MAINE REPORTS

92

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

1898—9.

CHARLES HAMLIN

REPORTER

PORTLAND, MAINE

WILLIAM W. ROBERTS

1899

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.

ASSIGNMENT OF JUSTICES

FOR THE JUDICIAL YEAR 1898.

LAW TERMS.

MIDDLE DISTRICT, at Augusta, 4th Tuesday of May.

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

EASTERN DISTRICT, at Bangor, 3d Tuesday of June.

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

WESTERN DISTRICT, at Portland, 3d Tuesday of July.

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

PRESS OF THOMAS W. BURR,
BANGOR, MAINE.

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CASES

IN THE

SUPREME JUDICIAL COURT,

OF THE

STATE OF MAINE.

HENRY BAKER *vs.* EVERETT C. WALDRON, and Mill.

Somerset. Announced June 15, 1898.

Opinion December 22, 1898.

Lien. Building. Dam. Consent of Owner. R. S., c. 91, § 30. Stat. 1891, c. 21.

S. gave W. an agreement to sell him a parcel of land, one condition of the agreement being that W. should build a dam across a stream running through the land, and erect a mill at one end of the dam. W. procured labor and materials of B. for building the foundation walls of the mill, but before the walls were fully completed W. failed and the work stopped. *Held;* That S. (the owner) is presumed to have assented to the supplies of labor and materials furnished by B.; and that B. has a lien for the amount due him for the same upon the land and (uncompleted) mill. The fact that one of the four foundation walls of the mill happened to serve, pro tanto, as a section of the dam did not have the effect to destroy B.'s lien.

Held; that an attachment on the writ in this case is not void because made upon the land as real estate instead of against the materials on the land as personal property.

ON REPORT.

This was a suit to enforce a lien claim and was reported by the presiding justice to the law court upon the facts as agreed by the parties.

The parties agreed upon the following facts:—

The plaintiff performed the work and furnished the materials described in his writ by virtue of an employment by the defendant, Everett C. Waldron.

Prior to the commencement of the work said Waldron made an oral contract with Herbert L. Seekins, owner of the land, before the work of the plaintiff was done and ever since, to buy the land described in the writ for $300, and it was part of the agreement that said Waldron should build a dam across the stream running through the land, and should erect a factory upon the east side of the stream for manufacturing woolen goods. Said Waldron thereupon built the dam across said stream which stream runs nearly north and south and commenced the foundation for a factory building on the east side. The dam not only extended across the stream from west to east but was built partly in the mill pond on the east side in a northerly direction about fifty feet; and this fifty feet was intended for the foundation of the factory on its west side. Another portion of the dam extended about forty-seven feet to the east shore and this was intended for the north foundation of the factory. In other words—a wooden dam crosses the river and strikes the north side of the foundation nearly if not quite at right angles; and the north side wall runs in nearly a parallel course with the stream. That part of the north wall east of the dam, and a portion of the east side, were surrounded by water, and served the purposes of a dam as well as of the foundation of the mill. The construction of the west side of said dam was nearly completed and the north side partly constructed—both being intended as part of the foundation for the factory. Part of the foundation work for the east and south sides of said factory was laid, consisting of stone work, but neither side completed only in part.

The work and labor and material furnished by the plaintiff and embraced in the present suit, were furnished and performed on the four sides of the foundation for the factory, and consisted in hauling the stone and placing it in position as far as the foundation was built. Before the foundation on the north, east and south sides was completed, said Waldron failed and stopped work, and the plaintiff stopped. No factory or other building was erected, or any timber hauled for the same.

After the work and labor and materials were furnished by plain-

tiff the oral contract between Waldron and Seekins was reduced to writing and signed by the parties, a copy of which was introduced in evidence by the plaintiff; and it is admitted that the oral contract, under which Waldron employed the plaintiff, is correctly set out in the written agreement. The plaintiff filed his claim for lien within the time required by statute in the town clerk's office of St. Albans, where the land is situate, and brought his suit within the statute period.

The owner of the land, said Herbert L. Seekins, claimed that the statute of liens does not apply, there never having been any building erected, but only part of the foundation for a building having been completed by the work of the plaintiff and others, employed by said Waldron. He also claimed that there was no valid attachment on the writ. The case was reported upon the foregoing agreed facts to the law court, who was to enter such judgment as should be in accordance with the right of the parties and the law of the case.

And if, in the opinion of the court, the plaintiff was not entitled to a lien judgment, it was agreed that he should have a judgment for the amount sued for against the defendant Waldron.

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

Counsel cited: *Worthen* v. *Cleaveland*, 129 Mass. 570; *Truesdell* v. *Gay*, 13 Gray, 312; *McCue* v. *Whitwell*, 156 Mass. 205; *Carew* v. *Stubbs*, 155 Mass. 549.

Consent of owner: *McCue* v. *Whitwell*, supra; *Hilton* v. *Merrill*, 106 Mass. 528; *Davis* v. *Humphrey*, 112 Mass. 309; *Weeks* v. *Walcott*, 15 Gray, 54; *Norton* v. *Clark*, 85 Maine, 359.

D. D. Stewart, for land-owner Seekins, argued:—

1. That the plaintiff has no lien on any "building," because no building was ever erected.

2. That an incomplete piece of stone wall upon which it was intended to erect a mill-building, when completed, is not a mill-building.

3. That the plaintiff has no lien upon the dam, because he never performed any labor upon it, or furnished any materials for

it. Because also no statute gives a lien upon a dam, eo nomine, even when labor is performed upon it. A dam actually in use with a mill, and the head of water, which it creates, furnishing the driving power for the machinery in the mill, might become an appurtenance to the mill; and labor upon such a dam might come within the lien statute. But this dam was never used with any mill, and never drove any machinery in a mill, for the simple reason that neither mill nor machinery ever had any existence.

The plaintiff's employer, at the time the work was done, "had no legal interest in the land;" and if the plaintiff had any lien when he stopped work, (which is wholly denied, as no building was erected,) it could only attach to the stones which he hauled upon the land, and these should have been attached, under the statute, as personal property. No lien is created by any statute upon any res except the res upon which the labor was performed; in this case, the stones, and nothing else.

The real estate attachment, in the present suit is void, under the statute of 1891, the plaintiff's employer, Waldron, having had no legal interest in the land at the time the labor was performed on the stones. *Dustin* v. *Crosby*, 75 Maine, 75.

J. W. Manson, in reply.

Under the mechanics' lien law in Massachusetts, it is held that if work is done in laying a foundation and the construction of a building proceeds no further, no doubt the mason would be entitled to his lien. *Somerville* v. *Walker*, 168 Mass. 388.

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

PETERS, C. J. This is a suit to enforce a lien. Defendant bargained for land upon which to erect a dam and a mill. He contrived to have the foundation for the mill serve as a section of the dam. Before the foundation was entirely completed defendant failed, and no mill was built. Plaintiff furnished labor and materials for the foundation and now asks a lien for the same on the foundation and land upon which it stands.

It is objected by the owner of the land that the lien does not attach, because, as he contends, no superstructure had been built, the statute giving a lien only upon a building and the land upon which it stands; and that the existence of a building, a superstructure, is necessary before any lien can attach; it then attaching both to the building and the land, that is to the whole property.

We think the point untenable. The reason for the statute applies just as strongly to a building partially completed as to one wholly so. Otherwise very many contractors and laborers might be wronged out of their wages by designing or improvident builders and owners. The fallacy of the defendant's argument consists in his assumption that the foundation walls of a structure are not a part of the structure itself. It is too fine a distinction to attempt to draw a line, in the meaning of the statute, between substructure and superstructure. It is all superstructure. The foundation walls of a building, though lowered into the earth, are just as much a part of the building as its upper story or roof is, and even a more essential part. Is the mason to lose his lien and the carpenter to secure his on the same unfinished building? Or shall both mason and carpenter lose their lien when without fault on their part the building has not been completed? Such has not heretofore been the interpretation of the statute.

We have no doubt that the owner of the land must be considered as assenting to the purchasing of materials and the hiring of labor for the purpose of erecting the contemplated mill, inasmuch as the contract of sale of the land between him and the principal defendant (Waldron), who hired the plaintiff's services, made it a condition of the sale that Waldron should erect just such a mill as he was undertaking to construct when by reason of his failure the work of construction became suspended.

The above views are, we think, a full answer to the criticism that one section of the dam at the same time is made to serve, pro tanto, as one of the walls of the mill.

It is urged that the attachment on the writ is void because it is an attachment against the land as real estate instead of against the

materials on the land as personal property. But the owner's consent that the mill might be erected on his land is a consent that a lien for materials and services procured for erecting the same may be established on his land. He is estopped from denying defendant's ownership. His consent is equivalent to defendant's ownership. The lien, as said by EMERY, J., in *Shaw* v. *Young*, 87 Maine, 275, "attaches to the res, the fee." That being so, the res, or fee, or land must be attached as real estate in order to execute the lien. And to this effect are other decisions. *Dustin* v. *Crosby*, 75 Maine, 75; *Skillin* v. *Moore*, 79 Maine, 554.

But it is contended that the earlier cases are overturned by an alteration of the statutes in 1891. Chapter 21, Laws of 1891, merely adds a new subject of lien to such rights of lien as already existed, and that is for labor and materials in moving a building as well as in erecting it. The alteration discloses nothing more.

Great stress is put on the clause in the statute that a claimant shall have a lien "on any interest that such owner has in the same," as repugnant to the idea of an attachment of realty; the clause with its context reading as follows: "Whoever performs labor in erecting a house or building, by virtue of a contract with or by consent of the owner, has a lien thereon, and on the land on which it stands, and on any interest that such owner of the land has in the same." The words "the same" refer to the house or building and not to the land, to meet a case where the owner of the land also owns some interest in the building, a clause that appears a little blind for the reason that it is difficult to see any utility in it.

Judgment against defendant, and property attached.

ELLA C. KINGSLEY *vs.* HENRY A. SIEBRECHT.

Hancock. Opinion July 22, 1898.

Stat. of Frauds. Memorandum. Lease. Principal and Agent. Evidence. Action. R. S., c. 111, § 1, par. 4.

A contract for the purchase of an assignment of a written lease is within the statute of frauds, R. S., c. 111, § 1, par. 4, and must therefore be in writing, signed by the parties, etc., to be binding; but a sufficient "memorandum or note thereof in writing" may be evidenced by letters and telegrams.

The statute of frauds does not change the law as to the rights and liabilities of principals and agents, either as between themselves or as to third persons. The provisions of the statute are complied with if the names of competent contracting parties appear in the writing; and if one of the parties be an agent, it is not necessary that the name of the principal shall be disclosed in the writing.

If a contract, within the statute of frauds, be made by an agent, whether the agency be disclosed or not, the principal may sue or be sued thereon as in other cases, and *it is accordingly held;* that the plaintiff in this case may show by parol that she was the real principal, although a third person, her general agent, appeared to be such in the writings.

In order to constitute a sufficient memorandum under the statute of frauds, the subject matter of the contract must be so certainly described that no oral testimony is needed to supply any necessary terms or conditions.

Held; that the date of a lease and its duration are essential elements of a contract and the want of them in a memorandum cannot be supplied by parol. But when the lease, which is itself in writing, discloses these terms, and it is so connected with the other writings, (the letters and telegrams between the parties,) as to become a part of the memorandum, and when the connection becomes apparent from a comparison of the writings themselves without the aid of parol testimony, a perfect contract is made out.

In an action upon a contract in which the plaintiff alleged that the defendant agreed to pay her for an assignment of a written lease followed by a tender of the assignment and refusal to pay, the defendant pleaded the statute of frauds, and also that the contract as alleged became inoperative by reason of a subsequent and independent contract made between the parties essentially different from that as stated and claimed by the plaintiff, and which he, the defendant, was always ready to perform, but that the plaintiff refused. As to the latter contention of the defendant the court being satisfied that the proof is otherwise, *it is held;* that the original contract remained in force.

ON REPORT.

This was an action of assumpsit to recover damages from the defendant for breach of an alleged contract by the defendant to pay six hundred dollars, and take an assignment of a lease. The writ is dated April 28, 1896.

The declaration is as follows:—

In a plea of the case, for that the plaintiff being possessed of the lease of a certain piece of land situated in Bar Harbor, in said Eden, which said lease was dated April 27, 1895, in which said plaintiff agreed to pay to the lessor, one T. L. Roberts, the sum of two hundred and fifty dollars per year rental, with the privilege of buying said premises at any time within ten years from said April 25th for the sum of three thousand dollars, and that heretofore, to wit, on the fifteenth day of January, A. D. 1896, by means of certain notes and memoranda in writing, it was agreed by and between the plaintiff and the said defendant, that the said plaintiff should sell and assign said lease with all its rights and privileges in said premises to the said defendant, and in consideration thereof the defendant then and there agreed to pay to the said plaintiff the sum of six hundred dollars. And the plaintiff avers that pursuant to her said agreement and relying upon the aforesaid promise of the said defendant, she tendered to the said defendant an assignment of said lease, duly signed and sealed by her, said plaintiff, but that the defendant then and there wholly refused to receive the same and then and there refused to pay to said plaintiff said sum of six hundred dollars or any part thereof.

Plea, general issue and brief statement setting up the statute of frauds; also a new and independent verbal arrangement entered into at Boston by way of substitution of any previous contract between the parties.

After the evidence was taken out, by consent of counsel the case was withdrawn from the jury and reported to the law court, it to pass upon all questions of law and fact involved, and to have the same right that a jury would have to draw inferences. If it should be decided that an action could be sustained, the law court was to assess the damages for the plaintiff.

The facts are stated in the opinion.

L. B. Deasy (*B. E. Clark* with him) for plaintiff.

A. W. King and E. S. Clark, for defendant.

There is no sufficient description of the subject matter of the alleged agreement. Nothing in the correspondence determines the time when the lease term began, or was to end. 8 Am. & Eng. Ency. p. 725, note (2); *Farwell* v. *Mather*, 10 Allen, 322.

The name of the vendor does not sufficiently appear. *Williams* v. *Robinson*, 73 Maine, p. 195; *Grafton* v. *Cummings*, 99 U. S. 100.

New agreement: It is an undisputed condition, arrived at in Boston, that the papers were to be made satisfactory to the defendant's attorney before the money was paid over. *Dana and Henry* v. *Hancock*, 30 Vt. 616.

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

SAVAGE, J. The plaintiff alleges in her declaration that the defendant contracted to pay her $600 for the assignment to him of a written lease of a certain parcel of land in Bar Harbor from T. L. Roberts to her, dated April 27, 1895, for the term of ten years from that date, at a rental of $250 per year, with the privilege of buying the land at any time within the ten years for $3000; that she has tendered to the defendant an assignment of the lease, but that the defendant refused to receive the lease, and refused to pay the six hundred dollars.

The defendant pleads the statute of frauds. He also alleges that if any such contract was made as is alleged by the plaintiff, "the same became inoperative by reason of a subsequent and independent contract made between the parties in relation to the transfer of said leasehold interest, by which subsequent agreement the defendant agreed to purchase of the plaintiff the said leasehold interest together with a strip of land one foot wide and extending along the side of the lot covered by the lease, and to pay therefor the sum of $600," and that the plaintiff agreed to sell to the defendant both the leasehold interest and the one foot strip for

$600; and the defendant says that he has always been ready to perform the substituted contract, but that the plaintiff has refused.

So far as the latter contention of the defendant is concerned, it is sufficient to say that we think the proof is otherwise.

The plaintiff's agent having general charge of this business was Mr. T. F. Moran. After certain correspondence between Mr. Moran and the defendant, which ended in a proposition by Moran and an acceptance of the proposition by the defendant, Moran and the defendant arranged for a meeting in Boston to consummate the trade. Moran telegraphed to the defendant to "come prepared to buy the one-foot lot," to which reference had been made in their correspondence. Instead of going to Boston himself, Moran intrusted the lease and assignment which had been the subject matter of their correspondence, and a deed of the "one-foot lot," to Mr. E. H. Greely to deliver to the defendant. Greely met the defendant in Boston, and the defendant claims that the new and substituted contract was there made between himself and Greely. From the testimony of the defendant himself, it is not clear that the new contract which is set up was made. The defendant testifies, in substance, that he claimed to Greely that the trade between him and the plaintiff covered both the lease and the one-foot strip, that both were to be conveyed to him for the $600, but he also testifies that Greely told him that he had no instructions at all from Mr. Moran in regard to the "extra foot." Mr. Greely, testifying, denies that any new contract was made, and says that he named to the defendant a price for the one-foot strip, and that the defendant "thought he would do nothing about that at the time." But whatever may have been attempted in the way of making a new contract, there is no evidence that Greely had any authority to make a new contract, or that, if any was made, it was ever ratified by the plaintiff.

It appears that when the assignment of the lease was examined by the defendant in Boston, it was discovered that the original lessor, Roberts, had not consented in writing to the assignment as was stipulated in the lease itself, and thereupon it was mutually agreed that the papers should be sent back to Bar Harbor, in order

that Mr. Roberts' consent might be obtained. And this, we are satisfied, was the only arrangement entered into in Boston between the defendant and Greely.

We now recur to the other contention of the defendant, that the contract on which this action is brought is a contract for the sale of an interest in land, and that the action cannot be maintained for want of a sufficient memorandum to satisfy the statute of frauds. The subject matter of the contract is the lease itself, not the land. Still the contract is for "an interest in or concerning" land, and hence is within our statute of frauds, R. S. ch. 111, § 1, par. 4. And the contract being within the statute, we must now inquire whether there is a sufficient "memorandum or note thereof in writing."

The plaintiff relies upon certain letters and telegrams between T. F. Moran and the defendant as a sufficient memorandum to satisfy the statute. She also offers a lease from T. L. Roberts to herself, and claims that it is the lease referred to in the correspondence between Moran and the defendant, and that it should be taken as a part of the memorandum. The defendant contends that the lease is not admissible as a part of the memorandum, because it does not appear upon its face, and without the aid of parol evidence, to be the lease referred to, and because the plaintiff, named as lessee in the lease, is not in any way referred to in the correspondence; in other words, that in the correspondence Moran appears to be the owner of the lease, while the lease offered shows the plaintiff to be the owner. And it is contended that parol evidence is inadmissible to connect the two. Then the defendant contends that the letters and telegrams alone do not constitute a sufficient memorandum, because the plaintiff's name nowhere appears, nor is she described, in the correspondence, and because the correspondence is silent as to when the leasehold term began or when it was to end.

It is well settled that "to satisfy the statute, the memorandum must contain within itself, or by some reference to other written evidence, the names of the vendor and vendee, and all the essential terms and conditions of the contract, expressed with such

reasonable certainty as may be understood from the memorandum and other written evidence referred to, (if any) without any aid from parol testimony." *Williams* v. *Robinson*, 73 Maine, 186. In this case, it is true that the plaintiff's name does not appear anywhere in the letters and telegrams. They are all between the defendant and T. F. Moran, and Moran is apparently negotiating as owner of the lease. But the case discloses, by parol testimony, that Moran was the plaintiff's agent, and that the plaintiff herself was an undisclosed principal. Two questions arise. First, may the undisclosed principal sue upon a contract made in the name of her agent? and secondly, is it competent for the undisclosed principal to show by parol that the party appearing in the memorandum to be the contracting party was her agent only, and contracted in her behalf, and thus be enabled to maintain an action on the contract?

We think both questions must be answered in the affirmative. The authorities are numerous and decisive that the contract of the agent is in law the contract of the principal, and the latter can come forward and sue thereon, although at the time the contract was made the agent acted and appeared to be the principal.

In *Wilson* v. *Hart*, 7 Taunton, 295, Parke, B., said: "It is the constant course to show by parol evidence whether a contracting party is agent or principal." In *Eastern R. R. Co.* v. *Benedict*, 5 Gray, 561, the court said that "the rule that the principal may sue in his own name upon a contract made with his agent applies to cases of sales by written bills or other memoranda made by the agent, using his own name, and disclosing no principal," the same as in cases of oral contracts. *Tainter* v. *Lombard*, 53 Maine, 371; *Barry* v. *Page*, 10 Gray, 399; *Winchester* v. *Howard*, 97 Mass. 305; *Sims* v. *Bond*, 5 Barnwell & Adolphus, 393; *Huntington* v. *Knox*, 7 Cush. 371; *Exchange Bank* v. *Rice*, 107 Mass. 37; *Byington* v. *Simpson*, 134 Mass. 169.

And the great weight of authority, we think, sustains the proposition that in case of a memorandum within the statute of frauds, where the name of the agent only appears, it may be shown by parol who the principal is, in support of an action by the latter.

In *Higgins* v. *Senior*, 8 M. & W. 834, it is declared that "there is no doubt that where such an agreement is made, it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals; and this, whether the agreement be or be not required to be in writing by the statute of frauds; and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom on the face of it, it purports to bind, but shows that it also binds another by reason that the act of the agent, in signing the agreement, in pursuance of his authority, is in law the act of the principal."

"Parol evidence is always necessary to show that the party sued is the person making the contract and bound by it. Whether he does so in his own name, or in that of another, or in a feigned name, or whether the contract be signed by his own hand, or by that of an agent, are inquiries not different in their nature from the question who is the person who has just ordered goods in a shop. If he is sued for the price and his identity is made out, the contract is not varied by appearing to have been made by him in a name not his own." *Trueman* v. *Loder*, 11 Ad. & Ell. 589.

The statute of frauds does not change the law as to the rights and liabilities of principals and agents, either as between themselves, or as to third persons. The provisions of the statute are complied with if the names of competent contracting parties appear in the writing, and if a party be an agent, it is not necessary that the name of the principal shall be disclosed in the writing. Indeed, if a contract, within the provisions of the statute, be made by an agent, whether the agency be disclosed or not, the principal may sue or be sued as in other cases. *Thayer* v. *Luce*, 22 Ohio St. Rep. 62; *Pugh* v. *Chesseldine*, 11 Ohio St. Rep. 109; *Dykers* v. *Townsend*, 24 N. Y. 57; *Lerned* v. *Johns*, 9 Allen, 419; *Hunter* v. *Giddings*, 97 Mass. 41; *Williams* v. *Bacon*, 2 Gray, 387; *Salmon Falls Mfg. Co.* v. *Goddard*, 14 How. 446; Browne on the Statute of Frauds, § 373; 3 Parsons on Contracts, 5th Ed. p. 10.

Judge Story, after stating the doctrine, said: "The doctrine thus asserted has this title to commendation and support, that it not only furnishes a sound rule for the exposition of contracts, but that it proceeds upon a principle of reciprocity, and gives to the other contracting party the same rights and remedies against agent and principal which they possess against him." Story on Agency, § 160 a. See also cases cited in note to *Wain* v. *Warlters*, 2 Smith's Leading Cases at page 252.

The case of *Grafton* v. *Cummings*, 99 U. S. 100, is relied upon by the defendant. But that case, we think, is clearly to be distinguished from the case at bar. That case grew out of an auction sale, and involved a construction of the New Hampshire statute of frauds. The memorandum was signed by the auctioneer and vendee, but did not disclose who the vendor was. The court held that the memorandum was insufficient, saying, "It is very clear that Walker [auctioneer] did not intend to hold himself out as the vendor in this case, because he described himself as auctioneer and agent for both parties. If he had been sued on this contract by Grafton for failing to tender sufficient deeds of conveyance, it would have been a good answer to the action that he describes himself in the paper on which he is sued as merely an auctioneer in the matter, and in that sense as agent, and not principal. . . . What did he mean by placing his name there? It can have no other fair meaning than simply to say, as he does, I was the auctioneer who struck off this property." In *Grafton* v. *Cummings*, no one was named in the memorandum as contracting to sell. In the case at bar, Moran is named. There, the auctioneer would not have been liable on the contract; here, Moran would have been liable.

The distinction is well stated in *McGovern* v. *Hern*, 153 Mass. 308. "The trouble with the memorandum in the case before us is that the seller is not named nor described. Sullivan Brothers were indicated in one corner of the paper as the auctioneers, and it cannot be fairly considered that they were anything else. Their function as auctioneers was recognized in the memorandum, as something distinct from that of parties contracting for unnamed principals."

Grafton v. *Cummings*, supra, was decided on the authority of *Sherburne* v. *Shaw*, 1 N. H. 157, in which it is stated that the "writings disclose the name of no person to whom the defendant was liable." This was also the case of an auctioneer's memorandum. So were *Nichols* v. *Johnson*, 10 Conn. 192; *O'Sullivan* v. *Overton*, 56 Conn. 105, which were cited by the defendant. When such a memorandum fails to show who the contracting party was, the auctioneer's signature does not aid, for the auctioneer is not a party nor liable. It is not a case of an undisclosed principal, for in such a case the agent is liable.

Salmon Falls Mfg. Co. v. *Goddard*, supra, is doubted in *Grafton* v. *Cummings*, and the dissenting opinion of Mr. Justice Curtis is referred to with approval. But examination shows that these two cases rest upon entirely different grounds, and that Mr. Justice Curtis dissented in the former case only on the ground that the memorandum in question failed to show which party was vendor, and which was purchaser. And the learned Justice used this significant language: "It is one thing to show that a party who appears by a writing to have made a contract made it as an agent, and quite a different thing to prove by parol that he made a purchase, when the writing is silent as to that fact."

There is no question but that the memorandum must name or describe two contracting parties, as in this case, a seller and a buyer, but the doctrine of the cases we have cited is to the effect that if one of the parties named is merely an agent, the undisclosed principal may be shown by parol. Accordingly, we hold that the plaintiff may show by parol that she was the real principal, although Moran appeared to be such in the memorandum.

We are next confronted by the objection that it does not appear in the correspondence when the leasehold term began or when it was to end. The letters and telegrams are indeed silent on this subject. In order to constitute a sufficient memorandum, the subject matter, the lease in this case, must be so certainly described that no oral testimony is needed to supply any necessary terms or conditions. The date of a lease for years, the remaining time it has to run, is obviously an essential item in the description of the

interest created by it. Without that being fixed, the whole interest under the lease is indeterminate. It is an essential element of the contract, and must be completely stated in the memorandum. The want of it cannot be supplied by parol.

This point, therefore, is well taken by the defendant, and must prevail, unless the lease offered by the plaintiff can be read into the memorandum.

The letters and telegrams refer to a lease. The plaintiff contends that the lease thus referred to is the lease she offers, and that it is to be read as a part of the memorandum. If this be so, the lease, which is itself a writing, discloses the missing terms, the time when the leasehold interest began and when it was to end. Can this lease be connected with the letters and telegrams so as to become a part of the memorandum, without the aid of parol testimony? Parol evidence can only bring together the different writings. It cannot connect them. They must show their connection by their own contents. The connection must be apparent from a comparison of the writings themselves. *Freeport* v. *Bartol*, 3 Maine, 340; *O'Donnell* v. *Leeman*, 43 Maine, 158. We will now apply this test.

The defendant in a letter to Moran, dated December 18, 1895, inquired: "What are the best terms you can make us on the lot next to the Brick Block on Main St., on a lease, with privilege of buying before the lease expires, at a price with or without that extra foot, which I believe you own next adjoining the Brick Building?" The context shows that the property was in Bar Harbor. December 20, 1895, Moran answered: "I think I gave you price on the lot adjoining the Brick Block. . . . I think I told you I would sell you the lease for a small bonus (10 year lease.)" January 9, 1896, defendant wrote to Moran: "I asked you to give me the amount of rent, the lowest price at which it can be purchased for, within the time you have the lease; also what bonus you want for your option." In answer to this, Moran wrote to the defendant, January 11, 1896, "Yours received, and in reply will say that the lot 25 x 60 on Main St. is leased for 10 years at $250 a year, with privilege of buying at any time during the term for

$3000. I have paid one year's rent in advance, and will turn over my lease to you for $600." Thereupon the defendant telegraphed Moran, January 13, 1896, "I accept your offer. Meet me with all necessary legal papers at Quincy House, Boston, Wednesday morning. H. A. SIEBRECHT."

All of these writings refer, on their face, to the same lease. It was a ten year lease of a lot in Bar Harbor, with a rental of $250 a year, and an option of purchase at any time during the term for $3000. The lot was 25 by 60 feet in size. It was situated on Main Street, and was on the same side of the street as the Brick Block, for it "adjoined" it. It was one foot distant from the Brick Building, "that extra foot, which," the defendant in his letter of December 18, 1895, says, "I believe you (Moran) own next adjoining the Brick Building."

Now if we turn to the lease offered by the plaintiff, we find that it answers every particular called for by the correspondence. On its face it shows that it was a ten year lease of a lot of land in Bar Harbor, on Main Street, twenty-five feet by sixty feet in dimensions, adjoining and one foot distant from the lot known as the Brick Block lot. It yielded a rental of $250 per annum. It contained an option of purchase at any time during the term for $3000. Can there be any doubt that the lease offered by the plaintiff is the lease referred to in the correspondence? We think not. The writings connect themselves. The only other possible lot to which the description in the correspondence could apply would be a lot on Main Street on the other side of the Brick Block. But the court in *Hurley* v. *Brown*, 98 Mass. 545, answering a similar hypothesis, said: "We think the presumption is strong that a description which actually corresponds with an estate owned by a contracting party is intended to apply to that particular estate, although couched in such general terms as to agree equally well with another estate which he does not own." See also *Mead* v. *Parker*, 115 Mass. 413.

The lease, therefore, may be read into the memorandum. It supplies all the missing elements. It shows particularly that the

leasehold interest contracted for was for a term of ten years from April 27, 1895.

The contract alleged, and the failure of the defendant to perform it, are both proved by the requisite evidence. The plaintiff is entitled to recover her damages, that is, the difference between the agreed price and the fair value of the leasehold interest, subject to the payment of the rent reserved. On this point the testimony is conflicting. The rent had been paid in advance to April 27, 1896. The testimony discloses estimates of the value of the leasehold interest, ranging from nothing to six hundred dollars.

Upon the whole, we think the plaintiff's damages may be fairly assessed at four hundred dollars.

Defendant defaulted.

GEORGE W. ROSS *vs.* JAMES B. LIBBY, and another.

Washington. Opinion August 10, 1898.

Attachment. Officer. Receiptor. Damages. Non-Resident Defendant.

Receiptors to an officer for personal property attached by him and intrusted to them upon their engagement to safely keep the property and return it to him on demand cannot avoid liability by showing that what purports to be a judgment in favor of the creditor is void.

Such receiptors can avoid liability only by showing that the officer is free from all liability to the debtor or owner of the property as well as to the attaching creditor.

At least, in the absence of other evidence, the sum stated in the receipt as the value of the property is the measure of damages in an action upon the receipt.

AGREED STATEMENT.

This was an action of assumpsit upon an accountable receipt given by the defendant Libby and A. K. P. Dakin to the plaintiff, a deputy of the sheriff of Washington County, and of the following tenor:—

"Washington, ss. Vanceboro, June 20, A. D. 1896.

Received of George W. Ross, Deputy Sheriff of the County of Washington, for safe keeping, the goods and chattels following, viz:

All the stock in stores at Brookton and Forest City, Maine, lately in the possession of Charles W. Clement, Trustee, (the company stores so called) of the value of one thousand dollars, which property the said officer has taken by virtue of a writ against Charles W. Clement, Trustee, of Boston, Mass., in the county of Washington, in favor of The Haynes & Chalmers Company (incorporated) of Bangor, Maine, bearing date, the 18th day of June, A. D. 1896, returnable before the Justices of the Supreme Judicial Court next to be holden at Bangor, within and for the County of Penobscot, on the first Tuesday of October, A. D. 1896, and in consideration of one dollar paid us by the above named officer, the receipt whereof is hereby acknowledged, we promise and agree safely to keep and re-deliver all the above named property to said officer, or his order on demand, to be delivered at Vanceboro, Maine, in like good order and condition as the same is now in, free from all charges and expenses to said officer, or the creditor in the action aforesaid. And we further agree, that a demand on one of us shall be binding on all. And we further agree, if no demand be made, we will within thirty days from the rendition of judgment, in the action aforesaid, re-deliver all the above property, so that the same may be taken in execution. And we further agree, to save harmless said officer from all costs, and indemnify him for any damage or loss he may sustain in consequence of said property not being delivered him as aforesaid, at any time he may request us so to do, or in consequence of its not being delivered within thirty days aforesaid. And we further agree that this receipt shall be conclusive evidence against us as to our receipt of said property, its value before mentioned, and our liability under all circumstances to said officer for the full sum above mentioned.

J. B. LIBBY,
A. K. P. DAKIN."

Plea, general issue and brief statement alleging that said attachment was illegal and void because the goods of the trust estate of which said Clement is alleged to be trustee in the writ upon which the same were attached, cannot be taken in the proceedings at law

against the trustee but can only be reached by chancery proceedings.

Defendants further claim that there was no legal service of the said writ of The Haynes and Chalmers Company upon said Clement and no valid judgment was or could be rendered in that action, because it appears by plaintiff's return that service was made upon an agent by virtue of a statute which is unconstitutional and void.

The parties submitted the case to the decision of the law court upon an agreed statement as follows:

"Action upon an accountable receipt. The plaintiff in this action, as a deputy sheriff, attached the goods for which the defendants gave him the receipt declared on, by virtue of a writ, in favor of The Haynes and Chalmers Company *versus* Charles W. Clement, Trustee, service thereof having been made by leaving a summons with I. E. Seavey, who is admitted to have been, at the time of said service, an agent, within the meaning of section 21, of chapter 81, of the Revised Statutes, of said defendant, a non-resident, but who had no instructions from said defendant to accept or receive service of process.

"A copy of which said writ together with the officer's return thereon, and a copy of the judgment rendered in that action, all duly certified, also a copy of the writ and pleadings in the present action, are to be annexed hereto as a part of this agreement.

"Demand was legally made upon the defendants for the goods receipted for.

"The defendants claim that the attachment was illegal and void, and that they are not liable on their said receipt; a copy of which is hereunto annexed, as a part of this agreement.

"Either party may argue orally, or in writing, at his option.

"The court to render such judgment as the law and facts require."

Peregrine White and John F. Lynch, for plaintiff.

Service sufficient: *Blaisdell* v. *Pray*, 68 Maine, p. 273, citing Freem. Judgt. § 130; *P. R. R. Co.* v. *Weeks*, 52 Maine, 456. Service on agent valid: The validity of this contention is recog-

nized and sustained by the following cases: *Eastman* v. *Wadleigh*, 65 Maine, 251; *Marco* v. *Low*, 55 Maine, 549; a case where service was made upon an attorney in a cross action, and the court held the service good; *Cassity* v. *Cota*, 54 Maine, 380; PETERS, C. J., in *Parker* v. *Prescott*, 86 Maine, 243; *McVicker* v. *Beedy*, 31 Maine, 314; *Cousens* v. *Lovejoy*, 81 Maine, 467; *Eastman* v. *Dearborn*, 63 N. H. 364. Reno on Non-Residents, §§ 46, 214, 215. Counsel also cited: *Liblong* v. *Kansas Fire Ins. Co.*, 82 Pa. St. 413; *Hagerman* v. *Empire Slate Co.*, 97 Pa. St. 534.

Statute constitutional: Reno on Non-Residents, § 153.

Geo. A. Curran and Geo. R. Gardner, for defendants.

The defendant in original suit had no attachable interest in the property and the receipt in suit is void. The only way to reach the property attached was by chancery proceedings. *Stanley* v. *Drinkwater*, 43 Maine, 468. *Daniel G. Lane*, et al., v. *Charles W. Clement*, Trustee, —— decided on rescript August 24, 1897; *Sawyer* v. *Mason*, 19 Maine, 49; *Continental Mills* v. *Dow*, 59 Maine, 428.

Receiptors are not holden when liability of officer is discharged. In this case the attachment was illegal and no liability attached to the officer. *Moulton* v. *Chapin*, 28 Maine, 505; *Plaisted* v. *Hoar*, 45 Maine, 380; *Mitchell* v *Gooch*, 60 Maine, 110.

There was no legal service of the original suit against Clement, Trustee; service was on an agent. The statute authorizing service on an agent in this case is contrary to the Constitution U. S., Article 4, Sec. 2, par. 1. "Citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states."

Constitution U. S., 14th Amendment, § 1. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

See cases cited page 25 R. S., Maine, (Ed. 1883,) under "C" bottom of page.

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

EMERY, J. The plaintiff, a deputy sheriff, armed with a writ against one Clement (described as trustee) and for the purpose of attachment thereon took into his possession certain goods as the property of Clement. If the attachment was valid and was followed by a valid judgment against Clement, the plaintiff, the attaching officer, became responsible for the goods to the judgment creditor in that suit to the amount of his judgment. If the attachment was invalid in its inception, or was not followed by a valid judgment against Clement, the plaintiff became responsible for the goods to their legal owner or custodian. Instead of keeping the goods in his own possession to meet whichever responsibility should be finally cast upon him, he intrusted them to these defendants taking their receipt, a written obligation to safely keep them and re-deliver them to him on demand, and containing a stipulation that the receipt should be conclusive of their liability under all circumstances to the officer for the stated value of the goods. He afterward demanded such re-delivery but the defendants have refused to re-deliver the goods, and this suit is upon the receipt.

The defendants now contend that the goods belonged, not to Clement personally, but to a trust estate of which Clement was trustee, and hence were not attachable on the writ against Clement personally, though described as trustee. They also contend that no valid judgment was obtained against Clement for want of proper service of the writ upon him, he not having appeared.

As against the terms of their receipt both of these contentions are unavailing, even if well founded in fact. In either case, the officer would be responsible to some one for the goods, to the lawful owner or custodian. He was entitled to have the goods back from his receiptor to enable him to respond to any valid claim. The defendants, the receiptors, can avoid their obligation to the officer only by showing that the officer is free from liability to any person on account of his attachment. This they have not done. *Brown* v. *Atwell*, 31 Maine, 351; *Harris* v. *Morse*, 49 Maine, 432;

Torrey v. *Otis*, 67 Maine, 573; *Bangs* v. *Beacham*, 68 Maine, 425.

The only evidence in the case as to the value of the goods received by the defendants is their statement in the receipt that they are of the value of one thousand dollars. The judgment must therefore be for that sum.

Judgment for the plaintiff for $1000, with interest from date of writ.

ANNIE E. MCLANE, Administratrix,

vs.

FRANK G. PERKINS, and others.

Penobscot. Opinion August 10, 1898.

Negligence. Burden of Proof. Presumption of Fact and Law. Contributory Negligence.

In this state, it is a long and firmly established rule that in all prosecutions for injuries alleged to have been caused by the negligence of the defendant, the burden is upon the plaintiff to establish by evidence, as an affirmative proposition of fact, that at the time of the injury or accident the person injured was free from contributory negligence.

This rule obtains in all suits or prosecutions based on allegations of negligence.

There is no presumption of fact or law that any person injured was so careful or acted so prudently in the emergency as to be free from contributory negligence. Such a proposition must be established by evidence.

While freedom from contributory negligence can sometimes be inferred from the circumstances shown, the inference must be from circumstances shown by the evidence to have actually existed and cannot be made from circumstances merely conjectured or even probable.

Where, as in this case, the evidence fails to show the circumstances attending the injury,— fails to show how the injury occurred, and fails to show that the person injured was merely passive in his proper place in the care of the defendant,— it does not sustain the essential proposition that at the time he was free from contributory negligence.

In this case the course of events after the boat (in which was the plaintiff's intestate as employee) left the shore is utterly unknown and can only be conjectured; but conjecture is never sufficient to sustain a proposition of law or fact.

On Exceptions by Plaintiff.

This was an action on the case to recover damages for the loss of life of the plaintiff's intestate claimed to have been caused by the negligence of the defendants.

The case comes before the court on exceptions taken at the trial of the cause to the ruling of the presiding justice who, on the motion of the defendant's counsel, granted a nonsuit — the grounds being that after the plaintiff had put in all of her testimony she had failed to make out a prima facie case, and that she had not shown that her intestate was at the time of his death, in the exercise of due and ordinary care.

The facts are sufficiently stated in the opinion.

P. H. Gillin and E. C. Donworth, for plaintiff.

It would seem that the court of Maine puts (and it is often quoted as so ruling) the burden upon the plaintiff; but an examination of the different cases shows that in all of them the plaintiff in making out his case showed contributory negligence himself; and of course when this was clear he could not recover.

The plaintiff does not claim that she has made out a clear prima facie case against these defendants until she has proved that her intestate was in the exercise of due care.

But we contend that the plaintiff need not prove affirmatively that her intestate was in the exercise of due care. And for this reason we have cited the cases against railroads to show the distinction we claim. That is, where it appears or must be assumed or there is a presumption that the plaintiff was not exercising due care he must show that he was not negligent by actual facts; but where there is no grounds for the contention that the plaintiff was negligent, then his due care is to be inferred from the circumstances in the case. *Guthrie* v. *Me. Cent. R. R.*, 81 Maine, 572; *McGuire* v. *Railroad*, 146 Mass. 379.

On principle it is enough for the plaintiff's recovery for him to show a negligent injury by the defendant with nothing in the circumstances to show that he was not in the exercise of ordinary care. This done the duty is upon the defendant to show the plain-

tiff's contributory negligence affirmatively. *Cassidy* v. *Angell*, 12 R. I. 447; *Dallas R. R.* v. *Spicker*, 61 Tex. 427, (48 Am. Rep. 297); *Prideaux* v. *Mineral Point*, 43 Wis. 513, (28 Am. Rep. 558); *Buesching* v. *Gas Co.*, 73 Mo. 219, (39 Am. Rep. 503); *Furnace Co.* v. *Albend*, 107 Ill. 44, (47 Am. Rep. 425); Wharton on Negligence, 423, 425, 426; *Louisville, etc., R. R. Co.* v. *Goetz's Admx.*, 79 Ky. 442; (42 Am. Rep. 227); *Chicago R. R.* v. *Cary*, 115, Ill. 115; *Phila. R. R.* v. *Stabbing*, 62 Md. 504.

Where it is possible to infer due care on the part of the plaintiff the case should go to the jury, so that the question may be determined from the facts. *Greany* v. *Railroad*, 101 N. Y. 419.

Contributory negligence is a defense and the burden of showing it is upon the defendant after the plaintiff has made out a clear prima facie case. *Railroad* v. *Gladmor*, 15 Wall. (U. S.) 401; *Hill* v. *New Haven*, 37 Vt. 501.

It cannot be contended that in this state the burden of showing absence of contributory negligence is on the plaintiff. For the court of this state says distinctly, speaking of contributory negligence, when the plaintiff's horse was frightened by a discharge from the defendant's quarry, "evidence that the horse was vicious and unruly was to show contributory negligence and was matter in defense." Court set aside a verdict for the plaintiff because such a defense was not allowed in trial below. *Wadsworth* v. *Marshall*, 88 Maine, 263.

See also cases holding the same way. *Thompson* v. *Duncan*, 76 Ala. 334; *Smith* v. *Railroad*, 35 N. H. 356; *Hough* v. *Railroad*, 100 U. S. 213.

That the death was caused by the act of God is no defense: "To constitute an accident or casualty, or as the law sometimes states it, inevitable accident, it must be such an accident as the defendant could not have avoided by the use and the kind and degree of care necessary to the exigency and in the circumstances in which he was placed.

When the proof is all in, whether directly proved or inferred from circumstances, if it appears that the defendant was doing a lawful act and unintentionally hurt the plaintiff then unless it also

appears that the defendant is chargeable with some fault, negligence, carelessness or want of prudence, then plaintiff fails to sustain the burden of proof." *Brown* v. *Kendall*, 6 Cush. 292; 2 Greenleaf on Evidence, 85-92; 1 Am. and Eng. Ency. of Law, (1st ed.) 174; *Crosby* v. *Fitch*, 12 Conn. 410; *Railroad* v. *Reeves*, 10 Wall. (U. S.) 176; *Bowman* v. *Teal*, 23 Wend. (N. Y.) 306; *Sweetland* v. *B. & A. R. R.* 102 Mass. 276.

When the act of God and want of care concur in producing the injury, the negligent person is liable if without his negligence the injury would not have happened by the accident alone. *Salisbury* v. *Herchenroder*, 106 Mass. 458; *Woodard* v. *Aborn*, 35 Maine, 271.

If the negligence of the defendant be in the direct causal connection with the injury and a violation of such reasonable care as a cautious aud prudent man would take to protect his property from loss by ordinary wind, storm, rain, etc., then the one who is guilty of such negligence is liable. *Condict* v. *Railroad*, 54 N. Y. 500; *Converse* v. *Brainard*, 27 Conn. 607; *Denny* v. *Railroad*, 13 Gray, 481, 487; *Lake* v. *Milliken*, 62 Maine, 240.

C. F. Woodard and O. F. Fellows, for defendants.

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

EMERY, J. The plaintiff's evidence goes only to the following extent. The defendants were operating in Bucksport, on the Penobscot River, a mill for the manufacture of barrel staves and heads from wood. They had occasion in the course of their business in September, 1897, to send some eight of their employees, including the plaintiff's intestate, up the river some two or three miles to raft and drive some logs down the river to the mill. The party detailed for this purpose assembled at the wharf near the mill a little before four o'clock on the morning of September 21, when it was quite dark. One of the defendants, Perkins, was in charge of the party and accompanied it. They launched into the water two small boats of the defendants known as "punts," put into them the pick-poles and other implements necessary for rafting

and driving the logs, and then embarked. In one boat was Mr. Perkins with four men. In the other boat were the other four men including the plaintiff's intestate. In this boat also was a lighted lantern. The first boat, that of Perkins, started off about four o'clock while the second boat, on which was the plaintiff's intestate, was still at the wharf. The first boat went safely up the river to its destination. The second boat did not arrive, and was not seen for some days afterward when it was found on the shore. Its crew were never afterward seen alive, and their drowned bodies were found at intervals afterward at different places up and down the river, that of the plaintiff's intestate among the rest.

After the first boat started, its crew did not see the second boat on account of the darkness, but they saw a light as of a lantern moving after them for some fifteen minutes or half a mile, when it disappeared. They heard no cries, and saw and heard nothing else indicating any disaster. At this time the river was comparatively smooth with little wind, but later, towards seven o'clock, it became rough from a rising gale of wind. The plaintiff's intestate was a young man nearly twenty-two years of age, and unacquainted with boats as the defendants knew.

The boat itself was an old punt made of inch pine boards with bottom and sides almost flat and straight, and with ends nearly square. It was about fourteen feet long, 3 1-2 feet wide, and 19 inches deep in the centre. Along one of its sides was an old crack which had been caulked with waste. The top part of one end had been split off, so that only about 7 inches of height of that end remained while the other end was 14 inches high. It did not appear which, or whether either, of the crew was in charge of the boat more than the others.

The four men in the boat were undoubtedly drowned in the river sometime that morning, but where, how and when that morning they were drowned is utterly unknown. Whether they fell overboard, or the boat capsized or foundered is left completely to conjecture.

The plaintiff insists that it can be logically inferred from this evidence that the drowning was the direct result of the unseaworth-

iness of the boat furnished by the defendants, and hence was the direct result of their fault. The defendants insist that it cannot be reasonably inferred from the evidence that the plaintiff's intestate at the time of the accident did not by his own want of care contribute to produce the accident.

The plaintiff admits that contributory negligence on the part of her intestate would bar her action, but she argues that such contributory negligence should not be presumed and that if her evidence does not indicate its existence she is entitled to recover unless the defendants adduce evidence that it did exist. Her counsel have argued the proposition ably and vigorously with many citations especially from other states. The law of this state however is unmistakably and inexorably against her. More than a generation ago, in *Gleason* v. *Brewer*, 50 Maine, 222, this court declared through the able, learned and liberal-minded Mr. Justice KENT that:—"The law is clear and unquestioned that the plaintiff must satisfy the jury, as an affirmative fact to be established by him as a necessary part of his case, that at the time of the accident he was in the exercise of due care." This clear and unqualified statement has been often affirmed since. In *State* v. *Maine Central R. R. Co.*, 76 Maine, 357, the court again said more tersely, but not less unmistakably:—"The burden is on the party prosecuting to show that the person killed or injured did not by his own want of care contribute to produce the accident." It also said that sometimes the plaintiff's own evidence shows that he by his own carelessness did thus contribute, but that it is equally fatal to him if his evidence fails to show that he did not thus contribute. The court has not made this repeated declaration by way of dicta but has made it the foundation of its judgment in several cases. *Buzzell* v. *Laconia Manufacturing Co.*, 48 Maine, 113; *Lesan* v. *Maine Central R. R. Co.*, 77 Maine, 87; *Chase* v. *Maine Central R. R. Co.*, 77 Maine, 62; *State* v. *Maine Central R. R. Co.*, 81 Maine, 84; *Giberson* v. *Bangor & Aroostook R. R. Co.*, 89 Maine, 337. It is useless to try to move the court from this ground so long and firmly maintained.

The plaintiff's counsel further urge that in dealing with moving

railroad trains persons should be apprehensive of danger and hence in case of accident should be held to adduce affirmative evidence of their own care, and that the rule in question has grown out of such cases, and should not be extended to cases like this, where the plaintiff's intestate had no acquaintance with boats and could not apprehend danger. The rule, however, will be found to have been applied to all cases of negligence in this state. The inquiry has always been whether the plaintiff's evidence showed affirmatively, either directly or by inference, that he did not by his own fault contribute to the accident.

Counsel again urge that the rule has been too broadly stated and that the true rule, even in this state, as to the burden of proof upon the issue of contributory negligence may be stated thus:—If the circumstances disclosed and left unexplained indicate any contributory negligence then the burden is on the plaintiff to explain the circumstances, and to show that after all he was free from fault; but that if the circumstances disclosed do not indicate any contributory negligence, there can be no presumption of any such negligence, and there is nothing for the plaintiff to rebut or explain.

It is true that the plaintiff's freedom from contributory negligence can sometimes be reasonably inferred from the circumstances without direct evidence of what he did or left undone. When a plaintiff is injured while merely passive in the care of the defendant, without any active agency of his own in the matter, it is fairly inferable that he did not contribute to the injury. In the case of an injury to a passenger in his seat in a railroad train, caused by the train leaving the track or by a collision, he is merely passive in the care of the railroad company, and his freedom from fault affirmatively appears from the shown circumstances. In his seat, in the place assigned to him by the railroad company, he evidently could do nothing to bring about, or prevent such an accident. In the case of the engineer or conductor of the train, or in the case of any person who might be exercising any active agency in the matter, such freedom from fault would not be apparent. So in a disaster to an unseaworthy ship, a person on board, shown by the evidence to be merely passive in the place

assigned to him, would affirmatively appear to be without fault, while other persons on board, not shown by the evidence to be merely passive in their proper places, would need to show by other evidence their freedom from fault.

But in all cases the plaintiff's freedom from contributory negligence in the particular case must affirmatively appear in evidence or at least by some legitimate inference from the evidence. It is not to be presumed. If sought to be established by inference it must be by inference from facts in evidence in the case. It cannot be inferred from general conduct, nor from the habits or instincts of mankind, nor from the argument that men are likely to be careful in danger. It is as true that men are careless as that they are careful. It is as true that men negligently contribute to their own injury as that they do not. We maintain the statutory rule stated in *Chase* v. *Maine Central R. R. Co.*, 77 Maine, 62, that the plaintiff must affirmatively show by evidence that in his case he was free from contributory negligence.

The plaintiff in this case cites *Guthrie* v. *Maine Central Railroad Co.*, 81 Maine, 572, as such a departure from the rule as to authorize her to proceed with this action. That case, however, was decided strictly in accordance with the rule. Guthrie, a brakeman, was injured by the coming together of two box-freight cars, the bumpers and draw bar upon one of them having been broken off, so that the cars came much nearer together than usual and sufficiently near to injure a person between them. The defective car was stationary and the plaintiff was on top of a moving train of freight cars backing up to couple on the defective car. He was directed by the conductor to run to the rear car and "make the hitch," meaning for him to go down between the cars and couple them. In compliance with this order he ran along over the top of the train and was seen to begin the descent of the ladder on the end of the car first approaching the defective car. In descending his back was to the defective car and he would not know of its defective condition. While no one saw him at the moment of the injury, and he instantly became unconscious and had no memory of it himself, it was apparent that he was injured

by the absence of the draw bar and bumpers from the defective car, which permitted the cars to come so close together as to crush him while between them in the performance of his duty. He was in his proper place, the place assigned to him. As to the condition and movement of the cars he was passive. He could not see the defect. He did nothing to bring the cars so close together. He could do nothing to prevent it. The collision was too sudden to give him any chance to extricate himself by any amount of care, after he had begun to descend the ladder. The evidence for the plaintiff tending to show all these facts affirmatively, the court properly decided that the case should go to the jury.

In several cases decided by this court the application of the rule led to a different result. In *Chase* v. *Maine Central R. R. Co.*, 77 Maine, 62, the plaintiff's intestate, while driving in a sleigh over a railroad crossing, was hit and killed by a passing train. No one saw him at the time. No evidence was given as to how the accident happened. It did not appear from the evidence that in approaching the railroad track he had taken any precautions to ascertain whether a train was coming. It did not affirmatively appear from the evidence that he could not have avoided the collision by the exercise of due care on his part. In *State* v. *Maine Central R. R. Co.*, 81 Maine, 84, the plaintiff's intestate, a passenger, was last seen alive as he was passing through the train toward the rear while the train was in motion. He was found next morning dead upon the track, with severe wounds and fractures. The plaintiff claimed that he fell off the train solely by reason of a defective platform on one car in the rear, but there was no evidence as to what he was doing or attempting to do at the time of the accident, nor how the accident happened. He was not shown to be in his seat, nor to be merely passive in the matter. As in the case of Chase, it did not appear from the evidence that he could not have avoided the accident by the exercise of due care. In *Giberson* v. *Bangor and Aroostook R. R.*, 89 Maine, 337, it could not be inferred from the evidence that the plaintiff's intestate took the proper precautions in crossing the railroad track.

Recurring now to the plaintiff's evidence in this case, it is pain-

fully wanting upon the affirmative of the proposition that the plaintiff's intestate at the time of the accident did not by his own negligence contribute to produce the catastrophe. He was alive in the boat at the wharf, at four o'clock on the morning of September 21, and days afterward was found dead on the shore. All between is a blank. Perhaps it sufficiently appears that he came to his death by drowning within a few hours after the preceding boat left the wharf, but that is all. If the following light, observed by the crew of the first boat, was the lantern in the second boat, its disappearance is no evidence of disaster at that time. The lantern may then have been placed in the bottom of the boat as would be usual. No sounds indicating trouble were heard at that time or ever. There is nothing indicating where or how the drowning took place, nor what the plaintiff's intestate was doing or attempting to do at the time, nor that he was passive. He may have fallen out of the boat, and the others swamped the boat in trying to rescue him. He may himself have swamped the boat by his own acts. The boat may have come in contact with a floating log, or run upon a ledge, or may have been capsized by the rough water, or by the swell of a passing steamer, or may have sunk for want of bailing, or, as contended by the plaintiff, may have foundered solely by being overloaded in its defective condition. All is conjecture however. The evidence does not indicate any one course of events more than another. The sad result is all that is shown. The evidence does not show that the plaintiff's intestate did in any way contribute to the drowning, but it does not show affirmatively that he did not, and this latter lack in the evidence is fatal to the plaintiff's action. *State* v. *Maine Central R. R.*, 76 Maine, 357.

The rule herein affirmed may seem to work a hardship in such a case as this, where the plaintiff is prevented from compliance with the rule by the suddenness and magnitude of the disaster itself sweeping away all possible evidence, but if the rule were otherwise it would work equal hardship to a defendant. It is not a peculiar hardship however. Many meritorious claims and defenses often fail for want of legal evidence to establish them. Judgments of courts, however, should never be based upon conjecture, but always and only upon evidence.

Exceptions overruled.

BELLE I. BUTTERFIELD, by pro ami, In Error,

vs.

WILLIAM H. H. BRIGGS.

Penobscot. Opinion August 10, 1898.

A writ of error can be issued only after final judgment when the only remaining step is execution.

A person summoned as trustee of the principal defendant and adjudged to be such trustee upon default is not thereby made subject to execution. He has no occasion for a writ of error until after judgment against him in the subsequent suit upon scire facias when he first becomes liable to execution.

ON EXCEPTIONS BY DEFENDANT.

This was a writ of error to set aside a judgment recovered in the Bangor Municipal Court, against the plaintiff in error on default as trustee. The grounds upon which the suit was sought to be maintained are substantially as follows:—

In the action aforesaid the plaintiff in error, then a minor under the age of twenty-one years, was adjudged trustee on default in the sum of $15.00 debt or damage and costs of suit taxed to the amount of $6.38.

On August 14th, 1897, the defendant in error brought an action against one Rachel Tucker of Springfield, in the County of Penobscot, to recover for medical attendance rendered to said Tucker, and at the same time trusteed the plaintiff in error who owed said Tucker for board while teaching school in the town of Springfield.

Execution in the aforesaid case was issued and placed in the hands of a deputy sheriff for Penobscot County, who made a demand on the alleged trustee for the property of the principal defendant within thirty days after judgment of said court.

Payment was refused and a few days after the three months from the date of the issuing of said execution the same was returned to the court of issue in no part satisfied.

In accordance with the provisions of R. S., Chap. 67, scire facias was sued out against the said trustee and before disclosure of the

said trustee on scire facias this writ of error was brought on the ground that said Belle I. Butterfield, who it was admitted was a minor, was injured by being adjudged trustee of said Rachel Tucker, because said Butterfield was not represented at said trial either by a guardian appointed by the probate court, or by a guardian ad litem, appointed by the judge of the Municipal Court of Bangor, but said judgment was rendered against her by default.

At the return term of this action the defendant in error filed a general demurrer to the plaintiff's declaration, which was overruled by the presiding justice, to which ruling the defendant excepted.

E. C. Ryder, for plaintiff.

A judgment against a trustee is a collateral judgment; it stands upon the same footing as any other judgment and can be vacated or avoided only by the same process which would reverse a principal judgment. The judgment recovered against the plaintiff as trustee in the suit of Briggs v. Tucker, is voidable and should be reversed, because no legal judgment can be recovered against a minor unless he is represented in court, either by a regular guardian appointed by the probate court or by a guardian ad litem; and it is the duty of the plaintiff in the suit, if he wishes to obtain a valid judgment against a minor, to see to it that a guardian ad litem is appointed, who, if he neglects to do so after appointment, will be duly summoned into court.

Trustee Process: A judgment in trustee process having been rendered and duly recorded, must stand until reversed by due course of law. *McAllister* v. *Brooks*, 22 Maine, 80. It can be vacated or avoided only by the same process which reverses the principal judgment. *Todd* v. *Darling*, 11 Maine, 34. Counsel also cited: *Wallace* v. *Blanchard*, 3 N. H. 395; *Middleton Paper Co.* v. *Rock River Paper Co.*, 19 Fed. Rep. 252; *Dennison* v. *Benner*, 36 Maine, 227; *Crockett* v. *Ross*, 5 Greenl. 443.

Guardian ad litem: *Stinson* v. *Pickering*, 70 Maine, 273; *Wakefield* v. *Marr*, 65 Maine, 341; *Crockett* v. *Drew*, 5 Gray, 399; *Swan* v. *Horton*, 14 Gray, 179; *O'Hara* v. *McConnell*, 93 U. S. 150; *Nelson* v. *Moon*, 3 McLean, 321. Effect of judgment against

an infant: *Farris* v. *Richardson*, 6 Allen, 118; *Johnson* v. *Waterhouse*, 152 Mass. 585; *Crockett* v. *Drew*, 5 Gray, 399; *Swan* v. *Horton*, 14 Gray, 179. Error will lie if no guardian be appointed: *Marshall* v. *Wing*, 50 Maine, 62; *Valier* v. *Hart*, 11 Mass. 300; *Tucker* v. *Bean*, 65 Maine, 352; *Austin* v. *Charlestown Fem. Sem.* 8 Met. 196; *Somers* v. *Rogers*, 26 Vt. 583; *Sargent* v. *French*, 10 N. H. 444; *Silver* v. *Sargent*, 1 Dall. 166; *Cook* v. *Adams*, 27 Ala. 294.

A. S. Blanchard, for defendant.

The minor has not been injured as alleged in the plaintiff's writ, because no personal liability arose whereby she might be injured; and hence no guardian was necessary. *Crockett* v. *Drew*, 5 Gray, 399; *Townsend* v. *Libbey*, 70 Maine, 163; 8 Am. & Eng. Ency. p. 110, (Note 2).

The writ of error was sued out prematurely as such writs are issued to reverse final judgments only. Shipman's Common Law Pleadings, (2nd. Ed.) p. 196. Am. & Eng. Ency. p. 813; *Lovell* v. *Kelley*, 48 Maine, 263.

A judgment rendered against a trustee by default is not a final judgment. 6 Am. & Eng. Ency. p. 813.

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

EMERY, J. We think the issuance of this writ of error was premature. Such a writ is available only after final judgment when the only remaining step is execution. Stephen on Pleading, (Tyler's Ed.,) 142; Tidd's Practice, 1064; *Wallace* v. *Middlebrook*, 28 Conn. 464.

No final judgment for or against the plaintiff in error appears to have been rendered. In the proceedings described she was not summoned to answer to any claim of that plaintiff against her. Her default through non-appearance did not confess any such claim nor subject her to judgment therefor. The plaintiff in that suit obtained no judgment against her, but, as to her, only a judgment and execution against the defendant's goods, effects or credits in

her hands or possession. At the most, her default was only prima facie evidence against her that she had such goods, effects or credits in her hands or possession. It gave the plaintiff in that action no right to execution against her, but only the right to maintain, upon certain conditions and within a limited time, a suit by scire facias in which he may or may not recover judgment against her.

She has no occasion for a writ of error until after a judgment against her in a scire facias suit. That suit may not be brought, and if brought may not result in that judgment. *Townsend* v. *Libbey*, 70 Maine, 162; *Cairns* v. *Whittemore*, 88 Maine, 501; *Crockett* v. *Drew*, 5 Gray, 399.

Exceptions sustained.

BELFAST WATER COMPANY *vs.* CITY OF BELFAST.

Waldo. Opinion August 12, 1898.

Construction of Contract. Water Works.

1. The plaintiff made a contract with the defendant in which it was agreed, among other things, that the company should furnish at such points as the city should thereafter designate, which points should be substantially those indicated upon the plan annexed to the contract, forty-five hydrants of approved pattern, each provided with three nozzles wherever required by the city. It was further agreed that if at any time the city desired additional hydrants above said number of forty-five, the company should furnish the same at an annual rental of thirty-five dollars for each hydrant set upon the pipe indicated upon the plan, and forty dollars for each hydrant which should come on new pipe; also that if the city should desire five hydrants additional to the forty-five before stipulated, located so as to require no more pipe than should be necessary to connect up the said forty-five hydrants, the company should place said five hydrants without additional charge, provided they could be set during the construction of the works, and include the rent thereof in the sum thereinafter designated for hydrant service. It was also agreed that all hydrants should be "so piped as to receive an abundant and sufficient circulation of water among and in all of the same." The company further agreed "to lay a main pipe not less than ten inches and not more than twelve in diameter in the clear, from the reservoir or stand pipe" through certain specified streets, "to connect up all said forty-five hydrants,

located as aforesaid, and all such additional hydrants, in such manner that none of said hydrants shall come on pipe smaller than six inches in diameter in the clear." The city agreed "to pay semi-annually for the hydrants aforesaid, not exceeding fifty in number, a rent of nine hundred dollars."

After the original water works had been completed, the city directed the company to lay a main through a street not specifically named in the contract, "as provided in the contract with said company." The company laid a four inch main, set two hydrants, and connected the hydrants and main with six inch pipe. In an action to recover the hydrant rental under the contract, *the court holds* that all hydrants in addition to the original forty-five, whether placed during the construction of the works or later, are within the provision of the contract requiring the location of "all such additional hydrants in such manner that none of said hydrants shall come on pipe smaller than six inches in diameter; and that even if the facts of the case otherwise admitted of the application of the doctrine of "substantial compliance," it cannot be said that furnishing pipe less than half the capacity called for by the contract is a substantial compliance with its provisions. *Held;* That the plaintiff cannot recover the rental.

2. By virtue of a contract with the city, the company obtained authority "to dig up any and all highways, ways and streets in said city, for the purpose of laying pipes during the time of constructing said works," and acting under this authority, it laid its pipes, and located certain water gates, within the street limits, near the edge of the sidewalk as it then existed. Subsequently, the city proposed to widen the sidewalk and put down a granite curbing, and directed the company to move the gate boxes and place them outside of the curbing, which was accordingly done. *Held;* that when the company placed its water gates in the street under this contract, it did so subject to the right of the city to make such changes in the surface of the street and the alignment of the sidewalk as might be necessary to render the street safe and convenient for public travel; and whenever it became necessary to change the location of the water boxes, by reason of necessary repairs or improvements in the street, it was the duty of the company to make the change at its own expense. *Held;* That it cannot recover the expense of the city.

On Report.

This action was brought to recover the rental of two hydrants from October 1, 1893, to October 1, 1897, four years at forty dollars per year, one hundred and sixty dollars, and for changing water gates by order of the committee on highways of the city of Belfast, twelve dollars and thirty cents, making one hundred and seventy-two dollars and thirty cents in all. The price of the hydrants charged in the account annexed to the writ is fifty dollars per year.

The case is stated in the opinion.

R. F. Dunton, for plaintiff.

In 1891 the Belfast Water Company, by order of the City Government, made an extension on Bay View street, for two hydrants; the pipe laid was four inch pipe, and the city has paid for these hydrants without objection, from the time they were set to the time of the trial of this case. It has never been claimed that this extension on Bay View street should have been laid with six inch pipe. This was a construction put upon the contract by the parties, presumably with full knowledge of the facts, and the court should not now adopt a different construction. *Varney* v. *Bradford*, 86 Maine, 510.

But whatever construction the court may put upon the contract, there can be no doubt that the construction put upon it by the Water Company was in good faith, and that the four inch pipe was laid by the company in good faith, supposing that it was complying with its contract. This being the case, and it appearing that the water supply is sufficient for the locality, the city would be liable for the contract price of the hydrants. If the water supply is sufficient, the result for which the city contracted has been accomplished, and this is such a substantial performance of the contract as entitles the plaintiff to recover, if done in good faith, and as to the bona fides of the plaintiff, it seems to me there can be no doubt. There being no claim, or evidence tending to show, that the water service from these hydrants is insufficient, or less efficient, on account of the size of the pipe, nothing should be deducted from the contract price. *Hattin* v. *Chase*, 88 Maine, 237; *Veazie* v. *Bangor*, 51 Maine, 509; *Norris* v. *School District*, 12 Maine, 293; *Hayward* v. *Leonard*, 7 Pick. 181.

George E. Johnson, for defendant.

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

SAVAGE, J. The principal item which the plaintiff seeks to recover in this suit is the rental of two hydrants from October 1,

1893, to October 1, 1897. It appears that the defendant city directed the plaintiff company "to lay a main through Vine Street to Waldo Avenue, as provided in the contract with said company." A main was laid and the hydrants placed. And these are the hydrants in question. The main was of four inch pipe. The connection from the main to the hydrants was of six inch pipe.

The defendant claims that the plaintiff was obliged by its contract to lay its mains with which hydrants were to be connected at least six inches in diameter, and that having failed to do so in this instance, and having put in only four inch pipe, it cannot recover the hydrant rental.

The rights of the parties are fixed by a contract in writing, dated November 15, 1886, which is made a part of the case. The only parts of the contract which relate to the subject matter of this controversy are these:

"And said party of the first part (the company) hereby further agrees to furnish at such points as said party of the second part (the city) may hereafter designate, which points shall be substantially those indicated upon the plan hereunto annexed, forty-five (45) hydrants of approved pattern, each provided with three nozzles, wherever required by said party of the second part. If at any time said party of the second part desires additional hydrants above said number of forty-five (45), said party of the first part agrees to furnish the same at an annual rental of thirty-five dollars ($35) for each hydrant set upon the pipe indicated upon the plan aforesaid, and forty dollars ($40) for each hydrant which shall come on new pipe; provided, however, that said party of the second part shall pay at the rate of rent of one hydrant for every seven hundred (700) feet of extended pipe. And if said party of the second part should desire five (5) hydrants additional to the forty-five before stipulated, located so as to require no more pipe than shall be necessary to connect up said forty-five hydrants, said party of the first part agrees to place said five hydrants without additional charge, provided they can be set during the construction of said works, and to include the rent thereof in the sum hereinafter designated for hydrant service. All hydrants are to be so

piped as to receive an abundant and sufficient circulation of water among and in all of the same."

"And said party of the first part further agrees to lay a main pipe not less than ten (10) inches, and not more than twelve (12) inches in diameter, in the clear, from said reservoir or standpipe, down Main street to the junction of Main and High streets, and there divide the same into three (3) eight (8) inch branches, one continuing down Main street, and one each way on High street, and to furnish sufficient six (6) inch pipe, to connect up all said forty-five hydrants, located as aforesaid, and all such additional hydrants in such manner that none of said hydrants shall come on pipe smaller than six (6) inches in diameter in the clear."

And the city on its part agreed "to pay semi-annually for the hydrants aforesaid, not exceeding fifty in number, a rent of nine hundred dollars."

By this contract the company agreed, in the first place, to place forty-five hydrants for a semi-annual rental of nine hundred dollars. Then it agreed to place additional hydrants without limit, as desired by the city, for a specified rental. But it was provided that the company should place five hydrants additional to the forty-five, without extra charge, that is to say, for the same nine hundred dollars, if they could be set during the construction of the works, and should require no more pipe than was necessary to connect up "the forty-five hydrants."

The defendant relies upon the following clause in the contract, —"and all such additional hydrants" shall be located "in such manner that none of such hydrants shall come on pipe smaller than six inches in diameter in the clear." The plaintiff claims that this clause is limited to the five "additional hydrants" which might be placed without extra charge during the construction of the works, under the proviso to which we have referred, and not to "additional hydrants" which might be placed thereafter by direction of the city. The plaintiff contends further that as to additional hydrants placed after the completion of the works, the only requisite specified in the contract is that "all hydrants are to be so piped as to receive an abundant and sufficient circulation of water among

and in all of the same." We do not think so. It is true that the clause just quoted is general and applies to all hydrants, both the original forty-five and all additional ones whenever placed. But we think that, in addition to this, all additional hydrants, whenever placed, must be so located as to come on pipe at least six inches in diameter. The contract reads, "all such additional hydrants." The words are general and inclusive. There is neither limitation nor distinction. We think that the necessary construction is that all additional hydrants, whether placed during the construction of the works or later, are within the requirement of the contract, relating to size of pipes.

But the plaintiff says that, even if such be the proper construction of the contract, it has in good faith substantially complied with the requirement in question. We do not think that the facts in this case admit of the application of the doctrine of "substantial compliance." *Hill* v. *School District*, 17 Maine, 316; *Holden Steam Mill Co.* v. *Westervelt*, 67 Maine, 446. And if they did, we cannot say that furnishing pipe less than half the capacity called for by the contract is a substantial compliance with its provisions. The plaintiff cannot recover this item.

The plaintiff also sues for expense of changing water gates by order of committee on highways. The contract between the parties provides that the water company "shall have the privilege and right to supply water for domestic and other purposes, and be authorized to dig up any and all highways, ways and streets in said city, for the purpose of laying pipes during the time of constructing said works, and at any time thereafter, for the purpose of making extensions and repairs, and for doing such other work as may be necessary in connection therewith, or in the operation of said water works; the same to be done with as little obstruction or delay to public travel as may be practicable."

The water company, at the time it built its works, located the gates in question, which control private services, within the street limits, near the edge of the sidewalk as it then existed. Subsequently, in 1897, the city proposed to widen the sidewalk and put down a granite curbing. The city authorities notified the water

company to move the gate boxes and place them outside of the curbing, which was accordingly done. No question is raised but that it was reasonable that the gate boxes should be so moved. There was no express agreement on the part of the city to pay the expenses of removal, but it is claimed that a promise may be implied from the circumstances already stated. We think not. When the company placed its gates in the street of the city under the contract referred to, it did so subject to the right of the city to make such changes in the surface of the street and the alignment of the sidewalk as might be necessary to render the street safe and convenient for public travel. In making needed repairs and changes in the streets, the city is but an instrument of the state, an agent of the public, and it cannot barter away its rights or fetter its duty to make such repairs and changes. To subject itself to the expense of changing the appliances of the water company in the streets whenever it became necessary to change them, by reason of repairs, would be a serious impairment of its rights, and an onerous addition to its duties.

As well stated in *National Water Works* v. *City of Kansas*, 28 Fed. Rep. 921: "The contract between the plaintiff and the defendant must be interpreted in the light of this well established rule; and, so interpreted, the plaintiff took its right to lay its pipes in the streets of the city subject to the paramount and inalienable right of the city to construct sewers therein whenever and wherever in its judgment the public interest demanded. Laying its pipes subject to this right of the city, it has no cause of action if, in consequence of the exercise of this right, it is compelled to relay its pipes." See *Rockland Water Co.* v. *Rockland*, 83 Maine, 267. Whenever it became necessary to remove the gates, it was the duty of the company to do so at its own expense.

Judgment for the defendant.

FERDINAND PENLEY

vs.

THE MAINE CENTRAL RAILROAD COMPANY.

Androscoggin. Opinion, September 1, 1898.

Way. Culvert. Town. Railroad. R. S., c. 18, § 27; Stat. 1889, c. 282, Spec. Laws, 1845. c. 270; 1856, c. 651.

In 1847 the Androscoggin and Kennebec Railroad Company located its road across a highway in Auburn and across a brook known as Barron Brook. Subsequently, having obtained from the county commissioners upon its own petition, a change of location of the highway, to facilitate the crossing of the railroad, it built its railroad across the highway by an over-head bridge, and built a culvert diagonally across the highway to give passage to the waters of the brook. By virtue of Chapter 651, Special Laws of 1856, the defendant company succeeded to the privileges and franchises and became subject to the burdens and liabilities of the first named company. The over-head crossing and culvert were maintained by the Androscoggin & Kennebec Railroad Company until its consolidation with the defendant company and have since been maintained by the defendant company. *Held;* that the defendant company is liable to the plaintiff for damages sustained by him by reason of the insufficient size of the culvert.

ON EXCEPTIONS BY DEFENDANT.

This was an action on the case to recover damages for the obstruction of an ancient water course in the city of Auburn. The jury returned a verdict for the plaintiff and the defendant excepted to the instructions of the presiding justice to the jury, which are given in the opinion, upon the question as to whose duty it was to maintain the culvert of sufficient size and suitable condition on the first day of March, 1896, when the damage complained of was done.

John A. Morrill, for plaintiff.

At the time this culvert was constructed and as it existed until 1888, the centre of the westerly abutment was located and built directly over the culvert. After the widening of the roadway under the track in 1888, the wing wall of the westerly abutment

still projected over the culvert, and at the time of the destruction of the culvert by flood a portion of that westerly abutment fell in. The great danger which would result to the public by allowing inexperienced men even of the best intentions to undertake the repair of a culvert so located directly under the main line of a railroad company is too obvious to need argument. All considerations of public policy require that the same absolute control should be exercised by the railroad company over that portion of their location, within the lines of a highway, when the crossing is below grade as when it is at grade.

If the railroad company is not under obligation to maintain a suitable culvert under such conditions, the obligation must fall upon the municipality. The measure of liability of a municipality in the maintenance of its highways is that they should be reasonably safe for travelers. The obligation of a railroad company is greater. "They are bound to exercise that degree of care and skill which cautious persons would use in the construction by competent engineers and workmen of the road-bed, track, culverts, and all the appliances and means of transportation to carry on the business of the road and operate its trains; to make frequent, careful examinations and inspections of the same in order to avoid accidents, so far as human skill and oversight can reasonably secure such result." *Libby* v. *Maine Central Railroad Company*, 85 Maine, 34, 41.

It would certainly be unjust to the railroad company, and fraught with great danger to the public, to permit a municipality charged with the duty of only maintaining a highway reasonably safe for travelers, to interfere with the structure of the road-bed of a railroad company charged with a far higher duty toward its patrons.

Counsel also cited: *Railroad Co.* v. *Halloren*, 53 Tex. 46, S. C. 37 Am. Rep. 744; and *Gt. Western Ry. Co.* v. *Braid*, *Ib.* 749, S. C. 1 Moore P. C. (N. S.) 101.

Wallace H. White and Seth M. Carter, for defendants.

The defendant built the road in accordance with the directions of the county commissioners, and when this was done the town took

the piece of new road in place of the old and had the same rights and duties at the crossing that they would have had were the crossing at the old location and no alteration of the highway made. This action depends upon the failure to maintain a suitable culvert, neglect of a common law duty.

The duty to maintain the highway with proper culverts is, in the first instance, on the town. The railroad company had the right to cross the highway. That right is granted by necessary implication under the charter. Elliott on Railroads, § 1099.

The duties of a railroad company crossing a highway above grade, aside from that of maintaining the bridges and abutments, are mostly of a negative character. It must construct its track over the highway in such a manner as not to obstruct at least the traveled portions of the way, and in case it has been necessary to make any changes in such way, to restore it into a safe and proper condition for use. In other words, it must effect its crossing by such structures and appliances as will interfere with the highway to as small an extent as practical. Each has the right of passage. The town is to be left to exercise its right, as nearly as it well can be, in the same manner as it did before the building of the railroad. In some cases the embankments and abutments may be entirely outside the limits of the highway and the only interference come from the span of the bridge far above the surface of the way. The town is left free to take care of the surface of the road, to build sewers and drains, to lay water pipes, to license the laying of street railroad tracks, to build sidewalks, and in fact to use and control the street in exactly the same manner as it would if the span of steel were not suspended over it. Elliott on Railroads, § 1109.

The common law duty of the defendant did not include any responsibility on its part for the condition of the surface of the street, the water pipes, sewers, street railroad, and the like, nor did it extend to the culverts in the road, where it was crossed by an overhead bridge. The legislature has always understood this to be the rule, and declared it early by providing that the bridges and abutments, at an overhead crossing, should be maintained by the

railroad. That was the statute when this crossing was constructed and it has been the statute ever since. Later on the legislature changed the rule providing that there might be an apportionment of the expense at an overhead crossing.

Chapter 43, of the Laws of 1878, in its provisions that a determination may be had in relation to a way already laid out, whenever the municipal officers request the railroad company to build and maintain such part of the road as is within the limits of its location, shows clearly that the legislature did not understand that any duty then existed on the part of the railroad company to maintain such way. That does not sound like a statute based upon an existing liability on the part of the railroad company to absolutely maintain the street, surface, sewers, culverts and drains.

Properly understood the language of the court in *Lander* v. *Bath*, 85 Maine, 141, applies only to grade crossings. The statute there referred to by its express terms imposes upon the railroad the expense of building and maintaining so much of the way as is within the limits of such railroad in case of a grade crossing. A different provision is made by the same statute when the crossing is not at grade. Hence this statute does not cast upon the railway corporation the duty of building and maintaining so much of the street as is within the limits of the railroad except in case of a grade crossing. Therefore the case, *Lander* v. *Bath*, has no application to this action.

In this case the abutments of the railway corporation are almost entirely outside the limits of the street. There is but slight occupation of the street by the railroad, otherwise than with the iron bridge which makes a span of sixty feet. The railroad company in no way interferes with the use of this street by the city, and the statute in question clearly recognizes the fact that in this case the duty of the building and maintaining the street is not as a matter of law cast upon the railroad corporation, for it provides by express terms a method in which the question of whose duty it is to construct and repair may be determined or apportioned.

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

FOGLER, J. This is an action on the case in which the plaintiff claims to recover damages of the defendant corporation for an alleged obstruction of an ancient water-course, known as Barron Brook, said alleged obstruction being the construction and maintenance of a culvert insufficient in size and condition to carry off the water of said brook. In 1848, and before the construction of said railroad, the county commissioners of Androscoggin county, on petition of said railroad company, in order to facilitate the crossing of said county road by said railroad, authorized said railroad company to alter the course of said county road at its expense and according to certain conditions prescribed by the county commissioners. There was evidence tending to prove that the Androscoggin and Kennebec Railroad Company built the county road on the new location and constructed the culvert in question diagonally across the county road within the limits of the railroad location to give passage to the waters of the brook; and that after its construction the culvert was maintained, inspected and kept clear by the railroad company. There was no evidence that the town or city of Auburn ever maintained or repaired the culvert except on one occasion when it repaired its outlet at the request of the railroad officials and the expense of such repairs was paid by the railroad company. At the time when the location of the county road was changed by authority of the county commissioners, the railroad company put in abutments for an over-head bridge in accordance with the requirements of the county commissioners, and in 1888 the company widened the passage way under its track and built new abutments on both sides for its over-head bridge, the wing wall of one of said abutments projecting out over the culvert for a few feet but not resting upon the culvert which was some seventeen feet below the surface of the street, the abutment being only about six feet below said surface. The surface of the county road had been taken care of by the city officials, a sewer had been built in it by the city, water pipes had been laid in it by the Auburn

Aqueduct Company, the title to which has since passed to the city, and a street railway track has been laid through it. There was no evidence of any proceedings in relation to said crossing or the respective rights and liabilities of the railroad company and the city in relation thereto except the order of the county commissioners above referred to. The defendant corporation succeeded to the rights and duties of the Androscoggin and Kennebec Railroad by virtue of Chapter 651 of the Special Laws of 1856.

Upon the question of whose duty it was to maintain said culvert of sufficient size, and in suitable condition, the presiding justice instructed the jury as follows:

"It appears that the Androscoggin & Kennebec Railroad Company located its road across what is now known as Turner Street, and upon their petition had Turner Street changed to its present location, and that the railroad under the direction of the county commissioners in making the change built Turner Street and built the culvert complained of. Subsequently under authority from the legislature that railroad and others were consolidated in what is known as the Maine Central Railroad Company, and by the act of consolidation the Maine Central Railroad assumed all the privileges and franchises and was subjected to all the burdens and liabilities of the original corporations which were consolidated in it.

"And it appears that since the consolidation, the Maine Central Railroad Company have occupied the railroad across Turner Street and over its original location and still continue to do so, and for the purposes of this case I instruct you that the Maine Central Railroad Company is charged with the duty of maintaining a suitable culvert at that place. If the culvert existing there at the time of the consolidation was in fact insufficient and unsuitable for the place and for the purposes for which it was designed, the railroad company would be liable to the same extent as if it had been originally built by them, and you will apply the principles of law which I shall give you in regard to the duty of this defendant corporation, the Maine Central Railroad Company, as to culverts, in the same manner in which you would if they had been the original road that built and located the culvert at that place."

The jury returned a verdict for the plaintiff and the defendant excepts to the foregoing instructions.

By its Act of incorporation, Chapter 270, Special Laws of 1845, the Androscoggin and Kennebec Railroad Company was authorized and empowered to locate and construct its railroad between the termini therein named "with all suitable bridges, tunnels, viaducts, culverts, drains and all other necessary appendages." By virtue of such authority it constructed the culvert in question and maintained it until by proceedings under Chapter 651, Special Laws of 1856, the defendant corporation succeeded to the rights and duties of the Androscoggin and Kennebec Railroad Company. By the last named act the defendant corporation acquired all the powers, privileges and immunities then possessed by, and was subject to all the legal obligations then resting upon said former corporation. Since it so succeeded the Androscoggin and Kennebec Railroad Company, the Maine Central Company has maintained and operated its tracks over its original location where the culvert was constructed, and we can have no doubt that it is liable for the defective construction and condition of this culvert to the same extent that the Androscoggin and Kennebec Railroad Company would have been had it continued in the possession and management of its road, and the instructions of the presiding justice in this respect were correctly given.

The further instruction of the presiding justice to which exceptions are taken, to the effect that the defendant corporation is charged with the duty of maintaining the culvert is also correct. It is well settled that a railroad corporation which obstructs a watercourse for its purposes must provide and maintain suitable culverts or other means for the uninterrupted flow of the water; and if it neglects so to do it is liable to a party injured in an action for damages. *Rowe* v. *Granite Bridge Corp.*, 21 Pick. 348; *Proprs. of Locks and Canals* v. *Nashua & Lowell R. R.*, 10 Cush. 388; *March* v. *Portsmouth & Concord R. R.*, 19 N. H. 372; *Brown* v. *Cayuga & Sus. R. R. Co.*, 12 N. Y. 492; *Lander* v. *Bath*, 85 Maine, 141.

The case of *Lander* v. *Bath* is decisive of the case at bar.

There as here, the culvert was built and maintained by the railroad company and the city had in no way meddled therewith. The action, like that at bar, was grounded upon the unlawful obstruction of an ancient water course. In both cases all acts that contributed to the conditions of things were the acts of the railroad companies. In deciding in *Lander* v. *Bath*, that the defendant city was not liable for the defective condition of the culvert, the court held by necessary implication that the railroad company was liable.

Exceptions overruled.

JOHN Z. CAMPBELL *vs.* LEBARON ATHERTON.

Androscoggin. Opinion September 1, 1898.

Conditional Sales. Record. Lease. R. S., c. 91, § 1; c. 111, § 5; Stat. 1891, c. 11.

In 1894, A and B made a written agreement, therein called a "lease," by the terms of which the former delivered to the latter certain articles of furniture, the price of which was stated in the agreement, for which B was to pay five dollars down and one dollar a week, as rental, until the whole price was paid, and A agreed, upon complete payment, to sell the furniture to B. B failed to make the payments as required by the agreement.

Held; a conditional sale, and not a mortgage, and not an agreement that personal property bargained and delivered for which a note was given should remain the property of A until the note was paid; and that a record of the city clerk's office was not required by the statutes then in force as against the plaintiff, a mortgagee of B.

AGREED STATEMENT.

The facts appear in the opinion.

