, no authority being shown for his detention. In an action by the creditor against the sheriff, based upon these facts, *held;* that the jailer had committed no actionable wrong and that the action was not maintainable.

A jailer need not receive a debtor without sufficient written evidence of authority to receive and hold him. He may very properly require a certified copy of the execution and officer's return thereon, or of the bond; but, if he sees fit, he may waive this without making himself, or the sheriff under whom he is serving, liable for any consequences which may follow.

An execution creditor brought an action to recover damages for the alleged unlawful and illegal act of the jailer in receiving the debtor into his custody without sufficient evidence of authority to detain him, so that he was subsequently discharged upon habeas corpus; and moved to so amend his writ as to recover an amount received and retained by the jailer for the debtor's board, claimed to be in excess of the amount allowed by law. *Held;* that the amendment is not allowable because for a new and different cause of action.

ON REPORT.

The case is stated in the opinion.

H. L. Mitchell, for plaintiff.

The jailer was not bound to receive the debtor without an attested copy of the execution and return thereon, or of the bond. *Jones* v. *Emerson*, 71 Maine, 207.

To hold otherwise would place the power in the hands of the

jailer to prevent or defeat the remedy provided by statute, and prevent the discovery of property by disclosure in cases where a bond is given.

Amendment: *Parish* v. *Clarke*, 74 Maine, 113; *White* v. *Blake*, Id. 491; R. S., c. 82, § 10.

Chas. H. Bartlett and A. W. King, for defendant.

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

WISWELL, J. This case was reported to the law court by the justice who heard it upon facts found by him. From his finding the following material facts appear. The plaintiff was a judgment creditor of and held an execution against one Jones S. Kelley, who, upon being cited to appear before a disclosure commissioner failed to appear; whereupon that fact was certified by the commissioner upon the execution, and upon the 30th of April, 1894, the commissioner issued an execution in favor of the plaintiff against the debtor for the costs in the disclosure proceedings.

Upon the 13th of June, 1894, Kelley was arrested upon the commissioner's execution, and thereupon gave a poor debtor's six month's bond, which appears to be in due form except that it was not approved as provided by statute. It was a good common law bond. Upon the 5th of December 1894, Kelley delivered himself into the custody of the keeper of the jail to which he was liable to be committed upon the execution, without any written evidence of the jailer's authority to take and detain him, stating that he had come to surrender himself into jail to save the conditions of the bond he had given when arrested upon the execution.

He was received by the jailer and committed to jail, where he remained until the following March, when he was discharged by order of the justice of this court upon Habeas Corpus, no authority being shown to the justice for his detention, after notice sent to the plaintiff's attorney, which, by accident, was not received.

Immediately after his voluntary surrender into jail, the debtor made the complaint, provided by statute, that he was unable to

support himself in jail and had not sufficient property to furnish security for his support; notice thereof was sent by the jailer to the plaintiff's attorney and the creditor sent at different times to the jailer various sums of money for the debtor's board.

On January 1st, 1895, the term of the sheriff having expired, the jailer who had received and committed the debtor went out of office and turned over to his successor a portion of the money sent for the debtor's board. The new jailer, on January 29th, 1895, notified the creditor's attorney by letter that he could find nothing in his office relating to Kelley's commitment nor any authority for the same.

Upon these facts the plaintiff claims that the sheriff, the defendant's intestate, was liable for the alleged wrongful and illegal act of his deputy and jailer in receiving into his custody the debtor without any copy of execution, or bond, or other evidence of a right to retain him in custody.

We think that the action can not be maintained. The jailer committed no actionable wrong, for which either he or his principal became liable in damages, in receiving the debtor without written evidence of his authority to receive or keep him.

One of the conditions of the bond given by the debtor was that within six months he would deliver himself into the custody of the keeper of the jail to which he was liable to be committed upon the execution. To comply with this condition, so as to save the penalty of his bond, it was necessary for him, within the time named, either to deliver himself into the custody of the jailer and be received into jail, or to deliver himself to the jailer at the jail in such a manner as would make it the duty of the jailer to receive him into custody. The jailer was not obliged to receive him unless at the same time he had produced and delivered to the jailer sufficient evidence of his authority to keep and hold him until discharged by authority of law, such as an attested copy of the bond or of the execution and officer's return thereon. But a jailer may receive a debtor without such evidence; and if he did, it would be a sufficient compliance with the conditions of the bond. *Jones* v. *Emerson*, 71 Maine, 405.

The surrender and actual confinement in jail saves the penalty of the bond. *Hussey* v. *Danforth*, 77 Maine, 17; *Blanchard* v. *Blood*, 87 Maine, 255.

That it would be a sufficient compliance with the condition of the bond, if the jailer actually received the debtor, is said by the court in *Jones* v. *Emerson*, supra.

If a jailer may receive a debtor who voluntarily surrenders himself without a copy of bond or execution, so as to make the delivery a sufficient compliance with the condition of his bond, we think it follows that the acceptance by a jailer of a debtor under these circumstances can not be an actionable wrong. He need not receive a debtor without sufficient evidence, he may very properly require a certified copy of execution and return, or of the bond; but, if he sees fit, he may waive this without making himself, or the sheriff under whom he is serving, liable for any consequences that may follow. The creditor whose debtor is in jail under these circumstances should see that the jailer is supplied with proper evidence upon which to hold him.

There was certainly no liability upon the part of the sheriff because of the debtor's discharge upon Habeas Corpus by a justice of this court.

The plaintiff further claims that the jailer retained out of money sent him to pay the debtor's board more than the weekly allowance provided by statute, and in order that he may recover this claimed excess, he desires an amendment to his writ. The question whether this amendment was allowable was also reserved for the decision of this court. We do not think it was. The action was to recover for the claimed unlawful and illegal act of the jailer in receiving the debtor into his custody without evidence of authority to detain him, so that he was subsequently discharged upon Habeas Corpus. Now the plaintiff desires to so amend his writ as to recover an amount received and retained by the jailer for the debtor's board, claimed to be in excess of the amount allowed by law. We think this is a new and different cause of action.

Judgment for defendant.

DANFORD O. FRENCH

vs.

EASTERN TRUST AND BANKING COMPANY.

Washington. Opinion April 30, 1898.

Bank. Deposit. Mistake. New Trial.

In an action to recover the amount of a deposit claimed to have been made by the plaintiff in the defendant bank, and which was disputed by the bank, the issue being exclusively one of fact, *the court considers*, taking into consideration the evidence offered in support of the motion for a new trial upon the ground of the defendant's newly-discovered evidence, as well as that introduced at the trial, that the verdict for the plaintiff was clearly wrong and that a new trial should be granted.

In this case it appeared that the plaintiff having an account with the bank made a deposit of $100, on October 13, 1892, which was duly credited to him upon his pass-book and upon the books of the bank. Under the same date an entry of another item of the same amount was made by the bank officer upon the pass-book to the plaintiff's credit but was not credited to him on the bank's books, and is the item here in suit. The plaintiff did not claim that this second sum of $100 was deposited on the day of its date, but did claim that in the fall of 1893 when he made a deposit of $35, he sent the sum of $100 by his wife to be deposited; that this sum was deposited, but that it was never credited to him upon the bank's books. The plaintiff and his wife were people of limited and few financial transactions, and had no recollection whatever whether this claimed deposit was made in currency or by check. He was a light-house keeper and lived with his wife on an island at such a distance from the bank that the wife's journey there and back to make the deposit could not be completed in one day; but neither was able to fix the time, nor even the month, when, as they claimed, the deposit was made.

On the other hand, the system of book-keeping, and the manner of doing business, including the use of deposit tickets, used at the bank, rendered it improbable that an honest error could long remain undiscovered; and a deposit that had been omitted through inadvertence would have shown itself in the cash, when the books and cash were balanced daily at the close of business. During this period of time there was no cash over, or deposits entered by mistake to the credit side of another person's account. The newly-discovered testimony showed that the statements of both the plaintiff and his wife were inconsistent with their position and testimony at the trial.

By reason of this newly-discovered testimony in its connection with all the

circumstances of the case, the unsatisfactory character of the plaintiff's testimony and the extreme improbability that such a mistake could have been made by the employees of the bank and remain undiscovered, *held;* that the verdict for the plaintiff was wrong.

ON MOTIONS BY DEFENDANT.

This was an action of assumpsit on account annexed, in which the plaintiff recovered a verdict and the defendant moved for a new trial under a general motion and also on the ground of newly discovered testimony.

The case is stated in the opinion.

H. H. Gray, for plaintiff.

J. F. Lynch and W. R. Pattangall, for defendant.

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

WISWELL, J. The plaintiff kept an account with the Machias Branch of the Eastern Trust & Banking Co. On October 13, 1892, he made a deposit of $100, which amount was duly credited to him upon his pass-book and upon the books of the bank. Under the same date an entry of another item of the same amount was made by the manager of the banking company upon the pass-book to the plaintiff's credit. It is not claimed by the plaintiff that this second sum of $100 was deposited by or for him on the day of its date upon his pass-book; but he does claim that in the fall of 1893, sometime prior to October 21st, 1893, when he made a deposit of $35, he sent the sum of $100 by his wife to be deposited; that this sum was deposited, but that it never has been placed to his credit upon the bank's books. Nor was it entered upon his pass-book, unless the second entry made under date of October 13th, 1892, was in fact made at the time of this claimed deposit.

At the trial of this suit to recover the disputed item, together with an admitted balance, the jury returned a verdict for the plaintiff for the full amount claimed. The case comes to the law court upon two motions for a new trial, one because the verdict was against the weight of the evidence, and the other because of newly-discovered evidence.

The testimony of the plaintiff and of his wife is not particularly satisfactory. Although they were people of limited and few financial transactions, they had no recollection whatever as to whether the claimed deposit was made in currency or by check. The admitted deposit upon October 13, 1892, was, as shown by the deposit slip, by a check upon another bank for $160 of which $60 was taken in currency and the balance deposited. And, although the plaintiff as the keeper of a light-house, lived with his wife on an island at such a distance from Machias that the wife's journey there and back for the purpose of making this deposit could not be completed in one day, neither she nor her husband was able to fix the time, nor even the month, when as they claim the deposit was made. She was also unable, although inquired of with considerable persistency, to state any other fact or circumstance connected with her journey, which would have any tendency either to verify or contradict her story.

Upon the other hand, the system of book-keeping and manner of doing business adopted at the bank were such that it was extremely improbable, to say the least, that an honest error could long remain undiscovered. The books and cash were balanced each day at the close of business. All deposits were first entered upon the deposit slips, which are kept and subsequently posted. During this period there had been no "cash over" upon the balancing of the books and cash each night, except of inconsiderable amounts. If a deposit had not been credited through inadvertence, it would have shown in the cash when the books and cash were balanced at the close of business; and if by a mistake a deposit had been placed to the credit of another person, it would in all probability have been discovered long before the time of the trial.

It is rather a strange coincidence that the manager should have given the plaintiff credit upon his pass-book for two deposits of $100 each, one of which entries is admitted to have been a mistake, and that this is the same amount which the plaintiff claims to have deposited about a year later receiving no credit either upon the bank's books or the pass-book. It seems to us not improbable that the erroneous entry under date of October 13th, 1892, was the origin of the plaintiff's present claim.

It would not be profitable here to analyze or to refer in detail to the testimony of the witnesses called in support of the motion upon the ground of newly-discovered testimony. It is sufficient to say that this testimony, if believed, shows statements of both plaintiff and his wife entirely inconsistent with their position and testimony at the trial.

By reason of this testimony in connection with all the circumstances of the case, and in view of the unsatisfactory character of the testimony in the plaintiff's behalf, and the extreme improbability that such a mistake could have been made by the employees of the bank and remain undiscovered, we are forced to the conclusion that the verdict was wrong.

If the case should be tried again, the plaintiff should exercise great diligence in fixing, with as much definiteness as is possible, the time when this claimed deposit was made, as this will enable the defendant, by a production of its books and deposit slips, either to rectify an error, if one has been made, or to prove with much certainty that its position is correct.

Motions sustained. New trial granted.

MILLARD F. HASKELL, and others,

vs.

JAMES T. DAVIDSON, Appellant.

York. Opinion April 30, 1898.

Offer of Reward. Performance. Arrest and Conviction.

An offer of a reward for "the arrest and conviction" of an offender can not be taken literally. The person who by reason of the offer is induced to make an investigation and finally obtains possession of sufficient facts to authorize the arrest of an offender and his subsequent conviction for the crime referred to in the offer, can not himself convict the offender. The service contemplated by a person making such an offer, and which the proposal should be construed as meaning, must be the obtaining and giving to some proper per-

son interested, sufficient information in relation to the perpetrator of the crime and his whereabouts as to authorize and secure the arrest of the offender, and subsequently to procure his conviction by a court of competent jurisdiction.

The defendant was one of thirty citizens who agreed to pay ten dollars each as a reward "for the arrest and conviction of the person or persons who entered the room of Alexander Wilson and stole $35 therefrom." The plaintiffs were informed of this offer and were thereby induced to enter upon an investigation of the crime referred to. As a result of which, facts and circumstances were discovered by them tending strongly to inculpate a person, who, upon being found and confronted with the charge by the plaintiffs, made a full confession of his guilt and subsequently pleaded guilty to the indictment found against him by the grand jury. But the formal arrest of the respondent on the capias issued by the court, was made by a deputy sheriff, who, however, makes no claim to any part of the reward.

Held; that the ruling of the justice who heard the case, without the intervention of the jury, that the defendant was liable upon the foregoing facts, was correct.

On Exceptions by Defendant.

The case is stated in the opinion.

The bill of exceptions in this case shows that the presiding justice, before whom it was tried without the intervention of a jury, filed a written decision in which he gave judgment for the plaintiffs. In this decision the presiding justice further stated: "The fact that the full demands of public justice have been in any degree disregarded by the officers of the government in allowing the respondent Thompson to go at large without punishment after conviction cannot affect the plaintiff's title to the reward."

H. H. Burbank and John C. Stewart, for plaintiffs.

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

Sitting: Peters, C. J., Foster, Haskell, Wiswell, Strout, Savage, JJ.

Wiswell, J. Exceptions to the ruling of the justice who heard the case, without the intervention of a jury, that the defendant was liable upon the following facts, found by him.

The defendant was one of thirty citizens who agreed to pay ten dollars each as a reward "for the arrest and conviction of the person or persons who entered the room of Alexander Wilson and

stole $35 therefrom." The plaintiffs were informed of this offer and were thereby induced to enter upon an investigation of the crime referred to. As a result of which, facts and circumstances were discovered by them tending strongly to inculpate one Harry Thompson, who, upon being found and confronted with the charge by the plaintiffs, made a full confession of his guilt and subsequently pleaded guilty to the indictment found against him by the grand jury. But the formal arrest of the respondent, on the capias issued by the court, was made by a deputy sheriff. That officer, makes no claim, however, as found by the court, to any part of the reward.

An offer of reward is a proposal. The party making it may insert his own terms, and no person can become entitled to the reward without a performance of all the terms contained in the proposal. But such performance need not be a literal compliance with the terms of the offer. It is sufficient, if the party claiming the reward has substantially performed the service required by the proposal.

An offer of a reward for "the arrest and conviction" of an offender, can not be taken literally. The person who by reason of the offer is induced to make an investigation and finally obtains possession of sufficient facts to authorize the arrest of an offender and his subsequent conviction for the crime referred to in the offer, certainly can not himself convict the offender. The service contemplated by a person making such an offer, and which the proposal should be construed as meaning, must be, the obtaining and giving to some proper person interested, sufficient information in relation to the perpetrator of the crime and his whereabouts as to authorize and secure the arrest of the offender, and subsequently to procure his conviction by a court of competent jurisdiction.

In *Crawshaw* v. *Roxbury*, 7 Gray, 374, the offer was "for the apprehension and conviction." The court at nisi prius instructed the jury, in regard to the service to be performed to entitle the plaintiff to a reward, that the offer of a reward could not be taken literally, for, as the conviction must be in due course of law, requiring the intervention of the court and jury, a person might be

entitled to the reward by becoming the prosecutor, and, as such, causing the arrest and conducting the case to a conviction; or he might be entitled to it by giving information which should lead to and produce the arrest and conviction of the offender. This instruction was unqualifiedly sustained by the full court. See also to the same effect *Besse* v. *Dyer*, 9 Allen, 151.

In *Shuey* v. *United States*, 92 U. S. 73, a case relied upon by the counsel for the defendant, the offer of reward was, "for the apprehension of John H. Surratt, one of Booth's accomplices." Offer was also made of liberal rewards, "for any information that shall conduce to the arrest of either of the above named criminals or their accomplices." The court held that the person who furnished the information to which the discovery and arrest of Surratt were entirely due, but who did not himself make the arrest, was not entitled to the reward offered for the apprehension, holding in that case that the arresting and giving information that led to the arrest were different things. There can be no question but that the construction of the offer of reward by the court was correct. The proclamation of the Secretary of War in making the offer treated the arrest and the giving of information that would lead to the arrest as different, making an offer of a specified sum for the apprehension and of liberal rewards for information that would lead to the apprehension. That case is different from this in another important respect. There the offer was for the capture of a known person; here, what was desired was not the apprehension of a known criminal who was a fugitive from justice, but information which should show who was the unknown perpetrator of the crime.

Other defenses urged by the counsel are not based upon any facts found by the justice who heard the case.

We think that the ruling was correct, that the plaintiffs substantially performed the service required by the offer of reward, so as to accomplish the entire object contemplated and desired by those making it.

Exceptions overruled.

JAMES R. MORRISON, and another,

vs..

THE WILDER GAS COMPANY.

Knox. Opinion May 4, 1898.

Corporations. Directors. Contracts. Evidence. Seals.

Directors of a corporation, as such, have no implied authority to act singly; they can only act as a board, unless there be an express or implied delegation of authority to act individually.

The presence of a corporate seal upon an instrument purporting to be the contract of a corporation, which does not appear to have been affixed by one having authority, or by a proper official in the general line of his authority, is not even prima facie evidence that such instrument is the contract of the corporation.

A contract under seal executed by the agents of a corporation is subject to the same rules of evidence, and of law, as a similar contract executed by the agents of an individual. In order to prove the execution of such a contract, it must be shown that the agents by whom the contract purports to have been executed were in fact agents of the corporation, having authority to execute the contract in question or contracts of that general description.

In an action to recover the purchase price of materials furnished by the plaintiffs for the construction of a gas plant, the defendant denied that it had ordered the goods or received them, or that it had any connection whatever with the construction of the plant. For the purpose of showing that the defendant did construct this plant and that it received and used these articles in the construction, the plaintiffs were allowed to introduce in evidence, against the defendant's objection, a written instrument which purported to be a contract executed by the defendant corporation and which provided for the construction of the plant. This instrument bore the corporate seal of the defendant and was executed in the name of the defendant corporation by one of its directors, who was also chairman of its executive committee. But there was no evidence by record or otherwise, that the contract was ever authorized by the corporation, or that the director had authority to execute this contract or contracts of this general description, or that the executive committee or any member thereof had any authority to make contracts of this nature, or any contract whatsoever for the defendant corporation.

Held; that the instrument was not proved to be the contract of the corporation and that it was improperly admitted in evidence.

ON MOTION AND EXCEPTIONS BY DEFENDANT.

This was an action of assumpsit brought by the plaintiffs to recover the price of certain supplies furnished to construct a plant and introduce a process for the manufacture of gas in Rockland. The undisputed facts in the case are substantially as follows:—

The plaintiffs were J. R. Morrison and John W. Rowe, doing business in Boston, Massachusetts, under the firm name of J. R. Morrison & Company, dealers in steam pipes, fittings and supplies. The defendants named in the writ were O. P. Ricker and Wilder Gas Company, a corporation organized under the laws of Maine, July 26th, 1892. The writ was dated April 7th, 1894, and the amount claimed as indebtedness was $462.22. At the trial the defendants pleaded separately the general issue. The Wilder Gas Company denied that it was indebted to the plaintiffs, as a corporation, or that any contract had been entered into with the plaintiffs; and that if any contract or agreement had been made with plaintiffs, such contract or agreement was unauthorized and without the knowledge or consent of the corporation; and whatever contract was in fact made was made with Luke A. Wilder and Charles H. Wilder and one Mr. Judd, and that the plaintiffs knew at the time the supposed contract was made the corporation had no knowledge of the transaction. After the evidence was all out, the plaintiffs discontinued as to the defendant Ricker, and a verdict was thereafter rendered against the corporation for the sum of $512.22. There was no contention as to the amount of the account or bill sued. The issue was as to the contract: Was or not the corporation the promisor either by an express or implied promise? The defendant, the Wilder Gas Company, filed a general motion to set aside the verdict as against evidence, and also took exceptions to the ruling of the presiding judge as to the admission of evidence and his refusal to admit other evidence that was offered by the defendant as explanatory of the evidence which, it said, was erroneously admitted in behalf of plaintiffs.

W. H. Fogler, for plaintiffs.

The seal of the company gave the instrument prima facie authenticity. Beach, Priv. Corp. § 376.

The presence of a seal gives rise to a prima facie presumption that it was affixed by proper authority. The burden of proof is on the party impeaching and the seal is prima facie evidence that the officer did not exceed his authority. 4 Am. & Eng. Ency. p. 244; *Trustees* v. *McKechnie*, 90 N. Y. 618; *Flint* v. *Clinton Co.*, 12 N. H. 434; *Burrill* v. *Nahant Bank*, 2 Met. 166.

When a deed is signed by one as agent of a corporation, if the seal of the corporation is affixed thereto, it will be presumed, in the absence of contrary evidence, that the agent was duly authorized to make the conveyance. 2 Greenl. Ev. § 62.

Proof of authority to execute contracts by corporation: *Maine Stage Co.* v. *Longley*, 14 Maine, 444–449; *Warren* v. *Ocean Ins. Co.*, 16 Maine, 439; *Badger* v. *Bank of Cumberland*, 26 Maine, 428–435; *Trundy* v. *Farrar*, 32 Maine, 225–228; *Fitch* v. *Steam Mill Co.*, 80 Maine, 34; *Sherman* v. *Fitch*, 98 Mass. 59–64; *Bank of Columbia* v. *Patterson*, 7 Cranch, 299; *Bank of U. S.* v. *Dandridge*, 12 Wheat. 64; *Tenney* v. *Lumber Co.*, 43 N. H. 343–356; *Flint* v. *Clinton Co.*, 12 N. H. 434; *Bank of Middlebury* v. *Rutland & W. R. Co.*, 30 Vt. 170; 2 Greenl. Ev. § 62; Story's Agency, § 53; R. S., c. 49, § 21.

The following principles are established by the above authorities:—

Grants and proceedings beneficial to a corporation are presumed to be accepted; and slight acts on their part, which can be reasonably accounted for only upon the supposition of such acceptance, are admitted as presumptions of fact.

The same presumptions are as applicable to corporations as to individuals; and a deed, vote or by-law is not necessary to establish a contract, promise or agency.

The authority of an agent to act for a corporation need not be proved by record or writing, but may be presumed from acts, and the general course of business.

Authority in the agent of a corporation may be inferred from the conduct of its officers, or from their knowledge, and neglect to make objection, as well as in the case of individuals.

If the directors of a corporation are accustomed to give separate

assent to the execution of contracts by their agents, it is of the same force as if done at a regular meeting of the board; and it is competent evidence for a stranger of the concurrence of a quorum of a board of directors, to show their acts of assent separately.

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

Corporations from necessity must act by and through some lawfully constituted agent or agents. There certainly would be no safety for corporations if every man's word was to be taken as true who might claim to be the agent of any such corporation. The rule is well settled that "there must be proof of agency before the declarations of the alleged agent are admissible," and then, as this court has said, "only such declarations as are strictly part of the res gestæ." *Hazeltine* v. *Miller*, 44 Maine, 181; *Polleys* v. *Ocean Ins. Co.*, 14 Maine, 141; *Holmes* v. *Morse*, 50 Maine, 102; *Dorne* v. *Southwork Mfg. Co.*, 11 Cush. 206.

The declarations of a professed agent, however publicly made and although accompanied by an actual signature of the name of the principal, are not competent evidence to prove the authority of such agent when questioned by the principal. *Brigham* v. *Peters*, 1 Gray, 145; *Mussey* v. *Beecher*, 3 Cush. 517.

If any contract was made at all it was a contract to be implied from some "corporate acts" or from the acts of a general agent. There is no evidence of any kind of any corporate act of this corporation which tends to prove this contract, and there is no legitimate evidence that the company had any general agent.

The document offered by the plaintiffs could only be received as an admission or declaration, not of the corporation, but of L. A. Wilder. Such evidence is not admissible until after the plaintiffs have shown him to be the general agent of the corporation.

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

WISWELL, J. This action is to recover the purchase price of certain materials furnished by the plaintiffs for the construction of a gas plant at Rockland. The defendant denied that it had

ordered the goods, or received them, or that it had any connection whatever with the construction of the gas plant.

For the purpose of showing that the defendant did construct this plant, and that it received and used these articles in the construction, the plaintiffs were allowed to introduce in evidence, against the defendant's objection, a written instrument which purported to be executed by the defendant corporation and which provided for the construction of the plant. The attestation clause and form of execution were as follows:— "In witness whereof, said Wilder Gas Company by the hands of its chairman of the executive committee, Luke A. Wilder, thereunto duly authorized, has hereunto set its corporate name and affixed its corporate seal, and said Knox Gas and Electric Company by the hand of A. D. Bird, its Treasurer, thereunto duly authorized, has set its corporate name and affixed its corporate seal the year and day above written.

The Wilder Gas Co., by Luke A. Wilder
Chairman of Executive Committee (L. S.)
Knox Gas & Elec. Co., by A. D. Bird, Treas. (L. S.)"

Objection was made to the introduction of this instrument upon two grounds; because it was not a contract between the parties to the suit, and because there was no evidence showing that the contract had been authorized by the defendant corporation. We have no doubt that a contract between the defendant and the owner of the plant, if shown by competent testimony to have been authorized by the defendant, was admissible in evidence for the purpose for which it was introduced.

But was there any evidence showing that this instrument was the contract of the defendant? The signature of Luke A. Wilder, and the fact that at the time he was a member of the board of directors and of the executive committee of the defendant corporation, were proved and admitted; but there was no evidence by record or otherwise, outside of the instrument itself, and the fact that it bore the corporate seal, that the contract was ever authorized by the corporation, or that Wilder had authority to execute this contract or contracts of this general description, or that the

executive committee or any member thereof had any authority to make contracts of this nature.

Some cases and text writers have laid down the rule that the presence of the corporate seal upon an instrument that purports to be the contract of a corporation gives rise to a prima facie presumption that it was affixed by proper authority; while others very materially limit the rule by saying, that when the seal is affixed by a proper official, in the line of his authority, it is evidence of the assent and act of the corporation.

Here the only proof was that Wilder was a director and member of the executive committee. But a director, as such, has no authority to make contracts for his corporation. He may of course have such authority,—it may be either express or implied, and it may be shown by record or parol,—but it does not follow that he had, merely from the fact of his being a director. It is a familiar rule, which requires no citation of authority, that directors of a corporation, as such, have no implied authority to act singly; they can only act as a board, unless there be an express or implied delegation of authority to act individually. So far as this case shows, Wilder had no such authority; he was not the proper official, either to sign the corporate name or to affix the corporate seal; it was not within the line of his authority.

We can see no reason why the presence of a corporate seal, which does not appear to have been affixed by one having authority, or by a proper official in the general line of his authority, should be even prima facie evidence that a contract, signed and sealed by a person, who, so far as the case shows, had no authority to make or execute this or such a contract, was the contract of the corporation.