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

Under the addition made to the contract April 4th, signed by both parties, a new and different agreement was made. It contains all the essential elements of such a writing as is required to be recorded by R. S., c. 111, § 5, as amended by Stat. 1891, c. 11. Kelley had paid under this agreement thirty-two dollars, nearly

the full agreed price of the goods. The court will avoid a forfeiture and a hardship if possible. *Gross* v. *Jordan*, 83 Maine, 380; *Hervey* v. *Locomotive Works*, 93 U. S. 664; *Hine* v. *Roberts*, 48 Conn. 267, (40 Am. Rep. 170); *Loomis* v. *Bragg*, 50 Conn. 228, (47 Am. Rep. 638); *Whitcomb* v. *Woodworth*, 54 Vt. 544; *Lucas* v. *Campbell*, 88 Ill. 447; *Singer Co.* v. *Holcomb*, 40 Iowa, 33; *Domestic S. M. Co.* v. *Anderson*, 23 Minn. 57.

It will be observed that the contract as it finally appears, if it is construed by the court as a conditional sale and not as a lease, contains all the elements of a promissory note,— the parties, the time, the promise to pay a fixed sum at a definite time.

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

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

FOGLER, J. This is an action of trespass quare clausum for entering the plaintiff's premises and taking away certain goods and chattels hereinafter referred to.

The defendant admits the entering and taking and justifies the taking of the goods and chattels as agent of the Atkinson Furnishing Company, claiming that the said goods and chattels at the time of the taking thereof, were the property of that company.

The Atkinson Company in March, 1894, delivered a portion of said goods to one Kelley and the following writing was signed by the company and said Kelley:

"53395

MEMORANDUM OF AN AGREEMENT made and entered into this 31st day of March, A. D. 1894, by and between the Atkinson Furnishing Company, of Lewiston, in the county of Androscoggin and State of Maine, of the first part, and Morrison O. Kelley of Auburn in the county of Androscoggin and State of Maine of the second part:

Witnesseth:

In consideration of five dollars paid to the party of the first part, by the party of the second part, the receipt whereof is hereby

acknowledged, said party of the first part hereby agrees, upon the complete payment of the amounts hereinafter specified, and at the respective times herein named, to sell to said party of the second part, the following goods and chattels, to wit:

[Here follows list and prices of goods.]

This instrument is upon the condition that said party of the second part shall pay to said party of the first part the sum of one dollar per week until the amount of this lease shall have been paid in full.

It is agreed that said party of the second part shall have possession of said goods and chattels until breach of the above written condition, but shall use them in a reasonable manner and shall keep them in such manner that said party of the first part may take possession of them upon any breach of the conditions, it being agreed that time is of the essence of this contract.

Provided, however, that after twenty dollars shall have been paid, then in case of default of any payment, the party of the second part shall have a grace of ten days, in which he may by payment of the sum then overdue, and interest thereon, be restored to the same rights which he would have had if he had made the payments promptly.

Made in duplicate the day and year first above written.

MORRISON O. KELLEY,

Witness, THE ATKINSON FURNISHING CO.

C. P. ATHERTON. Per L. B. Atherton."

Subsequently the company delivered to Kelley the other goods so taken by the defendant, and an agreement was written on the back of said original writing and signed by the parties, to the effect that the goods then delivered should "be added to and put upon the lease of goods hired by me of them previously and upon the same terms and conditions," and none of the goods "whether named in the original lease or afterwards added, is to be or become my property until the full amount or price for each and all of them is paid."

Neither the original agreement nor that subsequently made upon

the back of the original were recorded in the office of the city clerk of the city of Auburn in which said Kelley resided.

November 23, 1894, Kelley gave the plaintiff a mortgage of all the same goods, which was duly recorded in the city clerk's office, November 24, 1894.

Kelley has not paid the Atkinson Company in full the amount stipulated in said contract, and has not paid his mortgage debt to the plaintiff.

The plaintiff took possession of the goods under his mortgage, and the defendant, as the company's agent, entered the plaintiff's premises and took away the goods, for which entry and taking this suit is brought.

The plaintiff claims title to the goods under his mortgage, contending that the contract of Kelley and the Atkinson Company is invalid as against him because it was not recorded.

The defendant contends that the contract of Kelley and the company, whether it be regarded as a lease or a conditional sale, was not an instrument which, by the statute in force in 1894, was required to be recorded to be valid as against any other person than the parties thereto.

The plaintiff contends, in the first instance, that the instrument in controversy may fairly be considered a mortgage of personal property from Kelley to the Atkinson Company and therefore of a nature to require record under R. S., c. 91, § 1, which provides that "No mortgage of personal property is valid against any other person than the parties thereto unless . . . . the mortgage is recorded by the clerk of the city, town or plantation . . . . in which the mortgagor resides."

We are of the opinion that the transaction in question cannot be regarded as a mortgage. By the terms of the contract the title to the property remained in the Atkinson Company. Kelley was to have no title to the property until he should have paid the full amount stipulated in the contract. Having no title to the property, Kelley could give no mortgage to the party owning the same.

The plaintiff further contends that, if the court shall decide that the transaction cannot be construed as a mortgage, it contains all

the essentials of "an 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," and that by the provisions of R. S., c. 111, § 5, is not valid, except as between the original parties to said agreement, unless it is recorded like mortgages of personal property.

We do not think that either the original instrument, nor the subsequent agreement indorsed thereon can be regarded as containing the essentials of a note given by Kelley to the Atkinson Company.

As stated by the court in *Loomis* v. *Bragy*, 50 Conn. 228, in which the written contract was nearly identical with that in the case at bar: "The defendant's promise in the contract to pay the monthly rent was not to be regarded as a promise for the breach of which the plaintiff could maintain a suit, but the plaintiff's remedy was solely that provided by the contract, to retake the piano and hold as forfeited all that had been paid."

In the cases in this state where agreements of a somewhat similar character have been held to constitute or include a note, and so required to be recorded under the provisions of the statute above referred to, the written instrument contained, either expressly or by necessary implication, a promise to pay the price stipulated in the writing. *Nichols* v. *Ruggles*, 76 Maine, 25; *Cunningham* v. *Trevitt*, 82 Maine, 145; *Hill* v. *Nutter*, Id. 199.

When no such promise is expressed or necessarily implied in the writing, the transaction has been held to be a conditional sale. *Morris* v. *Lynde*, 73 Maine, 88; *Gross* v. *Jordan*, 83 Maine, 380; *Quimby* v. *Lowell*, 89 Maine, 547; *Hopkins* v. *Maxwell*, 91 Maine, 247; *Hine* v. *Roberts*, 48 Conn. 267; *Loomis* v. *Bragg*, supra; *Whitcomb* v. *Woodworth*, 54 Vt. 544.

In our opinion the transaction between Kelley and the Atkinson Company was a conditional sale, and no record of the writing was necessary under the statute then in force in order that the title to the property and the right of possession should remain absolutely in the company; and the defendant, as agent of the company, is not liable to the plaintiff for taking the property.

The parties have agreed that if the defendant was justified in taking the goods and chattels judgment is to be rendered for the plaintiff for nominal damages.

Judgment for plaintiff.
Damages assessed at one dollar.

STATE *vs.* JOSEPH NEDDO.

Kennebec. Opinion September 2, 1898.

Indictment. Pleading. Burglary. Accessory. R. S., c. 119, § 8; c. 131, § 7.

In an indictment against an accessory after the fact, indicted jointly with the principal, who is charged with breaking and entering a dwelling-house, *held;*

(1) that an allegation that the principal broke and entered a dwelling on a day named sufficiently charges a breaking and entering in the day time;

(2) that, if it is intended to charge the offense for which the lighter punishment is provided by R. S., c. 119, § 8, it is not necessary to aver that no person was lawfully in said dwelling-house and put in fear;

(3) that charging a breaking and entering and larceny of chattels therein is not bad for duplicity;

(4) that the allegation that the principal "feloniously and burglariously did steal, take and carry away" certain goods and chattels in the dwelling-house is a sufficient averment of felonious intent;

(5) that it is not necessary to aver that valuable things were kept in the dwelling-house;

(6) that the indictment having sufficiently charged the principal with breaking and entering, the averment that the accessory knew the principal "to be such principal felon and to have committed the crime aforesaid," is a sufficient allegation of guilty knowledge on the part of the accessory;

(7) that the averment that the accessory "did harbor, conceal, maintain and assist" the principal, "knowing him to be such principal felon and to have committed the crime aforesaid with intent that he the said principal felon [naming him] might escape detection, arrest, trial and punishment" charges with sufficient exactness that the accessory intended that the principal should escape punishment for the crime set forth in the indictment;

(8) that the averment that the accessory did not stand in the relation of husband or wife, or parent or child to the principal sufficiently alleges that the accessory did not stand in such relation at the time stated immediately preceding such averment;

(9) that it is not necessary to set forth the means by which the accessory assisted the principal.

ON EXCEPTIONS BY DEFENDANT.

This was an indictment found at the September term, 1897, of the Superior Court, for Kennebec county, against William Coro as principal, and the defendant, Joseph Neddo, as accessory after the fact. The crime alleged was breaking and entering in the day time into a dwelling-house, no person being lawfully therein, in violation of the provisions of R. S., chap. 119, § 8:—"Whoever, with intent to commit a felony, breaks and enters in the day time, or enters without breaking in the night time, any dwelling-house, or breaks and enters any office, bank, shop, store, warehouse, vessel, railroad car of any kind, or building in which valuable things are kept, any person being lawfully therein and put in fear, shall be punished by imprisonment for not less than one nor more than ten years, but if no person was lawfully therein and put in fear, by imprisonment for not more than five years, or by fine not exceeding five hundred dollars." The principal pleaded guilty and was sentenced; the accessory filed a special demurrer which was overruled by the presiding justice and the defendant brought his exceptions thereto into this court.

The case is sufficiently stated in the opinion.

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

Jos. Williamson, Jr. and L. A. Burleigh, for defendant.

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

FOGLER, J. Exceptions by Joseph Neddo to the overruling by the judge of the Superior Court for the county of Kennebec of the respondent's demurrer to an indictment against one William Coro, as principal, for breaking and entering a dwelling-house and larceny of goods and chattels therein, and against the respondent, as accessory after the fact. The indictment, as to Coro, is under R. S., ch. 119, § 8, which is as follows:

"Sec. 8. Whoever, with intent to commit a felony, breaks and

enters in the day time, or enters without breaking in the night time, any dwelling-house, or breaks and enters any office, bank, shop, store, warehouse, vessel, railroad car of any kind, or building in which valuable things are kept, any person being lawfully therein and put in fear, shall be punished by imprisonment for not less than one nor more than ten years, but if no person was lawfully therein and put in fear, by imprisonment for not more than five years, or by fine not exceeding five hundred dollars."

And, as to Neddo, the respondent, the indictment is under R. S., ch. 131, § 7, which is as follows:

"Sec. 7. Every person, not standing in the relation of husband or wife, parent or child, to the principal offender, who harbors, conceals, maintains, or assists any principal felon or accessory before the fact, knowing him to be such, with intent that he may escape detection, arrest, trial or punishment, is an accessory after the fact, and shall be punished by imprisonment for not more than seven years, and by fine not exceeding one thousand dollars; but in no case shall such punishment exceed the punishment to which the principal felon on conviction would be liable."

The demurrer alleges that the indictment is defective in the following respects: (1) that it does not allege whether the breaking and entering and larceny was committed in the day time or in the night time; (2) that it does not allege whether at the time of the alleged breaking and entering any person was lawfully in said dwelling-house therein mentioned and put in fear; (3) that it alleges two distinct offenses, viz: a breaking and entering and a larceny, and is therefore bad for duplicity; (4) that it does not allege that the taking of the bank bills therein mentioned was accompanied with a felonious intent; (5) that it does not allege that the dwelling-house therein mentioned was a building for public use or in which valuable things were kept; (6) that the allegation that the respondent knew that Coro had committed the "crime aforesaid" does not sufficiently charge the respondent with knowledge that Coro had committed any specified offense; (7) that it does not sufficiently allege any harboring, concealing, maintaining and assisting of said Coro by the respondent, with the intent on the

part of the respondent that said Coro might escape detection, arrest, trial and punishment for any offense set forth in the indictment; (8) that it does not set forth the time at which the respondent did not stand in the relation of parent or child to said Neddo; (9) that the manner of harboring, concealing, maintaining and assisting are not set forth. We are of opinion that neither of the grounds for demurrer can be sustained and that the demurrer was correctly overruled.

I. The indictment alleges that Coro broke and entered the dwelling-house on a day named. This sufficiently charges an offense under the statute above quoted for breaking and entering a dwelling-house in the day time. If the indictment had alleged an entry without breaking it would have been necessary to aver that such entry was in the night time. It is well settled that if a crime is punishable more heavily when committed in the night time, the indictment, to justify the heavier punishment, must charge it to have been committed in the night time, but ordinarily if only the lower punishment is sought to be inflicted, the allegation of day time is not essential. II Bishop Crim. Proc. § 133 a; *Commonwealth* v. *Reynolds*, 122 Mass. 454; *Butler* v. *The People*, 4 Denio, 68.

II. The offense defined and made punishable by the statute is the breaking and entering with felonious intent of a dwelling-house or other building or place therein designated, and the punishment provided is graded according to whether or not any person is lawfully therein and put in fear. In *Devoe* v. *Commonwealth*, 3 Met. 327, Shaw, C. J., declares it to be a well established rule, "that where there are several species of the same general crime, with more or fewer circumstances of aggravation, and subject to a gradation of punishments, it is not necessary in the indictment, to negative those circumstances which would render it more aggravated." . . . . "If it is intended to charge the mitigated offense, it is sufficient to charge those facts which constitute the crime, simply omitting the circumstances which, by the statute, would aggravate the offense and increase the punishment." To the same

effect is *Commonwealth* v. *Squire*, 1 Met. 258-263; *Larned* v. *Commonwealth*, 12 Met. 240; *Commonwealth* v. *Hamilton*, 15 Gray, 480. In the case at bar it was not necessary to aver that no person was lawfully in the dwelling-house and put in fear, and the indictment is sufficient to charge Coro with the offense of breaking and entering a dwelling-house, for which the lighter punishment provided by the statute can be inflicted.

III. The indictment charges that Coro broke and entered the dwelling-house and certain chattels therein did steal, take and carry away. The respondent contends that thus two distinct offenses are charged and that the indictment is on that account bad for duplicity. In a certain sense the indictment sets out two offenses, but this form of indictment, in cases of burglary and breaking and entering, has been long in use in England and in this country and it is well settled that an indictment so framed is not open to the charge of duplicity. II Bishop Crim. Pro. § 143; I Wharton Ind. & Pleas, (368); *Commonwealth* v. *Hope*, 22 Pick. 1; *Commonwealth* v. *Tuck*, 20 Pick. 356; 1 Hale's P. C. 547; East's P. C. 515, 516. "To make up burglary," says Lord Hale, "it must not be only to break and enter a house in the night time, but either a felony must be committed in the house, or it must be to the intent to commit a felony." Mr. East in note to p. 520, says that the true definition of burglary is, "breaking and entering with the intent to commit felony, of which the actual commission is so strong a presumptive evidence, that the law has adopted it and admits it to be equivalent to a charge of the intent in the indictment."

As stated by Shaw, C. J., in *Commonwealth* v. *Hope*, supra: "And the indictment may be laid, as in the present case, with an intent to steal, and with actually stealing, and this is not double, and the accused may then be convicted of the whole, or either the burglary or the larceny separately."

IV. The indictment alleges that Coro, "feloniously and burglariously did steal, take and carry away" certain goods and chattels in the said dwelling-house then and there being found. This is

undoubtedly a sufficient allegation of felonious intent. Indeed, it is difficult to conceive how such intent could have been more explicitly set out.

V. The statute makes the breaking and entering of a dwelling-house a distinct offense. Whether or not valuable things are therein kept is immaterial. If the breaking and entering is of any building other than a dwelling-house it is necessary to allege that valuable things were therein kept, but no such allegation is required when the indictment charges the breaking and entering of a dwelling-house.

VI. The indictment sufficiently charges Coro with the offense of feloniously breaking and entering a dwelling-house. It alleges that the respondent knew Coro "to be such principal felon and to have committed the crime aforesaid." To avoid unnecessary repetition one count or allegation may refer to a preceding count or allegation. *State* v. *McAllister*, 26 Maine, 374; *State* v. *Nelson*, 29 Maine, 329. The averment that the respondent knew that Coro had committed the "crime aforesaid" is clearly equivalent to an allegation that he knew that Coro had committed the crime fully set forth in the former part of the indictment and is a sufficient averment of guilty knowledge.

VII. The indictment charges that the respondent did harbor, conceal, maintain and assist said principal felon, William Coro, with intent that he, the said principal felon might escape detection, arrest, trial and punishment. The crime with which the principal felon is charged being fully set forth in a former part of the indictment, we are of opinion that it charges with sufficient exactness that the respondent intended that Coro should escape punishment for the crime set forth in the indictment. The indictment is in the form laid down in II Bish. Crim. Pro. §§ 8 and 10, and in I Wharton's Prec. of Ind. and Pleas, (99) and (100).

VIII. The indictment alleges "that Joseph Neddo of Waterville in said county of Kennebec on said second day of September in the year of our Lord one thousand eight hundred and ninety-seven, at

Waterville aforesaid, in the county of Kennebec aforesaid, said Joseph Neddo not standing in the relation of husband or wife or parent or child to the said William Coro, etc." This is a sufficient allegation that the respondent did not stand in such relation at the time stated immediately preceding such averment. It could by no possible construction refer to any other time.

IX. "It is in no case necessary to set forth the means by which the accessory before the fact incited the principal to commit the felony, or the accessory after received, concealed or comforted him; for it is perfectly immaterial in what way the purpose of one was effected, or the harboring of the other secured; and as the means are frequently of a complicated nature, it would lead to great inconvenience and perplexity if they were always to be described upon the record." II Bishop's Crim. Proc. § 8.

Exceptions overruled.

MELVIN P. FRANK, and another,

vs.

CLARA H. MALLETT, and Trustee.

Cumberland. Opinion August 31, 1898.

Practice. Exceptions. R. S., c. 77, §§ 49, 51; Stat. 1893, c. 174.

It is settled law in this State that when a cause is tried by the presiding justice without the intervention of a jury, under the R. S., c. 77, § 49, exceptions do not lie to his rulings upon matters of law, unless the right to except has been expressly reserved.

It is equally well settled that under ordinary circumstances his judgment as to the effect of the testimony, and his decision of questions of fact, are conclusive.

By agreement of the parties this cause was heard by the presiding justice without the aid of a jury, in accordance with the statute named. The right of "exceptions in matters of law" was not reserved to either party. There was no entry on the docket indicating any desire or purpose on the part of the defendant to claim such right.

Held; upon petition under Stat. of 1893, c. 174, providing for a hearing upon exceptions which the presiding justice disallows or fails to sign, that the defendant's exceptions were properly disallowed in the court below and his petition should be dismissed by the law court.

PETITION BY DEFENDANT TO ESTABLISH EXCEPTIONS.

This was a petition by the defendant and presented to this court sitting as a court of law praying to have exceptions, alleged by him at the trial in the court below, established by this court sitting as a law court and as provided by the statute of 1893, c. 174, as follows: "Section fifty-one of chapter seventy-seven of the revised statutes is hereby amended by adding thereto the following words: "If the justice disallows or fails to sign and return the exceptions, or alters any statement therein, and either party is aggrieved, the truth of the exceptions presented may be established before the supreme judicial court sitting as a court of law upon petition setting forth the grievance, and thereupon, the truth thereof being established, the exceptions shall be heard, and the same proceedings had as if they had been duly signed and brought up to said court with the petition. . . . ."

The petition was presented to the court sitting at Portland within and for the western district, July term, 1898; and notice having been ordered thereon the parties were heard at that term.

The case is sufficiently stated in the opinion.

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

W. E. Ulmer, for defendant.

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

WHITEHOUSE, J. This cause was heard by the presiding justice without the aid of a jury and a decision rendered in favor of the plaintiffs. The defendant's counsel alleged exceptions to the rulings of the presiding justice in excluding certain testimony offered at the hearing and also excepted "to the judgment of the court in the case." These exceptions were presented to the presiding justice and disallowed by him. The case comes to this court on the defendant's petition to have the truth of her exceptions

established before the law court in accordance with the provisions of section one of chapter 174 of the public laws of 1893.

It appears from the docket entries in the case that the cause was heard and determined by the presiding justice by agreement of the parties in accordance with section 49 of chapter 77 of the Revised Statutes. The right of "exceptions in matters of law" was not reserved to either party. There is no entry on the docket indicating any purpose or desire on the part of the defendants to claim such right. No requests for rulings upon questions of law were submitted to the presiding justice, and no such rulings appear to have been made by him. On the contrary it may fairly be inferred from the defendant's omission to claim the right of exceptions by entry upon the docket, as well as from the fact that by consent of the parties the case was tried without the services of a stenographer and from all the evidence before the law court, that the right of exceptions was mutually understood to be waived.

However that may be, it is settled law in this state that when a cause is tried by the presiding justice without the intervention of a jury, in accordance with the provisions of R. S., c. 77, § 49, above cited, exceptions to his rulings in matters of law do not lie, unless there has been an express reservation of the right to except. *Reed* v. *Reed*, 70 Maine, 504; *Roxbury* v. *Huston*, 39 Maine, 312; *Dunn* v. *Hutchinson*, 39 Maine, 367. In the case last named, as in the principal case, the right to exceptions in matters of law was not reserved, but the defendant alleged exceptions to the exclusion of evidence and to the decision of the cause.

In dismissing the exceptions the court said: "Where a case has been submitted to the presiding justice to be heard and determined by him, we do not understand that exceptions can properly be taken to his decision or proceedings."

In such a case it is equally well settled that, under ordinary circumstances, the judgment of the presiding justice as to the effect of the evidence and his decision as to the matters of fact in issue, are also final and conclusive upon the parties. *Haskell* v. *Hervey*, 74 Maine, 192; *Reed* v. *Reed*, supra; *Kneeland* v. *Webb*, 68 Maine, 540; *Randall* v. *Kehlor*, 60 Maine, 37.

It is therefore plain that the petitioner has failed "to establish the truth" of her exceptions within the meaning of the act of 1893 above named, and that the exceptions presented to the presiding justice were properly disallowed.

Petition dismissed.

ELBRIDGE G. BENNETT, Surviving Partner,

vs.

EDGAR H. BENNETT, Administrator.

Cumberland. Opinion September 9, 1898.

Partnership. Administrator. Limitations. R. S., c. 69; c. 87, § 12. Stat. 1895, c. 133.

The plaintiff was co-partner with Henry P. Bennett who died January 20, 1889. The plaintiff gave bond as surviving partner in March, 1889. The defendant was appointed administrator of the deceased partner in March, 1889, and published notice of his appointment in the same month. The plaintiff settled his first and final account as surviving partner October 23, 1896, by which it appeared that he had paid $1015.81 in settlement of the partnership affairs in excess of the amount received by him from the partnership assets. This action was commenced December 23, 1896, in which the plaintiff sues to recover one-half of said amount from the estate of the deceased partner.

Held; that the suit is barred by the special statute of limitations, R. S., c. 87, § 12, which, prior to the amendment of 1895, provides that no action shall be maintained against an administrator or executor on claims against the estate unless commenced within two years and six months after notice has been given of his appointment.

ON REPORT.

This was an action of assumpsit submitted to the law court upon a report of the evidence from the Superior Court for Cumberland County, and brought by the plaintiff as surviving partner against the defendant as administrator of the estate of Henry P. Bennett, late of Deering, deceased, who was during his life time a co-partner with the plaintiff, to recover the sum of $507.90, which the plaintiff claims is one-half of the amount paid out by him over

and above all moneys and property belonging to the co-partnership formerly existing between himself and the deceased.

The case is stated in the opinion.

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

The limitation of two years does not apply as against a surviving partner, because he has no right of action until the settlement of his account in probate. *Forward* v. *Forward*, 6 Allen, 496–8: "The decease of one partner dissolves the partnership, and the debts become the sole debts of the surviving partner. He should pay them and settle his account in probate court." "The objection (of limitation) does not apply to the payment of partnership debts and as they become the debts of the surviving partner at the decease of the testator, he may pay them at any time before rendering his account in the probate court. The limitation of four years does not affect them."

As to the general rights of the surviving partner against the estate of the deceased partner, see 2 Lindley on Partnership, Am. Ed. pp. 591–2: "On the death of a partner the surviving members of the firm are the proper persons to get in and pay debts." "The survivors have a right, if they pay more than their share of the debts of the old firm, to be reimbursed out of the estate of their deceased partner." 17 Am. & Eng. Ency. pp. 1161–2–3; *Wilby* v. *Phinney*, 15 Mass. pp. 120–1; Croswell on Executors and Administrators, § 595.

By R. S., c. 69, § 6, the surviving partner may represent the partnership estate insolvent; but if he does not see fit so to do, he is not prevented from paying in full, as surviving partner, the debts of the partnership, and collecting the proper share thereof from the estate of the deceased partner by action at law.

George Libby, for defendant.

Besides the action being barred by statute, the defendant claims that the plaintiff is not entitled to recover in this form of action, because there never existed any promise either express, or implied, that the administrator would pay to the surviving partner any sum or sums of money which he might expend in payment of the co-

partnership indebtedness in excess of the co-partnership funds and property in his hands. The action should be debt and not assumpsit. The surviving partner must have known that the co-partnership was hopelessly insolvent, and knowing this fact he should have so represented the estate and settled the same accordingly.

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

FOGLER, J. The plaintiff as surviving partner brings this suit against the administrator of his deceased partner to recover $507.90, or one-half of the balance found due him on settlement of his account as surviving partner.

The writ is dated December 23, 1896.

The plea is the general issue with brief statement that the claim sued is barred by R. S., c. 87, § 12; and further that, inasmuch as the plaintiff did not represent the partnership estate insolvent, he is precluded from recovering of the individual estate of the deceased partner any amount expended by him in settlement of the partnership affairs in excess of the partnership assets in his hands.

The defendant further contends in argument that if the plaintiff has any remedy it is in an action of debt and not in assumpsit.

The action was begun in the Superior Court for Cumberland county and at the request of the parties was reported by the justice of that court to the full court.

The facts so far as material are substantially as follows: The plaintiff is the surviving partner of the late firm of H. P. and E. G. Bennett, which was composed of the plaintiff and Henry P. Bennett, who died January 30, 1889.

On the first Tuesday of March, 1889, the plaintiff gave bond and was authorized to settle the partnership estate as provided by R. S., c. 69.

The defendant was duly appointed administrator of the estate of the deceased partner on the 8th day of February, 1889, and published notice of such appointment on February 8th, 15th and 22d, 1889.

The plaintiff, as such surviving partner, filed his first and final account in the probate court on the third Tuesday of March, 1896, which was finally settled on appeal by the Supreme Court of Probate on the 23d day of October, 1896, a balance of $1015.81 being found due to the plaintiff for money paid by him in settlement of the partnership business over and above the amount received by him from the partnership assets.

I. A surviving partner who pays more than his share of the partnership liabilities may recover from the estate of his deceased partner his due proportion thereof. *Bird* v. *Bird*, 77 Maine, 499. And recovery thereof may be by an action of assumpsit. *Bond* v. *Hays*, 12 Mass. 34; *Wilby* v. *Phinney*, 15 Mass. 120.

II. Revised Statutes, c. 87, § 12, prior to the amendment of 1895, provided that no action shall be maintained against an executor or administrator on claims against the estate unless commenced within two years and six months after notice has been given of his appointment. To this provision the statute makes certain exceptions, none of which, however, are applicable to the case at bar.

The defendant gave notice of his appointment in February, 1889. This suit was commenced December 23, 1896, more than seven years after such notice.

The statute above referred to bars the plaintiff's suit unless his claim as surviving partner is excepted from the operation of the statute.

The cases cited by the plaintiff's counsel sustain the position that a suit by the surviving partner against a debtor of the firm is not subject to the limitation provided in suits against executors or administrators, but do not sustain the position that such statute is not applicable to a suit by a surviving partner against an executor or administrator. Revised Statutes, c. 69, § 2, makes the duty of a surviving partner, who has given the bond provided by law, to close up the affairs of the partnership within one year after the date of his bond unless a longer time is allowed by the judge of probate. The plaintiff delayed for more than seven years from the

date of his bond to close up the affairs of the partnership, and his suit for reimbursement was not commenced against the administrator of his deceased partner within the time limited by the statute for bringing actions against administrators and executors. His suit is not excepted, either by statute or by adjudged cases from the operation of such statute, and is therefore barred. *Whittier* v. *Woodward*, 71 Maine, 161; *Fowler* v. *True*, 76 Maine, 46.

Judgment for defendant.

JOHN O. SULLIVAN, Libellant, *vs.* CATHERINE SULLIVAN.

Androscoggin. Opinion October 10, 1898.

Divorce. Gross and confirmed habits of Intoxication. Evidence.

In an action for divorce where the issue is whether the libellee has, since the marriage, contracted gross and confirmed habits of intoxication, evidence of his good reputation before marriage for sobriety is not admissible.

ON EXCEPTIONS BY LIBELLEE.

This was a libel for divorce inserted in a writ of attachment. The libel alleges, and the answer admits the marriage between the parties, both of whom have been previously married and are elderly people, on the seventh day of January, A. D. 1895. The date of the libel is February 3, 1898. The charges in the libel are that "the said Catherine Sullivan, wholly unmindful of her marriage covenants and duty, during the three years last past, has been guilty of gross and confirmed habits of intoxication, and during the three years last past has been guilty of cruel and abusive treatment towards him" the libellant.

The defendant offered, as tending to show the improbability of her at once falling into gross and confirmed habits of intoxication, the testimony of four of the citizens of Auburn, who had known her well for from twenty to twenty-five years prior to her marriage, as to her general reputation and character and her general reputation and character as to sobriety. On objection by the libellant's

attorney, the court excluded all evidence of her character prior to the date of her marriage. The jury found the libellee guilty of gross and confirmed habits of intoxication and of cruel and abusive treatment as charged in the libel, on May 17, 1898.

To these rulings the libellee excepted.

Tascus Atwood, for libellant.

Geo. C. Wing, for libellee.

Counsel cited: 3 Greenl. Ev. § 25, citing in 15th ed. *Heine* v. *Com.* 91 Pa. St. 145; *Porter* v. *Seiler*, 23 Pa. St. 424, S. C. 62 Am. Dec. 341; *Townsend* v. *Graves*, 3 Paige, 455, in which among other things Chancellor Walworth says: "If a party is charged with a crime or any other act involving moral turpitude, which is endeavored to be fastened upon him by circumstantial evidence, or by testimony of witnesses of doubtful credit, he may introduce proof of his former good character for honesty and integrity to rebut the presumption of guilt arising from such evidence, which it may be impossible for him to contradict or explain."

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

EMERY, J. The issue of fact is whether the libellee, since her marriage three years before these proceedings, was guilty of "gross and confirmed habits of intoxication."

Is evidence of her good reputation or character for sobriety before the marriage admissible to sustain the negative of the issue? Her counsel argues that such reputation or character would naturally induce the tribunal to require more evidence of her guilt than it would otherwise,—that in all criminal prosecutions evidence of previous good reputation or character is received in behalf of the accused,—and that in this case she should equally have the benefit of such evidence.

The law, however, is settled otherwise. In civil suits, unless the reputation or character of one of the parties is directly in issue as in slander cases, no evidence as to them can be received. In *Potter* v. *Webb*, 6 Maine, 14, the issue was whether a decree of the

judge of probate had been obtained by fraud and collusion. In *Thayer* v. *Boyle*, 30 Maine, 475, the issue was whether the defendant had maliciously set fire to the plaintiff's barn. In *Soule* v. *Bruce*, 67 Maine, 584, the issue was whether the defendant was guilty of an assault upon the plaintiff. In all these cases evidence of reputation or character was held to be inadmissible.

A suit for a divorce is a civil suit. A judgment in such a suit is not followed by any penal consequences. When a divorce is sought for upon a specific statute ground, like utter desertion, adultery, gross and confirmed habits of intoxication, etc., the reputation or character of either party is not directly in issue. In *Humphrey* v. *Humphrey*, 7 Conn. 116, the issue was whether the libellee, the wife, was guilty of adultery. The evidence against her was presumptive rather than positive, but evidence of her good character was nevertheless held to have been rightfully rejected.

Exceptions overruled.

WILLIAM E. ALDEN *vs.* WILLIAM H. THOMPSON.

Androscoggin. Opinion October 8, 1898.

Jurisdiction. Disclosure by Debtor. Register of Probate. R. S., c. 113, § 51; Stat. 1887, c. 137; 1897, c. 330.

The jurisdiction of registers of probate to act in disclosure proceedings was not taken away by the Stat. of 1897, c. 330, relating to disclosure commissioners.

AGREED STATEMENT.

This was an action of trespass to recover damages for an alleged false imprisonment of the plaintiff in the county jail, at Auburn, from the 23rd day of June to the 29th day of June, 1897.

The writ is dated January 3, 1898. The plaintiff was arrested and committed to jail upon an execution issued by Fred O. Watson, the register of probate for the county of Androscoggin, in favor of the defendant, for the costs of a disclosure under and by virtue of

the provisions of chapter 137 of the public laws of 1887 and acts additional thereto.

The parties agreed to the following statement of facts:

The defendant, as surviving partner of the late firm of Jordan and Thompson, recovered judgment on the 11th day of May, A. D. 1897, in the municipal court of the city of Lewiston, against the plaintiff, for the sum of twenty-five dollars and seventy-two cents, debt or damages, and costs of suit taxed at eight dollars and three cents. On the twelfth day of May, 1897, an execution in due form was issued thereon by the clerk of said court, and on the same day, one Harold R. Smith, attorney of record of the defendant, made application in the form prescribed by said chapter 137 to said Watson, the register of probate for the county of Androscoggin, praying for a subpœna to issue to said William E. Alden to appear before said register and make disclosure, in accordance with said chapter 137 and the acts additional thereto and amendatory thereof. On the same day, said Watson duly issued a subpœna to said debtor, commanding him to appear before him at the probate office, in Auburn, in said county, at four o'clock in the afternoon of the nineteenth day of June, 1897. This subpœna was duly served upon the said William E. Alden. Said Watson had not been appointed a commissioner under the provisions of Revised Statutes, Chap. 113, § 51, as amended by the laws of 1897, chapter 330, but acted in his capacity of register of probate for said county. On said nineteenth day of June, the said Alden failed to appear, and his default was recorded by the said Watson, and he failed to obtain the benefit of the oath provided for in section 8 of said chapter, and thereupon, the said Watson rendered judgment in favor of the defendant, William H. Thompson, for his costs, and the legal fees of said magistrate, taxed at three dollars and ninety cents in accordance with section 23 of said chapter 137, and on the twenty-first day of June, 1897, said Watson issued an execution therefor in due form of law, and on the twenty-third day of June, 1897, the said plaintiff was arrested by virtue of said execution for costs so issued by said Watson, and committed to jail in Auburn, in said county of Androscoggin.

It was agreed that all proceedings in making said application to said register of probate, and before and by said register of probate, were in conformity to the provisions of chapter 137, and acts additional thereto and amendatory thereof, provided the said register was authorized by said chapter as amended by chapter 330 of the laws of 1897 to entertain said proceedings.

If the law court should be of the opinion that the said register had jurisdiction in the premises, judgment is to be rendered for the defendant; otherwise, said action is to stand for trial.

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

J. A. Morrill, for defendant.

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

SAVAGE, J. Trespass to recover damages for alleged false imprisonment. The plaintiff was arrested and committed to jail upon an execution in favor of the defendant, issued June 21, 1897, by Fred O. Watson, the register of probate for the county of Androscoggin, for the costs of a disclosure, under the provisions of chapter 137 of the Public Laws of 1887, and acts additional thereto.

The only question raised in the case is whether the jurisdiction of registers of probate to act in disclosure proceedings was taken away by chapter 330 of the Public Laws of 1897. We think this question must be answered in the negative.

By section 51 of chapter 113 of the Revised Statutes, the supreme judicial court was empowered to appoint disclosure commissioners. Such a commissioner, upon application of the owner of an unsatisfied judgment, was authorized to take the disclosure of the judgment debtor's business affairs. By section 3, chapter 137 of the Public Laws of 1887, like jurisdiction to take disclosures was given to judges of probate, registers of probate, and judges of municipal and police courts, and thereafter in the statute, the term "magistrate" was used to designate these officials indiscriminately. Chapter 330, Public Laws of 1897, repealed section 51, chapter

113, of the Revised Statutes, and provided for the appointment of disclosure commissioners by the governor, instead of by the supreme judicial court. The act then provided, in section 2, that the commissioners so appointed should "perform the duties required by chapter one hundred and thirty-seven of the public laws of eighteen hundred and eighty-seven, and acts amendatory thereof and additional thereto." The plaintiff in this case claims that the jurisdiction thus conferred was exclusive—that these duties were to be performed by such commissioners, and by no one else. Were this section to be considered alone, the plaintiff's contention would be entitled to much weight. But we must construe the statute, and ascertain the legislative intention, by an examination of all its parts, and such an examination renders it clear, we think, that the legislature intended that registers of probate and the other officers named in the statute of 1887 should retain their jurisdiction. The act of 1897, after providing for the appointment of disclosure commissioners by the governor, and specifying their duties, proceeded to amend the act of 1887 (chap. 137) section by section. Sections 2, 4, 5, 7, 9, 14, 16, 20 and 21 were thus amended. These sections all relate to the machinery of disclosure proceedings. Section 26, which gave to disclosure commissioners appointed by the court the power to perform the duties required by the act of 1887, was specifically repealed. But section 3 of the act of 1887, the very section which conferred jurisdiction upon registers of probate and the other officers in question, was left intact, and the term "magistrate," which had been applied to all such officers, was retained throughout the chapter. If it was the intention to take away the jurisdiction of these officers, it is inconceivable that it should not have done so by amending the only section which conferred jurisdiction. This was not done, unless by an implication that would be strained indeed, if we construe the chapter as a whole.

It is the opinion of the court, therefore, that Mr. Watson had jurisdiction to issue the execution upon which the plaintiff was arrested, and that in accordance with the stipulation of the parties, the entry must be,

Judgment for the defendant.

ARTHUR W. CAMPBELL, by next friend,

vs.

CHASE GRANITE COMPANY.

Hancock. Opinion October 11, 1898.

Jury. Verdict. Misconduct. New Trial.

It is the duty of the court to secure a fair trial of causes heard before a jury, and the trial must be conducted upon legal principles and free from suspicion or abuse.

Verdict set aside and a new trial granted where it appears that, at the boarding house of some of the jurors, the merits of a cause on trial before them were quite generally discussed by others in their presence and hearing; that one of the jurors on one occasion, if not more, joined in the discussion and expressed an opinion upon a vital point of the case; that during the trial these discussions sometimes became heated, and that the merits of the case were freely and frequently commented on and discussed in the presence and hearing of the jurors.

ON MOTION BY DEFENDANT.

J. A. Peters, Jr., for plaintiff.

A. W. King and E. E. Chase, for defendant.

PER CURIAM. This case comes before us upon motion to set aside the verdict for misconduct of some of the jurors, and improper influences brought to bear upon them during the progress of the trial.

From the evidence upon the motion it appears, that at the boarding house where some of the jurors boarded, the merits of the cause were quite generally discussed by third parties in the presence and hearing of some of the jurors and opinions expressed thereon, and that one, at least, of the jurors on one occasion, if not more, joined in the discussion and expressed an opinion upon a vital point in the case; that during the trial these discussions sometimes became quite heated, and that the merits of the case were freely and frequently commented on and discussed in the presence and hearing of the jurors boarding there, who were then

sitting as jurors in this case. What and how much effect these discussions and expressions of opinion may have had in producing or influencing the verdict cannot be known, but they were so pronounced that we think they became a mischievous factor in the deliberations of the jury, destructive of an honest verdict. The law requires that causes shall be decided upon the evidence introduced in court, and that alone; that jurors are to act unbiased and unaffected by outside influences or public opinion.

If a departure from this wholesome rule is permitted there is great danger that the rights of parties may be sacrificed by irresponsible statements of uninformed or interested persons, having the effect of testimony which is not under oath or subjected to cross-examination or in any way subservient to legal rules. It is not only improper, but it is a contempt of court liable to severe punishment, for outside parties to discuss a case on trial, or state alleged facts, or express opinions upon the merits of a cause in the presence and hearing of jurors sitting in the cause; and it is in the last degree improper and reprehensible for a juror while thus employed to listen to such discussion or express an opinion upon the merits of the cause. His duty is to hear all the evidence in court and the instructions of the presiding judge and then, and not till then, to arrive at a conclusion as to what facts have been proved, and apply to them the rules of law received, and render a verdict which shall express the legal effect of the facts proved. A verdict is supposed to be and ought to be the deliberate conclusion of the mind of each and every juror wholly uninfluenced and unimpressed by the opinions of anybody outside of the jury. Truth and purity in verdicts can be reached in no other way.

In this case some of the jurors were exposed to improper and unlawful influences, and to some extent, joined therein, unwittingly, no doubt, but still the infectious poison existed. It is the duty of the court in such case to secure a fair trial of the cause, conducted upon legal principles and free from suspicion or abuse.

Motion sustained. Verdict set aside.
New trial granted.

NETTIE S. JOHNSTON *vs.* NORRIS H. HUSSEY, Exor.

Lincoln. Opinion November 3, 1898.

Stat. Limitations. New Promise. Evidence. R. S., c. 81, § 97.

In *Johnston* v. *Hussey*, 89 Maine, 488, it was held that a certain letter written to the defendant by the plaintiff's husband, and subscribed also by the defendant's testator, was insufficient to remove the bar of the statute of limitations which had been pleaded. Upon a re-trial of the case, the plaintiff introduced oral testimony to "explain and elucidate the meaning of the language and words in the letter as used and understood by the parties," notwithstanding which the presiding justice ordered a nonsuit. *Held;* that this ruling is right. The new evidence relied upon afforded no aid in interpretation of the letter. It was really additional to the letter.

To remove the bar of the statute of limitations, the acknowledgment or promise must be express, in writing, and signed by the party chargeable thereby. The acknowledgment must be in the writing itself, and cannot be read into it by means of oral testimony. *Held;* that the words of the defendant's testator which are relied upon are not in the letter, nor are any words having an equivalent meaning. The court cannot write them in.

See *Johnston* v. *Hussey*, 89 Maine, 488.

ON EXCEPTIONS BY PLAINTIFF.

This action is now before the law court for the second time. The opinion in its former appearance is found in 89 Maine, 488. At that time the case showed that an action of assumpsit had been brought on an account annexed by Nettie S. Johnston against her father, Job Hussey,—against him personally, in his lifetime, his death occurring soon after,—and the action being now defended by his son and executor, Norris H. Hussey, who relies on the statute of limitations. The writ is dated November 16, 1896. The last item in the account is dated some seven or eight years prior, in June, 1879. The plaintiff in the former argument of this case, relied upon a certain letter of considerable length, to be found in the former report at p. 490, signed by Wm. Johnston, the plaintiff's husband, to remove the statute bar, the letter having also at the bottom the names of Job Hussey, the original defendant, and

his wife. The court held that the letter not only did not contain an express acknowledgment of an existing liability, but did not acknowledge that Job Hussey ever was indebted to the plaintiff according to her declaration. The case then went back to the court at nisi prius, when, some time later, in October, 1897, the plaintiff's daughter, whose name appears as a witness to the signatures to the letter just referred to, offered her affidavit, which is a part of the case as it now appears, and as follows:

"To THE HONORABLE COURT, setting for the County of Lincoln, at Wiscasset, Me., I would most respectfully make a statement of facts within my knowledge concerning the letter offered before the Court, at the October term, 1895, signed by Wm. Johnston, Job Hussey, Ruth Hussey and Hattie M. Johnston, as a witness in the Nettie S. Johnston vs. Job Hussey case.

"In connection, herewith, will be offered the copy of a letter from "Noll" Hussey to his mother.

"The copy I believe to be correct, from my certain knowledge of the original letter, and in no essential does it differ.

"It startled and agitated my grandfather and grandmother in whose employ I was at that time. They declared that they were indebted to both my father Wm. Johnston, and to my step-mother Mrs. Nettie S. Johnston.

"They instructed me to invite my father and step-mother to come to their residence and upon their arrival at the house of my grandparents, I was told to show them the letter and, after it was read, Mr. and Mrs. Johnston disclaimed any such indebtedness, declaring, on the contrary, that Job Hussey was their debtor. My grandfather declared that no one of his children had aided him as had Mrs. Johnston.

"A settlement of all accounts was agreed to be necessary and the various claims of each party were considered; but, as I am informed that my father's claim has been finally adjusted, I shall say no more about that in my statement.

"Mrs. Nettie S. Johnston claimed there was due her on account, as per her book placed in evidence, certain sums of money,

advanced at different times, as stated in her letter, also for services rendered to my grandparents in their home during the period in which Mr. Wm. Johnston, his daughter, and infant son boarded with them, from Nov. 12th, 1879, to Apr. 1st, 1881, and that they, Mr. and Mrs. Job Hussey, had agreed to pay for such service.

"These claims named, were admitted by Mr. Job Hussey, who declared both his willingness and ability to pay for it in these words: 'The place is good for it.' Having considered the several accounts, including that of money she had loaned them at different times, at the request of Job Hussey, her, (Nettie S. Johnston,) board and that of her child, her services to them and his indebtedness therefor to her at a moderate wage, Job Hussey instructed Wm. Johnston to write Norris Hussey a letter detailing to him the particulars of the agreement of settlement and that when Wm. Johnston had written the letter to bring it to him for his signature.

"The letter was written by my father on the 4th day of February, 1886, he again, with his wife Nettie S. Johnston, visited my grandfather with the draft of the letter and several books of account for examination.

"It was at this time that Nettie S. Johnston made the proposition to her father, Job Hussey, to off-set any claim for wages due her, as before stated, if, upon his part, he would repay to her such sums of money as she had advanced to them, as stated in the letter, when she might demand the same, or upon his decease, that his executor should pay the same. His executor, Mr. Norris Hussey, my grandfather declared, was instructed by his will, to 'Pay my just debts.' The paper was formally signed. My father then asked my grandfather if he desired the letter witnessed and he said he did and asked me to witness their signatures and his statement which I did.

"As to other matter contained in the letter, I refer to its history, I do not think it would be necessary for me to repeat the statements I have already made before the courts.

HATTIE M. DRAKE.

COMMONWEALTH OF MASSACHUSETTS.

WORCESTER, ss. WEBSTER, OCT. 23rd, 1897.

Personally appeared the above named Hattie M. Drake and made oath to the truth of the above statements by her subscribed.

Before me,

FRANK E. DEON, Justice of the Peace."

[A COPY OF NORRIS HUSSEY'S LETTER TO HIS MOTHER.]

BOOTHBAY, Jan. 3rd, 1886.

"DEAR MOTHER:

Received Hattie's letter Friday. Was very glad to hear from you all. Mother, you said you would like some money. Don't you think "Will" would pay father for the horse or part of it so he could get along for a few weeks or has he paid it all up? I should like to know, as it don't seem, as though anyone pays him. They take his goods and that seems to be the end of it. If he can't pay him why not sell him to some one that can? I wish father would get some of him if he owes him as I am having a very poor trade, and have got to pay father's taxes soon, which is nearly $40.00. Please write me and let me know how matters stand between "Will" and father. Your son, NOLL.

"Tell me all the bills that father has now owing him and the persons who owe him if you can.

HATTIE M. DRAKE."

The presiding justice ruled that the evidence was insufficient to remove the limitation bar and ordered a nonsuit. To this ruling the plaintiff had exceptions.

W. H. Hilton, for plaintiff.

The statement signed by Job Hussey setting forth "how matters stand," explained and elucidated as it is by the affidavit of Mrs. Drake, showing what meaning was intended to be conveyed by this statement and in what sense the expression "how matters stand" was used, shows an express acknowledgment of an existing debt with a declaration of willingness to pay the same, clear and definite.

The instrument must operate according to the intention of the parties unless it be contrary to law. Where the meaning is doubtful, the circumstances at the making of the instrument and the subsequent acts of the parties are to be considered in determining the sense of the words. *Berridge* v. *Glassey*, 112 Pa. St. 442; *Patrick* v. *Grant*, 14 Maine, 233; *Tyler* v. *Fickett*, 73 Maine, 410; *Gallagher* v. *Black*, 44 Maine, 99; *Storer* v. *Ins. Co.*, 45 Maine, 175; 1 Am. & Eng. Ency. p. 533, note.

Mrs. Drake says that, "these claims named were admitted by Mr. Job Hussey, who declared both his willingness and ability to pay for it in these words: 'The place is good for it.'"

O. D. Castner, for defendant.

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

SAVAGE, J. In *Johnston* v. *Hussey*, 89 Maine, 488, this court decided that the letter dated February 4, 1886, which was written to the defendant by the plaintiff's husband, and which was also subscribed by Job Hussey, the defendant's testator, was insufficient to remove the bar of the statute of limitations which had been pleaded. The court said: "We do not find in the letter any words indicating that the father promised to make a money payment for the services and supplies, or that he expressly acknowledged any liability therefor." Upon a re-trial of the case, the plaintiff, to remove the statute bar, introduced the same letter, and also introduced, without objection, the affidavit of Hattie M. Drake, who had been a witness to the signature of Job Hussey on the letter before referred to. The purpose of the introduction of the affidavit, as the case shows, was "to explain and elucidate the meaning of the language and words as used and understood by the parties in the statement of February 4, 1886." It is true that extrinsic evidence is admissible to explain words of doubtful or ambiguous meaning, or to disclose the circumstances surrounding the parties, or to apply language of description and designation to the parties and subjects intended. These are aids to interpreta-

tion. But the interpretation in the end must be of the writing itself. Nothing can be added to it nor incorporated within it. If the letter as written failed to show an express promise or acknowledgment, a promise or acknowledgment can not be read into it by means of oral testimony. It is claimed that the affidavit shows the intention of Job Hussey to acknowledge the debt sued. That can not help the plaintiff, if the letter fails to express that intention. There appears to be nothing in the letter which requires or admits extrinsic explanation or elucidation. There are no words of doubtful meaning. The situation and relation of the parties sufficiently appear. The affidavit affords no aid by way of explanation. It really seeks to add to the letter. The matter in the affidavit chiefly relied upon is the statement that Job Hussey declared, in connection with the writing of the letter, and with reference to the claim sued for: "The place is good for it." And the plaintiff claims that this expression was an acknowledgment of the claim, and of his willingness and ability to pay it, and that the letter should be interpreted in the light of this circumstance. If by any stretch of construction, the words could be interpreted as the plaintiff contends, still the fact remains that neither they, nor any words having an equivalent meaning, are in the letter; and we can not write them in. The statute is explicit. The acknowledgment or promise must be express, in writing, and signed by the party chargeable thereby. R. S., c. 81, § 97.

If we should give the effect claimed to the statements in the affidavit, we should thereby admit as evidence of the acknowledgment, matter not contained in the writing. We repeat the language of Mr. Justice EMERY in the former opinion: "The acknowledgment must be in writing—must be contained and found in the writing." "The writing signed by the father is alone to be searched for evidence of a promise." The ruling of the presiding justice that the evidence was insufficient to remove the bar of the statute, and the order of nonsuit, were both correct.

Exceptions overruled. Nonsuit confirmed.

JOHN M. THOMPSON, Administrator,

vs.

WILLIAM W. MASON, et als., Executors.

York. Opinion November 3, 1898.

Error. Costs of Reference. Exceptions. R. S., c. 82, §§ 10, 73. Rule of Court, XXI.

Where a referee awards costs against a defeated party, and in his report states specifically what items of costs he awarded, whether the award is erroneous or not, is a question of law, and exceptions will lie as a matter of right to the acceptance of the report. But when such a report is accepted, and the defeated party, without fraud, accident or mistake, fails to preserve his rights by taking exceptions to the acceptance of the report, error will not afterwards lie to reverse the judgment against him.

ON REPORT.

A writ of error to reverse the judgment in suit John M. Thompson, Administrator, v. Jeremiah M. Mason, September Term, 1895, Supreme Judicial Court, York county.

The plea, the general issue, with a brief statement.

The case appears in the opinion.

Edgerly and Mathews of N. H., *J. O. Bradbury*, with them, for plaintiff.

N. and H. B. Cleaves and S. C. Perry; F. M. Higgins, for defendant.

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

SAVAGE, J. Writ of error to reverse a judgment in the suit of John M. Thompson, administrator, against Jeremiah M. Mason. The error complained of, if error, is one of law and not one of fact. We can, therefore, notice only such matters as appear of record. The transcript of the record is the only competent evidence. *Lewiston Steam Mill Co.* v. *Merrill*, 78 Maine, 107. An

examination of the record produced discloses that the action of Thompson against Mason was, by agreement of parties, referred by rule of court; that the referee subsequently made his report to the court, and his report was accepted.

The referee awarded "that the defendant recover and have judgment for the sum of four hundred and twenty-eight dollars and fifty-four cents, being that portion of the costs of this reference which I award (said sum including the defendant's witness fees and that part of the referee's fees which are not paid by the county,) and that he also recover costs, exclusive of witness fees, to be taxed by the court." Judgment was rendered upon the award, for the specific sum awarded by the referee as costs of reference, and for the costs of court taxed by the court, all amounting to four hundred eighty-nine dollars and ninety-two cents. The plaintiff in error does not complain of the taxation of costs of court by the court, but he insists that it was error for the referee to award against him as a part of the costs of reference so much of the referee's own fees as were not allowed by the court and paid by the county. Revised Statutes, c. 82, § 73, provides that the fees and necessary expenses of referees appointed by agreement of parties, under rule of court, shall be paid by the county, and that the amount thereof shall be fixed by the court. The plaintiff in error contends that under this statute, in the absence of any agreement of the parties, (concerning which in this case the record is silent,) the fees of a referee are limited to the amounts allowed to him by the court, and that a referee has no power to award the recovery of his own fees, or a part of them, against the defeated party. Whether this be so or not is clearly a question of law; and when the report of a referee shows, as it does in this case, that such fees have been awarded against the defeated party, exceptions will lie as a matter of right to the acceptance of the report.

We do not deem it necessary to pass upon the merits of the plaintiff's principal contention, because we are satisfied that under the practice in this state for half a century at least, error will not lie under such circumstances as are disclosed by this record, where a party in court could have had his rights summarily determined by

exceptions, and, without fraud, accident or mistake, has failed to avail himself of them. It is undoubtedly true that formerly, even within the history of this state, courts looked more favorably than now upon writs of error. Practice was more special and technical then than it is now. Many dogmas suited to the genius of former generations have passed into the limbo of discarded doctrines. Notably so are many rules relating to pleading and practice. Modern practice tends more and more to direct and speedy results. More and more it is required of suitors to be diligent in the pursuit of their rights, and more and more the failure to take timely advantage of such remedy as the law affords is deemed to be a waiver. The courts and the people alike realize that it is best that a lawsuit should have an end. This universal sentiment was voiced by the legislature when it declared that no proceeding shall be reversed for error that is by law amendable. Revised Statutes, c. 82, § 10. To the same effect have been the decisions of this court, both as to errors of law and errors of fact.

A judgment will not be reversed on a writ of error for a mistake in casting interest. *Starbird* v. *Eaton*, 42 Maine, 569. In cases where the facts alleged are such as do not affect the validity or regularity of the proceeding itself, and in which a party having a legal capacity to act has had a full and fair opportunity upon legal notice to avail himself of such facts, in a court having competent jurisdiction, but has voluntarily or by his own laches waived his rights in regard to any defense which might have been sustained by them, error cannot afterwards be maintained. *McArthur* v. *Starrett*, 43 Maine, 345; *Starbird* v. *Eaton*, supra. Error will not lie where remedy is afforded by review. *Lovell* v. *Kelley*, 48 Maine, 263. The right of appeal is a bar to writ of error, because it is a more speedy, cheap and convenient mode of correcting errors; and it is difficult to perceive why the same reasoning will not apply with equal force to the right to file exceptions, and why the latter right should not bar a writ of error equally with the former. *Weston* v. *Palmer*, 51 Maine, 73. Error does not lie when the party could have taken exceptions for the same cause and had a summary decision. *Conway Fire Ins. Co.* v. *Sewall*, 54

Maine, 352. Generally, error will not lie when the questions of law raised by the assignment might have been presented to the court in some other form. *Prescott* v. *Prescott*, 59 Maine, 146. The neglect of counsel for plaintiff in error to be present at the acceptance of a report of itself affords no ground for relief. *Denison* v. *Portland Company*, 60 Maine, 519. Nothing of which the party could have taken advantage in the court below can be assigned for error of fact. Nor where he might have appealed. Nor where exceptions might have been taken. *Denison* v. *Portland Company*, supra. Error does not lie when the assigned error might have been pleaded in abatement. *Richmond* v. *Toothaker*, 69 Maine, 451. When remedy for erroneous taxation can be heard by exceptions or appeal, error for its correction will not lie. *Wood* v. *Leach*, 69 Maine, 555. If a mere error of taxation were to be deemed sufficient ground for the reversal of a judgment, the evils resulting from such a doctrine would be incalculable. An irregularity in entering up judgment is not ground for error. *Wood* v. *Leach*, supra. Defects in a declaration that are amendable cannot be reached by writ of error. *Lewiston Steam Mill Company* v. *Merrill*, 78 Maine, 107.

This collation of the expressions of opinion in the decisions of this court shows unmistakably that the rule is settled beyond controversy, that when a party litigant has had his day in court, has had a fair opportunity to raise his questions of law and to preserve his rights by exceptions, but has neglected or omitted to do so, and has stood silently by while his case went to judgment, he cannot afterwards raise the same questions by writ of error. To permit him to do so would be to permit him to take advantage of his own laches, and frequently to the great disadvantage of his adversary.

It is not difficult to apply this rule to the case at bar. The report of the referee was duly filed. It was open to the plaintiff in error to file his objections in writing under Rule XXI. The court might then have recommitted the report, if the justice presiding had deemed the award erroneous, and to rulings thereon in matters of law, exceptions would have lain. Or, as the alleged error appeared upon the face of the report, the rights of the plaintiff in

error would have been fully preserved by simply taking exceptions to the acceptance of the report. He did neither. Whether his failure to act was due to his own remissness, or to his sense of the justice of the report, or as suggested at the argument, because the fees were awarded in pursuance to an agreement of the parties, it is immaterial to inquire. Had he seen fit to do so, every question which he now seeks to raise by his writ of error might have been expeditiously and conveniently raised and determined upon a bill of exceptions, in the original proceeding. It is now too late. He has had his day in court. He must be bound by the judgment.

Judgment affirmed, with costs for the defendants in error.

CORNELIUS SULLIVAN

vs.

JOSEPH N. GREENE, and WASHINGTON COUNTY RAILROAD, trustee.

LEWIS D. GREENE, claimant.

Washington. Opinion November 3, 1898.

Trustee Process. Claimant. Void Assignment. R. S., c. 86, § 79.

A claimant in a trustee process should make full, true and explicit answers to all questions propounded to him in relation to the indebtedness to him of the principal defendant.

In this case the claimant of the funds in the hands of the trustee is the son of the defendant and he claimed the funds by virtue of an assignment from his father. The plaintiff claimed that the assignment was without consideration and fraudulent. It appearing, aside from the relations and conduct of the parties, that the evidence in support of the claimant's position, which came wholly from the claimant and defendant, was vague, indefinite and unsatisfactory, and that the claimant has not made full, true and explicit answers—he refusing to produce written evidence admitted by him to be in his possession—*it is held by the court,* that the assignment is void; that similar findings of the justice below are correct, and that the trustee be charged in the manner ordered by him.

ON EXCEPTIONS BY CLAIMANT.

This was an action of debt on judgment brought by Cornelius Sullivan against Joseph N. Greene, in which the Washington County Railroad was summoned as one of the trustees. Lewis D. Greene appeared as a claimant for the funds disclosed by the Washington County Railroad in their disclosure duly filed. A hearing was held upon said disclosure before a justice of this court at the October term, 1897. The testimony offered in behalf of the claimant and in behalf of the alleged trustee was duly heard.

The court entered as of said October term, 1897, the following ruling and decision, to wit:

Cornelius Sullivan vs. Joseph N. Greene and trustees.

"Hearing before me upon disclosure of the Washington County Railroad, Lewis D. Greene, claimant, at Ellsworth, Dec. 2, 1897, by agreement of parties.

"It appears from the disclosure of the alleged trustee, the Washington County Railroad, that of the sum of $25,000, which the Washington County Railroad was to pay the principal defendant in accordance with the provisions of Chap. 90, Private and Special Laws of 1895, the sum of $19,000 has been paid to said Greene prior to the service of the trustee process, leaving the sum of $6000 unpaid. . . . .

"It further appears from the trustee's disclosure that the goods, effects and credits in the hands of the alleged trustee are claimed by a third person, to wit, Lewis D. Greene, by virtue of an assignment from the principal defendant to him. Leave having been previously granted to cite in the claimant, at the October term, 1897, the said Lewis D. Greene, appeared and was admitted as a party to the suit so far as respects the title to the goods, effects and credits in question. It appears that upon the 6th day of May, 1896, Jos. N. Greene made and executed a written assignment under seal to the said Lewis D. Greene of 'all claims I now have against the Washington County Railroad Company, a corporation duly established by law and now having its place of business at said Calais, for money due me, and particularly a claim for six thousand four hundred thirty-one dollars and fifty cents, and what-

ever interest may be due thereon; the said sum of six thousand four hundred thirty-one dollars and fifty cents with interest thereon, being now due me from said Washington County Railroad Company, in money.' And that on the 11th day of May, 1896, by a written instrument also under seal, the said Lewis D. Greene acknowledged the receipt of the assignment and accepted the same.

"The only question presented at the hearing was as to the validity of this assignment. The position of the claimant was that the assignment was made in good faith, for a full and adequate consideration and that it was consequently valid; while the plaintiff claimed that the assignment was made for the purpose of defrauding the defendant's general creditors, or at least this particular creditor, the plaintiff, who had recovered a verdict in the original suit against Jos. N. Greene, a few days before the date of the assignment.

"Except for this assignment, and the bill in equity above referred to which has been disposed of, there is no dispute as to the fact that the Washington County Railroad has in its hands at least six thousand dollars—the defendant claims more—belonging to Jos. N. Greene, the principal defendant.

"The position of the claimant is that this assignment was made as security for indebtedness of some $7000 owed by Jos. N. Greene to the claimant, which indebtedness is said to have arisen, in brief, in this way. It is claimed that in the year 1883, Lewis D. Greene took the contract to build what is known as the Mount Desert Branch of the Maine Central Railroad Company; that the profits of this enterprise amounted to about $50,000; that this sum belonged to Lewis D. Greene; that the amount was received by Jos. N. Greene for Lewis D. under a power of attorney and was subsequently loaned to the Grand Southern Railroad Company; that in 1893 Lewis D. Greene recovered judgment against the Grand Southern Railroad Company for the money previously loaned, and subsequently in the same year some $45,000 was collected by Jos. N. Greene for the claimant, still acting under a power of attorney for him. That of this sum Jos. N. Greene used for his own purposes, with the knowledge and assent of the claim-

ant, $7000, or more, for which sum he became indebted to the claimant and that this indebtedness continued up to and existed at the time of the assignment in question.

"Lewis D. Greene is the son of Jos. N. Greene and during all the period of time covered by the transaction above referred to he was an officer in the regular army of the United States. It is undoubtedly true that the contract for building the Mount Desert Branch of the Maine Central Railroad was in the name of the claimant. Was he the real contractor who built this road, or was his name merely used for some purpose?

"After carefully considering all the evidence, the conduct and relation of the parties, the position of the claimant and the fact that during the greater portion of the time while the Mount Desert Branch Railroad was being built, he was at his army post, the manner in which, from first to last, Jos. N. Greene treated and handled this money, giving no evidences of indebtedness and not keeping books of account, and from the vague, indefinite and unsatisfactory character of the evidence in support of the claimant's position, when such a claimant should make full, true and explicit answers to all questions propounded to him in relation to the indebtedness to him of the principal defendant, I am unable to believe that it was understood at the time between Jos. N. Greene and his son, that the latter was in fact—although he was in name—the contractor for the construction of this railroad.

"Upon the other hand I am forced to the conclusion that Jos. N. Greene was the real contractor and that his son's connection with such construction was merely nominal, simply a matter of form, and that his name was used by Jos. N. Greene for convenience for reasons which are not difficult to perceive.

"From this conclusion it necessarily follows, that the profits accruing from the construction of the Mount Desert Branch belonged to Jos. N. Greene; that the money loaned to the Grand Southern Railroad Company and subsequently recovered was the money of Jos. N. Greene, and that at the time of the execution of the written assignment, the basis of Lewis D. Greene's claim, Jos. N. Greene was not indebted to the claimant in any considerable

amount. This assignment was consequently void as to his creditor, the plaintiff in this suit.

"In accordance with my conclusions as above upon the facts involved, I therefore find that there is now and was at the time of the service of the trustee writ upon the Washington County Railroad, at least the sum of six thousand dollars in its hands belonging to Jos. N. Greene, the principal defendant, and that it should stand charged as trustee for the amount for which the plaintiff shall recover final judgment, not exceeding the amount of the ad damnum in the plaintiff's writ, that being less than the amount found to be in the trustee's hands as the property of the defendant.

"Trustee charged for the amount for which the plaintiff shall recover final judgment, but not exceeding the ad damnum in the writ in this suit.

"Trustee to have its taxable costs out of the balance in its possession."

To the foregoing ruling and decision, the said claimant excepted.

J. F. Lynch and C. B. Donworth, for plaintiff.

Clarence Hale, for Lewis D. Greene, claimant.

The assignment from Jos. N. Greene to Lewis D. Greene is valid and legal: (1.) It was based upon a full and ample consideration. (2.) As matter of law actual fraud must be affirmatively shown in order to defeat such assignment. *Laughton* v. *Harden*, 68 Maine, p. 213; *Dunlap* v. *Bournouville*, 26 Pa. St. 73; *Wheelden* v. *Wilson*, 44 Maine, 11; Wait, Fraud. Convey. § 218; 8 Am. & Eng. Ency. p. 767. (3.) As against subsequent creditors the assignment is valid even if based only on a good and equitable consideration. *Moore* v. *Thompson*, 32 Maine, 503; *Jones* v. *Roberts*, 65 Maine, p. 274; *Littlefield* v. *Smith*, 17 Maine, 327; *Ellis* v. *Higgins*, 32 Maine, 34. (4.) All the dealings between the parties show the elements of a valid assignment which the court should uphold. (See case of verbal assignments: *Simpson* v. *Bibber*, 59 Maine, 196.) *French* v. *Motley*, 63 Maine, p. 326; *Hamilton* v. *Hill*, 86 Maine, 137.

It cannot be intimated that claimant's position is trumped up for the purposes of this case, for the testimony shows that years ago

the same position was taken in the courts of New Brunswick, and finally sustained by the Privy Council of Great Britain. The position taken in the foreign courts has a direct bearing as showing good faith in this case. See *Hall* v. *Sands*, 52 Maine, 355; *Bailey* v. *Bailey*, 61 Maine, 364.

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

SAVAGE, J. In this case a controversy has arisen concerning the title to something over $6000 in the hands of one of the trustees, the Washington County Railroad Company. The defendant is Joseph N. Greene, and his son, Lewis D. Greene, has appeared and become a party as claimant of the funds by virtue of an assignment to him from the defendant, dated May 6, 1896, and prior to the service of process upon the trustee in this suit. The presiding justice before whom the cause was heard found that the assignment was void as to the plaintiff, a creditor of Joseph N. Greene, and ordered that the trustee be "charged for the amount for which the plaintiff shall recover final judgment, but not exceeding the ad damnum in the writ in this suit." The claimant excepted.

"Whenever exceptions are taken to the ruling and decision of a single justice as to the liability of a trustee, the whole case may be re-examined and determined by the law court, and remanded for further disclosure or other proceedings, as justice requires." R. S., c. 86, § 79. We have accordingly carefully examined the entire record in this case, in order to determine the correctness of the ruling complained of.

The allegations of the claimant, if any were filed, have not been printed as a part of the record. But an examination of the evidence of the claimant, taken by deposition at the instance of the plaintiff, shows that the position of the claimant is, that the assignment was made as security for an indebtedness of some $7000 said to be owed by Joseph N. Greene to the claimant, which indebtedness is said to have arisen, in brief, in this way: It is claimed that in the year 1883, Lewis D. Greene took the contract to build

what is known as the Mount Desert Branch of the Maine Central Railroad; that the profits of this enterprise amounted to about $50,000; that this sum belonged to Lewis D. Greene, the claimant; that the amount was received by Joseph N. Greene for Lewis D. Greene under a power of attorney, and was subsequently loaned to the Grand Southern Railroad Company; that in 1893 Lewis D. Greene recovered judgment against the Grand Southern Railroad Company for the money previously loaned, and subsequently, in the same year, about $45,000 was collected by Joseph N. Greene for the claimant, still acting under a power of attorney from him; that of this sum, Joseph N. Greene used for his own purposes, with the knowledge and assent of the claimant, $7000 or more, for which sum he became indebted to the claimant; and that this indebtedness continued up to and existed at the time of the assignment in question, and is the indebtedness attempted to be secured by such assignment.

The plaintiff contends that the assignment was without consideration, was expressly intended to defraud creditors, and particularly the plaintiff, and hence is void; that in fact the contract to build the Mount Desert Branch, though in the name of the claimant, was in reality the contract of Joseph N. Greene; that the claimant's connection with the contract was merely nominal and colorable; that he had no real interest in it, and that it was understood between him and his father that the latter was the real party; that, accordingly, the profits under the contract belonged to Joseph N. Greene; that the money loaned to the Grand Southern Railroad Company and subsequently recovered was the money of Joseph N. Greene; and that, therefore, Joseph N. Greene did not become indebted to the claimant by using any part of it. The justice below found substantially in accordance with the contentions of the plaintiff. If they are well founded, it needs no argument to show that the assignment to the claimant was without consideration, and fraudulent and void. The questions raised are purely questions of fact, and depend for their correct solution entirely upon the force and weight which may be properly given to the testimony of the claimant and his father.

The claimant in his deposition testifies that at the time the contract for the construction of the Mount Desert Branch was made, he was twenty-six years old, was then and has ever since remained an officer in the regular army; that his income was limited to the pay he drew from the government as second lieutenant; that his father, Joseph N. Greene, was then and for thirty years had been civil engineer, and promoter and contractor of railroads, and was the chief engineer and contractor for the Mount Desert Branch; that his recollection is that the contract was originally in the name of his father, but was subsequently assigned by him to the claimant during the construction of the road, and while the claimant was in Maine under a leave of absence from the army; that the object of the assignment was to provide for him and to place obstructions in the way of his step-mother, who had entered upon a "domestic war" with his father; that he was consulted by his father before the assignment, but not before the contract was originally made, as he recollects; that all the part he took in the work was during his four months' leave of absence from the army.

The claimant is in error in regard to any supposed assignment of the contract to him by his father. It appears that he, the claimant, was the original contractor, which he evidently has forgotten. He testifies that he was not present when the contract was made and did not sign it in person. It further appears from his testimony that he is uncertain in regard to the amount of money collected of the Grand Southern Railroad Company in the suit in his name, and the amount as recollected by him differs somewhat from that testified to by his father, who made the actual collection. He claims that of the money so collected, his father used for himself about $21,000, which he regards as in the nature of a loan to him; and that his father invested, in the name of the claimant, a large part of what he had not used. The claimant admits that the only knowledge he has of the investments and loans of his money made for him by his father, and of the amounts of his money used by his father, came by reports from time to time in his father's letters to him; that these reports came at various times since 1893, the year in which the money was collected of

the Grand Southern Railroad Company. Upon inquiry, by plaintiff's counsel, he said that he had the correspondence; that he kept copies of his own letters in reply; and being asked if he had his father's letters transmitting his reports to him, he answered, "Yes, I think I have them all." Being asked to file the originals or copies as a part of his deposition, he answered that he did not feel disposed to furnish copies of these statements unless there was a legal necessity for it, that it would be a great deal of work, for no good that he could see. Elsewhere he testified that the assignment (for so he calls it) of the railroad contract by his father to him was purely voluntary; that his father suggested it; and that there had been no agreement on his part to reassign to his father at any time. He also testified that there had been no understanding between him and his father that the latter could use the moneys in his hands, but that there was in his own mind a moral obligation that his father should receive the benefits of that railroad contract so far as it was necessary for his own comfort and maintenance, and that the property, in case of his father's decease, would come to him. He claims that he himself drew out and used about $3,000 of the money collected from the Grand Southern Railroad Company. He says that his father has given him no notes or other security for the claimant's money which he had used. Being asked to produce the letters of his father and copies of his own letters in reply, touching the assignment before referred to, dated May 6, 1896, he replied that he should prefer to consult counsel as to that before he answered, and be given a little time to think about it; that it was going to be a good deal of work to get each letter; that he was willing to answer any categorical question he could of all the letters he found. At the conclusion of his examination he was again asked to produce, on the following day, the correspondence between him and his father touching the supposed assignment of the contract, the collection of the $50,000 loaned to the Grand Southern Railroad Company, the uses and purposes to which it had been appropriated, and also touching the assignment in question, dated May 6, 1896. On the following day, November 23, 1897, he appeared before the magistrate and produced certain statements

and exhibits, which are made a part of his deposition, but declined to produce the letters called for. He said he found that his correspondence prior to his coming to Hot Springs (three and one-half years before) was not then in his possession, being stored in Colorado. He said: "It would be impossible for me to file what is called for. Not being a party to this suit, I do not believe I am under legal obligations to produce the letters called for, even if the same were considered by the court material to the issues in this case, and therefore I respectfully decline to produce them." It will be noticed, however, that he does not state that any of the correspondence called for had taken place before he came to Hot Springs, or was then stored in Colorado.

On cross-examination by the counsel for his father, he testified that he came to Maine and assisted in the construction of the Mount Desert Branch at the invitation of his father; that at that time he expected to resign his commission in the army and continue to work with his father; that there was never any agreement between him and his father that the latter could use this fund, or the amount that he might use at any particular time; that his father had used about $21,000 of the money, mostly in the payment of personal obligations and for promoting the Maine Shore Line Railroad; that the assignment to him of the balance due from the Washington County Railroad Company was absolute; and that the money received was to be placed to the credit of his father on account of claimant's money which the father had used, which then amounted with interest to about $27,000.

The case shows that the father, in November, 1897, knowing that the son's deposition was then about to be taken, forwarded to him a statement which purported to show the several amounts of the money of the claimant which the father had used out of the proceeds of the judgment against the Grand Southern Railroad Company. The items, thirty-six in number, extend from November 1, 1893, to August 1, 1896, and amount, exclusive of interest, to nearly $23,000. But it appears that when the assignment of May 6, 1896, was made, it recited a consideration of $7000 only, and in his acceptance of it the claimant states it "is for and in considera-

tion of the sum of $7000 and interest thereon, and I hereby accept said assignment on account of his (Joseph N. Greene's) indebtedness to me." The language of the assignment and acceptance warrants the suspicion, at least, that the increase of the alleged indebtedness from $7000 in May, 1896, to $23,000 in November, 1897, was an afterthought.

Joseph N. Greene in his testimony said that, at the time of the assignment, he owed his son "at least seven thousand dollars;" that the statement of money used, which he sent his son in November, 1897, was made from data which he had of money paid out and received after the recovery of judgment against the Grand Southern Railroad Company; that he made the statement up for the purpose of presenting it if called upon; that he sent his son a copy after he knew his deposition would be taken; that he had kept no book account with his son; that he was "the promoter, head of the enterprise, engineer and so forth" of the Mount Desert Branch, but had nothing whatever to do with and no interest in the contract; that although he did the greater part of the work in the construction of the Mount Desert Branch, the contract for which was in the name of his son, he made no agreement or arrangement whatever with his son for compensation for his services, and that he made no charge against him therefor, and that he had received no compensation except that he was allowed by his son to use out of the funds whatever was necessary for his support. It appeared that this plaintiff, Sullivan, recovered a verdict against Joseph N. Greene April 30, 1896, only seven days before the assignment in question was made, the present action being a suit on the judgment recovered in the former action.

Even this extended account of the testimony of the claimant and his father is but a brief and incomplete statement of the history of the transactions as narrated by them; but it is sufficient, we think, to show the true nature of their business relations.

To summarize:—A father, who for thirty years had been engaged in civil engineering and promoting and constructing railroads, takes a contract for the building of a railroad in the name of his son, on account of a "domestic war;" that son was then a

lieutenant in the army and little more than a boy. Out of that contract it is claimed that $50,000 profits were made for the son, but the son remembers so little of the contract that he is unable to remember absolutely whether he was the original contractor or an assignee. He thinks he was assignee, but in this his recollection is at fault. The father did practically all the work, got no compensation, and made no charge for his labor. The father received the money, and continued to handle and control it, loaned it to another railroad company in his son's name, sued for and recovered it, also in the son's name, used a part of the proceeds for his own use, without any previous understanding to that effect on the part of the son; and invested the remainder as he pleased, but still in the son's name. He gave no note or security. He kept no book account. He apparently treated the money as his own, but used the son's name for obvious purposes. If, as is claimed, the father reported to the son by letter from time to time, touching his use of the money and his investments, it may have been a fatal mistake on the part of the claimant to fail to produce those letters. They were called for by the plaintiff and could have been made a part of the claimant's deposition. Such letters, written in the ordinary course of business and showing that these parties treated the money as the property of the son, would have been entitled to great weight. The claimant declined to produce them. The inference is irresistible that there were no letters which would help the claimant. Seven days after a hostile verdict, Joseph N. Greene assigned to the claimant a balance of over $6,000 in the hands of the trustee, to secure an alleged indebtedness of $7,000. Eighteen months later he sent to his son a statement of his indebtedness to the son, amounting to nearly $23,000, undoubtedly to enable the latter to testify in regard to the disposition of the money, about which we are constrained to think he would otherwise have been entirely ignorant. It is true that Joseph N. Greene has used the name of his son in the collection and investment of the money recovered from the Grand Southern Railroad Company. Before that time he had been doing business in the name of his son, acting under a power of attorney. But it is true also, we think, that

both the son and the father have always treated the money collected as the money of the father, and that it was really the father's money.

Aside from the relations and conduct of the parties in this matter, the evidence in support of the claimant's position is vague, indefinite and unsatisfactory. A claimant should make full, true and explicit answers to all questions propounded to him in relation to the indebtedness to him of the principal defendant. *Thompson* v. *Reed*, 77 Maine, 425. We are unable to believe that it was ever understood between Joseph N. Greene and his son that the latter was in fact, although he was in name, the contractor for the construction of the Mount Desert Branch. Joseph N. Greene was the real contractor, the profits belonged to Joseph N. Greene, the money loaned to and recovered of the Grand Southern Railroad Company was the money of Joseph N. Greene. By the use of that money, Joseph N. Greene did not become indebted to the claimant, and therefore the assignment made to secure such an assumed indebtedness is void. Such were the findings of the justice below. It is the opinion of the court that those findings were fully justified by the evidence.

Exceptions overruled.

AUSTIN I. HARVEY

vs.

THE MAINE CONDENSED MILK COMPANY.

EDWARD R. LEACH *vs.* SAME.

JAMES H. FRENCH *vs.* SAME.

CARROLL H. FOLSOM *vs.* SAME.

Penobscot. Opinion November 4, 1898.

Action. Covenant. Assumpsit. Equity.

Upon a covenant of the defendant, made with another corporation "to pay all outstanding debts and liabilities" of the latter corporation, it is held that assumpsit will not lie against the defendant by creditors of the other corporation, whose debts were outstanding at the time the covenant was made.

The beneficiaries' remedy is in equity.

Upon an agreement "to pay all outstanding debts," without names of creditors, without amounts of debts, without any designation or limit whatever, no action at law lies in favor of a beneficiary, as upon an implied promise.

Baldwin v. *Emery*, 89 Maine, 496, affirmed.

AGREED STATEMENT.

The case appears in the opinion.

Charles J. Hutchings, for plaintiffs.

Counsel cited: *Varney* v. *Bradford*, 86 Maine, p. 514; *Hinkley* v. *Fowler*, 15 Maine, 285; *Baldwin* v. *Emery*, 89 Maine, 498; *Huff* v. *Nickerson*, 27 Maine, 106; *Sawyer* v. *Lufkin*, 58 Maine, 429; *Locke* v. *Homer*, 131 Mass. 102; *Flint* v. *Land Company*, 89 Maine, 420. In the last case the court say: "Under this provision in the deed, the West Shore Land Company became liable to the holder of the mortgage for the entire mortgage debt. It was part of the purchase money and the promise to pay it was a promise to pay its own debt and not the debt of another within the statute of frauds. The complainant not being a party to that deed,

he may have remedy in equity against the mortgagor and his grantee or implied assumpsit against either." The cases at bar come within the exception to the general rule that only a party to a sealed instrument can bring an action upon it, viz: that where in the sealed instrument there is no stipulation for payment or performance to the party to be benefited, or to some other person for his use, that if the promise to pay is merely a recital in the deed, or, more accurately stated, if from the recitals in the deed a promise to pay may be implied by law, then the obligee or the beneficiary may have his remedy in assumpsit. In this deed and in this contract there is no covenant on the part of the Maine Company running to the Aroostook Company to pay to them, or to them for the use of another, any sum of money. There is simply a recital in the deed that the said company, as a part of the consideration for the conveyance, shall pay all the outstanding debts and liabilities of the Aroostook Condensed Milk Company not secured by mortgage on its property.

The agreed statement leaves no doubt that these were valid debts against the Aroostook Condensed Milk Company at the time of the conveyance; that the Maine Condensed Milk Company has never at any time paid for the property received under this conveyance, in fact, that the transfer was merely a reorganization of the old company; and further, that the plaintiffs have never been indemnified by the Aroostook Condensed Milk Company or the Maine Condensed Milk Company or by anybody. In this instrument under seal there is no covenant either to pay or to perform to the obligee or to the beneficiary, and therefore assumpsit will lie in favor of either one of them as if the promise were shown by parol to be express instead of implied from the recitals in the deed. The language in the deed cannot be construed as a covenant because there is no promise to pay any one any sum of money. There is merely a recital that, as a part of the consideration for the transfer and conveyance, the Maine Condensed Milk Company will pay all outstanding debts of the Aroostook Condensed Milk Company not secured by mortgage on its property.

James M. Sanborn, for defendants.

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

SAVAGE, J. These four actions come up together, upon a statement of facts agreed upon, from which it appears that on the twentieth day of April, 1894, each of the plaintiffs was a creditor of the Aroostook Condensed Milk Company; that prior to that time the Aroostook Condensed Milk Company had become deeply involved; that after the plaintiffs had become creditors as above stated, a new corporation, composed in part of the stockholders of the old company and in part of other individuals, was incorporated under the name of the Maine Condensed Milk Company, and is the defendant in these cases; that the plan of the new company was to purchase the entire property of the old company, to pay the entire indebtedness of the old company, and have the affairs of the old company wound up; that on the twentieth day of April, 1894, the Aroostook Condensed Milk Company and this defendant entered into an agreement under seal for the sale by the former and the purchase by the latter of the entire property of the former, in which sealed agreement the defendant company covenanted in the following words: "Said Maine Condensed Milk Company hereby agrees to pay said Aroostook Condensed Milk Company for said property in the following manner: 1st. That said company will pay all outstanding debts and liabilities of the Aroostook Condensed Milk Company that are not secured by mortgage on its property." Other covenants follow which need not be stated. It further appears that on the same day and as a part of the same transaction, the Aroostook Condensed Milk Company gave to the defendant a warranty deed of all its property, and in the preamble to this deed is the following recital of a vote passed by the stockholders of the grantor company: "Voted, that the Aroostook Condensed Milk Company do sell its entire property including its factory or plant at Newport, Maine, and its factory or plant at Winthrop, Maine, and all fixtures, furnishings, stock on hand, rights and credits, and all accounts for goods sold and delivered and any other accounts that may be legally due said company:

notes, bonds and other choses in action; trademarks, copyrights, labels and good-will in business, to the Maine Condensed Milk Company of Waterville, Maine, to be paid for in the following manner: 1st. That said company shall pay all outstanding debts and liabilities of said Aroostook Condensed Milk Company that are not secured by mortgage on its property."

These plaintiffs have sued the defendant in assumpsit, upon their several claims against the old company. They are not parties to the contract and deed between the old company and the defendant, but they claim that as creditors of the old company they are beneficiaries of the contract, and as such are entitled to recover as upon a promise of the defendant, which may be implied from the recitals in the contract under seal executed by the defendant, and from like recitals in the deed poll accepted by the defendant. Can these actions be maintained?

The law in this state is well settled. It has been recently examined in *Baldwin* v. *Emery*, 89 Maine, 496, and so fully as to require no more than a brief recapitulation here. Said Mr. Justice HASKELL in *Baldwin* v. *Emery*: "Where one covenants with another by deed, under his own hand and seal, to pay him money for his own use or for the use of another, the obligee alone can sue upon the covenant, and the action must be covenant or debt and not assumpsit; and the beneficiary can have no action at law, but may have remedy in equity. But where the sealed instrument contains no covenant to pay or perform to the obligee or to the beneficiary, assumpsit will lie in favor of either one of them, as if the promise were shown by parol to be express, instead of implied from a statement of the respective rights of the parties in the deed." "If the recitals from which a promise to pay either the obligee or the beneficiary may be implied by law, either one may have assumpsit." "The acceptance of a deed poll by the grantee or obligee renders him liable to perform all acts therein required of him as effectually as if it were an indenture executed under his own hand and seal, but the remedy is assumpsit or debt, and not covenant." "Whether the language in a deed be a covenant or raises an implied promise depends wholly upon the terms expressed.

An agreement under seal to pay money or perform to A for his own use or for the use of B would be a covenant. An agreement to pay a given debt of A not to A would raise an implied promise to pay to A, or to the creditor of A, the subject of assumpsit. In short, a covenant, upon which debt or covenant broken can only be brought must be a particular obligation to pay or perform to a particular person, and if to a person other than the obligee, his remedy is in equity only, for our decisions say so."

Let us now apply these principles to the facts in these cases. If the contract and deed between the old corporation and the new one, contain no covenant on the part of the defendant to pay to the other contracting party, or to the creditors holding outstanding debts, then, so far as this question is concerned, a creditor may maintain assumpsit against the defendant. If the deed alone is to be considered, it may be well held that it contains no covenant on the part of the defendant to pay any one, but merely a recital of the considerations of the conveyance, among which was the agreement to pay outstanding debts, and so, that it falls within the rule of *Baldwin* v. *Emery*, already cited. But the deed cannot be considered alone. The deed and the contract are but parts of one transaction, and they must be considered together. Indeed, the contract alone contains the express obligations of the defendant, whatever they may be. In the contract we find the explicit agreement of the defendant to pay the Aroostook Condensed Milk Company for its property by paying all the outstanding debts of the latter corporation. To pay one's debts to his creditors, by agreement, is to pay to the debtor. Being in a contract under seal, the agreement is a covenant, and it is a covenant to pay the obligee, for such is the language. It constitutes an express obligation; hence there can be no implied promise.

This construction places these cases within the well settled rule that where there is a covenant to pay or perform to one for his own use or for the use of another, the covenantee only can sue at law, and the beneficiary's remedy is in equity. *Baldwin* v. *Emery*, supra.

But there is another objection which we think is fatal to the

maintenance of these actions, even if assumpsit could be maintained by a designated beneficiary under this contract.

The agreement of the defendant was "to pay all outstanding debts and liabilities," without names of creditors, without amounts of debts, without any designation or limit whatsoever. "It is a general rule of law," says Judge Gray, in *Carr* v. *National Security Bank*, 107 Mass. 45, "that upon a promise made by one person to another, for the benefit of a third from whom no consideration moves, the latter cannot sue; and the exception to this rule, which holds a person, in whose hands funds have been placed to pay creditors of the depositor, liable to actions by them, has not been extended, in this commonwealth or in England, to a case in which neither such creditors nor the amount of their debts are named or ascertained at the date of the promise."

In *Dow* v. *Clark*, 7 Gray, 198, where the defendant's promise was to pay all the debts of a railroad corporation, without any specification of the names or number of its creditors, or of the amount of their demands, the court held that a creditor of the corporation could not maintain an action against the defendant, for the reason that the creditor had not been specifically named in the agreement.

The reasons for limiting the right of action by third parties to those whose debts are specifically named appear to us to be sound. As said by the court in Massachusetts:—"If the plaintiff can maintain this action, so may every one of the other creditors of the corporation, whatever may be their number, maintain a like action; and the defendants may be held answerable to persons of whom they never heard. And they will be bound, in such actions, to litigate the question whether the party who sues them has a legal claim on the corporation." *Dow* v. *Clark*, supra. If a promise may be implied in favor of a creditor, we think, under the authorities, it may be implied only in favor of such a creditor as is named or whose debt is specified in the recitals from which the promise is implied. There is no implication which arises in favor of unnamed and unknown creditors. To hold otherwise would be to extend the

operation of the exception to the general rule beyond the limits imposed by authority and wisdom.

According to the stipulation in the report, therefore, the entry in each case must be,

Plaintiff nonsuit.

JOSEPH E. FRIEND *vs.* JOSEPH PITMAN.

Penobscot. Opinion November 3, 1898.

Pleading. Averment that time note was overdue. Laws of 1821, c. 63.

The want of an averment in the declaration on a note payable five months after date, that the five months have elapsed, or that the note was overdue, is not fatal on demurrer.

ON EXCEPTIONS BY PLAINTIFF.

An action of assumpsit upon a promissory note. The defendant appeared by attorneys and filed a general demurrer to the plaintiff's declaration, on the ground that the plaintiff did not allege, and it nowhere appeared in the declaration, that the note declared on (which was a time note) was due and payable at the time of the commencement of the action by the plaintiff. The plaintiff joined in the demurrer. The presiding justice overruled the demurrer, and adjudged the declaration good, to which rulings the defendant seasonably excepted.

D. B. Young, for plaintiff.

F. J. Martin and H. M. Cook, for defendant.

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

SAVAGE, J. The plaintiff has declared upon a promissory note dated December 6, 1893, and payable five months after date. To this declaration the defendant has filed a general demurrer, and as ground for demurrer, he sets up the want of an averment in the declaration that the note was overdue, or that the five months had

long since elapsed, or, in substance, that a cause of action had accrued. Some such averment is usually found in the books of precedents in the forms for declarations on time notes. Is such an averment necessary?

The writ was dated September 4, 1897, and if we may look at the date of the writ, it becomes clear that the note was long overdue when suit was brought. But it is contended that we may not go beyond the four corners of the declaration, in determining its sufficiency upon demurrer, and hence that we cannot, by an inspection of the date of the writ, ascertain whether a cause of action had accrued upon this time contract. It is indeed generally true that every essential fact which it is necessary for the plaintiff to show in order to maintain his action must be affirmatively averred in his declaration; and it is likewise generally true that the sufficiency of a declaration must be determined from an examination of the declaration itself.

But we are of opinion, that under our present practice, it is permissible to read the date of the writ in connection with the allegations in the declaration on a time note, to ascertain if the note appears to have become due before the action was begun, and that, if it so appear, the want of a direct averment to that effect is not fatal.

In pleading at common law, when the "writ" the "process" and the "declaration" were each a separate and distinct instrument, complete in and of itself, there was more than a technical reason for saying that the pleader must make all his essential averments within the body of the declaration itself. *Church* v. *Westminster*, 45 Vt., 380. But in this state, these three ancient forms are blended in one. Laws of 1821, Chap. 63. The writ and the declaration now constitute but one instrument. All averments in the declaration in the present tense must necessarily be taken as of the date of the writ, and in construing such averments, the writ and declaration must be considered together. The averment in the declaration in this case that the defendant "neglects and refuses" to pay can only refer to the time the writ issued. The date becomes a part of the averment. In so far as the question at issue

is concerned, the reason for the old rule has ceased, and the maxim, cessante ratione legis, cessat ipsa lex, is not inapplicable. It would seem that any conclusion other than that at which we have arrived would be a travesty upon good sense and sound judicial reasoning.

Moreover, it has been held, (and we think such is the weight of authority,) that the want of an averment that the note or bill sued is due, is not fatal, even under the strict rules of common law pleading. In a note to 2 Chitty on Pleading, 16th Am. Ed. p. 73, the editor says: "It is not, it seems, necessary to aver that the bill became due before the commencement of the suit," citing, *Owen* v. *Walters*, 2 M. & W. 91; *Padwick* v. *Turner*, 11 Q. B. 124; *Shepherd* v. *Shepherd*, 1 C. B. 847. In *Shepherd* v. *Shepherd*, concerning the allegation "which day had expired before the commencement of this suit," Tindal, C. J., said: "This latter was a perfectly unnecessary allegation, inasmuch as we can see upon the face of the record, that the writ issued long after the note became due." See *Lester* v. *Jenkins*, 8 Barn. & Cress. 339. It has even been held that demurrer will not lie for such a cause as this, unless it appears affirmatively upon the face of the declaration that the cause of action had not accrued when the suit was commenced. *Maynard* v. *Talcott*, 11 Barb. 569; *Pugh* v. *Robinson*, 1 Term. Rep. 116. In *Bank of Montpelier* v. *Russell*, 27 Vt. 719, a declaration similar to the one in this case was held good on general demurrer, though the question here at issue was not noticed. But the court said of the declaration: "It is in a brief form, which has been in very general use in the state for many years, and always regarded by the court as sufficient."

Nor is this position weakened by the cases cited by counsel for the defendant. In *Bethel & Hanover Toll Bridge Co.* v. *Bean*, 58 Maine, 89, there was no allegation of the time when the assessments sued for were to be paid. Clearly demurrable. In *Hotchkiss* v. *Judd*, 12 Allen, 447, the pleader failed because he did not state any promise of the defendant which was to be performed *before the date of the writ.* Not so in this case. In *Curtis* v. *Hubbard*, 6 Met. 186, which was a suit against defendant as guar

antor for her son, the averment was that the plaintiffs "made known to the defendant more than ninety days before the commencement of this action, said William's indebtedness to them in a sum exceeding $2000, and made demand etc." It was not averred that at the time of the notice the sum sued for was due and payable, or that they gave her notice that it was due and payable. It was simply an averment of indebtedness on the part of the son. And here was her trouble in the pleading. The son bought on credit, and hence incurred an indebtedness before it became due and payable. But the mother by her contract declared on only became liable in case of the failure of the son to pay *when due*. It might be true as averred that the son was *indebted*, and still the mother not liable in any sense. The pleader failed to lay any foundation for any liability whatever of the defendant at any time. But that is not this case. The case of *Spears* v. *Bond*, 79 Mo. 467, is more directly in point. There the court held that a petition which "failed to allege that the note had become due or that it had matured," was defective. But curiously enough, that court in discussing another alleged ground of demurrer, said "If, *as appears from the date of the petition*, the time for the delivery of the lumber had arrived or passed, and demand for its delivery was made by the plaintiff, and met with refusal or non-compliance, the defendants were clearly in fault." If the Missouri court for some purposes looked beyond the four corners of the petition, (and much more, if the date was within the four corners) why might they not also have done the same for the purpose of ascertaining whether a cause of action appeared to have accrued before the date of the petition? We see no good reason.

It is the opinion of the court that defendant's demurrer was rightly overruled by the presiding justice.

Exceptions overruled.

GENEVA B. PALMER *vs.* CALLIGAN MCDONALD.

Washington. Opinion November 7, 1898.

Bastardy. Constancy of Accusation. R. S., c. 97, § 6.

Constancy in the accusation against the defendant made on oath before the magistrate, is a condition precedent to the maintenance of a bastardy suit. Proof of an accusation against some other person prior to the formal accusation before the magistrate, might affect the complainant's credibility as a witness, but it would not be a bar to the maintenance of her suit.

In a prosecution under the statute for the maintenance of bastard children, the presiding judge instructed the jury that "if the complainant has not been constant and has made other accusations, and still, if you are satisfied by a preponderance of the testimony that he is the father of the child, then he would be guilty." All of the evidence worthy of consideration tending to show a want of constancy on the part of the complainant, related to declarations made by her prior to the formal accusation upon oath against the defendant. As applied to the inconstancy contemplated by the statute the instruction given to the jury was erroneous; but as applied to such evidence of inconstancy as existed in this case, it was correct.

Held; that the defendant was not aggrieved by the instruction, and it cannot be deemed exceptionable.

ON EXCEPTIONS BY DEFENDANT.

This was a bastardy proceeding. The issue was whether or not the respondent was the father of the illegitimate child of the complainant, as alleged in her declaration, and the presiding judge in his charge to the jury stated: "If she has not been constant and has made other accusations and still, if you are satisfied by a preponderance of the testimony that he is the father of the child, then he would be guilty." To which the respondent seasonably excepted after a verdict against him.

C. B. Donworth, for plaintiff.

A. D. McFaul, for defendant.

The judge in his instructions to the jury erred, because it is a condition precedent to the maintenance of an action in bastardy proceedings that the complainant being put upon the discovery of the truth during the time of her travail should accuse the respond-

ent of being the father of the child and should be constant in her accusation. Revised Statutes, c. 97, §§ 5 and 6; *Foster* v. *Beaty*, 1 Maine, 304; *Drowne* v. *Stimpson*, 2 Mass. 443; *Dennett* v. *Kneeland*, 6 Maine, 461; *Loring* v. *O'Donnell*, 12 Maine, 29; *Rice* v. *Chapin*, 10 Met. 5; *Stiles* v. *Eastman*, 21 Pick. 132; *Maxwell* v. *Hardy*, 8 Pick. 561; *Burgess* v. *Bosworth*, 23 Maine, 573; *Beals* v. *Furbish*, 39 Maine, 469; *Blake* v. *Junkins*, 35 Maine, 433.

The requirement that the mother shall be "constant in such accusation" refers only to the man accused. *Woodward* v. *Shaw*, 18 Maine, 304. If the mother of a bastard child, after its birth or after her examination before a magistrate, declare, that the accused is not the father of the child, and that another man is, she is not constant in her accusation. *Bradford* v. *Paul*, 18 Maine, 30.

WESTON, C. J., in *Bradford* v. *Paul* says: "In prosecutions under the bastardy act, the mother of the child is an interested party, but is, upon certain conditions, from the necessity of the case, made a competent witness."

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

WHITEHOUSE, J. In the prosecution of the defendant under the statute for the maintenance of bastard children, the presiding judge gave the following instruction to the jury respecting the complainant's constancy in her accusation: "If she has not been constant and has made other accusations and still, if you are satisfied by a preponderance of the testimony that he is the father of the child, then he would be guilty."

The relief sought by this proceeding is given solely by express provisions of the statute, which prescribe the mode of prosecution and to some extent, the nature of the evidence requisite to hold the accused answerable to the charge. To authorize an adjudication in her favor, the complainant must show a compliance on her part with all the essential requirements of the statute.

After making specific provisions in regard to the complainant's accusation, her examination on oath respecting the accused, and the

declaration to be filed by her before proceeding to trial, chapter ninety-seven of the revised statutes further provides in section six as follows: "When the complainant has made said accusation; been examined on oath as aforesaid; been put upon the discovery of the truth of such accusation at the time of her travail, and thereupon has accused the same man with being the father of the child of which she is about to be delivered; has continued constant in such accusation, and prosecutes him as the father of such child before such court; he shall be held to answer to such complaint; and she may be a witness in the trial."

Prior to the general legislation of 1864 allowing parties to be witnesses in their own behalf, these two requirements of the statute respecting the accusation of the complainant at the time of her travail, and her constancy in such accusation, were uniformly held by the courts in this state and Massachusetts to be conditions precedent to the right of the complainant to testify as a witness. As might have been anticipated from their correlation in the statute, both of these conditions were placed upon the same ground and deemed prerequisites to the admission of the complainant as a witness. *Foster* v. *Beaty*, 1 Greenl. 304; *Loring* v. *O'Donnell*, 12 Maine, 27; *Bradford* v. *Paul*, 18 Maine, 30; *Drowne* v. *Stimpson*, 2 Mass. 441; *Stiles* v. *Eastman*, 21 Pick. 132; *Rice* v. *Chapin*, 10 Met. 5.

It has also been settled law in this state, both before and since the enactment of 1864 allowing parties to be witnesses, that proof of the accusation by the complainant at the time of her travail was indispensable to the success of her prosecution. Prior to the enactment of 1864, it was a prerequisite to the admission of the complainant as a witness, as well as a condition precedent to her right of prosecution. *Loring* v. *O'Donnell*, 12 Maine, 27. The effect of that general enactment was to make the complainant in such a case a competent witness without preliminary proof of an accusation by her at the time of her travail, but such proof was still essential to the success of her prosecution. In *Payne* v. *Gray*, 56 Maine, 317, the court said in the opinion by Mr. Justice WALTON; "We do not decide that it is now unnecessary for a

plaintiff in a bastardy suit to accuse the defendant with being the father of her child at the time of her travail. By the very terms of the statute, such an accusation is necessary. It is one of the averments in her declaration; and like every other averment, it must be proved; but we hold that she is a competent witness to prove it by. We think she was not properly excluded; although if it turns out as a matter of fact that she did not make the accusation she must fail in her suit."

It has been seen that the accusation at the time of her travail and constancy in such accusation, were equally required by the statute, and prior to 1864, were deemed alike indispensable to her admission as a witness. The conclusion is irresistible that they must both sustain the same relation to the complainant's right to prosecute. The accusation at the time of her travail is held to be a condition precedent, and constancy in such accusation must also be deemed a condition precedent to the maintenance of the suit.

It is important to observe, however, that the statute requirement is that the complainant should continue constant in the accusation against the defendant made upon oath before the magistrate and at the time of her travail. She is required to be constant in that accusation after it is made. The constancy contemplated by the statute does not relate to accusations or declarations made by the complainant prior to the formal accusation against the defendant made under oath before the magistrate. *Burgess* v. *Bosworth*, 23 Maine, 573; *Maxwell* v. *Hardy*, 8 Pick. 560. Proof of an accusation against some other person prior to such accusation under oath against the defendant, might affect the complainant's credibility as a witness, but it would not be a bar to the maintenance of her suit. It would still be a question of fact for the jury to determine, upon all the evidence, whether the defendant was the father of her child.

In this case it appears from the transcript of the testimony which, by agreement of the parties, is made a part of the bill of exceptions, that the evidence tending to show a want of "constancy" on the part of the complainant related to declarations made by her prior to the accusation upon oath against the defendant. There was an entire absence of any evidence worthy of con-

sideration that she did not continue constant in her accusation on oath against the defendant after it was made. It appears from his testimony that prior to such accusation against him she stated to him in substance that her condition did not concern him, that the child did not belong to him. The instruction complained of related to the evidence in the case, and must have been so understood by the jury. As applied to the inconstancy contemplated by the statute, the instruction was undoubtedly exceptionable; but as applied to such evidence of inconstancy as existed in this case, it was substantially correct. The defendant was not aggrieved by it, and it cannot be deemed error.

Exceptions overruled.

JOHN J. QUIMBY *vs.* SELDEN HEWEY and Trustee.

Penobscot. Opinion November 15, 1898.

Trustee Process. R. S., c. 86, §§ 30, 55, par. VI.

In a trustee suit the following facts appeared. Service of the trustee writ was made upon the trustee December 12, 1896, again February 3, 1897, and again March 4, 1897. At the time of the first service there was nothing due from the trustee to the principal defendant; at the time of the second service there was due $11.86 and at the time of the third service a further sum of $16.31 was due, these respective sums being due from the trustee to the principal defendant for his personal labor for a time not exceeding one month next preceding the service. *Held;* that, said sums being respectively less than twenty dollars, the trustee must be discharged unless the suit is for necessaries furnished the principal defendant.

To charge the trustee in this case it is incumbent upon the plaintiff to aver and prove that the debt sued is for necessaries furnished the principal defendant or his family. There being no such averment or proof, the trustee will be discharged.

ON EXCEPTIONS BY PLAINTIFF.

From the bill of exceptions it appeared that this case came before the court for an adjudication of a trustee disclosure.

The action was assumpsit on an account annexed to the writ for the sum of $89.98. The account annexed showed that the amount

sued for or the principal part thereof was for groceries, provisions and clothing, but otherwise than this there was no affirmative allegation in the writ that the suit was for necessaries.

By the disclosure of the trustee it appeared that at the time of disclosure, there was due the principal defendant and held by trustee service of said writ, the sum of $28.17. It was not stated either in the disclosure or in the record, nor were there any written allegations on the part of the defendant or the trustee, that the funds in the hands of the trustee so disclosed as aforesaid, or any part thereof, were due from the trustee to the principal defendant, "as wages for a time not exceeding one month next preceding the service of the process." Nor was any evidence offered or adduced by either the trustee or the principal defendant, tending to show this fact.

It neither appeared in the record, nor were there any written allegations either by the principal defendant or the trustee, that the goods mentioned in the said account annexed were not for necessaries furnished to said principal defendant or his family. Nor was there any evidence adduced or offered upon this point.

Plaintiff contended that the burden is upon the defendant to bring himself within the provisions of Clause VI, Sec. 55, Chap. 86, R. S., not only with respect to the time when the wages are earned but as to whether or not the suit is for necessaries furnished him or his family, especially in this suit, where the writ shows that the goods sued for were groceries, clothing, etc.

Plaintiff first asked the court to rule that the trustee be held for the whole amount disclosed, to wit, $28.17. This the court refused to do, and ruled that plaintiff must aver in the declaration that the suit is for necessaries furnished the principal defendant or his family, and that therefore there being no such affirmative averment or proof the trustee must be discharged.

The plaintiff then asked the court to rule that the trustee be held for all disclosed, over $20.00, to wit, $8.17. This the court also refused to do, and ruled that the trustee be discharged.

To each of the foregoing rulings and refusals to rule, the plaintiff took exceptions.

Clarence Scott, for plaintiff.

Counsel argued: (1.) In trustee process it is clearly the duty of the debtor to bring himself within the statute by specifically claiming exemption. Drake, Attachment, p. 426, §§ 480, 480 a; *Pullen* v. *Monk*, 82 Maine, 412; *Lock* v. *Johnson*, 36 Maine, 464.

(2.) A trustee, indebted to the principal defendant for his personal labor, is bound to disclose, not only the indebtedness but also that it accrued for such labor. *Lock* v. *Johnson*, supra; Drake, Attachment, supra; *Toothaker* v. *Allen*, 41 Maine, 324; *Barker* v. *Osborne*, 71 Maine, 69.

(3.) If the trustee do not disclose that the wages of the principal defendant, held in his hands by trustee service, were due for his personal labor, a judgment against him as trustee will furnish no protection in an action against him by the laborer for the services. Cases supra.

(4.) The exemption is for the benefit of the debtor and the right of election is in him. *Colson* v. *Wilson*, 58 Maine, 416.

(5.) The debtor must claim his exemption, or he will generally be regarded as having waived it. 7 Am. & Eng. Ency. p. 141; *Pond* v. *Kimball*, 101 Mass. 105; *Spitley* v. *Frost*, 15 Fed. Rep. 299; Drake, Attachment, p. 224, § 244 a.

(6.) A debtor may waive his privilege, and consent that exempted property may be attached. The waiver may be made by acts or neglects to act, and when the debtor fails to set apart or claim to set apart exempted property, he waives his privilege. *Smith* v. *Chadwick*, 51 Maine, 515; *McKenzie* v. *Redman*, 87 Maine, 322; *Colson* v. *Wilson*, 58 Maine, 416.

Peregrine White, for defendant.

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

FOGLER, J. Exceptions by plaintiff to the ruling of the presiding justice discharging the trustee.

The action is assumpsit on an account annexed to the writ. Service was made upon the trustee December 12, 1896, and again

February 3, 1897, and again March 4, 1897. The disclosure of the trustee, fairly construed, shows that the principal defendant was employed by the trustee as a night watchman; that nothing was due him by the trustee at the time of the first service; that at the time of the second service there was due him the sum of $11.86; that there was due him at the time of the last service the further sum of $16.31; and that these respective sums at the times of each service were due from the trustee to the principal defendant as wages for his personal labor for a time not exceeding one month next preceding the service of the process. These sums being respectively less than twenty dollars are exempt from attachment by trustee process and the trustee must be discharged unless it appears that the plaintiff's suit is for necessaries furnished the principal defendant or his family. R. S., c. 86, § 55, Par. VI; *Collins* v. *Chase*, 71 Maine, 434; *Haynes* v. *Thompson*, 80 Maine, 125.

The goods charged in the account annexed to the plaintiff's writ are clearly of the class known as "necessaries." Attachment of property of the principal debtor in the hands of trustees are wholly regulated by statute. *Hanson* v. *Butler*. 48 Maine, 82. To charge the trustee the attaching creditor must allege and prove every material fact necessary to bring his case within the purview of the statute. Whether the goods charged in the account sued were furnished the principal defendant or his family is a material and decisive fact in determining whether the trustee shall be charged. That such goods are of the class recognized as "necessaries" is not sufficient. *McAuley* v. *Tracy*, 61 Maine, 523. The plaintiff does not allege, either in his declaration or in an allegation which he might have filed under R. S., c. 86, § 30, which provides that the plaintiff, defendant or trustee may allege and prove any fact material in deciding the question of the trustee's liability, that the goods charged were furnished the principal defendant or his family, nor does he offer any proof that the goods were so furnished.

The ruling of the presiding justice is correct and the trustee must be discharged.

Exceptions overruled.

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

Somerset. Opinion November 14, 1898.

Negligence. Contract. Damages. New Trial.

The defendant made a contract with the plaintiff to drive a quantity of logs from Pittsfield to Clinton for $142; but before the drive was started the plaintiff sold the logs to one McNally of Clinton for $1443. In an action against Parks for failure to deliver all of the logs, McNally recovered judgment for $402 as damages for the shortage.

The present action was to recover damages for Libby's failure to drive the logs in a proper manner; and secondly, for breach of his alleged agreement to assume and pay the amount which McNally might recover in the action against Parks. The verdict was for the defendant.

Held; That the rule of damages in the two actions was not the same. The defendant might be liable for such damages as arose from his negligence in driving the logs, while Parks was liable to McNally for not delivering the logs according to an agreement of sale. One stood in the position of a bailee, and the other in that of a seller of logs.

A new trial will not be granted by the law court when the court might possibly have reached a conclusion different from the verdict rendered, but there was testimony in behalf of the defendant in support of all of his contentions and if full credence were given to this evidence, it was sufficient to warrant the findings of the jury; nor when after a careful examination of all the facts reported, this court is not prepared to say that the result necessarily indicated prejudice or misapprehension on the part of the jury, or that a contrary result was the only reasonable one.

See *Parks* v. *Libby*, 90 Maine, 56.

ON MOTION BY PLAINTIFF.

Assumpsit.

The writ in this action contains two counts. The first count is brought on the following contract:

"PITTSFIELD, ME., Feb. 1, 1893.

I this day agree to drive what logs and cedar D. M. Parks has or will have just above Peltoma to put on this winter to be driven to Clinton for 75-100 dollars per M. for the logs and 30-100 dollars per cord for the cedar; to be done in a good workmanlike manner this coming spring. Said Parks is to pay me as soon as the logs and cedar is delivered in the booms at Clinton. O. E. LIBBY."

The plaintiff contended and introduced evidence tending to show the following facts:—That the lumber spoken of in this contract was afterwards, before the time came to drive it down the river, sold to one McNally—Parks agreeing to deliver it into the boom of McNally at Clinton. At that time McNally had a saw-mill on the east end of the dam at Clinton, and just above his mill was his small boom used to hold logs to be sawed after they had been run down from his larger storage boom half a mile above on the same side of the river.

At the same time William Lamb had a saw-mill on the west end of the same dam and he had booms like McNally's for the same purpose; all said booms being in the same large mill pond formed by a dam extending across the Sebasticook river at Clinton Village in Kennebec County. This condition of dams was well known to Libby at that time.

The reason why the word "booms" was used in the contract was that Parks, the plaintiff, expected to sell the lumber to one or both of these Clinton mill owners—he did not know which one. He so stated to Libby, the defendant, when the above contract was written, and that is the reason why the place of destination of the lumber was left so indefinite. It made no difference in expense of driving, because the booms were opposite each other and in the same mill pond. It was really a little less expensive to put the lumber into one boom than into two.

Before the driving season came around Mr. Parks informed Mr. Libby, the defendant, which boom to land the lumber in, namely, McNally's, and before Libby started the lumber he wrote to McNally to have his boom ready for the lumber. So the plaintiff claimed that Mr. Libby understood that he was to deliver the lumber into McNally's boom at Clinton.

The plaintiff further contended that the defendant started in on his job, but carried it on so unworkmanlike that he failed to drive all the lumber into McNally's boom, but lost a great portion of it by the way on his passage down the river.

Mr. McNally, failing to get his lumber, threatened Parks, the plaintiff, with suit for failure to deliver into his boom the logs that

were lost. Mr. Parks called Mr. Libby's attention to McNally's claim. Libby was requested by Parks to take charge of the matter, and he agreed to do so, but did not.

No settlement having been effected, McNally brought suit. A conference was had between Parks and Libby, and Libby decided that an offer to be defaulted for the sum of $125.00 should be made by the attorney, whom Parks had employed to defend the suit. Mr. McNally refused the offer, and then, under the direction of Libby, the action was tried, resulting in a verdict of $402.00 against Parks.

Before the action was tried, Mr. Libby told Parks and his attorney that he would pay McNally $125.00, and that if McNally would not take that sum in discharge of the claim, he, Libby, would prefer to defend against the claim, and the defense was made by his direction.

After the verdict was returned by the jury, Parks by his attorney who had charge of the defense, filed a motion for a new trial. After that, Parks and Libby had a conference at Pittsfield, in which they discussed the propriety of attempting to get a new trial. At the close of that conference Libby told Parks and his attorney that he did not want to carry the case any further. He said he had not the means by him then to settle it, but he said to Parks that if he, Parks, would pay what was due McNally including the verdict and costs, he, Libby, would in a few days pay to Parks whatever the sum paid to McNally might be.

Thereupon, Parks, the plaintiff, paid McNally $490.00, the amount to which the latter was entitled to under the verdict and the costs,—which Libby has never paid back to him, although he has frequently been requested by Parks to pay it.

Under the second count in his writ the plaintiff seeks to recover the sum so paid and what expenses the plaintiff incurred in the trial of the McNally suit.

The defendant on the other hand introduced evidence which he contended proved that he had performed his written contract; that he delivered all the lumber into McNally's boom; that he took no part in the McNally suit, had no connection with that action

except as a witness for Parks, made no promises before the trial or after it to pay what McNally recovered against Parks, and owes Parks nothing on account of the transaction.

The jury returned a verdict for the defendant and the plaintiff pleaded a general motion for a new trial.

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

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

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

WHITEHOUSE, J. The defendant made a written contract with the plaintiff to drive a quantity of logs down the Sebasticook river from Pittsfield to Clinton at an agreed price for the driving, which amounted to $142 for the lot.

Before the drive was started the plaintiff sold the logs to one McNally of Clinton under a contract calling for a specified quantity, to be delivered at McNally's boom, for $1443, and received payment therefor.

But McNally failed to receive the entire quantity purchased and paid for by him, and in an action against Parks for failure to deliver all of the logs, McNally recovered judgment for $402 as damages for the shortage.

Thereupon Parks brought the present action against the defendant Libby to recover, first, for his failure to perform the original contract to drive the logs in a proper manner; and second on Libby's alleged agreement to assume and pay the amount which McNally might recover in the action against Parks.

The jury returned a special finding that the defendant Libby was not liable for any failure to perform his original contract to drive the logs in a suitable and workmanlike manner, and also rendered a general verdict for the defendant.

The case comes to this court on the plaintiff's motion to set aside this verdict and special finding as against the evidence.

As stated in the opinion in *Parks* v. *Libby*, 90 Maine, p. 60, "the rule of damages in the two actions is not the same. The

defendant may be liable for such damages as might arise from negligence, while the plaintiff in the other action against him was liable for damages arising for not delivering a certain quantity of logs according to an agreement of sale. One stands in the position of a bailee and the other in that of a seller of logs."

The plaintiff contends that all the damages suffered by McNally and himself were attributable directly to the failure of the defendant to perform his contract in driving the logs. He says there was unnecessary delay in starting the drive; that the rafts were of such excessive width as to be unmanageable; that the rafts were not manned with sufficient crew, nor the men equipped with suitable implements; and that by reason of these things and of a want of reasonable and ordinary foresight, skill and prudence, the defendant failed to drive the logs to the lower McNally boom, but became discouraged and left the greater part of them at a temporary boom three-fourths of a mile above the point agreed upon.

The defendant took issue upon each of these propositions set up by the plaintiff. He contended in the first place that there were not so many logs at the landing in Pittsfield as the plaintiff undertook to sell to McNally; that he discovered a shortage of eleven hard wood logs before he started the drive and that the same ratio of shortage in the other lumber, together with the small loss actually sustained in the drive which no ordinary care and skill could prevent, would fully account for all the logs which McNally purchased, but failed to receive. He admitted that the greater part of the logs were left by him at the temporary boom three-fourths of a mile above McNally's lower boom, but claimed that this was done under an arrangement with McNally, whereby the logs were practically accepted at the upper boom. And McNally admits in his testimony that he agreed to employ men for the defendant, and have the logs driven to the lower boom under his own supervision and that this agreement was carried out by him.

A careful examination of all the evidence relating to the several issues raised in regard to the defendant's manner of performing the original contract, induces the belief that the court might possibly have reached a different conclusion from that announced by

the jury; but there was testimony in behalf of the defendant in support of all of his contentions, and if full credence were given to this evidence, it was sufficient to authorize the findings of the jury; and the court is not prepared to say that the result necessarily indicated prejudice or misapprehension on the part of the jury or that a contrary result was the only reasonable one.

With respect to the plaintiff's second contention, that the defendant recognized his liability in his negotiations for settlement of the McNally claim, and in consulting and advising with the present plaintiff at that trial, and that he finally assumed and agreed to pay any judgment McNally might recover, the testimony was also conflicting. It is not improbable that some of the jury may have been influenced in some degree by a consideration of the hardship upon the defendant in compelling him to pay $700 damages on account of an undertaking for which he was to recover in any event but $142, and from which in fact he realized no profit whatever; but upon this branch of the case, as upon the former, there was legitimate and material evidence, which if believed was sufficient to support the verdict. It was a simple issue of fact, which the jury were well qualified to determine. They saw the witnesses and heard their testimony and we do not feel justified in declaring the verdict to be so manifestly wrong as to demand the interposition of the court in setting it aside.

Motion overruled.

CHARLES H. NEAL and others *vs.* EDWARD F. COBURN.

Franklin. Opinion November 25, 1898.

Bank Check. Forgery. Negligence.

A bank is presumed to know the signatures of its depositors.

If a bank pay to an innocent holder for value the amount of a check purporting to be drawn upon it by one of its depositors, but the signature to which was in fact forged, the bank cannot recover back the amount from such holder.

If such holder on demand repay the amount to the bank that does not entitle him to recover the amount from a prior innocent holder for value who had indorsed the check.

AGREED STATEMENT.

Assumpsit to recover two hundred and fifty dollars paid by the plaintiffs to the defendant for a check which was found to be a forgery, and of which the following is a copy:—

HENRY C. HAVEN.

$250. BOSTON, June 19, 1895.

BAY STATE TRUST COMPANY

Pay to J. W. Crewe or order Two Hundred and Fifty Dollars.

H. C. HAVEN.

No. 1000.

[INDORSEMENTS.]

J. W. CREW,
E. F. COBURN,
NEAL & QUIMBY,
FURBISH, BUTLER & OAKES.

Plea, general issue and brief statement of special matter of defense that if defendant ever did promise, etc., he, the defendant was relieved and discharged from all liability or obligation before the commencement of this action.

The parties agreed to the following statement of facts:—

"For the purposes of this trial it is agreed: that the check declared on in plaintiffs' writ, purporting to have been drawn by H. C. Haven, in favor of J. W. Crew, on the Bay State Trust Company, dated June 19, 1895, for two hundred and fifty dollars, ($250.00) is a forgery; that the defendant received said check from said Crew on the 5th or 6th day of July, 1895; that said Crew was a stranger in the vicinity, boarding at the hotel of the defendant, and gave this check in payment of his board bill, which amounted to ninety-nine dollars and seventy-five cents, ($99.75), receiving from the defendant the balance, amounting to one hundred fifty dollars and twenty-five cents in money; that said Crew is not known or believed by the parties to have ever owned any property in this State, which was attachable; that defendant has never seen or heard from said Crew since taking the said check from him, as aforesaid, and does not know or believe that his real name is Crew, but believes he was an imposter; that said Crew left immediately upon paying his board bill as aforesaid; that defendant indorsed said check and delivered the same to the plaintiff on July 20, 1895, paying an account which plaintiff had against him of about fifty dollars, ($50.00), receiving the balance in money; that plaintiffs indorsed and delivered said check to Furbish, Butler and Oakes, on July 22, 1895; that Furbish, Butler and Oakes indorsed and deposited said check to their credit for collection, in the Phillips National Bank, on July 23, 1895; that the Phillips National Bank indorsed the same and forwarded it for collection to their correspondent in Boston, the National Bank of the Commonwealth, where it was received on the 26th day of July, 1895; that on the same day it was presented through the clearing house and Merchants National Bank, by the National Bank of the Commonwealth, to the said Bay State Trust Company for collection, (the Bay State Trust Company not being a member of the Clearing House Association, and all checks drawn upon them being received by the Merchants National Bank as an accommodation to them); that said check was received with others by the Bay State Trust Company, in due course of business as aforesaid, marked paid

and charged to the account of said H. C. Haven, he being a regular customer of said bank and having an account there; that when said Trust Company received said check it did not discover that it was a forgery, the signature thereto being a close imitation of the signature of said H. C. Haven; that as soon as said Bay State Trust Company discovered that said check was a forgery, namely, sometime from July 27, to July 29, 1895, inclusive, it at once returned said check to the National Bank of the Commonwealth, demanding a return of the amount; that the National Bank of the Commonwealth refused to return the amount unless they first received it from the Phillips National Bank, from which bank they received said check; that said National Bank of the Commonwealth received said check from the Bay State Trust Company, and immediately forwarded it to the Phillips National Bank, demanding a return of the amount, where it was received by said Phillips National Bank, on July 30, 1895; that the Phillips National Bank returned said check to Furbish, Butler and Oakes, on July 30, 1895, demanding the amount thereof of them; that on the same day Furbish, Butler and Oakes returned said check to the plaintiffs, demanding the amount of them, which was then and there paid by the plaintiffs to said Furbish, Butler and Oakes; that said Furbish, Butler and Oakes at once remitted the amount to the Phillips National Bank, and they to the National Bank of the Commonwealth where it was received and paid to the Bay State Trust Company, where it was received and credited to the account of said H. C. Haven on August 5, 1895; that the plaintiffs offered to return said check to the defendant, and demanded a return of the amount of him, on July 31, 1895, and the defendant agreed to pay the same and did pay thereon the sum of one hundred dollars, but subsequently refused to pay the balance; that the defendant required no identification of said Crew, nor his right, or title to said check before taking the same; that said Haven has now drawn upon said Bay State Trust Company about 650 checks, and had at the time of the forgery drawn about 350; that said Crew on June 19, 1895, called at the cottage of said Haven and procured three genuine checks as an accommodation, he said, to

send away, one for $50 and two for $25 each, paying the money for the same, and at the same time stole three blank checks from the back of said Haven's check book, namely, Nos. 998, 999, 1000; that the check in suit is the blank numbered 1000; that said Crew at the time of transferring said check to the defendant said, that Haven wanted him (said Crew) to hold said check until about the first of August before collecting the same, and that he (Crew) would like to have him (defendant) hold the same until that time; that said defendant did not impart or make known said request to said plaintiffs. Copy of check to be a part of the case and original to be transmitted to law court. Upon the foregoing facts it is agreed that the law court may render such judgment as the law and facts require. If the action is maintainable, defendant to be defaulted for $150, and interest from date of writ; if not maintainable, plaintiffs to become non-suit."

F. E. Timberlake, J. C. Holman and F. W. Butler, for plaintiffs.

It is a general rule that a bank must know the signature of its depositor, and between the bank and the depositor, if no negligence on the part of the depositor, this rule is absolute; and if money is paid by it on a forged check or instrument it must bear the loss. *Price* v. *Neal*, 3 Burr. 1355; Dan. on Neg. Insts. §§ 1359, 1655, and cases there cited.

If the suit were between the drawee bank and the depositor, Haven, or between the drawee bank and a party who took the check in the usual course of business, without any suspicions of its forgery, or without suspicious circumstances sufficient to have aroused the suspicions of a prudent man, the loss would fall upon the bank. *Levy* v. *Bank of the United States*, 4 Dallas, 234; *Bank of St. Albans* v. *Farmers and Mechanics Bank*, 10 Vt. 141; *National Bank of North America* v. *Bangs*, 106 Mass. 441.

But this responsibility, based upon presumption alone, is decisive only when the party receiving the money has in no way contributed to the success of the fraud, or to the mistake of fact under which the payment was made. *National Bank of North America* v. *Bangs*, supra.

If the loss can be traced to the fault or negligence of either

party, it shall be fixed upon him. *Gloucester Bank* v. *Salem Bank*, 17 Mass. 33, 42; *Danvers Bank* v. *Salem Bank*, 151 Mass. 280. *First National Bank of Crawfordsville* v. *First National Bank of Lafayette*, 4 Indiana, 355 (51 Am. St. Rep. 221), and cases there cited.

The check being a forgery was absolutely worthless in the hands of the forger. When defendant indorsed it he guaranteed the genuineness of the signature of the drawer and all prior indorsements and that his title was good. *Peoples Bank* v. *Franklin Bank*, 88 Tenn. 299; (17 Am. St. Report, 887); 3 Am. and Eng. Ency. page 225, and the same is true of each subsequent indorser.

If the drawee paying a forged check within a reasonable time after discovering the forgery returns or offers to return the same to the indorsee from whom it was received, it can recover back the money, if the indorsee is placed in no worse position than he would have been in had the bank refused payment when presented. *National Bank of North Am.* v. *Bangs*, 106 Mass. 441, 445; *Ellis* v. *Ohio L. I. & T. Co.*, (64 Am. Dec. 630.) 4 Ohio St. 628; *Welch* v. *Goodwin*, 123 Mass. 77; *People's Bank* v. *Franklin Bank*, supra; *Danvers Bank* v. *Salem Bank*, 151 Mass. 280; *Merchants Bank* v. *National Bank of the Commonwealth*, 139 Mass. 513; *Star Ice Co.* v. *New Hampshire Nat'l Bank*, 60 N. H. 442; *Birmingham Nat. Bank* v. *Bradley*, 103 Ala. 109, (49 Am. State Rep. 17, and note).

The check being a forgery was a nullity from the beginning.

Possessed of no commercial life or value. Nothing passed from the defendant to the plaintiffs, as a consideration for the plaintiffs' money.

Being a forgery it was the duty of the bank upon which it was drawn to give the party from which they received it notice within a reasonable time after discovering the forgery. *Canal Bank* v. *Bank of Albany*, 1 Hill 291; Dan. on Neg. Inst. § 1372, and cases there cited.

The mistake of the bank was no legal prejudice to the defendant inasmuch as the forger departed for parts unknown on the 6th day of July, and had been away nearly one month before check was indorsed by defendant.

The plaintiffs together with all subsequent indorsers and the drawee bank had a right to believe that the defendant in taking the check had by the usual and proper investigation satisfied himself of its authenticity.

Had the check been presented to the drawee bank direct over its counter, by the forger himself, payment would have been refused until identification of the person presenting the same, had been received by the bank and his title shown.

The defendant was negligent in taking the check from a stranger, without inquiring as to its genuineness. Defendant made no investigation or inquiry himself, although living only a short distance from the cottage of the said Haven. At the time of the indorsement and delivery to the plaintiffs, defendant never communicated to them the fact that he was requested to hold the check for a long period of time, to wit: from July 6 to August 1, a circumstance which ought to have aroused the suspicions of any prudent man, but suppressed and concealed his knowledge, and by so doing aided in the fraud.

The drawee bank was guilty of no actual negligence in not discovering the forgery, as the signature was a very close imitation of the signature of said Haven. No question can be raised that the bank did not promptly return the check upon discovering it to be a forgery.

By the agreed statement Crew is an admitted stranger with never any attachable property in this State; that immediately after passing check to defendant he left the State and has never been seen or heard from since. Such being the facts, defendant is in no worse position than he would have been in had the drawee bank refused payment when the check was presented.

It was the duty of the bank to detect the forgery, and if it failed in that duty it should be held accountable to the extent of the injury, but where no loss has resulted to any one through this failure of duty, why should the bank forfeit the money so paid out by it?

There is no justice or propriety in permitting defendant to profit by a mistake which his own negligent disregard of duty has contributed to induce the drawee bank to commit.

H. L. Whitcomb and J. P. Swasey, for defendant.

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

EMERY, J. Haven was a depositor in the Bay State Trust Company, a bank in Boston. A written instrument purporting to be his check upon that bank, payable to Crew or order, was by Crew indorsed for value to Coburn, the defendant. Coburn indorsed it for value to Neal and Quimby. That firm indorsed it for value to Furbish, Butler & Oakes. The latter firm indorsed it for collection to the Phillips National Bank. The Phillips Bank indorsed it for collection to the Commonwealth Bank of Boston, which bank presented it for payment through the clearing house to the Bay State Trust Company, the bank upon which it was drawn. The Bay State Trust Company paid it as Haven's check, marked it paid and charged the amount to Haven's account. Three days afterward it was discovered that the drawer, (Haven's) signature was forged, and the paper was returned through the same channel to Neal and Quimby, the plaintiffs, who refunded the amount and in their turn presented it to Coburn, the defendant, and demanded of him to refund the amount in his turn which he refused to do. Hence this action for money had and received to enforce such refunding.

It is conceded that Neal and Quimby cannot maintain this action unless the Bay State Trust Company could do so had all the intermediate indorsers refused to refund. The question therefore is,— assuming the good faith of all parties,—who shall bear the loss in such case, the first innocent indorser for value or the bank which accepted the paper as genuine and paid it as the check of its depositor?

Since a check belongs to that class of written instruments called commercial paper, the question stated is not so much one of abstract justice in the particular case, as it is of what is the established or workable rule in this class of cases. Commercial paper has long been governed by special rules which, while designed to ensure justice, are also designed to ensure the free and safe use of an indispensable commercial agency. The commercial world needs

and seeks for the plain workable rule rather than for the somewhat uncertain abstract right in each case. We think such a rule decisive of this case has been long and firmly established.

A check is in form and nature a species of bills of exchange and is pro tanto governed by the same rules (*Foster* v. *Paulk*, 41 Maine, 425), hence decisions as to bills of exchange upon this question are applicable to this case. In 1715 in an action by an indorsee against the acceptor of a bill of exchange, tried before Lord Raymond in the King's Bench Court sitting at Guildhall to hear commercial cases, it was held that the acceptance sufficiently proved the signature of the drawer. Evidence offered by the acceptor to affirmatively prove the bill to be a forgery was rejected, one of the reasons given being "the danger to negotiable notes." *Jenys* v. *Fowler*, 2 Strange, 931. In 1762 before Lord Mansfield, in the King's Bench then also sitting at Guildhall, was tried an action for money had and received to recover back money paid to an innocent indorsee of a bill of exchange by the drawee. The signature of the drawer was forged. Lord Mansfield stopped the defendant's counsel, saying the case could not be made plainer by argument, and ordered judgment for the defendant. *Price* v. *Neal*, 3 Burr. 1355. In 1815 the question came before the Common Pleas also then sitting in London. The banker sought by an action for money had and received to recover back money paid by him to an innocent holder of a bill of exchange bearing a forged acceptance of a correspondent of the banker's. The plaintiff was nonsuited. *Smith* v. *Mercer*, 6 Taunt. 76. In 1882 the English "Bills of Exchange Act" was passed "to codify the law relating to Bills of Exchange, Cheques and Promissory Notes." In section 54 it was enacted that, "the acceptor of a bill by accepting it is precluded from denying to a holder in due course the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill." 4 Eng. Rul. Cases 159, 160. The rule stated by Lord Raymond, in 1715, seems to have become firmly established in that great commercial country.

In this country the earliest published judicial decision upon the question appears to have been made in 1802 by the Supreme

Court of Pennsylvania. An innocent holder of a check for value presented it for deposit to his credit in the bank upon which it was drawn. The bank received it, and credited the amount to the holder and debited the same to the supposed drawer. It soon proved to be a forgery, whereupon the bank charged the amount back to the holder's account. The holder then brought an action against the bank, and recovered judgment. *Levy* v. *Bank of U. S.* 1 Binney, 27. In 1825 a case similar in principle came before the U. S. Supreme Court which always decides for itself questions of general commercial law as applicable to the whole country. The Bank of the United States remitted to the Bank of Georgia papers purporting to be bank-notes of the latter bank which were received and credited to the account of the former bank. Some days afterward the supposed notes were found to be counterfeit and the Bank of Georgia tendered them back to the U. S. Bank and charged the amount back to that bank, and refused to acknowledge any indebtedness for them. The U. S. Bank brought an action for balance of account stated, and for money had and received, and was held entitled to recover the amount so deposited. *Bank of U. S.* v. *Bank of Georgia*, 10 Wheat. 333. This decision does not appear to have been questioned in any federal court. The applicability of this decision is manifest when it is recalled that the acceptor of a bill of exchange is in the same category as the maker of a note. If one who pays what purports to be his note cannot recover the money back, no more can one who pays what purports to be a bill of exchange or check drawn upon him.

In 1820, five years earlier than the case in Wheaton, a similar case occurred in Massachusetts between two banks as to the counterfeit bills of one of them which it received from the other and paid as genuine. It was held that it could not recover back the money paid. *Gloucester Bank* v. *Salem Bank*, 17 Mass. 33. As late as 1890 the Supreme Court of Massachusetts stated the rule as follows: "In the usual course of business, if a check purporting to be signed by one of its depositors is paid by a bank to one who finding it in circulation or receiving it from the payee by indorsement took it in good faith for value, the money cannot be recovered back on the

discovery that the check is a forgery." *Danvers Bank* v. *Salem Bank*, 151 Mass. 282.

In a New York case in 1850 the bank upon which a draft was drawn refused payment for want of funds of the drawer, whereupon Goddard, the correspondent of the supposed drawer, being informed of the draft but without seeing it, left his own check for its payment, which amount was remitted to the holders of the draft. The next day Goddard on seeing the draft found it to be forged. Held, however, that he could not recover back the amount of the holder. *Goddard* v. *Merchants Bank*, 4 N. Y. 149. In 1871 a bank in New York paid to an innocent holder a forged draft drawn upon it and then sought to recover the money back. The court rendered judgment for the defendant as in the earlier case, using this language: "For more than a century it has been held and decided without question that it is incumbent upon the drawee of a bill to be satisfied that the signature of the drawer of the bill is genuine,—that he is presumed to know the handwriting of his correspondent;—and if he accepts or pays a bill to which the drawer's name has been forged he is bound by the act and can neither repudiate the bill nor recover the money paid. . . . . A rule so well established and so firmly rooted in the jurisprudence of the country ought not to be overruled or disregarded." *National Park Bank* v. *Ninth National Bank*, 46 N. Y. 80, 81.

Other courts have also recognized the rule more or less explicitly. *Commercial Bank* v. *National Bank*, 30 Md. 11; *Germania Bank* v. *Boutell*, 60 Minn. 192; *St. Albans* v. *Farmers Bank*, 10 Vt. 141; *Star Ins. Co.* v. *State Bank*, 60 N. H. 442; *Dipont Bank* v. *Fayette Bank*, 90 Ky. 22.

The only allusion to the rule we have found in the published opinions of this court is in *Belknap* v. *Davis*, 19 Maine, 457, in 1841, where in an action by the holder against the acceptor of a bill of exchange it was held that "the acceptance admits the signature of the drawer and the authority to draw." So far as it goes this would seem to be in the same line with the decisions above cited and quoted from, and would seem to indicate that the rule so long and firmly upheld by those decisions is in harmony with the law of commercial paper in this state.

In some cases the courts have been led to inquire whether the condition of the holder had changed between the payment of the check and notice to him of the forgery, and to hold that if the holder had suffered no loss by reason of the payment he should refund the amount to the bank or drawer. The rule cited does not make any such distinction,—does not call for any inquiry into the condition of the holder. To do so is to abandon the rule, and with it all certainty. It would leave every person receiving payment on a check in complete uncertainty as to whether and when it was in fact finally paid. It would be a destructive blow to the usefulness of checks as an instrumentality of trade. It is also against the reason and equity of the rule as stated by the courts recognizing it, and hence is inconsistent with the rule. Wherever the rule is upheld the doctrine of such cases must be rejected.

The reason usually given for the rule is that it is impracticable for the indorsee or holder of a bill of exchange or check to know or learn whether the signature of the drawer is genuine, and that the bank or other drawee has the best means of knowing or learning the fact; or, as sometimes expressed, the bank may be presumed to know the signature of its depositor, and the acceptor the signature of his business correspondent. Lord Mansfield in *Price* v. *Neal*, supra, compared the equities. He said that the action for money had and received could not be maintained unless it was against conscience in the defendant to retain it and that it was not against conscience for an innocent holder to retain money paid to him by the drawee of a bill of exchange which he had in good faith paid value for. As between parties equally innocent there seems to be no more equity in throwing off the loss from one to the other, than in leaving it where it fell. In cases like these however, where the loss fell in the regular course of business upon the bank which could have known and should have known the forgery, it seems positively inequitable to throw off that loss upon an innocent man who had much less opportunity of knowing. As also said by Lord Mansfield in *Price* v. *Neal*, if negligence is to be considered it was as much if not more in the drawee or bank as in the holder. But whatever the reason or equity of the rule and however much it

may be criticised by text writers and theorists, it has been so long established and so explicitly recognized by the courts in commercial communities it should stand as the rule until modified by legislative action. It evidently has been found to be a workable rule, and its plainness and certainty should not be obscured by fine judicial distinctions confusing to the lay mind.

It has been suggested that this rule breaks against another rule of the law of commercial paper, viz:—that the defendant by indorsing the check guaranteed to every subsequent holder the genuineness of the signature of the drawer. But the bank upon which the check was drawn did not become a holder. It did not purchase the check. The bank paid it, extinguished it. It was no longer a check, and could no longer have a holder as such. It had become merely a voucher. *Skowhegan Bank* v. *Maxfield*, 83 Maine, 576.

The plaintiff cites cases in which it was found that the bank was induced by the conduct of the holder to assume the check to be genuine without investigation. In other cases it was found that the holder knew or had reason to know of the forgery or was put upon inquiry before taking the check. In these cases it was held that the holder was without the rule.

In this case, however, no such facts can be found. Haven the supposed drawer was occupying a summer cottage in the neighborhood. The check was written upon one of his blanks taken from his check-book. The signature was so good an imitation that the bank accepted it. Crew, the forger, had previously received genuine checks from Haven. He was a boarder at the defendant's hotel or boarding house. While after the event the defendant now believes Crew to have been an impostor, nothing in the case shows that he so believed or had reason to so believe before the event. It is true he was told by Crew that Haven desired the check to be held about three weeks before presentment, but that was no reason for suspecting the genuineness of the signature. It might have generated a doubt as to the solvency of Haven but no more. While perhaps a banker would have hesitated to accept the check under the circumstances, we find in them nothing that would natu-

rally have deterred a man like the plaintiff. In the New York case, *Goddard* v. *Rutland Bank*, supra, the circumstances surrounding the transfer of the check from the forger to the first holder were even more suspicious than here, and were held to be insufficient to affect the holder.

We find the plaintiff was an innocent holder for value, and that the loss by the forgery fell in the course of business upon the bank. We hold that the defendant though he has suffered no loss is protected by the rule cited, and that under the rule the loss cannot be thrown off the bank upon him.

It is conceded that the defendant's verbal promise to refund made under a misapprehension of the law was without consideration, and hence not binding.

Plaintiffs nonsuit.

PATRICK KEEFE, Petitioner for Mandamus,

vs.

FRANK E. DONNELL.

York. Opinion November 25, 1898.

Elections. Ballots and Inspection. Town Clerk. Mandamus. Stat. 1891, c. 102, § 25; 1893, c. 267; R. S., c. 102, § 16.

At the State election of 1898 the petitioner's name was on the official ballots as a candidate for representative to the legislature. According to "the result declared and recorded" he failed of an election, but he believed that if the ballots had been properly sorted and counted, he would appear to be elected. The petitioner thereupon applied to the town clerk for permission to inspect the ballots, they having been delivered to him sealed in a package, as provided by the statute, "to be preserved by him as a public record for six months." This application to the town clerk was made before the six months had elapsed and was refused.

Upon a petition for mandamus, *held;* that the petitioner has a legal right to inspect the ballots, a right which the town clerk must accord to him and that the mandamus must be made peremptory.

Also; that neither the petitioner, nor any one in his behalf, can sort or count, or in any way handle or even touch the ballots. He can inspect them and they must be exposed to his inspection, but they are all the while in the custody of the clerk and he is responsible for them.

Such inspection must be in the presence of the clerk who can make and insist on such regulations or restrictions consistent with the right of inspection as will secure every ballot, like any other record, from loss, impairment or change in any respect.

The clerk can afterward reseal the package for greater security until inspection is again required by some person interested.

ON EXCEPTIONS BY DEFENDANT.

Petition for mandamus against the respondent, as clerk of the town of Kittery, praying that the petitioner may be allowed to make examination of all the ballots, votes, stickers and check lists in his custody and which were used and unused at the state election held in said Kittery on the 12th day of September, 1898, and at which election the petitioner was supported as a candidate for representative to the legislature from the classed towns of Kittery and Eliot.

The petition alleges, among other things, that the respondent refused to exhibit or allow the examination of said ballots and check lists by the petitioner. The petition having been presented at the September term of the court then in session in York County an order of notice was granted thereon returnable on the fourth day of October, when upon hearing the following alternative writ was issued.

L. S. STATE OF MAINE.

Supreme Judicial Court. October 4th, 1898.

FRANCIS KEEFE *vs.* FRANK E. DONNELL.

To Frank E. Donnell, Town Clerk of the town of Kittery, in our County of York, Greeting:

Whereas, Francis Keefe, of Eliot, in said County of York, was duly nominated at a caucus of the Republican voters of the classed towns of Kittery and Eliot in said County legally holden at said Eliot on the fourth day of August, 1898, for the choice of Representative to the 69th Legislature of the State of Maine from the towns of Kittery and Eliot, as provided by the Resolves of the State of Maine for the year 1891, chapter 118, and,

Whereas, both the certificate of nomination by said caucus for Representative, and the assent thereto by said Francis Keefe were

duly executed and filed with the Secretary of State of the State of Maine, as required by law; and,

Whereas, Thomas F. Staples, of said Eliot, was a candidate for Representative to said 69th Legislature from said classed towns of Kittery and Eliot, as Independent Republican, he having filed nomination papers as and for such candidacy, as provided by law; and,

Whereas, at said election held on the 12th day of September, 1898, both said Francis Keefe and Thomas F. Staples were voted for as candidates for Representative from the classed towns of Kittery and Eliot to said 69th Legislature, and there were cast and counted for said Francis Keefe, in the town of Eliot, one hundred and thirty-two (132) votes for Representative and in the town of Kittery there were alleged to have been cast and counted for said Keefe one hundred and sixty (160) votes, and there were cast and counted in the town of Eliot for said Thomas F. Staples seventy-eight (78) votes for Representative and there were alleged to have been cast and counted in said town of Kittery two hundred and sixteen (216) votes for said Staples for Representative, and the Town Clerk of the towns of Kittery and Eliot made return as required by law of said votes counted for said candidates for Representative as aforesaid, each for his respective town, to the Secretary of State accordingly; and,

Whereas, it is alleged that at said election in said town of Kittery the election officers of said Kittery then and there, to wit: on the 12th day of September, 1898, counted for said Staples for Representative certain and many ballots, to wit: twenty (20) ballots bearing the name of said Staples which were legally defective, and which should not have been counted for said Staples for Representative under the laws of this State; and it is alleged that at said election held in said Kittery, the election officers of said Kittery counted for said Thomas F. Staples for Representative, as aforesaid, certain and many loose stickers not attached to any ballots then and there found in the ballot box and enclosed in the ballots, to wit: to the number of fifteen (15) stickers bearing the

name of said Thomas F. Staples, which said stickers were illegally counted for said Staples for Representative aforesaid; and,

Whereas, said Francis Keefe alleges that because of said illegal and wrongful acts of said election officers of the town of Kittery, to wit: the said counting of said twenty (20) defective and illegal ballots for said Thomas F. Staples for Representative aforesaid, and the said counting of said fifteen (15) not attached stickers bearing the name of said Thomas F. Staples for Representative as aforesaid, said Thomas F. Staples was alleged to have received two hundred and ninety-four (294) votes for Representative as against two hundred and ninety-two (292) votes for said Francis Keefe for Representative in the classed towns of Kittery and Eliot, and that the said Staples thereby received a plurality of votes, to wit: a plurality of two votes over said Francis Keefe and a plurality of votes over all other candidates voted for for Representative in said classed towns of Kittery and Eliot, and that but for said illegal and wrongful acts of said election officer in the said counting of said defective ballots and said not attached stickers, the said Francis Keefe would have received a plurality of votes cast for Representative, as aforesaid, from said classed towns of Kittery and Eliot; and,

Whereas, said Francis Keefe denies that the said Thomas F. Staples was duly and legally elected Representative to the said 69th Legislature from the classed towns of Kittery and Eliot, and contests the alleged election of said Staples as Representative aforesaid, and alleges that he is specially interested in the count made by said election officers of the votes of the town of Kittery and the return of the Town Clerk of the town of Kittery, for Representative, to said Secretary of State, and that he has been specially damaged and wronged thereby; and,

Whereas, the said Francis Keefe, on the 30th day of September, 1898, at said Kittery, at 2.30 o'clock in the afternoon, made demand on Frank E. Donnell, Town Clerk of said Kittery, which said Town Clerk said Donnell legally was and now is, then and there having custody of all the ballots and check lists used at said

election for Representative, as aforesaid, on said 12th day of September, 1898, and of all the unused and cancelled ballots and check lists sealed in packages, as provided by law, which said three classes of ballots include all the ballots returned to said Donnell's possession as Town Clerk aforesaid by the election officers of the town of Kittery, for permission to have access to and examine all of said ballots herein enumerated and the check lists used at said election, which said ballots and check lists then and there were and now are in the custody of said Donnell, as Town Clerk aforesaid, as a public record, as provided by the laws of Maine; and,

Whereas, it was and is the duty of said Frank E. Donnell as Town Clerk aforesaid, to preserve said ballots and check lists as a public record, and as such public record to allow access to and examination of said ballots and check lists by persons having a special interest in the same, yet disregarding his duty in said behalf utterly refused then and there, to wit, on said 30th day of September, 1898, at 2.30 o'clock in the afternoon, at said Kittery, to allow to said Francis Keefe, who had and still has a special interest in the same, access to and examination of said ballots and said check lists for the purposes aforesaid so held in his, said Donnell's possession as a public record, and still refuses so to do, and that because of the refusal of said Donnell, as clerk aforesaid, to allow said Francis Keefe to examine said ballots and check lists, he, the said Keefe is unable to gain access thereto, and to examine the same, and is unable to protect his legal rights and provide himself with proper and necessary data and facts to enable him to contest the alleged plurality and election of said Thomas F. Staples as Representative aforesaid before the Legislature of this State to be convened at Augusta on the first Wednesday of January, 1899, to his, the said Francis Keefe's great and special damage; and,

Whereas, said Francis Keefe is without remedy at law for said wrongful acts of said Frank E. Donnell, as said Town Clerk of Kittery, in that he, said Donnell, refuses access to and examination of said ballots and check lists by said Keefe for the purposes aforesaid; in contempt of us, and to the no small damage and griev-

ance of him, the said Francis Keefe, as we have been informed from his complaint made to us in that behalf; we therefore, being willing that due and speedy justice be done in this behalf to the said Francis Keefe as it is reasonable, do command you, that immediately after the receipt of this our writ you do allow said Francis Keefe to have access to and make examination of all the ballots, votes and check lists in your custody as Town Clerk as a public record, being the same ballots, votes and check lists returned by the election officers of said Kittery to you, in your said capacity as Town Clerk of the town of Kittery, which were used and unused at said State election held in said Kittery on the 12th day of September, 1898, for the election of Representative from the classed towns of Kittery and Eliot to the 69th Legislature of Maine to be convened on the first Wednesday of January, 1899, or that you show us cause to the contrary thereof, that the same complaint may not, by your default, be repeated to us; and how you shall have executed this our writ, make known to us forthwith at this term of the Supreme Judicial Court now being held at Alfred, for our County of York on this fourth day of October, A. D. 1898, there returning to us this our said writ.

Witness Albert R. Savage, Esq. a Justice of our said Supreme Judicial Court, at Alfred, the fourth day of October, in the year of our Lord one thousand eight hundred and ninety eight.

James E. Hewey, Clerk.

The defendant took exceptions to the order of the court directing the writ to issue, and the case was certified to the Chief Justice under the provision of R. S., c. 102, § 16, as amended.

Geo. M. Seiders and Frank D. Marshall, for petitioner.

Samuel W. Emery, of the N. H. bar for respondent.

The ballots cast at the biennial election held in September, 1898, are not a "public record" in the fullest, or even in a general sense. They are a public record, not to be resorted to by all persons, as a record of chattel mortgages may be, but a public record for use on important public occasions, such as a recount or

contest when the election of a county officer is in question, (R. S., c. 4, § 53, amended,) or when a legislative committee on elections recounts the ballots in a contest pending in the legislature.

That this is so is apparent when we consider the nature of the ballots, the fact that the statute does not, as at § 9, with respect to nomination papers, require them to be open to general inspection, and the fact that it is only as sealed packages that they have the protection of the law after being once sealed.

If they are a public record in a general sense, every person has right to count and examine them, and in frequent handlings the pencil marks would be obliterated, and frequent opportunities for fraud offered. It is easy for an unscrupulous person to nullify a ballot by a surreptitious pencil mark, or to detach a "sticker." The exercise of a public right, which is destructive of the main object of the law,—to keep the ballots as evidence,—cannot be supposed to have been intended. These ballots, the best possible proof in many cases of contest, are the only evidence, and any mutilation or tampering with them is fatal to their credit. Also, frequent handling may destroy their credit by rubbing off marks, or detaching stickers. The seals, broken in the Supreme Judicial Court when the contest over a county office is in question, may have their sanctity restored by a resealing and superscription by the clerk of the court showing when and why the package was opened. And the same is true if broken by authority of the legislative committee on elections. But if they are a "public record" in a general sense, the package may be lawfully broken 5000 times and the ballots reduced to shreds by handling. To say that only the candidates may open the packages is to deny the words "public record," the meaning the petitioner claims for them. Our view is that they are a "public record," but usable as such only by tribunals which are called upon to decide right to office.

The petitioner does not stand in need of the remedy he asks, because he can have a recount by the legislative committee on elections. A writ of mandamus will not issue where there is another adequate remedy.

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

EMERY, J. By act of 1891, c. 102, § 25, as amended by Act of 1893, c. 267, being "an Act to provide for the printing and distributing ballots at the public expense, and to regulate voting for state and city elections" it is provided that after the election is over "when the ballots have been sorted and counted and the result declared and recorded, all the ballots shall in open meeting be sealed in a package which said package, together with the check lists sealed in the same manner as the ballots, shall be forthwith delivered to the city, town or plantation clerk to be preserved by him as a public record for six months." The clerk and all other persons are forbidden to "abstract from or in any manner tamper with" said packages.

At the state election of 1898 the petitioner's name was on the official ballots in the town of Kittery as a candidate for representative to the legislature. According to "the result declared and recorded" he failed of an election, but he believes that if the ballots had been properly sorted and counted, he would appear to be elected. He desires to inspect the ballots used in that election and which were sealed in a package and returned to the town clerk of Kittery, and are now in his office still sealed up in that package, the six months not having expired. Has he any legal right to inspect them?

It is argued that he can only inspect the exterior of the package, that it is the package sealed and to be kept sealed, and not its contents, which is to be "preserved by the clerk as a public record." Such a construction would leave the statute without meaning or purpose. The only use suggested in the argument for packages which are to be kept sealed is that they can be taken into the courts or legislature and there unsealed and sealed again. There is, however, no suggestion in the Act that the packages are to be taken from the clerk's office, or that an inspection of their contents can be had only by the court or the legislature.

The contents of the packages, the ballots, are the concern of the

statute. Its language must be applied to them. They are to be preserved. They are to be "the public record," and their place is in the custody of the town clerk. A record, however, is not public unless it can be inspected by any person interested in what it shows.

It is again urged that the clerk is forbidden to "in any manner tamper with" the package. Taken by itself this language might indicate that the clerk could not open the package, though the word "tamper" in a criminal statute at least, has the limited meaning of improper interference "as for the purpose of alteration; and to make objectionable or unauthorized changes." Cent. Dict. Taken in connection with the language of the statute declaring the packages (in their contents) to be public records, it is evident that the clerk is not forbidden to open the packages to enable interested persons to inspect the ballots.

We think the petitioner has a legal right to inspect the ballots, a right which the town clerk must accord to him, and that the mandamus must be made peremptory. It does not follow, however, that the petitioner or any one in his behalf can sort or count, or in anyway handle or even touch the ballots. He can inspect them and they must be exposed to his inspection, but they are all the while in the custody of the clerk and he is responsible for them. The inspection must be in his presence, and he can make and insist on such regulations or restrictions consistent with the right of inspection, as will secure every ballot like any other record from loss, impairment or change in any respect. The clerk can afterward re-seal the package for greater security until inspection is again required by some person interested.

Exceptions overruled.

HARRY J. HILTON *vs.* EDWIN A. SHEPHERD, and another.

SAME *vs.* SAME.

Penobscot. Opinion November 25, 1898.

Infancy. Sales. Rescission. Ratification. R. S., c. 111, § 2. Stat. 1845, c. 166.

A minor bought horses for which he gave his note and other considerations. After he became of age, he first used the horses in his business, and then sold them as his own. In a suit brought by him to recover the consideration paid, he claimed that he had rescinded the contract of purchase,—but prior to his use and sale of the horses. *Held;* that the conduct of the plaintiff in the use and sale of the horses was not only an abandonment of the attempted rescission, but was a ratification of the original bargain.

Held, also, that R. S., c. 111, § 2, does not require proof of ratification to be in writing, when one seeks to recover back the consideration paid by him on a contract made while he was a minor.

ON REPORT.

Two actions, one assumpsit, and the other trover, involving the same facts, tried together.

The declaration in assumpsit is as follows:—

In a plea of the case: For that the said Edwin A. Shepherd and Nial S. Wheeler, then copartners under the firm name of Shepherd & Wheeler, at said Dexter, on the 18th day of June, 1896, bargained and sold to the plaintiff who was then and there a minor, as defendants well knew, two matched, dark bay horses, for a price agreed to be two hundred and fifty dollars; that, as a part of said contract the plaintiff then and there paid to said defendants the sum of twenty-five dollars in money, and also transferred and delivered to the defendants a certain promissory note dated at St. Albans, in April, 1896, signed by one Welch and made payable to Fred Lucas or order, and by said Lucas indorsed and delivered to the plaintiff, said note being for the sum of twenty-five dollars payable in six months from date, with interest, value received. That plaintiff discovering that he had been

defrauded by said defendants in said contract, sometime in the early fall of said year, 1896, verbally notified said defendants of his intention to rescind said contract, offering to return said two matched, dark bay horses, and requesting the return by them of the twenty-five dollars so paid them, and said note and other property they had received of him under said contract, which offer and request said defendants refused, denying plaintiff's right thereto. And the plaintiff avers that said defendants have collected and received payment of said promissory note given by said Welch, and of the interest due thereon. He further avers that said defendants have asserted title to and have retaken into their own possession said two matched, dark bay horses and now hold the same. Wherefore by reason of said plaintiff's minority when said contract was made and of his rescission of the same, his offer to return said horses to said defendants and his request for the return to him of said money, note and other property so received by them, of defendants refusal to comply with same and their collection of said note and interest, and retaking said horses as their own property, said defendants became liable and in consideration thereof then and there promised the plaintiff to pay him said twenty-five dollars received directly from him and said twenty-five dollars and interest received by them as the proceeds of said promissory note given by said Welch.

The declaration in trover counted on a conversion of the mare and plaintiff's own note for $125.

The facts are stated in the opinion.

Thos. H. B. Pierce, for plaintiff.

F. D. Dearth, for defendants.

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

SAVAGE, J. Two cases between the same parties. June, 1896, the plaintiff, then a minor, made a trade with the defendants. He received from them two horses. He gave them in payment $25 in cash; a note for $25, signed by one Welch and then owned by the

plaintiff; a mare; and his own note for $125, secured by a mortgage on the two horses he had bought of the defendants. The plaintiff became of age October 10, 1896. He claims that he has rescinded the contract, and he brings these actions to recover back the consideration,—one, assumpsit for the cash paid and for the proceeds of the Welch note which the defendants collected; the other, trover for the mare and his own one hundred and twenty-five dollar note. The case comes to us on report of the evidence on behalf of the plaintiff, with the stipulation that "if the action is maintainable, it is to stand for trial; otherwise a nonsuit is to be entered." The question is not exactly whether there may be any evidence upon which a verdict for the plaintiff could have been rendered, but whether upon all the evidence a verdict for the plaintiff could be sustained.

The history of the controversy subsequent to the trade appears to be as follows: In September, 1896, the plaintiff, being yet a minor, brought one of the horses back to the defendants and claimed that that horse was unsound and not such as it had been represented to be. The defendants, however, did not take the horse back, and the plaintiff continued in possession of both horses. In January, 1897, one of the defendants was at plaintiff's home. The plaintiff said he should not pay the one hundred and twenty-five dollar note; offered a compromise by losing fifty dollars on the trade, or to let the defendants have the horses back, they to restore the property he had let them have. The horses were then in the stable near by. To the offer of compromise, the defendant then present said, "no, he would have the whole." The plaintiff asked the defendant to come in and look at the horses, but the defendant refused. The plaintiff's witness, his father, testifies that at the January interview, the plaintiff made the statement that "he was a minor at the time he signed the note and was not liable." The plaintiff himself testifies that nothing was said about minority that day. Both agree that the only ground on which the plaintiff then claimed the right to rescind was that the horses were not as they had been represented to be. Subsequently the plaintiff hired out these horses to go into the woods with himself, where they worked

for forty-eight days. Later, the plaintiff sold the horses outright to one Hurd for $150. Afterwards, the defendants took the horses from Hurd, on what ground does not appear, but presumably, we think, claiming under their mortgage.

It is urged by the defendants that the attempted rescission in January, 1897, was ineffectual, because the horses were not restored or sufficiently tendered. The plaintiff answers that the defendants waived tender by their words and conduct, on the principle that it is not necessary to make a tender to a party who in advance announces that he will not receive it.

But we do not deem it necessary to determine the sufficiency of these claims on the one side and the other. If it be assumed that the plaintiff attempted a rescission, and that a tender of the horses was made or waived, it is the opinion of the court that the subsequent conduct of the plaintiff, which was after he became of age, must be held to be not only an abandonment of the attempted rescission, but also a ratification of the original bargain. Not only did he hire out the horses for work in the woods, which alone might not be decisive, but he sold the horses as his own. It is not questioned but that such conduct by the plaintiff would amount to a ratification at common law, but the plaintiff claims that under our statute, R. S., Chap. 111, § 2, such a ratification must be in writing in order to bind a minor. This section reads: "No action shall be maintained on any contract made by a minor, unless he, or some person lawfully authorized, ratified it in writing after he arrived at the age of twenty-one years, except for necessaries, or real estate of which he has received the title and retains the benefit." The plaintiff claims that this statute applies not only when an action is brought against one, upon a contract made by him during minority, but also when a ratification is set up as a defense to an action brought by him to recover back the consideration. The common law doctrine relating to the liability of minors upon their contracts was designed for their protection, and it is clear to us that this statute was intended as an additional protection. If it be held that by this statute, one who seeks to enforce a contract made by him when a minor must first ratify it in writing, it has little

significance, for all he will need to do in any case is to reduce his ratification to writing before bringing suit. Thus the statute is no protection to him. On the other hand, if the other party to the contract seeks to enforce it against him, the statute is a protection. Such an action cannot be maintained on oral and uncertain proof of ratification, but only on proof of his deliberate written ratification.

Now, how is it in case the minor wishes to repudiate the contract and recover back the consideration? Can it be said that a minor who has received the articles purchased by him, who has kept and used them after he becomes of age, and then has sold them, is not barred from recovering back the consideration, simply because he has not ratified the contract in writing? We think not. The statute would thus become a sword instead of a shield. In the hands of the dishonest it would become an instrument of robbery. It would be rank injustice to permit the minor, after he becomes of age, still retaining the property or having sold it, to recover back also the price paid for it. On the ground of common honesty, he should be estopped. We think such a result was not intended by the legislature. An examination of the original statute, Laws of 1845, chap. 166, which in a condensed form now appears as R. S., Chap. 111, § 2, above quoted, only confirms this opinion. That statute reads as follows: "No action that may be brought after the passage of this act shall be maintained *against any person upon a contract made while a minor*, unless the same is ratified in writing, signed by the party to be charged by said contract." By the express language of this statute, the necessity of written ratification is limited to actions *against* persons on contracts made by them while minors. It is not at all applicable to actions brought by them to recover back the consideration paid. And we think that when this statute was condensed and placed in the Revised Statutes there was no intention to change its meaning. A change in phraseology merely in the revision of a statute is not deemed to be a change in the meaning. *Hughes* v. *Farrar*, 45 Maine, 72; *Cota* v. *Ross*, 66 Maine, 161. Though this precise point has not been raised since the adoption of the statute in 1845,

all cases decided since then seem to be in harmony with the construction placed upon the statute in this opinion. *Robinson* v. *Weeks*, 56 Maine, 102; *Bird* v. *Swain*, 79 Maine, 529; *Neal* v. *Berry*, 86 Maine, 193.

Upon the evidence found in the report, therefore, the actions cannot be maintained.

Plaintiff nonsuit in each case.

CHARLES DUNN

vs.

THE AUBURN ELECTRIC MOTOR COMPANY.

Androscoggin. Opinion November 25, 1898.

Exceptions. Practice. Pleading. Assumpsit. Covenant.

The certificate of the presiding justice that exceptions have been "allowed" is conclusive as to the regularity of the filing and allowance of the exceptions.

Assumpsit does not lie for the breach of an instrument under seal wherein the defendant covenanted to manufacture and deliver to the plaintiff an electric motor properly set up and connected, and in running order, and which it was warranted should be "all right."

Nor can such sealed instrument be used as evidence to support such an action of assumpsit.

ON EXCEPTIONS BY DEFENDANT.

This was an action of assumpsit for an alleged breach of warranty in the manufacture of an electric motor. The defendant was a manufacturer of electric motors in the city of Auburn; the plaintiff was a brick maker and bargained with the defendant for an electric motor to be used to run his brick machines. The contract for the manufacture of the motor and the warranty of the same by the defendant was in writing, signed by the treasurer, under the seal of the corporation.

At the trial the plaintiff offered this written instrument under seal in evidence, and the court admitted the same against the objection of the defendant, to which the defendant seasonably

excepted, because the instrument being under seal is not admissible under this declaration. The jury returned a verdict for the plaintiff of $210.

The motor was manufactured and set as to time according to the contract; and was used by the plaintiff in the seasons of 1894, 1895 and 1896, but as he claims the motor did not do good work and the interruptions caused by the same in his business made him great loss of time of his men.

At the hearing on the bill of exceptions before the law court, the plaintiff filed a motion, in substance as follows, to dismiss the case from the law docket:

"And now comes the plaintiff in the above entitled case and moves that the defendant's exceptions be dismissed, because they were not presented and filed in conformity to law and the rules and practice of the court. The case was tried at the January term, 1898, in Androscoggin County. No exceptions were prepared and submitted to plaintiff's counsel until the latter part of June, 1898.

"Exceptions were then irregularly and improperly allowed by the presiding justice against the written protest of plaintiff who refused to consent to the exceptions. No provision was ever made with plaintiff for extending the time of filing exceptions. Plaintiff files with this motion a copy of the court docket in this case duly attested by the clerk, showing time of trial, and time of filing exceptions, and also affidavit of plaintiff's attorney that he protested in writing to the presiding justice against the defendant's exceptions being allowed in June, 1898.

Tascus Atwood, for plaintiff.

Counsel cited in support of his motion: *Fish* v. *Baker*, 74 Maine, 107; *McKown* v. *Powers*, 86 Maine, 291, and cases there cited; *Doherty* v. *Lincoln*, 114 Mass. 362; *Com.* v. *Greenlaw*, 119 Mass. 208; *Conway* v. *Callahan*, 121 Mass. 165; *Phillips* v. *Soule*, 6 Allen, 150; R. S., c. 77, § 51.

In 1894 due warning was given all practitioners in Maine that the statute would be lived up to. The closing sentence in *McKown* v. *Powers*, is as follows: "Hereafter, however, exceptions must be

seasonably and properly taken, and be presented in the summary manner required by the statute, or they will be dismissed without further consideration."

Counsel also cited on the principal question: 2 Pars. Cont. 5th Ed. p. 712, where the author says: "It has been, indeed, held that when a seal adds no actual strength to the contract and does not interfere with the intention of the parties which is adequately expressed and effected by the instrument regarded as a simple contract, then the seal may be treated as mere surplusage." "And if an agent having no authority to affix the seal of his principal, puts it to an instrument which would be valid without a seal, the seal is mere surplusage." See also *Brainerd* v. *N. Y. & H. R. R.*, 25 N. Y. 496; *Ide* v. *R. R.*, 32 Vt. 297; *White* v. *Fox*, 29 Conn. 570; *Cent. Nat'l Bank* v. *C. C. & A. R. R.*, 5 So. Car. 156, S. C. 22 Am. Rep. 12. In the case last cited the seal was considered unnecessary, a consideration being expressed in the contract.

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

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

SAVAGE, J. At the threshold of this case a question of practice is presented.

In the law court, the plaintiff filed a motion that defendant's exceptions be dismissed "because they were not presented and filed in conformity to law and the rules and practice of the court." By the certificate of the presiding justice, it appears merely that the exceptions were "allowed." There is no qualification or limitation whatever. We think this certificate is, and should be, conclusive as to the regularity of the filing and allowance of the exceptions. It happens occasionally, through the exigencies of the business of the court, that it is inconvenient or practically impossible for counsel to draft a bill of exceptions after a trial and during so much of the term as remains, in accordance with statute requirements. It is competent for the parties, with the consent of the presiding justice, to waive, expressly or impliedly,

these requirements. Such is not an uncommon practice. But in such case, at whatever time, in point of fact, the exceptions are actually filed, the certificate of the presiding justice that they are "allowed" is his official decision that they are regularly and properly filed and allowed. And this decision, like so many other decisions of the court at nisi prius upon questions of fact, is not reviewable by the law court. In *Fish* v. *Baker*, 74 Maine, 107, cited by the plaintiff, the presiding justice incorporated in the exceptions his statement showing that they were not seasonably filed, and not showing that the statute provision had been waived, and said "I wish to allow the exceptions now as of the October term, if I have authority to do so." This was only a conditional allowance of the exceptions, and was not a decision that they were seasonably filed, but rather the contrary. In *McKown* v. *Powers*, 86 Maine, 291, also cited by the plaintiff, the time of filing the bill of exceptions was not considered.

We now pass to a consideration of the principal question in the case, which is primarily one of pleading. The plaintiff declared in assumpsit, alleging that the defendant agreed to manufacture and deliver to the plaintiff at his brick-yard in Auburn, properly set up and connected and in running order, one ten-horse electric motor, which motor the defendant warranted should be all right and satisfactory to the plaintiff; and also alleging a breach of this agreement. In support of this declaration, the plaintiff, against the objection of the defendant, was permitted to introduce in evidence the contract of the defendant in writing and under its seal, by which the defendant covenanted to do the things which are set forth in the declaration. We think the admission of this document was erroneous. It has been decided many times that when one covenants or agrees under seal with another to pay a sum or to do an act, the other cannot maintain assumpsit upon the agreement. The action must be debt or covenant broken. But when there is in the sealed instrument no covenant or agreement to pay or perform to the obligee, or to some other person for his use, the instrument may be used as evidence in an action of assumpsit. *Varney* v. *Bradford*, 86 Maine, 510; *Baldwin* v. *Emery*, 89 Maine, 496, and cases cited. See also *Carrier* v. *Dilworth*, 59 Pa. St. 406,

cited by plaintiff. In the instrument in question, the defendant agreed under seal to do a certain act, namely, to manufacture and deliver to the plaintiff an electric motor, properly set up and connected and in running order, and which it was warranted should be "all right," and it is for a breach of this agreement that the plaintiff seeks to recover here. Clearly it falls within the rule of covenants to do or perform acts. Assumpsit will not lie upon such a sealed instrument, nor can it be used as evidence to support an action of assumpsit.

But the plaintiff contends that the seal may be regarded as surplusage, inasmuch as the instrument would be equally valid without a seal. We do not think so. The authorities cited by the plaintiff do not go so far. It must be remembered that this is not a question of the validity of a contract, but one of pleading and evidence. In cases touching the *validity* of contracts where seals have been affixed inadvertently or without authority, the courts have in many cases held the seal to be surplusage. *Tapley* v. *Butterfield*, 1 Met. 515; *Sherman* v. *Fitch*, 98 Mass. 59; *Schmertz* v. *Shreeve*, 62 Pa. St. 457, (1 Am. Rep. 439); *White* v. *Fox*, 29 Conn. 570; 2 Parsons on Contracts, 5th Ed. 721. So it has been held that the bonds of a railroad company under seal are commercial paper, and that assumpsit lies thereon. *Brainerd* v. *N. Y. & Harlem R. R. Co.*, 25 N. Y. 496; *Ide* v. *Pass. & Conn. R. R. Co.*, 32 Vt. 297. But the contrary has been held in this state. *Woodman* v. *York & Cumb. R. R. Co.*, 50 Maine, 550; *Jackson* v. *York & Cumb. R. R. Co.*, 48 Maine, 146. It has been held, indeed, in *Central National Bank* v. *Charlotte, Columbia & Augusta R. R. Co.*, 5 So. Car. 156, (22 Am. Rep. 12), cited by the plaintiff, that "the seal of a corporation is not of itself conclusive of an intent to make it a specialty. It is equally appropriate as a means of evidencing the assent of a corporation to be bound by a simple contract, as by a specialty." However this may be in the case at bar no question appears to have been raised but that the instrument offered in evidence was sealed by authority and with intent to make it a specialty. It so appears upon its face, and it must be so regarded by us.

Exceptions sustained.

NELLIE M. LAWTON, Appellant,

vs.

LEWIS C. LANE, Administrator.

Kennebec. Opinion November 28, 1898.

Title by descent. Illegitimates. Stat. 1887, c. 14.

Under the statute of 1887, chap. 14, an illegitimate child born prior to March 24, 1864, though never legitimized, can inherit from his maternal grandfather deceased since the enactment of the statute.