We very much prefer the doctrine laid down by Mr. Morawetz in his work on Private Corporations. We quote from that work a portion of section 340: "It has sometimes been said, that, if the seal of a corporation appears to be affixed to an instrument, the presumption is that it was rightfully affixed,—that the seal is itself prima facie evidence that it was affixed by the proper authority. The meaning of these statements is not perfectly clear. The seal

of a corporation certainly has no mysterious virtue not possessed by other seals; and a contract under seal executed by the agents of a corporation is subject to the same rules of evidence, and of law, as a similar contract executed by the agents of an individual. In order to prove the execution of a contract purporting to have been executed under the corporate seal, two facts must be shown. First, it must be shown that the agents by whom the contract purports to have been executed were in fact agents of the corporation, having authority to execute the contract in question, or contracts of that general description; and, secondly, it must be shown that the signatures are genuine, or, in other words, that these agents did actually execute that particular contract. The mere circumstance that a seal was affixed to the contract would evidently not tend to establish either one of these facts."

Here there was sufficient evidence that Wilder executed the contract in the name of the corporation and affixed thereto the corporate seal. There was no evidence whatever that he had any authority, express or implied, to execute this contract, or contracts of this nature, or any contract whatsoever for the defendant corporation. We think, therefore, that the instrument was improperly admitted.

Exceptions sustained.

ELTON M. HEATH *vs.* CHARLES J. STODDARD.

Androscoggin. Opinion May 4, 1898.

Agent. Power to Sell. Apparent Authority.

A principal is not only bound by the acts of his agent, whether general or special, within the authority which he has actually given him, but he is also bound by his agent's acts within the apparent authority which the principal himself knowingly permits his agent to assume, or which he holds the agent out to the public as possessing.

Whether or not a principal is bound by the acts of his agent, when dealing with a third person who does not know the extent of his authority, depends, not so much upon the actual authority given or intended to be given by the principal, as upon the question, what did such third person, dealing with the agent, believe and have a right to believe as to the agent's authority, from the acts of the principal.

The plaintiff, the owner of a piano, intrusted it to one Spencer for the purpose of having it taken to and left at the house of the defendant with a view to its sale, but without any authority, as the plaintiff claimed and was found by the jury, to sell the piano or to make any contract for its sale; the arrangement being, as the plaintiff claimed, that Spencer should merely take it to and leave it at the defendant's house and that a day or two later the plaintiff would go there and make a sale of it if he could. Spencer had the piano taken to the defendant's house, but instead of simply leaving it so that the plaintiff might subsequently sell it, he assumed authority in himself to sell it to the defendant, who bought it and paid in cash and otherwise the full purchase price fixed by Spencer, without any knowledge of his want of authority.

Spencer was himself a dealer in pianos and musical instruments, and upon the very day when he made the arrangement with the plaintiff to take one of his (plaintiff's) pianos to the defendant's house, he had seen the defendant and attempted to sell him one of his pianos. There was evidence tending to show that the plaintiff knew these facts when he intrusted the piano to Spencer for the purpose of its being taken to the defendant's house with a view to its sale.

Held; that a jury might have been warranted in coming to the conclusion that the purchaser was justified in believing, in view of the facts, that Spencer had authority to sell, and that the plaintiff knowingly placed Spencer in a position where he could assume this apparent authority to the injury of the defendant; and that the instructions of the court, in which it was not explained to the jury that a principal might be bound by the acts of an agent,

not within his actual authority, but within the apparent authority which the principal had knowingly and by his own acts permitted the agent to assume, in view of the facts of the case, were inadequate.

ON EXCEPTIONS BY DEFENDANT.

This was an action of replevin to recover a piano which one Spencer sold to the defendant for $125 in cash and a horse worth from $10 to $25. The jury returned a verdict for the plaintiff, and assessed damages in the sum of one cent.

At the trial the defendant contended that if the plaintiff after knowing that Spencer had talked with the defendant relative to the purchase of a piano, delivered the piano in suit to Spencer to be carried to the defendant's home in Greene to plant, and if Spencer instead of planting the same as instructed by the plaintiff, sold the same to the defendant and appropriated the proceeds, then having placed Spencer in the position to commit a fraud, the plaintiff must suffer the loss incurred by the fraudulent acts of Spencer in selling the piano and appropriating the proceeds, and not the defendant, who was an innocent party.

The presiding justice did not instruct the jury as contended for by the defendant, but did instruct them among other matters and things as follows:

"The mere fact that Spencer had possession of that piano and sold it to the defendant, even, as the defendant says, Heath's name not having been mentioned to the defendant, would not necessarily give a title to the defendant. To illustrate: Suppose you are a livery stable keeper, and you let a man have a horse to go from here to Portland. You let him have that horse, but it is for a special purpose to go from here to Portland. He meets a man on the road and asks him what he will give him for the horse, and they dicker and finally the man whom he meets buys that horse for one hundred and twenty-five dollars. You do not suppose that would divest you of the title as a livery stable keeper; because you never have given authority to that man to sell it. You gave authority to that man to drive to Portland and back, and if any man was foolish enough to buy that horse of that man he will have to stand his chances. I give you this as an illustration.

It may be an extreme illustration. Now, if a party allows another to take a piano and go into the country to leave it, and that party who takes it sells it and there is not any authority for that sale, then whoever purchases it in the country, or wherever it is left, or on the way, can obtain no greater title than the party has who sells it. So it comes back to the question of whether this man Heath, the plaintiff in this case, ever authorized Spencer to so deal with that property in the way of a sale of it as to constitute him an agent for that purpose. He may have constituted him an agent to go out and leave that piano. He would be then a bailor (the plaintiff would) and Spencer would be the bailee, a person doing an act for another,—a bailment as it is termed; or you may put it in the more familiar phrase, that if the plaintiff allowed Spencer to take the piano and go out and leave it and gave him no other right or authority, why he would be the plaintiff's agent for that particular purpose, but he would not be an agent to make a sale of that property."

The defendant took exceptions to these among other instructions.

Tascus Atwood, for plaintiff.

Counsel cited: Story, Agency, §§ 126, 133; *Parsons* v. *Webb*, 8 Maine, 38; *Rodick* v. *Coburn*, 68 Maine, 170; *Stevens* v. *Ellis*, 48 Maine, 501; *Stollenwerck* v. *Thacher*, 115 Mass. 224.

W. H. Newell and W. B. Skelton, for defendant.

When a commodity is sent in such a way, and to such a place, as to exhibit an apparent purpose of sale, the principal will be bound and the purchaser will be safe, although the agent may have acted wrongfully, and against his orders or duty, if the purchaser has no knowledge thereof. *Carmichael* v. *Buck*, 10 Rich, Law Rep. (S. C.) 322 (70 Am. Dec. 226); Story, Agency, §§ 73 and note, 94.

Counsel argued:

1. It appears that the defendant believed that Spencer was the principal.

2. That the plaintiff knew all the talk or negotiations which had taken place between Spencer and the defendant.

3. That knowing all this the plaintiff delivered this piano to Spencer to be sold to the defendant.

4. That the apparent ownership in the piano was in Spencer.

5. That the defendant purchased the same believing Spencer to be the owner, and knowing nothing of the ownership of the plaintiff in it, or of his instructions to Spencer.

6. That the plaintiff placed Spencer in the position to commit a fraud.

7. That if either should suffer from the fraudulent acts of Spencer, it should be the plaintiff, who placed Spencer in the position where he could accomplish the wrong, and not the defendant, who knew nothing of it from its inception to its consummation.

Counsel cited: 1 Benj. Sales, p. 19, 3d Am. Ed; Chitty, Cont. p. 362, 11 Ed. (1881); *McNeil* v. *10th Nat. Bank*, 46 N. Y. 325. Estoppel: *Nixon* v. *Brown*, 57 N. H. 34–39; *Barnard* v. *Campbell*, 55 N. Y. 456; Story, Agency, § 127.

SITTING: PETERS, C. J., HASKELL, WISWELL, STROUT, SAVAGE, JJ. HASKELL, J., concurred in the result.

WISWELL, J. Replevin for a piano. The piano was at one time the property of the plaintiff who intrusted it to one Spencer for the purpose of taking it to, and leaving it at, the house of the defendant, but without any authority, as the plaintiff claims and as has been found by the jury, to sell the piano or to make any contract for its sale: the arrangement being, as the plaintiff claims, that Spencer should merely take it to and leave it at the defendant's house and that a day or two later the plaintiff would go there and make a sale of it if he could.

Spencer had the piano taken to the defendant's house, but instead of simply leaving it so that the plaintiff might subsequently sell it, he assumed authority in himself to sell it to the defendant, who bought it and paid in cash and otherwise the full purchase price fixed by Spencer, without any knowledge of his want of authority.

Spencer was himself a dealer in pianos and musical instruments, and upon the very day when he made the arrangement with the plaintiff to take one of his (plaintiff's) pianos to the defendant's house, he had seen the defendant and attempted to sell him one of his pianos.

Upon the question of Spencer's authority as an agent the presiding justice instructed the jury as follows: "The mere fact that Spencer had possession of that piano and sold it to the defendant, even as the defendant says, Heath's name not having been mentioned to the defendant, would not necessarily give a title to the defendant. To illustrate: Suppose you are a livery stable keeper and you let a man have a horse to go from here to Portland. You let him have that horse but it is for a special purpose to go from here to Portland. He meets a man on the road and asks him what he will give him for the horse, and they dicker and finally the man whom he meets buys that horse for $125. You do not suppose that would divest you of the title as a livery stable keeper; because you never have given authority to that man to sell it. You gave authority to that man to drive to Portland and back, and if any man was foolish enough to buy that horse of that man, he will have to stand his chances. I give you this as an illustration. It may be an extreme illustration. Now, if a party allows another to take a piano and go into the country to leave it, and that party who takes it sells it and there is not any authority for that sale, then whoever purchases it in the country, or wherever it is left, or on the way, can obtain no greater title than the party has who sells it. So it comes back to the question of whether this man Heath, the plaintiff in this case, ever authorized Spencer to so deal with that property in the way of a sale of it as to constitute him an agent for that purpose."

While these instructions were technically correct, so far as they go, we do not think that they were adequate in view of the defendant's position, and we fear that the illustration given was so extreme as to be misleading.

A principal is not only bound by the acts of his agent, whether general or special, within the authority which he has actually

given him, but he is also bound by his agent's acts within the apparent authority which the principal himself knowingly permits his agent to assume, or which he holds the agent out to the public as possessing. Am. & Eng. Encyl. of Law, 2 Ed. Vol. 1, page 969, and cases cited.

Whether or not a principal is bound by the acts of his agent, when dealing with a third person who does not know the extent of his authority, depends, not so much upon the actual authority given or intended to be given by the principal, as upon the question, what did such third person, dealing with the agent, believe and have a right to believe as to the agent's authority, from the acts of the principal. *Griggs* v. *Selden*, 58 Vt. 561; *Towle* v. *Leavitt*, 23 N. H. 360; (55 Am. Dec. 195); *Walsh* v. *Hartford Ins. Co.* 73 N. Y. 5.

For instance, if a person should send a commodity to a store or warehouse where it is the ordinary business to sell articles of the same nature, would not a jury be justified in coming to the conclusion that, at least, the owner had by his own act invested the person with whom the article was intrusted, with an apparent authority which would protect an innocent purchaser?

In *Pickering* v. *Burk*, 15 East, 43, quoted by MELLEN, C. J., in *Parsons* v. *Webb*, 8 Maine, 38, Lord Ellenborough says: "Where the commodity is sent in such a way, and to such a place as to exhibit an apparent purpose of sale, the principal will be bound and the purchaser safe."

Let us apply this principle to the present case. Spencer was a dealer in pianos. Immediately before this transaction he had been trying to sell a piano to the defendant. There was evidence tending to show that the plaintiff knew these facts. With this knowledge he intrusted the possession of this piano with Spencer for the purpose of its being taken by Spencer to the defendant's house with a view to its sale. Spencer was not acting merely as a bailee; he did not personally take the piano to the defendant's house, but had it done by a truckman or expressman; Spencer was employed for some other purpose. Whatever may have been the private arrangement between the plaintiff and Spencer, or the limit of

authority given by the plaintiff, would not a jury have been warranted in coming to the conclusion that the purchaser was justified in believing, in view of all of these facts, that Spencer had authority to sell, and that the plaintiff knowingly placed Spencer in a position where he could assume this apparent authority to the injury of the defendant? We think that a jury might have properly come to such a conclusion, and that consequently the instructions were inadequate in this respect, that it was nowhere explained to the jury that a principal might be bound by the acts of an agent, not within his actual authority, but within the apparent authority which the principal had knowingly and by his own acts permitted the agent to assume.

Exceptions sustained.

CHARLES W. DEXTER *vs.* MILFORD A. CURTIS and others.

Androscoggin. Opinion May 4, 1898.

Chattel Mortgage. After-Acquired Property. Sales to Creditors.

A chattel mortgage does not ordinarily pass the legal title to after-acquired property, without some new act sufficient for the purpose, like a delivery to the mortgagee and retention of the same by him, or a confirmatory writing properly recorded.

But the rule is subject to this exception, that if the mortgage contains a stipulation authorizing the mortgagor to sell any portion of the mortgaged property, and requiring him to replace that sold by purchasing with the proceeds other articles of a like kind, which are to be subject to the lien of the mortgage, then the mortgage will have that effect, and will pass to the mortgagee the legal title to the property so acquired.

The mortgage claimed under by the plaintiff in this case contains such a stipulation, *and it is considered by the court,* the case coming to the law court upon report, that the evidence fairly shows that the goods claimed to have been converted by the defendant, were either in the mortgagor's store as a part of his stock in trade when the mortgage was executed, or were subsequently purchased by him for the purpose of replenishing his stock and paid for with the proceeds of the goods sold; and that in either case the mortgage was sufficient to pass the legal title to the plaintiff.

The defendants obtained these goods from the mortgagor, with both actual and constructive notice of the mortgage, for the purpose of reducing his indebtedness to them, and credit was given him for the goods upon their account.

Held; that the title to the goods thus obtained by the defendants did not pass to them; that while the mortgagor had the right to sell or to exchange any portion of his stock, under the terms of the mortgage, he did not have the right to sell these goods to his creditors in payment of past indebtedness, and that any person who obtained them of the mortgagor, for this purpose, did not acquire title to them as against the mortgagee.

ON REPORT.

The case appears in the opinion.

Henry W. Oakes, for plaintiff.

Tascus Atwood, for defendants.

The plaintiff saw fit at the outset to grant the mortgagor the right to "barter, sell and exchange" his stock, not even restricting him to "retail" or the "usual course of trade" and the law will not now allow him when he cannot demonstrate his claim to come in and at random, demand satisfaction from one who has dealt with his mortgagor. *Griffith* v. *Douglass*, 73 Maine, 532; *Jones* v. *Richardson*, 10 Met. 481.

SITTING: PETERS, C. J., EMERY, HASKELL, WISWELL, STROUT, JJ. SAVAGE, J., having been of counsel, did not sit.

WISWELL, J. Action of trover for the conversion of a portion of a stock of goods. The case comes to the law court upon report.

For the purpose of proving title in himself to the articles alleged to have been converted, the plaintiff introduced in evidence a chattel mortgage given to him by one Edwin F. Goss, which contains the following description of the property mortgaged: "All my stock in trade, consisting principally of confectionery, fruit and cigars, and all my store furniture, fixtures and appliances, excepting my soda fountain and appliances, and including all machinery and appliances for making ice cream, now contained and used in the store and basement occupied by me situated in said Auburn on the southerly side of Court Street and known as No. 50 on said street."

The mortgage also contained the following provision: "It is mutually agreed and understood by the parties to this mortgage that the said Edwin F. Goss shall be allowed to barter, sell and exchange the above named stock and with the proceeds purchase other goods of a like kind which, together with all additions to said stock, shall be equally subject to the lien of this mortgage."

It has been frequently decided in this state that a chattel mortgage does not ordinarily pass the legal title to after-acquired property, without some new act sufficient for the purpose, like a delivery to the mortgagee and retention of the same by him, or a confirmatory writing properly recorded. *Sawyer* v. *Long*, 86 Maine, 541, and cases there cited. But the rule is subject to this exception, that if the mortgage contains a stipulation authorizing the mortgagor to sell any portion of the mortgaged property, and requiring him to replace that sold by purchasing with the proceeds other articles of a like kind, which are to be subject to the lien of the mortgage, then the mortgage will have that effect, and will pass to the mortgagee the legal title to the property so acquired. *Abbott* v. *Goodwin*, 20 Maine, 408; *Sawyer* v. *Long*, supra.

While the evidence in this case is not as definite and as exact as could be desired, we think that the testimony of Goss, the mortgagor, which is entirely uncontradicted upon this question, fairly shows that the goods claimed to have been converted by the defendant were either in the mortgagor's store as a part of his stock in trade when the mortgage was executed, or were subsequently purchased by him for the purpose of replenishing his stock and paid for with the proceeds of the goods sold.

Are the defendants liable for a conversion of these goods? They were creditors of Goss. They had both constructive and actual notice of the mortgage. They obtained these goods from Goss for the purpose of reducing his indebtedness to them, and credit was given him for the goods upon their account. The title to goods thus obtained did not pass to them. While the mortgagor had the right to sell or to exchange any portion of his stock, he did not have the right to sell these goods to his creditors in payment of past indebtedness. Any person who obtained these goods

of the mortgagor for this purpose, did not acquire title to them as against the mortgagee. The refusal to deliver the goods thus obtained upon demand by the plaintiff was a conversion.

There is no merit in the claim that a portion of these goods was received by the defendants in exchange for other goods which they at the time, or as a part of the transaction, delivered to the mortgagor, because the case shows that the mortgagor paid in cash for all goods received during the period that the defendants were obtaining the articles sued for.

According to the testimony upon the part of the defense, the price agreed upon, and for which the mortgagor received credit, was $134.47. The defendants also had of the mortgagor a quantity of cigars, the price of which was not settled by the parties to the transaction, but the value of which was estimated by one of the defendants to be $52.65. For these two amounts, together with interest from the time of the demand and refusal, the plaintiff should have judgment.

Judgment accordingly.

SANFORD CREAMER *vs.* INHABITANTS OF BREMEN.

Lincoln. Opinion May 4, 1898.

Tax. Personal Property—in transit. Action. Involuntary Payments. R. S., c. 6, §§ 13, 14, cl. 1. Stat. 1883, c. 126.

The plaintiff, an inhabitant of another town, was the owner, on the first day of April, 1893, of a quantity of fire-wood piled upon a wharf and upon the adjacent shore in the defendant town, for which he was taxed in that year by the assessors of that town. Having paid the tax under protest he sought in this action to recover it.

During the preceding winter the plaintiff had cut and hauled this wood from a lot owned by him in the same town to a wharf and the adjacent shore in the defendant town belonging to another person, for the purpose of shipping it during the spring and summer to Thomaston. Before he commenced hauling he made an arrangement with the wharf owner whereby he obtained the right to pile his wood upon the wharf and the landing by paying an agreed wharfage. The plaintiff was the only one whose wood was piled on the wharf during that season, but there were others who, with the permission of

the owner and upon agreeing to pay the same price as wharfage, had hauled and deposited wood upon the same landing. The wood on the wharf was so arranged that a chance was left to drive a team across the wharf and turn around. A jury would have been authorized in finding, from the reported testimony, that the plaintiff had made no arrangement for any specific part of the wharf and had no further or greater right thereon than others who obtained a like permission from the owner, except as he first got possession of the wharf by piling his wood thereon.

Held; that under these circumstances this personal property was not taxable to the plaintiff in the defendant town by virtue of the provisions of R. S., c. 6, § 14, clause 1.

This wood, under the above circumstances, can not be said to have been "employed in trade" in the defendant town. It was not hauled to the wharf to be there sold, nor even to be shipped to the place or different places where the owner might subsequently sell it. It was hauled there for the definite purpose of being shipped from there to a particular place when the river opened for navigation in the spring. It was merely in transit.

To render a non-resident liable to be taxed for merchandise in a store, shop, mill or upon a wharf, landing place or ship yard, his occupancy must be of such a character and under such circumstances as would constitute him the owner of the premises for the time being. In this case, *held;* that the plaintiff was not such an occupant of the wharf or landing place, and that for this further reason the personal property was not taxable in the defendant town.

When money, claimed to be rightfully due, is paid voluntarily and with a full knowledge of the facts, it can not be recovered back, if the party to whom it has been paid may conscientiously retain it; and even taxes illegally assessed, if paid voluntarily, can not be recovered. But when a non-resident pays a tax for which he is not liable, under protest and for the purpose of avoiding a threatened arrest or seizure of his property, he may recover it of the town into whose treasury the money has been paid.

In an action for the recovery of money paid for taxes illegally assessed, the law is more liberal, as to what constitutes duress, than in other cases. The collector holds a warrant by which he is authorized to take the body or seize the property of the person against whom a tax has been assessed,—such person has had no opportunity to test the validity of the assessment against him; he has not had his day in court. In such a case he need not wait until his goods have been actually seized or his person arrested; but, for the purpose of preventing either, he may pay the amount demanded in such a way as to recover it, if, after judicial investigation, it should be decided that the tax was illegally assessed.

In this case, *held;* that the jury might have properly come to the conclusion, from the evidence reported, that the plaintiff paid this tax to avoid a threatened arrest or seizure of his property, which he had reasonable cause to apprehend; that he paid it under protest making the specific objection at the time that the wood was not liable for taxation in that town; and that the action is maintainable.

ON EXCEPTIONS BY PLAINTIFF.

This was an action to recover back money paid for a tax claimed to have been illegally assessed and claimed to have been paid under protest.

The facts appear in the opinion.

O. D. Castner, for plaintiff.

Wm. H. Hilton and Weston M. Hilton, for defendant.

On April 1, 1893, when the tax was assessed, the plaintiff occupied Storer's wharf in Bremen in the manner and for the purposes contemplated by the statute under which we justify, and no action to recover it back can be maintained. The plaintiff was for the time being, the owner of the wharf for the purpose of piling his wood upon it. There was no distinct part of the wharf assigned to him, but the whole wharf.

No action can be maintained for that part of the tax assessed on the plaintiff's wood piled upon the landing, as his remedy was by application for abatement. *Waite* v. *Princeton*, 66 Maine, 225; *Gilpatrick* v. *Saco*, 57 Maine, 277; *Stickney* v. *Bangor*, 30 Maine, 404; *Hemingway* v. *Machias*, 33 Maine, 445; *Howe* v. *Boston*, 7 Cush. 273; *Salmond* v. *Hanover*, 13 Allen, 119.

It seems to be the commonly accepted doctrine that payment of taxes where there is no legal duress will be deemed to have been voluntary, and the money cannot be recovered back. 6 Am. & Eng. Ency. of law, p. 86; *Hayford* v. *Belfast*, 69 Maine, 63; *Preston* v. *Boston*, 12 Pick. 14; *Smith* v. *Readfield*, 27 Maine, 145; *Hilborn* v. *Bucknam*, 78 Maine, 482.

Money voluntarily paid cannot be recovered back. *Parker* v. *Lancaster*, 84 Maine, 512.

As a general rule a protest is not effectual unless the payment or other act takes place under compulsion. Rapalje & Lawrence Law Dict., title, Protest.

Protest alone will not make a payment involuntary unless the payment is made by reason of some coercion, or by reason of duress of person or seizure of goods. *Smith* v. *Readfield*, 27 Maine, 145.

A person who, without compulsion of legal process or duress of

the goods or of the person, yields to the assertion of an invalid or unjust claim by paying it, cannot by a mere protest whether in writing or by parol, change its character from a voluntary to an involuntary payment. *Cook* v. *Boston*, 9 Allen, 393; *Emmons* v. *Scudder*, 115 Mass. 367.

SITTING: FOSTER, HASKELL, WISWELL, STROUT, SAVAGE, JJ.

WISWELL, J. The plaintiff, an inhabitant of the town of Waldoboro, was the owner, on the first day of April, 1893, of a quantity of fire-wood piled upon a wharf and upon the adjacent shore, in the defendant town, for which he was taxed in that year by the assessors of that town. Having paid the tax under protest he seeks in this action to recover it. At the trial, after the plaintiff's testimony was closed, the presiding justice, for the purpose of giving progress to the case and in order to have certain questions determined by the law court, deemed it expedient to order a nonsuit, which was accordingly done. The two questions presented are, whether the tax was properly assessed against him; and, if not, whether he can recover back the money in this action.

The plaintiff being an inhabitant of Waldoboro, by R. S., c. 6, § 13, this, as well as all other personal property of which he was the owner, wherever situated, was taxable to him in that town and not elsewhere, unless it comes within the exceptions referred to in sec. 14 clause I of the same chapter, which is as follows: "All personal property employed in trade, in the erection of buildings or vessels, or in the mechanic arts, shall be taxed in the town where so employed on the first day of each April; provided, that the owner, his servant, sub-contractor or agent, so employing it, occupies any store, shop, mill, wharf, landing place or ship yard therein for the purpose of such employment."

From the report of the testimony accompanying and made a part of the exceptions, these facts appear: The plaintiff was the owner of a wood lot in the defendant town; during the preceding winter he had cut and hauled a quantity of wood to the wharf and the adjacent shore in the same town, belonging to one Storer, for the purpose of shipping it during the spring and summer to Thomaston.

Before he commenced hauling, he made an arrangement with the wharf owner whereby he obtained the right to pile his wood upon the wharf and the landing by paying an agreed wharfage of ten cents per cord for so much of the wood as was placed upon the wharf and eight cents per cord for that on the shore. The plaintiff was the only one whose wood was piled on the wharf during that season, but there were others who, with the permission of the owner and upon agreeing to pay the same price per cord, had hauled and deposited wood on the same landing. The wood on the wharf was so arranged that a chance was left to drive a team across the wharf and turn around. A jury would have been authorized in finding, from the reported testimony, that the plaintiff had made no arrangement for any specific part of the wharf and had no further or greater rights thereon than others who obtained a like permission from the owner, except as he first got possession of the wharf by piling his wood thereon.

Under these circumstances, was this personal property taxable to the plaintiff in the defendant town by virtue of the provisions of R. S., c. 6, § 14, clause 1, above quoted? We think not. Prior to 1883 the exception provided by the clause of the statute above quoted was much broader than it is now. Then the language of the first part of the clause was: "All goods, wares and merchandise, all logs, timber, boards and other lumber, and all stock in trade, including stock employed in the business of any of the mechanic arts, etc." But by chap. 126 of the Public Laws of 1883, the statute was so amended that the following language was used in the place of that just quoted: "All personal property employed in trade, in the erection of buildings or vessels, or in the mechanic arts, etc."

This wood can not be said to have been employed in trade in the town of Bremen. It was not hauled to the wharf to be there sold, nor even to be shipped to the place or different places where the owner might subsequently make sales of it. It was hauled there for the definite purpose of being shipped from there to a particular place when the river opened for navigation in the spring. It was merely in transit. The wood was not in the town of

Bremen for the purpose of trade, it was simply there because it had been cut from a wood lot in that town and the owner had not had an opportunity to remove it from the town prior to the day fixed by law for the assessment of taxes. The facts are entirely different from those in the case of *Gower* v. *Jonesboro*, 83 Maine, 142.

Nor do we think that the plaintiff occupied the wharf within the meaning of the statute. It has been frequently decided in this state that the statute meant an occupancy of such a character as to make the occupier the owner for the time being. In *Campbell* v. *Machias*, 33 Maine, 419, Chief Justice SHEPLEY said: "The design of the statute was to render liable to taxation the property of individuals, who so occupied a mill or wharf, as that they should be entitled to receive and not liable to pay mill rent for the lumber from time to time sawed in the one, or wharfage for lumber deposited on the other."

In *Desmond* v. *Machias Port*, 48 Maine, 478, a portion of a wharf was assigned by the owner to a non-resident by metes and bounds, to which he brought lumber from his mills in another town, placed it thereon, where it remained for several months awaiting sale or shipment. His right to use the premises was by written lease, for a fixed, certain and long period of time; it was held that this was an occupancy contemplated by the statute, but the court affirmed the doctrine of the case of *Campbell* v. *Machias*, supra, and laid down the rule, that to render a non-resident liable to be taxed for merchandise in a store, shop or mill, or upon a wharf, his occupancy must be under such circumstances as would constitute him the owner of the premises for the time being. See also *Stockwell* v. *Brewer*, 59 Maine, 286; *Martin* v. *City of Portland*, 81 Maine, 293; *Lee* v. *Templeton*, 6 Gray, 579.