AGREED STATEMENT.

This was petition by Nellie M. Lawton, claiming to be the granddaughter and heir-at-law of her grandfather, Harvey Ladd, of Readfield, deceased, praying for a distribution of the estate in the hands of the administrator. A decree of distribution was accordingly ordered by the probate judge who refused and denied the petitioner's claim to one-half of the net personal property of the estate and made thereon the following decree: "The court finds that Nellie M. Lawton, an illegitimate child, cannot inherit from her grandfather as no act of her parents had given her inheritable qualities." An appeal was duly taken by the petitioner to the supreme court of probate, where the parties submitted the case to the decision of the law court upon the following agreed statement:—

"In the claim of Nellie M. Lawton as heir to the estate of Harvey Ladd the following facts are agreed to, viz:

"Harvey Ladd the intestate had two children, viz: Hattie E. Ladd and Laura F. Ladd.

"He died June 27, 1892. At the date of his decease he had only one surviving child Laura F. Luce.

"The daughter Hattie E. Ladd died May 15, 1866, leaving one illegitimate child, Nellie M. Lawton, who was born in May, 1863.

"Nellie M. Lawton claims one-half of the estate of Harvey Ladd as the representative of her mother Hattie E. Ladd."

J. O. Bradbury and F. K. Sweetser, for petitioner.

E. O. and F. E. Beane, for respondent.

When Harvey Ladd, deceased, his only surviving issue was Laura F. Luce. She was his sole heir. Nellie M. Lawton was not the lawful issue of Hattie E. Ladd and so, as we submit, was not entitled to any part of the estate of her grandfather by right of representation, as her counsel now claims.

The case of *Messer* v. *Jones*, 88 Maine, 349, cited by petitioner's counsel, does not apply here. The question there was who had the right of administration, as being nearest of kin to the deceased.

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

EMERY, J. The question is whether an illegitimate child born prior to March 24, 1864, and never legitimized can under the Act of 1887, ch. 14, inherit from his maternal grandfather deceased since that Act. In *Messer* v. *Jones*, 88 Maine, 349, it was decided that under the same circumstances an illegitimate child could inherit from a legitimate daughter of his mother, that is, from a natural half-sister. We see no difference in principle between the two cases. The Act of 1887 expressly includes lineal as well as collateral kindred.

The decree of the Probate Court is reversed. The cause is remanded to the Probate Court to enter new decree that the appellant is entitled to one-half of the estate as heir.

AMINIE A. BROOKS *vs.* LLEWELLYN MORRILL.

Somerset. Opinion November 29, 1898.

Deed—boundaries. Way. Tree. Sidewalk.

In an action to recover damages for an injury received by the falling of a limb from a tree overhanging the sidewalk, it appeared that the defendant's land, opposite the tree, was bounded "on the west line" of a highway which was built nearly four rods outside of the recorded location.

Held; That the true boundary line of the defendant's land was the exterior limit of the road that was wrought and in actual use for travel, and not the "west line" of an invisible and unwrought location.

ON EXCEPTIONS BY DEFENDANT.

This was an action on the case to recover from the defendant damages which the plaintiff claims to have sustained by the falling of a limb from an elm tree, claimed by the plaintiff to be standing on the defendant's land and overhanging a sidewalk forming a part of the highway, upon which the plaintiff was walking at the time of the accident, said road or highway extending from Hartland village to Palmyra.

One of the grounds of the defense was that the tree did not stand on his land, but stood in the limits of the highway, some little distance east of the west line of said road, which said road line, the defendant claimed, formed the eastern limit of the defendant's lot.

Other facts are stated in the opinion.

Wm. B. Brown, for plaintiff.

This action can be maintained if the tree, from which the plaintiff sustained the injury, is on the land of the defendant. It is a duty incumbent upon land-owners abutting a highway, to keep their premises safe to the public exercising its right of passage along said highway.

They should keep their trees fringing such highway well trimmed of rotten and defective branches, and a person injured while passing along the street, under such defective tree, in the

exercise of due care, after proof of heedless negligence on the part of the defendant, has an undoubted remedy in damages against its owner. *Weller* v. *McCormick*, 52 N. J. L. 470, S. C. 18 Vroom, 397.

The defendant admitted that said defective tree was planted by his father, John J. Morrill, his predecessor in title, which tree, standing within 14 feet of defendant's front door, he has maintained for shade and ornament ever since. It is his tree, for the negligent misuse of which he is liable.

The record of a town way properly laid out and accepted by the town establishes its limits, and is the legal boundary of lands lying adjacent thereto. Fences and buildings facing a highway can be deemed its true boundaries only in the absence of proper records and monuments.

This case discloses both monuments and a record location, which unerringly establish the side-lines of Elm street in Hartland village. R. S., c. 18, § 95; *Whittier* v. *McIntire*, 59 Maine, 143; *Stetson* v. *Bangor*, 73 Maine, 359; *Wood* v. *Inhbts. of Quincy*, 11 Cush. 489; *Horne* v. *Haverhill*, 110 Mass. 527; *Plumer* v. *Brown*, 8 Met. 578; *Pettingill* v. *Porter*, 3 Allen, 349.

A fence placed more or less near a highway is only "prima facie evidence of the boundary of the highway, it being a question for the jury whether it was a fence fronting upon" the highway, within the meaning of the statute. See *Sprague* v. *Waite*, 17 Pick. 309.

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

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

WHITEHOUSE, J. This is an action on the case to recover damages for a personal injury sustained by the plaintiff by reason of the falling of a limb from an elm tree overhanging the sidewalk upon which she was walking in the village of Hartland.

The principal ground of defense was that the elm tree in question opposite the defendant's house was not on the defendant's

land, but stood within the limits of the highway, and that he owed no duty with respect to it towards travelers on the highway.

The earliest conveyance of the defendant's lot introduced in evidence is that of Edward Warren to Levi Morrill, dated November 24, 1849. In that deed the boundaries are thus described: "Beginning on the west side of the road leading from the village of Hartland to Palmyra, at a stake thirteen rods and sixteen and one-half links from the north-east corner of the Avon house, now occupied by Horace M. Stewart, measuring on the west side of said road; thence southerly on the west line of said road eight rods; thence south seventy-five degrees west at right angles to said road, twenty rods; thence northerly on a line parallel to said road, eight rods; thence to the place of beginning, being the same parcel of land now occupied by John J. Morrill."

It is undoubtedly the well settled rule of construction in this state that if the land described in a deed is bounded on a highway, or its boundary line runs to a highway, and thence by the highway, the grantee is presumed to take a fee to the centre of the highway subject to the public easement, if the grantor owns to the centre; but this presumption may be rebutted and controlled when the terms of the description and the circumstances of the conveyance clearly indicate a contrary intention. *Low* v. *Tibbetts*, 72 Maine, 92; *Oxton* v. *Groves*, 68 Maine, 372. And ordinarily if a boundary runs to or by the *line* of an object, the exterior limit of the object is intended. "So in common language, if one speaks of the line or lines of a street, the exterior limits would be understood and intended." *Hamlin* v. *Pairpoint Manfg. Co.*, 141 Mass. 51; *Smith* v. *Slocomb*, 9 Gray, 36.

It has been seen that in the description above given in the deed of Edward Warren to Levi Morrill, the easterly line of the lot is "on the west line of said road." Indeed there is no evidence in the case that Edward Warren owned beyond the "west line of said road;" and it is not in controversy that the lot conveyed to Levi Morrill by this deed was bounded and limited on the east by the exterior west line of the road.

In 1855 Levi Morrill conveyed the lot to John J. Morrill,

describing it in the same language employed in the deed above described from Edward Warren; and in 1874 John J. Morrill conveyed the lot to Llewellyn Morrill, the defendant, by a deed which embraced also the Avon lot mentioned in the first named deed. The description of the eastern boundary of the lot, in this deed, is not identical with that in the preceding deeds. But this fact becomes immaterial when it is considered that Levi Morrill could convey no more than he owned; and as the lot described in his deed to John J. was bounded by the west line of the road, so the lot conveyed by John J. to the defendant must be limited by the same boundary and stop at the line of the road as an abuttal.

It was not in controversy that, at the date of the deed first mentioned from Edward Warren to Levi Morrill, there was a "road leading from the village of Hartland to Palmyra" past the defendant's lot, as described in that deed, and that it had then been built, and traveled as a public highway, for about seven years, and continued to be so used and maintained as a public way, within the same limits, down to the time of the accident, a period of fifty-five years. And the defendant introduced evidence, and offered other evidence, tending clearly to show that the westerly line of this road, as thus constructed and maintained, was west of the elm tree in question, and hence that the tree was within the limits of the highway and not on the defendant's land. But it appeared that for a distance of seventy-five or eighty rods, including that portion of it opposite the defendant's lot, this road had been built outside of and nearly four rods west of the original location recorded in the town records in 1842; and it was not in controversy that if the defendant's lot were bounded by the west line of the original location as recorded, the elm tree would undoubtedly be upon the defendant's land. It appears from the evidence that nearly one-half of the width of this location, within the limits of the eighty rods mentioned, is at one point under a meeting-house, and at another point under a dwelling-house; and that no attempt has ever been made to build the road as located, and that it has never been opened or used for public travel.

The defendant contended that the west line of the existing road

as wrought and traveled, and not the west line of the recorded location, must be deemed the line mentioned in the deeds, and the true boundary line of the defendant's lot. For the purposes of the trial the presiding justice ruled otherwise and instructed the jury that "the west line of the road means the west side of the road as laid out and recorded." Thereupon the jury returned a verdict for the plaintiff, and the case comes to this court on exceptions to this ruling.

It is the opinion of the court that this ruling cannot be sustained. The question is not free from difficulty, but it must be regarded as res judicata in this state. The precise question arose in *Sproul* v. *Foye*, 55 Maine, 162, and in the opinion by Mr. Justice WALTON, the court said: "Some forty or fifty rods of this road was built outside of the original location of the county commissioners, and the question is whether the line of location or the road as actually built is to be regarded as the true boundary of the land conveyed. The deed bounds the land by the new county road leading from Wiscasset to Dresden. At this time the road had been open and used for public travel about three years. Did the parties refer to the road as located or to the road as built? To a mere line of location not wrought, not in use for public travel, or to the road that was wrought and in actual use as a public highway? A road is a way actually used in passing from one place to another. A mere survey or location of a route for a road is not a road. A mere location for a road falls short of a road as much as a house lot falls short of a house. Can the proposition be maintained that an invisible and unwrought location answers such a call better than a visible wrought road over which the public is passing daily? We think not." See also *Tibbetts* v. *Estes*, 52 Maine, 566.

Exceptions sustained.

JOHN W. GREEN, and others, *vs.* WILLIAM G. ALDEN.

Knox. Opinion November 29, 1898.

Foreign Will. Witnesses. Real Property. Trust Powers. R. S., c. 64, §§ 13, 14.

Where a testator's will that gave lands in Maine to his trustees was executed and allowed in conformity with the laws of New York, but having only two attesting witnesses, it is not in accordance with the laws of Maine. It having been duly allowed and recorded, however, in the state of Maine, in the county where the demanded premises in this action are situated, and under the provisions of our statutes as construed in *Lyon* v. *Ogden*, 85 Maine, 374, it is held by the court that the devise in question was effectual and operative in giving to the trustees named a valid title to the demanded premises for the purposes of the trust described.

They were not required to have letters testamentary issued to them, or to qualify as executors by giving bond, in this state, in order to make a valid transfer of their title. In making that conveyance they were not in fact acting as executors, but as donees of a trust power in whom the legal title had been vested by act of a testator having his domicile in New York where their account was to be settled.

The copy of the will and of the probate in New York was not recorded in this state until long after the conveyance of the demanded premises by the trustees. *Held;* that in such a case the estate of the devisees would vest by relation back to the time of the death of the testator and not to the time of filing the will.

No title passes under a tax deed when the description is insufficient, e. g. "a lot of land containing five acres or thereabouts situated on the easterly side of Bay View Street, at Camden Village within the town of Camden aforesaid, on Ogier's Point, so-called."

A recital in a tax deed that the treasurer "offered for sale such part of the above described real estate as would be sufficient to pay the tax, interest and charges thereon" is not evidence that the treasurer exposed for sale and sought offers for a fractional part of the premises sufficient to pay the tax and legal charges and that he could obtain no bid therefor.

Nor is such recital a compliance with the statute which authorizes the town treasurer to offer for sale so much of the real estate taxed as should be required to pay the tax, interest and costs.

ON REPORT.

The facts of the case appear in the opinion.

E. P. Spofford, for plaintiffs.

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

The plaintiffs claim through a deed of sale from parties who sign themselves executors of the will of William A. Keteltas, June 19, 1883, and recorded Dec. 2, 1896, to their ancestor Mary C. Keteltas. It is simply their deed of sale of the premises. It does not announce in it whether it was made for the furtherance of the provisions of the will or not. It is simply their deed of sale.

A will made in another state by a non-resident, is a foreign will as to this state. Until such a will has been properly probated in this state it is as though it did not exist. *Campbell* v. *Sheldon*, 13 Pick. 22.

This action was commenced Dec. 29, 1896. Copies of the will and probate of it in New York were not filed in the probate court here until July, 1897.

Until a foreign will has been properly proven here it is not recognized by our court. Nor the executors appointed under it by a foreign state. 1 Redf. Wills, p. 412; *Campbell* v. *Sheldon*, 13 Pick. 22.

Foreign executors have no power to bring suits in matters pertaining to the testate estate in other states than the one appointing them. *Clark* v. *Clement*, 33 N. H. 567.

Their appointment in one state confers upon them no right to, or control over, the property of the testate estate in another state. *Sheldon* v. *Rice*, 30 Mich. 301, (18 Am. Rep. 136.)

The executors of the will in this case, with only a qualification from the court of New York, could not bring an action for the rents and profits of the land in dispute in this state. As executors under a New York appointment they could not bring a writ of entry for its possession. And they cannot, by their deed, confer that right upon a third party.

This action is prematurely brought. The will should have been proven here before the action should have been commenced. R. S., c. 74, § 15, and the executors who made the deed appointed.

A will simply proven in our state grants no rights to executors or trustees to control the testator's property until they have qualified by giving bond, R. S., c. 68, § 1. See *Goodwin* v. *Jones*, 3 Mass. 520.

Redfield on Wills Vol. 3. p. 568, says: "and therefore a non-resident is not, except for special reasons and by exceptional permission of the court administering the trust allowed to act as trustee."

The residue of the estate, after providing for the objects of the trust, is to be divided among certain kindred of his according to the law of New York. It is not all to be held in trust. The case does not show what part is trust, and what part is residuary.

Defendant claims the land under a tax title. There seems to be no question about the due execution of the deed from the treasurer of the town, and from the town to the defendant.

Description: The town, the village in the town, the point of land in the village the street and the side of the street, the owner's name and the number of acres in the piece are all stated with particularity. With such a description it would not seem a very difficult act to find the piece of land conveyed. The deed from the town to the defendant describes the land by bounds referring to the Keteltas deed from Ogier, and to the premises as having been sold for taxes. The title is connected by the descriptions in the deeds.

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

WHITEHOUSE, J. This is a writ of entry in which the demanded premises are represented to be "certain real estate situated in Camden in this state, containing five and one-half acres more or less," and more particularly described by metes and bounds.

The plaintiffs derive title to the land through certain mesne conveyances from the devisees thereof in trust, named in the will of William A. Keteltas of New York. The defendant derives title from the inhabitants of the town of Camden to whom the land was sold by its treasurer as the property of Wm. A. Keteltas for non-payment of taxes.

In the will of William A. Keteltas after disposing of his burial plot in Trinity Cemetery, the testator proceeds in the second item as follows:

"I give and bequeath and will and devise the rest and residue of all and every the estate real and personal and mixed, whereof I may die seized or possessed wheresoever and whatsoever, unto my executors hereinafter named, the survivors or survivor of them or such of them as shall qualify and undertake the burthen of the execution of this my will in the trusts and upon the confidences nevertheless and for the purposes and effects hereinafter stated, that is to say:

First—They my said executors shall take into possession, care for and manage my said estate, receive and collect the rents, issues, incomes and profits thereof and from time to time invest the same as hereinafter directed." In the eight succeeding items the testator directs the mode of investing and reinvesting the property, specifies the beneficiaries to whom the trustee shall pay the income and principal of the estate and prescribes the manner in which the trust shall be executed, and then closes as follows:

"Lastly, I nominate and appoint my nephew Eugene M. Keteltas and Henry W. Clark husband of my niece Fanny, to be executors of this my last will and testament; hereby giving and granting unto them and to the survivors of them, or such of them as may undertake the burthen of the execution of this my will, full and ample power and authority in law to make, sign and deliver bonds, mortgages, leases and conveyances, and mortgage, lease or sell the whole or any part of my estate for the purpose of carrying into effect my full intention in this my last will and testament expressed."

This will was duly proved and allowed in the Surrogate's Court of New York, and the executors therein named having accepted the trust and been duly qualified, letters testamentary were issued to them on the ninth day of February, 1876.

On the nineteenth day of June, 1883, Eugene M. Keteltas and Henry W. Clark "as executors of and trustees under the last will and testament of Wm. A. Keteltas", sold and conveyed the demanded premises to Mary C. Keteltas from whom the plaintiffs acquired their title.

The plaintiffs' action was commenced on the twenty-ninth day

of December, 1896, and on the seventh day of August, 1897, an authenticated copy of the will of Wm. A. Keteltas and of the probate thereof in New York, was presented to the probate court in the county of Knox in this state, and duly allowed as the will of Wm. A. Keteltas and filed and recorded in the Probate Court of Maine.

Upon this state of facts it is earnestly contended in behalf of the defendant that, inasmuch as these foreign executors never qualified by giving bond in this state and never received letters testamentary from the probate court of Knox County, they had no control over the property of the testator situated in this state, and no power or authority to execute a conveyance of the demanded premises.

It has been seen, however, that by the terms of the will of Wm. A. Keteltas, unrestricted power to sell and convey the whole or any part of the estate, was expressly given to Eugene M. Keteltas and Henry W. Clark as donees of a power in trust. It is true that the same persons were named as executors of the will, but the devise of the estate was made to them as trustees or donees of a trust power and not as executors. Their authority as trustees had no necessary relation to the office of executor, and might with equal propriety have been conferred upon any others not named as executors. It was a power which, in the absence of any testamentary provision to the contrary, might have been executed by the trustees without the intervention of executors. *Conklin* v. *Egerton*, 21 Wend. 429. See also *Hall* v. *Bliss*, 118 Mass. 559.

In *Newton* v. *Bronson*, 13 N. Y. 587, (67 Am. Dec. 89,) the executor did not hold the fee in trust, but had only a naked power under the will and yet the court said: "It is argued that the defendant's office of executor does not extend to the lands in Illinois, upon the principle that letters testamentary and of administration have no force beyond the jurisdiction in which they are granted. Hence, it is said, the defendant cannot effectually perform the judgment of the Supreme Court not being able, as it is insisted, to affect the title to lands out of the state. But the

authority of the defendant in respect to real estate is not conferred by the probate court. He is the donee of a power at common law and under the statute; and although it was by the will made a condition to his acting under the power that he should qualify as executor, when he has performed that condition, he acts in conveying the land as the devisee of a power created by the owner of the estate, and not under an authority conferred by the surrogate."

In the principal case, in order to execute the power conferred upon them and accomplish the purposes of the trust created by the will, it was necessary that the legal title should be vested in the trustees. *Morton* v. *Barrett*, 22 Maine, 257; *Cleveland* v. *Hallett*, 6 Cush. 407; 3 Redf. on Wills, 537. It is not in controversy that the will of Wm. A. Keteltas was executed and allowed in conformity with the laws of New York, but having only two attesting witnesses, it is not in accordance with the laws of Maine. It was duly allowed and recorded, however, in the State of Maine in the county where the demanded premises are situated, and under the provisions of sections thirteen and fourteen of chapter 64 of our revised statutes, as construed in *Lyon* v. *Ogden*, 85 Maine, 374, the devise in question was effectual and operative in giving to the trustees named a valid title to the demanded premises for the purposes of the trust described. They were not required to have letters testamentary issued to them, or to qualify as executors by giving bond, in this state, in order to make a valid transfer of their title. In making that conveyance they were not in fact acting as executors, but as donees of a trust power, in whom the legal title had been vested by act of a testator having his domicile in New York where their account was to be settled.

It is true that the copy of the will and of the probate in New York, was not recorded in this state until long after the conveyance of the demanded premises by the trustees, but it is familiar and well-settled law in this state, that in such a case the estate of the devisees would vest by relation back to the time of the death of the testator and not to the time of the filing and recording of the will. *Spring* v. *Parkman*, 12 Maine, 127; *Putnam Free School* v. *Fisher*, 30 Maine, 523; *Grant* v. *Eliot and Kittery Mutual Fire Insurance Co.*, 75 Maine, 196.

The tax title set up by the defendant is so manifestly defective, that it is evidently not seriously relied upon as a ground of defense.

In the first place, it does not appear that the land was described with the precision and fullness required by law. It is represented as "a lot of land containing five acres or thereabouts, situated on the easterly side of Bay View Street at Camden Village within the town of Camden aforesaid, on Ogier's Point, so-called." Such an indefinite description is clearly insufficient. *Libby* v. *Mayberry*, 80 Maine, 137; *Bingham* v. *Smith*, 64 Maine, 450; *Greene* v. *Walker*, 63 Maine, 311; *Orono* v. *Veazie*, 61 Maine, 433.

It nowhere appears, that the treasurer exposed for sale and sought offers for a fractional part of the premises sufficient to pay the tax and legal charges and that he could obtain no bid therefor. This requirement is not fulfilled by the recital that he "offered for sale such part of the above described real estate as would be sufficient to pay the tax, interest and charges thereon." *Ladd* v. *Dickey*, 84 Maine, 190; *French* v. *Patterson*, 61 Maine, 210.

The recitals in the deed are in other respects defective, but even if complete, it is well settled that they would not be evidence of the truth of the facts stated. *Libby* v. *Mayberry*, supra; *Ladd* v. *Dickey*, supra.

Judgment for plaintiffs.

WM. H. FOGLER, Admr. de bonis non, in Equity,

vs.

BENJAMIN TITCOMB and others.

Knox. Opinion November 29, 1898.

Will. Life Estate. Power of Disposal.

Where by the terms of his will a testator provides that his wife should have the use and control, during her lifetime, of all the testator's property not specifically bequeathed by him, and the power to dispose of the residue by will as freely as if it were a part of her own estate, and she fails to exercise the privilege thus given her, such residue will continue to remain a part of his estate and descend to his heirs as intestate property.

Held; that the personal property now in the hands of the plaintiff as administrator, and in respect to which the power of disposal by will was not exercised by Mary C. Titcomb, after deducting such expenses as have necessarily been incurred by him in the prosecution of this suit, and such reasonable counsel fees therein as may be allowed to him by the judge of probate, should be distributed among the heirs of the testator, who are entitled to costs against the heirs of his wife.

ON REPORT.

Bill in equity, heard on bill, answers and proofs, to determine who is entitled to the residuum of the estate of William H. Titcomb, deceased, now in the hands and possession of the plaintiff, as administrator de bonis non with the will annexed.

The case is stated in the opinion.

J. E. Moore, for Benj. Titcomb and others.

C. E. and A. S. Littlefield, for Silas W. McLoon and others.

Where there is a conflict in the provisions of the will, the last expression controls. *Orr* v. *Moses*, 52 Maine, 287; *Dunlap* v. *Dunlap*, 74 Maine, 402; *Woodbury* v. *Woodbury*, Ib. 413; *Grant* v. *Insurance Co.*, 75 Maine, 201.

The courts will uphold the will and give it such a construction as will result in a complete disposition of all of the estate, and not such as would result in partial intestacy. *Davis* v. *Callahan*, 78 Maine, 318; *Nash* v. *Simpson*, Ib. 147.

The apparently obvious intention of the testator should certainly be allowed to take effect and the residuum held to pass absolutely to Mrs. Titcomb. This result must clearly follow from the language of the will unless the clause "to be disposed of under her will as a part of her estate" restricts the previous absolute language and imposes a condition upon the bequest of the residuum. If that language did not appear in that will we submit that no question could be raised but that the gift was absolute and complete and vested a perfect title in Mrs. Titcomb at her decease. In *Copeland* v. *Barron*, 72 Maine, 208, our court held that "it is a well-settled general rule, that, if a gift be absolute and entire in its terms, any limitation over afterwards is repugnant and void." In *Buck* v. *Paine*, 75 Maine, 589, the court held, "a limitation over is void where there is a clear intention of the testator that the first taker shall have an absolute estate. Absolute property gives absolute dominion. You cannot first give an absolute property, and then provide what such absolute owner shall do with it."

This proposition would seem to clearly cover the case at bar, as the property in the remainder is given absolutely to Mrs. Titcomb, and then follows a provision "to be disposed of as a part of her estate." See *Spooner* v. *Lovejoy*, 108 Mass. 529. p. 532; *Mitchell* v. *Morse*, 77 Maine, 423; *Sears* v. *Cunningham*, 122 Mass. 538; *Wells* v. *Doane*, 3 Gray, 201; *Davis* v. *Mailey*, 134 Mass. 588; *Veeder* v. *Meader*, 157 Mass. 413; *In the matter of Moehring*, 154 N. Y. 427, and cases.

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

WHITEHOUSE, J. The plaintiff in his capacity as administrator, with the will annexed, of the estate of William H. Titcomb, brings this bill in equity asking that the heirs of William H. Titcomb on the one side and the heirs of Mary C. Titcomb, his deceased wife, on the other side, be required to interplead respecting the distribution of the residue of the estate of William H. Titcomb now in the hands of the plaintiff. He seeks thereby to obtain a judicial construction of the will of William H. Titcomb, and inci-

dentally, also, of the will of Mary C. Titcomb; for it appears that the two instruments were executed as a part of the same transaction and involve the element of mutuality, the sixteenth and seventeenth paragraphs of the latter being identical, excepting the special bequests, with paragraphs three and four of the former which are here directly brought in question.

In the first and second items of the will of William H. Titcomb the testator disposes of his life insurance. The third and fourth paragraphs are as follows:

"Third: I give, devise and bequeath the use, income and control of all the residue of my estate, real and personal, to my wife, Mary C. Titcomb, for and during the term of her natural life."

"Fourth: I give, devise and bequeath the residue of my estate which may remain at the decease of my wife, as follows, to wit: One thousand dollars to my brother-in-law Matthew A. Mayhew of Boston, Mass.; one thousand dollars to my niece, Mary F. Greenlief; one thousand dollars to my nephew William T. Blunt; five hundred dollars to Rev. W. M. Kimmel and his wife; one hundred dollars to Jennie F. Clark of Rockland; two hundred dollars to my grand-nephew, Herman Kent; two hundred dollars to the City of Rockland to hold in trust, the income thereof to be forever expended in the care and preservation of my family burial lot in the Jameson Point Cemetery, so-called, in said Rockland, and of the grave-stones and monuments therein; and the remainder of my estate remaining at the decease of my wife I give, devise and bequeath to my wife, said Mary C. Titcomb, to be disposed of under her will as part of her estate. And I hereby authorize my wife to pay, in her lifetime, by way of advancement any or all of the legacies provided in this fourth clause of this will."

After the decease of her husband, Mary C. Titcomb made a codicil to her will of which the following is the first clause:

"First: I give, devise and bequeath my homestead now occupied by me, formerly the property of my deceased husband, William H. Titcomb, situated in said Rockland on the northerly side of Beech Street, and all my furniture, household goods and effects, household ornaments of which I shall be possessed at

the time of decease, to my cousins, Lucy Lancaster and Lydia Williams both of said Rockland upon the condition that they pay to Benjamin Titcomb, my late husband's brother, the sum of two thousand dollars and to Sophia Titcomb, my late husband's sister, the sum of two thousand dollars, which said sums when so paid, shall be in full for the legacies provided for said Benjamin and Sophia in the next succeeding clause of this codicil."

With respect to the third paragraph in the will of William H. Titcomb, it may be said to be a well settled and familiar rule of law in this state that in case of either real or personal property a gift of the income for life is a gift of the property for life. *Sampson* v. *Randall*, 72 Maine, 109; *Paine* v. *Forsaith*, 86 Maine, 357; *Fuller* v. *Fuller*, 84 Maine, 475; *Wilson* v. *Curtis*, 90 Maine, 463. Indeed, it is not in controversy between the parties to this proceeding that the effect of the plain and unambiguous language of the third paragraph in this will is to give to Mary C. Titcomb a life estate in "all the residue" of William H. Titcomb's property, real and personal, after the bequests of his life insurance made in the first and second items of the will. But it is earnestly contended in behalf of the heirs of Mary C. Titcomb that by the fourth paragraph of the will she acquired an absolute title to "all the residue" of the remainder after the payment of the special bequests therein made.

On the other hand it is confidently argued in behalf of the heirs of William H. Titcomb, that the clause in paragraph four following the special bequests above mentioned, and directly in question here, viz: "and the remainder of my estate remaining at the decease of my wife I give, devise and bequeath to my wife, Mary C. Titcomb, to be disposed of under her will as a part of her estate," ought to be rejected as void for uncertainty; but that if it is to be upheld as valid it can in no event have the effect to vest in Mary C. Titcomb an absolute title to such residue, but only to give her the power to make a disposition of it by will; and the devise in the codicil to her will of "the homestead now occupied by me, formerly the property of my deceased husband," is conceded to be a valid and reasonable exercise of the power of disposal by will thus vested in her.

In the construction and interpretation of wills the decided cases afford many suggestive and helpful analogies, but few reliable precedents. As said by the court in *Bosley* v. *Bosley*, 14 How. 390: "No two wills, probably, were ever written in precisely the same language throughout; nor do any two testators die under the same circumstances in relation to their estate, family and friends. And it would be very unsafe as well as unjust, to expound the will of one man by the construction which a court of justice had given to that of another, merely because similar words were used in particular parts of it." "The struggle in all such cases," observes Judge Story, "is to accomplish the real objects of the testator, so far as they can be accomplished consistently with the rules of law; but in no case to exceed his intentions fairly deduced from the very words of the will." *Nightingale* v. *Sheldon*, 5 Mason, 336. But the intention must be gathered ex visceribus testamenti and not drawn from detached portions alone.

In the case at bar, when the will of Wm. H. Titcomb is compared with that of his wife Mary C. Titcomb, and all parts of it examined in the light of the circumstances and the situation of the parties, it is not difficult to discover that the dominant idea pervading the instrument is that the wife should have the use and control, during her life time, of all of the testator's property not specifically bequeathed by him, and the power to dispose of the residue by will as freely as if it were a part of her own estate. In view of the manifest intelligence of the testator, disclosed by the will, it is inconceivable that if he had intended to give his wife an absolute title to all of the residue after his special bequests, he should not have done so by means of testamentary clauses more consistent with each other and by the use of terms more aptly designed to effectuate that intention. He was capable of expressing such a purpose in plain and unambiguous language, and he could not have failed to convey to the mind of the scrivener a clear apprehension of it. It would only have been necessary, after making his special bequests, to give all of the residue to his wife. There would have been no occasion for the carefully limited estate for life described in paragraph three.

On the other hand, the construction which gives to the wife a life estate, and the right to dispose of the residue by will, if she saw fit to exercise it, brings all the clauses of the will into harmonious relations with each other, and accomplishes a result which is at once reasonable and equitable, and entirely consistent with the situation of the parties and the condition of their respective estates. It is apparent from the terms of their mutual wills that relations of more than ordinary confidence and affection existed between the testator and his wife. Each had ample means of support without benefactions from the estate of the other, but they evidently desired to make testamentary provisions which should be enduring marks of their mutual confidence and esteem. Thus in the will of William H. Titcomb, the testator gives to his wife the use and control, during her life time, of all his property, except his life insurance, and then, after certain bequests, gives her a discretionary power to dispose of the residue by will in any manner and for any purpose most agreeable to her wishes. If she failed to exercise the privilege thus given her, such residue would continue a part of his estate and descend to his heirs as intestate property. *Collins* v. *Wickwire*, 162 Mass. 143.

This view is clearly reconcilable with the provision in item four in regard to the payment of the legacies in advance and with the language of the codicil to the will of Mary C. Titcomb, wherein she exercises the power given her by disposing of "my homestead, formerly the property of my deceased husband." *Blagge* v. *Miles*, 1 Story, 426. See also *Burbank* v. *Sweeney*, 161 Mass. 490. And barring the apparent solecism in the language of clause four, in giving to the wife what may remain at her decease, the instrument expresses with reasonable clearness and fullness the idea of a life estate with the privilege of disposing of the residue by will, after certain bequests made by the testator, if she saw fit to exercise it.

The conclusion is that the personal property now in the hands of the plaintiff as administrator, with respect to which the power of disposal by will was not exercised by Mary C. Titcomb, after deducting such expenses as have necessarily been incurred by him in the prosecution of this suit and such reasonable counsel fees

therein as may be allowed to him by the judge of probate, should be distributed among the heirs of William H. Titcomb, who are entitled to costs against the heirs of Mary C. Titcomb.

Decree accordingly.

DORA L. MORGAN *vs.* SOPHIE MARTIN.

Androscoggin. Opinion November 29, 1898.

Married Woman. Action. Seduction.

A married woman cannot maintain an action against another woman for alienation of the affections of the husband of the former.

Doe v. *Roe*, 82 Maine, 503, affirmed.

ON EXCEPTIONS BY PLAINTIFF.

Case for alienating the affections of the plaintiff's husband.

(Declaration.)

In a plea of the case, for that whereas the said defendant unjustly contriving, and intending to injure the plaintiff and to deprive her of the aid, comfort and society of her husband, Howard E. Morgan, and to alienate his affections from her, heretofore, on or about the first day of July, A. D. 1897, and divers other days between that day and the day of the purchase of this writ at said Auburn, wrongfully, willfully and maliciously did entice away the said Howard E. Morgan, from his home and family, and from the society of his said wife, the plaintiff, and did wrongfully persuade the said Howard E. Morgan to go to the home of the said defendant and there remain for a long space of time on divers days between the said first day of July and the date of the purchase of this writ; the said defendant well knowing that during said times aforesaid, the said Howard E. Morgan was the lawful husband of the said plaintiff, and was living with the said plaintiff as such, until persuaded by the defendant to leave his said wife and his home and family, whereby and by reason of the acts of the said defendant, the said husband, Howard E. Morgan, did leave and

desert his said wife, and went to the home of the said defendant, and has never since returned to his said wife, although entreated so to do, and thereby the affections of the said Howard E. Morgan, for his said wife, the plaintiff, has been wholly alienated and destroyed; by means whereof the said plaintiff has wholly lost the comfort, society and assistance of her said husband, Howard E. Morgan, in her domestic affairs, which the said plaintiff ought to have and otherwise would have. To the damage of the said plaintiff as she says the sum of five thousand dollars.

The court having sustained a demurrer to the declaration, the plaintiff took exceptions.

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

The action is maintainable: *Seaver* v. *Adams*, 66 N. H. 142, (1890); *Foot* v. *Card*, 58 Conn. 4; *Bennett* v. *Bennett*, 116 N. Y. 584; *Van Olenda* v. *Hall*, 88 Hun, 452; *Manwarren* v. *Mason*, 79 Hun, 592; *Eldredge* v. *Eldredge*, 79 Hun, 511; *Warren* v. *Warren*, 89 Mich. 123; *Price* v. *Price*, 91 Iowa, 693; *Hayes* v. *Nowlan*, 129 Ind. 581; *Holmes* v. *Holmes*, 133 Ind. 386; *Westlake* v. *Westlake*, 34 Ohio St. 621; *Bassett* v. *Bassett*, 20 Ill; *Clow* v. *Chapman*, 125 Mo. 101.

The only two cases now remaining against the maintenance of such actions are, *Duffies* v. *Duffies*, 76 Wis. 374; *Doe* v. *Roe*, 82 Maine, 503.

In the Wisconsin case the court was divided, a very strong dissenting opinion being written. This case was afterwards particularly considered by the court in Michigan in the case of *Warren* v. *Warren*, 89 Mich. 128, and the doctrine in favor of maintaining the action was clearly and emphatically laid down in an exhaustive opinion. See also Bigelow on Torts, p. 153; Cooley on Torts, p. 228.

The latest case affirming the doctrine for which we contend is from the Supreme Court of Pennsylvania, *Gernerd* v. *Gernerd*, 39 Atl. Rep. p. 884, opinion dated March 28, 1898.

Tascus Atwood, for defendant.

Once open the door for this class of litigation and the way is paved for countless lawsuits and family dissensions. The common

courtesies of life now commended would often be instrumental in bringing trouble.

A wife and husband acting in collusion would have a splendid equipment for levying blood money from women of wealth.

Impulsive and emotional women encouraged by meddlers and hungry attorneys would fancy causes of action where none existed and encouraged by the new interpretation of law would seek vengeance for fancied wrongs.

Public policy and good morals demand that this demurrer be sustained and Justice WALTON'S sound views as expressed in *Doe* v. *Roe*, 82 Maine, 503, receive the indorsement of the court the second time.

If it be said, in this case, there are no such grave accusations as in the Maine case cited, then I reply "the greater includes the smaller" and certainly if action is denied in the greater it must be in the smaller.

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

STROUT, J. This is an action by a married woman against another woman for alienating the affections of plaintiff's husband. The cause comes up on exceptions to a ruling sustaining a demurrer to the declaration.

This court held in *Doe* v. *Roe*, 82 Maine, 503, that such suit could not be maintained. We are aware that in some jurisdictions it is held otherwise; but we are satisfied with the reasons given in that case, and adhere to them. As said in that case, "an action in favor of the husband for the seduction of his wife has been regarded of doubtful expediency." Such actions "seem to be better calculated to inflict pain upon the innocent members of the families of the parties than to secure redress to the persons injured."

We are not disposed to enlarge the range of this class of actions.

Exceptions overruled.

THOMAS H. WELLMAN *vs.* FRED CHURCHILL.

Waldo. Opinion December 1, 1898.

Deed. Reservation. Road. Easement.

A deed of warranty conveyed a parcel of land by metes and bounds, "with the reservation of a road two rods wide over the northerly side of said lot." *Held;* that the words of reservation in the deed excepted from the grant the easement only, and that the fee in the soil passed to the grantee.

ON REPORT.

Action of trespass q. c.

The case appears in the opinion.

R. F. Dunton, for plaintiff.

W. P. Thompson, for defendant.

The road mentioned in the reservation, in plaintiff's deed, being in existence at the time, did not pass to the plaintiff by the conveyance to him by Aaron Edgecomb, and the plaintiff acquired no title thereto except for purposes of travel beyond the centre thereof from that side of the same next to his land. *Winthrop* v. *Fairbanks*, 41 Maine, 307; *White* v. *Crawford*, 10 Mass. 183; *Mendell* v. *Delano*, 7 Met. 176; *Bowen* v. *Conner*, 6 Cush. 132.

The plaintiff not being in possession of the locus must show title in himself to recover, whether the defendant has any right or title therein or not. *Derby* v. *Jones*, 27 Maine, 357.

The court will look to the intention of the parties in conveyances in giving construction to exceptions and reservations in deeds. In *Kuhn* v. *Farnsworth*, 69 Maine, 404, the road excluded ran through the land conveyed, leaving parts of the land conveyed on either side of the piece reserved. Also in *Day* v. *Philbrook*, 85 Maine, 90. In *Wellman* v. *Dickey*, 78 Maine, 30, the court say that the exception in terms is of something laid out over the land, not of the land itself, and carries the land. This road is a two-rod strip on the extreme southerly side of the land claimed by the plaintiff. The plaintiff in *Wellman* v. *Dickey*, is the same person

as the plaintiff in the case at bar, and the road mentioned is the same road. The court in the opinion say that the plaintiff's deed bounds him by the centre of the road. It is evident that the intention of the parties to the deed from Edgecomb to Wellman was to exclude the road from the conveyance, and being excluded plaintiff is bounded by the centre of the road.

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

FOGLER, J. Trespass quare clausum for cutting down and carrying away certain trees standing within the limits of a certain road in the town of Belmont, known as Dickey's Mills road, and on the northerly side thereof. The defendant admits the cutting and carrying away of the trees and justifies under his wife, Ella C. Churchill, who, he claims, held the title, and was in possession and had the right of possession of the land upon which the trees stood. The defendant introduced a deed from one Miles Pease to the defendant's wife in which the granted premises are described as beginning on the northerly side of the road leading from Miles Pease' house to Dickey's Mills, thence easterly by said Dickey's Mills road to land of Elijah M. Pease, thence, by other courses and bounds, to point of beginning, being part of the Isley Jordan place. It is admitted that the south line of the Isley Jordan place is the northerly line of the Dickey's Mills road. From the foregoing description and admission it is clear that the defendant's wife is bounded by the northerly line of the Dickey's Mills road and has no title or right of possession of the land included within the limits of the road. The defendant, therefore, fails to justify the cutting by title in his wife.

The plaintiff in support of his title to the locus in quo introduced a deed of warranty from one Edgecomb to himself of a parcel of land beginning on the northerly side of the road leading from Dickey's Mills to the road near the dwelling-house of Isley Jordan, thence by courses and bounds to the place of beginning, "with the reservation of a road two rods wide over the northerly side of said lot." It is admitted that the road mentioned in the

deed of Pease to the defendant's wife as leading from Miles Pease' house to Dickey's Mills, is the same two-rod road mentioned in the reservation in the deed of Edgecomb to the plaintiff. The defendant contends that the reserving clause in the plaintiff's deed should be construed as an exception and not as a reservation, because the road was in existence at the time of the grant, and, being an exception, the fee in the land included within the limits of the road did not pass to the plaintiff.

Every exception or reservation in a deed is the act of the grantor and should therefore be construed most strictly against him and most beneficially for the grantee. *Wyman* v. *Farrar*, 35 Maine, 71; *Kuhn* v. *Farnsworth*, 69 Maine, 405. A reservation has sometimes the force of a saving or exception. Co. Litt. 143. Exception is always a part of the thing granted, and of a thing in being; and a reservation is of a thing not in being, but is newly created out of the land and tenements devised, though exception and reservation have often been used promiscuously. Co. Litt. 47 a. A construction given to a clause called a reservation, is, that it is an exception if it fall within that definition, and if such was the design of the parties. *State* v. *Wilson*, 42 Maine, 9; *Winthrop* v. *Fairbanks*, 41 Maine, 307. Where a road or way is spoken of, there are two distinct rights or interests which naturally present themselves to the mind—the fee in the land itself and the easement or use (public or private) which may be made of it for the purposes of travel or transportation. *Kuhn* v. *Farnsworth*, supra. The construction and effect of reservations or exceptions of "roads" and "ways" in deeds have uniformly been held by this court to import only the easement and not the property in the soil. *Stetson* v. *French*, 16 Maine, 204; *Tuttle* v. *Walker*, 46 Maine, 280; *Cottle* v. *Young*, 59 Maine, 105; *Kuhn* v. *Farnsworth*, supra; *Day* v. *Philbrook*, 85 Maine, 90; *Morrison* v. *Bank*, 88 Maine, 155. We therefore hold that the words of reservation in the plaintiff's deed excepted from the grant the easement only and that the fee in the soil passed to the plaintiff. Having such fee his action is maintainable.

Judgment for the plaintiff, and damages are assessed at ten dollars as agreed by the parties.

HENRY W. NADEAU, and another,

vs.

RANSOM C. PINGREE, and another.

Aroostook. Opinion December 1, 1898.

Surveyor. Logs. Scale.

When parties agree upon a surveyor to scale logs, they will, in the absence of fraud or mathematical mistake, be bound by his scale.

ON EXCEPTIONS BY PLAINTIFF.

The case appears in the opinion.

P. C. Keegan, for plaintiffs.

L. C. Stearns, for defendants.

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

FOGLER, J. This is an action of assumpsit upon an account annexed to the writ, with a quantum valebant count. The account sued is for 22,218 pieces of cedar containing 750,080 feet at $8 per M. amounting to $6000.64. The plaintiffs give credit for payments made by the defendants, concerning which there is no controversy, and claim a balance due of $679.26. The defendants admit the receipt of 20,365 pieces of cedar scaling 687,580 feet and that there was a balance of $179.16 due therefor at the date of the writ. The cedar concerning which the controversy arises was delivered in pursuance of a written contract dated October 12, 1896, signed by the parties. The contract, so far as material for determining the issues presented by the exceptions, is as follows:

"The said Nadeau & Mallett of the first part agree to cut, haul and deliver in a good, safe boom, at or near the mouth of The Little Black River, during the winter and spring of 1896 and 1897, a quantity of good merchantable cedar logs, say seven hundred thousand feet, more or less. . . . . Said cedar logs are to be scaled

by whoever may scale for stumpage whose scale shall be final and binding in settlement between parties. Said cedar logs shall be counted at time of delivery from said boom, and any shortage in count shall be deducted from scale bill according to the average scale of the whole."

The logs were scaled by F. J. Quincy who, it is admitted, was the scaler who scaled for stumpage. The scale bill, verified by the oath of the scaler in court, showed 20,365 pieces containing 687, 580 feet. The plaintiffs, not offering to prove that there was fraud or mathematical mistake in the scale, offered evidence to show that a larger quantity of logs was delivered under the contract than the surveyor's scale showed, to wit: 22,218 pieces, which would make some 750,080 feet, instead of 20,365 pieces scaling 687,580 feet, a difference of 1853 pieces, scaling 62,500 feet, which at the contract price of $8 per thousand would make a difference of $500. Upon objection, the presiding justice excluded the testimony offered in proof of any greater number of logs than is shown by the scale bill of the stumpage scaler. Thereupon a verdict was rendered for the plaintiffs for the amount admitted by the defendants to be due. To the ruling of the presiding justice excluding the testimony so offered by the defendants, the defendants except.

We are of opinion that the ruling of the presiding justice was correct. It is a well settled and familiar rule of law that when parties have agreed upon a surveyor to scale logs, they will, in the absence of fraud or mathematical mistake, be bound by his scale. *Oakes* v. *Moore*, 24 Maine, 214; *Robinson* v. *Fiske*, 25 Maine, 401; *Haynes* v. *Hayward*, 41 Maine, 488; *Bailey* v. *Blanchard*, 62 Maine, 168; *Ames* v. *Vose*, 71 Maine, 17.

The clause in the written contract providing for a count of the logs at the time of delivery from the boom, does not aid the plaintiffs. Such clause provides for a deduction from the scale in case of shortage but does not authorize any addition to or increase of the scale of the surveyor.

Exceptions overruled.

FANNIE E. MUSGRAVE *vs.* RUFUS FARREN.

SAME *vs.* SAME.

Hancock. Opinion December 1, 1898.

Replevin. Amendment. New Trial. R. S., c. 96, § 10.

In an action of replevin the writ must specify the particular property to be replevied and describe it with a reasonable degree of certainty, in order that the property may be identified and delivered to the plaintiff.

Where the property is described as "five barrels, thirteen boxes and two crates" without any mention whatever of their contents, and the plaintiff has no title to the barrels, boxes and crates themselves, no recovery can be had for any part of their contents. Nor is such writ amendable.

The court will grant a new trial in cases where the verdict for a defendant husband is rendered against the positive testimony of the plaintiff, his wife, against the probabilities in her favor arising from the relations formerly existing between her husband and herself, and the husband's course of dealing with his wife in respect to his property, and against the husband's own previously signed declaration made under oath during his examination as a judgment debtor.

ON MOTIONS AND EXCEPTIONS BY PLAINTIFF.

Two actions of replevin tried together by consent of the parties.

The facts appear in the opinion of the court.

H. E. Hamlin and C. H. Wood, for plaintiff.

E. S. Clark and L. B. Deasy, for defendant.

SITTING: EMERY, WHITEHOUSE, WISWELL, STROUT, SAVAGE, JJ.

WHITEHOUSE, J. These were actions of replevin brought to recover possession of certain articles of property in the possession of the defendant, a warehouseman at Bar Harbor, who claimed to hold the property as bailee of Thomas B. Musgrave, husband of the plaintiff. By consent of parties the two actions were tried together. In the former action the property replevied was described as "One Victoria carriage, trimmed in dark brown

broadcloth, has a brake and was manufactured by Bender in France." In the latter the articles were described as follows: "One coupe carriage, five barrels, thirteen boxes, two crates, three tables, five chairs, one chest of drawers, two fire screens and one basket." The issue submitted to the jury was whether the title to the property replevied was in the plaintiff Fannie E. Musgrave, or her husband Thomas B. Musgrave. The verdict was for the defendant in both cases. The plaintiff now asks to have these verdicts set aside upon three grounds: First, because the verdict was against the evidence submitted at the trial; second, on account of newly-discovered evidence, and third, upon exceptions to the rulings of the presiding justice.

I. The motion.

The plaintiff's evidence tended to show that she acquired title to the several articles described in her writs by virtue of absolute gifts from her husband at different times, long prior to their separation and when they were living together in harmony as husband and wife in New York City. It was not in controversy that the Victoria was bought and paid for in Paris by the husband in 1873; but the plaintiff contended that he procured it for the express purpose of making a gift of it to her; that it was presented to her immediately after its delivery in New York, and thereafterwards it was recognized as her property, and remained under her dominion and control until it was taken by him from her stable in Bar Harbor and deposited in the defendant's warehouse.

It is clearly shown by the plaintiff's evidence, that the coupe mentioned in the second writ was given to her in 1880. It was selected by her and her monogram "F. E. M." painted on the panels of the carriage at the time.

Indeed, this appears to have been an instance where the husband arranged to have the title to all of his valuable property vested in his wife. The plaintiff introduced, without objection, a bill of sale given by Musgrave to his wife in 1872, comprising all the furniture in the dwelling-house occupied by them at 749 Fifth Avenue, New York, and of all the carriages, horses and harnesses

owned by him at that time. The next year he purchased and conveyed to his wife, the house at 535 Fifth Avenue, valued by him at $200,000 and the principal part of the furniture was then removed from 749 Fifth Avenue to this new house. In 1881, he conveyed to his wife the real estate at Bar Harbor valued at $150,000, with all the furniture in one of the houses. These gifts were proved by the testimony of Mr. Musgrave himself and also shown by record evidence, Musgrave claiming that when he conveyed the real estate to his wife, it was agreed that he should continue to receive one-half of the income. It was not in controversy, that at different times he had also given his wife diamonds and other jewelry of the value of about $15,000. Evidence of the gift of the real estate in New York and of the diamonds and other jewelry, was introduced by the defendant subject to the plaintiff's objection.

In corroboration of the positive testimony of the plaintiff in support of her claim, and of the probabilities in her favor arising from the relations then existing between her husband and herself, their circumstances and situation in life, and the husband's course of dealing with his wife with respect to his property, special attention is called to a declaration under oath made by Mr. Musgrave in the Supreme Court of New York on the thirteenth day of November, 1889. It was the result of his examination as a judgment debtor, reduced to writing and signed and sworn to before a justice of that court. It contains the following statement inter alia:

"I have resided until about October 19, 1889, for 16 years last past at 535 Fifth Avenue; this property and the house and furniture belongs to and is owned by and in the name of my wife, and has been for sixteen years last past. I do not own any real estate or personal property, except my wardrobe and a few articles of jewelry, some books and miscellaneous small articles of no particular value to any one but myself."

He admits in his testimony that he signed the paper and made oath to it, as shown by the record, but claims that he never read the statement and had no knowledge of its contents, except the information from the creditor's attorney, that it related to the affairs of Musgrave & Co.

It does not require the "newly-discovered evidence," of the attorney who conducted that examination, and of the other officials of the court in New York, to show that Musgrave's pretense of ignorance respecting the contents of this paper, was unreasonable and untrue. He was an intelligent man of affairs, who for twenty-five years had an income from his business exceeding $40,000 per year, and he must be presumed to know the contents of a paper comprising his answers to interrogatories reduced to writing under such circumstances, and deliberately signed and sworn to before a justice of the Supreme Court. It is not difficult to infer that if he had then been particularly interrogated in regard to these carriages, he would have stoutly maintained, that the coupe was an absolute gift to his wife and that her initials were painted upon its panels as evidence of the gift; and that the Victoria was ordered with special reference to the comfort and convenience of his wife, who testifies that she was in poor health at the time, and was intended as a gift to her, was delivered to her as her property, and had remained her property ever since.

It is the opinion of the court, that against these deliberate statements of Thos. B. Musgrave made under oath, and shown to be in harmony with his general conduct in the management and disposition of his property, these verdicts cannot consistently be permitted to stand. The conclusion is irresistible, that in contemplating the large amount of property given to the wife by the husband and still held by her, the jury failed to give effect to the evidence showing title in the plaintiff to the particular articles in question.

II. This conclusion renders it unnecessary to examine the plaintiff's exceptions, but as some of the questions presented by them must again arise in the event of another trial, it seems expedient and proper to consider them here.

The case shows that the plaintiff did not claim title to the "boxes, barrels and crates" named in her writ, but did claim to own a part of the contents of the several packages, and asked the court to rule that she might recover any such articles which she could prove to be her property. The court declined to give this

ruling, and also refused to allow an amendment to the writ describing the articles contained in the several packages named which she claimed to own.

These rulings were correct. In an action of replevin, the writ must specify the particular property to be replevied, and describe it with a reasonable degree of certainty, in order that the property may be identified and delivered to the plaintiff. 1 Chitty on Pl. 185, and note; Wells on Replevin, §§ 168-184, and cases cited; *Wingate* v. *Smith*, 20 Maine, 287; *Litchman* v. *Potter*, 116 Mass. 371.

In the present case it has been seen that the "boxes, barrels and crates" are mentioned in connection with the carriage, tables and chairs, without any reference whatever to their contents; and an application of the rule of noscitur a sociis would lead to the obvious conclusion that the plaintiff sought to recover the boxes, barrels and crates themselves, and made no claim to their contents. It is clear that she could not be allowed to recover articles of property which were neither generally nor particularly described nor in any manner mentioned in her writ.

The motion to amend the writ by inserting a schedule of that portion of the contents of the packages in question, which the plaintiff claimed as her property, was properly denied. It would have introduced a new cause of action and increased the aggregate value of the property to be replevied. The bond which the officer is required by our statute to take from the plaintiff to the defendant, before serving the writ, must be in double the actual value of the goods to be replevied. R. S., ch. 96, § 10; *Hall* v. *Monroe*, 73 Maine, 123. The penal sum of the bond in this case was presumably fixed with reference to the real value of the articles originally described in the writ before it was served; and without consent of the sureties this amount could not afterward be increased to meet the requirements of a writ amended in the manner proposed.

The entry in each case must be,

Motion sustained; new trial granted.

WILLIAM A. BRALEY *vs.* ROBERT E. POWERS.

Androscoggin. Opinion December 1, 1898.

Deceit. Sales. False Representations by Vendor. Exceptions.

In an action for fraudulent representations in the sale of letters patent for the manufacture of harness buckles, positive statements made by the defendant as of his own knowledge in relation to the cost of manufacturing the buckles, are material as directly affecting the value of the right to manufacture them.

Where the buckle is a novel, mechanical contrivance or device and has no established market price, *held;* that the jury would not be authorized to find that the plaintiff is chargeable with a want of ordinary care and vigilance in relying upon the defendant's statement of their cost.

It is not error to refuse to give an instruction which, though correct as an abstract principle, is not called for by the facts in evidence.

Exceptions will not be sustained for admitting testimony although not legally admissible as to statements made out of court by buckle-makers concerning the cost of manufacturing buckles when it tends to corroborate the defendant's own testimony in court, and he is not prejudiced by its introduction.

In actions of deceit the falsity and fraud on the part of the defendant consist in stating that he knows the facts to be true of his own knowledge when he has not such knowledge; and he may be liable although he believed and had reasonable cause to believe his representations to be true.

ON MOTION AND EXCEPTIONS BY DEFENDANT.

An action on the case for deceit, in the sale of an interest in a patent right, a verdict for $500 being rendered for the plaintiff.

This case is stated in the opinion of the court.

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

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

The law requires a purchaser to use some care, to apply some intelligence, and to exercise some diligence, before he can receive protection from even false and material statements by which a vendor has deceived him to his damage.

In *Pratt* v. *Philbrook*, 33 Maine, 23, the court says: "And if a party is imposed upon by the fraud of the other, where the former had the full means of detecting the fraud and ascertaining the truth, and neglected to inform himself of it, when he might

easily have done so, courts have not interposed in behalf of the injured party." This is the instruction asked and refused.

And later, in *Palmer* v. *Bell*, 85 Maine, 355, the court goes even further and says: "Even in cases where the misrepresentations are in reference to material facts affecting the value of the property, and not merely expressions of opinion or judgment, the law holds that the person to whom such representations are made has no right to rely upon them, if the facts are within his observation, or if he has equal means of knowing the truth, or by the use of reasonable diligence might have ascertained it, and is not induced to forego further inquiry which he otherwise would have made." *Salem India Rubber Co.* v. *Adams*, 23 Pick. 256; *Nowlan* v. *Cain*, 79 Cal. 234; *Deming* v. *Darling*, 148 Mass. 504; *Edes* v. *Hamilton Mut. Ins. Co.*, 3 Allen, 363; *Farr* v. *Peterson*, 91 Wis. 182.

The court has held that whether or not there was such negligence on the part of the purchaser as to relieve the seller from liability in such cases is a question for the jury. *Brown* v. *Leach*, 107 Mass. 364; *Savage* v. *Stevens*, 126 Mass. 207; *Sharp* v. *Ponce*, 74 Maine, 470; *Trull* v. *True*, 33 Maine, 367; *Nickerson* v. *Gould*, 82 Maine, 512.

"The law does not go to the romantic length of giving indemnity against the consequences of indolence and folly or careless indifference to the ordinary and accessible means of information." 2 Kent's Com. 485. Whether these words are actionable or not becomes of little consequence in light of the plaintiff's testimony as to what deceived him. He says he was induced to buy by Powers' opinion as to what could be made out of the buckle.

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

WHITEHOUSE, J. This was an action to recover damages for fraudulent representations in the sale of an interest in letters patent for the manufacture of harness buckles. The false representation set out in the plaintiff's writ and relied upon at the trial, was that the defendant "had a quantity of said buckles on hand, consisting

of two sizes, which cost him thirty and thirty-five cents per dozen respectively, samples of which said buckles he then and there exhibited to the plaintiff, and then and there affirmed that he could get all the buckles which they desired to sell at said prices, respectively, and then and there affirmed that said buckles could then and there be sold at sixty-five and seventy-five cents per dozen respectively, and then and there double the cost."

The plaintiff paid the defendant $800 for one third interest in the patent and recovered a verdict for $500. The case comes to this court on exceptions to the rulings of the presiding justice and and also on a motion to set aside the verdict as against evidence.

I. Evidence was admitted under objection, to prove the allegation above set forth, but the court was requested to instruct the jury that this representation by the defendant concerning the cost of the buckles, was not a statement of a material fact, and if false, was not actionable. The defendant excepted to the refusal of the presiding judge to give this instruction.

It is undoubtedly a reasonable rule of the common law, uniformly recognized in this state, that representations of the value of real or personal property which is itself the subject matter of bargain and sale, or of the price paid or offered for it in a particular instance, are so manifestly statements of opinion on the part of the seller, or mere evidence of the opinion of others respecting its value, that they cannot be deemed statements of material facts which will lay the foundation of an action for deceit, even if the statements are false and intended to deceive. *Bishop* v. *Small*, 63 Maine, 12; *Rhoda* v. *Annis*, 75 Maine, 17; *Bourn* v. *Davis*, 76 Maine, 223; *Palmer* v. *Bell*, 85 Maine, 352.

But even in this class of cases when the statements relate directly to the subject matter of the sale, it was held in *Manning* v. *Albee*, 11 Allen, 520, that false representations that certain railroad bonds were selling in the market at a given price entitled the plaintiff to maintain an action, there being no evidence that the plaintiff had equal means of knowing the truth or untruth of the statements, or that he might not rely upon them without the

imputation of negligence. See also *Com.* v. *Wood*, 142 Mass. 460.

In *Coolidge* v. *Goddard*, 77 Maine, 578, it was held, that a false representation by the defendant in effecting the sale of shares in an electric light company, that he and all other stockholders had paid to the company the par value of the stock, constituted a legal fraud, as it affected directly the value of the stock.

In *Hoxie* v. *Small*, 86 Maine, 23, the seller of shares in a contract for the purchase of real estate, made false representations in regard to the amount paid for them to the owner of the land and the court held them actionable, saying: "They affected directly the value of the interest which the defendant was selling. The defendant was not selling tangible property. He was selling a fractional interest in a contract. And the value of that contract depended largely if not wholly upon the amount of payments that had been made upon it."

So in the principal case the defendant was not selling "tangible property," but an interest in a patent right for the manufacture of buckles. The value of the invention obviously depended upon the margin of profit between the cost of manufacturing the buckles and their selling price. Statements in regard to their cost were therefore material as directly affecting the value of the right to manufacture them. The representations immediately following, that he could furnish all the buckles they wanted at the price named by him at the cost of those exhibited and that they could be sold so as to double the cost, were not in themselves statements of existent facts, but were mere predictions and expressions of opinion. They served, however, to give significance and force to his positive statement of the cost of those exhibited. Considered in connection with these accompanying expressions of opinion, the representation, that the buckles shown to the plaintiff were manufactured for thirty and thirty-five cents per dozen respectively, were well calculated to convey to the mind of the plaintiff the idea that those buckles were manufactured at that cost under ordinary conditions, and not under exceptionally favorable circumstances.

The defendant also excepted to the refusal of the presiding justice to give the jury the following instruction, viz: "If a party is

imposed upon by the fraud of another, when the former had full means of detecting the fraud and ascertaining the truth of the matter and neglected to inform himself of it, when he might easily have done so, the law will not interfere to give relief."

With the exception of the last clause, the language of this request was taken from the opinion in *Pratt* v. *Philbrook*, 33 Maine, 23. It was there employed by the court in giving reasons for sustaining a demurrer to the declaration, in which it appeared that the written contract with respect to which the false representations were made, was readily accessible to the plaintiffs before the trade was completed, and one of the transactions involved was ratified by them after full knowledge of the facts. The language was appropriate for that purpose, but as an instruction to the jury, it would fail to explain with sufficient fullness and clearness the duty that might rest upon the plaintiffs to exercise reasonable and ordinary care, diligence and prudence to ascertain the truth or untruth of the defendant's representations. But a careful examination of the evidence in the principal case leads to the conclusion that the jury would not have been authorized to find that the plaintiff had equal means of knowing the truth or was chargeable with a want of ordinary care and vigilance in relying upon the defendant's statement of the cost of the buckles. If correct as a general principle, the requested instruction was not called for as applicable to the facts in evidence. The buckle was a novel mechanical contrivance or device, and had no established market price. The plaintiff was not an expert in such matters and had no personal knowledge of its cost. The defendant had already caused a quantity to be manufactured and had definite knowledge of the cost. The defendant's statement to the plaintiff was deliberate and positive and made as of his own knowledge, derived from actual investigation and experience. There was nothing in it so improbable or unreasonable as to put the plaintiff upon further inquiry. He had no reason to suspect that the statement was false and made for the purpose of cheating and defrauding him. He testified that he relied upon it as an inducement to the purchase, and it is the opinion of the court that he was justified in so doing. The request was properly refused.

The defendant further excepted to the admission of the testimony of Frank M. Braley, that buckle makers in Portland and Boston informed him that they could not make these buckles of the larger size, less than one dollar per dozen. This was clearly hearsay evidence and not legally admissible. The buckle makers themselves should have been produced in court, that they might be subjected to cross-examination. But it is equally clear that the defendant was not prejudiced by the introduction of this evidence; for he expressly admits in his testimony, that the buckles exhibited to the plaintiff cost 87 1-2 cents and one dollar per dozen, for the two sizes respectively, and it does not appear that he had ever known buckles of that quality to be actually manufactured at a less price. But he insisted, in his defense, that he so told the plaintiff during the negotiations for the sale of the patent. He testified that he distinctly informed the plaintiff before the sale, that the buckles cost 87 1-2 cents and one dollar per dozen. The plaintiff emphatically denied it, and insisted that the defendant told him that they cost only thirty and thirty-five cents per dozen respectively. This was the principal issue of fact submitted to the jury. It is manifest, therefore, that the plaintiff was not injured by testimony which only tended to corroborate his own admissions. It is not the duty of appellate courts to set aside the reasonable verdict of a jury upon exceptions to the admission of evidence that may be technically inadmissible under the established rules, when it clearly and satisfactorily appears that the excepting party was not aggrieved by the evidence and no injustice was thereby done.

It is the right and duty of the court under such circumstances to give heed to the general merits and substantial justice of the cause. *Fogg* v. *Babcock*, 41 Maine, 347; *Brooks* v. *Goss*, 61 Maine, 307; *Millett* v. *Marston*, 62 Maine, 477; *Barrett* v. *Bangor*, 70 Maine, 335; *Howard* v. *Patterson*, 72 Maine, 57; *Hall* v. *Otis*, 77 Maine, 122; *Powers* v. *Mitchell*, 77 Maine, 361.

Finally the defendant has exceptions to the exclusion of a letter offered by him in rebuttal, purporting to have been written by a manufacturer in Chicago, in reply to the defendant's inquiry two months after the commencement of this action, containing a pro-

posal to make similar buckles at much less than the cost of those exhibited to the plaintiff. But the defendant had been allowed to testify to what he called the "contract price" of another buckle exhibited by him to the jury and it sufficiently appears from the evidence reported, that this statement was based on the proposal in the Chicago letter, for the descriptions and prices of the buckles contained in the letter are practically identical with those given in the defendant's testimony. The letter was not in rebuttal of any evidence subsequently introduced by the plaintiff, and does not appear to have been legal evidence at any stage of the trial.

II. The motion to set aside the verdict must also be overruled. The plaintiff assumed the burden of proving by a preponderance of evidence that the defendant made a positive statement as of his own knowledge, in relation to a material fact, past or existent, directly affecting the value of the patent right as an inducement for the plaintiff to purchase an interest in it; that the plaintiff was justified, under all the circumstances in relying upon it, and that he did rely upon it as one of the material influences by which he was induced to make the purchase; and that such statement by the defendant was false and known by him to be false, or not known to be true. Such a statement is characterized in law as a fraudulent representation, and is uniformly recognized as a sufficient basis for an action of deceit. The cause of action is classified among the wrongs inflicted by one person upon another by means of deception, and in contemplation of law an intention to deceive is always involved; but a fraudulent purpose may be inferred from a wilfully false statement in relation to a material fact. And, as before intimated, it is not always necessary to prove that the defendant knew that the facts stated by him were false. "If he states as of his own knowledge material facts susceptible of knowledge, which are false, it is a fraud which renders him liable to the party who relies and acts upon the statement as true, and it is no defense, that he believed the facts to be true. The falsity and fraud consist in representing that he knows the facts to be true of his own knowledge, when he has not such knowledge."

Litchfield v. *Hutchinson*, 117 Mass. 195. And in *Cole* v. *Cassidy*, 138 Mass. 337, it was held that under such circumstances, the defendant would be liable, although he believed and had reasonable cause to believe his representations to be true. See also *Chatham Furnace Co.* v. *Moffatt*, 147 Mass. 403; *Milliken* v. *Thorndike*, 103 Mass. 382; *Wheelden* v. *Lowell*, 50 Maine, 499.

It was not necessary that the defendant's false representation should have been the sole, or even the principal inducement for the plaintiff to enter into the contract. If it exerted a material influence upon his mind, although it was only one of several motives acting together, which produced the result, it would be sufficient to render the defendant liable. *Matthews* v. *Bliss*, 22 Pick. 48; *Safford* v. *Grout*, 120 Mass. 20.

It is the opinion of the court that, upon the principles above stated, there was not only sufficient evidence in the case to sustain the verdict rendered by the jury, but that a careful analysis of the facts reported shows that a fair preponderance of all the evidence supports the propositions which it was incumbent upon the plaintiff to establish. Nor do the facts warrant the intervention of the court to set aside the verdict on the ground that the damages are excessive.

Motion and exceptions overruled.

ELM CITY CLUB *vs.* C. HERVEY HOWES.

Waldo. Opinion December 2, 1898.

Unincorporated Associations. Actions. Pleading. Waiver. Stat. 1897, c. 191.

Chapter 191 of the Laws of 1897 provides that an organized, unincorporated association may sue in the names of its trustees. It sufficiently appears in this case that the suit is brought in the names of the trustees of the club, and that they are the technical parties plaintiff.

An objection that the trustees named are not trustees in fact should be raised by plea in abatement. The plea of the general issue admits the capacity of the plaintiffs.

Indebitatus assumpsit upon an account annexed lies for the recovery of "dues" which are owing to an association in accordance with its by-laws.

By submitting a case to the law court "on report," objections that an account annexed is uncertain and indefinite are considered as waived, unless the contrary appears in the report.

ON REPORT.

Assumpsit to recover dues, etc., from a member of the plaintiff club.

The case is stated in the opinion.

R. F. Dunton, for plaintiff.

W. H. McLellan, for defendant.

The club has no legal existence. It cannot sue or be sued. It is a mere myth. *Lewis* v. *Tilton*, 64 Iowa, 220, S. C. 52 Am. Rep. 436. No one is responsible for costs if the action fails. *Soule* v. *Winslow*, 64 Maine, 518.

The action is not in the name of the trustees; they are not made parties. It should have been brought in the name of Knowlton and others for its benefit. The legislature must have intended to allow somebody to become a party for the benefit of the association. 1 Chit. Pl. 16th Am. Ed. pp. 16, 17. The club had no trustees and yet brings this action under the law of 1897 and calls certain men trustees.

A corporation cannot maintain assumpsit for dues. If defendant is liable it is to the secretary on a special contract by signing

by-laws to pay dues to him. The writ does not show he became liable or that assessments were made. Declaration on account annexed: *Plummer* v. *Bowie*, 76 Maine, 496; *Cape Elizabeth* v. *Lombard*, 70 Maine, 396; *Bethel, etc., Bridge Co.* v. *Bean*, 58 Maine, 89; *Thomas Mfg. Co.* v. *Watson*, 85 Maine, 300; *Rogers* v. *Newbury*, 105 Mass. 533.

Voluntary unincorporated associations: *Carr* v. *Bartlett*, 72 Maine, 120; *Phipps* v. *Jones*, 20 Pa. St. 260, (59 Am. Dec. 708); *Otto* v. *Benevolent Union*, 75 Cal. 308, (7 Am. Rep. 156.)

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

SAVAGE, J. The defendant was a member of the Elm City Club, an organized, unincorporated association. He refused to pay his dues to the Club to the amount of twenty-four dollars, and for billiards, five dollars and ninety cents, and this action is brought to recover these amounts.

To obviate the technical objection to the maintenance of an action at law which arises when an organized, unincorporated association seeks to enforce a claim against one of its members, inasmuch as he would be in such case both plaintiff and defendant, and as well the inconvenience of suing in the names of all the members in an action against a third person, Chapter 191 of the Public Laws of 1897 provides that such an association "may sue in the name of its trustees for the time being."

In the writ in this case the defendant is called to answer unto "the Elm City Club of Belfast, an organized, unincorporated association, which sues this action in the name of Charles E. Knowlton, Ben D. Field, W. J. Dorman, H. T. Field, John G. Damon, Fred G. White, W. H. Quimby, W. C. Libbey and F. R. Woodcock, its trustees." The defendant pleaded the general issue, and the case comes to us on report.

The defendant urges that there is no party plaintiff in court, that the Elm City Club is a legal myth, that a voluntary association as such is not recognized in law as a party to an action. The plaintiff replies that if the defendant wished to raise the question of

ability to prosecute the suit, he should have done so by plea in abatement. However this may be, we think the action may be sustained in this respect, under Chap. 191 of the Laws of 1897, before referred to. That statute says an association may sue *in the name of* its trustees. The Elm City Club, not a myth, but an association of men having enforceable rights, sues this action *in the name of* its trustees. The pleading is exceedingly inartificial. But we think the language in the writ is substantially equivalent to saying that Charles E. Knowlton, etc., trustees, sue this action *for* the Elm City Club. It is not an action brought in the name of the Elm City Club by the persons named, its trustees, but an action for the Elm City Club in the name of its trustees. Suits for minors by next friends are not analogous. In such cases the minor is the party, suing by next friend. Here the suit is not *by* the trustees, but *in the name of* the trustees, whose names are given, and these trustees are the technical parties plaintiff. The action is sued in their names. It is true that the defendant is summoned "to answer unto the Elm City Club." But that is not all. All of the language used in this connection must be examined to ascertain its legal effect. We think there is no difficulty in ascertaining that the persons named were the parties to the process, and the Club was the party beneficially interested.

The defendant in the next place says that the action cannot be maintained, because the parties named were not in fact trustees. This defense should have been made by plea in abatement. The plea of general issue admits the capacity of the plaintiffs. *Upham* v. *Bradley*, 17 Maine, 423; *Trustees, Ministerial & School Fund* in *Dutton* v. *Kendrick*, 12 Maine, 381; *Abbott* v. *Chase*, 75 Maine, 83.

The defendant next says that indebitatus assumpsit upon an account annexed will not lie for "dues," but that the suit should have been brought specially upon the defendant's written contract to pay dues. The by-laws of the association, signed by the members, including the defendant, constitute the contract. Under these by-laws, dues were to be paid quarterly. The amount of the quarterly dues was fixed annually. There is no pretense but that

at the time the action was brought the defendant owed the association for six quarters' dues. We see no reason why indebitatus assumpsit may not lie for these dues. The defendant owes them. In practice, the account annexed is a substitute for the common money counts. *Cape Elizabeth* v. *Lombard*, 70 Maine, 396. It was not necessary to sue specially upon the contract. The contract is, indeed, a part of the evidence of indebtedness and was properly introduced as such, although not specially declared on. *Marshall* v. *Jones*, 11 Maine, 54.

The defendant further objects that the account annexed is uncertain, indefinite and altogether insufficient. What might have been the result had he demurred, it is unnecessary to say. When a case is submitted to the law court on a report of the evidence, objections such as these are considered as waived, unless the contrary appears. *Pillsbury* v. *Brown*, 82 Maine, 450. There is no merit in the defense. The uncontradicted evidence shows that the defendant was a member of the Elm City Club, that the by-laws provided for quarterly dues, that the amount of the dues had been fixed, and that neither they nor the amount due for use of billiard tables have been paid.

Defendant defaulted.

ARLETTA KIMBALL *vs.* CHARLES S. F. HILTON, and another.

Lincoln. Opinion December 3, 1898.

Pleading. Estoppel. Judgment. Trespass, q. c. Real Action. Evidence. Plan.

Estoppel by judgment may be specially pleaded in bar, or it may be shown in evidence under the general issue.

A judgment in an action of trespass quare clausum is not a bar by way of estoppel to a real action. And this is true, though the defendant in the trespass suit pleaded soil and freehold. The right of possession is the only question necessarily determined by a judgment in the action of trespass. The question of title may, or may not, have been determined. For a former judgment to be a bar, it must appear that the question now in issue was in issue then and was decided.

In the trial of a real action the defendant made use of a plan as chalk. It appeared that this plan had been made by a surveyor for use in a former suit of trespass between the same parties. *Held;* that the plan was properly excluded, as evidence, in the present suit.

A new trial will not be granted when it appears that the evidence introduced by the demandant, if believed, warranted the jury in finding that the line claimed by her is now the true line by convention or disseisin, although the testimony is conflicting. The court cannot say in this case that the verdict is so manifestly wrong as to justify its intervention.

ON MOTIONS AND EXCEPTIONS BY DEFENDANTS.

Writ of Entry. Writ dated October 4, 1895.

Defendants pleaded nul disseizin as to a part, estoppel as to a part, and disclaimer as to a part. Plaintiff demurred to defendants' plea of estoppel. The demurrer was joined by the defendants and was sustained by the court.

The jury returned a general verdict for the plaintiff, whereupon the defendants filed a motion for new trial on the evidence reported by the presiding justice, and also filed exceptions to certain rulings of the presiding justice in matters of law; and subsequently, at that and the next succeeding term, filed motions for a new trial for newly-discovered evidence.

Declaration: In a plea of land, wherein the said plaintiff demands of the said defendants a certain lot of land, with the buildings thereon, situated in said Boothbay, and bounded and described as follows, to wit: Beginning at the northeast corner of land of Ella B. Kimball, on the westerly side of Back River, so called; thence northeasterly by said river sixty rods, more or less, to a stone wall; thence northwesterly by said stone wall, and a board fence, to the southerly edge of the Knickerbocker Ice Pond, and thence to a maple stump; thence northwesterly about forty and one-half rods, to a large pine stump at the end of a fence; thence westerly in a straight line to a spruce tree on the east bank of the Sheepscot River; thence southerly by said river to land of Manly Campbell; thence easterly by said Campbell's land to the westerly edge of said Knickerbocker Ice Pond; thence southerly by land of said Campbell, and land of Georgia A. Newcomb, and land of S. C. Hodgdon, and other land of Manly Campbell, to the

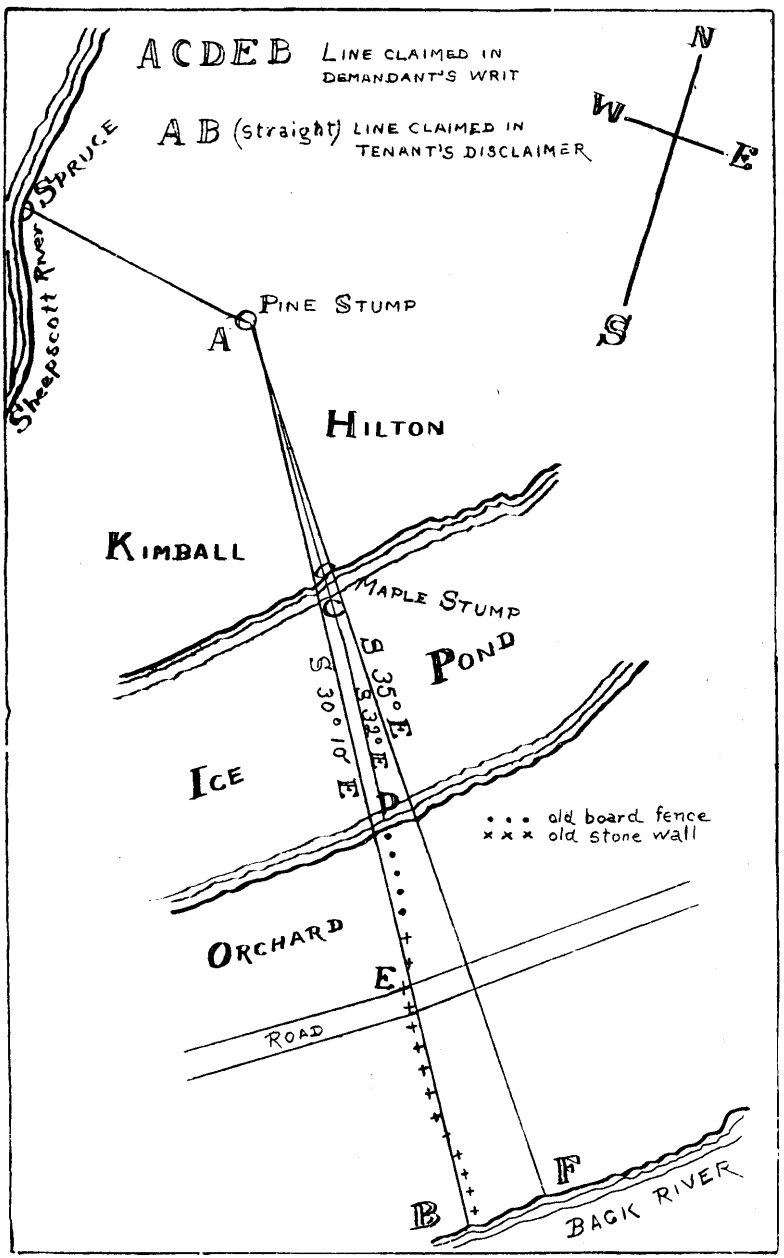
north line of land of Ella B. Kimball; thence easterly by said Ella B. Kimball's north line to the point of beginning, etc.

Plea, general issue.

"And for brief statement of special matter of defense the defendants say that as to so much of the demanded premises as set forth in the plaintiff's writ as lies northerly of a line beginning at a spruce tree marked on four sides, standing on the westerly side of Barter's Island, in Sheepscot River, in Boothbay, in said county, and being the northwest corner of land of said Arletta Kimball and formerly of Sarah Kimball, deceased; thence running easterly by said last named land, fifty-eight rods, to a pine stump; thence southerly on a straight line to a point where an ash tree formerly stood at the end of a stone wall on the bank of Back River, so-called, in said Boothbay, they were in the rightful possession of the same and that the said plaintiff ought not to have or maintain her action against them, because they say, that they, the said Charles S. F. Hilton and Alfreda H. Hilton on the day of the purchase of the plaintiff's writ, and for more than twenty years then last past, were, and still are, lawfully seized and possessed of the same; and that the said Arletta Kimball then and there unjustly and without judgment disseized the defendants and put them out of the possession thereof.

"And as to so much of the demanded premises as lies southerly of the line aforesaid, part and parcel of the demanded premises, they say that they have nothing, and at the time of the purchase of the plaintiff's writ had nothing, nor at any time before or since had anything, nor claim, nor ever heretofore claimed any title or interest therein, and the said defendants wholly disclaim all right, title, interest and claim, of, in, and to the same." A portion of a plan of the premises in dispute is presented.

Exceptions: The defendants pleaded the general issue, with a brief statement setting up inter alia, an estoppel by the judgment of this court, at nisi prius, April, 1893, in an action of trespass, quare clausum, wherein the present defendants were plaintiffs, and the present plaintiff, with others, were defendants; and also claiming title in the land then and now in controversy, as alleged in


A C D E B LINE CLAIMED IN DEMANDANT'S WRIT
A B (straight) LINE CLAIMED IN TENANT'S DISCLAIMER
N
W
E
S
Sheepscott River
Spruce
Pine Stump
A
Hilton
Kimball
Maple Stump
C
S 35° E
S 32° E
S 30° 10' E
Pond
Ice
D
. . . old board fence
× × × old stone wall
Orchard
E
Road
F
B
Bagk River

defendants' pleadings; and disclaiming as to the residue of the premises demanded by the plaintiff in this action.

To so much of the brief statement as relates to the alleged estoppel, the plaintiff demurred. The demurrer was duly joined, and was sustained by the court.

The defendants offered in evidence the record of the former judgment and the plan made and returned by Frederick Danforth, the surveyor appointed by the court in the former action, both of which were excluded by the court. But the court allowed Mr. Danforth's plan, as well as an ex parte plan made by J. H. Blair in behalf of the plaintiff, to be shown to the jury as chalks for the purpose of illustration, and upon an equal footing.

To the rulings of the court, in sustaining the demurrer and in excluding the evidence offered as aforesaid, the defendants excepted.

The facts are sufficiently stated in the opinion.

W. H. Hilton, for plaintiff.

Geo. B. Sawyer, for defendants.

An estoppel sufficiently pleaded, and supported by competent evidence, is an effectual bar to this action. It was sufficiently pleaded.

The demurrer is general, thus waiving "any imperfection, omission, defect or want of form" (if any there be), in the pleading to which it is opposed, and admitting "all such matters of fact as are sufficiently pleaded." It must be limited in its operation to matters of substance. Stephen on Pleading, 3d Am. ed. pp. 158-160. The defendants, having in the preceding brief statement, described a fixed and definite line (northerly of which they claimed title, and southerly of which they disclaimed any title or interest in the demanded premises) proceed to say "that the plaintiff is estopped by law and by the record and judgment of this court to have and maintain her said action", etc. They then proceed to say "that as to that part of the demanded premises hereinbefore described lying northerly of the line aforesaid", describing and identifying the parties as the same in this and the former suit, these defendants recovered judgment. They set forth the record, showing that they, as plaintiffs, declared in trespass,

qu. cl. against the present plaintiff and others acting as her servants and agents, with respect to the piece of land before described, and setting up the same dividing line before specified; and that Arletta Kimball defended, pleading the general issue, and "by way of brief statement said that the title and rightful possession of the locus where the alleged acts complained of, if done at all, were committed, at the time of the alleged trespass, were in her, the said Arletta Kimball"; and that afterwards the case was submitted to a jury and a verdict was returned under the pleadings for the then plaintiffs, upon which judgment was rendered, etc. Stat. 1831, c. 514; R. S., c. 82, § 22; *Trask* v. *Patterson*, 29 Maine, 499, 502.

The record of the former judgment between these parties and in support of the plea of estoppel was admissible under the general issue. *Green* v. *Thompson*, 5 Maine, 224; *Young* v. *Pritchard*, 75 Maine, 513; *Washburn* v. *Mosely*, 22 Maine, 160; *Sturtevant* v. *Randall*, 53 Maine, 149; *Trask* v. *Patterson*, supra.

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

SAVAGE, J. Real action. The tenants plead nul disseizin, and under a brief statement, disclaim as to a portion of the demanded premises, and as to the remainder, claim an estoppel by virtue of a former judgment in an action of trespass quare clausum, in which these tenants were plaintiffs, and this demandant, and others, her agents and servants, were defendants, and in which the then plaintiffs recovered judgment upon a verdict of guilty. The brief statement also alleges that in the former action this demandant, then defendant, pleaded that the title and right of possession of the locus where the alleged acts of trespass complained of were committed, were in her.

The demandant demurred to so much of the brief statement as set up an estoppel, and the demurrer was sustained. During the trial, touching the same subject matter, the tenants offered the record of the former judgment, which was excluded. They also

offered the plan made and returned by the surveyor appointed by the court in the former action, which was likewise excluded. To all these rulings the tenants excepted.

EXCEPTIONS. We may consider at the same time the rulings upon the question of estoppel, both the sustaining of the demurrer and the exclusion of the record, for an estoppel by judgment may be specially pleaded in bar, or it may be shown in evidence under the general issue. It is immaterial which. *Cunningham* v. *Foster*, 49 Maine, 68; *Sturtevant* v. *Randall*, 53 Maine, 149; *Walker* v. *Chase*, 53 Maine, 258; *Whiting* v. *Burger*, 78 Maine, 287. Both of these exceptions raise the same question, and that is,—Is the judgment in the action of trespass qu. cl. a bar by way of estoppel to the real action? We think it is not.

In order that the former judgment shall operate as a bar, it must appear that the very question in issue here was in issue and determined there. But the issues in actions of trespass qu. cl. and in real actions are vitally distinct. In a real action the issue is seizin or title. In trespass qu. cl., it is rightful possession. The action lies for an injury to the possession. It is called a possessory action. *Lawry* v. *Lawry*, 88 Maine, 482. The gist of the action is the breaking and entering, that is, the invasion of a rightful possession. *Hunnewell* v. *Hobart*, 42 Maine, 565. As the law writers say, "If a man's land is not surrounded by an actual fence, the law encircles it with an imaginary enclosure, to pass which is to break and enter his close." The mere act of breaking through this imaginary boundary constitutes a cause of action. Addison on Torts, § 375. It is a violation of the right of possession. To sustain trespass qu. cl., proof of possession is essential. *Abbott* v. *Abbott*, 51 Maine, 575; *Jones* v. *Leeman*, 69 Maine, 489; *Butler* v. *Taylor*, 86 Maine, 17. But proof of title is not essential. *Moore* v. *Moore*, 21 Maine, 350; *Brown* v. *Ware*, 25 Maine, 411; *Hunt* v. *Rich*, 38 Maine, 195. The owner of land may not be in possession of it, while one may be in the rightful possession who is not the owner. Possession is presumed to be in the lawful owner. *Griffin* v. *Creppin*, 60 Maine, 270. But the contrary may be

shown. The fact, and the only fact, necessarily determined by a judgment of guilty in an action of trespass qu. cl., is that the plaintiff was at the time of the alleged trespass in the rightful possession of the particular locus where the acts of trespass were committed. *Morse* v. *Marshall*, 97 Mass. 519. It is not necessarily determined that the plaintiff had title. And this is true, though the defendant pleads soil and freehold, because the defendant may have had the title, and at the same time the plaintiff may have had the rightful possession. Therefore the judgment does not settle the title. And it follows that the judgment is not an estoppel to a real action, whether pleaded or offered in evidence.

In general, a judgment is conclusive only as to facts without proof of which it could not have been maintained. *Hill* v. *Morse*, 61 Maine, 541; or where the pleadings show that the subject matter was necessarily in issue. *Blodgett* v. *Dow*, 81 Maine, 197. In a case like the present, it must appear that the issue of title was not merely submitted, but was determined. *Howard* v. *Kimball*, 65 Maine, 308; *Young* v. *Pritchard*, 75 Maine, 513; *Dutton* v. *Woodman*, 9 Cush. 255. For these reasons, this court has uniformly held that a judgment in trespass qu. cl. is not a bar to a real action. *Green* v. *Thompson*, 5 Maine, 224; *Dunlap* v. *Glidden*, 34 Maine, 517; *Young* v. *Pritchard*, supra. In the latter case it appeared that the defendant in the trespass suit, which was relied upon as a bar, had pleaded soil and freehold, as in this case, but neither by the record, nor by evidence aliunde, was it shown that the jury had determined the issue of title. That case is decisive of this question. Were the rule otherwise, the judgment might be offered to prove exactly the contrary of what the jury determined.

As to the exclusion of the plan of the court surveyor in the former action, we think no error was committed. The tenants were allowed to use it as a chalk, which was all they were entitled to do. The surveyor was not called as a witness. Standing alone, the most that can be said for it, is that it represents the contention of these parties in another suit upon another issue. We think it was not admissible as evidence.

MOTIONS. The verdict was for the demandant. The parties agree that one part of the divisional line between them runs in a straight line from a spruce tree on the Sheepscot River to a certain pine stump which marks an angle. They disagree as to the location of the line from this pine stump to Back River, so-called. This latter line appears to have been first established by a deed in 1823, when the farm which embraced both the land of the demandant and that of the tenant was divided. This deed calls for a line running from a pine tree S. 35° E. to an ash tree standing on the shore of Back River. And the tenants claim that this line is now represented by a line running from the pine stump S. 30° 10 min. E. to Back River. They claim that the southerly end of this line was formerly marked by an ash tree. Beyond this line they have disclaimed.

The demandant claims a line starting at the same pine stump, thence running somewhat easterly of the line claimed by tenants to a maple stump, thence across an ice pond, formerly a swamp, to the end of a board fence at the southerly shore of the ice pond, thence by the fence and a stone wall to the same point on Back River where the line claimed by the tenants ends.

Wherever the original line as created by the deed in 1823 would now run, the tenants concede that the board fence and wall mark the present true line between the parties from Back River to the ice pond. This line is somewhat irregular and is not coincident with the line claimed by the tenants in their disclaimer, but is easterly from it. Nor is it coincident with the line created in 1823 by a course then running S. 35° E. But the wall has been standing for a longer time than any witness can remember, and the board fence was built as early as 1845; and all the time since 1845 at least, the adjoining owners have occupied respectively to the fence and wall, and neither now claims beyond these. So much of the line has become established by convention or disseizin. It will be observed that there is a strip of land lying easterly of the line of disclaimer, and owned by the demandant. The tenants did not disclaim enough. This justifies a verdict of disseizin of some part of the demanded premises. *Perkins* v. *Raitt*,

43 Maine, 280. But we pass this. The real controversy is as to the location of the line between the pine stump and the southerly shore of the ice pond. The jury have found that the line claimed by the demandant is the true one. The pivotal point in the demandant's case is a maple tree which it is claimed formerly stood about two rods easterly of the line claimed by the tenants, and in what is now the northerly shore of the ice pond. The demandant claims that this maple was a line tree; that it was marked as such, and that it was recognized as such by the owners on both sides; that this tree is in, or very near, the line established by the original deed in 1823; that when the ice pond, an artificial one, was first flowed in 1878, and the land cleared, the maple was left standing as a line tree; that it was afterwards cut down by those who were operating the ice pond; that from 1856 to 1878, a board fence, regarded by her and her predecessors as a line fence, extended from this maple to the present end of the board fence on the southerly shore of the pond; that the portion of the board fence where the ice pond now is, and the portion which remains standing, and the stone wall,—all marked the line from the maple tree to Back River. The tenants do not deny the existence of a maple tree in that vicinity, but deny that it was a line tree, or that it was situated where the demandant claims it was. The tenants claim that the board fence across what is now the ice pond was substantially on the line claimed by them. The line from the maple tree to the southerly shore of the ice pond as claimed by the demandant is not, upon any theory, the same as that created by deed in 1823, but the line from the maple tree northerly to the pine stump may be. The demandant makes an angle at the maple tree. We think the position of the demandant is materially strengthened by two facts which do not seem to be disputed. First, the line claimed by the tenants, at the southerly shore of the pond, is not coincident with the old board fence from that point towards Back River. Yet there is no question but that the old board fence is now the line, at that point.

A more important fact is this: The deed of 1823 calls for a line running S. 35° E. The variation in the compass since 1823

amounts to 3° 2 min. If the line running in 1823 S. 35° E. be now located upon the face of the earth, it will run, as appears by the testimony of the surveyor appointed by the court, within a "few inches" of the maple stump claimed by the demandant to be the remains of the line tree. Another surveyor testified that the maple stump is in a line S. 32° E. from the pine stump, which is, making allowance for the variation of the compass, within two minutes of one degree of a line running S. 35° E. in 1823.

We do not forget that the tenants contend that the line of 1823, S. 35° E. ran to an ash tree, a definite monument, which controlled the course, and that the ash tree was in fact at the end of the line now claimed by them. But where the ash tree mentioned in the deed stood, and whether it was the one which was testified to as standing prior to 1869, at or near the end of the stone wall on the shore of Back River, were questions purely for the jury. We think the evidence introduced by the demandant, if believed, warranted the jury in finding that the line claimed by her across the ice pond is now the true line by convention or disseizin. The testimony was conflicting. The jury saw and heard the witnesses, and could judge of their intelligence and credibility. We certainly cannot say that the verdict is so manifestly wrong as to justify our intervention.

On the motion for a new trial on the ground of newly-discovered evidence, it is only necessary to say that, so far as the evidence is competent, it is merely cumulative, and it does not appear that it was not known or could not have been discovered by due diligence, before the trial. *Ham* v. *Ham*, 39 Maine, 263; *Brann* v. *Vassalboro*, 50 Maine, 64. The statement of the juror to one of the tenants was incompetent and immaterial as evidence.

Motions and exceptions overruled.

BYRON P. CARTER and another *vs.* HENRY CLARK.

Hancock. Opinion December 3, 1898.

Deed. Description. Monuments. Evidence. Disseizin. Taxes.

The description in a deed was: "Beginning at the head of South West Harbor in Mt. Desert aforesaid, the corner bound on the shore between said lot and Isaac Mayo's lot and follows the shore southerly to the corner of Jonathan Brown's lot; thence follows said Brown's and Mayo's lines westerly to the head of said lot which is called Cockle's lot." *Held;* that the description is not uncertain.

It is permissible for a witness, having knowledge, to testify whether the lines described in a deed, when applied to the face of the earth, actually surround the lot. Parol evidence is always admissible to locate the monuments and boundaries in a deed.

It is not objectionable for a witness to testify whether a certain fence is on or near the northern line of the "Byron Carter place," especially when nothing appears to show that the excepting party is prejudiced by the answer.

When the predecessor in title of one claiming by disseizin had stated that the property assessed to him in the valuation books of the town was all the property he owned, and it appeared by the books that the locus in question was not assessed to him, the books are admissible to show the extent of his disclaimer, and his statements in disparagement of his title are admissible against his successor.

When one in possession of land pays taxes upon it, that fact has some tendency to show the character of the occupation. It is an act of ownership. And in such case, when it is proper to show the payment of taxes, it is also proper to show by the valuation upon what property taxes were paid.

A preliminary question, such as "I will ask you, in the first place, where the homestead of A is?" is harmless in character, and unobjectionable.

When a witness has testified to admissions made by a party at a certain time, it is not competent, on cross-examination, to show that the party made a contrary, and a self-serving statement, at another time.

When title by adverse possession is in issue, and the proof of occupation and its character are material, if a party claims that he has paid the taxes upon the locus, assessed to him as a part of his "homestead," he may show, as one step in his proof, that it was not assessed to any one else.

When a party claims by adverse possession, the fact that the selectmen of the town knew of his claim, and recognized it by an article in a warrant for a town meeting, is inadmissible. This would only prove notoriety of claim, and not notoriety of occupation.

It is notorious occupation which is one of the elements necessary to constitute a title by adverse possession. It is not proved by reputation. Notoriety of occupation is not to be inferred from notoriety of claim.

ON EXCEPTIONS BY DEFENDANT.

The case appears in the opinion.

L. B. Deasey, for plaintiffs.

H. E. Hamlin (*E. Webster French* with him) for defendant.

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

SAVAGE, J. Real action. Nine exceptions are reserved, each relating to the admission or exclusion of evidence.

I. The defendant objected to the admission of two deeds in the plaintiff's chain of title, on the ground that the description was incomplete and did not cover the locus. He contends in argument that the deeds give only two of the four boundary lines. We do not think so. The description (substantially the same in both deeds) is: "Beginning at the head of Southwest Harbor in Mt. Desert aforesaid, the corner bound on the shore between said lot and Isaac Mayo's lot and follows the shore southerly to the corner of Jonathan Brown's lot; thence follows said Brown's and Mayo's lines westerly to the head of said lot which is called Cockle's lot." The language used is inartificial, but not uncertain. The shore line extends from Mayo's lot to Brown's lot. The side lines are "Brown's and Mayo's lines." And the inland end boundary is "Cockle's lot."

II. A witness was asked with reference to the same deeds, "Whether those four lines, 'the said Mayo's', referring to Isaac Mayo, the line of the shore, the said Brown line, and the head line go all around the locus?" and subject to objection, was permitted to answer. The question called for the knowledge of the witness as to whether the lines described in the deed, when applied to the face of the earth, actually surrounded the lot. It called for a fact, not an opinion. Parol evidence is always admissible to locate the

monuments and boundaries in a deed. *Brown* v. *Haven*, 12 Maine, 164; *Wing* v. *Burgis*, 13 Maine, 111; *Emery* v. *Webster*, 42 Maine, 204; *Abbott* v. *Abbott*, 51 Maine, 575; *Simpson* v. *Blaisdell*, 85 Maine, 199.

III. The plaintiff was permitted to ask a witness the following question: "Was this fence on or near the northern line of the Byron Carter place?" The defendant's objection is that the northern line of the Byron Carter place was a question for the jury to establish, and not the witness. The phrase "Byron Carter place" assumes that there was a tract of land known by that name. It was competent for any witness having knowledge, to testify as to the geographical limits of that "place," and as to the position of a fence or other object relative to a boundary of that "place." Whether the boundary of the "place" and of the locus in question were coterminous was for the jury, if the matter was relevant to the issue. The question whether the witness was qualified to answer the inquiry was addressed to the presiding justice. Moreover, nothing appears in the bill of exceptions to show that the question and answer were prejudicial to the defendant. *Harriman* v. *Sanger*, 67 Maine, 442.

IV. The plaintiff showed that the valuation books of the town of Tremont from 1882 to 1897 inclusive, except 1884 and 1892, had been exhibited to Henry H. Clark, the defendant's predecessor in title, in connection with the assessment of the tax for the year following the date of the book in each case; and that the list of Clark's property in each book was read to him or by him, and that in every case he said he had no other property. The plaintiff then offered the books in evidence, and they were admitted. The locus was not included in the list of Clark's property in any one of the books. We think they were clearly admissible. The defendant's claim is that Henry H. Clark was the owner of the locus during the prescribed period covered by the books, by grant and by disseizin. The admissions of Henry H. Clark in disparagement of his title were admissible against the defendant. *Parker* v. *Marston*, 34 Maine, 386; *McLanathan* v. *Patten*, 39 Maine, 142; *Royal* v.

Chandler, 81 Maine, 118. The statement of Henry H. Clark that he had no property other than that contained in his lists in the valuation books had some tendency to show that he did not claim title to the locus, for it was not included in his lists. The books were admissible to show the latter fact, for the books became in fact a part of his statement, his admission. They were admissable to show to what extent he disclaimed the ownership of property, and whether his disclaimer covered the locus. The weight and effect of his statement were wholly for the jury.

V. The plaintiff, subject to objection, was permitted to introduce the valuation books of the town of Tremont for the years 1882 to 1897 inclusive, "so far as they relate to the property of Byron Carter, the plaintiff." And without objection, he introduced evidence of the payment by himself of all taxes so far as the assessment to the plaintiff was shown. In this connection, it does not appear whether the locus was or was not assessed to Byron Carter. If the payment of taxes by the plaintiff was material, then we think it was proper to show by the books what the property was for which he was assessed. Whether the payment of taxes was material or not, we are unable to determine from the facts stated in the case. When one in possession of land pays the taxes upon it, that fact has some tendency to show the character of his occupation. It is an act of ownership. Whether the character of the occupation of this locus by either of these parties was in question, we are unable to say. It is the duty of the excepting party to set out enough in his bill of exceptions to show affirmatively that the ruling is erroneous. *Darling* v. *Dodge*, 36 Maine, 370; *Pollard* v. *Maine Central R. R. Co.*, 87 Maine, 51.

VI. The plaintiffs' counsel was permitted, against objection, to ask a witness, one of the assessors, the following: "I call your attention to the fact that there is assessed to the heirs of Roland Carter a homestead of forty acres, and will ask you *in the first place*, where the homestead of Roland Carter taxed there, is?" This question appears to be preliminary in its character, and whether material or not, is entirely harmless.

VII. In the direct examination of a witness for the plaintiff, the witness testified in substance that while he was an assessor of the town of Tremont, and after the death of Henry H. Clark, he went to the defendant to get a list of his property for purposes of taxation, and that the defendant did not at that time make any claim of ownership of the locus. On cross-examination of the same witness, the defendant offered to show by him that on another near occasion, and while the witness was still an assessor, in a statement made in his presence, but not directed to him as assessor, the defendant claimed to own the property in question. This offer was excluded. Such a statement, if made by the defendant, was self-serving, a declaration in his own interest, and clearly inadmissible as original, substantive evidence. Nor was it admissible in rebuttal. The offer related to a conversation other than the one previously testified to by the witness. If the defendant had made a contradictory statement at another time, proof of that fact would have no tendency to rebut the testimony of this witness as to his declarations, or want of declarations, at the time in question.

VIII. One of the issues at the trial was whether the defendant had acquired title by adverse possession. The locus was not specifically described and taxed to the plaintiff. The plaintiff claimed that it was part of his homestead; that it was taxed as such, and that he had paid the taxes upon it. As having a tendency to show that it was taxed to him as a part of his homestead, the plaintiff offered the valuation books of the town, to show that the locus was not taxed to any one else. We have already discussed the admissibility of the payment of taxes as an act showing the character of possession. Assuming, as we must in considering this exception, that such fact was material, it was for the plaintiff to show, if he could, that he had paid the taxes on this particular locus. This he might do by exhibiting the description in the valuation books, of the land for which he was taxed. If this description was clear and explicit, it might be sufficient. Or if a general term, as "farm" or "homestead" was used, the situation of the

locus relative to the other parcels claimed to make up the "farm" or "homestead," and its customary use in connection with them, would be admissible to show how much was included under either of these terms. *Morrell* v. *Cook*, 35 Maine, 207. And for the same purpose, in connection with such surrounding facts and circumstances, we think it may be shown that this particular land was not taxed to any one else. The inference may be remote, but we cannot say that the evidence has no tendency to prove this issue, for there is some presumption, of greater or less force, that all land is taxed to somebody; and the exclusion of all others to whom it might be taxed, taken with other circumstances, might be sufficient to warrant a jury in believing, in this case, that this land was included in the homestead taxed to the plaintiff.

IX. Under his claim by adverse possession, in order to show the notoriety of the occupation of the locus by Henry H. Clark, his predecessor, the defendant offered in evidence an article in the warrant for the town meeting in Tremont in 1884, namely, "To see if the town will vote to pay H. H. Clark damages done by road commissioners to his log landing at the head of South West Harbor in 1883." The evidence was excluded. The same article was then offered for the purpose of showing that the selectmen and assessors knew what Mr. Clark's claim to the property was; and again it was excluded. We do not think the defendant was aggrieved by the rulings of the presiding justice. It is a sufficient answer to the defendant's position to say that the offered evidence, if not objectionable on other grounds, would only tend, at the most, to show notoriety of claim, and not notoriety of occupation. It is notorious occupation which is one of the elements necessary to constitute a title by adverse possession. The occupation must be so notorious that the owner may be presumed to have knowledge that it is adverse. *Morse* v. *Williams*, 62 Maine, 445. But there is no such thing as constructive notoriety of occupation to be inferred from notoriety of claim. It is actual, notorious occupation. It is not proved by reputation, no matter how extensive and notorious. It must be proved by the character of the occu-

pation itself. *Howland* v. *Crocker*, 7 Allen, 153. The fact that the selectmen of the town knew of the claim of H. H. Clark, or that they recognized it in an article inserted in a warrant for a town meeting, would have no tendency to show that he occupied the locus, or, if he occupied it, that the occupation was notorious.

We discover no error in the rulings of the justice presiding, and all the exceptions must be overruled.

Exceptions overruled.

EMILY MOYES *vs.* FRED H. KIMBALL and others.

CHARLES T. FITZGERALD, in Equity, *vs.* SAME.

GEORGE B. BROOKS, in Equity, *vs.* SAME.

Androscoggin. Opinion December 5, 1898.

Lien. Sureties. Estoppel.

When a contractor has given bond to the owner of the building he has contracted to erect, and one of the conditions of the bond is that the building shall be turned over to the owner with all lien claims "fully discharged, legally waived, or good and sufficient indemnity therefor" furnished to the owner, a surety upon the contractor's bond cannot himself maintain a bill in equity to enforce a lien against the building.

A surety should be held to do precisely what he agreed to do, and having agreed that the building should be turned over to the owner free from liens, he is estopped from enforcing any.

ON REPORT.

The first action was debt on a bond, and the other two were suits in equity to enforce lien claims on a dwelling-house of the plaintiff, Emily Moyes.

The facts are stated in the opinion.

W. H. White and S. M. Carter, for Emily Moyes.

R. W. Crockett, for Fred H. Kimball.

D. J. McGillicuddy and F. A. Morey, for Bearce & Clifford.

Geo. C. Wing, for George B. Brooks.

W. H. Newell and W. B. Skelton, for Fitzgerald & Lane, argued:

1. Fitzgerald was surety in the contractor's bond, which provided that the building should be delivered to the owner on or before Dec. 15, 1896, with all lien claims arising from contracts legally waived, fully discharged or good and sufficient indemnity given.

2. Fitzgerald furnished materials which went into the construction of the building.

3. Fitzgerald brought a bill in equity to enforce his lien.

4. The remaining sureties contest the claim because it costs them less if the claim is disallowed, than it would to have their liens allowed and completed.

5. All the parties in interest are before the court and the entire matter can be disposed of under this report.

6. A fair interpretation of the bond, in the light of the circumstances, the conduct of the parties, and the language used show that neither the owner, the contractor nor the sureties, intended to provide that no liens should be placed upon the building, but that they should be discharged.

7. That on the part of Fitzgerald there was no waiver, no estoppel, and no covenant against his lien.

8. That a disallowance of his lien would be a hardship upon him that parties in interest do not have in contemplation.

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

SAVAGE, J. The first case is an action of debt on bond signed by the defendant Kimball as principal and by the other defendants, Bearce & Clifford, George B. Brooks, C. T. Fitzgerald and George W. Lane, as sureties. The condition of the bond is as follows: "Whereas the said F. H. Kimball has contracted with the said Mrs. J. A. Moyes to furnish or cause to be furnished all labor and materials for the erection and construction of a wooden

dwelling-house, on the land of said Moyes on the westerly side of Horton street in said Lewiston, in accordance with the plans and specifications made therefor by Coombs, Gibbs & Wilkinson, architects, of said Lewiston, if therefore, the said Kimball do and perform all acts necessary to the complete execution of said contract in accordance with said plans and specifications, and shall turn the same over to the said Mrs. J. A. Moyes, her heirs, executors, administrators and assigns on or before the fifteenth day of December, 1896, completed as aforesaid, with all lien claims arising from contracts made directly or indirectly by said Kimball, fully discharged, legally waived or good and sufficient indemnity therefor given said Moyes, then this obligation shall be void; otherwise shall remain in full force."

The other two cases are bills in equity to enforce liens for materials furnished to Kimball and used in the construction of the house mentioned in the bond. The plaintiffs in the bills in equity are sureties on the bond, and are defendants in the action at law brought by Mrs. Moyes on the bond. The actions are reported together, with the stipulation that if Fitzgerald and Brooks cannot maintain their liens, decrees shall be entered accordingly in the equity suits, and judgment shall be entered for the plaintiff in the suit on the bond for the sum of $214.79 with interest; otherwise judgment shall be for the plaintiff in the bond case for the amount of the three lien claims with costs thereon, less a specified amount due from the plaintiff on the contract; and decrees shall be entered accordingly in the equity suits.

The vital question is whether the plaintiffs in the bills in equity can enforce liens upon the property of Mrs. Moyes, under the circumstances of this case. The contractor, Kimball, by his bond, agreed with the owner, Moyes, to turn the building over to her "with all lien claims arising from contracts made directly or indirectly by said Kimball fully discharged, legally waived, or good and sufficient indemnity therefor given said Moyes." The plaintiffs in the lien suits as sureties of Kimball have also contracted with Mrs. Moyes that Kimball shall turn over the building free from liens. Having contracted that the building shall be turned

over free from liens, can they themselves enforce liens against it, in spite of their contract? This is the question.

It is suggested that the contract in the bond is not that there shall be no liens, but that all liens shall be discharged, or waived, or indemnified against, and that therefore the sureties were not estopped from creating liens, but were only bound to see them discharged. We do not, however, perceive that this distinction aids in the solution of the problem. If it should be held that one who has contracted that there shall be no liens is himself barred from enforcing one, so likewise ought one to be, who has contracted that all liens shall be discharged, waived or indemnified. For, in the one case as in the other, the object of the contract is that the owner shall receive the building from the contractor free from any burden or incumbrance in the nature of liens. Liens unless enforceable are harmless and useless. Of what avail is it to a surety in this case that he may create a lien if he cannot enforce it? So if it be said that the language of the condition in the bond contemplates that liens may be created, and only requires the sureties to discharge them, it does not necessarily follow that it also contemplates that the sureties themselves may create liens. A lien is created by force of law and may exist for the benefit of others than the sureties. The question still remains whether a surety who has agreed that liens shall be discharged may nevertheless enforce one. These lienors agreed that the liens should be discharged, waived, or indemnified against. Instead of discharging or waiving, or indemnifying, they are seeking to enforce, which is precisely the thing that they contracted should not be done. We see no good reason why the doctrine of estoppel is not as applicable in these cases as it would be if these sureties had contracted against the creation of liens.

It is also suggested that this is virtually a contest between two sets of sureties, those who seek to enforce liens, and those who have none, and that although it would be inequitable to enforce these liens to the injury of the owner of the building, and in violation of the condition of the bond given to her, still in this case, the sureties are all parties in court, and it is not inequitable to

require the sureties who have no liens to contribute to those who have. The rights of the sureties as to contribution, depend upon what are the implied relations among themselves. There is generally the implied contract between sureties that those who do not pay directly on the principal's account shall contribute to those who are compelled to pay. But what in this case would any surety be compelled to pay? If the lien of one of the sureties is valid and enforceable, then any one of them can be compelled to pay, and the others to contribute to him. If not enforceable, there is no liabibity to pay in the first instance, and hence, it would seem, no implied contract to contribute. The implied liability to contribute depends upon the nature of the principal contract. If between the obligee and the sureties no lien can be enforced, if there is no valid lien, then between the sureties themselves, how can there be any liability to contribute? Are not all rights, both of principal and sureties, to be determined by the construction of the conditions in the bond? The contract which was implied can not be broader than the one which was expressed. It would be a singular result if a surety should be estopped to enforce a lien as against the obligee of the bond on the ground that it would be in violation of his contract, and at the same time be enabled to compel contribution from a co-surety, so as to secure the benefits of the same lien, created, if at all, in violation of the same contract.

The sureties who seek to enforce liens cite *German Lutheran Church* v. *Wehr*, 44 Md. 453; *Atlantic Coast Brewing Co.* v. *Donnelly*, 59 N. J. Law, 48, and *Atlantic Coast Brewing Co* v. *Clement*, 59 N. J. Law, 438.

In the Maryland case, the surety on the bond having furnished materials for the building, filed a bill in equity to enforce a lien therefor. The bond was set up as a bar in answer to the bill. The claimants in reply said that there had been extensive changes and additions in the performance of the contract, increasing the liability of the sureties, whereby the sureties had become discharged. The court said: "It would be against equity and justice to allow the claimants to proceed with the enforcement of

their lien, even to the sale of the church, regardless and in the face of their bond that no such lien should exist. There is no reason or justice in requiring the church to pay off the lien, or allow the church edifice to be sold for its payment, and then be compelled to sue on the bond to recover the money back from the same parties receiving it under the lien. A court of equity should rather stay than enforce such a proceeding." But the court also held that the bills should be retained, to give the church a reasonable opportunity to bring an action on the bond, to have tried and determined the questions whether the sureties on the bond had been discharged as contended by them, and if not, to what extent they were liable for the default of their principals, the contractors. The court said: "If the sureties are discharged, then the lien can be enforced. But if it be determined otherwise, and there should be a recovery on the bond, that judgment may be made a set-off to the claim of the present plaintiffs. Such application of the doctrine of set-off or compensation is well established in courts in equity, and the ordinary principles of justice would require it in this case." It seems to be assumed (though the question is not discussed) that a surety on a contractor's indemnifying bond is not estopped from setting up a lien. But the doctrine of equitable set-off was invoked to prevent the surety from enforcing his lien against the building. And this doctrine was invoked for the benefit of the owner, and not for the benefit of the lienor. The bill by the surety to enforce his lien was retained so that the owner could get judgment against the surety, and then set off the judgment against the lien—a fruitless enforcement of the lien. It will be observed that the logic of this decision is to the effect that a surety's lien will not be enforced against the equities of the owner of the building.

The two New Jersey cases (in reality but one case at two different stages) follow the Maryland case, and go further. They sustain the right of the surety to maintain an action expressly on the ground that otherwise he would lose the power to enforce contribution from co-sureties.

We can perceive no other practical reason for sustaining these

bills, than to permit these sureties to lay the foundation for a supposed right of contribution from their co-sureties, which we have already discussed. By the doctrine of equitable set-off, it is clear that the full amount of the sureties' liens would have to be set off against the judgment on the bond; otherwise the result would be inequitable to Mrs. Moyes, the obligee. For if less than the full amount of the liens be set off, her property would be holden for the balance, in spite of the sureties' agreement that the building should be turned over free from liens. Thus, it is clear that the sureties would gain nothing by their suits. So, even if it were conceded that co-sureties are liable to contribute, we have no power to compel contribution in these proceedings. In the common law action on the bond, we can only render judgment at law. In the bills in equity, the co-sureties are not parties. In no aspect of the case, can we now adjust the equities among the sureties.

But dismissing these considerations as argumentative rather than decisive, we prefer to rest our decision upon the broader ground that the sureties should be held to do precisely what they agreed to do, and that having agreed that the building should be turned over to the owner free from liens, they are estopped from enforcing any. This would seem to be good law on general principles, without the citation of authorities. But we find the same view has been entertained by other courts. In a similar case in Pennsylvania, it was said, "If the plaintiff can recover upon a mechanic's lien against this building, the condition of the bond would be violated, and he would thereupon become bound upon a breach of condition to reimburse to the defendant whatever the defendant was obliged to pay him as a mechanic's lien creditor. He voluntarily made himself surety for the original contractors that he would indemnify the defendant against all charges, claims, liens, mechanic's liens, or any incumbrance or debt in the nature of a lien or charge, of any kind whatsoever. This is not a mere undertaking not to file a lien, but a contract by this particular plaintiff that the building shall be delivered to the defendant free of all charges, claims, liens. . . . . To perform this contract, there

must be no debt, charge or lien of any kind at the time of delivery. How then can the plaintiff have a lien himself without being bound to remove it just as much as if it were held by a stranger? But if he is bound to remove it, he certainly cannot be permitted to enforce it. . . . . When the necessary legal effect of his contract as a surety is that he would be bound to discharge a lien in his own favor the moment it was obtained, he must be held to have waived all right to file such a lien." *Rynd* v. *Pittsburg Natatorium*, 173 Pa. St. 237. Again, "It is inconsistent that one who guarantees that there shall be no lawful claim for work or materials furnished to the original contractor shall himself be permitted to occupy such a position. He cannot be permitted to recover without violating his contract of suretyship." *Gannon Exr.* v. *Central Presbyterian Church*, 173 Pa. St. 242. So in Washington. "It is clear to us," the court said, "from the face of the bond that it was the intention of all parties thereto that the owner of the building should thereby be secured from the enforcement of any liens against the property, or from being held liable on any account growing out of the contract with Jordan. This appearing from the face of the bond, it must be presumed that the sureties intended to bind themselves to that end when they signed it, and the respondent Morse having been one of the sureties, he could not in the face of this agreement to protect against liens under the contract, file and enforce one himself. *Morse* v. *Mansfield*, 10 Wash. 373.

"It would be inequitable to allow a person to enter into a solemn agreement to protect another from certain contingencies, and thereafter, and while such agreement was in full force, to himself seek to enforce the special liability which he had obligated himself to protect against." *Spears* v. *Lawrence*, 10 Wash. 368.

We think the reasoning in these cases is sound. We think it must be held that all the parties to the bond, principal and sureties, intended what they said, that no liens should be enforced against the building. The sureties expressly so agreed with the owner, and such, we think, was their implied contract inter sese.

In accordance with the stipulations in the report, the entries will be,

In Moyes v. Kimball et als.,

Judgment for plaintiff for $214.79, with interest.

In Fitzgerald, in Eq., v. Kimball et als.,

Bill dismissed.

In Brooks, in Eq., v. Kimball et als.,

Bill dismissed.

JUDSON WILCOX *vs.* CARL C. CHEVIOTT.

Aroostook. Opinion December 6, 1898.

Mortgage. Redemption. Law and Equity. Rents and Profits. Tender. Voluntary Payment. Mass. Stat. 1818, c. 98, § 3; Laws 1821, c. 180, § 2; R. S., c. 90, §§ 2, 22; Constitution of Maine, Art. X, § 1.

The plaintiff purchased a farm subject to an existing mortgage. The mortgagee subsequently commenced proceedings for foreclosure by peaceable entry. He retained possession and took the rents and profits. Afterwards he sold and assigned the mortgage to a third party. Upon redemption, the assignee refused to make any allowance for rents and profits received by the mortgagee, and the plaintiff paid the assignee the full amount of the mortgage debt, interest, taxes and costs, without deduction. *Held;* that the plaintiff cannot maintain an action at law against the mortgagee for the rents and profits received by him.

At common law, the right to an accounting is cognizable only in equity, and when the mortgage is extinguished by redemption, the right to an account dies with it.

Revised Statutes, c. 90, § 22, affords a remedy only against the person to whom a tender has been made and who has received the money.

In this case upon the evidence, *it is held;* that the payment was voluntary and for that reason cannot be recovered back. Also assuming that it were otherwise and that an action would lie, it would lie against the assignee rather than against the defendant.

Massachusetts statute 1818, c. 98, § 3, is not in force in this State. Being "within the purview" of the Maine statute 1821, c. 39, § 6, it was repealed by the statute 1821, c. 180, § 2.

ON REPORT.

Action on account for rents and profits under foreclosure of mortgage. The jury returned a verdict of $75 by agreement for the plaintiff, subject to the opinion of the court as to whether the action is maintainable. Thereupon the parties agreed to report the case to the law court. They stipulated "that if the law court shall be of the opinion that the action is not maintainable, the verdict for plaintiff is to be set aside and judgment rendered for defendant; otherwise the verdict for plaintiff is to stand."

The case appears in the opinion.

L. C. Stearns and W. B. Hall, for plaintiff.

The defendant Cheviott has in his hands $75 that belong justly to the plaintiff; money that he cannot hold in equity and good conscience; and there ought to be, and is, power in the court, sitting on the common law side, to compel him to pay it back. *Wiseman* v. *Lyman*, 7 Mass. 288; *Arms* v. *Ashley*, 4 Pick. 71; *Moore* v. *Marshall*, 76 Maine, 168; *Brady* v. *Harvath*, 64 Ill. App. 254.

It would be an exceeding hardship to compel the mortgagor seeking redemption to resort to a suit in equity and remain out of possession of his home perhaps for a period of years while his suit dragged along its slow length through the court.

An action at law may be maintained under the laws of Maine. By a statute of Mass. 1818, c. 98, § 3, it is provided that if a mortgagor overpay the debt secured by the mortgage, by rents and profits or in any other manner, he shall be entitled to recover such excess in an action for money had and received. This statute still subsists in Mass. (Vide c. 181, § 43, Public Statutes of Mass.) By our Constitution, Article X, Section 1: "All laws now in force in this State, and not repugnant to this Constitution, shall remain and be in force, until altered or repealed by the Legislature, or shall expire by their own limitation." The laws of 1821, c. 180, called the "Repealing Act," do not repeal this statute of the Commonwealth of Mass. nor are we able to find that it has been subsequently repealed. Nor is it in any way inconsistent with the provision of our statutes, § 61 of ch. 81, giving the mort-

gagor a remedy by a bill in equity, but it rather affords a concurrent remedy. If concurrent actions are found desirable in Mass. what reason can be perceived why they should not be allowed here? It should seem that the cases of *Nugent* v. *Riley*, 1 Met. 117; *Wood* v. *Felton*, 9 Pick. 171; *Cazenove* v. *Cutler*, 4 Met. 246, are decisive of plaintiff's rights.

This action of money had and received, may be maintained if the defendant has made himself legally liable for the amount claimed, although he has in fact received no money. *Floyd* v. *Day*, 3 Mass. 403; *Randall* v. *Rich*, 11 Mass. 494; *Emerson* v. *Baylies*, 19 Pick. 55; *Appleton* v. *Bancroft*, 10 Met. 237.

Geo. H. Smith, for defendant.

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

SAVAGE, J. This case comes up on report of the evidence. A verdict for the plaintiff was taken, by consent, with the stipulation that "if the law court shall be of opinion that the action is not maintainable, the verdict is to be set aside and judgment rendered for the defendant; otherwise the verdict is to stand."

From the report we gather the following facts: January 7, 1895, the plaintiff purchased of one Babkirk a farm and woodland, subject to a mortgage previously given by Babkirk to the defendant, to secure the payment of $500, according to the tenor of certain promissory notes. May 13, 1896, the notes being overdue and unpaid, the defendant commenced foreclosure of the mortgage by peaceable entry, in accordance with the statute. The defendant remained in possession of the mortgaged premises, receiving the rents and profits, from that time until December 21, 1896, when he sold and assigned the mortgage and notes to William C. Spaulding. April 1, 1897, the plaintiff gave the defendant written notice to acccount to him for the rents and profits of the farm while in his possession. The defendant told him that Spaulding then owned the mortgage, and that he (the defendant) had nothing to do with it. The plaintiff afterwards, having still the right

to redeem, gave Spaulding a like notice. Spaulding refused to account for rents and profits, and required payment of the mortgage notes in full. Thereupon, May 1, 1897, the plaintiff paid Spaulding the full amount of the mortgage notes, interest, taxes and costs of foreclosure, no deduction being made for rents and profits. The plaintiff now brings this action at law to recover the rents and profits of the farm while in defendant's possession.

We think the action cannot be maintained. It is well settled that a mortgagor's remedy for the redemption of real estate lies only in a court of equity. *Pearce* v. *Savage*, 45 Maine, 90; *Cole* v. *Edgerly*, 48 Maine, 108; *Randall* v. *Bradley*, 65 Maine, 43. In jurisdictions where the doctrine prevails, as in this state, that the mortgage conveys the legal title (*Gilman* v. *Wills*, 66 Maine, 275), the right of the mortgagor to an account of the rents and profits received by the mortgagee is purely and exclusively of equitable cognizance. At law the mortgagee cannot be made to account. 2 Jones on Mortgages, § 1115. He is the legal owner of the estate, and takes the rents and profits in that character. Unless the premises are redeemed, he is not bound to account for them in any proceeding. *Portland Bank* v. *Fox*, 19 Maine, 99. The mortgagor has a right of redemption only in equity, and the right to an account is incident only to this. Jones, supra; *Seaver* v. *Durant*, 39 Vt. 103. Therefore, upon redemption, when the mortgage is extinguished, the incident of the right to an account dies with it. Accounting cannot afterwards be enforced either at law or in equity. In a bill to redeem, a mortgagor has ample remedy to enforce accounting, and even to compel the mortgagee to refund, if there has been overpayment. *Farwell* v. *Sturdivant*, 37 Maine, 308.

Such are the rules of the common law, and they have not been modified by our statutes, so as to affect this case. Revised Statutes, c. 90, § 2, recognizes the mortgagor's equitable right to an accounting for rents and profits received by the mortgagee in possession, in case, and only in case, the mortgage is redeemed; and provides that "they shall be deducted from the sum due on the mortgage," not that they shall be recoverable from the mortgagee after

redemption. In section 22 of the same chapter, it is further provided that when money is brought into court in a suit for redemption, the court may deduct "therefrom the rents and profits with which the mortgage is chargeable." In the same section also is the provision that "the person to whom money is tendered to redeem such lands, if he shall receive a larger sum than he is entitled to retain, shall refund the excess." And under this special provision, it has been held that an action at law will lie. *Bragg* v. *Pierce*, 53 Maine, 65. But this will not aid the plaintiff in this case, because if otherwise applicable, this statute only affords a remedy against the person to whom a tender has been made, and who has received the money. No tender has been made to the defendant. He received no money from the plaintiff.

Other than this particular paragraph in section 22, all the statute provisions seem to contemplate equitable proceedings in compelling an accounting and the deduction of rents and profits from the sum due on the mortgage. The implication is that the deduction must be made at redemption, not afterwards.

The only cases we have been able to find where actions at law for rents and profits, or for overpayments, were sustained are those which were permitted by special statutes; *Bragg* v. *Pierce*, supra; *Wood* v. *Felton*, 9 Pick. 171; or where the overpayments were made under such circumstances of compulsion as to amount to duress in law. *Close* v. *Phipps*, 7 Man. & Granger, 586.

But even were the doctrine otherwise than as we have stated, there are other reasons why this action cannot be sustained. So far as the evidence shows, the payment made by the plaintiff was voluntary. The plaintiff asked for an accounting. Spaulding refused to account. The plaintiff seems to have chosen to pay rather than resort to the enforcement of his equitable rights. He was under no compulsion to do so. The equitable remedy was ample, and the time was ample within which to invoke it. Spaulding having refused to account, the plaintiff was excused from even making a tender, and could have maintained a bill to redeem without embarrassment on that score. *Roby* v. *Skinner*, 34 Maine, 270. But, on the contrary, he settled; he paid. The principle of volun-

tary payments applies. They cannot be recovered back. *Rawson* v. *Porter*, 9 Maine, 119; *Smith* v. *Readfield*, 27 Maine, 145; *Gooding* v. *Morgan*, 37 Maine, 419. The result is the same whether this action for money had and received be regarded as a suit to recover rents and profits as such, or to recover back a payment of more than was due. In substance it is the same thing.

Again. If any action could lie, it would lie against Spaulding, rather than against this defendant. When the defendant assigned the notes and mortgage to Spaulding, he assigned only what was equitably due upon them. That was all he had to assign. It was all he could assign. Spaulding took the mortgage and notes subject to an accounting for, and a deduction of, rents and profits, in case of redemption; and if any one should be held to account, it is Spaulding, who received the full amount due, without any deduction.

But notwithstanding all that has been said, the plaintiff insists that he is entitled to maintain this action by virtue of the plain provisions of a statute of Massachusetts, passed in 1818, c. 98, § 3, which he claims has never been repealed, and has always been, and now is, a part of the law of this State, though not found in any of our statute books. The Massachusetts statute in substance provided that if a mortgagor overpay the debt secured by the mortgage, by rents and profits or in any other manner, he may recover the excess in an action for money had and received. The plaintiff's position is this: This statute was in force at the time of the Act of Separation. By that Act, section 6, and by the Constitution, Art X, section 1, it was provided that "all laws now in force in this state . . . . shall remain and be in force, until altered or repealed by the Legislature." So the plaintiff properly concludes that the statute in question is now in force here, unless it has been repealed. Has it been repealed either in terms or by implication? We think it has. Chapter 180 of the Laws of 1821, called the "Repealing Act," and entitled "An Act repealing certain statutes therein named," does not in terms name the Massachusetts statute upon which the plaintiff relies. Section 1 repealed many acts named by title, but not this one. Section 2 enacted that "all

other acts and parts of acts passed by the Legislature of Massachusetts, and adopted by the Constitution of this State, the titles whereof are not particularly set forth in the first section of this act be, and the same are as respects this state, hereby repealed, so far as the same come within the purview of, or are inconsistent with any of the acts passed by this Legislature at the present session thereof." We think the Massachusetts act did come "within the purview" of chapter 39, passed by the same Legislature at the same session, entitled "An act respecting Mortgages, and the Rights in Equity of Redemption." That chapter in general provides a remedy for redemption by bill in equity, provides for an accounting, for a deduction of rents and profits from the sum due on a mortgage; and, in section 6, makes specific provision for the recovery of the excess, in case of overpayment. This certainly embraces the subject matter of the Massachusetts statute. The provisions are not identical, but that is not necessary. They are so closely analogous as to leave no doubt that the one is "within the purview" of the other. Hence, the Massachusetts statute was repealed by section 2 of chapter 180 of the Laws of 1821.

In accordance with the stipulations, the entry must be,

Verdict set aside. Judgment for the defendant.

ARTHUR C. FERGUSON *vs.* WINFIELD GARDNER, Applt.

Cumberland. Opinion December 9, 1898.

Writ. Indorser. R. S., c. 81, § 6; Stat. 1897, c. 254.

Revised Statutes, c. 81, § 6, as amended by c. 254 of the laws of 1897, provides that all writs entered in court, in which the plaintiff is a non-resident of the state, must be indorsed, or other security for costs furnished, if the defendant, at the first term, shall move therefor.

A voluntary indorsement of the writ, by a sufficient person, before entry, is a substantial and effective compliance with the statute. After such indorsement, it is not error for the court to refuse to order another indorser on motion of defendant.

An indorsement, on the back of the writ, under the printed words "from the the office of" is a good indorsement.

AGREED STATEMENT.

Appeal from the Municipal Court of Portland to the Superior Court, for Cumberland County, where the parties made the following agreed statement:

"It is agreed that the plaintiff is a non-resident of Maine, the defendant a resident of Portland, Maine.

"On the writ following the words 'from the office of' is the signature of 'James A. Connellan' who is an attorney at law in Portland. On the return day of the writ before the judge of the Municipal Court, Portland, the defendant, through his attorney, filed a motion in that court that the writ be indorsed by a sufficient inhabitant of the State, or security for costs furnished by deposit in court, claiming that there was no indorser for costs. The judge overruled the motion and decided that no other indorser was required, the attorney signing as aforesaid being sufficient as indorser.

"The case was brought by appeal duly taken to the Superior Court for Cumberland County.

"The question of the financial sufficiency of the plaintiff's attorney as indorser is not raised. No question is raised as to the form of motion filed. On the above statement the opinion of the law court is requested as to whether the attorney signing as aforesaid is sufficient as indorser for costs, in accordance with §§ 6 and 8 of chapter 81 of the Revised Statutes as amended by chapter 254 of the Laws of 1897."

James A. Connellan and Levi Turner, for plaintiff.

Charles J. Nichols, for defendant.

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

STROUT, J. The plaintiff, a non-resident of Maine, brought this action in the Municipal Court of Portland. On the back of the writ were the words, "from the office of," and under them the

signature of James A. Connellan, an attorney-at-law and a resident of Portland. The question is whether the writ was sufficiently indorsed, no question being made as to the financial responsibility of Connellan. Revised Statutes, c. 81, § 6, provides that all writs "before entry in court" shall be indorsed by some sufficient inhabitant of the State, when the plaintiff was a non-resident. If this was not done, the plaintiff has no standing in court and the action will be dismissed. Under this statute it has been held by this court that an indorsement like this was a compliance with the statute. *Stone* v. *McLanathan*, 39 Maine, 131; *Bennett* v. *Holmes*, 79 Maine, 51; and that the effect of such indorsement could not be defeated by other evidence, that such indorsement was not intended to create the statute liability. *Richards* v. *McKenney*, 43 Maine, 177.

It sometimes happened that through inadvertence such writs were not indorsed before entry, and a hardship resulted to the plaintiff. To remedy this, the legislature in 1897, c. 254, amended the provision in the revised statutes, and by that amendment provided that upon motion at the first term, the writ should be indorsed, or other security for costs furnished. Under this amendment an action may be entered without indorsement of the writ, but the defendant, if he desires security for costs, may obtain it on motion at the first term. No reason is perceived, why, under this statute, the plaintiff may not voluntarily do what he can be compelled to do. He need not wait for motion by defendant. He may do this before or after entry. In either case, the defendant is protected, as well as if it was done upon his motion. The object of the statute is to afford protection for costs; and it cannot be material, nor operate to the injury of defendant, if that security is voluntarily furnished by plaintiff at any time before the defendant asks it. The statute as amended does not in terms nor by implication forbid it. The ruling of the Municipal judge, that the indorsement is sufficient, was correct.

Motion for indorser denied.

FRED B. GOODRICH *vs.* ALBERT A. SENATE, and others.

Androscoggin. Opinion December 9, 1898.

Poor Debtor. Bond. Sheriff. Record. R. S., c. 80, § 33; c. 113, § 40.

Revised Statutes, c. 80, § 33, imposes upon a sheriff the duty to keep "a true and exact calendar containing, distinctly and fairly registered, the names of all prisoners committed to the jail under his charge." Such calendar is prima facie evidence of the facts contained therein which the law requires to be entered. But evidence is admissible to show the entries to be erroneous.

A poor debtor, enlarged from arrest upon giving the six months bond, as provided by statute, who seeks to save forfeiture of his bond by surrendering himself into jail, can only do so by actually surrendering himself into the custody of the jailer and being received by him into actual custody.

Notwithstanding the sheriff's calendar may contain an entry of such surrender, the creditor in a suit upon the bond, may be allowed to prove that the entry is erroneous, and that the debtor did not, within the time limited in the bond, in fact surrender himself into custody and was not so received by the jailer.

In this case the presiding justice found, from the evidence introduced, that the debtor in this case "did not actually deliver himself into the custody of the keeper of the jail," within the six months, and ordered judgment for the plaintiff.

Held; that this finding was fully sustained by the evidence, and the order of judgment for plaintiff, in accordance with § 40 of chap. 113, R. S., was correct.

ON EXCEPTIONS BY DEFENDANTS.

This was an action of debt on poor debtor's six months bond. The bond is dated December twenty-first, A. D. 1896.

The six months named therein expired at midnight June twenty-first, A. D. 1897. The execution of said bond was admitted.

The defense was performance of one of the conditions of said bond, i. e., the surrender of the debtor into the custody of the keeper of the jail to which he was liable to be committed within the six months named therein, to wit, on June twenty-first, A. D. 1897; and the defendants offered the records of the keeper of the jail to prove said surrender.

The following is a copy of said record:

Names.	Place of abode.	When committed.
A. A. Senate.	Auburn.	Dec. 21st., 1896.
Sentence.	By what authority.	
Safe keeping.	Execution from Municipal Court, Lewiston. Geo. E. Huskins, officer.	
What cause.	When discharged.	
Debt.	Dec. 21st, 1896. Gave six months bond and discharged. On June 21st, 1897, said A. A. Senate delivered himself up in satisfaction of said six months bond and was received into my custody. Benjamin J. Hill, Sheriff.	

Said Benjamin J. Hill was the keeper of the jail at the time of the alleged surrender.

The plaintiff offered testimony to contradict and vary said record, to the admission of which testimony the defendant seasonably objected, claiming that the record was conclusive of the fact stated therein.

The presiding justice notwithstanding said objection admitted the testimony of Benjamin J. Hill, keeper of said jail, and also the testimony of the defendant A. A. Senate; and upon said testimony and upon all the evidence in the case, the presiding justice found, as a matter of fact, that the said Senate did not actually deliver himself into the custody of the keeper of said jail before the expiration of the six months named in his said bond, and was not received, within said time, into the actual custody of the keeper of said jail, either in his dwelling-house or in said jail.

To the admission of said testimony the defendants excepted.

The writ is dated June 24th, 1897, and was entered at the July term, A. D. 1897, of the Lewiston Municipal Court and cause appealed to this court. Ad damnum $50.

The presiding justice ordered judgment in this court for plaintiff in accordance with section 40, chap. 113, R. S.

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

J. A. Pulsifer, for defendants.

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

STROUT, J. Action upon a poor debtor's six months bond given by the debtor Senate. Defense, performance of one of the conditions of the bond by surrender to jail within the six months.

Revised Statutes, c. 80, § 33, imposes upon a sheriff the duty to keep "a true and exact calendar containing, distinctly and fairly registered, the names of all prisoners committed to the jail under his charge." In this case the sheriff's calendar contained the entry: "On June 21st, 1897, said A. A. Senate delivered himself up in satisfaction of said six months bond and was received into my custody." This entry was signed by the sheriff. A former entry showed that Senate had been committed on December 21st, 1896, and was released on giving the six months statute bond. Evidence was allowed to be introduced to contradict the entry upon the calendar, and to show that in fact Senate did not surrender himself into the custody of the sheriff or jailer, and was not in fact received into custody on the 21st day of June. The six months limited in the bond expired at midnight of June 21st. Exception is taken to the admission of this testimony. It is claimed by the defendants that the entry upon the calendar is an official record, which cannot be contradicted or varied by parol evidence, and is conclusive upon these parties, and that if in fact untrue, the only remedy is by suit against the sheriff.

Records of judicial tribunals, as to parties affected, are conclusive as to all matters contained therein, of which the law requires a record. If erreonous, they may be corrected by the court, or the proper officer under its order, but until so amended they are treated as verities, and cannot be contradicted or varied by parol testimony. *Willard* v. *Whitney*, 49 Maine, 235.

But there is another class of entries, sometimes called records, which are of a public nature, and required by law to be kept by various non-judicial officers, which are of a less solemn character, and are not accorded the conclusiveness attaching to judgments of courts of record. They are competent evidence of the facts

recorded, and required by law to be recorded, but not conclusive. To this class belong the records of births and marriages kept by clerks of towns. *Sumner* v. *Sebec*, 3 Maine, 223; the record kept by a person employed in the signal service of the United States, whose public duty it is to record truly the facts therein stated; *Evanston* v. *Gunn*, 99 U. S. 660; calendar of prisoners kept by a jailer; *Sandy White* v. *United States*, 164 U. S. 104; Greenleaf on Evidence, Vol. 1, § 484; and many others of like character. They are all prima facie evidence of the facts stated, of which the law required a record, but only that. *Lewis* v. *Marshall*, 5 Peters, 476; *Commonwealth* v. *Chase*, 6 Cush. 248.

The calendar kept by the sheriff in this case, though required by law, was in the nature of memoranda or history of current events in the jail, but did not rise to the dignity of a judicial record. It was prima facie evidence of the facts recited, but may be overcome by evidence which shows it to be erroneous. Such evidence was properly admitted.

Upon the evidence introduced the presiding justice found as a fact, that Senate, the principal in the bond "did not actually deliver himself into the custody of the keeper of said jail before the expiration of the six months named in his bond." This finding is fully sustained by the evidence. Senate testified that on the 21st day of June, the last day of the six months, he went to the sheriff's office for the purpose of delivering himself up; that he did not see the sheriff, but did see his wife, who had no authority in the matter, and that she told him to call again; that he asked her to "notify the major [the sheriff] that Senate had come to deliver himself up"; that he went up again that night and was told to come in the morning.

Nothing more was done within the six months. He did not in fact deliver himself to the sheriff, or any deputy of his, and was not received into custody. Clearly the condition in the bond was not performed on that day. *Jones* v. *Emerson*, 71 Maine, 405.

Judgment for the plaintiff was properly ordered.

Exceptions overruled.

SAMUEL B. SAWYER, Petitioner,

vs.

JOSIAH CHASE, Exor., and others.

York. Opinion December 9, 1898.

Probate. Appeal. Exceptions. R. S., c. 63, § 25.

A petition for leave to enter an appeal from a decree of the judge of probate, on the ground that an appeal was not taken within the time limited therefor by statute, from "accident, mistake, defect of notice or otherwise, without fault" of petitioner, is addressed to the discretion of the presiding justice. His decision is final and not subject to exception.

ON EXCEPTIONS BY PETITIONER.

Petition for leave to enter an appeal from the decision of the judge of probate, York county.

By the direction of the presiding justice the petitioner, in the first instance, offered evidence to show that from accident, mistake, defect of notice or otherwise, without fault upon his part, he had omitted to claim or prosecute his appeal: at the conclusion of the testimony for the petitioner upon that point, and without evidence relating to the execution on the validity of the instrument, the presiding justice ruled that the petitioner had not shown due diligence in the prosecution of his rights, and that upon his own testimony it did not appear that from accident, mistake, defect of notice or otherwise, without fault upon his part he had omitted to appear and prosecute his appeal and ordered the petition to be dismissed.

To this ruling the petitioner excepted.

Lewis F. Johnson, Geo. F. and Leroy Haley, for petitioner.

This case differs materially from that of *Marston et al., Petitioners*, 79 Maine, 25. In that case the petitioners actually knew there was a will, although they did not know its precise terms. That will was read by the executor who wrote it to the resident heirs and twice to the petitoner's agent. There was no fraud prac-

ticed upon the petitioners to prevent them from contesting the probate of Abner Coburn's will.

Edgerly and Mathews, of the N. H. bar, for defendants.

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

STROUT, J. This is a petition for leave to enter an appeal from the decree of the judge of probate, allowing the will of Adaline Freeman. The decree of the probate court was made on the fourth day of May, 1897. No appeal was taken within twenty days thereafter, as provided in the statute. This petition bears date November 3, 1897. The statute provides that if from "accident, mistake, defect of notice or otherwise, without fault on his part", the party having a right of appeal, "omits to claim or prosecute his appeal, the Supreme Court, if justice requires a revision", may allow an appeal to be entered. R. S., c. 63, § 25. The petitioner invokes this provision of the statute. Upon a hearing on the petition, the presiding justice decided that the petitioner "had not shown due diligence in the prosecution of his rights, and that upon his own testimony it did not appear that from accident, mistake, defect of notice or otherwise, without fault upon his part, he had omitted to appear and prosecute his appeal, and ordered the petition to be dismissed." Exception is taken to the ruling.

The petition was addressed to the judicial discretion of the presiding justice. He found the facts adverse to the petitioner. That finding is conclusive. *Kneeland* v. *Webb*, 68 Maine, 540; *Reed* v. *Reed*, 70 Maine, 504. The order of dismissal followed as a necessary sequence to the facts found. But waiving this, it is the opinion of the court that exceptions do not lie to the refusal to grant the petition; that the judicial discretion of the justice hearing the cause, when exercised, is final. It was held in *Manning* v. *Devereux*, 81 Maine, 562, that a petition praying that a decree appointing an administrator be annulled, on the ground that at the time of the decree the person on whose estate administration had been

granted was not dead, the decision of the presiding justice was final. So the granting or refusing to grant a new trial, by a single justice, is not subject to exception. *Moulton* v. *Jose*, 25 Maine, 76. So exceptions do not lie to a refusal of a judge to grant a review. *York & C. R. R.* v. *Clark*, 45 Maine, 151; *Scruton* v. *Moulton*, 45 Maine, 417; nor to the exercise of the judge's discretion in framing issues to a jury in a probate appeal. *Bradstreet* v. *Bradstreet*, 64 Maine, 204. Many other analagous cases can be cited, but it is unnecessary.

The exceptions were improvidently allowed and must be dismissed. If the cause were properly here, it may be added that the evidence fully sustains the finding of the presiding justice, and justifies the ruling.

Exceptions dismissed, as improvidently allowed.

JOSEPH DELCOURT, scire facias,

vs.

JAMES WHITEHOUSE AND PETER E. MULLANEY.

Androscoggin. Opinion December 9, 1898.

Pleading. Infancy. Abatement. Demurrer.

If an infant brings suit in his own name, and not by next friend or guardian, and his infancy appears on the face of the writ, the objection is available on general demurrer, if filed within the time allowed for filing pleas in abatement. If it does not so appear, advantage can only be taken by plea in abatement.

The non-joinder of a necessary defendant, not appearing on the face of the writ, cannot be taken advantage of by demurrer. It is matter in abatement.

ON EXCEPTIONS BY DEFENDANT.

M. L. Lizotte, for plaintiff.

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

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

STROUT, J. Scire facias against bail in a civil action; general demurrer to the declaration, which was overruled, and the case is here upon exceptions to that ruling.

Defendant claims that the writ shows plaintiff to be an infant, and that he should sue by next friend. If such was the fact, and it appeared on the face of the writ, the objection would be available on general demurrer if filed within the time allowed for pleas in abatement. But an examination of the writ fails to disclose the fact. It is true that the declaration in reciting the original suit commences, "whereas Joseph Delcourt, etc., etc., who was (not "is") an infant, etc., etc., when this action was sued," "and who sued this action," by next friend and recovered judgment at the January term, 1897. The present action is based upon that judgment, and was sued out months after its rendition, and returnable to the September term, 1897.

The phrase "this action" taken in connection with the rest of the sentence, manifestly refers to the original suit, and not to the action then brought. Omitting the word "this" obviates all uncertainty. It must be ignored to make sensible the recital. In that recital it states that "this" action was brought through a next friend. That is true of the original suit but not of this. Then follow the proceedings upon the judgment and execution in the first suit, and the claim in this suit to recover of the bail in the first suit, for avoidance of the original defendant after judgment in the first suit. The mistake in using the word "this" corrects itself when the whole declaration is read.

Nothing in the declaration demurred to shows that the plaintiff was an infant when the present action was brought. If such were the fact, the objection could have been taken by proper plea in abatement, but it is not reached by the demurrer.

The only other contention of defendant is the alleged non-joinder of a defendant. It is said that the defendant in the original action was a party to the bail bond, and that the bond was joint and sev-

eral, and that two of the obligors cannot be sued jointly, omitting the third. Non-joinder of defendants is matter in abatement. It does not appear by the declaration that the bail bond was signed by any other person than the two defendants. If it did, the objection could be taken by demurrer; but not so appearing, a plea in abatement was the only method of raising the question. *State* v. *Chandler*, 79 Maine, 174.

It follows that the demurrer was rightly overruled, and the entry must be,

Exceptions overruled.

PENOBSCOT LUMBERING ASSOCIATION

vs.

JOHN B. BUSSELL, and others.

Contract. Judgment. Damages. Logs. Negligence. Penob. Boom Corp. Stat. 1832, c. 236, § 5; 1838, c. 468, §§ 4, 5; 1854, c. 299, § 3. Penob. Lumb. Assoc. 1854, c. 298, § 24.

In an action to recover the amount paid to satisfy a judgment rendered against the plaintiff for its failure to exercise reasonable diligence in rafting and delivering certain logs, that the defendants were bound by their contract with the plaintiff to do and perform, it appeared that the defendants were seasonably notified to assume the defense of the suit against the plaintiff, and also required to satisfy the judgment, but they refused so to do.

Held; that if the service due from the defendants under their contract with the plaintiff was the same for the breach of which the plaintiff was held liable in the judgment against it, then the defendants are liable in this action to the plaintiff for the amount so paid by it in satisfaction of that judgment.

An examination of the cause of action that resulted in the judgment against the plaintiff before named shows that it was a failure to raft out the logs with reasonable diligence. *Held;* That the defendants in this action did not, by their contract, assume that duty. While they agreed to raft logs, they did not agree to do it seasonably, but were both to begin and end rafting when the plaintiff's directors should order: and as there is no evidence that tardiness in rafting by the defendants was in violation of the plaintiff's orders, therefore the defendants are not liable in this action.

See *Palmer* v. *Penob. Lumb. Assoc.* 90 Maine, 193.

ON REPORT.

The case is stated in the opinion.

M. Laughlin and C. P. Stetson, for plaintiff.

The plaintiff is entitled to recover, upon the principle stated in *Littleton* v. *Richardson*, 34 N. H. 179, 189, and approved in cases in Maine and Massachusetts. *Davis* v. *Smith*, 79 Maine, 351, 356, 357; *Boston* v. *Worthington*, 10 Gray, 496, 499; *Lowell* v. *Boston & Lowell R.* 23 Pick. 24, 32.

"When one is responsible, by force of law or by contract, for the faithful performance of the duty of another, a judgment against that other for a failure of such duty, if not collusive, is prima facie evidence, in a suit against the party so responsible for that other. If it can be made to appear that such judgment was obtained by fraud or collusion, it will be wholly set aside. But otherwise it is prima facie evidence, to stand until impeached or controlled, in whole or in part, by countervailing proofs." *Lowell* v. *Parker*, 10 Met. 312, 315; *Veazie* v. *Penobscot R. Co.* 49 Maine, 119, 125; *Portland* v. *Richardson*, 54 Maine, 46, 48; *Grand Trunk R. R.* v. *Latham*, 63 Maine, 177.

If there is any parol evidence to show that the judgment in *Palmer* v. *Penobscot Lumbering Association*, is not conclusive upon defendants, the burden is on defendants of proving defense. *Bridgeport Ins. Co.* v. *Wilson*, 34 N. Y. 280, 281.

P. H. Gillin; C. F. Woodard; F. H. Appleton and H. R. Chaplin, for defendants.

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

HASKELL, J. This is an action of assumpsit to recover the amount paid in satisfaction of a judgment against the plaintiff for the failure to exercise reasonable diligence in rafting and delivering certain logs that defendants were bound to do and perform. The defendants were seasonably notified to defend the suit against the plaintiff, and required to satisfy the judgment therein, which they refused to do.

The defendants were contractors to perform certain service

required of the plaintiff, by its charter and lease from the Penobscot Boom Corporation; and if that service was to be the same for the breach of which the plaintiff was held liable in the judgment against it, the defendants are liable to the plaintiff for the amount paid in satisfaction of that judgment. In other words, if the breach of duty on the plaintiff, that is the foundation of the judgment against it, was the same duty that the defendants had agreed with the plaintiff to perform, then they are required to save the plaintiff harmless therefrom by paying the damages suffered thereby.

The law is stated in *Davis* v. *Smith*, 79 Maine, 356, "When a person is responsible over to another, either by operation of law or by express contract, and notice has been given him of the pendency of the suit, and he has been requested to take upon himself the defense of it, he is no longer regarded as a stranger to the judgment that may be recovered, because he has the right to appear and defend the action, equally as if he were a party to the record. When notice is thus given, the judgment, if obtained without fraud or collusion, will be conclusive against him, whether he has appeared or not. *Veazie* v. *Penobscot R. R. Co.*, 49 Maine, 124; *Hardy* v. *Nelson*, 27 Maine, 530; *Boston* v. *Worthington*, 10 Gray, 498; *Littleton* v. *Richardson*, 34 N. H. 187."

The question in this case, therefore, is whether defendants' breach of contractual duty was the cause of action, that gave judgment against the plaintiff. Are they identical? If not, it would be manifestly unjust to hold the defendants responsible for any part of damages recovered, not arising from the defendants' fault.

Let us look at the cause of action that resulted in judgment against the plaintiff. It is plainly stated in a special verdict of the jury contained in the record, viz., failure "to exercise reasonable diligence in rafting and delivering" logs. The meaning and scope of the verdict, however, must be determined by the cause of action stated in the declaration, upon which the verdict rests. That cause of action is stated to be:

I. Neglect to seasonably raft out logs, and neglect to raft them

out separately from the logs of others, but negligently suffering them to escape and go down river so that they were lost.

II. Neglect to raft the logs of different marks belonging to several owners separately, causing expense in separation.

III. Neglect in not seasonably rafting out logs, causing loss by a falling market.

The only cause of action stated in the declaration was negligence in rafting out logs, and the verdict, following the general issue of not guilty, determined that issue for the plaintiff therein, and assessed damages therefor in the sum of $2899.02. A special finding, however, limited the damages to failure "to exercise reasonable diligence in rafting and delivering" logs. The words "rafting and delivering," however, taken in connection with the statements in the declaration, plainly enough mean rafting, or rafting out; nothing more; nothing less. They are used in the conjunctive and as having the same significance and meaning.

The damages awarded against the plaintiff were for failure to raft logs, and it is essential to know what that duty is in order to determine whether it was assumed by the defendants, and for this the charters in evidence must speak.

The charter of plaintiff's lessor, the Penobscot Boom Corporation, Act of 1832, c. 236, § 5, imposes the duty "to raft all lumber in said booms securely and faithfully, with suitable warps and wedges for rafting, and secure the same below said booms ten days", if not over one hundred logs, and if not over three hundred, five days;—and if the owner shall not have removed them, the company may remove them to some convenient and safe place at the owner's expense, and if unclaimed, on sixty days' notice they may be sold, but redeemed within two years.

By Act of 1838, c. 468, § 4, an agent was required to remain at the boom to assist in the delivery of logs, and to cause the same to be properly secured in the eddies below, but when so secured "in a manner which he may consider safe" the corporation was released from future loss or damage beyond that care "a prudent

person would take of his property in a like situation"; and, by § 5, only required to keep the logs there twenty-four hours, when the agent might remove them at the expense of the owners; and, by § 6, the notice of sale was made thirty days.

An Act of 1854, c. 299, among other things, provided, § 3, "It shall be the duty of log owners to receive and take away their logs as the same shall be rafted out and fastened to the buoys", and, on neglect so as to retard rafting the corporation "might run them away and hitch them to the shores below", at the expense of four cents a log to the owner. Under § 24 of plaintiff's charter, Act of 1854, c. 298, the association was not required to keep rafted logs, that had been secured, beyond twenty-four hours, or such shorter time as the log agent might name, and if not removed by the owner, it might remove them at five cents a log expense to him. Section 28 of the same act is substantially the same as § 4 of c. 468, act of 1838, relating to Penobscot boom, ante.

So that it appears to have been the duty of plaintiff to raft the logs in the boom and secure the rafts in the river, so as to give the owners an opportunity to remove their respective logs. This constituted rafting out, and at the end of twenty-four hours, or such shorter time as might be fixed by the log agent, worked a delivery to the log owner, so that thereafter, the association, as his bailee, was charged, as the charter expresses it, with such care thereof "as a prudent person would take care of his own property in a like situation."

The damages awarded were for the failure of reasonable diligence to raft out. Did the defendants assume that duty by their contract with plaintiff? They contracted to raft all the logs at the several rafting places as had been customary by the association. To commence and stop at each of said places when and as the directors of plaintiff association should direct, and to do and perform all things pertaining to the driving, towing, rafting and care of the logs as had been customary for the association to do, and as it is obliged to do by its charter and lease, and to the satisfaction of its directors.

One clause, at least, in defendants' contract seems fatal to the

plaintiff's contention. Damages were awarded for failure to seasonably raft logs. That is one of the elements of damage declared for in the suit against plaintiff, and included in the damages, for failure to seasonably raft logs is the same as failure to exercise reasonable diligence to do it. Defendants agreed to raft the logs, but, they did not agree to do it seasonably, for the contract says that they were both to begin and end rafting when plaintiff's directors should order. If, therefore, they complied with that order, they complied with their contract, no matter how unseasonably they performed their work, for the unseasonableness of the work might have been the fault of plaintiff and not of defendants. To show that it was the fault of the latter, evidence should have been presented showing that tardiness in rafting was in violation of plaintiff's orders. Such evidence is wanting, and therefore, under the stipulation of the parties, the order must be,

Judgment for defendants.

CHARLES F. BESSEY, Executor, in equity,

vs.

MARY A. COOK and others.

Waldo. Opinion December 13, 1898.

Equitable Attachment. Costs. R. S., c. 77, § 6, Par. X; Stat. 1889, c. 208; 1891, c. 53.

The plaintiff having obtained judgment against the estate of the defendant's husband, who conveyed to her shortly before his death all of his property to enable her to settle his estate without expense of administration, brought a bill in equity under R. S., c. 77, § 6, to compel the application of a mortgage note, thus held by the defendant, to satisfy the judgment. *Held;* that the bill can be maintained.

If the defendant were allowed to deduct from the property thus received all the payments that she has made in settling the husband's estate, and retain the value of her dower in the land sold, the mortgage note would still remain assets in her hands belonging to her husband's estate that cannot be come at to be attached in an action at law.

No previous demand having been made, the plaintiff is not entitled to costs.

IN EQUITY. ON APPEAL.

Bill in equity, heard on bill, answers and proof. The presiding justice who heard the cause dismissed the bill with costs, and the plaintiff appealed from his decree. The bill was inserted in a writ and dated March 30, 1896.

BILL.

To the Supreme Judicial Court. In Equity.

Charles F. Bessey, of Brooks, in the County of Waldo, and State of Maine, executor of the last will and testament of Prince Bessey, late of Thorndike, in said County of Waldo, deceased, complains against Mary A. Cook, of Newburg, in the County of Penobscot and State of Maine, Rufus E. Page, of Jackson, in said County of Waldo, and Willis F. Cook, of Frankfort, in said County of Waldo, administrator of the estate of Jesse H. Cook, late of Jackson, in said County of Waldo, deceased, and says:

First. That on the seventeenth day of April, A. D. 1891, said Jesse H. Cook, being then alive, was indebted, jointly with said Willis F. Cook, to Prince Bessey, the plaintiff's testator, in a large sum, for which the said Willis F. Cook, and Jesse H. Cook had given said Prince Bessey their promissory notes.

Second. That on the said 17th day of April, A. D. 1891, said Jesse H. Cook conveyed to his wife, said Mary A. Cook, all of his real estate and personal property of the value of one thousand dollars, and in consideration of said conveyance, said Mary A. Cook then promised the said Jesse H. Cook that she would pay all of his debts, and there was no other consideration for said conveyance.

Third. That said Jesse H. Cook died on the 11th day of June, A. D. 1891, and said Willis F. Cook was duly appointed and qualified as administrator of his estate on the second Tuesday of March, A. D. 1893.

Fourth. That said Prince Bessey died on the third of October, A. D. 1891, and plaintiff was duly appointed and qualified as executor of his last will and testament.

Fifth. That on the 30th day of April, A. D. 1895, the plaintiff as executor of the last will and testament of said Prince Bessey, deceased, recovered judgment in the Supreme Judicial Court,

within and for said County of Waldo, against said Willis F. Cook, and against the goods and estate which were of said Jesse H. Cook, deceased, for the sum of six hundred and eighty-three dollars and seventy cents, debt or damage, and fourteen dollars and seventeen cents, costs of suit, and that said judgment was recovered as aforesaid upon certain promissory notes which said Prince Bessey held against said Willis F. Cook, and Jesse H. Cook on said 17th day April, A. D. 1891.

Sixth. That said Mary A. Cook sold and conveyed said real estate and personal property, and no part of the same has come to the hands and possession of the administrator of the estate of said Jesse H. Cook and said Mary A. Cook has neglected and refused to pay plaintiff's said debt or any part thereof, and there is now due on said judgment the sum of five hundred dollars.

Seventh. That after the decease of said Jesse H. Cook, said Mary A. Cook conveyed the real estate which was conveyed to her as aforesaid by said Jesse H. Cook, to said Rufus E. Page, in exchange for a certain lot or parcel of land situated in said Jackson, bounded as follows, to wit: Beginning at a cedar post near the town well; thence by the road southerly about twelve rods to land owned by Ella Littlefield; thence westerly about twelve rods to land owned by Jonathan Ridley; thence northerly about twelve rods to land owned by Eliza Mason; thence easterly about twelve rods to the place of beginning, containing one hundred and forty-four square rods, more or less, with the buildings thereon standing, which said lot or parcel of land the said Rufus E. Page conveyed to said Mary A. Cook.

Eighth. That on the 28th day of February, A. D. 1895, said Mary A. Cook sold and conveyed said last described parcel of real estate to said Rufus E. Page, and on said day, took from said Rufus E. Page, in part payment therefor, his promissory notes for the sum of two hundred and fifty dollars, and as security for the payment of said notes, said Rufus E. Page, on said day, made, executed and delivered to said Mary A Cook, a mortgage of said real estate, said mortgage being recorded in Waldo Registry of Deeds, Book 241, Page 256.

Ninth. That said mortgage and notes are still held by said Mary A. Cook, and are still unpaid, and that they are a part of the proceeds of the property conveyed as aforesaid by said Jesse H. Cook to said Mary A. Cook on the seventeenth day of April, A. D. 1891.

Wherefore, plaintiff prays the decree of this honorable court:

1. That said mortgage and notes may be applied to the payment of his said debt.

2. That said Mary A. Cook may be ordered to assign and transfer said mortgage and notes to him in part payment of his said debt.

3. That said Rufus E. Page may be ordered to pay the amount due on said mortgage and notes to the plaintiff in part payment of his said debt.

4. That he may have such other and further relief in the premises as equity may require, and to your honors shall seem meet.

Dated this thirtieth day of March, A. D. 1896.

CHARLES F. BESSEY, Exr.
By R. F. Dunton, his Atty.

R. F. Dunton, Solicitor for plaintiff.

The answer of Mary A. Cook who says:

That on April 17, 1891 her husband Jesse H. Cook being sick unto death conveyed to her his personal property worth about $175 and his real estate worth about $600 it being understood that she was to pay his personal debts, his funeral expenses and the expenses of his last sickness. The purpose of this transaction was to save the trouble and expense of administration. That neither she nor her husband had any purpose to defraud any of his creditors.

That she did not know that her husband had signed notes to the plaintiff's testator to the amount of $2100. That if he did sign notes to that amount he signed as surety for Willis F. Cook.

That she did not promise to pay any of said notes. That the notes were the debt of Willis F. Cook given for a bond for a deed

of a farm which Willis F. Cook has left, and which farm is, and has been for more than two years in the possession of plaintiff.

That in an administration of her husband's estate if it had not been conveyed to her, she would have taken 1-3 of personal property, or the judge of probate would have allowed to her all of the personal property without regard to creditors, and that she would have had dower in the real estate worth $113.22.

That she has paid out in cash for her husband's burial, last sickness and his debts $525, being as she supposed all of his liabilities.

That one J. M. Larrabee made an unjust claim against her husband's estate and was about to administer.

That at her request the judge of probate appointed Willis F. Cook administrator in March, 1893. That the claim was referred and $12.25 allowed, which she paid with expenses of administration and reference. She further says that she was to expense and trouble in settling her husband's debts, and that she should be allowed what would be equal to the commissions of an administrator.

That she has used her own pension money to pay her husband's debts.

That she now holds one note of Rufus E. Page for one hundred dollars and interest, which note and interest in law and equity belongs to her.

Wherefore she prays judgment and for her costs.

MARY A. COOK,
By her attorney W. H. McLellan.

The answer of Rufus E. Page admits that said Mary A. Cook conveyed to him on the 28th day of February, 1895, the real estate described in par. 7 of plaintiff's bill; and that he executed and delivered to her his promissory notes for two hundred and fifty dollars and a mortgage on said real estate to secure said notes, on which there is due one hundred dollars and interest from February 28, 1895; and that said Mary A. Cook stills holds said mortgage and note.

The bill was taken pro confesso as regards the other defendant, Willis F. Cook.

The plaintiff introduced testimony tending to show that on the seventeenth day of April, 1891, Jesse H. Cook, husband of the defendant Mary A. Cook, was indebted to plaintiff's testator, having signed notes with his son, Willis F. Cook, to the amount of twenty-one hundred dollars. These notes were given to Prince Bessey, the plaintiff's executor, for a bond for a deed of a farm in Jackson; the notes were not paid, and the plaintiff subsequently took the farm on account of failure to pay in accordance with the conditions of the bond. Mr. Bessey the plaintiff testified at the trial that the farm was worth from fifteen to seventeen hundred dollars, and this is the only testimony as to the value of the farm. The farm was not worth enough to pay the notes, and this plaintiff sued the administrator of the estate of Jesse H. Cook, and recovered judgment against said estate on the thirtieth day of April, 1895, for the sum of six hundred and eighty-three dollars and seventy cents debt, and fourteen dollars and seventeen cents costs of suit. At the date of this bill there was due on said judgment the sum of five hundred dollars.

On the seventeenth day of April, 1891, said Jesse H. Cook, being very sick and not expecting to live long, conveyed to his wife, Mary A. Cook, the defendant, all of his real estate, admitted by her to be worth six hundred dollars, and all of his personal property admitted by her to be worth one hundred and seventy-five dollars. This deed was made to enable the defendant, Mary A. Cook, to settle the estate of Jesse H. Cook without any administration, she promising to pay his debts and to have what there was left. She testified in her examination in the probate court that she promised to pay all of his debts, and in her answer she admits that she was to pay his personal debts, his funeral expenses, and the expenses of his last sickness. In her examination upon the stand, in this case, she says she made no promise to pay his debts, that there "wasn't a word said about paying debts," although she supposed that she would pay them.

From her testimony it appears that Mary A. Cook paid debts and funeral expenses of Jesse H. Cook, amounting to three hundred and fifty-six dollars and eighty-seven cents, and the plaintiff

claimed that according to her own figures, this leaves a balance of the property conveyed to her by Jesse H. Cook, in her hands, of more than four hundred dollars.

There is consequently no other creditor interested in the property which plaintiff is seeking to reach and apply towards the payment of his debts.

Thereupon the plaintiff claimed that one of two propositions must prevail and in either case that equity should apply the mortgage sought to be reached to the payment of this debt. Either Mrs. Cook promised to pay this debt, in which case this mortgage can be reached and applied as her property to the payment of a debt which she had made her own, or there was a mistake of fact in not considering this debt as a liability, in which case the conveyance is void, so far as the unexpended balance of the property conveyed to Mary A. Cook by Jesse H. Cook is concerned, in which case equity should apply this mortgage, as a part of the estate of Jesse H. Cook, to the payment of this debt as a debt against his estate. And the plaintiff further claimed that, taking Mrs. Cook's own valuation of the property conveyed to her by her husband, and allowing her all that she claims to have paid out for his debts and burial expenses, and allowing her all that she claims her right of dower to have been worth, there is considerably more of the property left in her hands, than the amount of the mortgage which plaintiff seeks to reach and apply to the payment of his debt.

On the other hand, the defendant, Mary A. Cook, claimed that in case of an administration, she would have taken one-third of the personal property, or the judge of probate would have allowed to her all of the personal property without regard to creditors, and that she would have had dower in the real estate worth one hundred and thirteen dollars and twenty-two cents.

R. F. Dunton, for plaintiff.

W. H. McLellan, for defendant Mary A. Cook and Willis F. Cook.

W. P. Thompson, for defendant Rufus E. Page.

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

HASKELL, J. The plaintiff has judgment against the goods and estate which were of one Jesse H. Cook in the hands of his administrator.

The defendant, Mary A. Cook, is shown to have in her hands a certain note for $100, signed by Rufus E. Page, secured by a mortgage of said Page, dated February 28, 1895, recorded in Waldo Registry of Deeds, Book 441, Page 256, that is the remnant of the estate that her husband, Jesse H. Cook, conveyed to her shortly before his death, to enable her to settle the same without the expense of administration. She has paid all the debts of the estate, except the debt to the plaintiff that was contingent at the time of the conveyance to her and of which she was ignorant. If she be allowed to deduct from the property received all the payments that she has made therefrom, and retain the value of her dower in the land by her sold, the Page note and mortgage would still remain assets in her hands belonging to her husband's estate that cannot be come at to be attached in an action at law.

The plaintiff brings this bill to compel the application of said mortgage debt in satisfaction of his judgment, under the provisions of R. S., c. 77, § 6, as amended by acts of 1889, c. 208, and of 1891, c. 53, and is entitled to maintain the same; but, as the bill was brought without previous demand, the plaintiff should not recover costs.

Bill sustained. Decree below reversed.

JAMES McLAIN *vs.* GEORGE T. FOWLER.

Penobscot. Opinion December 13, 1898.

Bangor Mun. Court. Removal of Case. Stat. 1895, c. 211, § 4.

An action was brought against the defendant in the Bangor Municipal Court, the amount claimed in the writ exceeding twenty dollars. On the return day he pleaded in abatement and on the third day the plaintiff demurred and the defendant joined in the demurrer and moved to remove the cause, but this motion of the defendant having been denied the defendant took exceptions. *Held;* That when the motion to remove the case was filed, the court had no further power over it than to grant the motion with appropriate orders; and that the exceptions must be sustained.

The proper construction of Stat. 1895, c. 211, § 4, is to allow defendants in the Bangor Municipal Court to file such pleadings as they wish at the return term of the writ, and then remove the case; or to remove the case without pleading and thereby be debarred of all matters that should have been raised within the first two days of the return term. In other words, all matters in abatement must be pleaded in the lower court or waived.

ON EXCEPTIONS BY DEFENDANT.

Assumpsit for labor on account annexed $22.40 entered in Bangor Municipal Court on the first Monday of June, 1898.

The defendant at the return term asked to have the cause removed to the Supreme Judicial Court for the reason that the amount claimed exceeds twenty dollars. The court denied this motion, and the defendant took exceptions. The parties agreed to the following statement:

"Plaintiff entered his writ on the first day of the term.

"On the same day the defendant filed his plea in abatement.

"On the third day of said term the plaintiff filed his demurrer to said plea, which was joined; and afterwards, on the same day, the defendant filed his motion to remove said action.

"The court sustained the demurrer, adjudged the plea in abatement bad, and denied the motion to remove.

"To which said rulings the defendant excepted and his exceptions were allowed by the court.

"By agreement the case may be entered at the next law term in the Eastern District, and argued and determined according to the practice in said court.

"If the law court sustains the rulings of the court below, the case is to stand for trial upon payment of costs, otherwise the action is to be removed." . . . .

Peregrine White, for plaintiff.

The motion to remove was too late; it had already been waived. The obvious meaning of the 4th section of the laws of 1895 is, that the defendant shall have his election to remove the action, or to file his pleadings and go to trial. But when he files his plea, he makes his election, and in accordance with a well established principle, he is bound by it. He thereby waives his right of removal. He cannot do both. He cannot plead, and then afterwards file his motion to remove. Especially can he not do so where a demurrer to his plea is filed and sustained, and thereby deprive the plaintiff of the advantage of the ruling on his demurrer. A defendant cannot lie by and make one defense and then raise another which belonged to a former stage at common law. Andrew's Stephen on Pleading, p. 420, and note.

J. D. Rice, for defendant.

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

HASKELL, J. This is an action of assumpsit to recover $22.40, brought in the Bangor Municipal Court which had jurisdiction thereof.

The act of 1895, c. 211, § 4, provides: "If any defendant in any action in said court, where the amount claimed in the writ exceeds twenty dollars, or his agent or attorney, shall, on the return term of the writ, file in said court a motion asking that said cause be removed to the supreme judicial court, and deposit," etc., "the said action shall be removed into the supreme judicial court for said county," etc. The action is there to be entered upon the docket of the preceding term, or upon the docket of the court if

then in session, and stand in order for trial at the next term. The pleadings in the Bangor Municipal Court are to be the same as in the supreme judicial court.