In this case the plaintiff was not entitled to receive wharfage, he was obliged to pay it. He was not such an occupant as to make him an owner for the time being. He did not have control of the wharf; other persons obtained permission from the owner to occupy it in the same way by paying the same wharfage. This personal property was therefore not taxable to him in the defendant town.

The case shows that the plaintiff had no other personal property for which he was taxed in Bremen; consequently an action at law, as has frequently been decided, and not an application for an abatement upon the ground of over-valuation, is his proper remedy.

But it is further claimed that this suit can not be maintained because the payment of the tax by the plaintiff was voluntary. It is undoubtedly true that when money claimed to be rightfully due is paid voluntarily and with a full knowledge of the facts, it can not be recovered back, if the party to whom it has been paid may conscientiously retain it; and even taxes illegally assessed, if paid voluntarily can not be recovered. But when a non-resident pays a tax for which he is not liable, under protest and for the purpose of avoiding a threatened arrest or seizure of his property, he may recover it of the town into whose treasury the money has been paid.

In an action for the recovery of money paid for taxes illegally assessed the law is more liberal, as to what constitutes duress, than in other cases. The collector holds a warrant by which he is authorized to take the body or seize the property of the person against whom a tax has been assessed; such person has had no opportunity to test the validity of the assessment against him; he has not had his day in court. In such a case he need not wait until his goods have been actually seized or his person arrested; but, for the purpose of preventing either, he may pay the amount demanded in such a way as to recover it, if, after judicial investigation, it should be decided that the tax was illegally assessed.

An early and leading case upon this subject, is *Preston* v. *Boston*, 12 Pick. 7, in which it was held, that if a person not liable to taxation is called on peremptorily to pay upon a warrant held by a collector and running against the person and property of the party, and he can save himself and his property in no other way than by paying the illegal demand, he may give notice that he so pays it by duress and not voluntarily, and by showing that he is not liable, recover it back as money had and received.

In *Joyner* v. *Third School District in Egremont*, 3 Cush. 567, it was decided, that a payment of taxes to a collector who held a

warrant authorizing the arrest of the plaintiff and the seizure of his property, and who has threatened to enforce the same, was not such a voluntary payment of a disputed demand as would preclude the person thus paying from opening the question of the right to enforce such payment, in an action to recover the money back. Payment of taxes under these circumstances is a payment under a species of duress. *Wright* v. *Boston*, 9 Cush. 233.

In *Smith* v. *Readfield*, 27 Maine, 145, which was an action of this nature, it is said in the opinion of the court: "He proved that the several sums assessed to be paid in money, had been paid to the persons acting as collectors of taxes. There is no proof, that he was compelled to pay any portion of them by duress of his person or property; or that any part was paid under protest and to avoid an arrest of his person or seizure of his property." This language was commented upon by the court in the case of *Hathaway* v. *Addison*, 48 Maine, 440, where it is said: "This language clearly implies that if the payment had been made under protest, and for the purpose of avoiding an arrest or seizure of his property it would not have been voluntary." To the same effect see *Abbott* v. *Bangor*, 56 Maine, 310; and *Howard* v. *Augusta*, 74 Maine, 84.

We think that in this case the jury might have properly come to the conclusion, from the evidence reported, that the plaintiff paid this tax to avoid a threatened arrest of his body or seizure of his property, which he had reasonable cause to apprehend; that he paid it under protest, making the specific objection at the time and in many previous conversations with the collector and the assessors, that he was not liable to be taxed for the wood in that town.

The case shows that the money so paid has been turned into the treasury of the defendant town. The action can, therefore, be maintained upon the plaintiff's evidence, and he was entitled to go to the jury upon any issues of fact that were raised.

Exceptions sustained.

SCHOOL DISTRICT NO. 1, IN GORHAM, Petrs. for Mandamus,

vs.

CHARLES W. DEERING, and others.

Cumberland. Opinion May 4, 1898.

School Districts. Stat. 1893, c. 216. Dist. No. 1, in Gorham. Spec. Acts, 1889, c. 454, c. 461.

A school district organized by the town and not by special act of the legislature, is not within the proviso in section 1, of chap. 216 of the laws of 1893 abolishing school districts, although the legislature by special acts subsequent to its organization conferred upon it special powers; and hence is not entitled to receive for its own expenditure any part of the town's money raised for the support of schools.

ON REPORT.

This was a petition for mandamus by the inhabitants of school district No. 1, in Gorham praying for a writ to issue commanding the superintending school committee to determine and award to the district the amount required for the maintenance of the schools therein for the current year from the common school funds of the town.

The defendants claimed that the district had been abolished by the statute of 1893, c. 216, and the plaintiffs contended otherwise. The first and fourth sections of the statute are as follows:

"Sec. 1. The school districts in all towns in this state are hereby abolished. Provided, however, that school districts organized with special powers by act of the legislature, may retain such organization and special powers; but said districts shall annually, on or before the first day of June, by their agents, trustees or directors, submit to the school committees of their several towns estimates of the amount required for the maintenance of the schools therein, other than free high schools, for the ensuing school year, and shall be entitled to such portion of the common school funds of the town as said committees shall determine, which sum shall

not be less than is necessary for the maintenance of their schools for a period equal to that of other schools of the town.

"Sec. 4. 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 by virtue of a gift, devise or bequest for the benefit of said district shall continue to be held and used according to the terms thereof."

The plaintiffs also contended that the statute of 1893 did not apply because special powers had been conferred on the district by special laws of 1889, c. 454 and c. 461, by which certain scholars could be educated at the normal school in this district, besides being authorized to accept, receive and hold property given to it in trust for educational purposes.

J. A. Waterman and G. B. Emery, for plaintiffs.

The act of 1893 does not say or mean "organized only by special charters." The districts comprehended within the proviso are the ordinary school districts, vested with special powers by legislation. *State* v. *Parker*, 25 Minn. 215–220.

If the legislature is limited to a single act, or to a special charter, in conferring special powers, then the act in question is unconstitutional. *Call* v. *Chadbourne*, 46 Maine, 206. The continuance of this district under the district system is essential to the rights conferred by the acts of 1889 and are identical in spirit and purpose with those which have been held to constitute a contract. *Dartmouth College* v. *Woodward*, 4 Wheat. 518; *State* v. *Donovan*, 89 Maine, 453; Endl. Int. Stats. § 340, and cases.

Section 4 has no reference to school districts not abolished, but to those that elect to go into the town system and are allowed to retain their funds. Their special powers could hardly be retained if at the same time the management of their affairs should be taken away. *Drainage Com.* v. *Walker* 41 Ill. App. 575; *Kane* v. *Kansas City*, 112 Mo. 34; *Hobin* v. *Murphy*, 20 Mo. 448.

The special intention must prevail over the general words: *Hallowell* v. *Gardiner*, 1 Maine, 93; *Milo* v. *Kilmarnock*, 11

Maine, 455; *U. S.* v. *Crawford*, 6 Mackey, 319; *Gray* v. *Co. Com.*, 83 Maine, 429; *Stevens* v. *Raymond*, 4 Cush. 214; *Phillips* v. *Drake*, 40 Ills. 388; *Collins* v. *Chase*, 71 Maine, 434, 436; *Smith* v. *Chase*, 74 Maine, 164; *Merrill* v. *Crossman*, 68 Maine, 412; *Holmes* v. *Paris*, 75 Maine, 559, 561; *Allen* v. *Young*, 76 Maine, 80; *State* v. *Bucknam*, 88 Maine, 385.

The agreed facts show that the district has not failed to retain the actual possession of its schools and school property, in manner as prior to the statute of 1893.

We are no more estopped than are the respondents estopped from denying our rights as claimed, after they have for three successive years granted in full the requests of the district in this regard. *Tower* v. *Haslam*, 84 Maine, 86; Bigelow, Estop. 430.

Having exercised the privileges of a district for three years from the passage of the act under consideration, the district is presumed to have a legal organization (R. S. 1883, c. 11, § 40.) This has been held to mean, both legally originally organized and legally acting in its present corporate functions. *Collins* v. *School District*, 52 Maine, 522, 526. And the presumption has also been held to be conclusive. *State* v. *School District*, 54 Minn. 213; *Stevens* v. *School District*, 30 Mich. 69; *State* v. *School District*, 42 Neb. 499.

John H. Fogg, for defendants.

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

EMERY, J. It was the policy of Massachusetts before the Separation, and has been the policy of Maine since down to 1893, to allow towns to sub-divide themselves into school districts and apportion the school money to their districts for them to expend upon the schools within their limits.

In 1893, by ch. 216 of the statutes of that year, that policy was reversed. The school districts were abolished. The towns were ordered to take possession of all the district school houses, reimbursing the districts therefor, and to expend by its own officers the

school money so as to give each part of the town as nearly as practicable school terms of equal aggregate length. Provision, however, was made by section 4 of that chapter that the corporate powers of school districts should continue so far as necessary to enforce rights and liabilities, and also, that any property held in trust by any school district for the benefit of the district should continue to be held and used according to the terms of the trust.

School district No. one, in Gorham, was created in the usual way by the town, and after the act of 1893 ch. 216, its district school houses were taken over by the town and paid for under the provisions of that act, the inhabitants of the district receiving the money through rebate on their town taxes. Now, however, the inhabitants of that particular territory claim to be still a school district, with the right to receive from the town a share of the school money to be expended by themselves upon schools within that territory as formerly. They base this claim on the proviso in the first section of the act of 1893, viz: "Provided, however, that school districts organized with special powers by act of the Legislature may retain such organization and special powers:"—and shall be entitled to a share of the school money to expend under its own direction.

District No. one, in Gorham, was not organized by any special or direct act of the legislature, but in 1889 two special acts were passed,—one (ch. 454) permitting the legal voters of that particular district to transfer a portion of its scholars to the model schools connected with the Normal school in the district;—the other (ch. 461) permitting the same district to accept, receive and hold property given to it in trust for educational purposes, and providing for the appointment by the district of trustees to hold and manage the fund. Under this last act property was given to the district in trust for educational purposes and was held by it under that act at the time the act of 1893, abolishing school districts, took effect.

The purpose of the act of 1893, as already stated, was to require the town to expend the school money by its own officers for the equal benefit of all portions of the town, instead of turning it over

to districts to be expended by district officers. The language of the proviso does not in itself, nor when read in connection with the whole act, purport to except from this purpose or operation of the act, those districts upon which special powers have from time to time subsequent to their organization been conferred by act of the legislature. Rights acquired and liabilities incurred under such special powers are expressly saved in all cases by § 4 of the Act of 1893. The benefit of the trust fund received by this district is also, by the same section, preserved to the inhabitants or scholars of the district.

The proviso in Section 1 of the act does not name districts endowed with, enjoying or exercising special powers by legislative favor, nor districts upon which special powers have been conferred by act of the legislature subsequent to their erection or beginning. The word used is "organized."

The language implies a school district originally and specially created by legislative act, with special powers made a part of its organization, or at least special powers coeval with its organization. District No. one in Gorham was not so organized. Its special powers were not coeval with its organization but were conferred nearly a century afterward. It is not within the terms nor spirit of the proviso, and hence is not entitled to receive for its own expenditure any part of the town's money raised for the support of schools.

Petition dismissed with costs.

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

Kennebec. Opinion May 14, 1898.

Towns. Way. Negligence. New Trial.

A verdict clearly wrong will be set aside.

As the plaintiff was driving in the evening over a road with which she was perfectly well acquainted, she saw an electric car approaching her. She testified that her horse "was under full control all the time and did not seem to be alarmed at all." When she saw the approaching car, she turned her horse toward the side of the road away from the car track and continued driving in that direction until her carriage wheel dropped down over the end of a culvert, when she was thrown out of the carriage and sustained certain injury. The road at this point was smooth and nearly level and twenty-one feet in width between the end of the culvert and the nearest rail of the car track. She also testified that "objects were plainly visible," that she could see the car tracks and the width of the road perfectly well. Yet, although she was an expert driver of twenty years' experience, as she says, and had a horse that showed no signs of alarm and was under perfect control, she continued to drive away from the track and towards the side of the road until the wheel of her carriage dropped down over the end of a culvert twenty-one feet distant from the track. It does not appear that she gave any thought or attention to the side of the road that she was all the time approaching, although, with a safe horse under perfect control she had ample opportunity to do so.

Held; that a verdict in favor of the plaintiff was clearly wrong; that the plaintiff's own testimony and that introduced in her behalf, showed conclusively that the accident was caused, in part at least, by her own negligence.

The court adheres to its former opinions in the same case in 85 Maine, 523, and 88 Maine, 103.

See *Tasker* v. *Farmingdale*, 85 Maine, 523; S. C. 88 Maine, 103.

ON MOTION AND EXCEPTIONS BY DEFENDANT.

This was an action to recover damages sustained by an alleged defective highway. The jury returned a verdict for the plaintiff, and the defendant moved for a new trial and also took exceptions. The view of the case taken by the court renders a statement of the exceptions immaterial.

The case appears in the opinion.

A. M. Spear and W. D. Whitney; H. M. Heath and C. L. Andrews, for plaintiff.

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

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

WISWELL, J. This case, an action to recover damages for personal injuries alleged to have been sustained by reason of a defective highway, has been three times tried, each time resulting in a verdict for the plaintiff.

The first two verdicts were set aside by the law court, not because the court believed that the jury had erred in passing upon contradictory testimony as to disputed facts, but because, in the opinion of the court, the plaintiff's testimony, and that introduced in her behalf, conclusively showed that the accident was caused, in part at least, by her own negligence. 85 Maine, 523, and 88 Maine, 103.

The case is now again before the court upon a motion to set aside the third verdict. Precisely the same question is presented that has been twice before passed upon by the court. The case has each time been tried upon substantially the same testimony. At the last trial no new testimony material to this issue of contributory negligence was introduced; and, from the nature of the case and on account of the reasons of the court for setting aside the former verdicts, it is difficult to perceive how the plaintiff's case could have been aided by additional testimony.

The material and undisputed facts, upon which the court in the former decisions has based its conclusion that the plaintiff's want of due care contributed to the accident, are these: As the plaintiff was driving in the evening over a road with which she was perfectly well acquainted, she saw approaching her an electric car. She says that her horse "was under full control all the time and did not seem to be alarmed at all." When she saw the approaching car, she turned her horse toward the side of the road away from the car track and continued driving in that direction until her

carriage wheel dropped down over the end of a culvert, when she was thrown out of the carriage and sustained certain injury. The road at this point was smooth and nearly level and twenty-one feet in width between the end of the culvert and the nearest rail of the track. She says that: "Objects were plainly visible," that she could see the car track and the width of the road perfectly well. Yet, although she was, as she says, an expert driver of twenty years' experience, and had a horse that showed no signs of alarm and was under perfect control, she continued to drive away from the track and towards the side of the road until the wheel of her carriage dropped down over the end of a culvert, twenty-one feet distant from the track. It does not appear that she gave any thought or attention to the side of the road that she was all the time approaching, although, with a safe horse under perfect control, she had ample opportunity to do so. It must be true, as was said by the court in its first opinion, "that her attention was so absorbed by the electric car that she gave no thought to the danger she might encounter by driving out of the road."

Upon these facts, this court held, when the case was first before it, that the verdict in favor of the plaintiff was clearly wrong, that she intentionally and unnecessarily reined her horse out of the road, that "thoughtless inattention—the very essence of negligence, was the cause of the accident."

When the case was again before the court upon the same facts, the first decision was affirmed, the court saying: "Upon second argument and further consideration the court considers that its views before expressed must control the case and the verdict be set aside."

And now after the third argument and still further consideration we see no reason to change the views of the court previously expressed. This result disposes of the case so that the exceptions need not be considered.

Motion sustained. New trial granted.

OZRO D. CASTNER, Assignee, in Equity,

vs.

TWITCHELL–CHAMPLIN COMPANY, and others.

Lincoln. Opinion May 17, 1898.

Corporations. Meetings. Quorum. Insolvency. Jurisdiction. Equity. Interpleader.

The court of insolvency has sole jurisdiction, in the first instance, over the distribution of funds in the hands of an assignee in insolvency; and this court has neither original nor concurrent jurisdiction over the same.

Held; that a plaintiff, as assignee in insolvency, who is himself a claimant of a fund in his possession cannot be awarded an interpleader.

A sale and conveyance of corporate property duly authorized by the stockholders will be sustained and declared valid.

At the organization of a corporation, the capital stock was fixed at $30,000, and was divided into shares of $50 each. Subsequently the corporation adopted the following by-law: "At all legal meetings of the company there must be present at least one-third of the stockholders holding at least one-third of the shares of stock, to constitute a quorum to do business." Only 96 shares of stock were ever subscribed for or issued.

Held; that the presence at a stockholders' meeting of one-third of the stockholders in number holding at least one-third of the 96 shares issued or subscribed for, was sufficient to constitute a quorum; and that a conveyance authorized at such a meeting was valid.

Ellsworth Manufacturing Co. v. *Faunce*, 79 Maine, 440, distinguished; and, in so far as it is in conflict with the opinion in this case, it is overruled.

See *Miller* v. *Kenniston*, 86 Maine, 550; *Miller* v. *Waldoboro Packing Co.*, 88 Maine, 605.

ON REPORT.

Bill of interpleader, heard on bill, demurrers, answers and documentary evidence.

The material allegations of the plaintiff's bill are as follows:

First. That the Waldoboro Packing Company, prior to its insolvency, was the owner in fee simple of certain real estate, situate in said Waldoboro, ... and that thereafterwards, and prior to its being adjudged an insolvent debtor by the court of

insolvency in said Lincoln county, by its deeds executed under its seal and duly delivered, [dated December 10, 1890] conveyed to the said W. A. Luce, one of the defendants, its entire plant, consisting of the first named lot with the factory thereon, and to the said E. R. White the other lot . . . . the consideration for which real estate formed the whole or substantially the whole of its assets at the time of its assignment in insolvency.

Second. That said insolvent corporation was adjudged to be such on the 6th day of September A. D. 1892, whereby under the assignment of the judge, pursuant to the same, its entire assets came into the hands of S. W. Jackson, Esq., for administration, and upon his decease to the hands of the complainant as his successor, to conclude the administration of said insolvent estate; whereby the complainant received the sum of two thousand six hundred and thirty-five dollars and eighty-two cents for administration and distribution.

Third. Your orator further shows to the court that the said Sarah F. Miller, one of the general creditors of said insolvent corporation as payee and holder of one of its promissory notes, brought an action of assumpsit on the same against the Waldoboro Packing Company, wherein she obtained judgment against said company and execution thereon for the sum of two thousand and ninety-seven dollars and sixteen cents and costs taxed at forty-three dollars and sixty-eight cents, notwithstanding she had likewise proved the same claim against the insolvent debtor in the insolvency court, both of which it is admitted she might lawfully do; but upon which execution, however, the said Mrs. Miller in her lifetime began a levy upon said factory plant, which it is proposed and intended to renew or complete, it being claimed by her, and since her decease by her administrator, as your orator understands, that the deed of conveyance to Mr. Luce above referred to was void by reason of certain illegalities in the proceedings of said corporation, prior to its act of insolvency, touching said property.

And it is pretended and claimed by the owner and holder of said execution that he can receive his dividend from the court of insol-

vency in distribution of said insolvent estate, and then levy upon the same real estate, from the sale of which the funds held by the assignee for distribution were received, for the payment and satisfaction of the remainder of the amount named in said execution. And the said Eliza U., Hattie C. and William A. Luce, who are parties to this process by reason of their being heirs of William H. Luce, who was guarantor of title to the Twitchell-Champlin Company in a deed of the same real estate by him to it, as your orator believes, pretend and claim that if said levy is sustained, they can follow the funds in the hands and possession of the assignee as a trust fund which can be reached by them in specie, and to which they are entitled by reason of the failure of the consideration for which the said Luce was induced to pay said fund to the insolvent company, claiming a title thereto in equity superior and paramount to that of the general creditors of the insolvency court; and claiming that at all events their contingent claim should be equitably adjusted before a final distribution.

Your orator has hoped that he would be able to distribute the funds in his hands without embarrassment, and that no dispute could have arisen concerning the same, and that no suit would be commenced against any of the parties with respect to the same. But now so it is, the above defendants claim to be entitled to said funds on different grounds and by different titles, and processes are now either pending, or imminent, for the enforcement of their respective rights or claims. Your orator says that under the circumstances aforesaid he is in danger of being harrassed on account of the diverse claims to said fund and cannot safely pay out and distribute the same without the aid of the court in equity.

When this cause came on to be heard in the court below, at the April Rules, 1897, it was reported by agreement of the parties to the law court, to be heard upon bill, answers, demurrer and such documentary evidence as either party should offer and file with the clerk. The parties further stipulated that if the court should decide that the defendants should interplead, "then it is desired by the parties and they request the law court to finally decide and determine all rights of the respective parties in relation to the

subject matter of the cause and to order such final decrees in respect thereto as the rights of the parties may require."

The defendant Twitchell-Champlin Company, the present owner of the land, joined in this request "only in the event it shall be first determined by the law court that it is subject to have its legal right to the title of said real estate drawn into equity, in this way, and determined by decree in equity, instead of by judgment by law; and only in case, in the judgment of the law court, all its legal rights of title and remedy, as aforesaid, will be fully protected by such decree."

O. D. Castner, for plaintiff.

It is always the trustee's privilege to ask and receive of the court having proper jurisdiction, directions as to the policy he shall pursue in the conduct of the trust and as to the construction to be placed upon the instrument of trust, under which he acts; and in all questions of doubt it is his duty to make this application to the court. *Treadwell* v. *Cordis*, 5 Gray, 341.

Where an insolvent debtor assigns his property to trustees for the benefit of his creditors, and various questions of difficulty arise from the conflicting claims of creditors, which it might not be safe for the trustees to decide without the directions of the court, they will be entitled to such directions; and they will not be obliged to wait until they are sued by the creditors, but may file a bill for the purpose of obtaining the same. *Dimmock* v. *Bixby*, 20 Pick. 368.

Although a bill of interpleader, strictly so called, lies only where the party applying is a stakeholder only and claims no interest in the subject matter, there are many cases where a bill in the nature of a bill of interpleader will lie by a party in interest to ascertain and establish his own rights, where there are other conflicting rights between third persons. *Stevens* v. *Warren*, 101 Mass. 564.

T. P. Pierce, for heirs of W. H. Luce.

The by-laws of a private corporation bind the members only, by virtue of their assent, and do not affect third parties. *State* v. *Overton*, 34 N. J. L. 440.

Counsel also cited: *Drake* v. *Hudson River R. R.* 7 Barb. 508; Boone, Corp. § 55; 1 Thomp. Corp. § 359; Morawetz, Corp. § 370; *Mellen* v. *Whipple*, 1 Gray, 317; *Field* v. *Crawford*, 6 Gray, 116; *Dow* v. *Clark*, 7 Gray, 198; *Hackensack Water Co.* v. *DeKay*, 36 N. J. Eq. 560; Cook, Stock, etc., § 725; Angel & Ames, Corp. § 397; Beach, Corp. § 322; *Bank* v. *Smith*, 19 Johns. 115; *Ins. Co.* v. *Keyser*, 32 N. H. 313; *Campbell* v. *Ins. Co.*, 37 N. H. 35 (72 Am. Dec. 324); *Fay* v. *Noble*, 12 Cush. 1; *Trustees* v. *Flint*, 13 Met. 543; *Worcester* v. *Bridge Co.*, 7 Gray, 457; *Flint* v. *Pierce*, 99 Mass. 68.

J. W. Symonds, *D. W. Snow*, *and C. S. Cook*, for Twitchell–Champlin Co.

This defendant is not properly a party to these proceedings. It acquired its title to the real estate under a warranty deed from William H. Luce to whom it paid the consideration therefor. No part of this consideration is now in the hands of the plaintiff or involved in these proceedings. This defendant looks, and must look, to its grantor for any failure of title to the real estate described in said deed, and not to the Waldoboro Packing Company.

This defendant's title to the real estate cannot be brought into equity by these proceedings. The parties interested or claiming to be interested in such real estate have a full, adequate and complete remedy at law. *Robinson* v. *Robinson*, 73 Maine, 170; *Gamage* v. *Harris*, 79 Maine, 531, 536; *Boardman* v. *Jackson*, 119 Mass. 161; *White* v. *Thayer*, 121 Mass. 226; *Russell* v. *Barstow*, 144 Mass. 130; *Payton* v. *Rose*, 41 Mo. 257.

The deed from the Waldoboro Packing Company to William A. Luce being signed by the president of the company, under the seal of the company "in pursuance of the by-laws and vote of said company" is the duly executed deed of said company, and said Luce had the right to take such deed as and for the deed of the company, upon payment of the consideration named therein and by virtue thereof to pass title to said William H. Luce. *McDaniels* v. *Flower Brook Mfg. Co.*, 22 Vt. 274.

On its face the deed purports to be the deed of the Waldoboro Packing Company. It is under its seal, and is signed by its chief

executive officer, thereto authorized its by-laws and vote of its stockholders. It is, therefore, presumptively the deed of the Waldoboro Packing Company, and the grantee had the right to so accept it. *Goodnow* v. *Oakley*, 68 Iowa, 25.

So far as W. A. Luce was concerned, the vote and the record of the stockholders were conclusive as to the authority of the president to execute the deed, and was sufficient assurance to the grantee named therein, that he assumed no risk in accepting it. *Whiting* v. *Wellington*, 10 Fed. Rep. 810.

The legality of the authority of the president to execute the deed as shown by the record is to be presumed. *Mussey* v. *White*, 3 Maine, 290; *Blanchard* v. *Dow*, 32 Maine, 557.

If there was a by-law limiting this apparent authority of the president, the grantee in this deed was not bound in the absence of the actual or constructive notice thereof, and was not bound at his peril to ascertain whether such a by-law had been complied with. Such a by-law was merely a provision for the internal government of the corporation, and the grantee had the right to presume due compliance in the absence of notice to the contrary.

The case admits that the grantee had no such notice. Cook, Stock, etc., § 725; *Fay* v. *Noble*, 12 Cush. 1.

If, however, the purchaser had made an examination of the records of the stockholders, he would have found that the president was not only authorized but directed by the stockholders to execute the deed by vote passed at a meeting of the stockholders at which a quorum was present. The record distinctly states that such quorum was present. The record is regular in form and is attested by the proper official, and the purchaser had the right to presume that it was correct. Beach, Pri. Corp. § 295; *McDaniel* v. *Flower Brook Mfg. Co.*, 22 Vt. 274; *Isbell* v. *N. Y. & N. H. R. R.* 25 Conn. 556.

The Packing Co. having received the benefit of the sale of the real estate, and disposed of a portion of it, is now bound by its deed. Beach. Priv. Corp. § 203.

By-Law: *Bucksport & Bangor R. R.* v. *Buck*, 65 Maine, 536, (as to capital stock subscribed); *Sturges* v. *Stetson*, 1 Biss. p. 248;

Thomp. Com. Corp. § 1061; *Pratt* v. *Munson*, 17 Hun, 475; *Greenpoint Sugar Co.* v. *Whitin*, 69 N. Y. p. 338; *Burrall* v. *Bushwick R. R. Co.*, 75 N. Y. 211; *Lehigh Ave. Ry. Appeal*, 5 L. R. A. 367; *State* v. *Morristown Fire Assoc.* 23 N. J. L. 195; *Haskell* v. *Sells*, 14 Mo. 91; *K. & P. R. R. Co.* v. *Kendall*, 31 Maine, 470; *Chicago* v. *Rumpff*, 45 Ill. 90.