This statute gives the defendant a right of removal at the return term of the writ. But it is contended that the filing of pleadings by defendant is a waiver of such right. We do not think so. The defendant should have a right to file pleadings and then remove the case, so that such issue as he raises may be in order for speedy trial. The plaintiff surely cannot be prejudiced by such course. On the contrary, he is apprised of the issue tendered him, and given time to meet it. Again, pleas in abatement must be filed, if at all, within the first two days of the term, meaning of course, of the return term in the municipal court; and unless the defendant may raise questions of abatement, and then remove the case, he cannot have the benefit of abatement decided by the supreme court at all, for when the case shall be entered there, ordinarily the time for abatement will have elapsed.

We think the proper construction of the act is to allow defendants to file such pleadings as they wish at the return term of the writ, and then remove the case; or to remove the case without pleading and thereby be debarred of all matters that should have been raised within the first two days of the return term. In other words, all matters in abatement must be pleaded in the lower court or waived.

In the case at bar, the defendant, on the first day of the return term, pleaded in abatement, and on the third day the plaintiff demurred and the defendant joined in demurrer and moved to remove the case. This motion should have been granted, but was refused, to which refusal exceptions are brought to us. They must be sustained. When the motion to remove the case was filed the court had no further power over it than to grant the motion with the appropriate orders.

Exceptions sustained. Motion granted.

GEORGE W. HILTON

vs.

PHOENIX ASSURANCE COMPANY OF LONDON.

York. Opinion December 20, 1898.

Insurance. Non-occupancy. Proof of Loss. Waiver. False Swearing. Forfeiture. Damages. R. S., c. 49, §§ 20, 90.

In an action upon an insurance policy, submitted on report to the law court with jury powers, it appeared that the house insured and burned was unoccupied at the time the policy was issued and remained so ever after; and it was described in the policy as "occupied by assured." Another house insured by the same policy was described as "occupied by the assured as a residence."

The court being satisfied by an examination of the evidence that the fact of non-occupancy was known to the defendant's agent who issued the policy, *held;* that by force of the statute, (R. S., c. 49, § 90,) the agent's knowledge must be deemed to be the knowledge of the defendant, and that all misdescriptions known to the agent must be regarded as waived by the defendant; and that the policy was not void by reason of false representations respecting occupancy.

The house being unoccupied at the time the policy was issued, and that fact being known to the agent, *held;* that the policy is valid.

The defendant in acknowledging the receipt of the proof of loss made no objection to it for want of form or omission of certificate of magistrate, but did object on other grounds. *Held;* that there was sufficient evidence of a waiver of informalities or omissions in the proof of loss.

Where the plaintiff can neither read nor write, and there was a misstatement as to occupancy in his proof of loss which was the mistake of the scrivener who prepared the proof, and it did not appear that the misstatement was intentionally made by the plaintiff, *held;* that the policy was not avoided.

To knowingly and intentionally overestimate a loss, either in items or amount, in a sworn proof of loss is false swearing and is fraudulent, and bars a recovery; but a misstatement honestly made, or a mistake of judgment or memory differs from one which is knowingly and intentionally false. While the plaintiff greatly overestimated the amount of his loss he apparently proceeded upon the theory that he was entitled to have money enough to replace the burned buildings, and that this was the measure of his loss. *Held;* That this was error, but not so uncommon an error as to justify the court in saying that the mere fact that the owner has committed such an error is sufficient evidence of intentional false swearing.

The true measure of damages is not what it would cost to replace the burned buildings with new ones, but it is the value of the buildings themselves, as they stood upon the land just before the fire.

ON REPORT.

In this action the plaintiff sought to recover from the defendant company under a policy of insurance issued to him, insuring him from loss and damage by fire on certain premises in Wells. The writ is dated August 8, 1894, and the action was made returnable to the September term in York County.

The policy of insurance covered two dwelling-houses; the plaintiff claims to recover for a loss sustained on the dwelling-house and L No. 2, insured for $800, the barn insured for $700, and hay therein insured for the sum of $200. The policy is dated September 4th, 1889, and it expired at twelve o'clock noon on the 4th day of September, 1892. The plaintiff claimed that the house, barn and hay were destroyed by fire on the first day of September, 1892, at about the hour of twelve o'clock midnight. The policy expired within two or three days after the date of the fire.

The written portion of the policy relating to the buildings claimed to have been destroyed reads as follows: "$800 on frame dwelling-house and L No. 2. $700 on frame barn situate about 100 feet from said dwelling, and $200 on hay therein. Situate in School Dist. No. 6, Wells, Me., and also occupied by the assured."

The first printed condition in the policy provides that the policy shall be void if "any false representation by the assured of the condition, situation or occupancy of the property, or any omission to make known every fact material to the risk, or an over-valuation, or any misrepresentation whatever, either in a written application or otherwise; . . . . or if the above mentioned premises shall be occupied or used so as to increase the risk, or become vacant or unoccupied, and so remain without notice to, and consent of, this company in writing . . . . endorsed hereon."

Printed condition 9 in the policy requires that persons sustaining loss or damage by fire shall forthwith give notice of loss to the company, and shall within thirty days render a particular account of such loss, signed and sworn to by them, setting forth certain

particulars named in said 9th condition, and provides that the assured shall also produce a certificate under the hand of a magistrate or a notary public nearest the place of the fire. It is also a condition of the policy that "all fraud or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture of all claim on this company under this policy."

The proof of loss filed by the plaintiff with the defendant company, bears date of October 11th, 1892, was not accompanied by a certificate of a magistrate or notary, but has a certificate certifying to certain matters, signed by a deputy sheriff, under date of October 17th, 1892, and which was later in October filed with the company. The plaintiff claimed in this proof of loss that the buildings destroyed were occupied by him as a residence and for his stock of cattle, hay, etc., and that there was a total loss to the extent of $2,875; $1,700 thereof being the value of the house and L; $1,100 the value of the barn, and $75 for hay; and he made claim for the entire amount of the insurance on the house and barn, and for $75 loss on hay.

In November, 1892, Mr. C. M. Slocum, the general agent of the defendant company, notified plaintiff that the proof of loss could not be accepted or recognized by the company as evidence of claim under the policy; and that if the property mentioned in the policy had been burned the company did not recognize or admit any liability therefor; and further stated that the house had been unoccupied at least sixty days prior to the time of the fire, and called plaintiff's attention to the conditions of its policy. The company claimed that this was a denial of all liability under the policy.

Under date of June 12, 1893, and nearly seven months after this notice from Mr. Slocum, plaintiff signed a written statement under oath, directed to the defendant company, and in which he stated: "That said dwelling-house at the time of said fire was occupied by me not as a residence." Plaintiff in his proof of loss, stated that the buildings in question were occupied by him as a residence, and does not deny this in his statement of June 12, 1893, but claimed that they were occupied by him, though not as a

residence, but as occasion might require; and he admitted in his statement that at the time of the fire, no person was living in the said buildings. The company thereupon claimed that this last statement filed by the plaintiff plainly shows he fully understood the policy was avoided if the buildings were unoccupied, and the inference intended to be conveyed by this statement as well as by his proof of loss, was that the buildings were occupied in compliance with the terms of the policy.

The plaintiff claimed that Mr. George F. Plaisted acted as the agent of the defendant company in the matter of the issuance of the policy, and put in testimony of certain conversations between plaintiff and Mr. Plaisted. But on the other hand, the defendant claimed such conversations were between the plaintiff and his own broker, who was not an agent of this defendant company.

Other facts appear in the opinion.

Geo. F. Haley, for plaintiff.

N. & H. B. Cleaves and Stephen C. Perry, for defendant.

Agency: In *Pottsville Mut. Fire Ins. Co.* v. *Minnequa Springs Improvement Co.*, 100 Penn. St. R. 137, it is said that: "It is the well settled law that where one engages another to procure insurance for him, the person thus employed is the agent of the employer, and not of the company." *Standard Oil Co.* v. *Triumph Ins. Co.*, 64 N. Y. 89; May on Insurance, 3rd Ed. § 122; *Richmond* v. *Phœnix Assurance Co.*, 88 Maine, 107.

Occupied as a dwelling or residence: *Agricultural Ins. Co.* v. *Hamilton*, (Md.) 30 L. R. A. 633; *Hanscom* v. *Ins. Co.*, 90 Maine, 333; *Ashworth* v. *Ins. Co.*, 112 Mass. 422; *Keith* v. *Quincy Mut. Ins. Co.*, 10 Allen, 228.

Vacant buildings: *Jones* v. *Granite State F. Ins. Co.*, 90 Maine, 40; *Lancy* v. *Home Ins. Co.*, 82 Maine, 492; *White* v. *Phœnix Ins. Co.*, 83 Maine, 279, S. C. 85 Maine, 97.

Agent's knowledge: May on Ins. 3d Ed. § 122; *Richardson* v. *Maine Ins. Co.*, 46 Maine, 394; *Ryan* v. *World Mut. L. Ins. Co.*, 41 Conn. 168; *N. Y. L. Ins. Co.* v. *Fletcher*, 117 U. S. 519.

Fraud and false swearing: *Atherton* v. *Assurance Co.*, 91 Maine, 289; *Dolloff* v. *Ins. Co.*, 82 Maine, 266; *Williams* v. *Ins.*

Co., 61 Maine, 67; *Barnes* v. *Un. Mut. F. Ins. Co.*, 51 Maine, 110; *Linscott* v. *Ins. Co.*, 88 Maine, 497; *Marston* v. *Ins. Co.*, 89 Maine, 266; *Dumas* v. *North Western Natl. Ins. Co.*, 40 L. R. A. 358.

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

SAVAGE, J. Action on policy of fire insurance, dated September 4, 1889. The case comes to us on report. It is conceded that the policy was issued and the premium paid, and that the property was destroyed by fire September 1, 1892, within the life of the policy. The policy covered two sets of buildings, and other property. The property burned with the insurance upon it is described in the policy as follows: "$800 on frame dwelling-house and L; $700 on frame barn situate about 100 feet from said dwelling, and $200 on hay therein; situate in School District No. 6, Wells, Me., and also occupied by insured." In a previous part of the policy, another dwelling-house, also insured, was described as "occupied by assured as a residence."

The dwelling-house burned was unoccupied at the time the policy was issued, and remained unoccupied as a residence ever after. The barn during the life of the policy was used only for storing tools and hay. The policy was procured of defendant's agent at Kittery, by one Plaisted, a broker, who acted as agent for the plaintiff. October 22, 1892, the plaintiff furnished to the defendant a written proof of loss signed and sworn to by him, in which he stated that his loss on the house was $1700, on the barn $1100, and on hay $75; also, that the buildings were occupied at the time of the fire, "by the assured as a residence and for his his stock of cattle, hay, etc." November 19, 1892, the defendant, by letter, acknowledged the receipt of the proof of loss, but also stated "that such alleged proof of loss is not accepted or recognized by this company as evidence of a claim under said policy, nor if the property mentioned therein has been burned, does this company recognize or admit any liability therefor." In the same letter, the

defendant also said, "Would state in explanation of above, that notwithstanding your statement that the house was occupied by you as a residence, we have, we think, good evidence that it was unoccupied at least sixty days previous to the fire. If you will read the conditions of your policy, you will find that makes it null and void." June 12, 1893, the plaintiff gave the defendant notice in writing, under oath, that the statement in the proof that the house was occupied by him as a residence was a mistake made by the person who prepared the proof of loss, and asked that the correction might be made a part of the original proof of loss. The plaintiff also stated that "the dwelling-house at the time of the fire was occupied by me not as a residence, but as occasion might require my attendance at the farm upon which the buildings were situated, no person at the time of said fire living therein, the furniture therein being such as I used when I stopped upon said farm." No reply was made by the defendant.

The defendant sets up non-occupancy as one ground of defense, and relies upon a condition in the policy which provided that it should be void if there was any false representation by the assured of the condition, situation or occupancy of the property, or any omission to make known every fact material to the risk, or if the premises should become vacant or unoccupied. So far as the last clause of this condition is concerned, it cannot be said that the house *became* unoccupied, because it is undisputed that it was unoccupied when the policy was issued. There was no material increase of risk on this ground.

But the defendant contends that the house was insured as an occupied house, that it was so described in the policy, that the proper signification to be attached to the word "occupied" in the policy is "occupied as a residence." The defendant insists that it had no knowledge that the house was unoccupied, and that the policy was procured by the false representations of the plaintiff or his agent. On the other hand, the plaintiff says that the fact of non-occupancy was well known to the defendant's agent who issued the policy; and that by force of the statute, R. S., ch. 49, § 90, the knowledge of the agent must be held to be the knowl-

edge of the company, and all omissions and misdescriptions known to the agent must be regarded as waived by the company.

The defendant's agent is a witness, and he testifies that he understood from the plaintiff's agent that all the premises covered by the policy were occupied, although he admits that something was said about one of the houses being unoccupied for a portion of the time, "simply temporarily," but not for any special length of time. Further on he testifies that he understood the house was occupied as a residence. Though he admits that he understood one of the houses was to be unoccupied part of the time, he says he can give no reason why it was not so stated in the policy. In reply to a question, to what extent the house was to be unoccupied, he replies: "I don't know as I can quite recall as to the time; *there was something said about his work, whether it was for haying, or whether it was to be occupied for haying time only*, or all except haying time, I can't say, but there was some question in regard to it which as I have already said that was to be unoccupied; the understanding was one of the houses was to be unoccupied temporarily." This testimony was given about eight years after the event, which of itself may afford some reason for want of a definite recollection. If, as he suggests it may have been, it was to be "occupied for haying time only," this would not be wholly unlike the claim of the plaintiff, that it was occupied only as occasion might require his attendance at the farm. However this may be, on September 5, 1889, the very next day after the date of the policy, in a letter in which he enclosed the policy to Mr. Plaisted, the defendant's agent said, "You will observe I have written it all in one policy, and at the same rate. Ordinarily we do not care for unoccupied buildings at any rate, but I've no doubt this is O. K., hence I have tried to do the best I could for your client. Better hold the policy for a few days to see if the company kicks on it." This letter was written while the matter was fresh in the recollection and understanding of the writer. There is no suggestion in it of temporary non-occupancy. It is evident that the writer had in mind two sets of buildings, one occupied, the other unoccupied. He has put them both into one policy, at the same rate,

doing the "best" he could for Mr. Plaisted's client. He seems to have doubted whether this would be acceptable to his company, for he advises Plaisted to "hold the policy for a few days to see if the company kicks on it." This agent in his testimony explained that this last clause in his letter had reference to its being a "farm risk," but we think that, taking the letter as a whole, it appears clearly that he feared the company might "kick" on the fact of non-occupancy. There is much more ground for saying that this defendant was deceived by its agent, than there is that the agent was deceived by the plaintiff or Plaisted. Though he had never seen the plaintiff or the premises, the agent reported to his company, September 4, 1889, that he had personally examined the premises "a few days since." He seems to have been anxious to have the policy issued, and, perhaps, to receive his compensation.

We must hold that this agent's knowledge was, in law, the knowledge of the defendant. *Day* v. *Dwelling-House Ins. Co.*, 81 Maine, 244, and that the policy was not void by reason of false representations respecting occupancy.

The defendant contends in the next place that the plaintiff must fail because his proof of loss was not accompanied by the certificate of a magistrate or a notary public nearest the place of fire, as required by the policy, nor by such a certificate as is required by statute, R. S., ch. 49, § 20. The plaintiff strictly complied with neither requirement. His proof was sworn to, and he furnished the certificate of a deputy sheriff. But the proof of loss, such as it was, was received by the defendant. No objection was made for any want of form or omission of certificate. The defendant did specify other matter as a reason why it refused to recognize the proof, or its liability, namely, non-occupancy. We think these facts, without further explanation, afford sufficient evidence of a waiver on the part of the defendant, of informalities or omissions in the proof of loss. *Bailey* v. *Hope Ins. Co.*, 56 Maine, 474; *Patterson* v. *Triumph Ins. Co.*, 64 Maine, 500; *Biddeford Savings Bank* v. *Dwelling-House Ins. Co.*, 81 Maine, 566.

The policy provides that "all fraud or attempt at fraud, by false swearing or otherwise shall cause a forfeiture of all claim on this

company under this policy." The defendant urges that the plaintiff in his proof of loss has sworn falsely, both as to the occupancy of the house, and the amount of his loss; and that a recovery should be barred thereby. It is not enough in this respect that the plaintiff's statements in his proof should be shown to be untrue, but they must be shown to be knowingly and intentionally untrue. *Dolloff* v. *Phœnix Ins. Co.*, 82 Maine, 266; *Atherton* v. *British America Assurance Co.*, 91 Maine, 289.

If the plaintiff understood, and we think he did, that the house was insured as unoccupied, we can see no good reason why he should intentionally misrepresent the fact of non-occupancy, particularly when the falsehood was certain to be detected upon the slightest inquiry. The plaintiff can neither read nor write. He testifies that the mistake was that of the person who made up the proof of loss. He corrected the mistake long before this action was brought. In the absence of any evidence that the company was prejudiced by the misstatement, we think it ought not to operate as a forfeiture.

That the plaintiff overestimated his loss, we think is true. The defendant does not claim that he misstated the items of property destroyed, the house, the barn, the hay, or their condition and situation, but that he knowingly overestimated their value and his loss, in making his sworn proof of loss. To knowingly and intentionally overestimate a loss, either in items or amount, is a fraud, but like all other frauds it must be proved. It cannot be presumed or surmised. A misstatement honestly made, or a mistake of judgment or memory differs from one which is knowingly and intentionally false. *Linscott* v. *Orient Ins. Co.*, 88 Maine, 497. The latter is fraudulent, the former not. A careful examination of the evidence fails to satisfy us that the fraudulent element has been proved in this case.

Preparatory to making his proof of loss, the plaintiff procured estimates from carpenters of what it would cost to replace the burned buildings with new ones, and he made his proofs in accordance with those estimates. He seems to have assumed that he was entitled to have money enough to replace the buildings so far,

at least, as the insurance would do it. This was error, but not so uncommon an error in the practical affairs of life as to justify us in saying that the mere fact that the owner has committed such an error is sufficient evidence of intentional false swearing. *Williams* v. *Phœnix Fire Ins. Co.*, 61 Maine, 67.

It remains for us to estimate the amount of the plaintiff's loss. This is a question which should have been submitted to a jury. The evidence necessarily consists of the opinions of witnesses. Very much depends upon their intelligence and credibility, and glean as well as we may from the cold printed page, we cannot be sure that we are able to distinguish those to whom most credit should be given. A jury seeing and hearing them could judge better than we. The witnesses estimate the loss all the way from $1700 for the house, and $1100 for the barn, (which is the same as claimed by the plaintiff in his proof of loss,) to $600 for both buildings. The higher estimates are clearly made on a wrong basis,—what it would cost to replace the burned buildings with new ones. The policy is a contract of indemnity merely. *Donnell* v. *Donnell*, 86 Maine, 518. The plaintiff is entitled only to have his actual loss made good. The true measure of damages is the value of the buildings themselves, as they stood upon the land just before the fire. 2 Sedgwick on Damages, § 722. These buildings, though apparently in a fair state of repair, were old, some of them very old. They were no longer in use, but we cannot assume that they were useless. Upon the whole, it is the opinion of the court that the plaintiff should be allowed to recover eight hundred dollars for the loss of his buildings. He also lost five tons of hay, for which he should be allowed sixty dollars. The policy provides that payment shall be made within sixty days after due notice and proof of loss shall have been made by the assured. We think the plaintiff should recover interest after sixty days from the time he corrected his proof of loss, which was June 12, 1893.

Judgment for plaintiff for $860, and interest from August 11, 1893.

JOHN WENTWORTH, in equity,

vs.

FRED A. FERNALD, Admr., and others.

York. Opinion December 21, 1898.

Will. Interpretation. Life Estate. Income. Rule against Perpetuities.

It is a fundamental rule or consideration which is paramount to all others, and which should never be overlooked, that the intention of the testator as declared by the will itself shall be allowed to prevail, unless some principle of law is thereby violated.

This intention must be collected from the language of the whole will interpreted by the avowed or manifest object of the testator; and all parts of the instrument must be construed in relation to each other, so as to give meaning and effect to every clause and phrase, and if possible form one consistent whole, every word receiving its natural and appropriate meaning.

A testator gave the residue of his estate to his trustee for these purposes: "the whole net yearly income thereof shall be appropriated for the benefit of my brother . . . . and sisters . . . . and said trustee is authorized and directed to pay to or expend or invest for the benefit, comfort and support and maintenance of my said brother and sisters, the whole net income of said trust property, and from time to time to expend any part or the whole of any accumulation of said unexpended income which may be needed in furtherance of my general object, which I here declare to be to secure the comfort, well being and support and happiness of my brother and sisters, and I hereby devolve the duty of carrying that object into effect upon said trustee, and this net income is to be so appropriated during their joint lives and to the survivors and survivor of them.

"After the death of my brother and both of my sisters, I direct the trustee under this will before named, to apply to the judge of probate for said county of York for the appointment of trustees to be joined with the trustee under this will, who shall be duly appointed, commissioned and qualified in conjunction with the trustee under this will, receive in trust all the rest, residue and remainder of my estate and appropriate the same to the procuring suitable buildings for the purpose of an academy in said Kittery, and the net income thereafter shall be forever applied to the maintenance of an academy in said Kittery, under such rules, regulations and limitations as the trustees under this will shall then in writing and with the written approbation of said judge prescribe, ..."

Held; that the testator did not intend to make an absolute gift to his brother and sisters of the whole income as it accrued, but to give them the right to receive so much of the income, from time to time, as might be needed for their comfort and support; and if not all needed for that purpose, it should be invested by the trustee and allowed to accumulate in his hands.

Also; that they acquired the right to receive, from time to time, such part of the accumulation of unexpended income as might be needed for their support; but they did not acquire a vested interest in the whole income; and the unexpended accumulation did not become the property of either of them during life, and did not pass to his or her representatives.

Held; that the residuary clause creating the trust in favor of an academy is not obnoxious to the rule against "perpetuity" or "remoteness." Under the direction of the testator and the operation of law, the conditions of the trust respecting the appointment of academy trustees would necessarily be fulfilled within the prescribed time.

ON REPORT.

This was a bill of interpleader filed by the plaintiff as trustee under the will of Robert W. Traip, deceased, to obtain the instructions of the court in the discharge of his duties as trustee. The defendants are the administrators and heir of a deceased brother and two sisters of the testator, who were in their lifetime beneficiaries under the will, and the trustees of a fund, provided in the will, for the erection of an academy in Kittery.

The other facts appear in the opinion.

J. H. & J. H. Drummond, Jr., for plaintiff.

Eben Winthrop Freeman, Fred A. Fernald, Robt. Treat Whitehouse, and Frank E. Rowell, for defendants.

I. Disposition of the income and accumulations of the trust fund: (1) There is survivorship between the life beneficiaries according to the express wording of the will. *Beevor* v. *Partridge*, (1840), 11 Sim. 229. (2) The interest of Lydia is vested. (3) The only word of grant used by the testator is the word "appropriate", and this word is used in four places. *Watson* v. *Hayes*, (1839,) 5 Myl. & Cr. 135; *Cole* v. *Littlefield*, (1853), 35 Maine, 439.

The language "for the benefit of Oliver, Lydia and Mary" imports an absolute gift. So with the expression "for the benefit, comfort, and support and maintenance" and the expression "com-

fort, well being and support and happiness." *Hoath* v. *Hoath*, (1785,) 2 Bro. C. C. 3; *Barber* v. *Barber*, (1838,) 3 Myl. & Cr. 638; *Webb* v. *Kelly*, (1839,) 9 Sim. 469; *Rudland* v. *Crozier*, (1858,) 2 DeG. & J. 143; *In re Hart's Trusts*, (1858,) 3 DeG. & J. 195; *Prescott* v. *Morse*, (1873,) 62 Maine, 447; *Warren* v. *Webb*, (1878,) 68 Maine, 135; *Beevor* v. *Partridge*, (1840,) 11 Sim. 229.

(4) After words of absolute gift of income, no succeeding equivocal expressions of a contrary tendency are effective. 1 Jarm. Wills, 448, 769; *Dodson* v. *Hay*, (1791,) 3 Bro. C. C. 404; *Beevor* v. *Partridge*, (1840,) 11 Sim. 229; *Ramsdell* v. *Ramsdell*, (1842,) 21 Maine, 288; *Stuart* v. *Walker*, (1881,) 72 Maine, 145; *Mitchell* v. *Morse*, (1885,) 77 Maine, 423; *Williams* v. *Bradley*, (1861,) 3 Allen, 282.

Succeeding repugnant and inconsistent statements are held advisory, and are otherwise of no effect. *Illsley* v. *Illsley*, (1888) 80 Maine, 23.

5. Lydia's interest being a vested interest, the income and its accumulations became hers. *Dodson* v. *Hay*, (1791) 3 Bro. C. C. 409; *Webb* v. *Kelly*, (1839) 9 Sim. 469; *Beevor* v. *Partridge*, supra.

6. Instead of "Trustee is authorized and directed to pay to or expend or invest for" the life cestui, read, "Life cestui is entitled to payment, investment and expenditure." *Earle* v. *Rowe*, (1853) 35 Maine, 419.

7. Interest on income, or accumulations of income, or increment of income, belong to life tenant if fund is vested, even though the fund be vested subject to be divested. *Nichols* v. *Osborne*, (1727) 2 P. Wms. 419. *In re Hart's Trusts*, (1858), 3 DeG. & J. 202.

The right to intermediate rents and profits does not go over unless a reference to the will shows they have been omitted by some clerical error. *Harvey* v. *Cooke*, 4 Russ. 34.

8. And income of accumulations follows the accumulations. 1 Perry on Trusts, § 397.

9. There is never power in trustee to withhold after absolute gift of income.

10. For convenience in laying hold of testator's intent it has been ruled that words occurring more than once in a will shall be presumed to be used always in the same sense, unless the context shows a contrary intention. Schouler on Wills, § 471; 1 Jarm. on Wills, *842; Bigelow on Wills, p. 192.

II. Disposition of the corpus or principal fund after deducting the income and accumulations:

This interest or remainder over was contingent and not vested. *Duffield* v. *Duffield*, (1829) 3 Bli. N. S. 333; *Snow* v. *Snow*, 49 Maine, 159, 164. The case falls therefore within the rule against perpetuities. Gray on Perpet. § 629. The rule applies to equitable estates and to gifts to charities and charitable institutions. Gray on Perpetuities, §§ 323, 592; 1 Perry on Trusts, § 737; *Coms. of Charitable Donations* v. *DeClifford*, 1 Dru. & W. 245, 253; *Smith* v. *Townsend*, (1859), 32 Pa. St. 434; *Jocelyn* v. *Nott*, (1876), 44 Conn. 59; *Merritt* v. *Bucknam*, (1885), 77 Maine, 259; *Tollemache* v. *Earl of Coventry*, (1834) 8 Bli. N. S. 547; *Rose* v. *Rose*, (1863) 4 Abb. 108.

The law favors that construction which prefers the testator's kin to strangers. Schouler on Wills, § 479.

The cy pres doctrine cannot be invoked in such a case. Tied. on Real Prop. 544.

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

WHITEHOUSE, J. This is a bill in equity brought to obtain a judicial construction of the will of Robert W. Traip.

After giving to his wife an annuity of three hundred dollars, payable semi-annually, and making three other absolute bequests of five hundred dollars each, the testator makes the following disposition of the "rest, residue and remainder" of his property, viz:

"All the rest, residue and remainder of my estate, whether real or personal, and wherever and however situated, I give, devise and

bequeath unto Wm. H. Y. Hackett, of Portsmouth, in the County of Rockingham and State of New Hampshire, Counsellor at law, to have and to hold the same, to him and his assigns and successors in trust for the following named uses and purposes, that is to say, the whole net yearly income thereof shall be appropriated for the benefit of my brother Oliver Traip and my sisters Lydia Traip and Mary Traip, and said trustee is authorized and directed to pay to or expend or invest for the benefit, comfort and support and maintenance of my said brother and sisters, the whole net income of said trust property, and from time to time to expend any part or the whole of any accumulation of said unexpended income which may be needed in furtherance of my general object, which I here declare to be to secure the comfort, well being and support and happiness of my brother and sisters, and I hereby devolve the duty of carrying that object into effect upon said trustee, and this net income is to be so appropriated during their joint lives and to the survivors and survivor of them.

"After the death of my brother and both of my sisters, I direct the trustee under this will before named, to apply to the Judge of Probate for said County of York for the appointment of trustees to be joined with the trustee under this will, who shall be duly appointed, commissioned and qualified in conjunction with the trustee under this will, receive in trust all the rest, residue and remainder of my estate and appropriate the same to the procuring suitable buildings for the purpose of an Academy in said Kittery, and the net income thereafter shall be forever applied to the maintenance of an Academy in said Kittery, under such rules, regulations and limitations as the trustees under this will shall then in writing, and with the written approbation of said Judge, prescribe."

The testator died in November, 1864, and the trustee Hackett, named in the will, accepted the trust and in the discharge of his duty under the foregoing provisions of the will expended money out of the income of the property for the support of the testator's brother Oliver and sisters Lydia and Mary, until the death of Mary in 1867; and thereafter paid over to Oliver and Lydia so much of the income as was requested by them or either of them,

until his own decease in 1879. The complainant Wentworth having been duly appointed Hackett's successor as trustee of the particular estate, continued in like manner to pay over to Oliver and Lydia such portions of the income as was requested by them, until the death of Oliver in 1888, and thereafter to Lydia such part of the income as was required by her until her decease in 1897.

No question is raised in relation to the share of the income payable to the sister Mary. But it appears that, at the time of the death of the brother Oliver, the trustee had not in fact paid over all of the income received by him from the trust fund, and held in his hands all of the accumulated income.

The administrator of Oliver's estate claims that the entire income was an absolute gift to the brother and sisters, and vested in them as it accrued, and accordingly claims one-half of the accumulated income in the hands of the trustee at the death of Oliver. The administrator of the estate of Lydia claims that all the accumulated income vested in Lydia as the survivor and became her property during her lifetime and that at her decease it must all go to him as her legal representative.

On the other hand, the respondents who were appointed trustees to receive and appropriate "all the rest, residue and remainder" of the estate to establish an academy in the town of Kittery, claim all of the accumulated income as well as the principal of the fund, under the residuary clause in the will, and deny that the representatives of the deceased brother and sister, or the representative of the survivor of them, can have any legal claim whatever to any part of the accumulated income.

As is usual in this class of cases, respectable authorities have been cited, and many rules of construction invoked by the learned counsel in support of their respective contentions. With reference to this perplexing branch of the law, Judge Story made the following observation a half century ago, in *Sisson* v. *Seabury*, 1 Sumn. 235: "The cases almost overwhelm us at every step of our progress; and any attempt even to classify them, much less to harmonize them, is full of the most perilous labor. To lay down any positive and definite rules of universal application in the interpre-

tation of wills, must continue to be, as it has been a task, if not utterly hopeless, at least of extraordinary difficulty." The analogies afforded by precedents are helpful servants, but dangerous masters. The same clause or phrase may appear to demand the same construction in the principal case as in the one cited; but a more discriminating inspection may disclose an important difference in the leading purpose of the testator, or in the modifying effect of another clause, and thus the force of the precedent be effectually destroyed. To a very great extent the decisions necessarily resolve themselves into the judgment of the court upon the circumstances of each particular case.

Again, there are certain rules of construction which have been sanctioned by the experience of courts as helpful in a majority of cases; but while they are not to be lightly disregarded, they are not to be blindly followed as inflexible guides. There is, however, one fundamental rule or consideration which is paramount to all others, and which should never be overlooked, and that is, that the intention of the testator as declared by the will itself shall be allowed to prevail, unless some principle of sound policy is thereby violated.

This intention must be collected from the language of the whole will interpreted with reference to the avowed or manifest object of the testator; and all parts of the instrument must be construed in relation to each other, so as to give meaning and effect to every clause and phrase, and if possible form one consistent whole, every word receiving its natural and appropriate meaning.

I. So here all of the provisions of the will relating to the income of the fund must be construed together in seeking to discover the real purpose of the testator in regard to the disposition of it. The clause by which the trustee is "authorized and directed to pay to or expend or invest for the benefit, comfort and support of my said brother and sisters, the whole net income of said trust property," considered apart from the clauses immediately following, might give color to the claims of the representatives of the testator's brother and sister as importing an absolute gift of the income

as it accrued. But a different complexion is put upon it by the next clause, as follows: "And from time to time to expend any part or the whole of any accumulation of said unexpended income which may be needed in furtherance of my general object, which I here declare to be to secure the comfort, well being and support and happiness of my brother and sisters, and I hereby devolve the duty of carrying that object into effect upon said trustee, and this net income is to be so appropriated during their joint lives and to the survivors and survivor of them." When the authority given in the former clause to "expend or invest" the income for the comfort and support of his brother and sisters, is considered in connection with the direction in the latter, to expend such part of the accumulation of the unexpended income as "may be needed" in furtherance of the testator's object, it becomes clear that the intention was not to make an absolute gift to the brother and sisters of the whole income as it accrued, but to give them the right to receive so much of the income, from time to time, as might be needed for their comfort and support; and if not all needed for that purpose, it should be invested by the trustee and allowed to accumulate in his hands. They also acquired the right to receive, from time to time, such part of the accumulation of unexpended income as might be needed for their support. If not all needed in furtherance of the testator's object, it might happen, as it did happen, that at the death of the survivor there would be in the hands of the trustee an accumulation of unexpended income. But as the brother and sister did not acquire a vested interest in the whole income, the accumulation of the unexpended income in the trustee's hands at the death of Oliver had never become the property of Oliver in his life time and hence did not pass to his representative, but remained in the hands of the trustee for the benefit of the survivor if needed. For the same reason the accumulation of unexpended income in the hands of the trustee at the death of Lydia, the survivor, never became her property but was held in trust for her benefit during her lifetime if needed. The duty of paying over so much of the income and accumulation of unexpended income as might be "needed" had been distinctly devolved upon the trustee

by the express terms of the will; and the case shows that the trustees respectively paid over so much of the income and accumulation of income as was requested by the beneficiaries from time to time. If any complaint had ever been made that the beneficiaries were not receiving all that they needed for their support, this court would undoubtedly have had jurisdiction of the matter in equity to protect their rights by appropriate decrees. But the question was never raised; and all of the accumulation of income remaining in the hands of the trustee at the death of the survivor, became a part of the "rest, residue and remainder" to be appropriated to the establishment of an academy under the ultimate trust in the will.

Analogous situations and inquiries were presented in the following cases, and the conclusions reached are in harmony with the views here expressed. *Minot* v. *Tappan*, 127 Mass. 333; *Horwitz* v. *Norris*, 49 Penn. St. 213; *Cole* v. *Littlefield*, 35 Maine, 439.

II. But it is further contended that the residuary clause of the will creating the ultimate trust in favor of an academy is void under the rule against perpetuities, and hence that the principal fund in the hands of the complainant, and the accumulation of income also, if not payable to the representative of the survivor under the former trust, must go to all the heirs as intestate property. It is argued that there is nothing in the language of the will which necessarily required the complainant to make application for the appointment of academy trustees within a life or lives in being and twenty-one years after the death of the testator, and nothing to prevent an indefinite continuance of the fund in the hands of the complainant if, in his judgment, it should be deemed advisable to await further accumulation of the estate.

But this position is clearly untenable. It is undoubtedly true, that even a public charitable trust may be created upon conditions that are obnoxious to the rule against "remoteness" with respect to the time within which the estate given to charity must begin. *Merritt* v. *Bucknam*, 77 Maine, 259; *Brooks* v. *Belfast*, 90 Maine, 318.

It has been seen in this case, however, that the testator directs the trustee, "after the death" of his brother and sisters to apply for the appointment of trustees who, in conjunction with himself, shall receive "all the rest, residue and remainder" of the estate, and appropriate a sufficient sum to purchase buildings for an academy to the support of which all of the net income, should thereafter be applied. There is no suggestion or intimation that the original trustee might, in the exercise of his discretion continue to hold the fund for further accumulation before applying for the appointment of academy trustees. By a reasonable construction of the language of the will, the complainant was required to proceed immediately, or as soon as practicable, after the termination of the life interests, to make application for the appointment of the academy trustees. The probate court was required by law to make such appointment; and as an illustration of its feasibility, it may be observed that the academy trustees appear to have been duly appointed under the residuary clause in the will, within a year after the termination of the former trust, and are made parties defendant to this bill.

It is furthermore a maxim in equity that a valid trust once created shall not be allowed to fail for want of a trustee. 1 Perry on Trusts, § 38; *Swasey* v. *Am. Bible Soc.*, 57 Maine, 523. There is nothing in the language of the will to preclude the intervention of the court for the purpose of upholding the trust by the appointment of trustees. On the contrary, under the direction of the testator and the operation of law, the conditions of the trust respecting the appointment of academy trustees would necessarily be fulfilled within the prescribed time, and the rule against "perpetuity" in its technical signification, or more properly speaking, against "remoteness" would not be contravened. 2 Pom. Eq. § 1026; Perry on Trusts, § 733; *Swasey* v. *Am. Bible Soc.*, 57 Maine, supra; *Howard* v. *Am. Peace Soc.*, 49 Maine, 288; *Preacher's Aid Soc.* v. *Rich*, 45 Maine, 553; *Inglis* v. *Trustees of Sailor's Snug Harbor*, 3 Pet. 99; *Ould* v. *Washington Hospital*, 95 U. S. 303; *Sanderson* v. *White*, 18 Pick, 336; *Odell* v. *Odell*, 10 Allen, 1. Indeed, this provision of the will is not distinguish-

able with respect to this objection, from the ordinary direction of a testator for the appointment of executors.

The result is that the entire income, as well as the principal of the estate, is payable to the trustees under the residuary clause of the will.

Decree accordingly.

GEORGE W. REYNOLDS, and others,

vs.

CITY OF WATERVILLE, and others.

Kennebec. December 26, 1898.

Constitutional Law. Municipal Debts. Spec. Laws, 1897, c. 523; Constitution of Maine, Amendment XXII.

By Article XXII of the Amendments to the Constitution of Maine, it is provided as follows: "No city or town shall hereafter create 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 of said city or town; *provided, however*, that the adoption of this article shall not be construed as applying to any fund received in trust by said city or town, nor to any loan for the purpose of renewing existing loans or for war, or to temporary loans to be paid out of money raised by taxation, during the year in which they are made."

The court construes the act of the legislature (ch. 523 laws of 1897), incorporating the City Hall Commission of Waterville, as imposing additional indebtedness and liability on the city while its municipal debt is already beyond the constitutional limit, the commission being regarded as merely the agent or trustee of the city, and therefore declares such act unconstitutional and void.

A proper remedy of tax-payers to prevent proceedings by the city in pursuance of the act is in equity by injunction.

The city's own valuation, and not that made by the State Board of Commissioners, is the test by which to ascertain the amount of indebtedness which settles the constitutional limit.

The court expresses a willingness, in a proper case, to adopt the rule adopted by many authorities, which allows a municipal corporation, although its indebtedness has reached the constitutional limit, to make time contracts, in order to provide for certain municipal wants which involve only the ordinary current expenses of municipal administration, provided there is to be

no payment or liability until the services be furnished, and then to be met by annual appropriations and levy of taxes; so that each year's services shall be paid for by each year's taxes.

ON REPORT.

Bill in equity, heard on bill, answers and proof. The bill was brought by the plaintiffs, being twelve taxable inhabitants of the city of Waterville, against the City, the City Hall Commission, created by special laws of 1897, c. 523, and M. C. Foster & Son, who were alleged to have contracted with the City Hall Commission for the erection of a city building in the city of Waterville.

The act of the Legislature which came under consideration by the court in this case provides, among other things, (Sect. 1) that the mayor of Waterville for the time being, and four other persons named "are hereby created a body corporate and politic, by the name of the City Hall Commission, and as such shall have a common seal and power to sue and be sued;" that vacancies in the City Hall Commission caused by expiration of term, or otherwise, shall be filled by the city council of Waterville; that the city treasurer of Waterville shall be ex officio treasurer of the City Hall Commission; that (Sect. 2) the powers and duties of the City Hall Commission shall be those heretofore conferred upon the new City Hall Commission by the city council of Waterville, and it "shall have any other powers and perform any other duties which may hereafter from time to time be voted and conferred upon it by the city council of Waterville;" that (Sect. 3) "the City Hall Commission are hereby authorized to issue the bonds of the corporation . . . . at such rates and on such times as may be approved by the city council, and for such an amount as the city council may approve, not to exceed seventy-five thousand dollars; and the proceeds of the sale of said bonds shall be exclusively used for the purpose of erecting a city building in the city of Waterville;" that (Sect. 4) "the city of Waterville is hereby authorized when its city council so votes, to convey to the City Hall Commission . . . . in trust, its present city hall building lot in said Waterville, together with all buildings, additions and improvements existing on said city hall lot at the time of said conveyance, for the sole pur-

pose of securing the payment of the bonds issued under the provisions of section three of this act and for no other purpose;" that the Commission shall hold said property in trust for said purposes; that the lot and all improvements, and all buildings which shall be erected thereon by virtue of the powers of this act shall be holden for the payment of said bonds and coupons, which shall constitute a first lien thereon, which lien shall not be impaired; that (Sect. 5) in case of default in the payment of bonds or coupons, any holder may have remedy by bill in equity for the benefit of himself as well as for the benefit of other holders; and that the lien may be enforced by appointment of receiver, and sale, according to the usual practice in equity proceedings; that (Sect. 6) "the city of Waterville is hereby authorized and required to raise annually by taxation such sum or sums as may be necessary to pay all expenses for repairs, insurance and management of said city building in a sum equal to the annual interest on the bonds issued and outstanding," and may exempt the trust property from taxation; that, (Sect. 7) in consideration of the rental, the city shall become the tenant of the building under such provisions and directions as the city council may vote from time to time, with power to sublet parts of the building; that the revenue derived from the building shall be invested in a sinking fund, to be used for the purchase of the bonds and for no other purpose; that the city may raise by taxation, or other means, such other sums from time to time as may be voted by the city council to be added to the sinking fund or used in the purchase of bonds; that (Sect. 9) the city may assume the indebtedness represented by the bonds whenever it can constitutionally, and whenever all of such indebtedness is thus assumed, or the bonds and coupons are paid, the property shall be reconveyed; that (Sect. 10) the Commission shall not sell or mortgage the property; that (Sect. 11) all duties and powers necessary to the erection and care of the city building, not conferred upon the Commission by existing ordinance or vote of the city or by this act, shall be vested in the city council; that the city and not the Commission shall be liable for damages, in the erection and proper care of the buildings; that vacancies occurring

in said City Hall Commission shall be filled by the city council of Waterville; that (Sect. 13) the act shall take effect whenever approved by a majority vote of the votes cast by the legal voters of the city.

The defendants demurred to the bill, and also answered.

From the bill, answer, evidence and admissions, may be gathered the following facts, about which the parties were not in dispute.

1. That the indebtedness of the city of Waterville exceeds, by more than five thousand dollars, "five per centum of the last regular valuation of said city."

2. That on the third day of June, 1896, the city council of Waterville created the "New City Hall Building Commission," which was then and afterwards authorized and empowered to "advertise for plans for a new city building," "to receive bids for a new city building," to employ an architect to prepare suitable plans and working specifications for the proposed building, "to advertise for bids by contractors for the construction of a new city building, according to plans drawn by George G. Adams or others," with full power and authority to close a contract or contracts; to "excavate for a foundation;" that the commission, by authority of the city, enlarged the city hall lot by the purchase of other lands, and caused the whole to be prepared for the erection of a city building, and contracted with an architect.

3. That on the fifteenth day of May, 1897, the City Hall Commission, incorporated by Chap. 523 of the Private and Special Laws of 1897, and one of these defendants, contracted with M. C. Foster & Son, other defendants, for the erection by them of a city building, under the provisions of the foregoing act, for the sum of $61,737, and that the Fosters intend to build the city building according to this contract.

4. That the city building as contracted to be built, will contain among other rooms, a large hall which can be used as a public opera or public amusement hall, but it is admitted that "the use of said city hall will go primarily for the city, and secondarily as a

place of amusement." The hall will be furnished with opera chairs, stage scenery, etc.

5. That chap. 523 of Private and Special Laws of 1897, has been duly accepted by a majority vote of the voters of Waterville.

6. That by authority of the city council, the city hall building lot, additions and improvements, have been conveyed, in trust, to the City Hall Commission, under the provisions of its charter.

7. That the city council of Waterville has authorized and directed the City Hall Commission to issue its bonds, for the purposes specified in its charter, not to exceed seventy-five thousand dollars, and that the City Hall Commission intends to issue such bonds, or as much as may be necessary.

8. That the city intends to become a tenant of the city building, when erected, under the provisions of said act.

The complainants charged, and in argument claimed, that the act of incorporating the City Hall Commission, as a whole, is "an evasion and legal artifice" to enable the city to increase its debts and liabilities far beyond the constitutional debt limit created by the 22nd amendment of the constitution, and is therefore unconstitutional and void; and specifically, (Waterville being already in debt beyond the limit) that the provisions of the act authorizing the conveyance of the city hall lot and other property to the commission, in trust, directing the indefinite, future, annual assessment of taxes for rental, repairs, insurance and care of the city building, and creating a sinking fund out of the income of the city building, are each and all of them means to enable the city to indirectly create debts or liabilities, beyond its constitutional limit, and are therefore unconstitutional.

The complainants further asserted that, in case of default of payment of the bonds, in the manner provided by the special statute, the city will ultimately be liable for their payment.

The complainants prayed that the contract between the City Hall Commission and the Fosters, the act incorporating the City Hall Commission, and the several votes of the city council, may all

be declared illegal and in contravention of the constitution of Maine. Also that the City Hall Commission be ordered to reconvey to the city of Waterville the city hall building lot, and the additions and improvements. Also that the defendants be enjoined from performing the stipulations of the contract to build a city building and from making any contract for the erection of the city building and lease thereof to the city of Waterville, and from issuing the bonds authorized by the act and by the vote of the city council.

E. F. Webb and J. W. Symonds, for plaintiffs.

Jurisdiction in equity: *Carleton* v. *Newman*, 77 Maine, 408; *Crampton* v. *Zabriski*, 101 U. S. 610, (Taxpayers may maintain suit) *Sackett* v. *City of New Albany*, 88 Ind. 473, (45 Am. Rep. 467); 1 Pom. Eq. § 265.

22d Amendment to Const.: To have liberal construction. *Law* v. *People*, 87 Ill. 385. Forbids implied as well as expressed indebtedness. *Litchfield* v. *Ballou*, 114 U. S. 190; *Buchanan* v. *Litchfield*, 102 U. S. 278; *Lake County* v. *Rollins*, 130 U. S. 662; *Lake County* v. *Graham*, Id. 674; *McPherson* v. *Foster*, 43 Iowa, 48, (22 Am. Rep. 215.)

The last regular valuation means that of the city assessors: *Buchanan* v. *Litchfield*, 102 U. S. 288.

Both bonded and floating indebtedness prohibited: *People* v. *May*, 9 Colo. 80; *Law* v. *People*, 87 Ill. 385; *French* v. *Burlington*, 42 Iowa, 614; *Lake County* v. *Rollins*, 130 U. S. 662; (Current expenses) *Prince* v. *Quincy*, 105 Ill. 138, (44 Am. Rep. 785); *Sackett* v. *New Albany*, 88 Ind. 473, citing *Springfield* v. *Edwards*, 84 Ill. 626; (Water supply and lighting) *State* v. *Atlantic City*, 49 N. J. L. 558; *Prince* v. *Quincy*, supra; *Salem Water Co.* v. *Salem*, 5 Ore. 30; *Buchanan* v. *Litchfield*, supra; *Cranch* v. *Davenport*, 36 Iowa, 402; (Future Contracts) *Law* v. *People*, supra; *Davenport* v. *Kleinschmidt*, 6 Mont. 502; *Wallace* v. *San Jose*, 29 Cal. 180; *Niles Water Works* v. *Niles*, 59 Mich. 311; *Springfield* v. *Edwards*, supra; *Culbertson* v. *Fulton*, 127 Ill. 30; *Coulson* v. *Portland*, Beady, (U. S.) 481; *Sackett* v. *Davenport*, 34 Iowa, 208; *City of Erie*, 91 Pa. St. 398; (grading

streets) *French* v. *Burlington*, supra; (County court house) *Hebbard* v. *Ashland County*, 55 Wis. 145; *Crooke* v. *Earl*, 87 Mo. 246; (wagon road) *People* v. *Johnson*, 6 Cal. 499.

Validity of past indebtedness: *McPherson* v. *Foster*, 43 Iowa, 48; *Millerstown* v. *Frederick*, 114 Pa. St. 435; *City of Valparaiso* v. *Gardiner*, 97 Ind. 1, (49 Am. Rep. 416). Opera House: *Thorndike* v. *Camden*, 82 Maine, 39, and cases.

Stat. 1897, c. 523: An evasion of the constitution, and what the law forbids to be done directly cannot be done indirectly. *Jose* v. *Hewitt*, 50 Maine, 248; *Magdalen College case*, 11 Coke, 79; *Carleton* v. *Newman*, 77 Maine, 408; *Buchanan* v. *Litchfield*, supra; *Board of Liquidation* v. *McComb*, 92 U. S. 531; *Fletcher* v. *Peck*, 6 Cranch, 87; *Marbury* v. *Madison*, 1 Cranch, 137; *Henderson* v. *Mayor*, 92 U. S. 259; *Green* v. *Biddle*, 8 Wheat. 1; *Packet Co.* v. *Keokuk*, 95 U. S. 80; *Township of Doon* v. *Cummins*, 142 U. S. 366.

H. M. Heath and C. L. Andrews; (*Harvey D. Eaton*, city solicitor, for Waterville; *W. C. Philbrook*, for M. C. Foster & Son; with them) for defendants.

Purpose lawful: It cannot be controverted that it is a legitimate municipal purpose for a city to erect or rent a building containing, as limited by the municipal records put in evidence and the terms of the special act, "rooms and apartments for all city officers, vaults for the city records, rooms for a public library, an assembly hall and an armory for the militia." The words "City Building" as used in the special act define themselves. Such a building has been often said by the courts to be a necessity. *State* v. *Haynes*, 72 Mo. 377; *Beaver Dam* v. *Frings*, 17 Wis. 398; *People* v. *Harris*, 4 Cal. 9; *Greeley* v. *People*, 60 Ill. 20; *Eastman* v. *Meredith*, 36 N. H. 295; *Spaulding* v. *Lowell*, 23 Pick. 74; *French* v. *Quincy*, 3 Allen 9; *Walton* v. *New Bedford*, 131 Mass. 23; *Stetson* v. *Kempton*, 13 Mass. 278; *Torrent* v. *Muskegon*, 47 Mich. 115; *Mayor* v. *McWilliams*, 67 Ga. 106; *Halbut* v. *Forrest City*, 34 Ark. 246; *Camden* v. *Camden Village Corporation*, 77 Maine, 530.

The courts have often held that the people are the sole judges of the necessity, and that the court will not disturb the exercise of such discretion. *Greeley* v. *People*, 60 Ill. 20; *Chambers* v. *St. Louis*, 29 Mo. 543; *Spaulding* v. *Lowell*, 23 Pick. 74; *Torrent* v. *Muskegon*, 47 Mich. 115, (41 Am. Rep. 715).

The right to erect carries with it necessarily the right to lease a suitable building. So held in *Wade* v. *New Berne*, 77 N. C. 460; *People* v. *Green*, 64 N. Y. 499; *Chambers* v. *St. Louis*, 29 Mo. 543; *Eastman* v. *Meredith*, 36 N. H. 295.

No special act was needed to authorize the city of Waterville to lease a building for municipal purposes. *People* v. *Harris*, 4 Cal. 9. The authority is inherent. *People* v. *Green*, 64 N. Y. 499.

Commission a lawful corporation: *Lester* v. *Georgia*, 90 Ga. 802; *Hinsdale* v. *Larned*, 16 Mass. 65; *People* v. *Salomon*, 51 Ill. 37; *Howard* v. *St. Clair Drainage District*, 51 Ill. 130; *People* v. *Mayor of Chicago*, 51 Ill. 17. (Road Districts.) *Butz* v. *Kerr*, 123 Ill. 659; (Drainage District.) *Owners of Land* v. *People*, 113 Ill. 304; (Commissioners of Public Ponds.) *St. Louis* v. *Shields*, 62 Mo. 247; (Mobile School Commission.) *Horton* v. *Com'rs*, 43 Ala. 598; (Park Commission.) *Kelly* v. *Minneapolis*, 30 L. R. A. 281; *Orvis* v. *Park Com'rs*, 88 Iowa, 674.

In *Wilson* v. *Sanitary District*, 133 Ill. 443, (36 Am. & Eng. Corp. Cases, 340,) the question is discussed at length. Unincorporated commissioners were simply agents of the city. *Orvis* v. *Park Commissioners*, 88 Iowa, 674; *West Chicago Park Commissioners* v. *Chicago*, 152 Ill. 392.

Bonds not city debt: *Gibbons* v. *R. R. Co.*, 36 Ala. 410; *Powell* v. *Madison*, 107 Ind. 106; *Finnegan* v. *Vaughan*, 54 Minn. 331.

Deed valid: *Weymouth & B. Fire Dist.* v. *Co. Com.*, 108 Mass. 142; *Whiting* v. *Stow*, 111 Mass. 214; *Kingman, Petitioner*, 153 Mass. 566; *Meriwether* v. *Garrett*, 102 U. S. 472; *Mayor of Baltimore* v. *State*, 15 Md. 376.

The Legislature can always authorize a municipality to dispose of its property as seems in consonance with the public welfare. *People* v. *Wren*, 4 Scam. (Ill.) 269; *County of Richland* v. *Law-*

rence, 12 Ill. 1; *Trustees* v. *Talman*, 13 Ill. 27; *Rock Island* v. *Sage*, 88 Ill. 582; *Supervisors* v. *People*, 110 Ill. 511; *Harris* v. *Supervisors*, 105 Ill. 445; *Wetherall* v. *Devine*, 116 Ill. 631; *Fort Wayne* v. *R. R. Co.*, 132 Ind. 558; *Coyle* v. *McIntire*, 7 Houston, 44.

Lease is honest: *Portland* v. *Portland Water Co.*, 67 Maine, 135; *Grant* v. *Davenport*, 36 Iowa, 396; *Utica Water Co.* v. *Utica*, 31 Hun, 431.

Rent not a liability: *Smith* v. *Dedham*, 144 Mass. 177; *Crowder* v. *Sullivan*, 128 Ind. 486, (13 L. R. A. 647); *Grant* v. *Davenport*, 36 Iowa, 396; *Appeal of Erie*, 91 Pa. St. 398; *Wade* v. *Borough*, 165 Pa. St. 497; *Brown* v. *Corry*, 175 Pa. St. 528; *Jacksonville R. R. Co.* v. *Jacksonville*, 144 Ill. 567; *New Orleans Gas Co.* v. *New Orleans*, (Louisiana, 1889,) 29 Am. & Eng. Corp. Cases, p. 247); Simonton on Municipal Bonds, 60, 61; *Walla Walla Water Co.* v. *Walla Walla*, 60 Fed. Rep. 957; *People* v. *May*, 9 Colo. 404; *Dively* v. *Cedar Falls*, 27 Iowa, 227; *Corpus Christi* v. *Woesner*, 58 Texas, 462; *Laycock* v. *Baton Rouge*, 38 La. Ann. 475; *Kerlie* v. *South Bend*, 76 Fed. Rep. 921; *Weston* v. *Syracuse*, 17 N. Y. 110; *Territory* v. *Oklahoma*, 37 Pac. Rep. 1094; *Porter* v. *Douglass*, 87 Mo. 239; *Lott* v. *Mayor*, 84 Ga. 681; *French* v. *Burlington*, 42 Iowa, 614; *Lehigh Coal Co. Appeal*, 112 Pa. St. 360; *Rice* v. *Keokuk*, 15 Iowa, 579; *Dyer* v. *Brenham*, 65 Tex. 526; *Carter* v. *Sec'y of State*, (S. Dak.) 24 L. R. A. 734; *McBean* v. *Fresno*, 112 Cal. 159, (53 Am. St. Rep. 191; also 13 L. R. A. 794); *Carlyle Water Co.* v. *Carlyle*, 140 Ill. 445; *Saleno* v. *Neosho*, 127 Mo. 627; *State* v. *McAuley*, 15 Cal. 429; *People* v. *Arguello*, 37 Cal. 524; *East St. Louis* v. *Gas Co.*, 98 Ill. 415, (38 Am. Rep. 97); *Valparaiso* v. *Gardner*, 97 Ind. 1, (49 Am. Rep. 419); *Utica Water Co.* v. *Utica*, 31 Hun, 431; *Davenport* v. *Kleinschmidt*, (Monta.) 16 Am. & Eng. Corp. Cases, 301; *Prince* v. *Quincy*, 105 Ill. 138, (44 Am. Rep. 785; also 2 Am. & Eng. Corp. Cases, 66); *Niles Water Works* v. *Niles*, 59 Mich. 311, (11 Am. & Eng. Corp. Cases, 299); *State* v. *Atlantic City*, (N. J. 1877) 17 Am. & Eng. Corp. Cases, 592; *Beard* v. *Hopkinsville*, 95 Ky. 239; *Salem Water Co.* v. *Salem*, 5 Ore. 29,

(49 Am. Rep. 416); *Sackett* v. *New Albany*, 88 Ind. 473, (45 Am. Rep. 467; also 2 Am. & Eng. Corp. Cases, 85); *Council Bluffs* v. *Stewart*, 51 Iowa, 385; *Law* v. *People*, 87 Ill. 385; *Fuller* v. *Chicago*, 89 Ill. 282; *Lake Co.* v. *Rollins*, 130 U. S. 662; *Spiller* v. *Parkersburg*, 35 W. Va. 605; *Read* v. *Atlantic City*, 49 N. J. L. 569.

Read v. *Atlantic City*, 49 N. J. L. 569, in fact furnishes a rule for reconciling all the cases. The court says the true rule is between the extremes. That where the money to be paid upon such contracts is provided for, and to be raised by taxation upon some fixed and definite scheme, such contracts are not within the constitutional restriction; that where there is no legislative scheme positively prescribing that the sum to be due shall be raised by taxation and appropriated as needed, then such contracts do not increase the debt within the meaning of the constitutional prohibition.

City not suable: There can be no "debt or liability," unless under, at least, some contingencies an action can be brought against the city and judgment recovered.

This reliance of the bondholders upon the power of the Commission to compel the city to levy a tax to meet the annual rental, and to have it in the treasury at the end of each year to discharge the rental due for the preceding year, robs the case of all pretense of there being any debt or liability against the city. There can be no debt or liability unless the obligation runs against the city as a whole. Where a special tax is to be assessed to meet the agreed price and the obligee looks to that particular fund, there is no debt or liability. *People* v. *May*, 9 Colo. 404; *Fuller* v. *Chicago*, 89 Ill. 282. If a tax is authorized and set apart to meet the contract, no debt is created. *State* v. *Pacheco*, 27 Cal. 175. Obligations payable from a particular fund and for which the fund only and not the municipality is liable are not within the constitutional restriction. *Quill* v. *Indianapolis*, 124 Ind. 292, (7 L. R. A. 681); *Strieb* v. *Cox*, 111 Ind. 299; *Baker* v. *Seattle*, 2 Wash. 576; *Davis* v. *Des Moines*, 71 Iowa, 500. For illustrations see: (Paving certificates.) *Tuttle* v. *Polk*, 92 Iowa, 433; (Betterment assess-

ments.) *Atkinson* v. *Great Falls*, 16 Mont. 372; (Park certificates.) *Kelly* v. *Minneapolis*, 30 L. R. A. 281. In such cases, it is essential that all right of action against the city as a whole is clearly surrendered. *State* v. *Fayette Co. Com'rs*, 37 Ohio St. 526; *Kimball* v. *Grant Co. Com'rs*, 21 Fed. Rep. 45.

Future city councils bound: It is no answer to suggest that future city councils are not required to order the rental tax. A contract that is fair, just and reasonable, and prompted by the necessities of the situation or advantageous to the municipality will not be construed as an unreasonable restraint upon the power of succeeding boards. *McBean* v. *Fresno*, (Cal.) 13 L. R. A. 794, and cases above cited.

Purpose of constitutional limit: Cooley Const. Lim. (5th ed.) 78, 79.

Adequate remedy at law: *Searle* v. *Abraham*, 73 Iowa, 507; *Dodd* v. *Hartford*, 25 Conn. 237; *Sheldon* v. *School Dist.* 25 Conn. 223; *Oregon* v. *Lord*, 1 L. R. A. 473; *Dow* v. *Chicago*, 11 Wallace, 108; *State R. R. Tax Cases*, 92 U. S. 575; *Moers* v. *Smedlay*, 6 Johns. Ch. 27; *Sellinger* v. *White*, 9 Neb. 399; *Altgett* v. *San Antonio*, 81 Tex. 446.

No equity jurisdiction: *Loud* v. *Charleston*, 99 Mass. 208; *Carleton* v. *Salem*, 103 Mass. 141; *Fiske* v. *Springfield*, 116 Mass. 88; *Prince* v. *Boston*, 148 Mass. 285; *Steele* v. *Municipal Signal Co.*, 160 Mass. 36; *Johnson* v. *Thorndike*, 56 Maine, 32. In the last case the court say that there are two classes of cases, and only two, where the court is authorized to interfere; where the city or town attempts to raise or pay money, or pledge its credit for a purpose not authorized by law, and where any agent or officer thereof attempts to pay out the money of such city or town without authority.

Laches: *Parsons* v. *Northampton*, 154 Mass. 410; *Tash* v. *Adams*, 10 Cush. 252; *Freeland* v. *Hastings*, 10 Allen, 575; *Frost* v. *Belmont*, 6 Allen, 156; *Hurd* v. *Lynn*, 1 Allen, 103; *Fuller* v. *Melrose*, 1 Allen, 166; *Babbitt* v. *Savoy*, 3 Cush. 530.

SITTING: PETERS, C. J., EMERY, HASKELL, WISWELL, STROUT, JJ. SAVAGE, J., dissenting. FOSTER, J., did not sit being related to one of the parties.

PETERS, C. J. The constitution of this State provides that no city or town shall create 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 of said city or town.

In interpreting this constitutional provision we believe we would be willing to adopt the middle doctrine on which some of the authorities stand, called by counsel for respondents the rule of reconciliation, which allows a municipal corporation, although its indebtedness has already reached the constitutional limit, to make time contracts in order to provide for certain municipal wants which involve only the ordinary current expenses of municipal administration, provided there is to be no payment or liability until the services be furnished, and then to be met by annual appropriations and levy of taxes; so that each year's services shall be paid for by each year's taxes; the scheme being variously denominated in the cases as a business, or cash, or pay-as-you-go transaction, and the like.

And we incline to the belief that, on this principle, a town or city may contract for the use of a hall for a term of years, to be used for strictly municipal purposes, provided the principle be fairly applied in any case and not be abused; not however allowing a hall to be hired for the purpose of subletting either the whole or any part of it. Municipal necessities are only to be regarded.

But under the guise of the principle above stated, a municipality should not be allowed to pass off, as an agreement for renting a hall, an agreement which is not really entered into strictly for such purpose. And we feel that the transaction here in question must be repudiated upon that ground. The transaction has in some respects the semblance of a lease, but it is a misnomer to call it such. It is attempted to make it one thing in form, while in reality it is something else. It is apparent enough that the city is to have

not merely the use of the building to be erected, but the building itself. It is not to get an annual service to be paid for out of annual revenues, but the city is to acquire a city hall presently, to be paid for by assessments of taxes for the long period of thirty years. It is a purchase.

It would not be a misinterpretation to say that the city of Waterville, instead of leasing the property, undertakes to purchase or pay for it on the installment plan, and that what are called rentals for the hall are merely partial payments on its cost.

In *Gross* v. *Jordan*, 83 Maine, 380, the head-note is as follows: "Writing an agreement in the form of a lease does not alter the character of an instrument which by its more essential terms discloses itself to be a conditional sale of personal property." The facts of that case showed that by a paper called a lease, and sprinkled with phrases appropriate to a lease, one person received a wagon of another, agreeing to pay fifteen dollars a month for its use, and when the sums so paid amounted to one hundred and sixty-five dollars and interest thereon, such party was to receive title to the wagon. The court said: "This paper, which calls itself a lease, is a conditional sale of property, the title passing when the full price shall have been paid. Its own terms are the true test of the nature of a contract, whatever its framers may denominate it." That case was followed by other cases in this state where agreements to convey pianos and sewing machines were attempted to be passed off and construed as leases, but the attempts did not prevail.

We need not dwell on this point, however, because our opinion is that the true nature of the transaction is rather the hiring of money by the city upon the security of city property through the intervention of a trustee, the title to the property being and remaining in the city from the beginning to the end, subject only to the lien upon it in favor of bondholders for money to be lent. This kind of agreement is so clearly and satisfactorily explained by Pomeroy in his Equity Jurisprudence, in § 995, that we here quote the entire section, as follows: "Deeds of Trust to Secure Debts.—A special form of trust for the benefit of creditors peculiar to the

law of this country, has become quite common in several of the states, and requires a brief description. A 'deed of trust to secure a debt' is a conveyance made to a trustee as security for a debt owing to the beneficiary—a creditor of the grantor, and conditioned to be void on payment of the debt by a certain time, but if not paid the trustee to sell the land and apply the proceeds in extinguishing the debt, paying over any surplus to the grantor. The object of such deeds is, by means of the introduction of trustees, as impartial agents of the creditor and debtor, to provide a convenient, cheap and speedy mode of satisfying debts on default of payment. A distinction, however, should be noted in this connection between unconditional deeds of trust to raise funds for the payment of debts, and deeds of trust in the nature of mortgages, the former being absolute and indefeasible conveyances for the purposes of the trust, while the latter are conveyances by way of security, subject to a condition of defeasance. In many states deeds of trust to secure debts are much favored, either on account of the intervention of disinterested third parties, whose position as trustees secures to the debtor fair dealing, or the absence of any necessity for the intervention of the courts; though in some states they are required to be judicially foreclosed, and are therefore of no practical advantage. Indeed, in a majority of the states this form of security has come into general, and, in some instances, universal use. An intimate relation exists between deeds of trust to secure debts and mortgages, especially mortgages containing powers of sale; in fact, the former are generally considered as being in legal effect mortgages. Where a mortgage is regarded as a conveyance of the legal estate, a deed of trust can be no less a conveyance of the legal estate, and where a mortgage is considered as but a mere lien, a deed of trust is generally considered as nothing more than a lien. A reconveyance, as a general rule, is not necessary on payment of the debt secured by a deed of trust, satisfaction being entered in the margin, as in the case of a mortgage. Statutes relating to the recording of mortgages embrace deeds of trust, without special mention of the latter, as also do those relating to powers of sale contained in mortgages. While a mortgage with

power of sale may be assigned, in the absence of words restricting an assignment, and the power of sale passes thereby to the assignee, a deed of trust to secure a debt, being a confidence reposed, cannot be delegated, and no assignment is possible, without an express and positive permission in the deed. The duties of the trustee of a deed of trust require the utmost good faith and impartiality as regards both the debtor and creditor. He is personally liable in a suit at law for damages to the party aggrieved for a failure to use reasonable diligence, or an abuse of his discretionary powers; and a sale may be enjoined or set aside at the instance of the injured party. It is not necessary that the person who is to execute the power in a trust deed should join in the deed, or execute any formal writing showing his acceptance of the trust; nor is it necessary that the beneficiary should signify his assent by any formal writing, for his assent is presumed since the deed is for his benefit. Where a trustee has accepted the trust, he cannot renounce it without the consent of the beneficiary, or of a court of equity; and he may be compelled to discharge the trust."

The statutory commission in the case before us was very little more than a passive trustee, and would be entirely such when the bonds should become paid. The trust at all times was to be fastened upon the estate rather than upon the trustee, and a conveyance of the estate by the city itself, after payment of the debt, could not be repudiated by the trustee. *Sawyer* v. *Skowhegan*, 57 Maine, 500; Pom. Eq. Juris. § 988. So there was no need of inserting in the act that the commission should reconvey to the city. The learned counsel for the respondents admits that an equity of redemption reposed in the city. When therefore the debt should become paid, the new city hall would be absolutely the property of the city.

There appears upon the brief of respondents this assertion: "In many cases, where commissioners, not being incorporated, have issued bonds, the courts have held that the city was liable, as the statutes properly construed required a holding that such unincorporated commissioners were simply agents of the city." We can see no reason why an incorporated commission may not act as an

agent or trustee just as well. An examination of the various sections of the legislative act reveals the fact that the commission was to be but the humble trustee of the city of Waterville, and the city itself the real owner of the property.

The commission as created by the act was naked of all authority excepting in just one respect, and that was as a formal medium through which the city could secure to the bondholders its debt. It will be seen all the way along that the commission is to be under the control of the city. The commission could sue and be sued, but it had no property and was subjected to no risks. It is entitled to have certain officers, and such others "as the city may direct." The city treasurer is to be the treasurer of the commission, but no new bond is required of him, and his sureties would not be responsible for his defaults, unless he be considered as acting for the city in what he does for the commission.

Section 2 declares that the powers and duties of the commission shall be controlled by the city. The commission is to have "such powers as are already conferred on it by the city," and it "shall have any other powers and perform any other duties which may hereafter from time to time be voted and conferred upon it by the city council." This does not sound much like the city being only a hirer and tenant of the property.

Section 3 imposes merely a clerical duty upon the commission, without the exercise of any discretionary power whatever. It is authorized to issue its bonds "at such rates and on such times and for such amounts as the city council may approve," not exceeding $75,000. By section 4 the city is authorized, "when its council so votes," to convey its city hall lot and all improvements thereon, presumably of great comparative value, to the commission for the sole purpose of securing the bonds before named and for no other purpose, the commission to hold the property and the new building to be erected thereon in trust as security therefor. These are all very commendable provisions, but only go to show the true relations which the city was to hold towards this city property, and indicating that the city was really to build the new hall as its own property. And does not the very mischief here arise which the

constitutional amendment was designed to prevent, the city thus getting their hall in the present, and having thirty years of continuous annual taxations with which to pay for it? And it is further deducible from these and other clauses in the legislative act that the commission is virtually created and controlled by the city for its own purposes. It is a corporation formed in blank, the city filling the blanks.

Section 5, in case of a default in the payment of bonds or coupons, authorizes bondholders to petition the court to enforce their lien by appointing a receiver for the sale and distribution of the property. The petitition goes to the court, ignoring the commission. Is there any doubt, should there be an excess of assets over indebtedness, that the balance would belong to the city as the debtor and owner?

By section 6, the city is "authorized and *required* to raise annually by taxation such sum as may be necessary to pay all expenses for repairs, insurance and management of said city building, when completed, together with an annual rental of said building in a sum equal to the annual interest on the bonds issued and outstanding . . . . and it shall be authorized to except said property from taxation while held in trust" . . . . These are exactly the burdens which the city would necessarily bear as an owner of the property, and it is nothing less than affectation to style such payments rentals instead of payments of interest on the bonds. It is indeed an ingenious provision to fix the so-called rental as just equivalent to interest on the bonds and the expenses, because it has a look of fairness on its face. But the unfairness of this proposition is exposed when we find in section 7 a compensatory clause "authorizing and empowering the city to raise by taxation *or other means* such other sums as may be voted by the city council to add to the sinking fund to be provided for the purchase of the bonds and coupons issued under section 3 of this act." It certainly cannot be pretended that these occasional taxations made from time to time are rentals or in the nature of rentals, for it is expressly provided that they shall swell the sinking fund for the payment of the bonds for the benefit of the city, and of course to

lessen the equitable if not legal indebtedness of the city. The language is to raise money by taxation *or other means*. What other means, unless it be by borrowing money? It is just here that the mischief may be apprehended which the constitution intends to prevent. The city could raise any amount of money at any time, under this general authority, without restriction as to amounts and without regard to conditions and circumstances. Absolute power is committed to the city by the legislature. It was just this kind of domination practiced by majorities and this improvidence of legislatures that the constitutional amendment was designed to restrain. If the act in question is to be deemed constitutional, in spite of the real plan transparent in it, why may not the city of Waterville be able, under a similar scheme of so-called rentals, to obtain for itself, by legislative permission, any other expensive scheme of improvements it might see fit to undertake?

Section 7 contains grotesque provisions: "In consideration of the rental as aforesaid the city of Waterville shall become the tenant of said city building when completed." If that shall be taken to mean that the city may remain in possession of its property without interference of bondholders, so long as it promptly pays the interest on the bonded indebtedness and keeps the property in good preservation and repair, that idea may be easily understood. If it means, however, that the city is to be a tenant and some other party a landlord, who is such landlord? It cannot be the constructors for they are to have their pay. Nor can it be the bondholders, for they have a lien only and must go to the court for the enforcement of any of their rights. It cannot be the Commission, for there are no words in the act investing them with any such authority. The landlord then cannot be other than the city itself, the city to be both landlord and tenant. The draftsman of the legislative act seems to have been in some confusion of mind on this point, evidently regarding the city as one party and its city council as another; especially when he declares in section 7 that the city shall become tenant "under such provisions and directions as the city council may vote from time to time." But it is of course difficult to keep up the landlord and tenant theory and

maintain consistency at the same time. Another inconsistent thing *on that theory* is that the city is to pay a full rent for the property as tenant and at the same time receive only partial benefit from it, turning all the earnings to be received from subletting the hall into a sinking fund for paying the bonds issued by the Commission.

Section 10 in effect affirms again that the commission shall have no power excepting to act as a medium through which the city may deal with the bondholders.

Certain provisions contained in section 11 are very important as disclosing the true nature of these transactions on the part of the city of Waterville, which section is as follows: "All duties and powers necessary to be exercised with respect to the erection of said city building and the care of the same after erection, not conferred on said City Hall Commission by any existing ordinance or vote of the said city of Waterville, or by the provisions of this act, shall be vested in the city council of Waterville. The city of Waterville, and not said City Hall Commission shall be liable for all damages which said city would have been liable for in the erection of said building or the proper care of the same, had not the trust herein provided for been created."

By this section all duties and powers to be exercised in the construction and after-management of the hall, not already lodged in the commission by the city council or by the act, and we do not find that any are so lodged, are vested in the city itself. How inconsistent with the contention that the city is to be really a tenant paying rent! It may be admitted that it is provided it may be *called* a tenant. And so purely submissive an agent of the city is the commission to be, and so thoroughly and abjectly under its control, that it is to be protected during the construction of the hall, from all incidental risks, and the city is to assume all the same. What an unheard of proposition that a tenant is to pay a full price for his tenancy, and also be answerable for all injuries and misfortunes that may happen while the building he is to occupy is in process of construction!

But none of the features of this section are at all inconsistent

with the true nature of the transaction as the complainants claim it to be. They contend that the city is the actual party constructing the city hall; that it is to construct it itself with money to be hired upon the security of its city hall lot and all improvements and erections thereon, no other person or party contributing either money or liability thereto; that the form of the security is to be by a trust deed to a trustee upon a term of credit of thirty years; and that the means of repaying the money borrowed is by annual installments for the same period from money collected by annual taxes assessed for the purpose and occasional taxes in the meantime, and by earnings of the hall when used for other than municipal purposes; the city in the beginning having the title to the estate subject to the bonded indebtedness, and in the end free of all indebtedness or claim. This construction renders every section and clause of the act sensible, consistent and clear, while any other construction renders it illogical and inconsistent throughout.

It appears from the facts that at first the city made its contract directly with the builders, and finding it illegal, afterwards annulled that contract, intending to make the same contract over again indirectly through its incorporated agent or trustee. Here were two forms, but the embodiment in each case is the same. Where is there any essential difference between the two?

Section 12 provides that all vacancies in the membership of the commission shall be filled by the city council. It constitutes its own agent or trustee at its liking.

Section 13 provides for the city's acceptance of the act, and it accepted it. By its acceptance the city assents to all the taxations provided for, and to all the obligations imposed upon it by the act. The learned counsel for respondents sets up the contention that the true test of its liability is whether the city can or not be sued, arguing that the only remedy against it must be by mandamus. But is not mandamus a legal remedy of the most potential kind? And is there not a clear liability where mandamus can be maintained? After the city accepted the act, were the act free from the taint of unconstitutionality, would not the city be under a requirement for thirty years to make at least an annual assessment

of taxes whereby to make annual payments on its indebtedness? It is the only mode of enforcing collections from municipalities in the practice of many of the states. Does not such a requirement constitute a liability? And could not equitable if not legal proceedings be maintained against the city in some conditions that might arise? Can there be any doubt that the bondholders could by equity process enforce the obligation expressly assumed by the city to insure the building and keep it in repair; and why may they not also enforce the city's obligation to pay interest on the bonds either directly or by process in the name of its trustee? Or are all of these provisions merely a rope of sand?

It must be confessed that the act in question is a very dexterous attempt to accomplish one thing under the name of another thing,—as plausible as it is fallacious. It is error with truth's clothes on. And such erroneous propositions are not always easy to answer. Dr. Whately truly said of erroneous arguments:—"Although they are most unsubstantial, it is not easy to destroy them. There is not a more difficult feat known than to cut through a cushion with a sword." It is sure, however, if the plan here, intended as it is to avoid rather than uphold the law, shall prevail, the result as a precedent will shatter the constitutional amendment into pieces.

The respondents further contend that the remedy here is at law and not in equity. Such a decision would be a victory for respondents, because the city could control its common law obligations to suit the majority; while the constitutional amendment is for the protection of the minority against the majority.

We have no doubt that the city's own valuation, and not the valuation made by the State Board of Commissioners, is the test by which to ascertain the amount of indebtedness which settles the constitutional limit. If the city wants its valuation increased for one purpose let it increase it, by its own act, for all purposes.

Our conclusion is that the bill must be sustained, and that the deed to the City Hall Commission from the city of Waterville must be adjudged to be illegal, null and void; and that the contract between the Commission and the firm of M. C. Foster & Son

for erection of a city hall must also be adjudged to be illegal, null and void, and that an injunction must issue against all the respondents to prevent any enforcement of such contract.

Decree accordingly, and for costs against the city of Waterville.

DISSENTING OPINION.

SAVAGE, J. I am unable to concur in the opinion of the court. And the importance of the decision, as affecting municipal development in this state both now and hereafter, seems to justify me in placing on record the reasons which govern my dissent.

The situation may be fairly summarized as follows: The inhabitants of the city of Waterville desired the present use of a city hall building, which by reason of the constitutional debt limit they were unable to build by borrowing money therefor. The city, being indebted already beyond its debt limit, could not incur any debt for that purpose. It owned land which had already been devoted to and used for city hall purposes. It was willing that the land and the new building which might be built upon it should be held for the payment of the cost of the building. In consideration of the use of the building, the city was willing to be bound to pay the actual current expenses, and a sum equivalent to the interest on the cost of the building, and to assume liability for such damages as might be incurred in the construction of the building. The city also desired to have the right to pay, at its option, whenever it could constitutionally do so, the cost of the building, at one time or in installments. None of these things, however, could be done, if thereby the city was to incur a debt or liability, within the meaning of the constitution. The legislature sought to enable the inhabitants of the city of Waterville to accomplish these purposes by the act creating the City Hall Commission.

I concede all that is said in the opinion of the court concerning the cordial, even intimate, relations between the Commission and the city. I see no reason why they should not be so.

The personnel of the Commission, the manner in which its mem-

bers should be chosen, and its duties and powers concerned only two classes—the inhabitants of the city and the prospective bondholders. It mattered not how closely the city was enabled to control the doings of the Commission or the management of the building, if those proposing to buy bonds were satisfied. That was merely a matter of regulative machinery. Nor did it matter, I think, if, as stated in the opinion, the city would have the title to the building, subject to the lien of the bondholders. That lien is their substantial protection; and if they were satisfied, no one else should complain. Nor is it of any particular consequence whether the city in its occupancy of the building is correctly styled a tenant, or whether the compensation it is to pay for the use of the building is properly a rental. These are merely names.

There seems to me to be no good reason why the city, with legislative permission, under these circumstances, may not divest itself of the right to the use of the building unless it pays what is equivalent to a fair rental. It seeks to put the property in trust for the benefit of those persons who advance money for the purpose of building it, and for the purposes of the trust it is to pay a compensation, which in the legislative act is styled rent. It is to remain in the possession and control, to be sure, but this privilege is subject to the duty of paying the compensation. If an individual places his property in trust, is it not permissible for him to agree to pay a rent in consideration of retaining the use?

All these things do, indeed, show the relations which the city bears to the building and to the Commission. Aside from the constitutional limit upon municipal indebtedness, I am unable to see why such relations may not properly be created by the legislature. And it is the legislature which has attempted to create them in this case. It must be remembered that we are not dealing with natural persons. These relations are not to be deemed colorable. as is frequently the case in the relations between private individuals, and as was the case in *Gross* v. *Jordan*, cited in the opinion, The relations in this case were created by law, by the statute, by the only body which had the right to create them. Both the city and the Commission are creatures of the legislature. Their powers,

duties and responsibilities are all limited by the legislature, and subject to legislative change and regulation. The same power which created the city of Waterville also created the Commission, and granted to it certain powers and imposed certain duties. *Burlington Water Works* v. *Woodward*, 49 Iowa, 58.

These relations are lawful, unless by operation of this statute the municipal debt of Waterville would be increased. The statute creating this Commission should be construed, like every other statute, according to the clear intention of the legislature as expressed therein. That intention, I take it, was that the city might put its city hall lot into a trust; that the trustee might hire money for the construction of a city hall on the security of the property alone; that the city should not in any event be liable for the debt; that the city might have the possession and control of the building by paying annually therefor a fair compensation, but not otherwise; and that the city might pay from time to time, or at one time, if it could constitutionally, the amount necessary to redeem the property from the bondholders. This is all there is to it.

The real question, however, underlying all others, is whether this legislation is in contravention of the constitution of Maine, in that it may increase the debt of the city beyond its limit.

Whatever may be the opinion of the court of the wisdom or expediency of this instrumentality devised as a part of municipal government in the city of Waterville, if its operation does not tend, directly or indirectly, "to increase the debt or liability" of the city of Waterville, it should not be held to violate the constitutional provision referred to. To the legislature, and not to the court, has been assigned the power to create municipal corporations and municipal governments, and the duty to modify, regulate and control them for the best interests of the people. With the exercise of this duty we should not interfere, unless the legislature oversteps the organic law of the state. The city is the creature of the state. Its powers and duties are defined and limited by the state, acting through the legislature. The state can abolish it and substitute another instrumentality in its place. The state may create, within the town or city, other municipal instrumentalities,

in furtherance of the public weal, as, for instance, village corporations, fire and sewerage districts, all performing municipal duties, which otherwise would devolve, or might have been devolved, upon the town or city itself. The state in some instances has created commissions to aid in municipal regulation, like police commissions and fire commissions, answerable not to the municipality, but to the statutes which created them.

I think it is not to be questioned that such legislation is within the power of the legislature. *No. Yarmouth* v. *Skillings*, 45 Maine, 133; *People* v. *Draper*, 15 N. Y. 532.

The complainants charge, and in argument claim, that the act incorporating the City Hall Commission, as a whole, is "an evasion and legal artifice" to enable the city to increase *its* debts and liabilities far beyond the constitutional debt limit created by the twenty-second amendment to the constitution, and is therefore unconstitutional and void.

The broad ground is taken that the statute under consideration is nothing but a mask, a scheme, a contrivance, a legal artifice, by which Waterville can get a city building, while indebted beyond the constitutional limit, by indirectly creating a debt or liability, and thus break the spirit, if not the letter, of the amendment above referred to.

"To get at the thought or meaning expressed in a constitution, the first resort, in all cases, is to the natural signification of the words in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning, which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning apparent on the face of the instrument must be accepted, and neither the courts nor the legislature have the right to add to it or take from it. . . . . The simplest and most obvious interpretation of a constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption." *Commissioners of Lake County* v. *Rollins*, 130 U. S. 662.

It is a striking and suggestive fact that the states whose courts have construed the debt limit amendments most narrowly and

strictly, most abound in various schemes and artifices for municipal improvements, like incorporated "road districts," "sanitary districts," "drainage districts," "fire districts," and "commissions" of all sorts possessing power to levy taxes or issue bonds. Not only is it held that these schemes and artifices are constitutional and that the legislature can create every conceivable description of corporate authorities and endow them with all necessary powers, but it is also held that the power of the original municipality to incur indebtedness is not in the least affected by the indebtedness or authorized indebtedness of its sub-municipalities. The two corporations are in this respect entirely distinct. *Wilson* v. *Sanitary District*, 133 Ill. 443; *West Chicago Park Commissioners* v. *Chicago*, 152 Ill. 392; *People* v. *Salomon*, 51 Ill. 37; *Butz* v. *Kerr*, 123 Ill. 659; *Owners of Lands* v. *People*, 113 Ill. 304; *St. Louis* v. *Shields*, 62 Mo. 247; *Horton* v. *Mobile School Commissioners*, 43 Ala. 598; *Kelly* v. *Minneapolis*, 30 L. R. A. 281; *Orvis* v. *Park Commissioners*, 88 Iowa, 674; *Todd* v. *Laurens*, (S. C.) 26 S. E. 682; *Adams* v. *East River Savings Institution*, 136 N. Y. 52.

The act in question creates a City Hall Commission, to which the city of Waterville has the power of appointment, which is charged with the duty of building a city hall for the use of the city, has power to issue bonds for that purpose, and is constituted a trustee for the bondholders.

It is not claimed that the building or leasing of a city hall by a city is not legal and proper, as a municipal act. *Spaulding* v. *Lowell*, 23 Pick. 71; *Stetson* v. *Kempton*, 13 Mass. 278; *State* v. *Haynes*, 72 Mo. 377; *People* v. *Mononey*, 4 Cal. 9; *Halbut* v. *Forrest City*, 34 Ark. 246; *Eastman* v. *Meredith*, 36 N. H. 295; *Beaver Dam* v. *Frings*, 17 Wis. 409; *Torrent* v. *Muskegon*, 47 Mich. 115; *People* v. *Green*, 64 N. Y. 499; *Rome* v. *McWilliams*, 67 Ga. 106; *Camden* v. *Camden Village Corp.*, 77 Maine, 530.

It is admitted that the primary object of the proposed city hall will be for the city's use. If the hall, which shall be adapted for meetings of the citizens for municipal, political and other purposes, shall at the same time be fitted so that it can be used as a theatre

or for purposes of amusement, when not needed for the use of the city, and thereby produce an income for the city's benefit, I think the erection of the city hall is no less within the scope of legitimate municipal purpose. Such seems to be the nearly universal practice in this and other states, and such is the result of the decided cases. *French* v. *Quincy*, 3 Allen, 9; *Worden* v. *New Bedford*, 131 Mass. 23; *Jones* v. *Sanford*, 66 Maine, 585; *Stetson* v. *Kempton*, supra; *Halbut* v. *Forrest City*, supra.

To call this act a "scheme" or "artifice" does not add to the weight of the argument. Much private legislation consists of "schemes." The wit of men is all the time being exercised in accomplishing new results by new means, within legal limits. If needed public improvements, if the ownership of public water supplies, and the like, by a town or city can be accomplished only by a "scheme" like this, and that without infringing upon the constitutional amendment, or becoming subject to the evils which that amendment was intended to prevent, then it is to the credit of the legislature that a "scheme" has been devised.

The question is whether any of the specific provisions of the act are within the inhibition of the constitution. Does the grant of authority to the city to convey its old city hall lot to the Commission in trust, or to the Commission to issue bonds, or the requirement of an annual tax levy to pay "all expenses for repairs, insurance and management," and an annual rental of the building, or the requirement that the "revenue derived from the building shall be invested in a sinking fund to be used for the purchase of the bonds," tend to "increase the debt or liability" of the city?

The language of the constitution is clear. No refinement of language can make it more so. Of its absolute wisdom no one can doubt. Its purpose is equally clear. It is easy to read it in the light of the history of the state. Municipalities of tax-payers can in most instances safely be left to tax themselves, but occasionally a wild and unwarranted enthusiasm attacks a community, as it does an individual. In the years just prior to the adoption of this constitutional amendment many towns in this state had incautiously lent their aid to what were thought to be improvements, notably

unsuccessful railroads, and in doing so, had incurred so great indebtedness that insolvency was the result, and liquidation was resorted to. This indebtedness was piled up to be met by future taxation, in some cases by a future generation, but like all "debts" it was to be paid, and it could be paid only by municipal taxation. It was, therefore, to prevent municipalities from incurring debts or liabilities (beyond the limit) that must be paid by future taxation, which was the object of the constitutional amendment. Burdens must not be created in the present to be laid upon the shoulders of future tax-payers. A "debt" is what is owed—and must be paid. It is claimed that the word "liability" is more significant in this instance. A definition which is ample for the purpose of construing the constitution is, "The condition of being responsible for a possible or actual loss, penalty, evil, expense or burden." Standard Dictionary. It will be easily perceived that this definition involves the idea of an ultimate pay-day. To be liable in this sense is to be financially responsible, to be obliged to pay, at least, upon a contingency. To be "liable" is to be bound, in the present, to pay, in the future, certainly, or upon a contingency. So defined, the constitution accomplishes its full purpose. It has protected over-confident communities from themselves, and has been and is a strong bulwark of our municipal credit. But it never was intended to prevent a municipality from acquiring for itself such advantages as it can, by any "scheme" or "artifice" which does not create or pile up a debt or liability now which must be paid by it by and by.

I. Is the provision authorizing the conveyance of the old city hall lot to the Commission in contravention of the constitutional amendment referred to? I do not think so. As has already been said, the City Hall Commission is a legal and proper municipal instrumentality. It was competent for the legislature to create it. The act merely authorizes the transfer of a piece of municipal property created for municipal uses, from one municipal corporation to another municipal corporation, to be used for the same purpose by the same people. Both corporations are a part of the

municipal machinery of the same city. The real beneficiaries are not changed. The act simply permits a change in the agency by which the public purpose is to be accomplished. Analogous statutes are frequent. By a recent statute in this state, all the property of school districts, each a separate and distinct municipal corporation, was transferred, nolens volens, to the towns in which they were situated. The right to do so has not been questioned. Much more is this permissive act legal. But it is said that this property was to be conveyed in trust to another corporation to secure its debts. True; but the other corporation was but another instrumentality of the same municipality. Not only does the legislature have power to change, modify or limit municipal corporations, but it can control the use and disposition of municipal property, or so much of it as is acquired for and applied to public municipal uses. *No. Yarmouth* v. *Skillings*, 45 Maine, 133; *Weymouth & B. Fire District* v. *Co. Com.*, 108 Mass. 142; *Whitney* v. *Stow*, 111 Mass. 368; *Kingman, Petr.*, 153 Mass. 566; *Meriwether* v. *Garrett*, 102 U. S. 472; *Mount Hope Cemetery* v. *City of Boston*, 158 Mass. 509, (35 Am. St. Rep. 515, note); *Richland Co.* v. *Lawrence Co.*, 12 Ill. 8; *Harris* v. *Board of Supervisors*, 105 Ill. 445; *Mayor of Baltimore* v. *State*, 15 Md. 370; *Coyle* v. *McIntire*, 7 Houst. 44.

Some courts have gone so far as to say that the legislature may divert municipal property to other and different uses from those to which it has been applied by the municipality itself. *Indianapolis* v. *Indianapolis Home*, 50 Ind. 215. See note to *Mount Hope Cemetery* v. *Boston*, (158 Mass. 509) 35 Am. St. Rep. at p. 536.

If the legislature may require an absolute conveyance of such property by a city to another municipal corporation to be used for the same purpose, can it not permit the conveyance in trust, reserving to the city what may be called an equity of redemption? I think it can. It must be remembered that it lies with the legislature to determine how and upon what terms and conditions, and for what purposes, a municipal corporation may hold property.

It is claimed, in argument, that the act is unconstitutional, so far as the authorized conveyance of the city hall lot in trust is

concerned, because thereby the property of the city is made subject to the lien of the bonds, and in case of default, it may be sold, and the proceeds applied to the payment of the bonds, and in this way the city is liable to lose its property.

It is not clear that such a possibility would render the act invalid. The act is permissive. The legislature merely gives the authority. And when the legislature and the municipality affected both agree as to the wisdom of the proposed proceeding, I am unable to see how it infringes upon any provision of the organic law. But a sufficient answer to this objection is, that it is at all times within the power of the city, by the legitimate exercise of the power of taxation, to provide for the payment of the bonds, and so prevent a forfeiture or loss. The amount of the bonds, the rate of interest, and the time or times when they shall mature are all subject to the approval of the city, and it certainly has it within its power to make such provisions that even the payment of the debt of the City Hall Commission, from time to time, by money raised by taxation, would not be extremely onerous.

It is claimed further that the subtraction of a portion of the municipal assets of the city is in effect increasing its "debt or liability," inasmuch as it lessens the means from which the city can derive funds for the payment of its debts. A plain reading of the constitution does not lead to this result. A city is forbidden to "increase its debt or liability," entirely irrespective of its assets. They may be more or they be less. If diminishing the assets increases the debt, so increasing the assets ought to diminish the debt. But it is not so. The prohibition is absolute, as to the debts. The amount of a person's debts is in no way contingent upon the amount of his assets. His debts are not increased by selling his assets.

In computing indebtedness, to ascertain whether it is within the limit, the courts do not permit the deduction of assets. The debt stands alone. *Lovejoy* v. *Foxcroft*, 91 Maine, 367. Even cash in the treasury for the purpose of paying bonds cannot be deducted. *Waxahatchie* v. *Brown*, 67 Tex. 519; 17 Am. & Eng. Corp. Cases, 348. So neither can uncollected taxes nor the levy for the present year be deducted. *Council Bluffs* v. *Stewart*, 51 Iowa, 385.

A case in point is *Fowler* v. *Superior*, 85 Wis. 411. The city of Superior issued its improvement bonds, containing an unconditional promise of the city to pay. The bonds were made "payable out of the proceeds of certain improvement assessments," were "issued upon the faith and credit of said assessments," and "their payment was made chargeable upon the property benefited by said improvements." It was held that the bonds constituted an indebtedness of the city within the meaning of the constitutional limitation. The court said: "It is the indebtedness of the city the constitution limits, and nothing else can be considered than that. . . . . The language of the constitution 'become indebted in any manner or for any purpose' is to be understood in its commonly accepted sense. Cannot one become indebted if he has pecuniary resources sufficient to pay it?"

The same general considerations which apply to the provision for the conveyance of the city hall lot also apply to the requirement that the revenues from the building shall be invested in a sinking fund to be used for the purchase of bonds issued by the Commission. This revenue as earned becomes municipal property. Placing it in a sinking fund does not, for reasons already stated, increase the city debt or liability. The legislature, especially with the assent of the city, which was given by accepting the act, may well impose a trust upon this revenue, when its purpose is to relieve the burden of debt from a property in which the city has an equitable interest. Indeed it may be said that the trust attaches to the money, as earned, and that the city never will have any title to it except subject to the trust. Would it not be clearly within the power of the legislature to require a city to set aside any income derived by it from its own income producing property, in order to create a fund to be used for proper municipal purposes? And if so, why may not the city be required to set aside the income of this trust property and apply it in time to the payment of the liens upon it? It is difficult to see how any municipal debt or liability is created thereby, and unless a debt or liability is created thereby, the propriety of the sinking fund provision is a question which addresses itself to the legislature and not to the court.

But it is said that the provision in the act creating a sinking fund contemplates the raising of money for it, not only by taxation, but by other means, as, for instance, by borrowing. Certainly, there is no constitutional objection to that, if at the time of borrowing, the city has the constitutional power to do so, just as any city or town may hire money to build a hall if it can do so within its debt limit. To authorize a city to borrow money may give opportunity for the "tyranny practiced by majorities," but it is a tyranny which is necessarily incidental to the right of the majority to govern. And the wisdom or unwisdom of bestowing that power upon the majority is a matter which is addressed to the legislature. To that body, and not to the court, is confided the power to add to and subtract from the rights and privileges of municipalities.

It is now the general law of this state that towns and cities may create sinking funds by taxation. The Laws of 1897, Chap. 208. See *Burlington Water Works* v. *Woodward*, 49 Iowa, 58.

II. The complainants argue that the city may ultimately be liable for the payment of the bonds issued by the Commission, that there is at least an implied liability which is as obnoxious to the constitution as an express liability. I am unable to see how this can be so, unless the Commission is the agent of the city for the purpose of issuing bonds. But the whole purport of this act is that the city shall not be liable for the bonds of the Commission. The legislature can undoubtedly create an agent for whose acts the city would be liable, but I think it did not do so in this case. Nothing can be clearer than the purpose of the legislature that the bondholders should look to the property alone for the payment of the principal of the debt.

The City Hall Commission is created a body corporate and politic; it has a seal; it can sue and be sued. It has a separate legal entity. It is a corporation entirely distinct from the municipal corporation of Waterville. It is true that the persons composing the Commission may be chosen by the city and that the city may prescribe its powers and duties, not inconsistent with the act

of incorporation, but these are matters of mere corporate machinery, as I have already said, designed to protect the equitable interest of the city in the trust property. The bonds, if issued, will be the corporate bonds of the City Hall Commission. The security and the mode of enforcement are both prescribed by statute. The only liability the city will be under is that of losing its equitable interest in the property, in case of non-payment of the bonds, and that is a possibility, or at the worst, a likelihood, rather than a constitutional liability or financial responsibility, as already defined in this opinion. And the city at all times has the legal power to prevent any such possibility by levying a tax. The City Hall Commission is a municipal agency, but it is not the agent of the other municipal corporation, the city, in the issuing of bonds. And such bonds will not be a debt or liability whereof payment by the city can be enforced. *West Chicago Park Com.* v. *Chicago*, 152 Ill. 392. The reasoning in *Adams* v. *East River Savings Inst.*, 136 N. Y. 52, is applicable to this question. "The power of the county or city, as the case may be, is restricted only by the amount of its own debt, and for the purpose of creating a disability against the one or the other, the debts of both cannot be aggregated." See *Wilson* v. *Sanitary District*, supra, and other cases cited in same connection.

A contract to build a sewer, by which the contractor was to receive certificates of assessments upon abutting owners of adjacent property in full payment, was held not to create a debt within the meaning of the constitutional limitation. *Davis* v. *Des Moines*, 71 Iowa, 500. Where a city council could not authorize expenditures for the current year beyond the limit fixed by the charter, a contract for grading and paving, not to be completed within the municipal year, and beyond the limit for the current year, was held valid. *Weston* v. *Syracuse*, 17 N. Y. 110.

The act, as I understand it, provides that the commission shall hire the money, and the debt will be the debt of the commission. The case of *Mayor of Baltimore* v. *Gill*, 31 Md. 375, which is sometimes cited upon this general question, and adversely to the ground I take, is a good illustration of the distinction which I

think should be made. In that case the court held that when an ordinance provides that $1,000,000 shall be raised by the pledge or hypothecation of stock held by the city, it is substantially the same thing as if it provided in terms for *borrowing* the money. To raise money on a pledge is to borrow it, and the party from whom it is obtained actually loans it, although in the ordinance it is called *furnishing* the money, and this is the result, though it is provided that the parties loaning the money shall look for its repayment exclusively to the stock pledged, and that in no event is the city to be liable or responsible for the return or repayment of any part thereof, even though the stock pledged should prove insufficient. The court said, "A debt is money due upon a contract without reference to the question of the remedy for its collection. It is not essential to the creation of a debt that the borrower should be liable to be sued therefor." In that case, the city made the contract and borrowed the money and thereby created a debt. That was the gist of the decision. In this case, a sub-municipal corporation which the legislature had authority to call into being makes the contract and borrows the money. Such corporations and such contracts are sustained, as I have already pointed out, although they accomplish indirectly for the people of the city what the city cannot do itself.

But it is said that the city would be liable to proceedings by mandamus. I do not think the city would be liable to proceedings by mandamus to aid in the recovery of the debt, for unless there is a liability for the debt, no proceedings whatever against the city, looking to its recovery, would lie. That mandamus might lie to compel it to meet the annual charges, I concede. There is no provision in the act which requires the city to raise any money whatever at any time except "such sum or sums as may be necessary to pay all expenses for repairs, insurance and management of the building, together with an annual rental of the building in a sum equal to the annual interest on the bonds issued and outstanding." There is no requirement that the city shall pay any portion of the debt or raise any money to contribute to the sinking fund. Creditors who take the bonds would have to take them subject to the provisions of the act.

III. The complainants claim that the provision for raising money by taxation annually to pay expenses and rental creates in the present a debt or liability to be paid in the future, that the amount of such debt is the aggregate of the payments to be made.

The opinion of the court admits that a town may make time contracts in order to provide for certain municipal wants which involve only the ordinary current expenses of the municipal administration, provided there is to be no payment or liability until the services be furnished, and then to be met by annual appropriations and levy of taxes; and also that such a time contract can be made for the use of a hall for a term of years to be used for strictly municipal purposes.

This may cover all that is sought to be done under the act in question. But if not, I wish to say that such an arrangement as is contemplated by the act is well supported by the authorities. I think that a city may contract for a definite term, or an indefinite period, for such current municipal expenses, as this act provides for, if provision is made by law requiring the raising annually by taxation of the amount necessary to pay such expenses as they accrue. *Atlantic City Water Works Co.* v. *Atlantic City*, 48 N. J. L. 378; *East St. Louis* v. *East St. Louis Gas-light & Coke Co.*, 98 Ill. 415, (38 Am. Rep. 97), where it was held that the aggregate future payments were not a present indebtedness.

In *Grant* v. *Davenport*, 36 Iowa, 396, in case of a water contract for a term of years, it was said, "A city already indebted to the maximum limit . . . . may rent real estate and buildings (suitable for its officers) for a like use, and agree to pay a reasonable rent therefor; such a contract would not be creating an indebtedness, but is a cash transaction, and the length of time the contract is to continue does not alter the effect, ... where the contract made by the municipal corporation pertains to its ordinary expenses, and is, together with other like expenses, within the limit of its current revenues and such special taxes as it may legally and in good faith intend to levy therefor, such contract does not incur an incurring of indebtedness within the constitutional prohibition."

See *Valparaiso* v. *Gardner*, 97 Ind. 1, (49 Am. Rep. 416); *Burlington Water Works* v. *Woodward*, 49 Iowa, 58; *Walla Walla Water Co.* v. *Walla Walla*, 60 Fed. Rep. 957; *Wade* v. *Oakmont Borough*, 165 Pa. St. 479; *Merrill Railway and Lighting Co.* v. *City of Merrill*, 80 Wis. 358; *Crowder* v. *Sullivan*, 128 Ind. 486; *New Orleans Gas Co.* v. *New Orleans*, 29 Am. & Eng. Corp. Cases, 246; *Smith* v. *Dedham*, 144 Mass. 177; *Erie's Appeal*, 91 Pa. St. 398; *State* v. *Atlantic City*, 47 N. J. L. 558; *Keihl* v. *South Bend*, (Ind.) 76 Fed. Rep. 921; *LaPorte* v. *Gamewell Fire Alarm Tel. Co.* (Ind.) 45 N. E. 588; *Hay* v. *Springfield*, 64 Ill. App. 671; *Quill* v. *Indianapolis*, 124 Ind. 292.

While the rent required by this act to be paid is arbitrarily fixed, it does not seem to be unreasonable in amount, as rent. And if the amount is fixed by the legislature and assented to by the city, and the amount is required to be raised annually by taxation, I think the statute provision requiring it should be held constitutional. It is not a contribution towards the principal part of the cost of the building. It is not a paying for the building in installments. It is merely a payment of the interest upon the cost of so much of the property as is represented by the building, together with expenses of maintenance, and that may be regarded as a reasonable rental. There would be an obligation to pay only when and as fast as the consideration was received.

It is generally held that the state can direct a town to make municipal improvements, and can lawfully impose a tax upon the property of the citizens of the town to pay the necessary expenses. *People* v. *Flagg*, 46 N. Y. 401; *Thomas* v. *Leland*, 24 Wend. 65; *Easton & Amboy R. R. Co.* v. *Central R. R. Co.*, 52 N. J. L. 267; *Guilder* v. *Otsego*, 20 Minn. 59; *Carter* v. *Cambridge & Brookline Bridge Proprs.*, 104 Mass. 236; *Kirby* v. *Shaw*, 19 Pa. St. 258; Cooley's Const. Lim. § 230.

A familiar illustration in this state, of the power of the state to compel towns to raise money by taxation for specific purposes, is found in the requirement that "every town shall raise and expend, annually, for the support of schools therein, ... not less than eighty cents for each inhabitant." R. S., c. 11, § 6.

For these reasons I think that the act creating the City Hall Commission of Waterville did not infringe upon any constitutional provision, and that the bill should have been dismissed.

TOWN OF SOUTH PORTLAND

vs.

TOWN OF CAPE ELIZABETH.

Cumberland. Opinion December 28, 1898.

Towns. Division. Special Laws, 1895, c. 194.

When part of a town is set off and incorporated as a new town, the old town, though shorn of part of its territory, still retains all the property, powers, and rights, and remains subject to all the obligations of the original town, unless otherwise provided in the act.

Chapter 194 of the special laws of 1895, which divided the town of Cape Elizabeth, treats South Portland, though under another name, as the old town from which the "new town" of Cape Elizabeth was set off. South Portland being treated in the act as the original town, became primarily liable for all its debts and is entitled to receive its assets. The act provided that "the town debt shall be borne by said towns in proportion to the valuation of taxable property and estate within their respective territories, as taken by the assessors in April eighteen hundred and ninety-four." Prior to the annual meetings in March, 1897, in both towns, a committee from each had ascertained and reported to each town at that meeting, that South Portland had paid of the debts of the old town, in excess of assets received, $25,150.09, and that Cape Elizabeth's proportion of that excess was $6,053.69. These reports were accepted by each town, and no question appears to have been raised as to the accuracy of their amounts.

Held; that under the provisions of § 3 of the act, it then became the duty of Cape Elizabeth to refund to South Portland this amount, and the law implies a promise on the part of Cape Elizabeth to pay it.

The town property, consisting of school houses, ferry wharf and other like property, was apportioned by § 4 of the act, by giving to each town what was situated within its territory. *Held;* That the language of the section is plain and imperative and cannot be modified by the court to meet any supposed equity. It was within the province of the Legislature to make such division, and it is to be presumed that the Legislature considered all the equities.

Held; that South Portland is entitled to recover from Cape Elizabeth its proportion of debts paid by South Portland, immediately after the payment. It is not obliged to wait till all the debts are paid.

ON EXCEPTIONS BY DEFENDANTS.

This was an action on the case brought by the plaintiff against the defendant for money paid to the use of the defendant. The case was heard by the presiding justice without a jury at the April term, 1898, the right to except being reserved.

The court ruled as matter of law that upon the evidence the plaintiff was entitled to recover, and ordered judgment for the plaintiff in the sum of $6,053.69 with interest from May 26, 1897, when demand was made for payment of the same.

To this ruling and to the exclusion of the evidence offered by defendants, as appears in the opinion of the court, the defendant took exceptions.

Nathan and Henry B. Cleaves, Stephen C. Perry and Edward C. Reynolds, for plaintiff.

J. W. Symonds, D. W. Snow and C. S. Cook; and Elgin C. Verrill, for defendant.

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

STROUT, J. This cause was submitted to the presiding justice with right of exception. To his ruling that plaintiff was entitled to recover, exception was taken.

The Legislature, in 1895, c. 194, of Special Laws, set off and incorporated a portion of the old town of Cape Elizabeth, into a new town by the name of Cape Elizabeth, and the remaining portion of the old town was given the name of South Portland.

The Act provided, section 3, that "the existing liabilities of the present town of Cape Elizabeth shall be divided as follows: the town debt shall be borne by said towns in proportion to the valuation of taxable property and estate within their respective territories, as taken by the assessors in April, eighteen hundred and ninety-four; and shall continue to pay the same proportion of the

State and county taxes assessed upon the present town of Cape Elizabeth, until a separate valuation shall be made by the State assessors. All paupers now supported or aided by the present town of Cape Elizabeth, or that may hereafter become chargeable as paupers, shall, after division, be chargeable to and maintained and supported by the new town of Cape Elizabeth, or the town of South Portland, according as their last settlement may fall within the respective territories of said towns."

Section 4 provided that "all town property, real and personal, now situated within the limits of said new town of Cape Elizabeth, shall become the property of said new town, and all town property, real and personal, now situated within the limits of said town of South Portland, shall become the property of said town of South Portland."

It will be observed that these two sections treat South Portland, though under another name, as the old town from which the new town is set off, and the Cape Elizabeth created by the act, as a "new town." This distinction is important, as it shows the primal relation which South Portland bears to the debts and duties of the old town of Cape Elizabeth. Where part of a town is set off and incorporated as a new town, the old town, though shorn of part of its territory, still retains all the property, powers and rights and remains subject to all the obligations of the original town, unless otherwise provided in the act. *Frankfort* v. *Winterport*, 54 Maine, 250; *No. Yarmouth* v. *Skillings*, 45 Maine, 133; *Poland* v. *Strout*, 19 Maine, 121; *Inhabitants of Windham* v. *Inhabitants of Portland*, 4 Mass. 384.

As the act treated South Portland as the old town from which the "new town of Cape Elizabeth" was set off, it became the duty of South Portland primarily to liquidate the liabilities of the original town; the new town of Cape Elizabeth, by the act, being responsible to refund its proportion of such liabilities to South Portland. Creditors of the old town could require payment from South Portland; they could not from the new town.

Both towns have acted in accordance with this view. Taxes assessed before division upon inhabitants of the new town were col-

lected and paid into the treasury of South Portland. All other available assets, except some tax deeds and sewer assessments which were divided by agreement, have been turned in to that town, and that town has paid all the debts of the original town, which have been paid.

Shortly after the division each town appointed a committee to confer with each other, to adjust the financial affairs between the two towns. These committees met and acted as a joint committee, and appointed a sub-committee from its members to examine and report to the joint committee, the assets and liabilities of the old town. The sub-committee made its report to the joint committee, which was adopted by the latter unanimously, and each town committee reported the result to the annual meeting of each town in March, 1896. These reports gave the amount of liabilities and assets, both agreeing, and each town at that March meeting, accepted the report, and continued its committee to make further progress, by way of final settlement. The vote of defendant town was to "adopt" the report of the committee.

At the March meeting in 1897, each committee again reported to its town, both agreeing upon the amount of liabilities paid by South Portland, and amount of assets received by it, and the share of the excess of payment which devolved upon the defendant town, which is the amount sued for in this action. Defendant town at that meeting accepted the report of its committee; but the committee of defendant town claimed that public property, such as school houses, ferry wharf, gravel banks and like property should be treated as assets for the payment of debts. They had not been so treated by the joint committee.

The committee of defendant town claimed that to ascertain its liability under section 3 of the act, all this class of property should be valued and treated as an asset, and together with available assets, which the joint committee had ascertained, should be deducted from the gross liability, and that the result thus obtained would constitute the net debt, to be apportioned according to the valuation of 1894; while South Portland claimed that this class of property was divided by section 4 of the act, and should not enter into the calculation.

We do not understand that the parties disagree as to these amounts, nor is it denied that the payments were made upon legal claims against the original town. But defendants insist that no promise on the part of the new town of Cape Elizabeth can be implied in favor of South Portland, because it was not consulted about the payments, and because they were not made at its request.

And counsel say, that the writ declares upon an accounting by the committees of the two towns, and adoption by them of the result, and a promise to abide and pay, and that the evidence fails to show such adoption or promise. However this may be, the writ contains a money count under which sums equitably due may be recovered. South Portland was bound to pay these debts in the first instance; then the liability of the new Cape Elizabeth attached. In such case, payment by South Portland was not a voluntary payment of another party's debt, without his request or consent, but it was a payment of its own debt, to which defendant was bound by law to contribute its proportion. Defendant's liability does not depend upon express agreement, or previous request of payment. The duty of payment was upon South Portland; and when it had paid, and as fast as it paid, the duty to reimburse its proportion was imposed upon the new Cape Elizabeth. Where the law imposes the duty of payment, it implies a promise to pay. *Farwell* v. *Rockland*, 62 Maine, 301; *Mt. Desert* v. *Tremont*, 72 Maine, 348; *Inhabitants of Brewster* v. *Inhabitants of Harwich*, 4 Mass. 278.

But there is another ground more strongly relied on in defense. It was claimed, and offered to be proved by the defendant, that at the time of the division of the towns, there was property of the old town of the value of nearly $88,000, a schedule of which appears on page 35 of the case, consisting of schoolhouses and school property, gravel banks, ferry wharf and landing, and like property, all of which was subject to the provisions of section 4 of the act of division; that of this property nearly $75,000 in value was in South Portland, and nearly $13,000 in the new town of Cape Elizabeth; that if South Portland received of this property all that was within its territorial limits, as provided by section 4 of the act,

that town would receive about $10,000 more than its proportional share; and that this excess should either be set off against plaintiff's claim, or that it should be adjusted in equity as prayed for in the brief statement, and allowed to defendant to make the division of the property equal, under the proportion established by section 3 of the act of division. This evidence was excluded and exception taken.

It may be said, in passing, that if the claim of the committee of defendant town, that the debt to be apportioned under section 3, was the net debt, after deducting all town assets, and that the property mentioned in this schedule should be treated as an asset, this inequitable result would follow. The committees of both towns found the gross liabilities of the old town to be $78,690.38; the assets they found to be $37,894.42. If to these assets is added the school and other property in the schedule, valued at $87,746.70, there would be a total of assets of $125,641.12, an excess of $46,950.74 over the gross liabilities. South Portland would thus be required to pay the entire indebtedness without contribution from defendant town, and the property mentioned in the schedules would go to each town according to its location in each, under the provisions in section 4. The statement proves the fallacy of the claim.

Counsel for defendant do not press this bald proposition in terms, but they do say that "the town property is a fund which must justly be considered as offsetting or reducing gross liabilities, and it is a fund in which each part of the town, upon division, should share proportionately." If limited to property available for payment of debts, the proposition is true.

School houses and other like property built, maintained and used for public purposes, and necessary thereto, are not to be converted into cash for payment of debts. If it was done, the town would be obliged at once to replace them, and nothing would be gained. Such property therefore cannot be treated as an asset when debts and resources for their payment are considered.

But it is strenuously urged that, notwithstanding the provisions of section 4, by which this property is specifically divided, and

the impracticability of treating it as an asset, the Court should go into an equitable accounting in regard to it, and adjust for itself its fair and equitable division; and that when this is done, it is claimed that the payments therefor made by South Portland are not in excess of its proportion, and therefore it cannot recover; that the division of this property made by section 4, leaves to South Portland about $10,000 in value, in excess of its proportion under the ratio established by section 3, and that to equalize this, South Portland should pay upon the debts of the old town that amount, in excess of its proportion fixed by the statute.

Upon the division of a town the Legislature is presumed to take into consideration all the equities, when it divides this class of property. Questions of public policy and expediency enter in, and of these the Legislature is the exclusive judge.

Towns derive existence only from the will of the Legislature, and by it may be divided or destroyed, as it shall deem for the interest of the State or the inhabitants of the town. The court cannot stay its hand, or control or modify its exercise.

In this case, the Legislature has said that all of this class of property within the territorial limits of each town, shall belong to such town. It was competent for the Legislature to so determine; we have no power to revise that decision. *North Yarmouth* v. *Skillings*, 45 Maine, 141; *Frankfort* v. *Winterport*, 54 Maine, 250; *Agawam* v. *Hampden*, 130 Mass. 530; *Kingman, petitioner*, 153 Mass. 573; *Whitney* v. *Stow*, 111 Mass. 372; *Rawson* v. *Spencer*, 113 Mass. 45.

The language of section 4 is plain and explicit. No apparent equity can be imported into it to modify its express declarations. It gave to each town absolutely the property situated in each. Section 3 apportions "the town debt;" section 4 divides "town property." It is the plain duty of the court to give effect to these provisions, according to their terms and the evident intention of the Legislature. The evidence offered was rightfully excluded.

But if the evidence is considered, it is not apparent that South Portland has received the large excess of property claimed by the defendant. In its schedule, defendant includes the ferry wharf and

landing which it values at $10,000, about the excess claimed. But this wharf and landing is a highway. It was laid out as such by the old town under authority of c. 602 of the Special Laws of 1871, for the purpose of a ferry to the city of Portland, and has always been used as such and is not likely ever to be used for other purposes. It is said that no income is derived from it: no evidence of any was offered. The burden of maintaining it falls upon South Portland, while its use, like other highways, is for the public generally. It can in no just sense be treated as an asset.

It is also urged that plaintiff should be postponed until all available assets shall be realized and all debts of the old town paid, and then the proportions of the two towns should be adjusted; that there are still outstanding debts, and doubtful assets that may be realized, and that only when these are ascertained can the proportion be adjusted. It may be many years before the whole debt shall mature, and it is manifestly a hardship to require South Portland to await that event before being reimbursed for the outlay it was compelled to make, for which the defendant is by law responsible. Such a result is not required by law, nor is it necessary to protect the rights of defendant.

The committees of both towns agreed upon the amount of available assets and the liabilities. Their report of that agreement was accepted by both towns. Those reports stated that South Portland had paid of the debts of the old town, in excess of all the available assets found by the committees, the sum of $25,150.09, and that the share of the new town of Cape Elizabeth of that excess was $6,053.69. No question of the correctness of these figures appears to have been made by the defendant town at the time of the committee's report, nor at any time since, nor that the payments were not properly made upon legal debts of the old town. If any farther assets shall be realized by South Portland, they must be applied toward the extinguishment of the debts of the old town, or ratably divided, if the two towns so agree. Farther payment of debts of the old town can easily be apportioned.

It is also objected that a lump sum is sued for, and the items not given. If defendant had desired a specification of items, the

court would have ordered it. It is now too late to make the objection. But if it were not, the action of defendant town upon the report of its committee and ever since may well be treated as an assent to the accuracy of the amount of payments for the old town. The justice who heard the cause decided that plaintiff was entitled to recover the amount which the committee had reported as the share belonging to defendant to pay. That ruling necessarily was based upon a finding of the fact that that sum was the defendant's share. Such finding of fact is conclusive.

The plaintiff is entitled to recover of defendant its share of plaintiff's payment in excess of plaintiff's proportional share, as established by section 3, of the act of division.

The decision below was correct.

Exceptions overruled.

ALBERT E. MCMULLIN *vs.* GEORGE MCMULLIN, and Spruce Logs.

Franklin. Opinion December 29, 1898.

Lien. Logs. R. S., c. 91, § 38.

One who lets his horse to another by the month to haul logs has no lien upon the lumber. The hirer may have.

See *Same* v. *Same*, post, 338.

ON EXCEPTIONS BY CLAIMANT.

Assumpsit to recover twenty dollars due the plaintiff for the use and service of his horse in the employ of the defendant hauling spruce logs and lumber. The log owner assumed the defense of the action.

The bill of exceptions is as follows:

The plaintiff testified that he let his horse to the defendant at five dollars per month, to work hauling lumber; that sometime during the winter the plaintiff himself hired out with the defendant working on a contract, made independent of the one for his horse; that his labor had nothing whatever to do with the labor of

the horse; that the defendant had the exclusive control and care of the horse. (The plaintiff also testified that he was a minor nineteen years old, and it appeared from the plaintiff's writ that the said minor commenced said action in his own name, without a prochein ami, or guardian, or guardian ad litem, and none being asked for or appointed during the trial, the claimant moved that said action be dismissed or become nonsuit. For decision of this question of infancy, see case following. Rep.)

Thereupon the presiding justice ruled that the plaintiff had a lien on said lumber for the services of said horse; and also that the action having been instituted by said minor in his own name without a prochein ami, or guardian, and that unless objection to the same be taken by motion or plea in abatement within the first two days of the return term, the action at this stage was properly in court.

To this ruling the claimant excepted.

E. O. Greenleaf, for plaintiff.

It may be that the price plaintiff was to receive for his personal labor and that of his horse were separately agreed upon, but that both he and his horse worked in the cutting and hauling of the logs described in the writ is not denied, but admitted, and it can make no difference to defendant whether it is all paid in one sum, or two parts; the result being the same. It makes no difference whether the plaintiff worked for $20.00 a month for himself, and $5.00 for his horse, or for $25.00 per month self and horse. They were all engaged in the same operation, even if plaintiff may not have driven his horse all the time.

The statute giving a lien on logs cut and hauled as these were is intended to be an equitable one, and should be liberally construed to the benefit of the laborer whom it was intended to protect.

Frank W. Butler, for claimant.

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

HASKELL, J. Assumpsit for the use of a horse in hauling logs upon which a lien therefor is claimed. The presiding justice ruled

in favor of the lien and the owner of the logs has exception. It appears that plaintiff let his horse to the defendant by the month to haul lumber. The horse thereby became the defendant's horse for the time being, and he it was who might have a lien for "personal services and the services performed by his team," not the plaintiff. *Richardson* v. *Hoxie*, 90 Maine, 227. Moreover, the case does not show that any services by anybody were performed in hauling claimant's logs.

Exceptions sustained.

EPHRAIM F. MCMULLIN

vs.

GEORGE MCMULLIN, and certain logs.

Franklin. Opinion December 29, 1898.

Pleading. Infancy.

Infancy of the plaintiff not pleaded in abatement is waived by plea to the merits. See *Same* v. *Same*, ante, p. 336.

ON EXCEPTIONS BY CLAIMANT.

This was an action of assumpsit brought to recover a lien claim for the plaintiff's personal labor in cooking for certain persons engaged in cutting and hauling certain spruce logs from Mt. Abram to Sanders' Mills in the town of Madrid from December 3, 1895, to April 5, 1897. The amount of wages due was $55.00. After due notice the log owner appeared and assumed the defense in the action.

The plaintiff testified that he is a minor, seventeen years of age; that he worked for his father, the defendant; that his father is now living. And, it appearing from the plaintiff's writ that the said minor commenced said action in his own name, without a prochein ami, or guardian or guardian ad litem, and none being asked for or appointed during the trial, the claimant moved that said action be dismissed or become nonsuit.

Thereupon the presiding justice ruled that the action having been instituted by said minor in his own name without a prochein ami or guardian, and that unless objection to the same be taken by motion, or plea in abatement within the first two days of the return term, the action at this stage was properly in court.

To this ruling the claimant took exceptions.

E. O. Greenleaf, for plaintiff.

Frank W. Butler, for claimant.

Minors cannot institute or defend actions at law or in equity except by prochein ami or next friend. *Leavitt* v. *Bangor*, 41 Maine, 460. He must appear by guardian; he has neither knowledge of his own affairs or to choose one to appear for him. *Marshall* v. *Wing*, 50 Maine, 62.

Where the infant sues alone the defendant must make due objection by plea in abatement or by motion to dismiss. *Blood* v. *Harrington*, 8 Pick. 552. The infant can amend his writ by inserting the name of a next friend. *Blood* v. *Harrington*, supra; *Young* v. *Young*, 3 N. H. 345.

If the suit is begun without a next friend, the proceedings will not be set aside if the appointment is made previous to filing of petition to dismiss and the costs are paid. *Fitch* v. *Fitch*, 18 Wend. 513.

If the defendant knowing the plaintiff to be a minor pleads to the merits of the case without objection, it is no doubt too late to raise the question of infancy after a trial on the merits, but in this case defendant had no knowledge of the infancy of the plaintiff until the day of the trial, but made the objection in the pleading before the trial commenced and immediately moved for a dismissal of said action as soon as plaintiff testified that he was a minor.

If the ruling was correct, an infant, if he is able to conceal his minority during the first two days of the return term, may appear in all legal proceedings with the same legal rights and privileges as one after majority.

It seems reasonable that defendant must not "sleep" after knowing the plaintiff to be a minor, as he may thereby waive his legal

rights, but that he is in no fault, if he acts promptly upon his first information or knowledge of the infancy.

A judgment rendered against an infant alone, will be reversed or set aside on legal application therefor.

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

HASKELL, J. Infancy of plaintiff was pleaded in bar, by way of brief statement, among other defenses. The court ruled that the defense could not be allowed; that it came too late; that it was matter of abatement that could only be pleaded within the first two days of the return term, and that it had been waived by plea in bar. The ruling was the law.

It was once resolved that judgment in ejectment or other personal action for an infant, who prosecuted the suit by attorney only, was error, and might be reversed. *Bartholemew* v. *Dighton*, Cro. Eliz. 424; *Rew* v. *Long*, Cro. Jac. 4, 43 Eliz. But the statute of 21 Jac. c. 13, § 2, enacted that, after verdict, judgments should not be stayed or reversed for infancy of the plaintiff, nor when rendered on default, 4 Anne, c. 16, § 2, leaving that defense, as Williams says in his notes, to be in abatement. *Foxwist et als.* v. *Tremaine*, 2 Saun. 212.

These statutes became our common law, and in courts proceeding according to the course of the common law, infancy of the plaintiff not pleaded in abatement is waived by a plea to the merits. 1 Chitty, 436; *Gally* v. *Dunlap*, 24 Miss. 410; *Schemerhorn* v. *Jenkins*, 7 Johns. 373; *Drago* v. *Moso*, 1 Spears' Law, 212; *Smart* v. *McCharney*, 14 Hun, 276; *Smith* v. *Van Houten*, 9 N. J. Law, 381. The want of a prochein ami may be cured by amendment, *Blood* v. *Harrington*, 8 Pick. 552, even when pleaded in abatement. *Young* v. *Young*, 3 N. H. 345.

Exceptions overruled.

ANNIE V. BRANN, Admx.

vs.

MAINE BENEFIT LIFE ASSOCIATION.

Androscoggin. Opinion December 29, 1898.

Life Insurance. Party to sue. Action. Covenant. Pleading.

Where the covenant under seal is with one person for the benefit of another, or to pay to another, which is the same thing, the action for breach must be in the name of the covenantee, or if he be dead, by his legal representative.

In an action of debt the declaration must show some certain amount due as damages. The action of debt lies for a sum certain only. Where a policy contains a covenant to pay the amount of one assessment but not to exceed $3,000, *held;* that the declaration should aver that the assessment amounted to at least $3,000. For the want of this averment, a demurrer will lie.

ON EXCEPTIONS BY DEFENDANT.

This was an action of debt on a certificate of membership issued by the defendant to John Kelley promising to pay within sixty days after due notice and proof of his death "to Mrs. Annie V. Kelley, his wife, or in event of her death, to his legal representative, the amount of one assessment made upon the surviving members of the association" . . . . "provided, however, that such payment shall not exceed three thousand dollars."

The plaintiff in her declaration set out the certificate in haec verba, and then alleged as follows:

"And the plaintiff says that the corporation in the said policy called the Maine Benefit Association was and is the defendant; and the plaintiff further avers that the said Annie V. Kelley, at the time of the making of the said policy, and during the said risk, and at the time of the death of the said John Kelley, was the lawful wife of said John Kelley and was interested in the life of the said John Kelley to the full amount insured thereon as aforesaid, and that during the said risk and whilst the said policy remained in force the said John Kelley died; and all conditions precedent have

been performed, and all things and events have existed and happened, and all periods of time have elapsed, to entitle the plaintiff as administratrix as aforesaid to payment of the said sum of three thousand dollars, and as administratrix as aforesaid to maintain this action for the same; yet the plaintiff has not been paid or satisfied the said sum of three thousand dollars, or any part thereof, and the same is wholly due and in arrears and unsatisfied, etc."

There was also a second count for money had and received. The writ is dated November 10, 1897, and was entered at the January term, 1898. At the April term the defendant filed a demurrer to the first count in the declaration and a plea of general issue to the second count. The court overruled the demurrer and adjudged the declaration sufficient. To these rulings the defendant took exceptions.

Fred N. Saunders and J. A. Morrill, for plaintiff.

Counsel cited *Grindle* v. *York Mut. Aid Assoc.*, 87 Maine, 177, to the point raised by defendant that the first count contains no averment that the defendant corporation was in funds with which to pay the maximum amount of the policy, ($3,000), nor any averment that it had any membership from which any sum of money could be raised, with which to pay the amount called for by the policy.

The action is rightly brought by Kelley's administratrix: *Flynn* v. *North Am. Life Ins. Co.*, 115 Mass. 449; *Flynn* v. *Mass. Benefit Assoc.*, 152 Mass. 289; *McCarthy* v. *Metrop. Life Ins. Co.*, 162 Mass. 254–256; *Wright* v. *Vermont Life Ins. Co.*, 164 Mass. 302; *Rindge* v. *N. E. Mut. Aid Society*, 146 Mass. 286–289; *Saunders* v. *Saunders*, 154 Mass. 337–338; *Hinkley* v. *Fowler*, 15 Maine, 285; *Packard* v. *Brewster*, 59 Maine, 404; *Farmington* v. *Hobert*, 74 Maine, 416; *Baldwin* v. *Emery*, 89 Maine, 496.

Geo. C. Wing and Seth M. Carter, for defendant.

To the first point counsel cited: Joyce on Ins. § 3667; Bacon on Ben. Soc., etc., § 453; *Mut. Acc. Assoc.* v. *Tuggle*, 138 Ill. 428.

No averment of any notice and proof of death: Bacon on Ben. Soc., etc., § 454; *Dolbier* v. *Ins Co.*, 67 Maine, 180.

Debt will not lie upon a specialty for failure to perform a collateral undertaking according to its terms. Am. & Eng. Ency., title, Debt, par. 3; Bouv. Law Dict., title, Debt.

Counsel also cited: Perry on Com. Law Pl. p. 55.

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

HASKELL, J. Debt by the administratrix of the assured upon a certificate of life insurance under seal for the insurance written for the benefit of the wife.

Two questions arise:

I. Can the administratrix maintain the suit, or must it be brought in the name of the wife, who survives? The covenant in the certificate was made with the assured. That was to pay to the wife, "or in in the event of her death to his (the assured's) legal representative." The covenant was with the assured to pay to the wife, if living, and the breach of it survived to his legal representative.

The law is well settled that where the covenant is with one person for the benefit of another, or to pay to another, which is the same thing, the action for breach must be in the name of the covenantee, or if he be dead by his legal representative. The beneficiary, however, may use his name or the name of the representative for the purpose. *Baldwin* v. *Emery*, 89 Maine, 496.

II. Should the declaration have averred that the assessment amounted to at least $3000, the amount sued for? The covenant sued is to pay one assessment upon the members of the association, not to exceed $3000. The declaration calls for $3000 damages, without an averment that the assessment amounted to that sum. Now the covenant is to pay one assessment and no more. To authorize a recovery for that sum the assessment must amount to it. It is the assessment that is due. That is the cause of action set out, and some averment of its amount seems necessary. This all appears from the declaration, for the certificate is recited therein

in his verbis. The declaration, to state a cause of action arising from its internal structure, should aver that the assessment equaled the sum demanded. In other words, without some such averment, no sum appears to be due, and every declaration in an action of debt must show some certain amount due as damages. The action lies for a sum certain only.

But it is argued that precisely the same question was raised and decided in *Grindle* v. *York Mutual Aid Association*, 87 Maine, 177. Not so. The question there was whether the company was presumed to be in sufficient funds to pay the assessment in the absence of evidence to the contrary; and the decision was in favor of the presumption, that might be overcome by evidence. In other words, the court held the fact a traversable fact supported by a presumption to be settled by evidence if there be any. Now every traversable fact must be averred and proved; sometimes to be proved by presumptions, and at others by presumptions aided or controlled by evidence, but always proved. The wanting averment in plaintiff's declaration was essential to entitle her to recover the sum named or any sum. When averred, a traverse would put it in issue. The law would presume the fact in her favor. That presumption, standing alone, would amount to proof. We think this defect, easily cured by amendment, a cause for demurrer.

Exceptions sustained.

NATHANIEL B. PEASE *vs.* INHABITANTS OF PARSONSFIELD.

York. Opinion December 29, 1898.

Town. Way. Notice. Officer de facto. Verdict.

A highway surveyor de facto, acting under color of authority, may bind the town within the scope of his authority in favor of the public or third persons.

Actual notice to such officer of a defective highway twenty-four hours prior to injury therefrom is sufficient.

The court refuses to set aside a verdict for the plaintiff under the following conditions: It was none too large. The issues of fact were stoutly contested. A careful reading of the evidence does not show that the verdict is wrong. Differences of opinion may well exist as to its correctness; but it is a verdict of the jury and commands the respect of the court.

ON MOTION AND EXCEPTIONS BY DEFENDANTS.

This was an action in which the plaintiff sought to recover of the defendant town damages for an injury to his horse received on the thirtieth day of January, 1896, while he was driving the same upon a highway in the said town.

The injury was inflicted by a defect in the highway and consisted of a ridge or hummock of ice with a broken and uneven surface extending across the traveled part of the road. The jury returned a verdict for the plaintiff of $144.97.

Upon the proposition that the municipal officers or highway surveyor of the district had had at least twenty-four hours actual notice of the defect causing the injury, the following admissions were made in court by the defendant. "It is admitted upon behalf of the defendants that George P. Davis was at the time one of the selectmen of the town of Parsonsfield, and that on or about May, 1895, the selectmen of the town placed in his [Merrill's] hands the surveyor's book for the district in which this road was located and that the book contained the written appointment of Merrill as surveyor of that district and signed by a majority of the selectmen. It is also admitted that George P. Davis, P. W. Benton and Brackett T. Lord were selectmen of the town at this time." The

plaintiff introduced evidence showing that the highway surveyor's book remained in Merrill's possession until after the injury complained of and until the taxes therein contained were worked out under his supervision; also, that Merrill had actual personal knowledge of the defect complained of at least twenty-four hours before the injury occurred and in fact for several days and had done some work in attempting to remedy the defect. Also that complaints had also been made to him relative to this identical piece of road some days prior to the injury; also that George P. Davis, one of the municipal officers, had knowledge of the defective condition of the road at that point; also that Peleg W. Benton, one of the selectmen of said town knew and appreciated the dangerous character of this piece of road as shown by a witness, Roberts, who quoted Mr. Benton as saying a few days prior to the injury complained of: "There is the worst piece of ice I ever saw on Merrill hill near Liston Merrill's and I shall break my devilish neck if I don't get there before the moon goes down." Mrs. Pease, wife of the plaintiff, testified to this same conversation and it was not denied by Mr. Benton.

Mr. Merrill had not taken his official oath, and the presiding justice instructed the jury that actual notice to Merrill, under the facts disclosed and admitted, would be a sufficient compliance with the statute and the defendants excepted to that instruction.

The defendants also filed a general motion for a new trial.

J. O. Bradbury and J. Merrill Lord, for plaintiff.

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

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

HASKELL, J. Case to recover damages for injuries to a traveler's horse, suffered from a defective highway. Verdict for plaintiff for $144.97. The defendants have exception to the instruction of the presiding justice, upon evidence that made the same pertinent: That if the municipal officers of defendant town, or a majority of them, gave a written appointment to one Merrill,

signed by a majority of them, as highway surveyor for the road district where the injury was received and he took the surveyor's book and performed the duties of surveyor and caused the taxes to be worked out during the season of 1895, and until after the accident occurred, he would be a highway surveyor de facto within that district, and that twenty-four hours actual notice to him prior to the injury would bind the town.

This instruction was well enough, for Merrill, apparently clothed with authority, performed the functions of the office, and the fact that he had not been sworn could make no difference. He was an officer de facto. That is, acting under color of authority, and so far as the public or third persons are interested his acts were just as valid and binding as if he had been an officer de jure. *Plymouth* v. *Painter*, 17 Conn. 585, and cases cited; *Smith* v. *State*, 19 Conn. 493. In *Woodbury* v. *Knox*, 74 Maine, 462, a school agent, chosen at a meeting that had not been duly notified, and not sworn, employed a teacher, and it was held that his act was binding upon the town. See also *Brown* v. *Lunt*, 37 Maine, 423; *Belfast* v. *Morrill*, 65 Maine, 580. In *Woods* v. *Bristol*, 84 Maine, 358, there was an attempt to usurp an office, not to fill one under color of right. *Bunker* v. *Gouldsboro*, 81 Maine, 188, is not in point.

The jury found a verdict for the plaintiff. It was none too large. The issues of fact were stoutly contested. A careful reading of the evidence does not show that the verdict is wrong. Difference of opinion may well exist as to its correctness. It is a verdict of the jury, and commands our respect. We are not disposed to overturn it.

Motion and exceptions overruled.

STATE *vs.* WALTER MADDOX, and another.

Kennebec. Opinion December 29, 1898.

Assault and Battery. Evidence. Res Gestae.

Upon the trial of an indictment for an assault and battery it appeared that the party assaulted, after the affray was over and shortly after the participants had separated, made declarations in regard to it which were admitted, in behalf of the State, as part of the res gestae. *Held;* that such declarations are not to be deemed part of the res gestae, simply because of the brief period intervening between the occurrence and the making of the declarations, if the fact remains that the affray had ended before the declarations were made.

To render them admissible, they must be so intimately interwoven with the principal fact or event which it characterizes as to be regarded a part of the transaction itself.

Held; that the declarations in this case cannot be regarded as part of the res gestae and should have been excluded.

ON EXCEPTIONS BY DEFENDANT.

This was an indictment found and tried in the Superior Court for Kennebec County, charging the defendants with the crime of assault and battery upon Albert Hodges. There was an affray at the time and place alleged in the indictment, in the public highway. The two defendants and said Hodges were present.

Sidney K. Fuller, one of the defendants, testified that he took no part in the affray whatever. Maddox, the other defendant, testified that all the acts of violence done by him on the occasion, were to repel the acts of assault and battery made upon him by said Hodges, who, he claims, assaulted him with a stake. He admitted that he, with a shovel, repelled the blows aimed at him by said Hodges with the stake, and that in so doing he hit said Hodges on the arm and shoulder, but he denied that he hit Hodges on the head.

Hodges in his testimony claimed that Maddox commenced the assault upon him with a shovel, hitting him on the arm, shoulder and head, and that while Maddox was doing that, Fuller was urging Maddox on and holding Hodges' horse by the bit. This both Maddox and Fuller denied.

The affray took place in the highway ten hundred and sixty feet from said Hodges' dwelling-house, where his wife was when the affray took place. Mrs. Hodges testified that she heard the outcry up the street and run out of her house into the road; that she looked up the street and saw the parties in the highway, and that she heard certain violent words passing between her husband and Maddox, but she saw no blows struck, and that she saw her husband turn his team around towards her. Then she, in answer to interrogatories by the County Attorney, testified as follows:

"When I saw he had turned, I turned and ran back to the house, and he drove back about as fast as the horse could come, that is a trotting gait, and drove down round to the stable. As he came down the road, he called to me and seemed in a good deal of distress, and took on terribly; the first words he said, 'Sadie, get your bonnet'."

Mr. Brown: "I object."

Question by the County Attorney: "How soon after you saw him in the road down there, was it before you heard him say what you were about to tell us."

Ans. "It might have been half a minute. I don't think it could have been a minute."

Mr. Heselton: "I offer it as a part of the res gestae, his account and what he said at that time."

Mr. Brown: "I object."

The Court: "He may answer."

Mr. Brown: "I except."

Exceptions entered.

Answer: "I cannot give his exact words, for he said a good deal and took on. He wanted me to get my bonnet and go with him; that Fuller and Maddox had stopped him in the road and assaulted him and Maddox had pounded him with a shovel and broken his arm, and pounded him on the head, and Fuller held his horse and backed him up and broke the breeching. He told me that as we were going down here (indicating a point on the plan) and he kept on after he got into the barn, talking on like a man in distress, and telling me about it. I helped him take the harness off. He said his arm was broken and he took on a good deal, and

he wanted me to look at his cap to see if his cap or collar was not cut. He said he had struck him on the head. I looked at his cap. His collar was turned up. He said he had got a blow on his head, but his fur collar was turned up to his cap nearly."

Question by the County Attorney; "Did he complain of any blows except in the arm and head?"

Answer: "No, he said they had pounded him terribly."

Mr. Brown: "Your Honor allows all this to come in under that question, I suppose?"

Court: "Yes, what he said within two or three minutes time."

Albert Hodges, called by the government, in cross-examination by the defendants' counsel, testified as follows:

"I have brought an action for civil damages."

Question, "How much have you sued for?"

Mr. Heselton, the County Attorney: "I object."

The Court: "Excluded."

The following testimony was then taken:

Mr. Brown: "It seems to me that the extent of it was proper and the court thinks otherwise."

The Court: "As bearing upon the amount of injury."

Mr. Brown: "No, as bearing upon the bias and influence under which the witness testifies. He is seeking damages for himself."

The Court: "It is to be presumed that he may testify under some feeling, perhaps, a bias."

Mr. Brown: "Yes, but there are various kinds of bias."

The Court: "Well he has brought suit anyway. I think that is all necessary to show."

Mr. Brown: "Yes, one is injury and the other is dollars and cents. I think I will have exceptions on that, your honor."

Court: "Very well."

Dr. W. P. Giddings, an experienced physician and surgeon, called by the government, gave the following testimony:

Question by the County Attorney: "Assuming that a man received a blow on the top of the head twenty-two days before you saw him, in the condition you found him in on that day, may the condition at that time have been produced by the blow?"

Mr. Brown: "I object."

The Court: "I cannot really see how that is material to the issue involved here."

Mr. Heselton: "I want to show the extent of the injury."

The Court: "It can only come in on the question of sentence."

Mr. Heselton: "I can conceive of its being admissible in this way; blows inflicted beyond the legitimate self defense."

The Court: "I see. If you can connect the condition of the man at that time with the blows he received."

Mr. Brown: "The question goes in subject to my objection and exception."

The Court: "Yes."

Witness answers: "It might have been."

The jury returned a verdict of guilty as to the defendant Maddox, but disagreed and rendered no verdict as to the defendant Fuller.

To the foregoing rulings of the presiding justice and the admission of said testimony of Mrs. Hodges, Mr. Hodges and Dr. Giddings, the defendants' counsel seasonably objected and took exceptions.

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

The chief objection of the defendant is to the admission of Mrs. Hodges' testimony as to what Mr. Hodges said on his return from the first assault, when he was suffering from a broken arm, a bruised body and a concussion of the brain (as it afterwards proved) one-half a minute after the assault. This testimony is admissible as a part of the res gestae.

Counsel cited: Wharton, Cr. Ev. 262, 263; *Kirby* v. *Commonwealth*, 77 Va. 681, (46 Am. Rep. 747); *Warren* v. *State*, 7 Tex. Ct. App. 619, (35 Am. Rep. 745); *People* v. *Simpson*. 48 Mich. 747; *Com.* v. *McPike*, 3 Cush. 181; *Lambert* v. *People*, 29 Mich. 71; *Johnson* v. *State*, 65 Ga. 94; *Insurance Co.* v. *Mosley*, 8 Wall. 397; *State* v. *Molisse*, 38 La. Ann. 381, (58 Am. Rep. 181, and note); *Lewis* v. *State*, 29 Tex. App. 201; *Flannigan* v. *State*, 64 Ga. 52; *Keyes* v. *State*, 122 Ind. 527.

21st Am. & Eng. Ency. Law, 113, n. 3, says: "No inflexible

rule as to the length of the interval between the act charged against the accused and the act or declaration of the complaining party can be formulated. In that matter the facts of each case stand alone, and must speak for themselves. In each case, the particular facts and instances must be considered as an independent group and the judge must determine whether they fall within or without the operation of the rule." *State* v. *Molisse*, supra.

In *Delaware L. & W. R. Co.* v. *Ashley*, 67 Fed. Rep. 209, at p. 213, the court says: "In the nature of things there cannot be a sharply defined line between what is and what is not permissible as a part of the res gestae. In this debatable region a margin must be left for the exercise of the sound discretion of the trial judge." Chamberlayne's Best on Evidence, p. 446.

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

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

STROUT, J. Defendants were indicted for assault and battery upon Albert Hodges. Ten hundred and fifty feet from the house of Hodges, the parties had an affray in the highway, in which it was alleged that Maddox struck Hodges with a shovel and broke his arm and inflicted other injuries. Hodges' wife while in his house, heard outcries, and "run out of her house into the road, looked up the street and saw the parties in the highway," and heard violent words between Hodges and Maddox, "but she saw no blow struck." She saw Hodges turn his team around towards her, and she then run back into the house, and Hodges "drove back about as fast as the horse could come, that is a trotting gait, and drove down round to the stable." She says it was about one-half a minute, she does not think over one minute, from the time she saw Hodges in the road with Maddox, when as he was going down to the barn, Hodges told her, "that Fuller and Maddox had stopped him in the road and assaulted him, and Maddox had pounded him with a shovel and broke his arm, and pounded him on the head and Fuller held his horse."

This declaration of Hodges the court admitted as part of the res gestae, against defendants' objection, and exception was taken to its admission. Hodges himself was a witness at the trial, and this declaration appears to have been introduced to corroborate his testimony.

Does it fall within the rule as to res gestae? The rule itself is well stated in *Enos* v. *Tuttle*, 3 Conn. 250, that the declarations to be admissible, "must have been made at the time of the act done, which they are supposed to characterize, and have been well calculated to unfold the nature and quality of the facts they were intended to explain, and so to harmonize with them as obviously to constitute one transaction."

It is said in *Lander* v. *People*, 104 Ill. 248, that, "the true test of the admissibility of such testimony is, that the act, declaration or exclamation must be so intimately interwoven with the principal fact or event which it characterizes, as to be regarded a part of the transaction itself, and also to clearly negative any premeditation or purpose to manufacture testimony." *State* v. *Wagner*, 61 Maine, 194.

These definitions are in accordance with the decisions in this country and England. But in their application to varying circumstances there has been a diversity of opinion, and the cases are not always in harmony. In *Commonwealth* v. *McPike*, 3 Cush. 181, declarations were admitted as res gestae which do not seem to fall within the generally accepted doctrine. But later cases in Massachusetts appear to adopt a narrower rule, in harmony with the definition before given. *Lund* v. *Tyngsborough*, 9 Cush. 36; *Commonwealth* v. *Hackett*, 2 Allen, 138; *Commonwealth* v. *Densmore*, 12 Allen, 537. See also *New Jersey Steamboat Co.* v. *Brockett*, 121 U. S. 648. In *Vicksburg & Meridian R. R.* v. *O'Brien*, 119 U. S. 99, the declaration of the engineer of the train, made ten to thirty minutes after an accident, as to the speed of the train, was excluded as not being part of the res gestae. The court in that case said: "It is not to be deemed part of the res gestae, simply because of the brief period intervening between the accident and the making of the declaration. The fact remains that the occurrence had ended when the declaration in question was made."

To apply this principle here: when Mrs. Hodges looked out of her house, on hearing an outcry, the affray had ended. She saw no blows struck, but heard angry words. Immediately her husband turned his team and drove home, and on his arrival made the declarations to her. They were not made at the time of the assault and so coupled with it as to be explanatory of it, but were made after it was all over and the parties had separated. They can in no just sense be treated as part of the res gestae, and were inadmissible.

Sound public policy requires that the established rule as to this class of evidence, should be strictly adhered to and not extended. It is a species of evidence liable to abuse, and when, as in this case, the party making the declaration is a witness at the trial, testifying to the facts, his declarations made at any time, however short, after the occurrence has ended, in regard to the occurrence itself is mere narrative, and should not have the force of corroborative evidence, unless they are strictly and unquestionably a part of the res gestae. They are not so in this instance.

Cases may be found in other jurisdictions where the rule has been applied more broadly, if not loosely, but we think the better view is in harmony with the more limited construction we have given.

The ruling in question being erroneous, it is unnecessary to consider the other exceptions.

Exceptions sustained.

MARGARET GOODWIN, Petitioner,

vs.

OLIVER PRIME, Executor, and others.

York. Opinion December 31, 1898.

Probate Appeal. Evidence. Exceptions. R. S., c. 63, § 25.

At the hearing upon a petition under R. S., c. 63, § 25, for leave to enter an appeal from the probate court, the presiding justice can receive or reject particular items of offered evidence at his discretion; and exceptions cannot be taken to his action in so doing unless it is apparent that he has abused the discretion to an extent that has worked manifest injustice.

ON EXCEPTIONS BY DEFENDANTS.

This was a petition for leave to file a probate appeal under R. S., c. 63, § 25. The decree of the probate court of York County, from which the petitioner asks leave to appeal under the above statute, was a decree entered in that probate court on November 2, A. D. 1897, admitting to probate two instruments, one purporting to be the last will and testament of Benjamin Kennard, and the other purporting to be a codicil to said last will and testament. The petition for leave to enter the appeal was duly filed in the Supreme Court in York county during the January term, A. D. 1898, which was the first term of that court held after the decree of the probate court was filed.

After full hearing upon this petition and the answers filed thereto in the Supreme Court at the May term, A. D. 1898, a decree was duly entered by the presiding justice. Exceptions were thereupon filed in behalf of Oliver Prime, executor, George F. Kennard and Clara B. Kennard, legatees. These respondents were the only respondents who appeared in opposition to the prayer of the petition.

The finding of the presiding justice of the Supreme Court, contained in the decree, is as follows:

"I further find that the petitioner, from accident or mistake and want of notice, without fault on her part, omitted to claim and prosecute her appeal within the twenty days specified by statute, and that she has diligently and seasonably filed her petition for leave so to do."

The petitioner assigns as the reasons why she should be allowed to enter her appeal, incapacity of the testator and undue influence by Oliver Prime named as the executor of the will.

The material allegations in the petition are as follows:

"That at the time of making said decree by said probate court, your petitioner, who is eighty-three years of age, resided in said Exeter, in said State of New Hampshire, and had no notice or knowledge and no means of knowledge that said alleged last will and testament and said alleged codicil thereto had been presented to, or filed in, said probate court or offered for probate therein, nor had she any notice or knowledge or means of knowledge of said decree admitting said alleged last will and testament and codicil thereto to probate until by accident she was informed of it on the sixth day of December, A. D. 1897, when the time allowed by the law of Maine for appeal from said decree had expired. That prior to said time December 6, 1897, your petitioner had been informed in a way she thought to be true that said testator kept no will or codicil,—or instruments purporting to be such,—and being infirm and at a distance, had been wholly misled by such information, without fault on her part. Your petitioner therefore shows that her omission to appeal from said decree, which she would surely have done had she known of it within twenty days after the making thereof, was wholly without fault on her part and was because she had no notice or means of knowledge whatever of the presentation of said alleged will in said probate court, or that the same would be offered for probate therein, and moreover was misled by relying on false information relating thereto, until more than twenty days after the decree aforesaid was made admitting said alleged will to probate.

"And she further shows that she was so deprived of notice by accident growing out of the situation and distance of your

petitioner from said probate court, and she ought not to be deprived of her rights in the estate of said Benjamin Kennard without notice and without opportunity to be heard thereon, and that justice requires a revision of said decree admitting said alleged will and said alleged codicil thereto to probate."

The petitioner introduced evidence tending to show the following facts:

Margaret Goodwin, the petitioner, was the sole surviving sister of the testator. There were no other relatives nearer than nephews or nieces. The testator and the petitioner had always lived on the most friendly terms. The testator was wealthy; the petitioner was poor, supported mainly or wholly by the wages of her daughter, earned in the shoe shops at Exeter, N. H.

The petitioner was eighty-three years of age, quite infirm; had been unable to go from Exeter, N. H., to Eliot, Maine, to visit her brother, the testator, during the last year or two of her life, and was unable to attend his funeral, and she did not know of her brother's death until about a week after it occurred. Her daughter did not tell her of it, because she was too feeble. She did not know whether her brother left a will or not. She was unable to travel or to correspond herself, and in these respects had to depend wholly upon her daughter. Shortly after the testator's death, the petitioner's son, Albert, who lived in Portsmouth, N. H., visited her over Sunday, and at that visit, at the request of the petitioner, he promised to try to ascertain for her whether the testator left a will or not. After Albert returned to his home in Portsmouth, the petitioner did not hear from him for some days, and her daughter again wrote to Albert, requesting him to make inquiries about the existence of a will. He replied to that letter, in substance, that he could not learn that there was any will. The petitioner's daughter then wrote to Albert to make inquiries of a Mr. Preble who, she thought, was well acquainted with people in that vicinity and might know whether there was a will or not. To this letter Albert replied that he had inquired of Mr. Preble and of others, and that he could not learn of the existence of a will. All this was during the month of October. About the first of

November, petitioner's daughter was taken ill, under the care of a physician and nurse and unable to attend to any business during the month of November. She had, however, requested her landlady, Miss Bradley, to make inquiries for her on the subject of the will, and she had promised to do so, and informed the petitioner's daughter that she (Miss Bradley) had learned from a Mr. Twombly the proper address of the person to whom to write to get information, and Miss Bradley promised the petitioner's daughter that she would write for that pnrpose; but did not make known to her the address. After that, during the month of November, the petitioner's daughter was ill and unable to attend to business, but she says that she did send her nurse frequently to the postoffice, expecting to get a letter from Miss Bradley. In the meantime, early in November, Miss Bradley had been called away, without notice to the petitioner or her daughter, from Exeter, by the insanity of her uncle whom it was necessary to commit to an asylum. This kept Miss Bradley away from Exeter during that month and explained the failure of the petitioner's daughter to get any reply from her. Miss Bradley returned to Exeter the 6th of December, when she learned for the first time from Mr. Twombly of the existence of a will. Mr. Twombly had been called, by the death of a sister, to Sanford or Alfred, and had there learned of the existence of a will, but Miss Bradley knew nothing of it until her return to Exeter on the 6th of December. On December 7th, the petitioner's daughter, although she had not recovered from her illness and was unable to travel alone, took Miss Bradley with her and went at once to Alfred and ascertained about the will. She immediately employed counsel, who applied for leave to enter the appeal at the next term, (January, 1898), of the Supreme Court, and the hearing upon it was at the next May term. The time for filing the appeal in the regular course of procedure expired on November 22, 1897.

The presiding justice who heard the petition and the parties thereto made the following decree:

"This is a petition for leave to enter an appeal from the decree of the judge of probate for the County of York, wherein the last

will and codicil of Benjamin Kennard were admitted to probate on the second day of November, 1897.

"The cause came on for hearing on petition, answer and proofs, and I find that the petitioner, Margaret Goodwin, aged eighty-three, is the only surviving sister of the testator, who died on the twentieth day of September, leaving no issue, but as heirs at law several nephews and nieces and the petitioner, to whom one-third of his estate would descend under the statutes of this State.

"I further find that the petitioner, from accident and mistake and want of notice, without fault on her part, omitted to claim and prosecute her appeal within the twenty days specified by statute, and that she has diligently and seasonably filed her petition for leave so to do, and I do consider that petitioner asks to prosecute her appeal in good faith and that justice requires a revision of said decree, and therefore do hereby order, adjudge and decree that the prayer of said petition be granted and that the petitioner have leave to enter her appeal in this court upon filing bond to the adverse party with sureties to be approved by the clerk in the penal sum of five hundred dollars, conditioned as required by law, and that neither party recover costs upon this petition.

"Upon the hearing a certain bill in equity was read in evidence by the petitioner against the defendants' objection, and to the admission of the same, exceptions are reserved.

"Defendants also insisted upon the right to call witnesses to disprove the allegations in petitioner's reasons for appeal touching the validity of the will, but were denied the right so to do by the presiding justice, to which denial exceptions are reserved."

The defendants alleged two exceptions; the first was to the admission in evidence, against their objection, of a bill in equity brought by Oliver Prime, named executor in the will of his testator and against him the said George F. Kennard, the testator.

The second exception is as follows: Defendants insisted upon the right and offered to call witnesses to disprove the allegations in petitioner's reasons of appeal, touching the validity of the will and codicil, but were denied the right to do so by the presiding justice.

Fred J. Allen; *J. W. Symonds*, *D. W. Snow and C. S. Cook*, for plaintiff.

Exceptions do not lie to the exercise of discretionary powers of the presiding justice. *Simmons* v. *Lander*, 85 Maine, 199; *Thornton* v. *Blaisdell*, 37 Maine, 190; *Bank* v. *Stevens*, 39 Maine, 532; *Moody, Petr.*, v. *Larrabee*, Id. 382; *Crocker* v. *Crocker*, 43 Maine, 561; *Burr* v. *Railroad*, 64 Maine, 130; *Davis* v. *Co. Com.* 63 Maine, 396; *Grant* v. *Libby*, 71 Maine, 427; *Marston et al., Petrs.*, 79 Maine, 43; *Fessenden, Applt.*, 77 Maine, 98; *N. E. Acc. Assoc.* v. *Varian*, 151 Mass. 17; *Sylvester* v. *Hubley*, 157 Mass. 308; *Stillman* v. *Whittemore*, 165 Mass. 234; *Scituate Water Co.* v. *Simmons*, 167 Mass. 313; *McKay* v. *Kean*, Id. 524.

Bill in equity was admissible against Prime. *Grant* v. *Libby*, 71 Maine, 427; *Witcher* v. *McLaughlin*, 115 Mass. 169.

Second exception: In *Boston* v. *Robbins*, 116 Mass. 313, it is said: "It is within the discretion of the judge to whom a petition for a review is presented, if he is of opinion that the petitioner had a substantial defense to the action upon the merits, which by accident or mistake, and without fault on his part, he has had no opportunity of making, to grant a review, without passing in advance upon the questions of law or fact which may be involved in the trial of the case; and to the exercise of his discretion in this respect, no exception lies."

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

As to admission of bill in equity counsel argued: Evidence of declarations, admissions or acts of parties to the record made after the death of the testator is inadmissible to prove any of the reasons for appeal, there being other parties to be affected thereby who are not jointly interested nor in privity with them. *Ware* v. *Ware*, 8 Greenl. 42, 45; *Shailer* v. *Bumstead*, 99 Mass. 129; *McLellan* v. *Cox*, 36 Maine, 95; *McConnell* v. *Wildes*, 153 Mass. 488; *Miller* v. *Miller*, 3 Serg. & R. 267, (S. C. 100 Am. Dec. 538); *Fairchild* v. *Bascomb*, 35 Vt. 398; *Boyd* v. *Eby*, 8 Watts, 66, (Pa.); *Dolts* v. *Fetzen*, 9 Barr, 88 (Pa.); *Brown* v. *Morse*, 6 Yerger, 272, (Tenn.); *Roberts* v. *Trawick*, 13 Ala. 68; *Blakey* v. *Blakey*, 33 Ala. 611; *Thompson* v. *Thompson*, 13 Ohio N. S. 356.

Second exception: *Capen* v. *Skinner*, 139 Mass. 191.

J. O. Bradbury, Oakes and Ayer, for Geo. F. and Clara B. Kennard.

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

EMERY, J. This was a petition under § 25, of c. 63, R. S., to the Supreme Court of Probate for leave to enter an appeal from a decree of the court of probate for York county, the time within which such appeal could have been entered of right having expired. The decree sought to be reviewed allowed as valid an instrument purporting to be the will of Mr. Kennard in which Mr. Prime was named executor. The petitioner was an heir. The alleged error in the decree was in holding Mr. Kennard to have been of sound mind at the time of the execution of the supposed will.

At the hearing upon the petition before the Supreme Court of Probate sitting in York county, the justice of that court upon the question of the sanity of Mr. Kennard received in evidence against the objection of Mr. Prime (named executor) a bill in equity signed by Mr. Prime, as such executor, in which he alleged that Mr. Kennard, his testator, was of unsound mind. Again, when the petitioner had put in all her evidence tending to show the insanity of Mr. Kennard at the time of the execution of the will, and the respondent Mr. Prime had put in his evidence tending to show that the petitioner was in fault in not filing her appeal within the time fixed by statute, Mr. Prime, as executor, further offered evidence tending to rebut the evidence of the petitioner upon the question of the sanity of Mr. Kennard, and affirmatively tending to establish his sanity. The justice declined to hear this evidence.

To the action of the justice in receiving in evidence the bill in equity, and in declining his offered evidence upon the question of Mr. Kennard's sanity, the executor, Mr. Prime, excepted and brings his exceptions to the law court.

If upon this petition the court could adjudicate upon the issue of sanity, or could reverse or modify in the least the decree of the

Probate Court upon that issue, then Mr. Prime would undoubtedly have the right to bring these rulings before the law court for review. But such is not the case. There was no issue formed for trial upon that question. The petitioner was only asking for an opportunity to be heard upon that issue in the Supreme Court of Probate. The only order that could be made by the court was that she should or should not have that opportunity.

The petition, therefore, was addressed to the judicial discretion of the justice of the Supreme Court of Probate who should happen to hear it. The law court cannot substitute its discretion for his. When the determination of any questions rests in the judicial discretion of a court, no other court can dictate how that discretion shall be exercised, nor what decree shall be made under it. There are in such cases no established legal principles or rules by which the law court can measure the action of the sitting justice unless indeed he has plainly and unmistakably done an injustice so apparent as to be instantly visible without argument. *Capen* v. *Skinner*, 139 Mass. 190; *Moulton's petition*, 50 N. H. 532. "Discretion implies that in the absence of positive law or fixed rule the judge is to decide by his view of expediency or of the demands of equity and justice." *State* v. *Wood*, 23 N. J. L. 560.

In this case the justice of the Supreme Court of Probate hearing the case did not rule that the bill in equity was admissible in strict law as upon a trial of the issue of sanity, nor did he rule that the evidence offered by the executor upon that issue could not lawfully be admitted. He simply decided that in his discretion he would receive the bill in equity but did not care to hear the evidence offered by the executor. It is not apparent that in so doing he abused the discretion vested in him by the law.

It was not his duty to try the issue of Mr. Kennard's sanity. His decree would not determine that issue either way. He was simply to satisfy himself that the petitioner was without fault on her part in omitting to appeal within the statute time, and that "justice required a revision" of the decree. The evidence adduced by the petitioner might have been so ample and convincing that he might have properly adjudged it ought to be heard and considered,

whatever evidence might be adduced in contradiction. To be satisfied that "justice requires a revision" of the decree is not to be satisfied that justice requires the decree to be reversed or modified. The word "revision" as used in this statute means "review" "re-examination" "looking at again". Cent. Dict. It does not at all follow that the result of the revision will be a reversal or an alteration. There may be a complete affirmation. It was enough for the justice to be satisfied that the petitioner's evidence was of such amount and character as to be an important factor in the right determination of the issue, whatever evidence might be brought against it. He could properly adjudge himself satisfied of this before and without hearing what might be adduced in rebuttal.

"In general a new trial (a review) is granted without inquiring further than is necessary in order to ascertain whether the party by reason of some accident or misfortune has been deprived of the opportunity of being heard." Gilchrist C. J., in *New England Mutual Fire Ins. Co.*, v. *Lisbon Mfg. Co.*, 22 N. H. 170. It is only necessary that the petitioner satisfy the court that she petitions in good faith and actually intends to try the issues presented, and that she has good evidence tending to show the truth of her contention upon those issues. *Moulton's Appeal*, 50 N. H. 538.

The executor, Mr. Prime, was not deprived of any right by the action of the justice. Upon the trial of the issue upon the appeal he can object to the bill in equity, and can offer his evidence as to sanity. He can then insist upon and receive a ruling as matter of law, and if that ruling be against him he can have it reviewed upon exceptions. He could not require such a ruling at the hearing upon the petition where the issue was not presented, and hence has no right of exception.

Exceptions dismissed.

ELIHU T. HAMOR *vs.* BAR HARBOR WATER COMPANY.

Hancock. Opinion January 6, 1899.

Eminent Domain. Water Company. Damages. Easement. Spec. Laws, 1874, c. 449; 1895, c. 299.

In an action for the diversion of water, it appeared that the Bar Harbor Water Company was authorized to take water from Eagle Lake, which is eminent domain, for domestic purposes; that the company by regular procedure took the water by means of a twenty-four inch pipe and paid damages for the same; and that the plaintiff is the tenant of a mill on Duck Brook an outlet of the lake. *Held;* that his rights are those of a riparian owner, entitled to the regular flow of the stream; but it does not concern him that the Water Company may have used the water taken from the lake for purposes unauthorized by its charter, so long as it does not take an excess of what it was authorized to take. That is a consideration for the public, and not for the individual. It makes no difference to him what use may be made of the water taken. He can only be concerned in the measure taken.

The Water Company also having become the lawful owner of a dam at the outlet of the lake which it was authorized by the legislature to maintain, so as to increase the water supply, the plaintiff claimed an easement in this dam by which he may regulate the flow of water to his mill. *Held;* that the evidence fails to show such easement; and if it did, it was extinguished by procedure in condemning the dam and land where damages were paid to all owners therein.

It further appeared that the Water Company have maintained at the outlet of Duck Brook a solid stone dam that raises the water some three feet, and thereupon the plaintiff complained that he is thereby deprived of the water to which he is entitled at his mill. *Held;* that while he is entitled to the natural flow of the stream, the volume is substantially the same with the dam as without it, inasmuch as it does not divert the water through any other outlet; and that he has no cause of action.

See *Same* v. *Same*, 78 Maine, 127.

ON REPORT.

This was an action on the case for diversion of water from Eagle Lake, a great pond, in Eden, Hancock County, containing five hundred and six acres.

The water of Eagle Lake flows into Frenchman's Bay through Duck Brook, a stream about two miles in length. The plaintiff is tenant of the mill situated at the mouth of Duck Brook, about two

miles from Eagle Lake and below the high tide mark of Frenchman's Bay. The defendant is a corporation created by the Legislature of Maine by charter granted in 1874 and amended in 1895, for the purpose of supplying Bar Harbor and other parts of the town of Eden with water from Eagle Lake or Duck Brook.

The corporation formerly took its water supply from the brook. Before any water had been taken directly from the lake and before there had been any condemnation of water, the plaintiff and his partners, then owners of the mill of which he is now the tenant, sued the Bar Harbor Water Company for damages. The case is reported in 78 Maine, 127. The supply now and during the term covered by this suit has been taken directly from the Lake and in no part from the brook.

From the undisputed testimony the following facts appear:

Duck Brook flows from Eagle Lake and, since there has been a saw mill on this brook, there has been a dam at the foot of the lake with a gate in it for the purpose of regulating the supply of water flowing from the lake through the brook to the mill. The maintenance of this dam and gate is essential to the operation of the mill. Incidentally there has also been a dam and gate about half way down from the lake to the mill at the foot of a small, natural, subsidiary reservoir called New Mill Meadows.

The defendant Water Company sells water in the village of Bar Harbor and, recently, also in the village of Hull's Cove, both in the town of Eden. It derives its authority from the Legislature by special charter. It takes water from Eagle Lake by a pipe 24 inches in diameter running through a dam at a point just below the sill of the old gate used by the plaintiff. It formerly took water farther down the brook, at New Mill Meadows. During the period complained of in the writ, from July 30, 1894, to March 13, 1897, it has taken its water from the lake by its pipe as mentioned. As Bar Harbor has grown and the water system has been improved, a large and constantly increasing amount of water has been taken and used by the Water Company and the plaintiff has had a constantly diminishing supply in Duck Brook for his use at the mill. This has occasioned litigation between these same parties as before

stated. In 1893, this plaintiff, then tenant of the mill, brought another suit to recover damages for the six years prior to that date and this suit was settled and the plaintiff paid damages on July 30, 1894. Down to 1894 the Water Company had taken no steps under its charter to condemn the water of Duck Brook or Eagle Lake, but had submitted to these periodical suits for damages. In May, 1894, it took proper steps to condemn a certain quantity of the water of Duck Brook and Eagle Lake. Immediately afterwards, in June, 1894, this plaintiff, as tenant, and Mrs. Buck as owner of the mill property, brought a petition to the county commissioners for the assessment of their damages for the taking of water in the future to the extent and as described in the published notice of the water company. And in the settlement between all parties on July 30, 1894, $2100 were paid by the Water Company in full for all diversion of water up to that date and in full settlement for all water to be taken or diverted in the future to the extent described in the company's notice of condemnation, which was especially referred to in the release.

From the date of the settlement referred to, to November 1895, the condition of things remained the same. The defendant continued to take water as before and the plaintiff to operate his mill as best he could, sawing some lumber spring and fall by using and regulating the surplus water with the gate in the dam at the foot of the lake. In November, 1895, the defendant took away the old dam at the lake and built a new and substantial one higher than the old. The old gate was taken away with the dam and not since restored. There is no gate in the new dam and no way of controlling the water. The lowest point in the new dam is a waste-way in the centre some three feet and nine inches higher than the bottom of the old gate. The water, that is not taken by the defendant through its pipe, remains behind the dam till it rises to the level of the water-way and then flows over gradually and runs away.

In 1896 the defendant extended its system to Hull's Cove and has furnished water to that village ever since through an eight inch main.

The plaintiff also claimed that during the period complained of, —from 30 July, 1894, to the date of the writ, 13 March, 1897,— the defendant has supplied water in Bar Harbor for many purposes other than what would seem to be covered by its charter,— such as furnishing steamers and other vessels at the docks, water motors to run printing presses, saw and planing mills, grist mills, elevators, coffee mills, boilers, laundries, electric light plants, rock crusher and other matters of private enterprise, and also for the extinguishment of fires.

The charter of the defendant was granted in 1874 and the purposes are therein expressed to be, "conveying to and supplying the village and vicinity of Bar Harbor, in the town of Eden, Hancock County, with pure and wholesome water, . . ."

The only amendment to this charter since that date, of any importance in this connection, is that of 1895, chapter 299, which gives the Company power, "in addition to the powers conferred upon it by its act of incorporation", Sec. 4, To erect a dam "for the purpose of raising the level and increasing the capacity of either or both of said lakes or of any such stream (referring to Eagle Lake, Turtle Lake above it). Damages caused by flowage shall be assessed and paid in the manner provided by the Bar Harbor Water Company's charter in case of taking land for any of its corporate purposes."

Sec. 5. "To supply water to the inhabitants of any part of the town of Eden not only for domestic purposes, but also for shipping and the extinguishment of fires."

The plaintiff claimed that, as tenant in possession of the water mill, he is entitled to the full, natural flow of water from Eagle Lake down Duck Brook past his mill to the sea, limited only by the condemnation proceedings of 1894; and that he has a prescriptive right to regulate the flow of water by means of a gate in the dam at the lake; that the defendant company has violated his rights in removing the gate, in holding back water behind the new dam in excess of the requirements of the company and in taking more water than was condemned and paid for in 1894,—more in fact than its charter authorizes,—such as water for Hull's Cove and water to sell for power purposes in Bar Harbor.

The defendant denied that it has supplied water to territory and for purposes not authorized by its charter or held back water in excess of its requirements; contended that the plaintiff has no rights in either lake or brook which are superior to the rights of the defendant, as Eagle Lake is a great pond and the legislature has authorized the defendant's use of it; that by special act of legislature it had a right to build the dam and raise the level of the lake; that it was not required by its charter nor by the special act to pay any damages for diversion or detention of water; that having properly condemned the land on which the new dam is built any damages suffered by the plaintiff for the removal of the gate and the building of the new dam should be proceeded for not by an action of tort, but in the manner provided by the Act; that it has done nothing more than was authorized by the plaintiff by the settlement of 1894; that for any violation of its charter the state should complain and not an individual; and, finally, that this plaintiff cannot maintain this action as he has suffered no damage and is not the owner of the property.