C. E. and A. S. Littlefield, for M. W. Levensaler, Admr. of Sarah F. Miller.

Counsel cited: *Ellsworth Manfg. Co.* v. *Faunce*, 79 Maine, 440.

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

SAVAGE, J. Bill of interpleader by the plaintiff as assignee in insolvency of the Waldoboro Packing Company. The plaintiff alleges, among other things, that by reason of conflicting claims to the funds in his hands, he is in danger of being harassed and that he cannot safely pay out and distribute the same without the aid of the court in equity. The previous phases of this litigation may be found in *Miller* v. *Kenniston*, 86 Maine, 550, and *Miller* v. *Waldoboro Packing Co.*, 88 Maine, 605.

The cause comes to us on report. All the parties who claim to be interested in the fund, waiving technical questions, ask for a decision upon the merits. Therefore, in the hope of being able to put an end to this long and annoying controversy, we proceed to inquire whether the bill, after any species of amendment suggested by the pleadings or facts proved, can be sustained.

The vital question is whether certain conveyances, executed by the officers of the Waldoboro Packing Company, and in its name and under its seal, long prior to its being adjudged insolvent, are valid. The purchase money received for these conveyances constitutes the fund in the hands of the assignee. The records of the corporation show that these conveyances were both authorized and ratified by votes of the stockholders in meetings duly called.

But it is objected, (and this is the only objection that is raised)

that the action of the stockholders was void for want of a quorum at any of their meetings. It appears that at the organization of the corporation, April 23, 1888, it was voted that "the capital stock of this company shall be $30,000; that said capital stock shall be divided into shares of $50 each." Subsequently, July 5, 1888, the following by-law was adopted:—"At all legal meetings of the company there must be present at least 1-3 of the stockholders, holding at least 1-3 of the shares of stock, to constitute a quorum to do business." It also appears that only 96 shares of stock were ever "subscribed for or issued."

It is not claimed that there were not present at the stockholders' meetings at least one-third of the stockholders in number, holding at least one-third of the ninety-six shares which had been issued. But it is claimed that under the by-law, the presence of stockholders holding one-third of the entire authorized capital stock of 600 shares, namely 200 shares, was necessary to make a quorum, and that "the whole number of shares of stock subscribed for being considerably less than one-third of the shares of [authorized] stock, by reason whereof, said corporation was legally incapable of having present at any of its meetings a legal quorum of stockholders." If this is so, then it appears that stockholders holding less than one-sixth of the authorized capital stock, by adopting this by-law, committed corporate suicide. Thereafter, the stockholders could hold no meeting, could elect no officers, could fill no vacancies, could make no new by-laws nor alter old ones, could neither buy nor sell, could make no contracts, could transact no corporate business whatever. The only possible escape from corporate destruction would be by obtaining additional subscriptions for stock, and this, it is easy to see, might be impracticable or impossible. If such is the construction which we are required to place upon the by-law in question, we should not hesitate to declare it to be unreasonable and void, as being totally subversive of corporate purposes. If a corporation chooses to die, there are easier and more appropriate methods.

It is conceded, and correctly so, that stockholders holding less than a majority of the authorized stock, but holding a majority of

the stock issued or subscribed for, may adopt by-laws, in the absence of any restrictive provisions in the charter or previous by-laws. Accordingly no question is made but that the by-law under consideration was legally adopted.

Does the phrase in the by-law, "holding at least one-third of the shares of stock" have reference to the whole amount of stock authorized, or to the whole amount of stock issued or subscribed for? We think the latter. The by-law relates to meetings of the stockholders. It established a quorum. It determined what proportion of stockholders' interest in the corporation must be represented at a meeting. There must be present at least one-third of the stockholders in number, and the stockholders present must hold at least one-third of the shares of stock.

While it is not denied that the stockholders have the right, in general, to fix the number of shares necessary for a quorum at a certain proportion of the capital stock authorized, still we think their intention so to do should be clearly expressed. The amount of capital stock authorized may have, and frequently does have, very little to do with the amount actually issued or subscribed for, and which represents the actual working capital.

The entire pecuniary stockholding interest is owned by those holding shares issued or subscribed for. It would be natural to suppose, that in fixing the amount necessary for a quorum, the stockholders would have in mind the stock which represented value and was owned and which could be voted upon in stockholders' meetings. Capital stock which has never been subscribed for nor issued cannot be voted upon, even by the corporation. *American Railway Frog Co.* v. *Haven*, 101 Mass. 398; *Ex-parte Holmes*, 5 Cow. 426; 1 Morawetz on Private Corporations, § 478. It is commonly said to "remain in the treasury." Such stock has not been divided into shares; it remains to be divided, as issued. The shares in such stock are potential, rather than actual. *Sturges* v. *Stetson*, 1 Biss. 246. They belong to the stockholders collectively. They can have no place or purpose in a stockholders' meeting. The very words "shares of stock" in this by-law seem to imply that the stock intended is stock that has been divided into shares

and issued, or at least subscribed for. *Burrall* v. *Bushwick R. R. Co.*, 75 N. Y. 216. The phrase "*holding* at least one-third of the shares of stock" naturally relates, we think, to "shares of stock," that are capable of being *held*, and are *held*, by stockholders. The undivided stock is not *held* by anyone. This construction seems to be fairly deduced from the purpose of the by-law, and from its language also, and such was, we think, the intention of the stockholders. For as we have already seen, only 96 of the 600 shares of authorized stock have ever been issued or subscribed for. Any other interpretation is destructive.

A case in point is *Greenpoint Sugar Co.* v. *Whitin*, 69 N. Y. 328. In that case, the validity of a mortgage was, by statute, made dependent upon "the written assent of the stockholders owning at least two-thirds of the capital stock" of the corporation. It will be observed that these words are substantially identical with the language of this by-law, the only essential difference being that in the New York case, the number of stockholders necessary to give effect to their action is not limited. The court in that case, said: "The capital stock fixed in the articles of association was 2500 shares, but there had been only 2000 shares actually issued, and only that number were then owned, and for aught that appears no more was intended to be issued. The owners of more than two-thirds of that number signed the assent. . . . . For the purposes of this act, we think that the amount actually issued and owned should be regarded as the amount of the capital stock. The design was to confer this power of assent upon those who represented two-thirds of the actual stock. They represented two-thirds of the pecuniary interest and property of the corporation. Otherwise it might happen that there would not be a sufficient ownership of stock to enable the company to execute a mortgage at all." Precisely what it is claimed has happened in this case. See *State* v. *Morristown Fire Association*, 23 N. J. Law, 195.

But it is earnestly claimed that such views as these are inconsistent with the opinion of this court as expressed in *Ellsworth Manufacturing Co.* v. *Faunce*, 79 Maine, 440, and that that case should be regarded as decisive of this. In that case, the by-law

construed was, "No business shall be transacted at any meeting of the stockholders, unless a majority of the stock is represented, except to organize the meeting and adjourn to some future time." The authorized capital stock was 400 shares, and 243 shares had been subscribed for. At the meeting whose acts were called in question, only 138 shares of the capital stock were represented. The court held that under the by-law, "it would take 201 shares to constitute a majority of that stock." But in some important respects, certainly, the by-law in that case may be distinguished from the one in the case at bar. The language of the two by-laws is far from being identical. There, the phrase construed was, "a majority of the stock." Here it is, "at least one-third of the stockholders *holding* at least one-third of the *shares* of stock." In that case, there was no reference to the stock being *held*, no reference to stockholders *holding* stock, no reference to "shares", and possibly no implication, that stock issued or divided was meant. And the action of the stockholders in adopting that by-law was not self-destructive. More than a majority of the authorized stock had been subscribed for. The learned justice who drew that opinion seems to have placed much stress upon this latter fact, and upon the construction which the stockholders themselves had placed upon the by-law after its adoption. At best, the case of *Ellsworth Manufacturing Co.* v. *Faunce*, seems to go to the extreme limit of strict construction. How far that case may be distinguished from this, or how valid the distinctions drawn between that case and this, we do not deem it necessary for us now to decide. We are satisfied that "the language, as well as the evident intent and meaning," of this by-law compels us to hold that a quorum of the stockholders of the Waldoboro Packing Company was "at least one-third of the stockholders holding at least one-third of the shares of stock" which had been issued or subscribed for. And in so far as the opinion in *Ellsworth Manufacturing Co.* v. *Faunce*, is in conflict with the views herein expressed, it must be regarded as overruled.

It follows that the conveyances by the officers of the Waldoboro Packing Company were duly authorized, and were valid. But this

finding makes it necessary to dismiss this bill. The plaintiff as assignee, being necessarily himself one of the claimants of the fund, cannot be awarded an interpleader.

Nor have we any original or concurrent jurisdiction over the distribution of the fund. In the first instance, the court of insolvency has sole jurisdiction. *Bird* v. *Cleveland*, 78 Maine, 524.

Bill dismisssd.

GARDINER SAVINGS INSTITUTION, in Equity,

vs.

DANIEL M. EMERSON, and another.

Kennebec. Opinion May 27, 1898.

Interpleader in Equity. Costs. Fraudulent Conveyance. R. S., c. 65, § 36.

In cases of interpleader, the money should be paid into court, and if an interpleader be awarded, a decree should be made discharging the plaintiff from all liability to either party, and directing the claimants to interplead. Thereby the court takes jurisdiction, and retains the possession and control of the fund, and the plaintiff ceases to be a party to the litigation.

Where the proceedings have been irregular in these respects, it is considered, for this reason, that costs should not be allowed.

A conveyance made with express intent to defraud, hinder or delay creditors is void as to them. A voluntary conveyance from father to son is prima facie fraudulent and void as to existing creditors. Such a conveyance is to be considered not only in the light of all surrounding circumstances, but in the light of necessary consequences. Whether the property conveyed was all that the grantor owned or not, and if not, the amount and value of what remained relative to existing debts, its situation, its availability for the purpose of being got at to be applied to the payment of debts, whether by the conveyance, the creditor is necessarily subjected to a loss of remedy for the collection of all or a part of his debt, or is necessarily hindered or delayed in his ability to collect his debt,—all these circumstances are to be weighed in determining whether the conveyance was fraudulent in intent, or worked out a fraudulent result; and one of these is as fatal as the other. When such a conveyance must necessarily result in defeating, hindering or delaying creditors, as well as when such a result was expressly intended, it is to be regarded as fraudulent and void as to them. The intent to defraud is sufficiently proved.

A non-resident debtor owing a creditor in this state, gave to his son all his property in this state. He died soon after, leaving an estate in California, sufficient to pay the claims of the creditor here. But in California a large part of the claim, at the date of the gift, was barred by the statute of limitations. In this state none of it was barred.

Held; that the necessary effect of the gift was to utterly deprive the creditor of the ability to recover a large part of his debt, and for the recovery of so much as remained collectible, in spite of the statute of limitations, to remit him to the tribunals of a distant state; and that the gift was void as against creditors in this state, and that the fund should be administered in this state as the estate of a deceased non-resident.

ON APPEAL IN EQUITY.

This was an appeal by the defendant Emerson from the following decree in equity made in the court below:

1. That the funds in the hands of the Gardiner Savings Institution standing in the name of Jacob Emerson, being the amount stated in deposit book No. 811 as alleged in the bill of complaint, together will all accrued interest thereon, be forthwith paid by said Gardiner Savings Institution to Fred Emery Beane, administrator of the estate of said Jacob Emerson, deceased, duly appointed by the probate court for said county of Kennebec, to be administered upon by said administrator in accordance with the laws of this state, and under the direction of the probate court for said Kennebec county.

2. That Daniel M. Emerson, of Alma, in the state of California, the other defendant in said bill, together with his servants, agents and attorneys, be and hereby is perpetually enjoined and restrained and prohibited from bringing any action at law, or bill in equity, against said Gardiner Savings Institution to enforce his alleged claim to said fund in the hands of said Gardiner Savings Institutions, and that a writ of injunction issue accordingly from this court.

3. That said Gardiner Savings Institution have and recover its costs to be taxed by the clerk and reasonable counsel fees, to wit, fifty dollars and deduct the same from the funds in its hands before transferring said fund to said administrator.

4. That said Fred Emery Beane, administrator, have and

recover his costs in this cause, to be taxed by the clerk, and reasonable counsel fees, to wit, the sum of fifty dollars.

Geo. W. Heselton, for Fred Emery Beane, Admr.

A. M. Spear and W. D. Whitney, for Danl. M. Emerson.

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

SAVAGE, J. Appeal of Daniel M. Emerson from decree on bill of interpleader. The proceedings in this case appear to have been irregular. In cases of interpleader, the money should be paid into court, and if an interpleader be awarded, a decree should be made discharging the plaintiff from all liability to either party, and directing the claimants to interplead. Thereby the court takes jurisdiction, and retains the possession and control of the fund, and the plaintiff ceases to be a party to the litigation. In this case, the money does not appear to have been paid into court, and there was no decree to interplead. The cause was heard by the sitting justice upon the bill, answers and proof, the answers being treated as the pleadings of the claimants. A decree was made upon the merits as between the claimants. And inasmuch as the case has been fully argued before this court upon the merits, we so far overlook the form of the proceedings, as to inquire whether the decree should be sustained, after the plaintiff, as it may yet do, brings the fund into court.

The facts alleged and admitted or proved are these: One Jacob Emerson, a resident of California, in his lifetime deposited about fifteen hundred dollars in the plaintiff bank, an institution located at Gardiner in this state. He came to Maine in 1889, and while here boarded with one John C. Willey from November 14, 1889, until August 6, 1890. He then returned to California, where he died, testate, June 12, 1892. At the time of his death, he was indebted to the estate of Mr. Willey for board, care and washing furnished him between the dates named. No part of that indebtedness has since been paid. Demand for payment was made upon him by letter three times. He made no reply to any of these letters.

May 21, 1892, he made his last will and testament, and after making sundry small bequests, he devised the residue, amounting, it is claimed, to eighty thousand dollars to his son Daniel M. Emerson, who is one of the claimants here. June 5, 1892, one week before he died, he executed an assignment in writing of the deposit in the plaintiff bank to the same Daniel M. Emerson, and delivered to him the bank book and assignment. The assignment was without consideration, it was a gift. It is under this assignment that Daniel M. Emerson makes claim to the fund in the Gardiner Savings Institution. It further appears that the will of Jacob Emerson was admitted to probate in California, and letters of administration issued to Daniel M. Emerson, executor, August 5, 1892. The executor gave notice of his appointment, August 6, 1892, and all creditors were required to present their claims to him within four months from that time. The claim of the estate of John C. Willey was not presented. Ancillary administration on the estate of Jacob Emerson, in the interest of the Willey estate, was taken out in this state, in June, 1893, and the defendant Fred Emery Beane was appointed administrator with the will annexed. Mr. Beane claims that the assignment of the fund to Daniel M. Emerson was fraudulent and void as to creditors in this state, and that the fund remains a part of the estate of Jacob Emerson, to be administered by him in this state; and here arises the issue between the claimants.

The sitting justice decreed that the fund be paid to claimant Beane as administrator, "to be administered upon by said administrator in accordance with the laws of this state." The other claimant, Emerson, appealed. The decree was not accompanied by a finding of facts, but an examination of the pleadings and proof shows that the justice who made the decree necessarily found as a fact that the assignment was in fraud of creditors, or at least, in fraud of creditors in this state.

Fraud in a matter like this is a question of fact, and not a presumption of law. It must be proved like other facts. *French* v. *Holmes*, 67 Maine, 186; *Weeks* v. *Hill*, 88 Maine, 111. And in equity procedure, the finding of a single justice, expressly made or

necessarily involved, upon a question of fact is not to be reversed upon appeal, unless clearly wrong. *Young* v. *Witham*, 75 Maine, 536; *Paul* v. *Frye*, 80 Maine, 26; *Gilpatrick* v. *Glidden*, 81 Maine, 137; *Jameson* v. *Emerson*, 82 Maine, 359.

We must apply this rule to the case at bar. The appellant must satisfy us that the decree appealed from is clearly wrong, or it will be affirmed. *Paul* v. *Frye*, supra. We think no error has been shown, and that the facts in the case considered in the light of legal principles are sufficient to support the decree.

It is well settled that a conveyance made with express intent to defraud, hinder or delay creditors is void as to them, and that a voluntary conveyance from father to son is prima facie fraudulent and void as to existing creditors.

In *Lerow* v. *Wilmarth*, 9 Allen, 382, it is said: "The better doctrine seems to us to be that there is, as applicable to voluntary conveyances made on a meritorious consideration, as of blood or affection, no absolute presumption of fraud which entirely disregards the intent and purpose of the conveyance, if the grantor happened to be indebted at the time it was made, but that such a conveyance under such circumstances affords only prima facie or presumptive evidence of fraud, which may be rebutted and controlled." This language was quoted with approval in *French* v. *Holmes*, 67 Maine, 186. See also cases cited in same case.

The conveyance is to be considered not only in the light of all surrounding circumstances, but in the light of necessary consequences. Whether the property conveyed was all that the grantor owned or not, and if not, the amount and value of what remained relative to existing debts, its situation, its availability for the purpose of being got at to be applied to the payment of debts, whether by the conveyance the creditor is necessarily subjected to a loss of remedy for the collection of all or a part of his debt, or is necessarily hindered or delayed in his ability to collect his debt,—all these circumstances are to be weighed, in determining whether the conveyance was fraudulent in intent, or worked out a fraudulent result. And we think one is as fatal as the other.

When such a conveyance must necessarily result in defeating,

hindering or delaying creditors, as well as when such a result was expressly intended, it is to be regarded as fraudulent and void as to them. The intent to defraud is sufficiently proved. In 2 Bigelow on Frauds, 83, the rule in such a case is stated as follows: "Whether the gift in such a case was made in good faith or not, whether the debtor intended to pay his creditors in full or not, whether he expected that his other property or the profits of a prosperous business would enable him to do so or not; in a word, however honest his intentions, the case is within the intent to hinder, delay or defraud, expressed in the statute of Elizabeth. It is only another way of stating the rule, to say that if the necessary effect of the gift is to delay creditors, the intent is sufficiently made out." See *Felker* v. *Chubb*, 90 Mich. 24.

And upon the general question involved here, the language of Peck, J., in *Church* v. *Chapin* 35 Vt. 223, is both instructive and appropriate: "A creditor has no right to impeach a conveyance of his debtor on the ground that it was voluntary, or without sufficient consideration, unless it would operate, if allowed to stand, to his detriment in the collection of his debt. The debtor is bound to reserve property ample for the payment of his debts. Whether the property reserved is what will be deemed ample for this purpose does not depend entirely upon the amount and value, as the real end to be accomplished is, that the deed or conveyance shall not deprive creditors of the means of collecting their debts. Hence the nature and situation of the property is to be regarded, as well as the amount and value, in view of the facilities the creditors have left for the collection of their debts." Mr. Bump in his work on Fraudulent Conveyances, at page 298, says: "The property must be so circumstanced that neither delay nor difficulty, nor expense need be encountered, before it can be made available to creditors. The donor must not only have ample means remaining to discharge all his obligations, but these means must be readily and conveniently accessible to his creditors." We think these doctrines are wholesome.

It only remains necessary for us briefly to apply these principles to the ascertained facts in this case. It is claimed that the testi-

mony shows, and for the purpose of this discussion we may assume, that Jacob Emerson died leaving an estate of about eighty thousand dollars. Whether he owed other debts than the one to the Willey estate does not appear. There is no competent evidence, and the counsel for the appellant in his argument does not claim, that he had any property in this state except the fund in the plaintiff bank. The assignment was a gift of all the debtor's property in this state. If it is valid, the creditor is driven to seek his remedy in California. Here, the creditor's entire claim was collectible. There, it would not have been, for it is admitted that by the statutes of limitation in California "an action upon a contract, obligation or liability, not founded upon an instrument of writing, or founded upon an instrument of writing executed out of the state," is barred there after two years. The Willey claim was accruing from day to day from November 14, 1889, to August 6, 1890, and, therefore, at the time of the assignment, June 5, 1892, a large portion of it was already barred there; none of it was barred here. Taking matters as they stood at that time, the necessary effect of the assignment was to utterly deprive the creditor of the right to recover a large part of his debt; and for the recovery of so much as remained collectible, in spite of the statute of limitations, to remit him to the tribunals of a distant state. There are, indeed, reasons for believing that the assignment was intended to compel the creditor to seek his remedy in California, where much of the claim was already outlawed. Jacob Emerson was a very wealthy man, but he had allowed this bill to remain unpaid nearly two years. He made no response to letters demanding payment. He made a will by which this fund would have gone to the appellant, and within three weeks made a gift of the same property to the same person. In the one case the fund would have been administered here, and creditors in this state protected; in the other case, not. But however this may be, we think the sitting justice would have been well warranted in finding that the gift necessarily operated to defeat, and to hinder or delay creditors in this state. The creditor must thereby lose a portion of his debt, and be put to entirely disproportionate delay and trouble and

expense to collect the small remainder. The fund in question should be administered in this state as the estate of a deceased non-resident, in accordance with the provisions of R. S., c. 65, § 36. Upon payment of the fund into court by the plaintiff, a new decree may be made directing its payment to Fred Emery Beane, administrator of the estate of said Jacob Emerson to be administered upon in accordance with the laws of this state. The former decree was premature.

But no costs should be allowed, or allowances made. There is no authority of law for the allowance of costs or allowances to be paid to either claimant out of the fund.

And in view of the irregularity of these proceedings, we do not think the plaintiff is entitled to costs or allowance out of the fund. For the same reason, the prevailing claimant is not entitled to costs against the other claimant.

Decree set aside. Upon payment of fund into court, new decree to be made in accordance with this opinion.

JOHN W. HAGGETT *vs.* FRANCES E. HURLEY, and another.

Knox. Opinion May 28, 1898.

Husband and wife. Partnership. Rights of Married Women. R. S., c. 61, § 4. Laws of 1821, c. 57, § 9. R. S. 1841, c. 87, §§ 29, 31, 32. Stat. 1844, c. 117, §§ 1, 2, 3. Stat. 1847, c. 27. Stat. 1848, c. 73. Stat. 1852, c. 227, c. 291. Stat. 1855, c. 120. Stat. 1856, c. 250. Stat. 1857, c. 59. R. S. 1857, c. 61, § 6. Stat. 1862, c. 148. Stat. 1863, c. 214. Stat. 1866, c. 52. Stat. 1876, c. 112. Stat. 1883, c. 207. Stat. 1889, c. 176.

A new statute will not be construed as intending a reversal of long established principles of law and equity unless such intent unmistakably appears.

The common law disabilities of a married woman have not been so far removed by statute as to empower her to form a business partnership with her husband, and thereby subject her separate estate to debts contracted by the partnership.

ON MOTION AND EXCEPTIONS BY DEFENDANT.

This was an action of assumpsit on account annexed for a quantity of kiln wood. The writ was against William P. Hurley and

Frances E. Hurley, who are husband and wife, as copartners under the firm name and style of "The Rockland Lime Co." Both defendants seasonably filed their affidavits denying the partnership alleged in the writ. Before trial William P. Hurley became defaulted and the defendant, Frances E. Hurley, pleaded the general issue.

At the trial the plaintiff contended and introduced testimony which he claimed tended to prove that when his account accrued Frances E. Hurley, the defendant, was a copartner with her husband, William P. Hurley, in the business of manufacturing lime and that the wood charged in the account annexed to the writ was sold by him to said copartnership. The defendant, Frances E. Hurley, denied that she was such copartner, and contended that the wood charged in the account was sold to her husband, William P. Hurley, individually.

The defendant, Frances E. Hurley, requested the presiding justice to instruct the jury that the defendant, being a married woman, could not lawfully be a copartner in said business with her husband, said William P. Hurley.

The presiding justice refused to give such instruction. The verdict was in favor of the plaintiff and against the defendant, Frances E. Hurley.

To such refusal to instruct, the defendant, Frances E. Hurley, took exceptions.

C. E. and A. S. Littlefield; and Mervyn Ap Rice, for plaintiff.

"The wife having the general and unrestricted power of making any and all contracts in relation to her estate, its sale, lease, improvement, with the further right to make contracts for any lawful purpose, may contract with whomsoever she may choose. She may contract with her husband equally as with any one else." *Blake* v. *Blake*, 64 Maine, 177.

Married women can now "make any lawful contract." *Wentworth* v. *Wentworth*, 69 Maine, 247. Ever since 1852 in this state husband and wife have had the right of conveying property directly to each other. *Allen* v. *Hooper*, 50 Maine, 371.

The states where the courts have held that the wife cannot make a contract of partnership or other contract with her husband are Arkansas, Florida, Indiana, Maryland, Massachusetts, Ohio, South Carolina, Texas, Washington, West Virginia and Wisconsin. The states which hold otherwise are New York, Illinois, Alabama, Colorado, Georgia, Kentucky, Michigan, Missouri, Oregon and Vermont. There is a preponderance of authority in favor of the wife's power to become a partner with her husband in a business partnership.

Counsel cited: *Suau* v. *Caffe*, 122 N. Y. 308, (9 L. R. A. 593); *Hamilton* v. *Hamilton*, 89 Ill. 350; *Dressel* v. *Lonsdale*, 46 Ill. App. 455; *Dunifer* v. *Jecko*, 87 Mo. 284; *Schofield* v. *Jones*, 85 Geo. 823; *Schlapback* v. *Long*, 90 Ala. 526; *Wells* v. *Caywood*, 3 Colo. 487; *Snell* v. *Stone*, (Ore.) 31 Pac. Rep. 663; *Louisville, etc., Co.* v. *Alexander*, 16 Ky. L. R. 306; *Lane* v. *Bishop*, 65 Vt. 575.

The Massachusetts court have uniformly held that no valid contract can be entered into between husband and wife. In *Lord* v. *Parker*, 3 Allen, 127, cited by our court in 87 Maine, 579, the court recognizes what they call a "sole and separate property" in the wife; and this appears to be an element in reaching the conclusion, as they say, "the property invested in such an enterprise would cease to be her 'sole and separate property.'" A husband in Massachusetts is forbidden by express statute from conveying property directly to his wife. *Porter* v. *Wakefield*, 146 Mass. 27.

See *Towle* v. *Torrey*, 135 Mass. 89, in which the court say:— "While the legislature has removed from a wife many of the disabilities she was under at the common law, and has authorized her to hold property as a feme sole, to deal with it as such, and to sue and be sued in relation thereto, it has been carefully provided always, in the acts by which this has been done, that nothing therein contained shall be construed as authorizing contracts between husband and wife, conveyances or gifts to each other, or as giving the right to either to sue or be sued by the other. Whatever rights they had in these respects remain the same as they stood at common law before this legislation commenced." In Massachu-

setts the statute in effect prohibits any and all contracts between husband and wife. In Maine the statute confers the power to make any and all contracts. The cases opposed to our contention are based upon statutory or constitutional provisions not like or so broad as our own, and therefore entitled to but little weight in determining the case at bar.

The cases in Maryland, West Virginia, Texas, Ohio and Indiana, are based upon the proposition that a married woman can enter into no personal contract.

W. H. Fogler and J. E. Hanley, for defendant.

Statutes regulating "rights of married women" being in derogation of the common law have always received a strict construction by this court. *Hobbs* v. *Hobbs*, 70 Maine, 381.

The plaintiff's contention has been decided adversely in Massachusetts under statutes enlarging the powers of married women to a greater degree than in this state. *Lord* v. *Parker*, 3 Allen, 127; *Lord* v. *Davidson*, Ib. 131; *Plumer* v. *Lord*, 5 Allen, 460; S. C. 7 Allen, 481.

Counsel cited:— *Artman* v. *Ferguson*, 73 Mich. 146, affirmed in *Vail* v. *Winterstern*, 94 Mich. 231; *Haas* v. *Shaw*, 91 Ind. 384, (46 Am. Rep. 607); *Seattle Board of Trade* v. *Hayden*, 4 Wash. 263, (31 Am. St. Rep. 919); *Payne* v. *Thompson*, 44 Ohio St. 192; *Horneffer* v. *Duress*, 13 Wis. 603; *Duress* v. *Horneffer*, 15 Wis. 195; *Kaufman* v. *Schoeffel*, 37 Hun, 140; *Hendricks* v. *Isaacs*, 117 N. Y. 411; *Chambovet* v. *Cagney*, 35 N. Y. Sup. Ct. 474, Sedgwick, J.; *Fairlee* v. *Bloomingdale*, 14 Abb. (N. Y.) N. Cas. 341; S. C. 24 Am. Law Reg. (N. S.) 648, notes 652–659; *Noel* v. *Kinney*, 15 Abb. (N. Y.) N. Cas. 403; Bates, Partnership, § 139; 2 Bish. Married Women, 435.

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

EMERY, J. The important and decisive question is whether a married woman can enter into the relation of a business partnership with her husband, and thus subject herself and her separate

estate to liability for the partnership debts contracted in the name of the partnership. The plaintiff, of course, concedes that the affirmative of this question is without support from the common law and must be based solely on some enabling statute. He contends however that it is fully sustained by the statute, R. S., c. 61, § 4, the full text of which is as follows:—

"Sec. 4. A husband married since April 26, eighteen hundred and fifty-two, is not liable for the debts of his wife contracted before marriage, nor for those contracted afterward in her own name, for any lawful purpose; nor is he liable for her torts committed after April twenty-six, eighteen hundred and eighty-three, in which he takes no part; but she is liable in all such cases; a suit may be maintained against her, or against her and her husband therefor; and her property may be attached and taken on execution for such debts and for damages for such torts, as if she were sole; but she cannot be arrested."

The "all such cases" in which she is by the statute made liable are three: (1) "her debts contracted before marriage," (2) "her debts contracted afterward (after the marriage) in her own name," and (3) "her torts committed after April 26, 1883, in which her husband took no part." The statute thus makes a distinction between her debts contracted before and those contracted after marriage. As to the former she is made liable without restriction. As to the latter her liability is confined to those contracted "in her own name." This phraseology alone at the outset should make the court hesitate to declare that she is liable for a debt contracted after marriage not by her in her own name but by the partnership in the partnership name. The intention of the legislature to subject her and her separate estate to such a liability is not clearly apparent from the statute in its present form.

The plaintiff, however, contends that the language of the present statute is but a consolidation of statute of 1866, c. 52, which reads as follows: "The contracts of any married woman, made for any lawful purpose, shall be valid and binding, and may be enforced in the same manner as if she were sole." This statute read by itself may seem very broad and inclusive. Read in connection with the

whole body of the law it will seem less so. For instance the statute declares in the most unlimited terms that her contracts "may be enforced in the same manner as if she were sole," yet her husband cannot enforce her contracts with him in any manner. *Hobbs* v. *Hobbs*, 70 Maine, 381. Again a contract to marry is ordinarily for a lawful purpose, but this statute would not empower a married woman to make such a contract.

No single statute should be interpreted solely by its own words. Upon enactment it becomes a part of, and is to be read in connection with, the whole body of the law. Its interpretation is to be in the light of the general policy of previous legislation and of the long established principles of law and equity. There is a presumption that by the new enactment the legislature intended some progress along the line, and did not intend any reversal, of such established policy and principles. No new statute will be construed as intending such a reversal unless that intent unmistakably appears. *Landers* v. *Smith*, 78 Maine, 212; *Cummings* v. *Everett*, 82 Maine, 260.

That, under the statute of 1866, a married woman may make a contract with her husband need not be questioned here. That such an authority to make contracts includes the power to enter into the relation of a business partnership with her husband, so as to subject herself and her separate estate to partnership liabilities, is more questionable. A business partnership between husband and wife is scarcely within the strict letter of the statute. The term "contract" in its ordinary legal sense implies two opposite parties, or two opposite sets of parties. Each has in the subject matter of the contract a right distinct and different from that of the other. Indeed, so marked is the difference, the right of the one is the duty of the other. If one is the vendor, the other as to the same subject matter is the vendee. If one is bailor, or employer, or creditor, the other is bailee, or employee, or debtor. Again, a legal contract implies a right of action at law for its breach. The law of contract was first developed through the allowance of actions for the breach. A right of action is often the test of the existence of a legal contract. Without such right it is

difficult to conceive of a binding contract. Neither in a contract, nor in the part ownership of property, is there any idea of community of interest nor any idea of an entity apart from the individual contractors or owners. The right or interest of each part owner is separate and distinct from that of the others.

Partnership is often called a contract, as marriage is often spoken of as a contract, but it is rather a relation, a status, somewhat as marriage is a relation or status. Parsons on Principles of Partnership, § 101.

In a partnership there are no opposite parties with separate and different interests in the subject matter of the partnership. There is a community of right and interest. Neither partner owns any proportional part of any article of partnership property; each has dominion over the whole article and over the entire partnership property. Upon the death of either partner this dominion remains in the survivors. So long as the partnership continues, no right of action at law exists between partners as to any partnership property or transaction. Much like marriage partners, business partners are left to adjust themselves to one another as best they can until they call upon the courts to dissolve the relation and administer the estate. Again, in a partnership there is a notion of an entity apart from the individual partners. In the Roman law the partnership was known as "societas." There is individual property and partnership property. A partner may owe the partnership and vice versa. A partnership usually has dealing and keeps accounts with each partner. In those jurisdictions where the Roman law is the basis of the jurisprudence, the entity of the partnership is frankly recognized and actions are allowed between the partner and the partnership. *Succession of Pilcher*, 39 La. Ann. 362. *Liverpool, etc., Navigation Co.* v. *Agar*, 14 Fed. Rep. 615.

In common law jurisdictions this entity is acknowledged, at least in equity, and to some extent at law, in spite of the technical rule that no action at law can be maintained between a partner and a partnership. *Pooley* v. *Driver*, 5 Ch. Div. 458; *Curtis* v. *Hollingshead*, 14 N. J. L., 402, p. 410; *Walker* v. *Wait*, 50 Vt. 668.

As to the character of the partnership relation, see also *Dwinel* v. *Stone*, 30 Maine, 384; *Woodward* v. *Cowing*, 41 Maine, 9.

It seems apparent that there is much difference between the partnership relation and the ordinary contract. So far as partnership is a contract, it is sui generis, and is not necessarily, or even ordinarily, brought to the mind by the use of the term "contract." The legislature in using the word "contract" in this statute of 1866, without further definition or expression, has not, we think, expressed in terms an intent to authorize a married woman to enter into a business partnership with her husband. But however unrestricted the term in the original statute, it should be noticed that in the revision, R. S., c. 61, § 4, the term is expressly restricted to contracts in her own name. This restriction clause would seem to exclude contracts made in the name of the partnership or in any other name than her own. The plaintiff's proposition certainly falls outside of the strict letter of the present statute.

Is such an authority within the spirit of the statute?

To determine this question we shall consider the rules and reasons of the anterior law, the character and trend of its successive modifications and the reasons for them, and the course, purpose and policy of legislation upon the subject. If the purpose of a course of legislation can be perceived, it is always to be presumed that the legislature intends to further that purpose rather than to abandon it.

Before the recent statutes it had been for more than a thousand years the settled legal policy of the Teutonic nations, at least, to exclude a married woman from all participation in business affairs. The husband upon the marriage took over all her personal property and the use of her real estate for his life. He became responsible for her support, her debts and her torts. She was not responsible for any debts, nor for any torts committed by her under her husband's influence. There was of course for this rule a reason which seemed sufficient for centuries. There is no warrant for saying that this reason was in the harshness or selfishness of the male sex, or in any desire to exploit the female sex. Though in early times manners were ruder and life harder, the family and marital affec-

tions do not appear to have been weaker. The strength of these among the Teutonic races, as compared with their weakness under the liberal marriage laws of the Roman Empire, excited the admiration of the historian. The reason appears to be in the almost instinctive desire to insure the unity,—the singleness of the family.

There is a general consensus of opinion that the family existed before the state and that autocratic family government was the first of all forms of government. It seems to have been regarded as an axiom by publicists for centuries, that the family was the basis of the state and that the destruction of the family would be the destruction of the state. To insure the unity and preservation of the family, there seemed to be thought necessary a complete identity of interests and a single head with control and power. The husband was made that head and given the power, and in return was made responsible for the maintenance and conduct of the wife. To prevent any clashing of interests between husband and wife, to prevent any divisions or separations in the family, the wife was disqualified during coverture from having any business interests and from subjecting her personal estate to the claims of creditors. Such at least was the common law.

This policy or rule undoubtedly worked hardship in individual cases; some husbands were incompetent, some were beyond the seas, some exercised rigidly their marital authority over the property of the wife but did not apply it to her support. The courts of equity began early to relieve and guard against these hardships,—by recognizing trusts for married women,—by recognizing her conveyances and even her contracts when clearly necessary for her support in the absence of her husband,—by refusing aid to the husband in recovering the wife's property until he create a trust fund for her maintenance,—and by other means. The doctrine of the wife's separate estate thus grew up in equity and was cherished by the courts, but rather to insure the wife's support under the law than to weaken the law. Every attempt of the husband or of third parties to charge this separate estate was resisted. The wife was not allowed to charge it unless clearly for her own benefit. The

idea of any legal relation between husband and wife other than that of marriage was not entertained.

In late years the legislatures have recognized these equitable doctrines, and have modified the law presumably in the same direction and for the same purpose, to more fully insure the maintenance of the married woman. An examination of the course of legislation in this state will show this to be the general purpose. The first statute was sec. 9 of c. 57 of Laws of 1821, which empowered the court to authorize the wife to make contracts in her name and sue in her name during the time her husband may have abandoned her and absented himself from the state. In 1841 by R. S., c. 87, § 29, this former statute was made to include the case of a wife whose husband was in the state prison. By § 31 of the same act, the land damages for land of the wife taken under eminent domain were to be secured to the wife's separate use. By sections 31 and 32, it was provided that a married woman coming into the state without her husband, he never having lived with her in this state, should have power to contract as if sole until his arrival and resumption of his marital rights. The act of 1844, c. 117, was entitled "An act to secure to married women their rights in property." Section 1 provided that a married woman could become seized and possessed of property in her own name provided the same did not come in any way from her husband. Section 2 provided that when a woman possessed of property married, the property should continue hers as her separate property exempt from liability for the debts of the husband. Section 3 authorized the wife to release to the husband the control of the property and the right to dispose of the income "for their mutual benefit." By statute of 1847, c. 27, the wife was allowed to acquire property from her husband except as against his creditors. By statute of 1848, c. 73, she was granted the right to use all processes to enforce and defend her rights of property under the statute of 1844. By section 3 of the same statute she was authorized to dispose of her estate by will and if she died intestate her estate was to descend to her heirs. By statute of 1852, c. 227, she was empowered to dispose of her separate estate, acquired under former acts,

in her own name as if unmarried. By statute of same year, c. 291, the husband was freed from liability for his wife's debts though he might still be joined in the suit against her. The wife could defend alone or with her husband, but was to be free from arrest. By statute of 1855, c. 120, she was again authorized to convey her separate estate by her separate deed. In 1856, however, by c. 250, this right of conveyance was restricted to property not acquired from her husband or his relatives. As to such estate the joinder of the husband was required. By statute of 1857, c. 59, she was authorized to receive and sue for the wages of her personal labor performed for others than her own family. Revised Statutes 1857, c. 61, § 6, of the same year authorized marriage settlements. By statute of 1862, c. 148, she was authorized to engage in business upon her own account, and her contracts therein were made binding and enforceable against her separate property, but the husband and his property were to be exempt from liability therefor.

By statute of 1863, c. 214, she was authorized to take and hold property from her husband as security for a bona fide debt, or for payment for money actually loaned. Next came the statute of 1866, which has been quoted in the early part of this opinion, and upon which the plaintiff relies. The next statute was that of 1876, c. 112, granting the wife all processes for the defense of her property and personal rights without control by her husband. By the statute of 1883, c. 207, the husband was freed from liability for his wife's torts in which he took no part. The statute of 1889, c. 176, limited the necessity of the husband's joinder in conveyances to property conveyed by him directly to his wife. Here legislation upon the subject has apparently come to an end.

The main purpose running through all this legislation seems to have been to enable a married woman to acquire, hold, and dispose of a separate property, a property which should be entirely free from her husband's control. This purpose is made more manifest from the revisions of the statutes since 1866. If the statute of 1866 was intended to have the sweeping, comprehensive effect claimed for it by the plaintiff, it must have been understood to have superseded all the previous legislation designed to enlarge a

married woman's rights and powers. The previous enlarging acts would have been regarded as obsolete and dropped from the statute book upon its revision. But this does not seem to have been the understanding of the legislature. We find nearly all these prior statutes twice re-enacted in the revisions of 1871 and 1883 and they are still upon the statute book. R. S., c. 61, §§ 1, 2, 3, 4, 5, 7, 8, 9 and 10. The statute of 1866 reappears in § 4, which enacts that a married woman shall be liable for all her debts contracted before marriage, and for those contracted afterward "in her own name for any lawful purpose." The words "in her own name," were not in the act of 1866, and seem to have been added to bring that act into harmony with preceding acts. They seem to limit her power to contract to such contracts as she may make in her own name. While mere consolidation, or condensation of the language of a statute in revision is not to be presumed to indicate a change of meaning, the addition of restrictive words not found in the original statute may indicate an intention or understanding that the statute is restricted in its effect. The words "in her own name" seem to indicate that the wife's power to contract is not unlimited,— that it is confined to her separate business or estate. The legislature by twice re-enacting most of the former statutes, and by using the words "in her own name" in the revisions, has certainly indicated that it did not understand that all disabilities and restrictions upon married women were removed by the act of 1866. While the legislative construction of a statute is not binding upon the court it is entitled to great respect.

In enacting these statutes the legislature was aware that they could not be extended by implication, but would be construed strictly as in derogation of the common law, and as modifying a long approved policy. Such was the settled rule of construction in this state when the statute of 1866 was passed. *Swift* v. *Luce*, 27 Maine, 285; *Newbegin* v. *Langley*, 39 Maine, 200; *Brookings* v. *White*, 49 Maine, 479. It has since been emphatically affirmed in *Hobbs* v. *Hobbs*, 70 Maine, 381, and *Cummings* v. *Everett*, 82 Maine, 260.

In view of this familiar rule of construction, it would be reason-

able to expect that if the legislature really intended the act of 1866, as recast in the revised statutes, to extend beyond the contract of a married woman in her own name and to include the power of entering into a business partnership with her husband, to contract in a firm name and to subject herself and her separate estate to all the incidents, risks and liabilities of such a relation, it would have used language more pointedly indicating such an intention. Up to that time, the policy of the legislature had been to insure the maintenance of the wife and the security of her separate property from her husband's control, following out the equities suggested by the courts. There was manifested no intention to interfere in any other respect with the marriage relation, except to free the husband from liability for his wife's debts or torts. The husband was still left the head of the family with the duty of support and the right to direct the family life. The importance of family unity was still recognized. Though husband and wife might each have separate property or business interests, this was for the protection of the wife against the misfeasance or nonfeasance of the husband as to his duty.

There seems to be an incongruity between this policy of the legislature and the incidents of the partnership relation, and also an incongruity between these and the incidents of the marriage relation. In a partnership all the partners are equal in power and liability. A partnership acting through one partner may commit torts as well as make contracts, and each partner may thus be made liable for torts as well as debts caused by another partner. By entering into a business partnership with her husband the wife practically subjects her separate property and herself to liability for debts and torts caused by him,—the very liability the legislature, as well as the court, had been striving to prevent. Ordinarily the husband would in fact carry on the business, and by reason of his position as husband would have an influence over his partner and the business not justified by any superior business capacity. The partnership relation could not be kept distinct from the marriage relation. The business partners could not forget they were also husband and wife. The essential element of perfect equality

between business partners could not exist. The wife would be at a disadvantage. The husband would still be the head of the family with marital authority. The assent he could not win from his business partner, he might extort from his wife. The result might often defeat the very purpose of the enabling statutes.

True, it may be best for the family and the state that the wife be permitted to enter into this additional relation with husband, and be subject to all its consequences. If we thought the legislature had clearly intended such an almost revolutionary change in the law of husband and wife, we should not assume to question its wisdom; but in view of all the foregoing considerations, until it uses language more explicit upon this point than it has heretofore used, we cannot think that such was its intention.

The plaintiff's counsel cites the cases *Blake* v. *Blake*, 64 Maine, 177, and *Wentworth* v. *Wentworth*, 69 Maine, 247, and especially the language of the opinion in the former case as inconsistent with the construction here put upon the statute. We do not find in either case an expression of an opinion that the word "contract" in the statute includes a business partnership between husband and wife. That point evidently was not in the mind of the court. We make no decision here inconsistent with those decisions or opinions. We do not decide that a wife may not make a valid contract with her husband, nor that she may not join with her husband in contracts with other parties,—nor that she may not become a surety for her husband,—nor that she may not make contracts through him as her agent. All these might be contracts "in her own name."

Both counsel with commendable diligence have made exhaustive citations of cases in other states. Such citations are of less assistance in the interpretation of statutes than in ascertaining general legal principles. Since our legislature does not appear to have adopted any statute of another state which has been construed by the courts of that state, but to have legislated independently,—those decisions should not very much influence us in endeavoring to ascertain the true intent of our own legislature. Apart from any difference in the phraseology of the statutes of the various states,

there may be wide differences in the history, in the general legislative and judicial policy and in the habit of judicial interpretation in the different states, so that the opinions of their courts as to the intent of their legislatures might not indicate the intent of our legislature even when they use similar language. Still it may be instructive to briefly survey some of the cases cited by plaintiff's counsel as antagonistic to our interpretation.

The only case necessarily and expressly affirming the plaintiff's contention is *Suau* v. *Caffe*, 122 N. Y. 308. But that decision was by four justices against three in the second division only of the court of appeals. The narrowness of the majority detracts from the authority of the decision. In the other cases cited there were other elements, not present in this case, which were considered and made to a large degree the basis of the decisions, especially the element of estoppel. These will appear in an examination of the cases. In *Lane* v. *Bishop*, 65 Vt. 575, the wife held herself out as a partner of her husband in running the hotel;—the goods were sold upon her credit;—and she personally promised to pay for them. The court practically held that she was estopped from denying her liability. The court said a wife could not be allowed to conduct a partnership in which her husband was a secret or open partner, to frequently receive all the benefits to be derived therefrom, and escape all liabilities. The case of *Louisville & N. R. R. Co.* v. *Alexander*, 16 Ky. Law Rep. p. 306, is briefly reported, but the wife seems to have been held liable upon the ground that she had held herself out as a partner. The language of the court is: "She cannot say to the world 'I am interested in this business venture with my husband and my property is therefore pledged to the payment of the partnership debts' and then escape liability." In *Snell* v. *Stone*, (Oregon) 31 Pac. Rep. 663, the wife carried on the business in her own name, but her husband was interested in the business and so informed the plaintiffs upon their inquiry about the time the account was opened. Upon this ground the husband was held liable. The wife made no defense, confessing her liability on her own contract made in her own name. In *Dunifer* v. *Jecko*, 87 Mo. 284, the husband and wife sued as co-owners and co-part-

ners in a newspaper. The defendant raised the point they could not sue as partners, but inasmuch as he had dealt with them as partners, and had been allowed a set-off against them as partners, it was held that he could not now complain as to the joinder,—but even this much was only held by three justices against two. *Dressel* v. *Lonsdale*, 46 Ill. App. 454, was an action by husband and wife for board. The defendant insisted that the action should have been by the wife alone. The court held that it could make no difference to the defendant whether the action was by one or both, since the judgment would in this case be a bar. The court said briefly and obiter that because husband and wife could contract with each other, they could form a business partnership. *Hamilton* v. *Hamilton*, 89 Ill. 350, contains dicta only. In *Skolfield* v. *Jones*, 85 Ga. 816, Jones and wife were part owners of a hotel, and as such gave joint promissory notes. The wife pledged some of her separate property as collateral security for these notes. It was held that her pledge was binding on her. In *Schlapback* v. *Long*, 90 Ala. 525, the action was on a judgment against husband and wife as partners in a hotel business. The husband had held himself out to the creditor as a partner. *Held*, that by reason of such holding out, and because of the judgment recovered against him as such partner, he was now estopped from denying the partnership. In *Wells* v. *Caywood*, 3 Colo. 487, the action was ejectment and the question was simply whether a husband could convey to his wife. The court adopted the liberal expansive rule of construction.

On the other hand the following cases are cited. *Lord* v. *Parker*, 3 Allen, 127; *Artman* v. *Ferguson*, 73 Mich. 146; *Vail* v. *Winterstern*, 94 Mich. 231; *Haas* v. *Shaw*, 91 Ind. 384; *Payne* v. *Thompson*, 44 Ohio St. 192; *Fuller* v. *McHenry*, (Wis.) 18 L. R. A. 512; *Gilkerson-Sloss Co.* v. *Salinger*, 56 Ark. 294, (16 L. R. A. 526); *Mayer* v. *Soyster*, 30 Md. 402; *Howard* v. *Stephens*, 52 Miss. 244; *Miller* v. *Marx*, 65 Texas, 132; *Salinas* v. *Turner*, 33 S. C. 231; *American Morty. Co.* v. *Owens*, 72 Fed. Rep. 219. The plaintiff insists that these cases are not in conflict with his proposition, since in all the statutes interpreted was restrictive lan-

guage indicating an intention to limit the power of contract by a wife to her separate property, or to her separate business affairs.

He assumes that there is no such restrictive language in our statute. As already intimated, we do not think this assumption is well founded. There is one restrictive clause at least. A married woman's contract to be binding must be "in her own name." Is not this a concise mode of saying that her contract must concern her own separate property, her own separate business? It could hardly mean the mere outward form or name of the contract. It must have referred to its character, its substance. We do not see such a dissimilarity between the substance of the statutes as the plaintiff claims there is.

There is one late case, however, which goes to the extreme against the plaintiff's proposition. *Seattle, etc.*, v. *Hayden*, 4 Wash. 263 (16 L. R. A. 530). The statute was as follows: "Sec. 2406. Contracts may be made by a wife and liabilities incurred, and the same be enforced by or against her to the same extent and in the same manner as if she were unmarried." The term "contract" in this statute is certainly unrestricted by anything in the context. The action was against Mrs. Hayden to charge her as a partner in her husband's firm of J. P. Hayden & Co. The court in an elaborate opinion held that the partnership relation between husband and wife was not within the spirit of the statute. Only one justice out of five dissented. The plaintiff suggests that the "community" law of the state influenced the decision, but the opinion seems to arrive at its result in spite of, rather than on account of, the "community" law.

Motion and exceptions sustained.

HORACE F. FARNHAM, in Equity,

vs.

ARTHUR N. RICHARDSON, and others.

Cumberland. Opinion May 28, 1898.

Lien. Filing Claim. Extension of Time. Priority of Lien. R. S., c. 91, §§ 30, 32.

The validity of a lien claim of persons who furnish materials for erecting and constructing houses or buildings as regulated by the statutes of the state, does not depend upon the amount or value of the material last furnished, provided all the other conditions necessary to the maintenance of the lien exist.

It is undoubtedly true that the trifling character of the labor last performed, or material last furnished, may often throw more or less light upon the question whether the service was at the time intended to be gratuitous and was only afterwards relied upon to save a lien which would have otherwise expired, or not. But when a lien claimant furnishes material for the construction of a building by virtue of a contract with a person other than the owner, but with the knowledge and consent of the owner, the lien given him by statute will not be dissolved if he files the required statement in the clerk's office within forty days after he ceases to furnish materials.

The defendants Gribben, owners of the land, contracted with the defendant, Richardson, for the construction of a building on the lot. The plaintiff furnished materials for the building upon the order of Richardson, the last of which, with the following exception, was upon September 19, 1895; and filed his claim in the clerk's office upon November 6, 1895. But upon October 1, 1895, the plaintiff furnished a door for the building upon the request of the land owner which was exchanged for another previously delivered by the plaintiff but of less value and that did not fit the frame. The exchange was inferably made upon the order of the defendant Richardson and for his convenience only; and the plaintiff credited him upon his books with the door returned at the price originally charged for the same, to wit: $3.35, and charged for the door delivered in exchange, $3.50, or fifteen cents more than for the door returned.

Held; that this exchange was not intended as a gratuity; nor was the charge an afterthought made for the purpose of extending the time within which the claimant could file his lien claim for the materials previously furnished. There was no intimation that the charge for the door furnished was too much, nor that the credit for the one returned was too little. And it was not suggested that the necessity for the change was caused by any fault of the plaintiff, so that no charge whatever should be made.

Held; that the plaintiff's lien should take precedence of two mortgages upon the property, one dated September 19, and the other, October 1, 1895, but both recorded upon the latter day, because all the materials were furnished by virtue of a contract made with the defendant Richardson, the builder, with the knowledge and consent of the owners before October first.

See *Hartley* v. *Richardson*, ante, p 424.

ON APPEAL IN EQUITY.

This was an equity appeal from a decree of the court sitting below dismissing a bill filed by the plaintiff to enforce a lien under the statute upon land and buildings for materials furnished by him in the construction of a building owned by Percy A. and Wesley L. Gribben, two of the defendants in the bill. The other defendants besides Richardson the contractor, are the Maine Wesleyan Board of Education holding a mortgage of $3000 dated September 19, 1895, recorded October 1, 1895, given for money advanced to pay a former mortgage and work done on the house; and S. H. and A. R. Doten assignees and holders of a second mortgage dated and recorded October 1, 1895, and given by Gribben Brothers to Richardson in full settlement for the balance due that contractor for building the block of buildings.

The case is stated in the opinion.

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

The case admits that there was a contract between Arthur N. Richardson, a building contractor, and Percy A. and Wesley L. Gribben for building a house. The consent of the owners of the building that the materials might be furnished in its construction may therefore be inferred. *Norton* v. *Clark*, 85 Maine, 357; *Shaw* v. *Young*, 87 Maine, 271; *Wheeler* v. *Scofield*, 67 N. Y. 311.

In view of the peculiar language of the contract under which this building was being erected, viz: "that he (the contractor) would give us (the plaintiff) his trade for the houses that they were building and were to build, and would buy the goods in our line from us," it is evident that this was not a purchase by the defendant Gribben, but an order under the terms of the contract. Under this contract the materials were to be furnished in building, etc. The plaintiff, therefore, was obliged to furnish materials

until the building was finished unless otherwise ordered by this contractor. The door which was returned had not been hung, and other doors had been found unsuited for the building and had been returned and other doors substituted in their place. The contract was not to furnish specified doors, etc., by actual measurements, but it was to furnish such materials in the plaintiff's line as should be needed in the construction of certain buildings. A door that was too small for its frame certainly was not within the terms of this contract. It was not a door which was needed in the construction of the building. On the contrary, it is very evident that it was a door which was not needed in the construction of this particular building, and that the door which was needed was the one which fitted the frame; that is, the door which was furnished on the first day of October. The plaintiff, therefore, claims that when he furnished the door on the first day of October it was done under the terms of the original contract between himself and the building contractor; that it was not done in pursuance of any contract with the owner of the building, although of course it was furnished with his consent.

The question is whether the building has been finished as originally planned and the materials furnished have entered into its construction in the manner required by such plan. (Phillips Mechanics Liens, 3d Ed., § 220.) If a door was too small for the frame, such a door could form no part of the building and must necessarily be changed for another door which would fit. The door received in exchange is the one which was actually furnished and which was used in the erection of a completed building. The first door was never actually furnished in erecting a building, and is in the possession of the material man at this time so far as this case discloses. The only door which entered into the erection of the house was that furnished on October 1st, 1895.

J. A. and Ira S. Locke, for P. A. & W. L. Gribben and Maine Wesleyan Board of Education.

H. W. Gage and C. A. Strout, for S. H. & A. R. Doten.

Mere alterations and repairs made after the substantial completion of a building (in this case September 19, 1895) do not

relate back to the previous construction so as to take precedence over a mortgage just before the alterations and repairs were commenced. 2 Jones on Liens, §§ 1446–1465, 1466.

The plaintiff's contract with Richardson for furnishing materials for the construction of the building, having been completed September 19th, when the forty days within which notice of lien must be given, began to run, and which expired October 29th, 1895, it is neither equity nor good law to allow a subsequent slight repair or exchange of doors amounting to fifteen cents, really furnished either under a separate contract or as a gratuity, to revive the former claim and extend its lien to November 5th, 1895.

A contract to take precedence of a mortgage must be definite and still in force with the mortgagor in possession, and the mortgagee's consent cannot be implied. *Morse* v. *Dole*, 73 Maine, 352–354; 2 Jones on Liens, § 1466.

Mechanics asserting a lien on real property and claiming priority over mortgagees, who have acquired an interest in the property, must furnish strict proof of all that is essential to the creation of the lien,—which has not been done in this case. *Davis* v. *Alvord*, 94 U. S. 545.

Counsel also cited: *Cole* v. *Clark*, 85 Maine, 338; *Farnham* v. *Davis*, 79 Maine, 282–285; *Baker* v. *Fessenden*, 71 Maine, 292–294; *Godfrey* v. *Haynes*, 74 Maine, 96; *Brown* v. *Tuttle*, 80 Maine, 162.

SITTING: EMERY, WHITEHOUSE, WISWELL, SAVAGE, FOGLER, JJ.

WISWELL, J. Bill in equity to enforce a lien for materials furnished for and used in the construction of a double frame-house in the city of Portland.

The case was heard by a single justice and comes here upon appeal from his decree. From the facts found by him and stated in his decree, and from the report of the testimony accompanying the appeal, it appears: that the defendants Gribben were the owners of the land upon which the building was erected, that they contracted with the defendant Richardson for its construction, that

the plaintiff upon the order of Richardson, furnished materials that went into the construction of the building to the amount of $422.20; and that the last of the materials furnished by the plaintiff, with the exception of the transaction hereafter referred to, was upon September 19, 1895. The plaintiff filed his lien claim in the clerk's office of the city of Portland upon November 6, 1895, more than forty days after September 19, 1895.

But upon October 1, 1895, the plaintiff furnished a door for this building and made a charge therefor of $3.50 under the following circumstances, as stated in the finding of facts contained in the decree: "The men of the defendant Richardson finding that one of the doors delivered by the plaintiff would not fit the frame prepared for it, made the fact known to one of the defendants Gribben, who thereupon telephoned to the plaintiff's office, requesting an exchange of the door delivered for one of a different size but otherwise similar, and that on the next day he took the door delivered by the plaintiff into his wagon, carried it to the plaintiff's place of business and there exchanged it for a new door different in size only, which he carried to the houses and it was there hung by the workmen of the defendant Richardson. The exchange was inferably made at the request of the defendant Richardson and for his convenience only. Upon the day that said door was exchanged, the plaintiff credited Richardson upon his books with the door returned at the price originally charged for the same, to wit, $3.35, and charged for the door delivered in exchange, which was two inches larger one way than the door returned, $3.50, or fifteen cents more than for the door returned."

The justice considered that the transaction of October 1, was of too trifling a character to allow the time, within which the lien claim must be filed in the city clerk's office, to commence running at that date and decreed that the bill be dismissed with costs.

The statute provides that a lien of this kind shall be dissolved unless the claimant files in the office of the clerk of the town in which the building is situated, a true statement of his claim, "within forty days after he ceases to labor or furnish materials." When did this claimant cease to furnish materials? On the first

day of October, with the knowledge, and in fact at the request of one of the owners, but inferably at the request of the contractor and for his convenience, he furnished a door that was of the kind and size desired that was used in the construction of this building, and took back, at a less price, a smaller door which he had previously furnished.

This exchange was not intended as a gratuity. It can not be claimed that the charge was an afterthought, made for the purpose of extending the time within which the claimant could file his lien claim for the materials furnished previously, because at the time of the transaction, when only some eleven days had elapsed since the materials next before this had been furnished, and when he had ample time, nearly thirty days, to secure his lien by filing his claim, he made a charge upon his books for the door. The case contains no intimation that the charge for the door furnished was too much, or that the credit for the one returned was too little. Nor is it suggested that the necessity for the change was caused by any fault of the plaintiff so that no charge whatever should be made.

The case must therefore be distinguished from *Cole* v. *Clark*, 85 Maine, 356, where the service relied upon was a mere act of friendly accommodation, performed under such circumstances as to repel any implication of a promise to pay.

This court has several times held that a lien once lost by the expiration of the time within which the statement required by statute must be filed with the town clerk, can not be revived by additional work. *Darrington* v. *Moore*, 88 Maine, 569; *Woodruff* v. *Hovey*, ante, p. 116. But this principle is not applicable to the case under consideration because, as we have already seen, the claimant's lien was not lost when this material was furnished; he then had nearly thirty days left within which to file his lien statement. Nor can it be said, as in *Woodruff* v. *Hovey*, supra, that the material was furnished for the purpose of reviving a lien already lost, because of the further reason that the claimant did not volunteer to furnish this material. He did so at the request of one of the owners for the contractor.

Nor is the principle laid down in *Baker* v. *Fessenden*, 71 Maine, 292, that "one single lien can not cover several distinct alterations in the same building made at different times and independent of each other," applicable to this case. None of the materials furnished by this claimant were for alterations or repairs. The door furnished October first was as much for the construction of the buildings as were any of the materials previously supplied. The building was not at that time completed. All of the materials were furnished for the construction of the building.

Whether the transaction amounted to a charge of $3.50 for a new door and a credit of $3.35 for the smaller one returned, or whether it should be regarded simply as a charge of the difference in price, we do not think the fact that the material last furnished was of a trifling character should prevent the lien from continuing for forty days from that time. The statute makes no distinction as to the amount of the labor performed or the value of the material furnished. If such a distinction is desirable, it must be made by legislative, not judicial, action.

It is undoubtedly true that the trifling character of the labor last performed or material last furnished may often throw more or less light upon the question, whether the service was at the time intended to be gratuitous and was only afterwards relied upon to save a lien which would otherwise have expired, or not. But when a lien claimant furnishes material for the construction of a building by virtue of a contract with a person other than the owner, but with the knowledge and consent of the owner, the lien given him by statute will not be dissolved if, within forty days after he ceases to furnish material, he files in the clerk's office the required statement. And we do not think that his lien depends at all upon the amount or value of the material last furnished, provided all the other conditions necessary to the maintenance of the lien exist.

The plaintiff's lien in this case should take precedence of the two mortgages upon the property, one dated September 19, and the other October 1, 1895, but both recorded upon the latter day, because all of these materials were furnished by virtue of a contract made with the defendant Richardson, the builder, with the knowl-

edge and consent of the owners before October first. Whether the general arrangement between Richardson and the lien claimant, whereby the latter was to furnish all of the material in his line for the construction of the house, could be considered as a binding contract upon the plaintiff or not, is immaterial. All the materials, other than the new door, were ordered and furnished on September 19, or before, while the door was ordered and the plaintiff agreed to furnish it on the day before it was furnished, and consequently on the day before the mortgages were recorded. *Morse* v. *Dole*, 73 Maine, 351.

The entry will therefore be,

Decree reversed. New decree in accordance with this opinion.

LENA M. MORGAN *vs.* CITY OF LEWISTON.

Androscoggin. Opinion May 28, 1898.

Way. Defect. Notice. R. S., c. 18.

This court has always held that the statute which requires cities and towns to keep their ways "safe and convenient for travelers" means reasonably and not absolutely safe.

Held; that it would be unreasonable and impracticable to require cities and towns to so construct all their sidewalks that, at the junction of rectangular streets, they should meet upon exactly the same level.

In an action to recover damages caused by an alleged defective way in the city of Lewiston, the defect complained of was that the sidewalks at the junction of Main and Park streets were not on the same level. The Main street walk was of brick, constructed about a month prior to the accident, with a plank at the outside of the walk at the junction, and set upon edge, with the top of the plank flush with the surface of the walk, for the purpose of retaining the brick in place. The Park street walk was of earth with ashes placed next to the brick sidewalk and extending back on the Park street sidewalk about six feet.

This latter sidewalk at the junction was slightly lower than the surface of the brick sidewalk. The difference in level varied somewhat because the dirt sidewalk was rounding, being higher in the middle, and on one side, than the

other. It was upon one side, and in the middle, from one to two inches lower than the Main street walk, and upon the extreme outside the Park street walk was five and one half inches lower than the top of the plank. Two feet in from this extreme outside the difference in level was but two and three-fourth inches,—the whole width being about six feet.

Held; that the condition of the street above described is not a defect within the meaning of the highway statute; *also*, that persons unacquainted with the locality ought to anticipate that, at the junction of two sidewalks in such a place, there might be such a condition in the sidewalks.

Where in such an action the statute requires the person injured to set forth his claim for damages, it does not mean that the damages must be specified or that the amount claimed must necessarily be stated. The notice is sufficient in this respect if the sufferer sets forth in his notice that he makes claim for damages.

Sawyer v. *Naples*, 66 Maine, 453, and *Lord* v. *Saco*, 87 Maine, 231, considered and discussed.

On Report.

This was an action on the case to recover damages for an injury to the plaintiff, on the evening of December 31, 1895, while traveling along Park street toward Main street, in the city of Lewiston, caused by her feet striking against a plank crosswise of the Park street walk, at its junction with the inside line of the sidewalk on Main street, placed there edgewise for the purpose of holding the brick of the Main street walk in place, and projecting above the surface of the Park street walk, with a perpendicular face toward Park street from five and one-half inches on the inside to two inches in the middle of the walk and three-fourths inches on the outside. The notice served upon the municipal officers by the plaintiff, according to the statute, is as follows:—

"You are hereby notified, that at about six o'clock on the evening of December 31, 1895, while walking in a northerly direction along the sidewalk located on the easterly side of Park street in said Lewiston, my feet encountered an obstruction and defect in said sidewalk which caused me to be thrown violently to the ground, thereby receiving injuries to my left leg, for which I claim damages from the city of Lewiston.

"Said injuries consisted of a bruise to the flesh and a spraining of the ligaments of my left knee, and a bruise to the flesh of my left leg from the knee to the ankle, and a complete fracture of

the tibia or front bone of the left leg, about half way between the knee and ankle; and of a bruise to the flesh and a spraining of the ligaments of my left ankle. [Here follows a description of the defect in the street or way.]

"Dated at Lewiston, Maine, this 7th day of January, 1896.

Lena M. Morgan."

W. H. Newell and W. B. Skelton, for plaintiff.

Counsel argued:—1. This plank constituted a defect. 2. The city placed it there and had notice of its precise condition. 3. That the plaintiff did not know of its existence. 4. That the plaintiff was rightfully on the walk, traveling in a careful and prudent manner. 5. That the plaintiff was injured through the negligence of the defendant. 6. That after the injury the plaintiff notified the defendant of the nature of the injury, the nature and location of the defect and her claim for damages, within fourteen days after the accident. 7. That the plaintiff suffered injuries for which the defendant is liable to the plaintiff in damages. The sidewalk is made to accommodate foot travel, and the traveler has the right to expect it to be reasonably smooth, free from structural defects and safe for travel.

It admits of little doubt that, in a comparatively dark street, within a line of buildings within from two to five feet of the sidewalk, at 6 o'clock the last day of December, a plank placed across a walk so as to present a perpendicular face of from five and one-half to two inches above the level of the sidewalk presents such an obstruction as would be likely to cause a person to trip and fall. She had a right to suppose that the connection of these two sidewalks was on a level so as not to subject her to unnecessary or unexpected dangers.

She was not to cross a street where she would have to step down from the surface of the walk or curbing to the surface of the street. But she had the right to expect that she was to travel around the corner of Park street and Main street upon a comparatively level surface.

Notice:—As held in *Sawyer* v. *Naples*, 66 Maine, 453, it is far better practice to state the nature of the injury, the nature and

location of the defect and that the plaintiff claimed damages, without annexing the absurdity that the plaintiff claimed damages in the sum of two thousand dollars.

Harry Manser, city solicitor, for defendant.

Defect:— *Moore* v. *Abbot*, 32 Maine, 46; *Church* v. *Cherryfield*, 33 Maine, 460; *Witham* v. *Portland*, 72 Maine, 539; *Raymond* v. *Lowell*, 6 Cush. 524, 533.

Due care:— *Mosher* v. *Smithfield*, 84 Maine, 334, and cases; *Thompson* v. *Bridgewater*, 7 Pick. 187; *Adams* v. *Carlisle*, 21 Pick. 146.

Notice:— *Low* v. *Windham*, 75 Maine, 113; *Veazie* v. *Rockland*, 68 Maine, 511; *Hubbard* v. *Fayette*, 70 Maine, 121; *Goodwin* v. *Gardiner*, 84 Maine, 278; *Sawyer* v. *Naples* has been overruled in *Wagner* v. *Camden*, 73 Maine, 486; and *Lord* v. *Saco*, 87 Maine, 231.

SITTING: PETERS, C. J., EMERY, FOSTER, WHITEHOUSE, WISWELL, STROUT, SAVAGE, JJ. EMERY and SAVAGE, JJ., concurred in so much of the opinion as relates to the sufficiency of notice.

WISWELL, J. Action to recover for personal injuries sustained by the plaintiff through an alleged defect in a street of the defendant city.

The defective condition complained of is, that at the junction of Main and Park streets, the sidewalks were not on the same level. The Main street walk was of brick, constructed about a month prior to the accident, with a plank at the outside of the walk, at the junction, set upon edge, with the top of the plank flush with the surface of the walk, for the purpose of retaining the brick in place. The Park street walk was of earth, with ashes placed next to the brick sidewalk and extending back on the Park street sidewalk for about six feet.

This latter sidewalk at the junction was slightly lower than the surface of the brick sidewalk. The difference in level varied somewhat because the dirt sidewalk was rounding, being higher in the

middle and on one side than on the other. The Park street walk upon one side and in the middle was from one to two inches lower than the Main street walk and upon the extreme outside of the Park street walk it was five and one-half inches lower than the top of the plank. Two feet in from this extreme outside the difference in level was but two and three-fourths inches, the whole width being about six feet.

The first question is, whether or not the condition above described was a defect within the meaning of the highway statute. The case comes to the law court upon report and we are given jury powers in passing upon all questions of fact.

This court has always held that the statute which requires cities and towns to keep their ways, "safe and convenient for travelers" means reasonably, not absolutely safe. Was this particular place, taking into account its location and all surrounding circumstances, reasonably safe for persons having occasion to pass over it, who upon their part were in the exercise of due care? We think it was. These sidewalks were upon different streets. In our opinion it would be unreasonable and impracticable to require of cities and towns that they should so construct all of their sidewalks, that at junction of rectangular streets the sidewalks should meet upon exactly the same level.

The difference in level here complained of was not so much as ordinarily exists between a sidewalk and a street crossing. True, it is said, that this would be expected in the latter case, but we think that a person in the exercise of due care, who was unacquainted with the locality ought to anticipate that, at the junction of two sidewalks, in a place such as was this, there might be exactly such a condition as is here complained of.

In *Witham* v. *Portland*, 72 Maine, 539, this court held as a matter of law, after a jury had found the other way, that a depression in the sidewalk of the defendant city, six and one-half inches below the surface of the walk, and eight and one-half inches in width from a basement window, about one-half of which was within the limits of the walk was not a defect. A much stronger case for the plaintiff, we think, than this.

Although this conclusion disposes of the case, we think it proper to refer to another position of the defense. The statute requires a person injured by reason of a defective way, to give the municipal officers written notice within fourteen days after the accident, and among other things therein to, "set forth his claim for damages." In the recent case of *Lord* v. *Saco*, 87 Maine, 231, it was said in the opinion of the court, referring to this requirement, "we think this fairly implies that the amount of his claim should be stated." In the notice in this case the amount of the plaintiff's claim for damages was not stated. After referring to the accident, the plaintiff says in her notice, "for which I claim damages from the city of Lewiston."

If the statute is correctly construed in *Lord* v. *Saco*, supra, this notice was insufficient. But this court held in *Sawyer* v. *Naples*, 66 Maine, 453, when the statute in this respect was the same as now, that it was not necessary that the amount of damages should be stated in dollars and cents. It is not unnatural that there should be considerable doubt among members of the profession as to which of these conflicting cases would be sustained.

We do not think that the court in *Lord* v. *Saco* intended to overrule *Sawyer* v. *Naples*. If that had been the intention it would have clearly appeared in the later case. In *Lord* v. *Saco*, the notice was clearly insufficient in other respects, there was no description whatever of the nature of the defect, nor was there any specification, as required by statute, of the nature of the injury. The insufficiencies of the notice in that case were so glaring that the members of the court passed over without noticing one of the reasons given in the opinion. And we believe that the learned justice who prepared the opinion did not at the time have in his mind the earlier case.

The case of *Sawyer* v. *Naples*, was decided in 1876, since which time the statute has remained unchanged in this respect; if the legislature had desired that the claim for damages should be more specifically made, than the construction placed thereon by the court required, it could have easily amended it. This court did not intend, after the statute had remained unchanged for twenty years

with the construction placed upon it by the court in *Sawyer* v. *Naples*, to change that construction so as to give it an entirely different meaning.

The court is of the opinion that where the statute requires a person injured to set forth his claim for damages, it does not mean that the damages must be specified or that the amount claimed must necessarily be stated. The notice is sufficient in this respect if the sufferer sets forth in his notice that he makes claim for damages.

Although this question was not involved in the decision of the present case, because of our conclusion that no defect existed, still we have thought that in view of the conflict of the two cases above referred to it was proper to express the opinion of the court upon the subject.

Judgment for the defendant.

JOSEPH F. SMITH *vs.* SUMNER HUNT.

Penobscot. Opinion May 28, 1898.

Dilatory Plea. Practice. Bangor Municipal Court. R. S., c. 77, § 52; c. 83, §§ 3, 9. Special Act. 1895, c. 211, § 2.

Exceptions to the sustaining of a demurrer to a plea in abatement should not be sent to the law court until trial upon the merits. If they are so sent and entered, any further right to hearing upon the merits is thereby waived, and if the exceptions be overruled judgment should be given for the plaintiff.

The plaintiff a resident of Orrington, Penobscot county, brought an action of assumpsit upon an account for $12.20 with a quantum meruit for the same cause of action in the Bangor Municipal court against the defendant, a resident of Kennebec county. The ad damnum in the writ was $50. The defendant pleaded in abatement to the jurisdiction of the court, in substance, that the debt sued for did not exceed $20, whereby the court had no jurisdiction over him. *Held;* that the jurisdiction depends upon the ad damnum, which is the amount of damages demanded.

ON EXCEPTIONS BY DEFENDANT.

This was an action of assumpsit brought in the Bangor Municipal Court, in which plaintiff, a resident of Orrington, Penobscot county, declared against the defendant, a resident of Kennebec county, on an account annexed to the writ for twelve dollars and twenty cents. There was also an account in quantum meruit covering the same cause of action and alleging a value of fifteen dollars. But one recovery was claimed under the two counts. The ad damnum in the writ was fifty dollars. On the return day of the writ, defendant appeared specially by counsel, for the purpose of pleading in abatement to the writ and for no other purpose whatever, and on said return day his counsel filed a plea in abatement to which plaintiff demurred. Defendant joined the demurrer. The presiding justice sustained the demurrer, adjudged the plea bad, and ordered the defendant to answer further. To these rulings of the presiding justice the defendant excepted without pleading anew.

The exceptions were certified to the Chief Justice under section 6 of the act establishing the Bangor Municipal Court.

The plea in abatement is as follows:—

STATE OF MAINE.

County of Penobscot. Bangor Municipal Court.

At the term thereof begun and held at Bangor within and for said County of Penobscot on the third Monday of June, A. D. 1897. Joseph F. Smith v. Sumner Hunt.

And now Sumner Hunt, the defendant named in the above entitled action, comes and defends at the time and place aforesaid and prays judgment of the plaintiff's writ and declaration aforesaid, because he says that at the time of the purchase and service of said writ and long before and ever since his residence has been and now is Vassalboro, in the county of Kennebec, and not in any place in the county of Penobscot, and that none of his goods were attached within the county of Penobscot, nor was service of said writ made upon him within said county of Penobscot, and that the amount sued for in this action as appears by the account annexed is less than twenty dollars; and he further says that the ad damnum in

said writ was fraudulently placed at a sum greater than twenty dollars, to wit, at the sum of fifty dollars, for the sole purpose of giving jurisdiction to this court, and for no other reason or purpose whatever; and he further alleges that at the time of the purchase and service of said writ and long before there was a court duly organized and existing under the laws of Maine at Waterville, in the county of Kennebec, called the Municipal Court of Waterville, and that said Municipal Court of Waterville still exists and ever had and now has full jurisdiction over his person and property and the subject matter involved in this action. And this he is ready to verify. Wherefore he prays judgment of said writ that it may be quashed, and for his costs. Sumner Hunt by Harvey D. Eaton, his attorney and agent.

(Here follows the affidavit of said Eaton.)

A. H. Harding, for plaintiff.

There is no statute or law which compels us to go into another county, outside of our own county to bring a personal action, as in the present case. There can be no doubt or question, but what we could bring our action in the Supreme Judicial Court, in Penobscot county; and if so, we could bring our action before the Bangor Municipal Court, which has concurrent jurisdiction with the Supreme Judicial Court in all personal actions, where the debt or damage demanded, exclusive of costs, is over twenty dollars, and not over three hundred dollars. It is less expensive for us to bring suit in our county, and a more convenient tribunal is open to us.

Statutes, prescribing the counties in which transitory actions may be brought, and tried, do not, in the least, change their legal character; but over such, the court has jurisdiction, in any county in which they are commenced. *Webb* v. *Garland*, 46 Maine, 505.

The defendant's plea in abatement is defective in the following particulars:—It is argumentative; it is double; it is uncertain which class of dilatory pleas he intended to plead. In the commencement "he prays judgment of the writ and declaration." In the conclusion he prays "judgment of writ," that it may be quashed. It also may be, as to jurisdiction of the court, as he

points out another Court at Waterville, and says it has full jurisdiction over defendant's person and property, does not say it has exclusive jurisdiction, but full jurisdiction.

The plea in abatement is ambiguous, uncertain which class of dilatory pleas he intended. It may be to the fourth class of dilatory pleas, viz: the writ; it may be to the third, viz: declaration; or to the jurisdiction, which is the first class. If he intended it to the jurisdiction, it is bad, as the affidavit should have been signed and sworn to, by the defendant in person, and not by attorney. 1 Chit. Pl. 452; *Grant* v. *Sands*, 2 Bl. R. 1094; *Hunter* v. *Nash*, 3 M. & G. 184.

H. D. Eaton, for defendant.

The material allegation in defendant's plea in abatement is "that the ad damnum in said writ was fraudulently placed at a sum greater than $20, to wit, the sum of $50, for the sole purpose of giving jurisdiction to this court, and for no other reason or purpose whatever;" and plaintiff by his demurrer has confessed that this is true. The admission of the truth of this allegation is absolutely fatal to the maintenance of the action. The fraudulent allegation of an excessive ad damnum for the purpose of giving jurisdiction to a court in a distant county is not only an imposition upon the defendant but an abuse of legal process such as courts are quick to condemn whenever the objection is correctly presented at the proper stage of the proceedings.

In *Ridlon* v. *Emery*, 6 Greenl. 261, the objection was properly presented by a plea in abatement and was carefully considered by the court. The court found in that case that under the statutes then in force, justices of the peace had only concurrent and not exclusive jurisdiction where the value did not exceed $20, and for that reason alone the plea was adjudged insufficient. And in *Small* v. *Swain*, 1 Greenl. 133, at p. 135, it is squarely stated "if an excessive value had been alleged in the writ, for the purpose of giving jurisdiction to the court, that fact should have been shown in abatement." And these decisions of our own court are supported by the decisions of all other courts which have ever considered the question.

"It is a well settled rule, and of course in harmony both with reason and justice, that one can not knowingly allege a fictitious amount for the sole purpose of bringing his case within the jurisdiction of a court, as such would manifestly be a fraud upon that jurisdiction." Ency. of Pleading & Practice, Vol. 1, p. 710, citing cases in Alabama, Georgia, Michigan, Mississippi, New Jersey, North Carolina, Pennsylvania, South Carolina, Texas, Vermont, West Virginia and various Federal Courts. See also same volume, p. 4, note on "Fraud in obtaining jurisdiction."

Pleas in abatement may be filed by attorney. *Atwood* v. *Higgins*, 76 Maine, 423, p. 425. Counsel also cited *State* v. *Flemming*, 66 Maine, 142, pp. 150, 151.

SITTING: PETERS, C. J., HASKELL, WHITEHOUSE, STROUT, SAVAGE, FOGLER, JJ.

HASKELL, J. Assumpsit upon an account for $12.20 with a quantum meruit for the same cause of action, brought before the Bangor Municipal Court. That court has concurrent jurisdiction with trial justices against defendants residing in the county, outside of Bangor, when the debt or damages demanded do not exceed $20 and exclusive jurisdiction when either party does reside in Bangor. It has concurrent jurisdiction with this court when the debt or damages demanded exceed $20 and do not exceed $300. Act of 1895, c. 211, § 2; R. S., c. 83, §§ 3 and 9.

This defendant resided in the county of Kennebec. The ad damnum is $50. The defendant pleaded in abatement to the jurisdiction of the court, in substance, that the debt sued for does not exceed $20, whereby the court had no jurisdiction over him, a resident in another county and within the jurisdiction of another court. To this plea plaintiff demurred and the court overruled the demurrer and ordered the defendant to answer over, and he, instead of so doing, not only took exceptions but at once sent them to this court.

The exceptions are to the overruling of a plea in abatement, a dilatory plea, and regularly should not have been brought up until

after trial upon the merits. R. S., c. 77, § 52. But, inasmuch as the defendant did not choose to accept the privilege of pleading over that was accorded him, he thereby waived all such right and the decision here must be final. *Furbish* v. *Robertson*, 67 Maine, 35.

It is common learning that pleas in abatement to the jurisdiction must be pleaded in person and not by attorney. However, the gravamen of this plea appears upon the face of the writ, and therefore it may be treated as a motion and the point it makes decided upon the merits.

Cole v. *Hayes*, 78 Maine, 539, is directly in point. There the plaintiff resided in Oxford county, the defendant in Piscataquis. The action was assumpsit upon a promissory note for $12 and interest. The ad damnum was above $20. The judgment is that the court had jurisdiction. The court says: "It appears to be well settled that in all actions sounding in damages as assumpsit and tort, the jurisdiction depends upon the ad damnum which is the amount of damages demanded." We cannot distinguish this case from that one. Here, the demand is $12.20. There, it was $12. Here, the ad damnum is $50. There, it was above $20. Here, it is unnecessarily large. There, it may have been. It would be impracticable to fix a reasonable limit. Quarter costs apply in that case, here not. It is a matter that the legislature may regulate. It is impracticable for the court to attempt it.

Exceptions overruled. Defendant defaulted.

THE BIDDLE AND SMART COMPANY

vs.

ROBERT T. BURNHAM, AND QUEEN INSURANCE CO., AND NEW HAMPSHIRE CO., Trustees,

ASBURY C. STILPHEN, Claimant.

Kennebec. Opinion June 8, 1898.

Estoppel. Judgment.

For a judgment in one suit to operate as a bar in another, the estoppel must be mutual.

One party to a suit will not be estopped by a judgment in a former suit unless the other party would also have been estopped by the same judgment if it had been adverse to him.

In a former action, the judgment in which is relied upon by the plaintiff in this suit as an estoppel, it appeared that the principal defendant held an insurance policy against fire in each of the two insurance companies summoned as trustees; that the property insured had been destroyed by fire, and that the principal defendant's claim under each policy had been assigned absolutely to the claimant. This court held in that case that the assignments to the claimant were fraudulent and void as to the general creditors of the principal defendant, and ordered the trustees charged for the full amounts in their hands, to the extent of the plaintiff's claim. The issue upon the validity of the assignments was the same in the former case as in this, but the present plaintiff and the plaintiff in the former suit are wholly independent and separate creditors of the principal defendant, who is the same in both cases.

Held; that the claimant to the funds in the trustees' hands is not estopped by the judgment in the former suit.

Atkinson v. *White*, 60 Maine, 396, distinguished.

ON EXCEPTIONS BY CLAIMANT.

This was an action brought by the plaintiffs, the Biddle & Smart Co., against Robert T. Burnham the principal defendant, and the Queen Insurance Company and the New Hampshire Insurance Company as trustees. A. C. Stilphen became a party to the suit as a claimant of the funds in the hands of the insurance companies by virtue of assignments from said Burnham.

Previous to the trial of this suit a third party, one Dennett, had brought suit against the said Robert T. Burnham and the said Queen Insurance Company and the said New Hampshire Insurance Company, trustees; and the said A. C. Stilphen claimed the funds held by the said trustees by virtue of the same assignments as those in this suit. Judgment in the Dennett case was for the plaintiff, and it was held by the court that the assignments from Burnham to Stilphen were illegal and fraudulent as against the general creditors of Burnham.

The plaintiffs in this case at the trial claimed that the validity of the assignments above mentioned was res adjudicata and was so to be treated here by force of the judgment in the Dennett case. This claim of the plaintiffs was sustained by the presiding justice, who ruled that the validity of the assignments was res adjudicata and that the claimant could not be heard further thereon; that said assignments, having been adjudged void as against creditors in a suit brought by one creditor, said Dennett, were to be treated in this proceeding as having already been adjudged void as against the present plaintiff, another creditor, so long as the judgment in the action, *Dennett* v. *Burnham and Trustees*, was unreversed and in full force; and upon this ground without further hearing ordered the trustees to be charged.

Upon exception to this ruling by the claimant the case came before the law court.

A. M. Spear, for plaintiff.

It is admitted that the issue is the same as to the validity of the assignment as in *Dennett* v. *Burnham and Trustees*, the case pleaded in bar.

This admission answers the claimant's case, under R. S., c. 32, § 32, which says: — "if he, (the claimant) appears, he may be admitted a party to the suit so far as respects his title to the goods, effects or credits" in question.

When this issue has once been settled, the career of the claimant in court is ended. He has nothing to do with anything else or anybody else. His case is settled and that is enough for him. It is no part of his duty or right to look out for other parties, and

when he undertakes to do so, as in this case, he is entirely outside the province of the statute. He has no right, under the statute, to except to the finding of the court under his admission that, so far as he was concerned, the issue as to his title has been decided; for his only standing in court was to decide his title, and the moment he admits that to be decided he is not in court. He has no right to protect, no claim to present, no issue to decide.

If the decision in the prior case, after his admission, did not remove the claimant from this case, yet so far as his title under the statute is concerned, the parties in the suit at bar are identical with those in the case pleaded in bar.

Counsel cited: (Res adjudicata) *Glass* v. *Nichols*, 35 Maine, 328; *Lynch* v. *Swanton*, 53 Maine, 100; *Sturtevant* v. *Randall*, Ib. 149; *Walker* v. *Chase*, Ib. 258; *Bunker* v. *Tufts*, 57 Maine, 418; (Estoppels need not be mutual) *Atkinson* v. *White*, 60 Maine, 396; *Hill* v. *Morse*, 61 Maine, 541; (Parties need not be same) *Emery* v. *Fowler*, 39 Maine, 326; *Thurston* v. *Spratt*, 52 Maine, 202.

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

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

WISWELL, J. The only question raised by the exceptions is whether or not the claimant to the funds in the trustees' hands is estopped by a judgment against him in a previous suit, in which the defendant, the trustees and the claimant were the same as here, but in which the plaintiff was a different person, in no way connected with the plaintiff in the present suit.

In the former action, it appeared that the principal defendant held an insurance policy against fire in each of the two insurance companies summoned as trustees; that the property insured had been destroyed by fire, and that the principal defendant's claim under each policy had been assigned absolutely to the claimant. This court held in that case, that the assignments to the claimant were fraudulent and void as to the general creditors of the princi-

pal defendant, and ordered the trustees charged for the full amounts in their hands, to the extent of the plaintiff's claim.

It is admitted in the present case that the issue upon the validity of the assignments was the same in the former case as in this, and, upon the other hand, that the present plaintiff and the plaintiff in the former case are wholly independent and separate creditors of Burnham, the principal defendant in each case.

Here, then, is identity of the issue involved and of the person claimed to be estopped by the former judgment, but no identity of the plaintiff in the two actions.

It has universally been said by text writers and very frequently decided by the courts, that for a judgment in one suit to operate as a bar in another suit, the estoppel must be mutual; that is, that one party to a suit will not be estopped by a judgment unless the other party would have been estopped by the same judgment if it had been adverse to him. The operation of estoppels must be mutual. Both the litigants must be alike concluded, or the proceedings can not be set up as conclusive upon either. Freeman on Judgments, § 159; Black on Judgments, § 548.

It is a general rule that estoppels by judgments must be mutual, that a party can not claim the benefit of a judgment favorable to him unless he would be bound by a judgment in the same matter if adverse to him. *Moore* v. *City of Albany*, 98 N. Y. 396.

Estoppels must be reciprocal, and bind both parties. They operate only on parties and privies in blood or estate and can be used neither by nor against strangers. He that shall not be concluded by the record or other matter, shall not conclude another by it. *Alexander* v. *Walter*, 8 Gill, 247.

A judgment in the case of a suit by other plaintiffs against the same defendants, is not a matter of estoppel on the principle of res judicata, in a subsequent suit by different plaintiffs against the same defendants, even as to the same general subject matters. *McGill* v. *Wallace*, 22 Mo. App. 675. Many other cases to the same effect might be cited.

This case presents a good illustration of the justice and equity of the rule. The issue is, whether the assignments of funds in the

trustees' hands are void as to the principal defendant's creditors. Suppose the court had decided in the former case that the assignments were valid, this result would not be binding upon any other creditor, and in however many different cases the decisions and judgments of the court might be favorable to the claimant, the assignments would still be open to attack by as many other separate and independent creditors as chose to make the attempt.

In other words, if the rule were otherwise, a decision favorable to the claimant in any case would only be decisive of that case, while an adverse decision would operate as an estoppel against him in suits by any number of other creditors who had risked nothing in the determination of the previous cases. As was said by the court in *Shulze's Appeal*, 1 Pa. St. 251, a case very similar to this in principle: "His position would have been unequal and disastrous, if a verdict in his favor would have given him no more than a single point, while a verdict against him would have lost him the game."

It is certainly a most salutary principle that where the parties to the two litigations are the same, and the issue necessarily involved is the same in each, a judgment obtained in the first suit shall operate as an estoppel in the second, but we believe that this rule should be limited to those cases in which both parties to the suit were parties or privies to the previous litigation. Unless the estoppel is reciprocal, the party against whom judgment was rendered in the former suit ought to have an opportunity, to produce other and further evidence in support of his contention if he can.

But in opposition to this rule, requiring estoppels by judgment to be mutual, the counsel for the plaintiff very strongly relies upon the case in our own state of *Atkinson* v. *White*, 60 Maine, 396, from the opinion in which we quote: "But if we hold that the old principle, that estoppels must be mutual, is applicable to this case, ought we to be bound by it any longer? That law was adopted when parties could not be witnesses, and from a very tender care of suitors, lest by possibility injustice might be done. For it is said, and this appears to be the only reason on which the law is founded, that if the adverse party was not also a party to

the judgment offered in evidence, it may have been obtained upon his own testimony; in which case, to allow him to derive a benefit from it would be unjust. Since the statute, making parties and all interested persons witnesses, this foundation has been taken away. No danger of injustice from that source now exists; and the reason of the law having ceased, why should the law be retained?"

In that case the issue was as to the ownership of certain logs. The plaintiff first sued the vendee of the defendants in the second suit, and after being defeated in that action, sued the vendors who had sold to the defendant in the first suit with a warranty of title. There was such a privity of estate between the vendors, the defendants in the second suit, and the vendee, the first defendant, that there was certainly much justice in holding that the judgment against the plaintiff in the former suit should operate as an estoppel against him in the second.

And we do not think it by any means clear that the case of *Atkinson* v. *White* was decided upon the ground that estoppels by judgment need not be mutual, for it is said in the opinion of the court: "But is it quite clear that the defendants in this suit were not parties to the former, so far as to make the estoppel mutual? They were parties in interest, and as such had a right to assume the defense of that, and be heard therein. Besides, the nominal defendant in that had a legal right to notify them of its pendency, and in either case they would be bound by the judgment, or, if Conner chose to defend the suit against him, it was for the benefit of these defendants, and we now find them adopting that defense, whether their own or Conner's, and attempting to avail themselves of it in the defense of this suit. It is true that the case does not find that they actually assumed that defense, nor does it find that they did not; while, as a matter of inference, all the facts lead to the conclusion that they did."

We think, therefore, that the case of *Atkinson* v. *White* must be distinguished from the one now under consideration, and we can not regard it as an authority for the contention that estoppels need not be mutual under circumstances similar to those involved in this case. We do not find that the suggestion of the court in that case

has ever been adopted, here or elsewhere, and it seems to us that the rule requiring mutuality is too well established by authority and rests upon too substantial reasons, to be lightly set aside.

We are, therefore, of the opinion that the plaintiff in this case can not rely upon the judgment in the former case as an estoppel upon the claimant.

Exceptions sustained.

ALBERT N. WATSON

vs.

PORTLAND & CAPE ELIZABETH RAILWAY COMPANY.

Cumberland. Opinion June 13, 1898.

Street Railway. Passenger. Contributory Negligence.

It cannot be said, as a matter of law, that a person who sustains injury while riding upon the platform of an electric street car, is, merely from that fact, guilty of contributory negligence which will prevent his recovery in an action against the carrier.

But a passenger who rides on the platform of a car necessarily takes upon himself the duty of looking out for and protecting himself against the usual and obvious perils attendant upon his position, such as, for instance, the danger of being thrown from the platform by the jolting or swaying of the car.

It is considered by the court that the evidence in this case does not so clearly show contributory negligence upon the part of the plaintiff as to authorize the withdrawal of this question from the determination of the jury; and that the case comes within the general rule that the question of negligence is ordinarily one for the jury, and not within the exception that when the facts are undisputed and are susceptible of but one conclusion, it is the duty of the court to take the case from the jury.

ON EXCEPTIONS BY PLAINTIFF.

This was a suit for injuries sustained by the plaintiff who was thrown from the platform of the defendant's car at Knightville, June 16, 1896, by reason of the car on which he was riding being carelessly run, as he alleged, upon an open switch leading from the main line to the car-barn at a rapid rate, the angle of the switch

being fifty degrees. The jury returned a verdict for the plaintiff, being ordered to do so by the court.

The plaintiff's counsel requested the court to give the following instructions; but the court declined to do so except as appears in the charge given below:—

(1.) Standing on the front platform of a car, even if there is standing room inside, is not of itself conclusive evidence that a person injured by the negligence of the persons managing the car was not in the exercise of due care.

(2.) That calling for and receiving fare from persons standing on the front and rear platform of a car, authorizes the jury to find that those so riding had been invited by those having charge of the car to ride in that place, and that implied assurance had been given by them that that was a suitable and safe place for them to ride.

(3.) That where negligence on the part of the plaintiff is connected with the cause of injury, the question to be determined is, whether the defendant by the exercise of ordinary care and skill might have avoided the injury. If he could have done so, the negligence of the plaintiff cannot be set up as an answer to the action.

(4.) That if the running of the car upon the switch was the direct cause of the accident and the running on to the switch could have been prevented by proper care and due diligence on the part of defendant's agents, if the other evidence in the case warrants it, the jury would be authorized to find for the plaintiff.

(Charge to the jury.)

"This action, like the action which was first tried before you this term, is based on the alleged negligence of the servants of the defendant railroad company. I have had occasion to instruct you heretofore, that to entitle the plaintiff in an action like this to to recover, the burden is upon him to prove not only the negligence of the railroad company, or of its servants, but that he himself was in the exercise of due care; or, in other words, that his own want of due care did not contribute to produce the injury.

"The question of contributory negligence, as it is called, is ordinarily a question of fact for the jury upon the evidence in the case; but there are a few cases, where the evidence is of such a character, that there is really no dispute about the facts, and it becomes a question of law for the court as to whether or not the plaintiff was in the exercise of due care.

"It is settled law in this state, that the riding upon the platform of a passenger car upon a railroad is such negligence, on the part of the passenger, as will bar his recovery for injuries sustained by being thrown from the platform in rounding a curve.

"It is settled as a legal question, that one who rides upon the platform of a car, and is injured by being thrown from it as the car rounds a curve, is guilty of contributory negligence.

"Now, giving the evidence in this case the most favorable view possible for the plaintiff, even taking his own statement of how the accident occurred, you perceive that there is no possibility, such being the law, of your rightfully returning a verdict for the plaintiff. You could not do it without violating a rule of law; because, taking the most favorable view possible of the evidence in the case, there is no dispute about the fact, that at the time of the plaintiff's injury he was voluntarily riding upon the platform of the car. The car was crowded undoubtedly; but there was standing room inside, according to the weight of the evidence. I do not understand that there is any dispute about it. And if he voluntarily took his position upon the platform, and was injured by being thrown off while the car was swinging around a curve,—the fact that he was on the platform bars his right of recovery. There are so many accidents of this kind, caused by people persistently riding on the platform of cars, a place of known danger, that the law is now settled, that if they choose to ride there, they must ride at their own risk. Accidents might occur wherein the fact that a passenger was riding on the platform of a car would be no defense. For instance, if a rotten bridge should break down, and all on board the car should go down into the river below, the fact that a man was on the platform would not have anything to do with the accident; the rotten bridge would be the sole cause. But if a passen-

ger is riding there, and is thrown off as the car rounds a curve,—in such cases his being there is a bar to his recovery.

"Such being the law, I am requested by the learned counsel for the defendants to instruct you, taking the most favorable view of the evidence for the plaintiff, he is not entitled to a verdict in his favor, and I so instruct you. Therefore, Mr. Foreman, you will have nothing to do but to sign a verdict pro forma for the defendants of not guilty."

To the refusals to give the requested instructions the plaintiff was allowed exceptions; he also took exceptions to the order of the court to return a verdict for the defendant and the following portions of the charge:—

"That the question of contributory negligence, as it is called, is ordinarily a question of fact for the jury upon the evidence in the case. That there was really no dispute about the facts and it became a question of law for the court as to whether or not the plaintiff was in the exercise of due care." . . . .

"That the riding upon the platform of a passenger car upon the railroad is such negligence upon the part of the passenger as would bar his recovery for injury sustained by being thrown from the platform in rounding a curve." . . . .

"That it is settled as a question of law that one who rides upon the platform of a car and is injured by being thrown from it as the car rounds a curve is guilty of contributory negligence." . . . .

"That giving the evidence in this case the most favorable view possible for the plaintiff, even taking his own statement of how the accident occurred, you perceive that there is no possibility, such being the law, of the jury rightfully returning a verdict for the plaintiff; they could not do it without violating a rule of law, because taking the most favorable view possible of the evidence in the case there is, there is no dispute about the fact that at the time the plaintiff was injured he was voluntarily riding upon the platform of a car and there was standing room inside, according to the weight of evidence." . . . .

"That the fact that plaintiff was on the platform bars his right of recovery. That if plaintiff voluntarily chose to ride on the platform he must ride at his own risk." . . . .

"That taking the most favorable view of the evidence for the plaintiff he is not entitled to a verdict in his favor." . . . .

"You will have nothing to do but sign a verdict pro forma for the defendant of not guilty."

H. and W. J. Knowlton; and L. M. Webb, for plaintiff.

Clarence Hale, for defendant.

The plaintiff cannot recover because he was voluntarily riding upon the platform of a car while there was standing room inside. *Goodwin* v. *B. & M. R.*, 84 Maine, p. 211; *Worthington* v. *Cent. Vt. R. R. Co.*, 64 Vt. 107; *Gavett* v. *M. & L. R. R. Co.*, 16 Gray, 502; *Hickey* v. *B. & L. R.*, 14 Allen, p. 429; *Torrey* v. *B. & A. R. R. Co.*, 147 Mass. p. 412; *Quinn* v. *Ill. Cent. R. R.*, 51 Ill. 495; Woods, Railroads, § 303, and cases; *Reber* v. *Pittsburg, etc., Co.*, 179 Penn. St. p. 339; *Akin* v. *Frankford R. R.*, 142 Penn. St. p. 47; *Francisco* v. *Troy, etc., R. R. Co.*, 78 Hunter, 13; *Clark* v. *8th Ave. R. R. Co.*, 36 N. Y. 138; *Wilmot* v. *Corrigan Consol. St. Ry. Co.*, 106 Mo. 135; Vol. 25 Albany L. J. p. 84; Booth, St. Rys. ed. 1892, § 338; *Chase* v. *Me. Cent. R. R. Co.*, 77 Maine, 62; *Smith* v. *Same*, 87 Maine, 339. In *Mann* v. *Phila. Trac. Co.* 175 Pa. St. 122, the passenger was invited or permitted to stand on platform.

One who rides upon the front platform of an electric passenger car is guilty of contributory negligence. Cases, supra.

Facts being undisputed it is a question of law whether or not the plaintiff was in the exercise of due care. *Elwell* v. *Hacker*, 86 Maine, 416; *Romeo* v. *B. & M. R. R.*, 87 Maine, 540; *Wormell* v. *Me. Cent. R. R. Co.*, 79 Maine, 397.

Second requested instruction:— *Clark* v. *8th Ave. R. R. Co.*, 36 N. Y. 138.

In *Olivier* v. *Louisville, etc., R. R. Co.*, 43 La. Ann. 805, the court says: "A party voluntarily boarding a crowded car and taking his place on the platform without complaint or effort to obtain a seat cannot allege the over-crowding of the train as negligence." Now, in the case at bar, the plaintiff has not shown that he called the attention of the conductor to the fact that he had not a seat, or that he endeavored to obtain a seat, or even looked to see

whether there was a seat, or not. In fact, the evidence shows affirmatively otherwise, namely, that as the car proceeded a little later there was plenty of room inside the car which the plaintiff could have occupied.

Third requested instruction: Shear. & Red., Negl., § 35, "The injured party cannot recover when his own or his agent's ordinary negligence or wilful wrong approximately contributed to produce the injury of which he complains, so that but for his concurring or co-operating fault the injury would not have happened to him." In *Woodman* v. *Pitman*, 79 Maine, 456, the Chief Justice clearly states the point and quotes from the London Quarterly Review: "The party who last has a clear opportunity of avoiding an accident, notwithstanding the negligence of his opponents, is considered solely responsible for it."

Fourth requested instruction: Counsel cited, *Railroad Company* v. *Norton*, 24 Penn. St. 465, "The law has no scales to determine whose wrongdoing weighed most in the compound that occasioned the mischief." In fact, a class of cases has gone to the extent of holding that where the negligence of a passenger is an approximate cause of his injury, he cannot recover unless the injury is wilfully inflicted. *Railroad* v. *Swift*, 26 Ind., 459; *Railroad Co.* v. *Rutherford*, 29 Ind., 82.

The plaintiff was not a passenger: Booth, St. Rys., § 326; *Hoar* v. *Me. Cent. R. R. Co.*, 70 Maine, 73; *Pitcher* v. *Peoples St. Ry. Co.*, 174 Penn. St. 402.

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

WISWELL, J. The plaintiff, while riding upon the front platform of one of the defendant's electric street cars, was thrown from the car by its sudden jolting, and, striking the ground with considerable violence, sustained more or less injury.

It is claimed that this was caused by the negligence of the motor-man in allowing his car to come towards a switch with such speed that he was unable to see whether it was properly set or not,

and, the switch being open, that the car was propelled so rapidly onto a siding as to cause violent jarring and jolting.

After the evidence upon both sides had been closed the presiding justice directed a verdict for the defendant. To which direction exception is taken. It becomes necessary therefore to decide, whether upon all the evidence, regarding it in the most favorable aspect for the plaintiff that it is susceptible of, the jury would have been justified in returning a verdict for the plaintiff.

Upon the question of the alleged negligence of the defendant, it is only necessary to say that in our opinion there was sufficient evidence to submit this question to the jury. Was there also sufficient evidence upon the question of the plaintiff's own care to sustain the burden of proof resting upon him in that respect?

The question of negligence is ordinarily one for the jury. It is always so, not only when the facts are in dispute but also when the facts are undisputed but intelligent and fair-minded men may reasonably differ as to the conclusions and inferences to be drawn from such facts. Because, in passing upon this question, a jury must not only decide what was in fact done or left undone but also as to what should have been done in the situation. But this is not true when the facts are not in dispute and when the undisputed facts are susceptible of but one conclusion. In such cases it is not only proper but it is the duty of the court to take the case from the jury. *Romeo* v. *Boston & Maine Railroad*, 87 Maine, 540.

In this case the presiding justice in directing a verdict for the defendant gave certain reasons why, in his opinion, a verdict for the plaintiff would not be warranted and could not be sustained, saying, among other things, "that the riding upon the platform of a passenger car upon the railroad is such negligence upon the part of the passenger as would bar his recovery for injury sustained by being thrown from the platform in rounding a curve." And again, "it is settled as a question of law that one who rides upon the platform of a car and is injured by being thrown from it as the car rounds a curve is guilty of contributory negligence."

In our opinion this was not a correct statement of law when applied to a street railroad car, whether propelled by horses, elec-

tricity or otherwise. Riding upon the platforms of such cars is too much encouraged by transportation companies and too much indulged in by the public, for the court to say, as a matter of law, that the mere riding upon the platform of such a car is conclusive evidence of negligence, or is negligence per se, or is negligence in law. It depends upon too many other circumstances and conditions for a court to lay down any hard and fast rule in regard to it; but it is a fact which should ordinarily be submitted to the jury in connection with all of the other circumstances of the case.

That this is true with respect to horse street cars is not questioned, and has been frequently decided. *Meesel* v. *Lynn & Boston Railroad Co.*, 8 Allen, 234; *Maguire* v. *Middlesex Railroad Co.*, 115 Mass. 239; *Fleck* v. *Union Railway Co.*, 134 Mass. 480; *Germantown Passenger Railway Co.* v. *Walling*, 97 Penn. St. 55; *Vail* v. *Broadway Railroad Co.*, 147 N. Y. 377; *Nolan* v. *Brooklyn City & Newton Railroad Co.*, 87 N. Y. 63; (41 Am. Rep. 345); *City Railway Co.* v. *Lee*, 50 N. J. Law, 435.

But it is claimed upon the part of the defense, that while this is true in the case of a horse car, as to electric cars the rule laid down in this state and generally with respect to trains of cars upon steam railroads should apply. *Goodwin* v. *Boston & Maine Railroad*, 84 Maine, 203. We do not think so. An electric street car is still a street car, and in our opinion the conditions, especially with respect to riding upon platforms, are more similar to those of the horse street car than those of a railroad train upon a steam railroad.

It is a notorious fact that street railroad companies, whose cars are propelled by electricity, constantly accept and invite passengers to ride upon the platforms of their cars when there is no room inside, and that persons having occasion to use such cars are frequently glad for even a foothold upon the platform, step or footboard. Neither carrier nor public have regarded the street car platform as a known place of danger, and we are not disposed to say, as a matter of law, that a passenger who rides upon the platform of an electric street car is thereby guilty of such contributory negligence as to prevent his recovery for injuries sustained through

the fault of an employee of the transportation company. We hold rather that it is a circumstance to be submitted to and decided by the jury.

Such is the conclusion that many of the courts of this country have arrived at. *Elliot* v. *Newport Street Railway Co.*, 18 R. I. 707, (23 L. R. A. 208); *Pray* v. *Omaha St. Railway Co.*, 44 Neb. 167; *Wilde* v. *Lynn & Boston R. R. Co.*, 163 Mass. 533; *Reber* v. *Pittsburg & B. Traction Co.*, 179 Penn. St. 339.

It is further urged by counsel for defendant that the verdict was properly ordered, even if the reasons given therefor by the presiding justice cannot be sustained: that if the court should hold that a person cannot be said, as a matter of law, to be guilty of negligence from the mere fact that he was standing upon the platform of an electric street car in motion, that this plaintiff was nevertheless negligent in not taking such precautions as the obvious and usual dangers of his position required; and that it is immaterial that the reasons given by the presiding justice in ordering a verdict were erroneous, if upon the facts the verdict was properly ordered.

There is no question about the correctness of these propositions of law. A passenger who rides on the platform of a car necessarily takes upon himself the duty of looking out for and protecting himself against the usual and obvious perils attendant upon his position, such as, for instance, the danger of being thrown from the platform by the jolting or swaying of the car. *Elliot* v. *Newport Railway Co.*, supra.

But the court is of the opinion that the evidence in this case does not sustain the defendant's contention, that is, in the opinion of the court, the evidence does not so clearly show contributory negligence upon the part of the plaintiff as to authorize the withdrawal of this question from the determination of the jury. The case comes within the general rule, that the question of negligence is ordinarily one for the jury and not within the exception, that when the facts are undisputed and are susceptible of but one conclusion it is the duty of the court to take the case from the jury. The entry will therefore be,

Exceptions sustained.

CLARENCE E. LEIGHTON, in Equity *vs.* ROSCOE G. LEIGHTON.

Somerset. Opinion June 14, 1898.

Equity. Appeal. Trust ex maleficio. Deed.

The parties are brothers. Their father conveyed all his real estate to the complainant, an unmarried son, taking back a life-lease secured by mortgage. There was also a contemporaneous oral agreement that such son should contribute towards the support of his aged parents during their natural lives; the expectation being that the son and the parents would live together upon their earnings and the income of the property. The son's marriage afterwards prevented their longer living together as a common family. At a later date, there being two mortgages on the estate, the respondent received an absolute deed of the property from the complainant, under a verbal agreement that the former should hold the title solely as security for the money he might advance for paying off the mortgages, promising to send to the latter a written agreement to that effect when he got home, being then away from his home, but never keeping such promise. Having sold one parcel of the estate for enough to pay off the mortgages and have eight hundred dollars of money besides, he assumed the position that he was the absolute owner of the remaining land and the money, which he should apply to the future support of the parents as he pleased; denying that the complainant had or could have any legal or equitable right in the present or future thereto.

On these, and other less important, facts it is by the court *held*, that the respondent be required to release all the remaining real estate, and pay over the money in his hands, to a trustee, to be appointed by the court, who is to be empowered to hold the land and money and administer the same, in the manner indicated in the opinion of the court, for the use and benefit of the parents as long as they may live, and to transfer any balance remaining unconsumed at their decease to the complainant. The court observes that, now as the control of the estate is judicially submitted to its hands, it becomes its duty to substitute for their benefit new equities for equities that are lost; equal but not entirely the same.

While it is a general rule of equity procedure that the decision of a case upon the facts by a single justice should not be overruled unless the appellate court is clearly satisfied of its incorrectness, especially when the credibility of witnesses whom such justice has seen and heard is an issue, still a hurried examination of a complicated case below may sometimes be less satisfactory than a deliberate re-examination of the case afterwards with the aid of a printed record.

IN EQUITY, ON APPEAL BY PLAINTIFF.

This was an equity appeal from the decision of a single justice sitting below. The bill sought to enforce a constructive trust upon a deed absolute upon its face. The plaintiff and defendant are younger and older brothers, the plaintiff being forty years of age and the defendant fifty.

The plaintiff's claim briefly stated is this: that on the eleventh day of April, 1895, he was the owner of real estate in Pittsfield worth $5500, upon which there were two mortgages then due amounting to about $1500, and which also was subject to a life-lease running to his father and mother also secured by a mortgage. The plaintiff, on that day, deeded to the defendant, his elder brother, all this real estate upon his promise to give the plaintiff a writing that he would take care of the mortgages, and give the plaintiff all the time which he needed to pay them in; or if the defendant should sell any of the land to the town, that he would pay off the mortgages, reconvey the balance of the unsold land, and pay the surplus money to the plaintiff.

The plaintiff signed and delivered the deed to his brother, the defendant, who promised to have his attorney draw up a writing which he would bring to the plaintiff: but when the plaintiff asked him for the writing, the defendant said that it could not be done, that it was all right, and the plaintiff should have the property back. The defendant never gave back the writing.

The case was submitted upon bill, answer and proofs. The defendant denied that he ever promised to give back such a writing; and charged that the plaintiff was under obligations to support his father and mother; and that about a year and a half before the deed was given, the plaintiff was married and took his wife home to live with his parents; that the wife treated her mother-in-law in such a way that they could not live together comfortably and happy, and the plaintiff thereupon voluntarily gave all of this property to his brother in order to get out of the trouble that existed between his wife and mother. The defendant admitted that he had sold the farm to the town for $2300, and has $800 after paying off the mortgages; also that the defendant

promised to take care of and provide for the father and mother as long as they might live.

Forrest Goodwin, for plaintiff.

J. H. and J. H. Drummond, Jr.; *and E. N. Merrill* for defendant.

SITTING: PETERS, C. J., HASKELL, WISWELL, STROUT, SAVAGE, FOGLER, JJ.

PETERS, C. J. The parties to this bill are brothers, being sons of Ira and Eunice Leighton who for many years have lived in Pittsfield in this state. There were eight sons in the family, seven of them now living, the complainant being the youngest. To seven of the sons the father gave their time after arriving respectively to the age of eighteen, and to the complainant, whom he called, as he says, his home boy, he intended to give what was left of his estate, when he and his wife should have passed away. The complainant remained at home until very lately and is now (1898) forty years old. After coming of age, he had the principal care of his father's farm upon which he and his father and mother lived together for many years. The father testifies that he has not himself done a full day's work for twenty years, being afflicted with asthma, but his wife thinks his disability on that account has not prevented his doing a fair day's work for more than twelve years. The father is now about eighty-four and the mother about eighty-one years old. The first act by the father in pursuance of his intention to provide an inheritance for the complainant was the making of a will in his favor, the precise terms of which are not known to us, as the instrument seems not to have been printed in the report. But, however that may be, the father, July 29, 1890, deeded all his real estate to his son, taking back a lease to continue for the lifetime of himself and wife and the survivor of them. The real estate consisted of a dwelling-house in Pittsfield fitted for two tenements, one above and one below, a farm of about twenty acres, situated about a half-mile out of the village, with a house on it, and a pasture lot of about twenty acres more in the neighborhood of the

farm; the three pieces being worth somewhere between five and six thousand dollars, subject to mortgages thereon amounting to about fifteen hundred dollars. This conveyance was not a sudden or rash transaction, for it had been previously talked of and discussed in the family, nor could it have been induced by undue pressure, as the father was then evidently a man of more will and intelligence than was the son.

The old couple and the son constituted the family after July 1890 as before, without any change until December 1893, when the son got married and brought his wife home, all living in the village-house together, first as one family and afterwards as two. After a while the wife and mother had some disagreement between themselves, and the consequences which it occasioned forms a feature in the after family history which will be noticed hereafter in another connection.

In the fall of 1894 and early in 1895, the complainant began to feel an anxiety about the mortgages subsisting on the property, and particularly so as a $500 note was coming due at the bank in the next April, payment of which could not be very well postponed. This condition of things led him to consult a good deal about his affairs with the respondent. There had been an expectation in the family that the town would sooner or later buy the farm-lot, as it soon afterwards did for an extension of the limits of its cemetery, but that prospect was not at that time promising enough to relieve present embarrassment. So the complainant appealed to his brother for assistance in taking up the $500 note, feeling an assurance he would himself have no difficulty in managing the balance of the indebtedness. And the two brothers had a number of consultations together on the subject, the result of which was that by deed dated April 11, and acknowledged April 30, 1895, the complainant, his wife joining in the deed to relinquish her right of dower, conveyed to the respondent all of the real estate thus received from his father. Sometime afterwards, the case not showing when, the respondent sold the farm to the town for the sum of $2300, and with it paid off all the incumbrances on the property, having $800.00 over, which he says he deposited

in some Portland savings bank in his own name, to be used as occasion requires for his father's and mother's benefit.

Here we strike the essential point in the case, and the natural inquiry is what was the purpose of the conveyance from the complainant to his brother? What motive or consideration, legal or moral, induced it? The complainant swears, as he alleges in the bill, that the purpose was for securing his brother for such advances as he might make for taking up such mortgage indebtedness, and further for the better accomplishment of a sale of the farm to the town if that could be done; that there was no intention to make any absolute gift of the property to any one for any purpose; that the expectation had been that he was to secure his brother by a mortgage and not by a deed; that the brother was to send a mortgage to him to be signed; that when a deed was sent him instead of a mortgage, he and his wife were unwilling to execute it, and retained the instrument until the respondent came to town, his residence being in Portland; that when the complainant and wife afterwards expressed to him their objection to giving a deed, and their willingness to substitute a mortgage instead, he represented that an additional mortgage on the premises would hurt the anticipated sale to the town, and said that an agreement back would be preferable because then no other persons would know what was going on, and that he would get his lawyer in Portland to draft one which he would send to them; that relying on these and other similar representations the complainant and his wife were induced thereby to execute the deed; and that the respondent afterwards put him off from time to time with different excuses for not sending the expected document until there finally came a refusal to do anything about the matter, the result being that he is to-day deprived of the possession of all the property and all title thereto with nothing to show for it.

The respondent, wholly denying the charges made against him by his brother, sets up that the deed was to enable him to provide a support for his father and mother during their lives; that the complainant had failed in carrying out the designs entertained by his father and himself when the conveyance was made to him in

1890; that on that account and because of the existence of an estrangement between his wife and his mother he willingly surrendered all the property to him for the benefit of the father and mother, even voluntarily seeking the opportunity to do so; that he (respondent) made no promise of any kind whatever to restore any part of the property to the complainant, and that there was no reason for expecting he would do so; and that there was nothing done or said in the transaction in question in consequence of which the complainant has any right to believe that he has or can have any present right in the remaining real estate or the $800.

The plaintiff and his wife testify positively to the asseverations made by the plaintiff, and their testimony is not only natural and consistent, sustaining itself by its own coherent strength, but is vindicated by very important circumstances, while we feel compelled to regard the prevaricating testimony of the respondent as not supported on this essential point by any other evidence, and as totally insufficient to withstand the evidence produced against it.

The version of the defense is on its face an improbable one, that the complainant would so readily renounce his title in such a valuable property for such trivial cause, without any expectation of its return to him in some form or condition, in whole or part, at some time or other. The complainant expresses his own interpretation of the transaction by his sending seasonable and frequent letters to and demands upon respondent as soon as his suspicions of an imposition were aroused. Still the respondent produces none of them, though called for. Why did the complainant and wife keep the deed and so long refuse to execute it, if it was understood by them that they were to give up everything and receive nothing? What was there to hesitate about? Is it probable that complainant's wife would have relinquished her dower, had she understood she and her husband were to receive no consideration or advantage present or future for it, but on the contrary were to be deprived absolutely of all they had in the world? The respondent came to Pittsfield, and, as he says, talked with them from a half to three quarters of an hour and they then signed the deed. They say themselves that his explanations and promises were what

then induced them to execute it. He says the trouble between complainant's wife and mother was the inducement. Would not the wife have resented such a proposition on such a ground? Is it at all probable that a word was said on that subject during the time the three were together? He pretends he cannot remember a word said in that interview but he knows that what he did say removed any objection against signing the deed. A strong if not conclusive circumstance showing that the complainant's version is true and that of the respondent untrue is evidenced by the fact that, after his deed to his brother, the complainant continued to live in the house with his parents, and to carry on the farm precisely as before, supplying the old couple as before with, as he and his wife say, milk daily, apples occasionally, and eggs, butter and vegetables frequently. The respondent seeing the force of this circumstance attempts to explain that his brother was on the farm by an agreement with him or under a permission from him. But this the complainant denies, and evidently the parents did not so understand it, and circumstances contradict it. The next day after the deed was executed the $500 note at bank was taken up and a new note given in payment signed by complainant and respondent and another person. Why was complainant on this note, if he was then without property and worthless, the brother having assumed, as he says, the payment of all the notes, and owning all the property? A still stronger circumstance in refutation of respondent's story is the fact that, when the renewal note was coming due, he wrote complainant to furnish some funds towards its payment. That would be consistent with complainant's position that his brother was to pay the note for him, but inconsistent with the brother's position that he was to pay it on his own account alone. Stoutly denying that he made any such request, and asseverating over and over again that he did not expect any funds from his brother and that there was no reason why he should, he was confronted with this extract from his letter to his brother dated October 17, 1895: "Please let me know when that note is due at the bank try and have sunthing to pay on it when it is due." Space can be afforded here for only a single question and answer

from the further long and damaging examination that ensued: "Q. What did you mean by asking Eugene to have something to pay on that note when it was due?" "A. He was — I let him go down there and have the cows and what he could make but he paid nothing — pay the taxes on it and what — that he might get in debt — that is he should not run me in debt any — and I didn't know but — if he had something toward the taxes I would put it in and pay the note but he wasn't to pay nothing towards the note." He after this admits in his testimony that he had at that time paid no taxes and that there were none to pay and that all taxes had then been paid by the mother out of her own money and not from his.

His denials in some instances are equal to admissions. In his answer to the bill he says the land was sold to the town with the consent of the father and mother and "the acquiescence of the complainant." The word acquiescence is an artful one in this connection, and still there is a lurking confession in it. Why is it of any importance that the complainant acquiesces in the sale of property, if he has no interest? He further answers that "he admits that *after* the property had been conveyed to him the complainant did ask him in relation to the disposition of what might be left after their parents' death, and he told the complainant he would do what is right." He frequently repeats the same idea in his testimony, but the idea fits awkwardly with other statements. He wants it understood that all promises or assurances were made *after* the conveyance, but would it not be more reasonable to believe that, if made at all, they were made before or at the time of the conveyance?

He writes in a letter dated December 17, 1895, in answer to complainant's importuning letters to him asking for the written agreement promised to him: "I shall do by you what is right if you do as you should now Eugene my advice to you is to keep right along and you will come out all right if you do not and mean to make trubble you must take the consequence and no one will be to blame but yourself." On November 24, 1895, he wrote his brother, this among other things: "You need not give aney fear

but what after they (their parents) have passed away but what you will get all that belongs to you if you do right and I know you will." He expresses himself in a similar way when, in speaking of the interview at the time the deed to him was executed, he says: "Something was said when I started to go out. Eugene said something about disposing of the property when father and mother was dead, and I made the answer and said, Eugene, I will do what is right." Repeatedly does the respondent admit that "after" the transaction he said he would do right or something to that effect, but he thinks it important to deny any such prior or contemporaneous promise.

He says at another place in his testimony that the disposal of the estate after the death of his father and mother "was left to my own discretion," rather a feeble expectancy for the complainant to accept as the only consideration for the conveyance of a valuable real estate. How can the complainant depend upon justice being done to him when the respondent has the power to do for him as he pleases, but who threatens consequences upon his head unless he submissively obeys his will as the master of the situation? Is it equitable and just for a court to trust the destinies of the complainant, who is asking its protection, in the hands of his more intelligent and apparently designing brother? And what security too have the aged parents that they will receive protection at his hands when they have no written obligation from their self-constituted guardian, who up to the time of giving his testimony had not contributed for their support, as he felt compelled to say, a single dollar in his lifetime? Nor had he as yet even used any money for that purpose acquired from the sale of land to the town, they having hitherto had other sources of income. What family jealousies might by and by arise should the respondent have an unlimited discretionary power to distribute the estate or retain it to himself in the future as he pleases,—not as his father would, or the complainant could—but as he sees fit? Indications of family differences are already seen on the surface in this controversy.

The complainant says the reason for his urgency to obtain assistance from his brother was because of his apprehension of

being immediately pressed for payment of one of the notes, while the respondent says the urgency was to substitute the respondent in the complainant's place on account of the domestic trouble at home. The following questions and answers illustrate the respondent's pretended view. "Q. Didn't he say when he was going to get the money and ask you to help him out? A. He asked me to help him out in the way of the family trouble. Q. Did he ask you to get the money to pay these notes? A. No, not for that purpose." What necessity was there for raising money unless for the purpose of paying notes? Could the raising of money compose the family differences? At any rate it had no effect upon them, for, as the respondent was forced to admit, and as we have substantially said before, the family relations remained for four to five months precisely the same after as before the deed, both families remaining during that time in the same house as before, and the complainant continuing in the same possession and management of all the property as before. In August following the deed in April the complainant moved from the house in the village to the farm a half a mile away.

It is, indeed, unfortunate that there should have been any family disturbance, and we can see in the testimony no occasion for it, the only explanation being that the two woman-wills did not blend together. The old gentleman and lady have on this account, and probably through other influences, come to prefer that the respondent and not the complainant should own the property. But that is not for them to decide. They speak in affectionate terms of the complainant, and really make no charges against his wife, excepting that, as the old lady expresses it, "she wanted to rule the house," admitting that she was a good housekeeper, of cleanly habits, and a lover of work. The reason she appeared lordly to her was because she wanted to do all the work to the exclusion of work by the mother. Other witnesses testified that she was ladylike, and she certainly appears so as a witness. Each charges that the other was silent and sullen sometimes. The young wife voluntarily did all the house-work, including milking and caring for the milk and selling it. She also for a portion of the time worked out

in a manufacturing shop. It certainly should not be regarded as an offense against the family that the complainant married her.

The defense invokes the rule that the decision of any fact by a judge below should not be overruled by the court above unless the appellate court is clearly convinced of its incorrectness, the burden being on the appealing party to prove the error. Such is the general rule, but it does not necessarily require proof beyond a reasonable doubt. And sometimes circumstances and conditions are to be considered which prevent the rule applying so literally as it otherwise would. A hurried examination of a long and complicated case below may not be so satisfactory as a deliberate re-examination of the case afterwards with the aid of a printed record. Of course, one who sees and hears the witnesses can judge of their credibility better than others can who merely review the printed testimony. We have the impression that the difficulty of formulating a decree upon some middle ground, that would afford protection to the aged couple who are interested in the controversy between the brothers, might have influenced the learned justice in adopting a result not on the whole the most equitable or advisable.

We have been discussing the merits of this controversy as it exists between the direct parties to the bill, but it will very readily be seen that other very important interests are indirectly involved. There are equities belonging to the parents of the parties which cannot be ignored. The old people have a life-lease of the property, and equitably a greater interest than that. It was a part of the understanding between the complainant and his father and mother, when they deeded to him and took a lease back, that they were to enjoy his care and attention and have the benefit of his services towards their support. The complainant admits in his bill that at that time "he entered into an oral agreement with them to contribute to their support during the period of their natural lives;" and the idea undoubtedly was that they were to constitute a common family. By a change of circumstances the old people are deprived of such privileges. And now while the control of the estate is judicially submitted to our hands it becomes our duty to substitute for their benefit new equities for equities that are lost; equal but not

entirely the same. To accomplish such a result, we think the old people should have annually such portion of the interest accruing from the eight hundred dollars of money as may, in addition to any and all other income, be necessary for their support; and, if such interest shall not be sufficient for such purpose, then to have any portion of the principal of the money necessary. And if in the future the money referred to becomes entirely expended, then the old couple and the survivor of them should have a lien on the real estate for the purpose of producing, by sale, lease or mortgage, means sufficient for such support; the scheme being to utilize the property for the economical support of the father and mother during their natural lives, and to carefully preserve any remainder for the complainant. And such was evidently the prime purpose of the original transaction.

This plan can best be carried into effect through the intervention of a trustee, to be appointed by any justice, to which trustee all the real and personal estate shall be conveyed by the respondent, unless such respondent is himself appointed such trustee. The trustee shall give a bond in a reasonable amount to be approved by the judge who fixes the final decree.

Decree below set aside, and a new decree to be entered in accordance with this opinion, with costs for complainant.

CITY OF AUGUSTA *vs.* DAVID P. KIMBALL, and another.

Kennebec. Opinion June 17, 1898.

Taxes. Non-Resident Trustees. R. S., c. 6, § 14, cl. 6. Stat. 1889, c. 175. Pub. Stat. of R. I., c. 42, § 12.

When the estate of a Maine decedent has been fully administered, and has vested in non-resident testamentary trustees, and the property has been removed by them from the state, they cannot be directly taxed in this state for such property, although they have qualified as such trustees in the Maine Probate Court which confirmed their appointment by the decedent, and although the beneficiaries under the trust reside in this state.

Semble: The beneficiaries under such a trust resident in this state can be directly taxed here upon their beneficial interest in the trust estate.

ON AGREED STATEMENT.

The case is stated in the opinion.

W. S. Choate; Thos. Leigh, Jr., city solicitor, for plaintiff.

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

SITTING: PETERS, C. J., EMERY, WISWELL, STROUT, FOGLER, JJ. HASKELL and SAVAGE, JJ., non-concurred.

EMERY, J. By his will probated in Kennebec county Horace Williams, late of Augusta in that county, appointed the defendants executors of the will, and also devised the residuum of his estate to them as trustees for the purposes therein named. Prior to April 1, 1896, the defendants had fully executed the will and had been discharged as executors. They took out letters from that court as trustees under the will to execute two trusts therein created: — (1) to set apart and hold sufficient of the estate to provide annuities for eight different persons, two of whom lived in Augusta, and the others of whom lived without the State; — (2) to hold all the rest of the estate, and the reversion of that portion set apart for annuities, in trust to be divided at a future time among certain descendants of the testator. They qualified as such trustees and filed in the Probate Court a schedule of the property held

under each trust. The property by them held under the first trust, that for annuities, consisted entirely of stocks, bonds and mortgages of corporations and lands without the state. The securities themselves were all kept without the state in Boston, Massachusetts, and were there held in actual possession by the defendant Kimball and under the personal control of both defendants. Neither defendant was a resident of or domiciled in Maine, the defendant Kimball being a resident of Massachusetts, and the defendant Vandewater being a resident of Tennessee.

The tax assessors of Augusta for the year 1896 desired to subject to taxation in Augusta the interest of the two annuitants living in Augusta. They did not assess a tax directly against these annuitants for the annuities payable to them, nor for any sums due them or to come to them under the trusts. They instead undertook to assess directly against the defendants a tax upon the corpus of so much of the estate thus held by them in trust, as was held to provide the annuities for the two Augusta annuitants, which amount the assessors calculated to be sixteen fifty-fifths of the whole property scheduled under that trust.

This suit is for that tax. The plaintiff contends that the Augusta assessors were empowered to make the assessment on the corpus of the estate, and directly upon the defendants, by the statute, R. S., ch. 6, § 14, cl. 6, as amended by c. 175 of Laws of 1889, which is as follows:

"Personal property held in trust by an executor, administrator or trustee, the income of which is to be paid to any other person, shall be assessed to such executor, administrator, or trustee, in the place where the person to whom the income is payable as aforesaid, is an inhabitant. But if the person to whom the income is payable as aforesaid, resides out of the state, such personal property shall be assessed to such executor, administrator, or trustee, in the place where he resides."

The defendants contend that the section cited did not and could not empower the assessors of Augusta to assess any such tax against them, being non-residents and non-domiciliants of the state, upon their property also entirely without the state.

If the defendants' title to the property thus situated had come to them from any other source than a devise to them as trustees under a will made by a resident of Maine and probated in Maine with a confirmation of the trust by a Probate Court in Maine, it would be evident that this state could not by any statute effectually empower the assessors of any town to assess a tax directly against them for this property. Neither they nor the property were within the state or within its jurisdiction or reach. Conceding, for the sake of the argument at least, that the state can tax every person subject to its jurisdiction for all of his property wherever situated,— and can tax persons without its jurisdiction for all their property left by them within its jurisdiction, — yet the taxing power of the state necessarily stops at the state boundary lines. It cannot reach over into any other jurisdiction to seize upon persons or property for purposes of taxation. Apart from the source of their title and authority as trustees, these defendants could not be made in any way amenable to the taxing powers of this state, since neither they nor any of their property were within the state or subject to its jurisdiction. *Railroad* v. *Jackson*, 7 Wall. 262; *Foreign-held Bonds Tax Case*, 15 Wall. 300; *N. Y., L. E. & W. R. R. Co.* v. *Pennsylvania*, 153 U. S. 628; *Graham* v. *St. Joseph*, 67 Mich. 652; *South Nashville St. R. R. Co.* v. *Morrow*, 3 Pickle, 406, 2 L. R. A. 853, (Tenn.); Cooley on Taxation, 15. The statute cited could not affect trustees and property thus situated even though the beneficiaries should reside in this state.

The question, therefore, is whether the circumstances, that these non-resident owners in trust of property without the state derive their title from a devise under a Maine will through confirmation by a Maine probate court, and have agreed to render accounts in that court, bring them or the property fairly and effectually within the purview of the statute.

The plaintiff's theories seem to be,— (1) that although the defendants as individuals and in every other capacity are non-residents, yet as such trustees and in that capacity they have become so far residents of this state that its tax statutes will actually and effectually grasp them; (2) that, although all the articles of the

property devised to them or purchased by them with trust funds are actually without the state and physically beyond its reach, yet the estate which they form is that of the deceased Horace Williams and hence the estate, the entity, (of which the various articles are only component parts,) is under the control of the proper Maine probate court, and thus holds their situs within this state. These are ingenious theories, but they will be found to run against actual facts and conditions.

I. The defendants themselves, the persons who own the property although in trust, none the less and notwithstanding the plaintiff's theory, actually reside without the state with no domicil in the state. They acquire thereby none of the peculiar rights or privileges of a resident of Maine. Should they bring suits in the courts of Maine to enforce against strangers their title to any of this property, they could be required to furnish security for costs as non-residents. They cannot maintain suits concerning the trust property in the Federal Courts in Maine against citizens of other states, but can maintain such suits in those courts (if for the requisite amount) against citizens of Maine. If themselves sued as such trustees in a state court by a citizen of Maine for the requisite amount, they could remove the suit to the proper Federal Court upon the ground of diverse citizenship. Indeed, the plaintiff suggests that this suit could be maintained against them in the Federal Courts in the states of their residence, thereby conceding them to be non-residents of this state even as trustees.

Although their title to the property came to them from a resident of Maine through a probate court in Maine, the title is in them and not in the court. The property vested in them. They were not annexed to the property. There was no loss nor division of the personalty of either. So long as either is resident without the state, he is not resident within the state.

These propositions, if not self-evident, are fairly deducible from judicial decisions; see among others, *Childress* v. *Emory*, 8 Wheat. 642; *Rice* v. *Houston*, 13 Wall. 66; *Relf* v. *Rundle*, 103 U. S. 222; *Hess* v. *Reynolds*, 113 U. S. 73; *Clark* v. *Bever*, 139 U. S.

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II. The other theory of the plaintiff seems equally opposed to actual facts and conditions. The estate of Horace Williams no longer exists. Its official custodians as such estate, the executors, have been discharged. It has been settled and distributed, and the distributed portions have vested in new and different owners. The portions now under consideration, the bonds, mortgages and stock certificates, etc., vested in non-residents, and were transferred by their non-resident owners to Massachusetts and there they actually are. The corporation and lands, out of which these securities arose, were and remain out of the state. The plaintiff's theory is not powerful enough to bring within the state any of these securities, corporations or lands. They are still in fact beyond the reach of any levying process this state can devise. No officer, however armed by statute or court process of this state, can seize upon it for taxes or other claims. The securities are held by their owners within the jurisdiction of Massachusetts, within reach of its officers and processes, and, so far as this state is concerned, are wholly subject to such taxes as that state may see fit to impose. They cannot escape her taxing power by any theory of constructive situs which the plaintiff or this court may advance. *Catlin* v. *Hull*, 21 Vt. 152; *People* v. *Ogdensburgh*, 48 N. Y. 390; *People* v. *Smith*, 88 N. Y. 576–585; *The Whiting case*, 150 N. Y. 27; *The Morgan case Ib.* 37; *Houdayer case Ib.* 37; *Kirtland* v. *Hotchkiss*, 100 U. S. 491; *Tappan* v. *Bank*, 19 Wall. 490, 499; *Redmond* v. *Rutherford*, 87 N. C. 122; *State* v. *St. Louis County*, 47 Mo. 454; *Frinch* v. *York County*, 19 Neb. 50; *Buck* v. *Miller*, (Ind.) 37 L. R. A. 385; *Schmidt* v. *Failey*, (Ind.) 37 L. R. A. 442.

The only case cited which apparently supports the plaintiff's theory is *Lewis* v. *Chester County*, 60 Pa. St. 325. In that case,

Mrs. Lewis, while residing in New York, became executrix and testamentary trustee of the estate of a New York decedent in the Surrogate Court of that state. She settled her final account as executrix, but no order of distribution was made and she was not discharged as executrix. She was directed to retain and invest the balance until distribution should be ordered. She afterward, but before distribution, removed to Pennsylvania and invested part of the estate in mortgages upon lands there. The court held that under the Pennsylvania statute she could be taxed there for those mortgages, but also held that the statute did not extend to the property invested in other states. The court seemed to assume that Mrs. Lewis in relation to the estate so held by her was taxable in New York, but such an assumption was not necessary to the decision and is only dictum.

In that case, however, the estate had not been distributed, and was regarded as still the estate of the New York decedent, and not as Mrs. Lewis' estate. In the case at bar, the estate had been distributed and could no longer be regarded as the estate of the Maine decedent.

On the other hand, the case *Anthony* v. *Caswell*, 15 R. I. 159, seems to be express authority against the plaintiff. The Rhode Island statute was very like ours, and was thus quoted by the court:—

"All personal property held in trust by any executor, administrator, or trustee, the income of which is to be paid to any other person, shall be assessed against the executor, administrator, or trustee in the town where such other person resides; but if such person resides out of the state, then in the town where the executor, administrator, or trustee resides, and if there be more than one such executor, administrator, or trustee, then in equal proportions to each of such executors, administrators, and trustees in the towns where they respectively reside." Pub. Stat. R. I. c. 42, § 12.

The defendant Caswell was trustee under a will and as such trustee held property in trust for two beneficiaries resident in Rhode Island, but the trustee himself was a resident of New York and none of the trust property was within the state of Rhode

Island. The court held that the defendant was not taxable in Rhode Island for the trust property without the state, and that the statute only extended to persons and things within the state. The case does not affirmatively disclose that the will under which the defendant Caswell claimed authority and title as trustee was that of a Rhode Island decedent probated in a Rhode Island court, but no other ground is disclosed as the basis of a power to assess and collect a tax against the non-resident defendant. If the defendant's title came from a will and probate in another state, so decisive a fact would have been mentioned by the court.

We must hold that our statute did not empower the assessors of Augusta to assess directly against these non-resident defendants, a tax upon the corpus of the property owned by them in trust and situated without the state, and hence that this action to recover such a tax cannot be maintained.

We do not hold, however, that the assessors of Augusta cannot assess a tax directly against the annuitants resident in Augusta for their annuities or other interests arising out of the property or trust.

Judgment for defendants.

HASKELL, J. I do not concur because I think the official residence of the trustees is where the trust is under administration.

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No right of, by necessity, where land bordered on ocean, *Hildreth* v. *Googins*, 227.

Want of railing a defect in, and proximate cause of injury, *Morsman* v. *Rockland*, 264.
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Use of steam roller not a defect in, *Lane* v. *Lewiston*, 292.
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Locus not included in land taken for a, *Littlefield* v. *Rockland*, 449.
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ERRATA.

Page 47, for c. 239 read c. 234.