J. A. Peters, Jr., for plaintiff.

Plaintiff as sole tenant in possession has right to recover for acts diminishing the value of his possession and is the only person who could sue for such injury. *Lyford* v. *Toothaker*, 39 Maine, 28.

For any injury affecting the present enjoyment of water rights the person entitled to the present enjoyment thereof is the proper party to bring the suit; but for any permanent injury to such rights the reversioner may maintain an action. Gould on Waters, Edition of 1883, § 376.

In case both tenant and landlord are injured each could sue for injury to his separate right. Gould on Waters, § 376.

In this case probably both tenant and landlord have suffered injury, because the acts of the defendant have diminished both the value of the possession and the value of the title or reversionary interest.

Condemnation and release of 1894: Quantity of water taken in 1894 is limited by the size of the outlet pipe; also the purposes for which the water is taken. If this limitation does not exist, then

all the water was taken which would flow through a 24-inch pipe ending in a 16-inch outlet and this would empty the lake in one hundred days according to the estimate of the defendant's engineer; and thus all the water of the lake would be taken, which is both unnecessary and unreasonable.

The purposes of the company are expressed in its charter to be "for the purpose of conveying to and supplying the village and vicinity of Bar Harbor, in the town of Eden, Hancock county, with pure and wholesome water." No amendments to the charter affecting the purposes of the corporation were passed until after the condemnation proceedings of 1894. Consequently the rights of the defendant consist in taking water to supply Bar Harbor with "pure and wholesome water."

This means water for ordinary domestic purposes. The company and the legislature have so construed the act. This is not conclusive as to construction; but the fact that this legislation would have been unnecessary, if the present claims of the company are well founded, should have great weight in construing the charter. *Quincy* v. *Boston*, 148 Mass. 392. The language of the act does not naturally cover water for fires or shipping. It is not necessary for these purposes that water be pure and wholesome. Supplying water for shipping is not supplying the village and vicinity of Bar Harbor with pure and wholesome water; but by furnishing water to vessels and steamers that touch at Bar Harbor in large numbers, the company is supplying water to people of other communities and for taking away. The company has the right to do this now, since the amendment of 1895, by instituting proceedings of condemnation, but not having taken such proceedings we claim to recover for all such water taken from our use. A grant of this kind is to be construed strictly against the company and no powers are to be read into the charter. *Rockland Water Co.* v. *Camden Water Co.*, 80 Maine, 544; *Hamor* v. *Bar Harbor Water Co.*, 78 Maine, 133.

The company never has had authority to sell water for the purpose of propelling machinery. Its charter, as it now reads, is almost exactly similar to the charter of the Rockland Water Co.

construed in 80 Maine, 544. The Bar Harbor charter has read since 1895, "to supply water . . . . not only for domestic purposes but also for shipping and the extinguishment of fires." The language of the Rockland charter was "a supply of pure water for domestic purposes, extinguishment of fires, and the supply of shipping in the harbor of Rockland." The court says, construing this language, "The language of the charter is plain and clear upon that point. The water which, by the terms of the charter, the company was authorized to take and use was for certain specific and defined purposes, and beyond that the plaintiffs were not authorized to go. By that charter they had no right to take or use the water for the purpose of propelling machinery. The right which they acquired from the state was a franchise right to so much water as was necessary for the purposes aforesaid." "When those purposes were fulfilled or satisfied this company could not lawfully hold the whole pond and thus eliminate the express provision of the legislature limiting their rights. This franchise right was not an exclusive right—a right by title or property right to the entire body of water of Tolman Pond—but only to so much thereof as was required for those purposes specified in the charter." The parallelism of the two cases continues when it is noticed that in the Bar Harbor charter the same clause occurs mentioned above. "Said corporation is hereby authorized, for the purposes aforesaid, to take, detain and use the water of Eagle Lake and Duck Brook," etc.; showing a right to take, not the total quantity, but only so much as is necessary for certain specified purposes.

In *Para Rubber Shoe Co.* v. *Boston*, 139 Mass. 155, the language of the legislature was, "so much of the water . . . . as shall be necessary for extinguishing fires, and for all ordinary domestic and household purposes and for the generation of steam." The court said "there can be no pretense that grinding, washing and cooling rubber, at least, are among the purposes" . . . . covered by the act. *Smith* v. *Dedham*, 144 Mass. 177, appears to hold that fire purposes have to be mentioned or covered other than by the term "pure water."

The defendant water company takes water from Hamor's mill

and sells it to Asa Hodgkins to run his mill and claims that Hamor has no redress. The legislature did not attempt to authorize this to be done and has no power to do so under the constitution. This is simply taking one man's property and giving it to another. Taking this water from the use of the plaintiff is taking his property as much as if his lot of land had been taken. So decided in *Hamor* v. *Bar Harbor Water Co.*, supra.

Besides taking water from the plaintiff for unlawful purposes in Bar Harbor, the defendant company has since the spring of 1896 diverted and sold water to the people of Hull's Cove. It was authorized to do this by the special act of the legislature for 1895; but it has taken no steps to legally condemn water for this purpose, any more than it has for supplying shipping and for fires—both purposes authorized by laws of 1895—and until it does so we can recover our damages in this form of action. *Lancaster* v. *Ken. Log Driv. Co.*, 62 Maine, 272.

Hull's Cove not included in charter: The language is "the village and vicinity of Bar Harbor in the town of Eden." Cases, supra.

Unreasonable detention of water: Under its charter the defendant is entitled to detain a supply reasonably sufficient for its charter purposes. Even under the doctrine of the *Watuppa Pond cases*, in Massachusetts, and *Auburn* v. *Union Water Power Co.*, 90 Maine, 576, it is not claimed that a water company or a city holding rights in a great pond is entitled to take any more of the water than is reasonably necessary for charter purposes. As Judge WALTON says in the latter case, "True, it is sometimes said that there must be no diversion of the waters of a stream; that the riparian proprietors above must allow the water to flow on in undiminished quantities to the riparian proprietors below. But this is not a correct statement of the law. And the inaccuracy of the statement has often been pointed out. The true rule is that there must be no unlawful or unreasonable diminution or diversion of the water." In *Rockland Water Co.* v. *Camden Water Co.*, it is held distinctly that a company chartered as this is has only the right to take so much water as is necessary for the "purposes aforesaid,"

and "when those purposes were fulfilled or satisfied, this company could not lawfully hold the whole pond and then eliminate the express provision of the legislature limiting their rights."

Plaintiff's right in dam and gate: The plaintiff claims a prescriptive right to maintain a gate in the dam. A prima facie title by prescription is shown by the testimony of the use of the dam with the mill, the necessity of such use and the deeds of the mill privilege back to 1848. The defendant claims that under the doctrine of *Auburn* v. *Water Power Co.*, we can gain no prescriptive rights in the water of this great pond against any use the state may grant of it.

We answer that we do not claim any rights adverse to the governmental use of the lake. So far as the legislature authorizes water to be taken by the defendant company,—thus far must our gate be raised. If the legislature has granted all the water of the lake we can maintain no gate at all. But under the facts that exist we claim to have a right to maintain a gate to regulate the water that the state has not given to the defendant, and the removal of that gate by the defendant is one element of our claim for damages.

The Auburn case asserts the right of the legislature to give a town the right to take a reasonable quantity of water from a large body of water claimed, in the possession of and dammed by the mill owners. In our case the water company is in possession claiming all the water and we are seeking a fair division.

The Auburn charter says that "the city, or said trustee, or said corporation, shall pay all damages sustained by any person or corporation in property by the taking of any water," etc.

The Bar Harbor charter says that "said corporation shall be held liable to pay all damages that shall be sustained by any persons by the taking of any land or other property, or by flowage, or by excavating, (etc.) . . . . and also damages for any other injuries resulting from said acts."

L. B. Deasy, for defendant.

(1.) Defendant has the right under its charter and amendment,

irrespective of any condemnation to take and use the water of Eagle Lake, and maintain the dam as built.

(2.) We have condemned the water of the lake, not, "so much as is necessary to supply Bar Harbor," but a quantity measured by the capacity of the outlet pipes, and that under this condemnation all water taken and used has been rightfully done, the capacity of the outlet pipe not having been exceeded.

(3.) As against the plaintiff we have the right to use the water to the capacity of the outlet pipe, even for purposes not contemplated in the condemnation, because we bought that quantity and paid him for it.

(4.) Dam was built and maintained rightfully under the condemnation of 1895, and no action of tort can be maintained in respect of it.

Plaintiff has suffered no damage. It is the owner of the mill privilege, if any one, and not the plaintiff who has been damaged. *Moody* v. *King*, 74 Maine, 497; *Sumner* v. *Tileston*, 7 Pick. 201; *Baker* v. *Sanderson*, 3 Pick. 352; *Monroe* v. *Gates*, 48 Maine, 467. Plaintiff leased the mill at a rental of one dollar and fifty cents per thousand feet for lumber sawed. If the plaintiff by reason of having no water could saw no lumber, he had to pay no rent. The amount of water condemned exceeds the whole supply in the lake, and neither mill owner or plaintiff has suffered damage by any act of defendant.

Defendant has committed no tort and plaintiff, if injured, must pursue the statutory remedy. *Hamor* v. *Bar Harbor Water Co.*, 78 Maine, 127; *Mason* v. *R. R. Co.*, 31 Maine, 215; *Hickox* v. *Cleveland*, 8 Ohio, 543, (32 Am. Dec. 730); *Stevens* v. *Proprietors*, 12 Mass. 465; *Brown* v. *Beatty*, 34 Miss. 227, (69 Am. Dec. 389); *Cushing* v. *Baldwin*, 4 Wend. 667, (21 Am. Dec. 168); *Plank Road Co.* v. *R. R. Co.*, 13 Ind. 90, (74 Am. Dec. 246.)

Under the statutory proceeding plaintiff must be held to have recovered the full value of his dam and gate, the value of the land taken, also consequential damages to his other property and rights. This condemnation gave defendant the exclusive right to occupy the dam and gate. His damages have been estimated accordingly

Goodwin v. *Cinn. & W. C. Co.*, 18 Ohio St. 169, (98 Am. Dec. 95); *Drury* v. *Midland R. R. Co.*, 127 Mass. 582; *Dickinson* v. *Fitchburg*, 13 Gray, 546; *King* v. *Minn. W. R. Co.*, 32 Minn. 224, (A. & E. R. R. Cases, 93); 6 Am. & Eng. Ency. 570; *Pittsburg, etc., Railway* v. *Gilleland*, 56 Pa. St. 445, (94 Am. Dec. 97); *Johnson* v. *Atlantic & St. Lawrence R. R. Co.*, 35 N. H. 569, (69 Am. Dec. 560); *First Parish in Woburn* v. *County of Middlesex*, 7 Gray, 106; *Winona, etc., R. R. Co.* v. *Waldron*, 11 Minn. 515, (88 Am. Dec. 100); *Walker* v. *O. C. & Newport R. R. Co.*, 103 Mass. 14; *First Church in Boston* v. *Boston*, 14 Gray, 215; *Commonwealth* v. *Coombs*, 2 Mass. 491; *Dearborn* v. *B. C. & M. R. R. Co.*, 24 N. H. 179; *Re Mt. Washington R. R. Co.*, 35 N. H. 134; *Wright* v. *Woodcock*, 86 Maine, 113. Counsel also cited: *Howe* v. *Inhabitants of Weymouth*, 148 Mass. 605; *Proprietors of Mills* v. *Randolph, etc.*, 157 Mass. 345; *Ingraham* v. *Camden & Rockland Water Co.*, 82 Maine, 335.

Counsel also argued that the plaintiff has no property in the water or in the flow of water in Eagle Lake; his water rights are subordinate to the right of the public. His right to the flow of water is subject to reasonable diminution and diversion. The alleged unauthorized uses of water for all purposes has been condemned, released and paid for. Hull's Cove is in the vicinity of Bar Harbor; at the time the charter was granted it was a mere suburb of Bar Harbor. The original charter authorized the taking of water for the extinguishment of fires, for the supply of shipping, and for running elevators and motors. These are public uses. 2 Dillon Mun. Corp. 597; *Opinion of Justices*, 150 Mass. 596; *Burden* v. *Stein*, 27 Ala. 104, (62 Am. Dec. 758); *Wayland* v. *Co. Com.*, 4 Gray, 500.

Plaintiff who has been paid for a diversion cannot object, whatever use is made of the water. Randolph on Eminent Domain, § 219; *State* v. *Newark*, (N. J.) 23 Atl. Rep. 130.

Plaintiff has not the right to the uninterrupted flow of water from the lake to the brook and thence to his mill: *Watuppa Reservoir Co.* v. *Fall River*, 134 Mass. 268, same case, 147 Mass. 548; *Auburn* v. *Union Water Power Co.*, 90 Maine, 576.

Plaintiff's claim to the right to control and regulate the water of the lake is not well founded: *Knox* v. *Chaloner*, 42 Maine, 150; *Arundel* v. *McCulloch*, 10 Mass. 71; *Com.* v. *Upton*, 6 Gray, 476; *Cary* v. *Whitney*, 48 Maine, 516; 1 Am. & Eng. Ency. p. 876; *Attorney General* v. *Revere Copper Co.*, 152 Mass. 450.

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

HASKELL, J. Eagle lake is a great pond. Defendant company by its charter, Act of 1874, c. 449, was authorized "to take, detain and use the water of Eagle lake and Duck brook, or either of them, in said town of Eden, and is also authorized to erect, maintain dams and reservoirs, and lay and maintain pipes and acqueducts necessary for the proper accumulating, conducting, discharging, distributing and disposing of water and forming proper reservoirs thereof." It was also authorized to take and hold necessary lands therefor and was required to pay "all damages that shall be sustained by any persons by the taking of land or other property or by flowage, or by excavating through any land for the purpose of laying down pipes and acqueducts, building dams and reservoirs, and also damages for any other injuries resulting from said acts." Unless the parties should agree upon the damages a method for their assessment was provided. The act also required surveys to be made locating dams, reservoirs, pipes and other fixtures, and plans thereof to be filed in the office of the town clerk of Eden and notice thereof by publication.

Prior to condemnation proceedings in 1894, the Water Company paid damages for the diversion of water from the Hamor mill on Duck brook. One suit to recover these damages was *Hamor* v. *Bar Harbor Water Company*, 78 Maine, 127. In 1894 the Water Company filed in the town clerk's office its notice that "it has taken and proposes to take, detain and use the water of Duck brook," and has caused surveys and profile plans to be filed in the town clerk's office, "showing the taking of the water of Eagle lake and Duck brook" under the provisions of its charter. "The quan-

tity of water to be taken may be determined by the outlet pipe," to wit:—"Pipe twenty-four inches in diameter starting from a gate house in Eagle lake, near the head of Duck brook, and running about 1505 feet to the stand pipe where the size of the outlet pipe is diminished to sixteen inches in diameter. The junction of the twenty-four inch and sixteen inch pipe is at a point fourteen five-tenths feet below the level of Eagle lake."

The plaintiff as tenant joined with the owner of the Hamor mill in a petition to the county commissioners under the provisions of defendant's charter to have his damages assessed. The petition alleges that defendant company "entered upon, took and detained for its own use for the purposes set forth in said act of incorporation (meaning defendant's charter) the water of said Duck brook, as more fully appears by the notice of location published by said corporation . . . . and by the plan therein referred to."

This petition, fairly interpreted, means damages for the taking of water through the twenty-four inch pipe before mentioned out of the lake, above the outlet, whereby the flow of Duck brook was diminished. To be sure, water had previously been taken from the brook below the lake, and for this damages had been paid. But by condemnation proceedings the Water Company limited its right to water from the lake by means of the twenty-four inch pipe, and for that damages could only be assessed. The lake was eminent domain, and, for that taking, mill owners on the stream had not suffered, in law, any damages, because the state had seen fit to grant only its own, without reserving any condition in favor of the riparian owners on the stream, as it might have done. *Auburn* v. *Union Water Power Co.*, 90 Maine, 576. Here, as in that case, the grant was for the taking of water for domestic purposes. How the use can curtail the power of the legislature is not plain, so long as it had not already made some grant of the water to others.

For this taking, however, the Water Company paid $2100, and the plaintiff released all his claim for damages in the premises, by which he is firmly bound. He asserts that defendant company has made use of the water for purposes other than authorized by its charter. The use, however, does not concern him. The volume

may. That is measured by the capacity of the contrivance by which the water may be taken. He must have his damages measured by the largest possible volume that it can divert. No other rule for the assessment of damages would work complete compensation. *Ingraham* v. *Camden Water Co.*, 82 Maine, 335; *Howe* v. *Weymouth*,, 148 Mass. 605; *Proprietors* v. *Randolph*, 157 Mass. 345.

For many years there existed an old dam at the outlet of Eagle Lake that the owners of the Hamor mill had been accustomed to use in regulating the flow of water so as to give a head at their mill. The plaintiff claims an easement in this dam, for his more convenient use of the water, acquired by adverse use for a long period by the owners of the mill. The evidence does not establish such easement; and if it did, it became an interest in the dam that was extinguished by the taking of it under the exercise of eminent domain, granted by the charter of defendant company, wherein a method is provided for the assessment of damages therefor. These damages were a full compensation for all persons having any title to the dam or the land on which it stands, and all such are confined to this remedy to the exclusion of all others. The taking of the old dam and the land on which it stood was clearly within the scope of the original charter, and the maintaining of a new dam in its place so as to raise the level of the lake and increase its storage capacity was authorized by Act of 1895, c. 299. By raising the water in the lake littoral owners only could suffer injury, and their damages were provided for by the act. The new dam raised the outlet some three feet, and held the water at that level, but did not divert it. No more water was thereby taken from the stream than the capacity of the twenty-four inch pipe would divert. That quantity might be taken, even if no water should be left to flow in the natural channel. The natural flow was substantially the same with the new dam as with the old or without any dam. What the plaintiff wants is not the natural flow, but an intermittent flow. This he is not entitled to by means of another man's dam that does not disturb the natural flow. There is no phase of the case that can give the plaintiff damages.

Indeed, he seems to have received already more than the law would have accorded him, and he should be satisfied therewith.

Judgment for defendant.

OTHELLO D. BROWN, and another, in equity

vs.

CHARLES H. ALLEN.

Cumberland. Opinion January 11, 1899.

Attachment. Lien. Seizure. Judgment. Laws of 1821, c. 60, §§ 1, 17; R. S c. 81, § 67; c. 76, § 38.

An attachment on mesne process of a right in equity to redeem real estate from mortgage will not continue for more than thirty days after final judgment in the suit unless the attaching creditor causes the right attached to be seized upon execution and notice of sale given within the thirty days after the final judgment.

ON REPORT.

Bill to redeem a mortgage of real estate, heard on bill, answer and agreed statement of facts.

The plaintiffs claimed that they own the equity in the mortgaged premises by virtue of a deed of warranty subject to the mortgage in question assumed by them. The deed was given them August 4, 1897, by Fannie R. and Frank O. Bolton. The defendant claimed that he obtained prior title to the equity by virtue of an attachment against said Boltons made August 31, 1896, and seizure, levy, and sale of the premises on second execution in October and November, 1897. He obtained the mortgage by assignment December 3, 1897, but has never been in possession of the premises.

The case shows that the defendant made a real estate attachment in the usual form against said Boltons—who then owned the equity of redemption in the mortgaged premises,—August 31, 1896, on a writ returnable to the November term, 1896, of the Superior

Court of Cumberland County; that he obtained judgment upon said writ which was entered up November 30, 1896; that he first took out execution for his judgment August 5, 1897; that said execution was returned to court "in no part satisfied" and a second execution issued November 10, 1897. Upon this last execution the officer returned that seizure of the equity in said premises was made October 6, 1897, and sold to the defendant at sheriff's sale November 10, 1897.

Tender and refusal are alleged by the bill and admitted by the answer.

For the purposes of the hearing upon this bill, it was admitted and agreed:

1. That the judgment set out in said bill was rendered upon default of the defendants and was in due form of law, and that the debtors were both living more than thirty days after rendition of said judgment;

2. That the first execution issued upon said judgment was in due form of law, and that no return of seizure, levy, or sale of property was made thereon;

3. That the second execution issued upon said judgment was in due form of law;

4. That the officer's proceedings in making the levy, sale, and return upon said second execution were regular as to form, but the seizure is not admitted by the plaintiffs to be seasonable or effective, and the validity of the sale is in controversy;

5. That the defendant has never been and is not in actual possession of the premises in controversy; and that in the event of a decree in favor of the plaintiffs the amount to be paid in redemption of the mortgage set out in said bill will be shown by adding to the amount due January 17, 1898, to wit, $833.64, interest upon the principal of the mortgage notes from that date to the date of the decree;

6. All other facts are as alleged in the bill and admitted in the answer, and shown by exhibits annexed to the bill.

The question submitted by the parties for the decision of the court was, whether the defendant's attachment continued in force

rising eight months after judgment was entered up before any execution was taken out, and more than ten months before seizure was made.

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

J. A. Waterman, for defendant.

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

EMERY, J. The question raised in this case is whether an attachment upon mesne process of a right in equity to redeem real estate from a mortgage continues for more than thirty days after final judgment in the suit, without further action by the officer or creditor within the thirty days. Inasmuch as such an attachment is essentially the creature of positive statute and is antagonistic to the common law idea of proprietary right, we must hold that the attachment continues no longer than the statute expressly or by necessary implication says it shall. We are not cited to any provision of the statute expressly declaring that the attachment shall so continue longer than thirty days after final judgment; but the defendant claims that such continuance is necessarily implied in R. S., c. 81, § 67, viz:

"An attachment of real or personal estate continues for thirty days, and no longer, after final judgment in the original suit, and not in review or error; except attachments of equities of redeeming real estate mortgaged or taken on execution; or equities of redemption sold on execution; or an obligee's conditional right to a conveyance of real estate on execution; or property attached and replevied; or property attached belonging to a person dying thereafter, or specially provided for in any other case."

We do not think such an implication is at all necessary. The exception "attachments of equities of redeeming real estate mortgaged" by the strict letter of section 67 may as well be from the general provision that attachments shall continue thirty days, leaving the excepted attachments without any life after judgment.

But to look solely at the language of section 67 is to take a

much too narrow view. That section like every section and clause of a statute is to be read in connection with, and reference to, every part of the statute and the law, present and past. In the first statute upon the subject, 1821, c. 60, was included in one chapter all the provisions for the attachment of, and levy of execution upon, property. In section 1,—it was declared: "That all goods and estate attached upon mesne process for the security of the debt or damages sued for, shall be held for the space of thirty days after final judgment, to be taken on execution;—and if the creditor shall not take them in execution within thirty days after judgment, the attachment shall be void." There was no where in that statute any exception of any kind of any property from this necessity of being taken in execution within the thirty days. In section 17—prescribing how equities of redemption of real estate mortgaged should be levied upon, as by sale, etc.,—it was expressly provided that "the notifications aforesaid being given or posted up within the space of thirty days after judgment given, whereon such execution shall issue, the attachment shall hold the equity attached as aforesaid, until the levy of such execution can be completed in the manner hereinafter described." Here was an express provision that an attachment of an equity of redemption should continue longer than thirty days after judgment, *provided* the creditor gave certain notifications within the thirty days. This provision has never been dropped from the statute book, but has been continued in all the revisions, and now appears in the last revision of 1883 as § 38 of chap. 76, relating to sale of equities of redemption upon execution, viz:

Sec. 38. "The seizure on execution is considered made on the day when notice of the sale is given, and it holds the right or interest seized within that time if the sale is not completed within thirty days after judgment; and the subsequent proceedings and return are valid, if made after the return day of the execution, or after removal or disability of the officer."

The implication from this language certainly is that, if the estate be not seized and notice of sale given within the thirty days, the attachment will expire like other attachments.

The phraseology of the section relied upon by the defendant (§ 67 of ch. 81) undoubtedly came to be used to guard against a possible interpretation, that if the title was not made to pass to the creditor within thirty days after final judgment he would lose his attachments. At the time of the introduction of that phraseology into the statutes, the only mode of levying execution on the fee of real estate was by extent and delivery of seizin, which could all be done within the thirty days. In levying by sale, the title could not pass till the sale was made and the officer's deed delivered, which could not be till after the thirty days. In such cases it was intended that the attachment should continue longer *provided* a seizure was made and notice of sale given within thirty days.

In this case no seizure was made, nor was any notice of sale given within the thirty days after judgment. Nothing was done to preserve the attachment and it accordingly expired with the lapse of the thirty days. The plaintiffs' title by deed from the debtor is therefore better than the defendant's title by subsequent levy, and he is entitled to redeem. The bill is sustained, and a decree will be made, according to the stipulation of the parties, that the plaintiff may redeem upon the payment of $833.64 plus the interest upon the principal of the mortgage notes from January 17, 1898, to the date of filing the decree, and that the defendant thereupon release all interest in the land described in the bill. No costs to either party.

Bill sustained. Decree as above.

MARIA WIRTH, Executrix, *vs.* EDMUND J. ROCHE.

Androscoggin. Opinion January 7, 1899.

Intox. Liquors. Beer Bottles. Entire Contract. R. S., c. 27, § 56.

No action can be maintained to recover the price of beer bottles, previously filled with lager beer, if the bottles and beer were purchased at the same time by the defendant in another state with the purpose of selling the beer in this state in violation of law.

Held; if the purchase of the bottles was merely incidental to that of the beer for its keeping and transportation, then the contract is indivisible; and the vendor cannot recover the price of the bottles in which such beer is contained.

ON EXCEPTIONS BY DEFENDANT.

Assumpsit brought to recover the purchase price of certain bottles alleged to have been sold by the plaintiff to the defendant. The bill of exceptions shows the following material facts:

At the time of these transactions the plaintiff carried on the business of a wholesale and retail liquor dealer in Boston, Mass. The bottles in question, filled with lager beer, were shipped from Boston upon the orders of the defendant, at or about the dates mentioned in the bill of particulars annexed to the writ. The different transactions were all by correspondence, written orders being sent by the defendant over the name of E. J. Roche or J. J. Roche, to the plaintiff in Boston. The orders were mailed in Lewiston, and the merchandise was delivered to a common carrier in Boston, directed to the various addresses given in the orders, such addresses being in no case in the name of either J. J. Roche or E. J. Roche.

The plaintiff also had a traveling salesman and collector, who periodically, once a month, made trips through Maine soliciting orders and making collections for his house. Most of the payments for the beer so sold were made by Roche to said salesman and collector.

The plaintiff contended that the bottles mentioned in the bill of particulars were sold to the defendant. The defendant, on the

other hand, contended that there was no sale of the bottles, but that he received them as a bailee and was only obliged to use reasonable diligence in returning them. And the defendant testified, and was uncontradicted in that particular, that the only bills which he received from the house or which he paid were bills for the beer at fifty cents per dozen bottles.

To sustain her contention, the plaintiff called one Ferdinand Krantz, who testified that he was cashier and shipping clerk of the plaintiff during the time covered by the accounts, and that in the absence of the general manager he acted as such of the plaintiff's establishment. The witness, Krantz, identified the various written orders forwarded by mail as aforesaid by the defendant to Boston as having been turned over to him for filling. He further testified that he filled the orders, made out the shipping directions and the shipping receipt, and placed them where the truckman would take them. He produced an account book containing the original entries of the different transactions made by him at the time when they purported to take place. He further testified that he did not know Roche and had never seen him, and that his knowledge of the transactions was derived only from the orders; and that his duties in regard to the shipments were ended when he had made the aforesaid entries in the shipping book and had made out the shipping tags and freight receipts.

To support the claim of the plaintiff that the bottles in question were sold to the defendant, the witness, Krantz, produced the aforesaid shipping book containing the original entries of the transaction and testified that the entries therein made, so far as they related to the defendant, were in his handwriting, made at the time they purported to be made and were the first entries of the transactions made in any book of the firm. The form of those entries was as follows:

"August 1, 1895, J. J. Roche, Lewiston, Maine
30 doz. Nar."

or in the following form:

"October 15, 1895, E. J. Roche,
10 doz. Nar."

The witness, Krantz, was permitted to read to the jury the different entries relating to these transactions as they appeared upon the shipping book, and further testified that the bottles in question were sold upon the above mentioned written orders sent in by Roche or his clerk; and that after the entries were made upon the shipping book the transaction was transferred by other clerks to a sales book, containing the charges for the beer, and to a "bottle-book" so-called, containing the charges for the bottles. But neither the "bottle book" nor the sales book was presented in evidence.

It was contended by defendant, and his testimony showed, that the beer in question was purchased by the defendant with the intention of selling the same in violation of the statutes of Maine regulating the sale of intoxicating liquors. There was also testimony tending to show that the plaintiff, or her servants or agents in charge of her business, knew that said beer was purchased by the defendant Roche with the intention of re-selling the same in violation of law, and that the same was so sold in violation of law in the bottles in which it was shipped from Boston. There was also evidence tending to show that the plaintiff, by her servants or agents in charge of her business, aided Roche by acts beyond the mere sale in carrying out his unlawful purpose.

The defendant contended that no action could be maintained upon the demand in question by reason of the provisions of R. S., c. 27, § 56, and that if said section was not applicable to this case, the plaintiff could not recover if she knew, or her agents in charge of her business knew, that said beer was purchased by the defendant with the intention of re-selling the same in violation of the laws of this State, and if the plaintiff or her agents in charge of her business aided the defendant by acts beyond the mere sale in carrying out his unlawful purpose.

Upon this contention the presiding justice instructed the jury as follows: "I say to you, as a matter of law, that if you should find that the defendant in this case received these goods, the bottles as well as the beer as a purchaser, that the plaintiff is not prevented by the prohibitory law of this State from recovering a fair

compensation for these bottles, if otherwise entitled to do so; that is to say, for the purposes of this trial, I rule that when the contraband liquors had been emptied out of the bottles, the taint of illegality is removed from the bottles, and they stand in the category of lawful merchandise like any other goods. They might thereafter be used for the purpose of bottling mineral water or anything else that is not in contravention of the laws of Maine."

The defendant's counsel requested the presiding justice to further instruct the jury as follows: "If the jury are satisfied that the lager beer which was contained in the bottles in question was purchased by the defendant with the purpose of re-selling the same in violation of law, and the plaintiff or her agents knew of such purpose, and aided the defendant by acts beyond the mere sale in carrying out his purpose, plaintiff cannot recover," which requested instruction the presiding justice refused to give.

To the foregoing instruction and to the foregoing refusal to instruct, the defendant excepted.

The plea was the general issue.

Verdict was for the plaintiff for the sum of $200.05.

R. W. Crockett, for plaintiff.

There is no penalty provided in the statute, as applicable to this case, or a prohibition, implied or expressed, in any way respecting the transporting, keeping or selling of bottles, casks, barrels or other vessels in which liquors are usually kept, nor would it be contended that such vessels are in any sense embraced within the scope of sections 39, 40, 44 or 56. There being no such penalty or prohibition, and § 56 being enacted for the purpose of preventing a recovery for only such articles as are sold in violation of c. 27, i. e. intoxicating liquors, then even under the most liberal construction, this section cannot be held to include the vessels in which the liquors are contained.

The rule of strict construction of the statute applies: *Wing* v. *Weeks*, 88 Maine, p. 118; *Abbott* v. *Wood*, 22 Maine, 541; *Butler* v. *Ricker*, 6 Maine, 268; *Cobb* v. *Corbitt*, 78 Maine, p. 243.

The sale of the beer and the sale of the bottles constituted in

this case two separate and distinct contracts. The sales of bottles were entered in a book called the "bottle-book", a book entirely separate from the book containing the charges for the beer. The beer was charged for at the rate of fifty cents per dozen, and the bottles at the rate of forty cents per dozen. Where a stock of goods is sold at a distinct and separate price for each article, and the sale of some of those articles is illegal, an action may nevertheless be maintained for the value of the balance of the sale.

In *Boyd* v. *Eaton*, 44 Maine, 51, which was an action brought for the value of the stock of goods, some of the items being for spirituous liquors at separate and distinct agreed prices, it was held that the plaintiff might recover for the legal items. The court quoting from *Carleton* v. *Woods*, 8 Foster, 291, say, "We are unable," says Woods, J., "to see how this case differs from the case of a sale by a merchant of various goods to his customer, at one and the same time, for separate values stated at the time, which, when computed, would of course amount to a certain sum in the aggregate. When in such case the goods are charged to the customer, and the sale of part of the goods should be found to be illegal, we think it would be difficult to maintain upon any legal or equitable principles, that under a proper declaration, the value of the goods which were proper and legal articles of sale, could not be recovered." See also *Towle* v. *Blake*, 38 Maine, 528.

J. A. Morrill, for defendant.

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

HASKELL, J. Assumpsit by a liquor dealer in Boston to recover of defendant the price of sundry bottles sold filled with beer. The defendant at sundry times ordered bottled beer from plaintiff to be shipped to him in Maine, there intended for unlawful sale as the plaintiff well knew. The plaintiff contends that although he cannot recover the price of the beer, he may recover the price of the bottles. If the beer and bottles containing it were sold together, the plaintiff cannot recover the price of either one

by reason R. S., c. 27, § 56. That provides, "No action shall be maintained upon any claim or demand, promissory note, or other security contracted or given for intoxicating liquors sold in violation of this chapter, or for any such liquors purchased out of the state with intention to sell the same or any part thereof in violation thereof; but this section shall not extend to negotiable paper in the hands of a holder for valuable consideration and without notice of the illegality of the contract."

The evidence shows that if the bottles were sold at all, they were sold with their contents. The thing sold was an entirety, and methods of book-keeping cannot change its nature. Where the contract of sale includes both legal and illegal elements neither can be recovered. In *Ladd* v. *Dillingham*, 34 Maine, 316, the sale of a stock of goods containing intoxicating liquors was held invalid. Where intoxicating liquors and vessels are illegally sold, the contract is indivisible, and the price of the vessels cannot be recovered. *Holt* v. *O'Brien*, 15 Gray, 311; *Bligh* v. *James*, 6 Allen, 570.

The evidence shows but one contract applying to each order, so that either the bottles were included in the sale, or they were not. If included, the contract cannot be enforced. If not, then there is no evidence of the sale of the bottles at all, and they still remain the property of defendant, and their price cannot be recovered in assumpsit unless the defendant has reduced them to cash, or its equivalent, and it does not appear that he has. His refusal to redeliver them would be a conversion, a tort, that cannot be waived so as to bring assumpsit unless they have been turned into money or its equivalent. *Fletcher* v. *Harmon*, 78 Maine, 465; *Androscoggin Co.* v. *Metcalf*, 65 Maine, 40, and cases cited; *Quimby* v. *Lowell*, 89 Maine, 547. Where the evidence relates to a single transaction in the sale of goods and shows an express contract that is invalid, the law does not imply one. *Wood* v. *Finson*, 89 Maine, 459; *Billings* v. *Mason*, 80 Maine, 496.

The pro forma rulings of the presiding justice, in substance, that when the contents of the bottles shall have been removed from them, their sale became valid and might be enforced was error;

for the contract of sale was an entirety and indivisible, including both bottles and contents, and therefore void.

Exceptions sustained.

JOSEPH D. MORRILL, in error, *vs.* MARY J. BUKER.

Androscoggin. Opinion January 11, 1899.

Error. Practice.

A writ of error cannot be sustained when only fragments of a record are produced. In such case, the writ may be dismissed, but the record below should not be affirmed.

ON EXCEPTIONS BY DEFENDANT.

This was a writ in error, wherein the plaintiffs ought to annul a scire facias judgment obtained by the defendant against the plaintiff in the Lewiston Municipal Court.

The case was heard before the presiding justice at the April term, 1898.

The presiding justice ruled that no errors appear of record as alleged in the writ, and ordered the writ dismissed with single costs, and judgment of the court below affirmed.

To this ruling and order the plaintiff excepted.

It appeared that the plaintiff in error, Morrill, a foreman in the shoe manufactory of the National Shoemakers at Lewiston, was summoned as trustee in a suit of Mary J. Buker (the defendant in error), against one William Simpson, an employee of the National Shoemakers, returnable at the February term, 1897, of the Municipal Court for the city of Lewiston.

Not supposing that the process was actually intended to reach him, as he himself was simply an employee of the same concern, Morrill did not answer at the return term of the writ, and was defaulted. Execution thereafter issued on the eighth day of February, 1897. A demand was made upon this trustee within thirty days, and on the 10th day of June, 1897, a writ of scire

facias issued. This writ being returned to court, no appearance was made, and Morrill was defaulted; execution issued, and upon this execution Morrill was cited to disclose; whereupon he brought his writ of error.

Several grounds of error were stated in the writ, but the plaintiff relied especially upon two, viz: the second and third grounds stated in his writ of error.

The second ground is, that by the return of said officer it does not appear that said execution, at the date of the alleged return by said officer, to wit, June 10, 1897, was unsatisfied; nor does it appear by the return of said officer that he was unable to find any property, goods or money of said principal debtor wherewith to satisfy said execution.

The third error specifies that in fact the trustee execution was not returned to the clerk of the Municipal Court for the city of Lewiston, and was not on file with said clerk, as alleged in said writ of scire facias, on the 10th day of June, A. D. 1897, and had not been at the time of the rendition of judgment in the scire facias suit.

H. W. Oakes, for plaintiff.

(1) By the provisions of the statute, it is required that, as a condition precedent to the issuance of a scire facias writ, it must be returned unsatisfied. R. S., c. 86, § 67; *Austin* v. *Goodale*, 58 Maine, 109; *Adams* v. *Rome*, 11 Maine, 39.

(2) Transcript of record sufficient: R. S., c. 79, § 11; *Lewiston Steam Mill Co.* v. *Merrill*, 78 Maine, 107. Grounds of error: *Piper* v. *Goodwin*, 23 Maine, 251; *Conway Fire Ins. Co.* v. *Sewall*, 54 Maine, 352.

By suffering judgment by default, a party may admit the justice of the claim, but he does not thereby admit the jurisdiction of the court or the correctness of the proceedings to establish and enforce the claim. He may safely rest upon the assumption that unless the process be legal, and the service sufficient, and the jurisdiction certain, no judgment will be rendered against him; or if from fraud, accident or mistake, a judgment should be erroneously

entered, that the whole may be revised on error. *Jewell* v. *Brown*, 33 Maine, 250.

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

(1.) It is not necessary for an officer to return an execution into court within three months from its date. *Robinson* v. *Williams*, 80 Maine, 267; *True* v. *Emery*, 67 Maine, 28.

(2.) The scire facias writ recites that the execution was returned into court wholly unsatisfied. The plaintiff in error defaulted to that declaration, and every statement contained in the declaration must be considered true. If the facts in scire facias writ were not true, then Morrill should have either pleaded in abatement or defended in fact, but he defaulted. This court has held that "error must appear that party was without fault and could not prevent. *McArthur* v. *Starrett*, 43 Maine, 345. Error will not be granted unless incurable error disclosed by the record. *Warren* v. *Coombs*, 44 Maine, 88. Discretion of the court in such cases, not revisable in error. *Lovell* v. *Kelley*, 48 Maine, 263.

Error does not lie for defects in matter of form. *Piper* v. *Goodwin*, 23 Maine, 251.

Nor when objection might have been taken by plea in abatement. *Piper* v. *Goodwin*, 23 Maine, 251.

Nor would writ lie for an error in fact which party might have pleaded. *Weston* v. *Palmer*, 51 Maine, 73.

Defects in declaration that are proper subjects of amendment cured by default and cannot be reached by writ of error. *Lewiston Steam Mill Co.* v. *Merrill*, 78 Maine, 107.

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

HASKELL, J. Error to a judgment of the Lewiston Municipal Court. The presiding justice ruled that "no errors appear of record as alleged in the writ." He might well so rule, for no complete record was produced, only fragments of one. These "do not necessarily show error, hence the writ of error should be dis-

missed." *Atkinson* v. *Bank*, 85 Maine, 368; *Lewiston Steam Mill Co.* v. *Merrill*, 78 Maine, 107; *Tyler* v. *Erskine*, 78 Maine, 91.

As a sequence to the above ruling, the presiding justice ordered the writ of error dismissed with single costs. That was a matter of discretion with him. It was analagous to a nonsuit. The pleadings were inartificial and irregular. No issue seems to have been tendered or joined. The order disposed of the case and is not erroneous. It seems to be appropriate, too, for the want of information upon the merits.

The presiding justice also ordered the judgment below affirmed. This is a non sequitur and unauthorized. A writ of error, in our practice, stands by itself like any other common law action. It is not an appeal that brings into the appellate court the original action, so that if the appeal, that is the plaintiff's contention, be dismissed, the decree or judgment below remains to be affirmed, for the whole action has been brought up by the appeal when properly taken; when not properly taken, the action has not been brought up and the decree or judgment below cannot be affirmed because not razed by the appeal. To be sure, judgment may be given for either party; but judgment contemplates the retention of the writ as a foundation therefor. Where the writ be dismissed, no other judgment follows. Indeed, the court thereby refuses judgment upon the merits of the action. It refuses to find any other fact than that plaintiff is not rectus in curia.

The order, therefore, affirming the judgment was error, and to this plaintiff's exceptions must be sustained, leaving the writ dismissed with costs and the judgment sought to be reversed untouched.

Exceptions sustained to order affirming judgment below, otherwise overruled.

FRANK D. MERROW *vs.* FRED B. GOODRICH.

Androscoggin. Opinion January 11, 1899.

Agent. Admissions. Evidence.

The admission of a creditor's agent, made after the debt had been contracted, as to the amount due, is not the admission of the creditor, and is incompetent evidence, either for the creditor or debtor.

ON EXCEPTIONS BY DEFENDANT.

This was an action of assumpsit, in which the plaintiff claimed the sum of thirty-five dollars due from the defendant on an account annexed. Defendant admitted an indebtedness of eighteen dollars and offered to be defaulted for that sum. The parties were at issue as to the alleged payment of seventeen dollars, for which no credit was given on the plaintiff's books.

In defense the defendant offered to prove, by a witness, Fred A. Golder, that the plaintiff's agent, Edward T. Brown, who testified in the case, admitted to him, shortly previous to the suit, that there was only about twenty dollars due from defendant to plaintiff. This evidence was objected to and excluded by the court.

The evidence shows that the witness Brown was the agent of the plaintiff; that he sold a part of the goods for which this suit was brought; and collected money which defendant claimed he paid the plaintiff.

Edward T. Brown, recalled by the plaintiff, was asked on cross-examination, "Now did you say to Mr. Golder that the bill of Mr. Merrow against Mr. Goodrich was about twenty dollars?" This question on objection was excluded.

In excluding the testimony of Fred A. Golder as to what the plaintiff's agent said to him, the court said: "I do not think the conversation between Brown and this witness is admissible, unless it is introduced to contradict Mr. Brown's testimony on the stand here. While I understand he delivered goods, yet he could not, by statements as to past events, bind his employer."

In excluding the testimony of Agent Brown, the court said:

"I think I will exclude it and you can have the benefit of your exceptions. Any statement that he made during the transactions, acting as agent, would be admissible; but this is a conversation which purports to have been made after Mr. Goodrich had gone out of business, and the conversation between this witness and a third party; and it does not seem to contradict the witness in his testimony here, and I do not think Mr. Merrow would be bound by his statement to another party, made outside of the transactions in issue.

The jury returned a verdict of $35.85 for the plaintiff and the defendant took exceptions to the rulings of the court.

Tascus Atwood, for plaintiff.

Edgar M. Briggs, for defendant.

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

HASKELL, J. Assumpsit upon account annexed to recover $35.00. The defendant offered to prove an admission by plaintiff's agent, made after the debt had been contracted but before suit, that there was only about $20 due plaintiff. It was properly excluded. It was not an admission of plaintiff, for it was neither made in his presence, nor as a part of any business transaction. It was purely hearsay. "What one man says, not upon oath, cannot be evidence against another man." *Franklin Bank* v. *Steward*, 37 Maine, 519, and cases cited; *Heath* v. *Jaquith*, 68 Maine, 433; *Craig* v. *Gilbreth*, 47 Maine, 416.

The agent, being recalled as a witness by plaintiff, was asked by defendant, whether he made the admission before referred to. The question was properly excluded. If the admission was incompetent as evidence, it could not become so, by the agent's own testimony that he made it. The method of proving it could not change its quality. Had the case shown that the inquiry was pertinent cross-examination, it might have been admissible, as contradictory of some prior statement of the witness and thereby affecting his credibility. Nothing of that sort appears however.

Exceptions overruled.

EMILY M. LONGLEY, Petr. for Partition,

vs.

JOSIAH B. LONGLEY.

Androscoggin. Opinion January 11, 1899.

Partition. Husband and Wife. Widow. Const. Law. R. S., c. 88; Stat. 1895, c. 157; 1897, c. 196.

A widow, to whom lands descend from her husband, may have partition thereof at common law.

The constitutionality of the act of 1887, excepting one-third of a decedent's lands from the payment of debts, cannot arise until such third shall have been subjected to the payment of such debts.

ON EXCEPTIONS BY DEFENDANT.

Petition for partition. By agreement of parties the case was submitted to the presiding justice with the right to except.

The petitioner is the widow of Josiah P. Longley, who died testate October 24, 1897, seized of the premises described in the petition. By his last will and testament said Josiah P. Longley devised said premises to the respondent, Josiah B. Longley. The petitioner seasonably waived the provisions of the will.

By her petition the petitioner prayed to have set out to her in severalty her one-third of said real estate to which she claims title as widow of said Josiah P. Longley, deceased.

The respondent's counsel contended that partition of said premises could not be made, and the petitioner's undivided portion thereof could not be set off to her in severalty in this suit; but that her share in said premises could only be set out to her in severalty by the probate court under the provision of R. S., c. 65. The defendant also contended that the law giving to the widow one-third of the real estate of which her husband died seized, free from the payment of debts, is unconstitutional, it appearing that the estate of Josiah P. Longley was largely involved.

The presiding justice ruled, as matter of law, that the law is constitutional and that the petitioner is entitled to partition in this

action and adjudged that the petitioner have judgment for partition.

To this ruling and adjudication the defendant excepted.

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

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

The plaintiff brings this action not as tenant in common by virtue of the will, for she has waived her provisions under the will, but as heir at law. An heir at law, as defined by this court in *Lord* v. *Bourne*, 63 Maine, p. 379, citing from Bouvier, "is one born in lawful matrimony who succeeds by descent, right of blood, and by act of God to lands, tenements, and hereditaments, being an estate of inheritance." The court in same case further says "so, under our statutes, if administration is not taken out within the time limited by law, when a person dies leaving personal property, such property becomes the widow's, or if none, it goes to the next of kin and administration of intestate estates is granted to the widow, husband or next of kin. R. S., c. 64, § 1. Chapter 64, § 1 and § 17 has not been repealed even by implication, and under these sections this court holds that the widow is not, as such, a legal heir. This court also holds that the husband is no heir of the wife. *Clark* v. *Hilton*, 75 Maine, 426; *Buck* v. *Paine*, Id. 582.

The wife not being heir at law under the decisions of this State, she must still have her interest as wife set out under provisions of R. S., c. 65 and 103.

Statute of 1897, c. 196, is unconstitutional: The estate is involved, the creditors are of long standing; long before the passage of this act. They contracted their bills with Mr. Longley when the inchoate dower, if vested, would be but the use of one third of the real estate, and later under the laws of 1895 when a widow was to have one-third of real estate after the debts were paid. They contracted their debts in good faith and the existing law of the State at the time the bills were contracted entered into and formed as much a part of the contract as if expressly stipulated between the parties thereto. So held in *Phinney* v. *Phinney*, 81 Maine, 450, and cases.

The act of 1897 not limiting its application to those estates in which debts were contracted after its passage is unconstitutional, as it deprives the creditor of the security upon which in good faith he depended in parting with his property. *MacNichol* v. *Spence*, 83 Maine, 87; 3 Am. & Eng. Ency. p. 756; *Gunn* v. *Barry*, 15 Wall. 610.

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

HASKELL, J. Petition for partition by the widow of Josiah P. Longley, who died the 24th October, 1897, seized of the premises of which partition is sought.

I. The jurisdiction of this court is denied. Partition of lands held in common may be had either at common law or under the statute, R. S., c. 88. The act of 1897, c. 196, gives a widow, free from the payment of her husband's debts, one-third of the real estate, of which he was seized during coverture, in fee. The petitioner, therefore, by the death of her husband, became seized in fee of one-third, at least, of his lands as tenant in common with others. She had a right of entry therein, and asks to have her one-third set out to her in severalty. We see no legal objection to the prayer of her petition. She is the owner of one-third of the common lands. No matter how she may have acquired her title. She has it, and may hold and enforce it just the same as any other tenant in common may do.

Sears v. *Sears*, 121 Mass. 267, seems directly in point. There, a widow took a moiety of certain land for life in lieu of dower, and the court held that she might have partition of the same in the supreme judicial court, notwithstanding she had a like remedy in the probate court; that the remedies were concurrent, and that she might avail herself of either one. *Allen* v. *Libbey*, 140 Mass. 82, held that the heir might have partition against the widow, who held one-half for life only.

The widow had an immediate right of entry into one-third of the lands of her husband and was therefore entitled to partition

thereof in severalty. A mortgagor in possession, who is not a tenant at will of the mortgagee, may have partition. *Call* v. *Barker*, 12 Maine, 320; *Upham* v. *Bradley*, 17 Maine, 423. The object of partition is a division of the estate between the legal owners of it regardless of equitable claims. *Tilton* v. *Palmer*, 31 Maine, 486. Semble, that where a widow takes one-half under the statute of 1895-7, but only one-third free from the debts of the husband, she would be entitled to partition of the half to her, subject to a lien for creditors upon one-third of it. That third, or one-sixth of the whole, might be sold in administration for the payment of debts, giving the purchaser thereof a right to partition of the same; but, until sold, the legal title thereto remains in the widow, and she has a right to immediate entry therein, hence partition thereof, for non constat that it ever will be sold for the payment of debts. In the case at bar, however, no such question arises, for the petitioner became seized of one-third only. We think the petition may be maintained.

II. The constitutionality of the act of 1897, exempting one-third of decedent's lands from the payment of debts, is denied. That question cannot arise here, for the widow's third has not been subjected to the payment of debts, and may never be. Until it has been, she is entitled to the possession and income thereof, just the same as an heir would be. The fee is in her, and she has a right of entry therein and therefore may have partition thereof as has already been shown. This question would arise, if at all, inter alios whose rights should not be precluded here.

Exceptions overruled.

JONATHAN P. PALMER

vs.

MAINE CENTRAL RAILROAD COMPANY.

Cumberland. Opinion January 12, 1899.

Arrest without warrant. Railroads. Passenger. Mileage Book. Damages R. S., c. 51, § 78; c. 133, §§ 14, 18.

If a private individual procures the arrest of an innocent person for a misdemeanor, by an officer without a warrant, he cannot justify by showing that he acted in good faith, without malice, and upon a belief of guilt founded upon reasonable grounds.

The defendant's conductor caused the plaintiff to be arrested by a constable without warrant, charging him with "fraudulently evading the payment of his fare." The offense charged was a misdemeanor only, and the plaintiff was, in fact, not guilty. *Held;* that the defendant cannot justify the arrest on the ground that the plaintiff's conduct afforded the conductor reasonable grounds to believe, and he did believe, that the plaintiff was guilty. *Held;* also that the constable had no lawful authority to arrest the plaintiff without warrant, on information merely, the plaintiff not being "found violating any law of the state."

The plaintiff, after being arrested, was taken immediately before a municipal court, where the conductor made a complaint under oath against him for "fraudulently evading the payment of his fare." The plaintiff pleaded "not guilty." He then paid his fare and the costs of prosecution to the judge. The conductor, in writing, acknowledged "complete satisfaction," and the plaintiff was thereupon discharged. *Held;* that by these proceedings, the plaintiff did not waive or release his claim against the defendant for the unlawful arrest, and the plaintiff was not thereby barred of his remedy.

When a plaintiff claims punitive damages, or damages for his injured feelings, the spirit and conduct of the defendant may be inquired into, to enhance or aggravate, and as well, the plaintiff's own conduct, and the provocation by him, if any, to mitigate the damages.

The plaintiff was traveling upon a non-transferable mileage book issued to him by the defendant company upon condition assented to in writing requiring him, among other things, and as a means of enabling the train conductors to identify the owner, to obtain his signature thereon.

The conductor, as a means of identification, asked the plaintiff three times if the name on the mileage book exhibited by the plaintiff was his name, and if the signature was his, and each time the plaintiff refused to give the informa-

tion desired, telling the conductor that it was "none of his business." *Held;* that the inquiry of the conductor was a reasonable one, and that it was the duty of the plaintiff to make a frank and truthful answer.

Also; that the plaintiff's conduct was willful, obstinate, evasive, and was well calculated to give the conductor reason to believe that he was attempting to ride upon a ticket, not his own; and that while these circumstances do not justify the arrest, they are entitled to full consideration on the question of damages.

The damages to the plaintiff in his person, and for loss of time and expenses were little more than nominal. *Held;* that under all the circumstances, the court is of opinion that a new trial should be awarded unless the plaintiff will remit all of the verdict $550 in excess of ten dollars.

ON MOTION AND EXCEPTIONS BY THE DEFENDANT.

This was an action of trespass for false imprisonment. The plea was the general issue with a brief statement justifying the imprisonment, on the ground of a lawful arrest of the plaintiff for fraudulently evading the payment of his fare as a passenger on one of the defendant's trains.

There was evidence tending to show:

That at the time alleged the plaintiff was a passenger on the defendant's train from Rockland to Brunswick.

That in payment of his fare he tendered to the defendant's conductor, Jones, a mileage book, which contained as a part of the contract, signed by the party to whom it is issued, the following among other provisions:

"That it is good only for the person in whose name it is issued, and if presented by any other person, the right to any remaining rides to which the purchaser might have been entitled shall be forfeited, and the conductor shall be authorized to take up this ticket and return the same to the general ticket office as forfeited, and conductors are authorized to obtain the signature of holder of the ticket for identification."

That the mileage book tendered to said Jones purported to be signed "Jona. P. Palmer."

That said Jones was not personally acquainted with the plaintiff.

That said Jones exhibited the signature to the plaintiff and asked him if that was his signature, but that he refused to say that

it was, and persisted in doing so, and in refusing to identify himself in any other manner and left the train at Brunswick without paying his fare.

That after leaving the train at Brunswick said Jones caused the plaintiff to be arrested by one Norman, a constable of Brunswick, for fraudulently evading the payment of his fare, claiming that he was so authorized as provided in R. S., c. 51, § 78, as follows:—"Whoever fraudulently evades payment by giving a false answer, or by traveling beyond the place to which he has paid, or by leaving a train without paying, forfeits not less than five, nor more than twenty dollars, to be recovered on complaint:

That said Jones immediately made complaint to the judge of the Municipal Court of Brunswick, who issued a warrant thereon, and whereupon proceedings took place, the record of which is as follows:

"CUMBERLAND, ss. At the Municipal Court for the Town of Brunswick in the County of Cumberland holden at the Municipal Court Room in said Brunswick on the tenth day of June A. D. 1896.

"Wm. F. Jones of Lewiston in the county of Androscoggin on the tenth day of June A. D. 1896 on behalf of said State on oath complained to the judge of said court that Jonathan P. Palmer on the tenth day of June A. D. 1896 at said Brunswick in the county of Cumberland fraudulently evaded the payment of his fare to Wm. F. Jones conductor for the Maine Central Railroad Co., against the peace of said State and contrary to the form of the statute in such cases made and provided.

"And now the said respondent is brought into court upon a warrant issued in the complaint aforesaid for examination thereon and said complaint is read to Jonathan P. Palmer and he pleads and says he is not guilty.

"Whereupon the complainant acknowledged satisfaction in writing as follows, to wit:—

Brunswick, Me., June 10th, '96.

To whom it may concern:

"I hereby acknowledge complete satisfaction to Jonathan P.

Palmer for evading his railroad fare as per my complaint before F. E. Roberts judge of the Municipal Court of Brunswick of this date. W. F. JONES.

"The defendant paying the costs of prosecution taxed at three & 37-100 dollars it is considered and ordered by the court that the said Jonathan P. Palmer be discharged.

Attest: FRANK E. ROBERTS, *Judge.*"

The defendant seasonably requested the presiding justice to give the jury the following instructions:

1. "The conductor had a right to ask plaintiff's name and to ask if the name signed to the mileage was his, and it was the plaintiff's duty to answer the questions truly."

2. "If the jury find that Norman was an officer when he arrested the plaintiff and that Jones, within a reasonable time, made oath to the complaint before a magistrate having jurisdiction of the offense, alleged in the complaint, and thereupon a warrant was issued by the magistrate upon which the plaintiff was held by the officer and was brought before the magistrate to answer to the complaint, this action cannot be maintained."

3. "That the proceedings before the magistrate as shown by the copy of the record put in evidence by the plaintiff are a bar to this action, and it cannot be maintained."

But the presiding justice refused to give each requested instruction, and to each refusal, the defendant seasonably excepted and his exceptions were severally reserved.

The foregoing satisfaction thus acknowledged by the complainant is authorized by R. S., c. 133, § 18, which is as follows: "When a person has recognized or is committed by a magistrate, or is indicted for an assault and battery, or other misdemeanor, for which the party injured has a remedy by a civil action, except felonious assaults, assaults upon or resistance of an officer of justice in the execution of his duty, and assaults and batteries of such officers, if the injured party appears before the magistrate or court, and in writing acknowledges satisfaction for the injury, the court, on payment of all costs, may stay further proceedings and

discharge the defendant; the magistrate may discharge the recognizance, supersede the commitment by his written order, and discharge the recognizance of the witnesses."

J. E. Hanly and J. F. Libby; Levi Turner; T. J. Boynton, for plaintiff.

Counsel argued that the first request for instructions was given; and the second request was properly refused. To justify an arrest without warrant for a misdemeanor, even by a constable, the offender must still be found in the act of committing the offense. The statute, R. S., c. 133, § 4, has not changed the rule of the common law in this particular. *McLennon* v. *Richardson*, 15 Gray, 74.

The defendant had no right to detain the plaintiff. The only claim it had against him, under any circumstances, was a civil claim for the payment of fare. Whatever regulation the defendant company may rightfully make as to its mileage or other tickets, it can have no lawful regulation whereby it may detain a passenger for any time, however short, without due process of law. *Lynch* v. *Met. R. R. Co.*, 90 N. Y. 77, (43 Am. Rep. 141).

Other cases of false imprisonment: Bigelow on Torts, p. 136, (2nd Ed.); *Bowditch* v. *Balchin*, 5th Ex. 378; *Baynes* v. *Brewster*, 2 Q. B. 375; 2 Addison on Torts, 802, and cases there cited.

Proceedings in Brunswick Municipal Court not a bar: Bigelow, Estoppel, pp. 98, 100; *Petrie* v. *Nuttall*, 11th Ex. 56; *Corbley* v. *Wilson*, 71 Ill. 209, (22 Am. Rep. 98); *Buttrick* v. *Holden*, 8 Cushing, 233; *Duchess of Kingston's Case*, 2 Smith's L. Cases, 679 (6th Eng. Ed.)

The plaintiff, therefore, is not estopped by judgment, neither can he be held to be estopped by his conduct. The payment of money by the plaintiff to the court at Brunswick was made under duress of imprisonment by an abuse of legal process. The criminal process against the plaintiff was instituted for the purpose of extorting money from him in settlement of a civil claim. Such an arrest is false imprisonment by all who directly or indirectly procured the same or participated therein for any such purpose. *Hackett* v. *King*, 6 Allen, 58; *Taylor* v. *Jaques*, 106 Mass. 291.

J. H. and J. H. Drummond, Jr., for defendant.

The right to issue a ticket which is not transferable necessarily carries with it the right to require the identification, in a reasonable manner, of the party producing it with the party to whom it was issued. When a particular method of identification is made a condition precedent to the validity of the ticket, the courts have invariably held that method must be observed by the holder of the ticket, and in case it is not that the conductor could rightfully refuse to accept the ticket. Woods' Law of Railroads, § 347, p. 1395; *Cody* v. *R. R. Co.*, 4 Sawyer, 114; *R. R. Co.* v. *Bannerman*, 15 Ill. App. 100; *Boylan* v. *R. R.*, 132 U. S. 149; *Mosher* v. *R. R.*, 127 U. S. 390; *Cloud* v. *R. R.*, 14 Mo. App. 136; *Edwards* v. *R. R.*, 81 Mich. 364, (21 Am. St. Rep. 527); *Abrams* v. *R. R.*, 83 Tex. 61; *Bowers* v. *R. R.*, 158 Pa. St. 302; *Bethea* v. *R. R.*, 26 So. Car. 91; *Rawitzky* v. *R. R.*, 40 La. Ann. 47; *R. R.* v. *Anderson*, 90 Va. 1.

It is not a question as to the reasonableness of rules and regulations but as to the construction of a contract. And the parties are bound by the contract, as construed by the court, and any violation of it by the holder of the ticket forfeits his right to use it. Cases supra, some of which are cases of identity on return tickets.

That he was not asked to sign his name as a means of identification does not help the plaintiff, for he did not offer to identify himself in that way, but absolutely refused to identify himself at all. As was said by the court in *Abrams* v. *R. R.*, 83 Texas, 61: "The identification of the holder of the ticket as the original purchaser is the foundation of the defendant's right to contract to carry him only, because the carrier would be under no obligation to carry another person on such a ticket."

This ticket was "good only for the person in whose name it is issued" and "conductors are authorized to obtain the signature of holder of the ticket for identification." The provisions necessarily imply that the plaintiff, when he offered his ticket should show, if requested, that he was the "person in whose name it (the ticket) was issued," and if he refused to do so he was not entitled to ride upon it. In principle it is exactly similar to *Ripley* v. *R. R.*, 31

N. J. L. 388; *Bethea* v. *R. R.*, 26 So. Car. 91; *R. R.* v. *Wysor*, 82 Va. 250; *Downs* v. *R. R.*, 36 Conn. 287, (4 Am. Rep. 77); *Abrams* v. *R. R.*, 83 Tex. 61; *R. R.* v. *Bannerman*, 15 Ill. App. 100; *Edwards* v. *R. R.*, 81 Mich. 364; *Mosher* v. *R. R.*, 127 U. S. 390; *Boylan* v. *R. R.*, 132 U. S. 146. See also *Burnham* v. *Grand Trunk Ry.*, 63 Maine, 298.

The third requested instruction should have been given. The proceedings before the magistrate are a bar to this action and it cannot be maintained. This is an action for false imprisonment and a conviction by the magistrate in the case before him would be a bar to it. The proceedings were essentially a conviction; such proceedings have frequently been had in this state from an early date. They are very much like proceedings on a plea of "nolo contendere," which are frequent but which are not expressly authorized by statute, and which nevertheless form the basis of a valid judgment. *Stratton* v. *Stratton*, 77 Maine, 373. Plaintiff's action in the Brunswick Municipal court was tantamount to a plea of guilty and he is now estopped to deny it. It was a valid and binding agreement between the parties, and as such within the principle of *Caffrey* v. *Drugan*, 144 Mass. 294; *Joyce* v. *Parkhurst*, 150 Mass. 243.

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

SAVAGE, J. Trespass for false imprisonment. The verdict was for the plaintiff for $550. The case comes up on exceptions by the defendant, and on motion to set aside the verdict on the grounds that it was against law, and against the weight of evidence, and that the damages are excessive. Substantially the same legal propositions are presented under the motion as under the exceptions. It will be more convenient to consider the motion first, for the conclusion which we think must be reached under the motion will necessarily dispose of the exceptions.

There is little dispute as to the essential facts. The questions at issue are chiefly legal ones. In January, 1896, the plaintiff

purchased from the defendant, and there was issued to him, a mileage book or ticket with coupons, one to be detached for each mile the purchaser should travel. By the purchase of this book, the plaintiff became entitled to travel one thousand miles on the defendant's railroad. Upon the ticket was a contract, which was signed by the plaintiff at the time of purchase. This contract discloses that one of the conditions under which the ticket was sold was the following:

"That it is good only for the person in whose name it is issued, and if presented by any other person, the right to any remaining rides to which the purchaser might have been entitled shall be forfeited, and the conductor shall be authorized to take up this ticket and return the same to the General Ticket Office as forfeited, and conductors are authorized to obtain the signature of the holder of the ticket for identification."

In June, 1896, the plaintiff was a passenger on the defendant's train from Rockland to Brunswick, and in payment of his fare tendered to the conductor the mileage ticket above referred to. The conductor was not personally acquainted with the plaintiff, and for identification, he asked the plaintiff if the name upon the ticket, "Jona. P. Palmer," was his name. The plaintiff refused to say whether it was or not, though he told the conductor that the ticket was his own. The conductor then declined to accept the ticket, and asked the plaintiff to pay a cash fare, which the plaintiff refused to do. As the plaintiff was leaving the train at Brunswick, without further payment or tender of his fare, the conductor caused him to be arrested by a constable, without a warrant, for fraudulently evading the payment of his fare; and this is the arrest complained of. The plaintiff was immediately taken before the Municipal Court of Brunswick, where the conductor, made a complaint, under oath, against him, under R. S., ch. 51, § 78, which provides that whoever "fraudulently evades the payment" of fare over a railroad "by giving a false answer, or by traveling beyond the place to which he has paid, or by leaving a train without paying, forfeits not less than five, nor more than twenty dollars, to be recovered on complaint." The plaintiff pleaded "not guilty."

The plaintiff then paid his fare and the costs of prosecution to the judge of the court. An acknowledgment of "complete satisfaction" was filed by the conductor, and the plaintiff was thereupon discharged without further prosecution. No question is raised but that the conductor was acting within the scope of his authority as a servant of the defendant corporation.

The defendant endeavors to justify the arrest. It claims that the conductor had a lawful right to ask the plaintiff, as a means of identification, if the name on the ticket was his name, and that it was the plaintiff's duty to answer truly; and further, that if the conductor had reasonable cause, from the plaintiff's conduct, to believe that he was fraudulently evading the payment of his fare, and did so believe, the conductor was justified in causing the plaintiff's arrest by an officer, as he was in the act of leaving the train, although the officer had no warrant.

The discussion will be simplified somewhat, if we state, at the outset, two propositions about which we think there can be no real controversy. First, the offense for which the plaintiff was arrested was simply a misdemeanor; secondly, the plaintiff was not guilty in fact. It cannot be said, in any view of the case, that the plaintiff *fraudulently* evaded the payment of his fare. He owned the mileage ticket. He had a right to travel upon it. He tendered it to the conductor. There was no *fraudulent* evasion of payment. There was on his part, only a willful, unreasonable obstinacy, which arose, perhaps, from a mistaken sense of pride.

The precise question to be decided, therefore, is whether a private individual who has procured the arrest of an innocent person for a misdemeanor, by an officer without a warrant, can justify by showing that he acted in good faith, without malice, and upon a belief of guilt founded upon reasonable grounds. We think the question must be answered in the negative.

This is a suit, not for a malicious prosecution, but for a false imprisonment. It is not for a misuse or an abuse of legal process, but for an arrest without legal process. The action must be sustained, unless the defendant can show a legal justification for causing the arrest to be made.

The principles which, by the common law, regulate the right to arrest, or cause an arrest, without warrant, have been long settled both in this country and England, and by these principles the rights of these parties must be determined. Unless modified by statute, they are recognized by the courts, almost without exception. They are designed to promote the safety of the public, and the due administration of public justice on the one hand, and on the other, to afford the citizen security against unwarrantable restraints upon his personal liberty. We shall state these principles somewhat more fully, perhaps, than the particular question under consideration requires; but a full statement is valuable by way of illustration, and for the purpose of showing the clear distinction between the powers of an officer and those of a private individual.

By the common law, an officer may arrest for felony, without warrant, upon reasonable grounds of suspicion. 2 Addison on Torts, § 802; *Samuel* v. *Payne*, 1 Doug. 360; *Davis* v. *Russell*, 5 Bing. 354; 1 Hale P. C. 567; *Burke* v. *Bell*, 36 Maine, 317; *Rohan* v. *Sawin*, 5 Cush. 281; *Holley* v. *Mix*, 3 Wend. 350, (20 Am. Dec. 702); *Com.* v. *Carey*, 12 Cush. 246; *Wills* v. *Jordan*, (R. I.) 41 At. Rep. 233; *Doering* v. *State*, 49 Ind. 56, (19 Am. Rep. 669); *Eanes* v. *State*, 6 Humphreys, 53, (44 Am. Dec. 289); *Kurtz* v. *Moffitt*, 115 U. S. 487; *Holden* v. *Hall*, 4 Hurl. & N. 423. And for making such an arrest, the officer is justified, although it turns out that no felony has, in fact, been committed. *Beckwith* v. *Philby*, 6 Barn. & Cres. 635; *Simmons* v. *Vandyke*, 138 Ind. 380, and the cases cited above. But an officer may not arrest on information or suspicion, without a warrant, for a misdemeanor, unless it was committed in his presence. 2 Addison on Torts, § 804; 4 Black. Com. 292; 1 Hale P. C. 567; *People* v. *McLean*, 68 Mich. 477; *Kurtz* v. *Moffitt*, supra; *Ross* v. *Leggett*, 61 Mich. 445; *Com.* v. *Ruggles*, 6 Allen, 588; *Com.* v. *McLaughlin*, 12 Cush. 615; *State* v. *Lewis*, 50 Ohio St. 179; *Paw* v. *Becknel*, 3 Ind. 475; *Webb* v. *State*, 51 N. J. L. 189; *Krulevitz* v. *Eastern R. R.* 143 Mass. 228. In the last named case, the plaintiff had been arrested, at the request of a conductor, by an officer, without

a warrant, for a refusal to pay fare. We have cited these cases in extenso, because nearly all of these contain valuable discussions of this subject. In many of these cases, it seems to have been held that the authority of an officer to arrest for misdemeanor, without warrant, is limited to breaches of the peace or affrays, committed in his presence; (See also *Com.* v. *Wright*, 158 Mass. 149;) though the offense has actually been committed, but elsewhere, *Scott* v. *Eldridge*, 154 Mass. 25. But in still other cases, the authority is extended to all crimes committed in the presence of the officer. *Baltimore & Ohio R. Co.* v. *Cain*, (Md.), 28 L. R. A. 688, and cases cited there.

But the authority of a private individual is much more limited and confined. He may arrest for felony, but he does it at his peril. If called upon to justify, it has been held by some courts that he must show that the felony had actually been committed, and that he had reasonable grounds for believing the person arrested to be guilty. *Wakely* v. *Hart*, 6 Binn. 316; *Davis* v. *Russell*, supra; *Allen* v. *Wright*, 8 C. & P. 522; *Reuck* v. *McGregor*, 3 Vroom, 70; *Holley* v. *Mix*, 3 Wend. 350; *Keenan* v. *State*, 8 Wis. 132; *Beckwith* v. *Philby*, supra; *Russell* v. *Shuster*, 8 Watts & Serg. 308; *Burns* v. *Erben*, 40 N. Y. 463; 2 Addison on Torts, § 803; Cooley on Torts, 2nd Ed. 202. But it has been held by other courts, and perhaps with better reason, that he must show that the person arrested was actually guilty of the felony. *Rohan* v. *Sawin*, 5 Cush. 281; *Com.* v. *Carey*, 12 Cush. 246; *Morley* v. *Chase*, 143 Mass. 396. So he may arrest for an affray or a breach of the peace committed in his presence, and while it is continuing. 1 Russell on Crimes, 272; 1 Archbold Crim. Pr. & Pl. 82; *Timothy* v. *Simpson*, 1 Crompton M. & R. 757; *Knot* v. *Gay*, 1 Root, (Conn.) 66; *Mayo* v. *Wilson*, 1 N. H. 53; *Phillips* v. *Trull*, 11 Johns. 486; *Kurtz* v. *Moffitt*, supra; *Ross* v. *Leggett*, supra. But a private individual may not arrest for misdemeanor, on suspicion, no matter how well grounded. And, as in case of felony, he is bound to show that the felony has been committed, so in case of affray or breach of the peace committed in his presence, he must show that the party arrested by him was guilty. Nor can

a private individual justify, if he procure the arrest of an innocent person for a misdemeanor, by an officer, without warrant. In such case he is answerable. He can no more lawfully cause such an arrest than he can make it himself. *Hobbs* v. *Branscomb*, 3 Camp. 420; *Hopkins* v. *Crowe*, 7 C. & P. 373; *Derecourt* v. *Corbishley*, 5 El. & Bl. 188; *Price* v. *Seeley*, 10 Clark & Finnelly, 28; *Collett* v. *Foster*, 2 Hurl. & N. 356; *Veneman* v. *Jones*, 118 Ind. 41; *Holley* v. *Mix*, 3 Wend. 350; *Samuel* v. *Payne*, 1 Doug. 360. In *Baltimore & Ohio R. Co.* v. *Cain*, supra, a case analagous in some respects to the one at bar, the plaintiff, by the procurement of the conductor, was arrested as he left the train, by an officer, without warrant. The charge was disorderly conduct on the train. The railroad company was permitted to justify by showing that the charge was true in fact, and that the disorderly conduct amounted to a breach of the peace, for which the conductor as a private individual would have been authorized to arrest, had he been physically able to do so. The court said that "the act of the conductor in telegraphing for a policeman and in a short space of time thereafter turning the plaintiff over to the officer was in no respect different from a formal arrest by the conductor in the midst of the riot and disorder." In the case at bar, however, the charge was not true, and herein lies one distinction at least, and a vital one. Furthermore, the alleged offense here was not a breach of the peace.

Revised Statutes, ch. 133, § 4, provides that every officer shall arrest and detain persons found violating any law of the state until a legal warrant can be obtained. But this statute does not aid the defendant. The plaintiff was not *found violating* any law of the state. The constable had no lawful authority to arrest him for a misdemeanor of which he was not guilty, on information merely, without a warrant.

We conclude, therefore, that the arrest of the plaintiff was unlawful. And, as already intimated, this conclusion disposes of the first two of the defendant's exceptions. For, assuming that the conductor had a right as a matter of law to make the inquiry he did as a means of identification, and assuming that by the

plaintiff's conduct, the conductor had reason to believe and did believe that the plaintiff was fraudulently evading the payment of his fare, still, as we have seen, all this would have afforded no justification, in law.

But the defendant further contends that the proceedings had before the Municipal Court of Brunswick should operate as a bar to this action. The plaintiff paid his fare which he owed, and the costs of prosecution. The conductor acknowledged "complete satisfaction to Jonathan F. Palmer for evading his railroad fare as per my complaint," and thereupon the plaintiff was discharged. The defendant claims that this settlement should be regarded as an admission by the plaintiff, of his guilt. If it were so, we do not see how this could aid the defendant, in view of the uncontroverted facts in this case, or under the law. But it seems to us rather that the settlement was equivalent to an entry of "nolle prosequi upon payment of costs." If this settlement could be regarded as authorized by R. S., ch. 133, § 18, which may well be doubted, it would operate only as a bar to a civil remedy by the railroad company for the injury for which the plaintiff was prosecuted criminally. Sec. 19. The plaintiff "settled" with the state, but the defendant did not settle with the plaintiff. The defendant relies upon *Caffrey* v. *Drugan*, 144 Mass. 294, and *Joyce* v. *Parkhurst*, 150 Mass. 243. In those cases, it was held that parties who had been arrested without warrant, for intoxication, and had been released without formal complaints having been made against them, had by their requests and agreements waived the right to maintain actions for false imprisonment against the officers. But in this case, there is no evidence of any agreement, on the part of the plaintiff, to waive or release his claim against the defendant.

There was no judgment in the criminal case against this plaintiff. If there had been, it would not have estopped him from maintaining this civil action. Bigelow on Estoppel, 100. It is the opinion of the court, therefore, that the plaintiff's remedy is not barrred, and has not been waived. This conclusion disposes of the defendant's third and last exception.

The verdict for the plaintiff was not against law, nor against the weight of evidence. Are the damages excessive? The principles upon which damages are to be assessed in this class of cases were elaborately discussed by this court in *Prentiss* v. *Shaw*, 56 Maine, 427. We need state here only the conclusions. Where the justification for an arrest fails, as in this case, the plaintiff is entitled to recover, at least, compensatory damages, damages for the necessary consequences of the act complained of, although the defendant may have acted in good faith, without malice, and upon reasonable grounds to believe that the plaintiff was guilty of the offense for which he was arrested. If the plaintiff claims punitive damages, or damages for his injured feelings, the spirit and conduct of the defendant may be inquired into, to enhance or aggravate, and as well, the plaintiff's own conduct, and the provocation by him, if any, to mitigate, the damages. *Prentiss* v. *Shaw*, supra; *Phillips* v. *Trull*, 11 Johns. 486; *Reuck* v. *McGregor*, 32 N. J. L. 70; *Beckwith* v. *Bean*, 98 U. S. 266; *Chinn* v. *Morris*, 2 C. & P. 361; 2 Greenleaf on Evidence, § 267.

Tested by these principles, we think the verdict in this case is unmistakably too large. In his charge, the presiding justice permitted the jury to assess "a fair and just compensation for the injured pride, the wounded sensibility, the humiliation and mortification of a public arrest." These are, indeed, proper elements of damage, but in view of all the circumstances of this case, the jury made an undue allowance for them. The damages to the plaintiff in his person, and for loss of time and expenses, were little more than nominal. Nearly the whole of the verdict must have been given as punitive damages, or as damages for the injury to the plaintiff's feelings. But whichever it was, it is too large. The fault in the first instance was the fault of the plaintiff. He was traveling on a mileage ticket which could be lawfully used by no other person than the one to whom it was issued. It was the right, as it was the duty, of the conductor, if in doubt, to make himself reasonably certain of the identity of the person presenting it. As one means of identification, the contract upon the ticket itself provided that the conductor might require the signature of

the holder of the ticket. But this provision did not exclude other simpler and easier, and equally reasonable methods of identification. The method adopted by the conductor was a reasonable and lawful one. He simply asked the plaintiff if the name on the ticket was his name. This was asked on three several occasions; and three times the plaintiff refused to give the information desired. He says he told the conductor he was under no obligation to give his name. The uncontradicted testimony of bystanders is to the effect that he also told the conductor that it was "none of his business." A frank and truthful answer, such as it was his duty to make, would have prevented all trouble. No question is made but that the conduct of the conductor was gentlemanly. The plaintiff was willful, obstinate, evasive. He chose to regard the inquiry of the conductor as an affront to his honesty or dignity. His wrong was, however, only fancied. We think the plaintiff's conduct gave the conductor reason to believe,—and he says he did believe,—that the plaintiff was attempting to ride upon a ticket not his own, and which he had no right to use. This, of course, is not a justification, but it deserves full consideration, in determining whether punitive damages are allowable, or in estimating the injury to the plaintiff's wounded sensibilities.

Under all the circumstances, we think ten dollars will be ample compensation. The entry will be,

Exceptions overruled.

If the plaintiff files a remittitur of all the verdict in excess of $10 within thirty days after the rescript is received, motion for new trial overruled; otherwise, motion sustained.

WHITLOCK MACHINE COMPANY *vs.* OSCAR HOLWAY.

Kennebec. Opinion January 23, 1899.

Lien. Storage. Money paid under protest.

In the absence of any agreement, the common law does not give to a person, not an innkeeper or warehouse man, a lien on personal property for its storage.

A mortgagor in possession of a chattel, the mortgage being duly recorded, cannot subject it to a lien for storage which will take precedence of the mortgage.

Money paid under protest for the purpose of liberating property illegally detained is not a voluntary payment, and may be recovered in an action of money had and received.

Held; an action of money had and received may be maintained to recover money paid by the plaintiff under protest to the defendant to recover possession of a chattel illegally detained by the defendant, under a claim for storage, for which there was neither a lien upon the property nor a valid claim against the plaintiff.

AGREED STATEMENT.

Money had and received to recover $37.50 paid to defendant under protest and claimed by him as a lien due for storage of a printing press.

The case was reported to the law court by the presiding justice of the Superior Court of Kennebec County upon an agreed statement of facts. They are sufficiently stated in the opinion of the court.

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

M. S. Holway, for defendant.

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

WISWELL, J. The plaintiff bargained and delivered to the W. F. Mooers Publishing Company of Augusta, a printing press, under a written agreement that it should remain the property of the plaintiff until the purchase price, for which promissory notes

were given, was fully paid. The instrument was duly recorded in the city clerk's office of the city of Augusta. This transaction was in effect, under our statute, a sale and delivery to the Mooers Publishing Company and a mortgage back to secure the purchase price.

The Publishing Company rented rooms of the defendant, in one of which the printing press was set up. After occupying these rooms for several months, during which time no rent was paid, the Publishing Company failed in business, made an assignment for the benefit of its creditors, vacated the rooms rented of the defendant and delivered to him the keys after removing all of its property except the printing press bought of and mortgaged back to the plaintiff.

The press remained in defendant's rooms for a period of two or three months, when the plaintiff sent a representative to take it away. The defendant then demanded pay for its storage from the time that the Publishing Company vacated the rooms, and refused to deliver the press until this claim was satisfied. The amount so claimed was thereupon paid by the plaintiff's attorney under protest in order to obtain the press. This action of assumpsit for money had and received is to recover the amount so paid.

The defendant had no right to refuse to deliver the property to the plaintiff, who, under the terms of the agreement, was entitled to its possession, unless he had a common law lien thereon for its storage. But, in the absence of any agreement, the common law does not give to a person, not an inn-keeper or warehouse man, a lien on personal property for its storage. *Preston* v. *Neal*, 12 Gray, 222.

Moreover this property was subject to a mortgage to the plaintiff and the mortgagor could not by any act of his subject it to a lien which would take precedence of the mortgage. *Storms* v. *Smith*, 137 Mass. 201. The defendant undoubtedly had a valid claim against the mortgagor for the storage of this chattel, left by it in the defendant's rooms, but he had no lien upon the property nor claim for its storage against the plaintiff.

The defendant, therefore, had no right to retain the possession

of the printing press until his demand for its storage had been paid and he would have been liable for its conversion if an action had been commenced therefor.

The only remaining question is whether the money, paid under protest for the purpose of liberating the property, can be recovered in this action? We think that it can be. It was so held in *Chamberlain* v. *Reed*, 13 Maine, 357, under circumstances similar in principle. Such a payment is not voluntary. When made under protest, as in this case, notice is in effect given that the validity of the claim is denied and that an attempt will be made to recover the money so paid. The action is an equitable one, it lies to recover money which in equity and good conscience belongs to the plaintiff. Here, the plaintiff, in order to obtain its property, was compelled to pay a demand enforceable neither against it nor the property detained. The money can not be conscientiously retained by the defendant. Upon the facts agreed the action can be maintained and the plaintiff is entitled to judgment for the amount paid by it, $37.50, together with interest from the time of payment.

Judgment accordingly.

FRED W. GOULD, and another,

vs.

BENJAMIN F. LEAVITT, and another.

Penobscot. Opinion January 23, 1899.

Evidence. Illegal Contract. Bills and Notes. R. S., c. 27, § 56.

The rule which forbids the introduction of parol evidence to contradict, add to or vary, a written instrument does not extend to evidence offered to show that the contract was made in furtherance of objects forbidden by statute, by common law or by the general policy of law.

One S. sold to the defendants, by a written bill of sale, the furniture and trade fixtures of a restaurant for the consideration of $1100, of which a portion was paid in cash and the balance by the defendants' notes secured by a bill

of sale, outright in form but intended as a mortgage, of the same articles. In the trial of an action of replevin to recover the articles named in the mortgage, it was claimed in defense that the sale from S. to the defendants included intoxicating liquors, and that the notes given for a portion of the purchase price were in part for such intoxicating liquors, and that consequently both the notes and the mortgage given to secure them were void in the hands of the plaintiffs, who had knowledge of the illegality of the transaction.

Held; that if the sale did include intoxicating liquors for one entire purchase price, the notes given back for a portion thereof were in part for intoxicating liquors sold in violation of the laws of the state; and, by R. S., c. 27, § 56, could not be enforced by the plaintiffs if they had knowledge of the original transaction. And further, *held;* that when such a defense is interposed it is competent to show the real transaction to the extent even of contradicting the written evidence of the sale.

One who has given his note for a legal and valuable consideration can not avoid payment because the payee has transferred it in payment of a debt which the law would not have compelled him to pay.

Upon the same day of the sale to the defendants and of the mortgage back, the mortgagee transferred the notes and assigned the mortgage to the plaintiffs in payment of indebtedness of about an equal amount, of which a portion was for borrowed money and the balance for intoxicating liquors previously sold by the plaintiffs to S., the mortgagee. *Held;* that these facts do not constitute a defense to the action of replevin to recover the articles included in the mortgage. While the statute makes a claim, demand or promissory note given for intoxicating liquors uncollectible, except in the case of a note in the hands of a holder for a valuable consideration and without notice of the illegality of the contract, it does not forbid the payment of such indebtedness. A debtor may pay indebtedness of this character either in money or by the transfer of any property or chose in action.

The court holds that the testimony in this case is sufficient to entitle the defendants to have the jury pass upon the question whether or not the original transaction included the sale of intoxicating liquors.

ON EXCEPTIONS BY DEFENDANTS.

Replevin to recover a lot of furniture and fixtures, valued at $319, and situated in the St. Elmo saloon, on Exchange street, in the city of Bangor, the plaintiffs claiming title under a mortgage by virtue of an assignment thereof, which said mortgage and assignment, bearing date November 2, 1896, were duly recorded.

Writ dated May 3d, 1897.

Plea, the general issue with the following brief statement:

And for brief statement of defense in this behalf, the said defendants say:

First, that at the time said goods and chattels were replevied by the plaintiffs, the title, possession and right to the possession thereof were in the defendants, and were not in the plaintiffs.

Second, that the mortgage, under which said plaintiffs claim title to said goods and chattels, was and is null and void.

(1) because it was given to secure the balance of the purchase money for the purchase of the St. Elmo restaurant, stock and fixtures, situated on Exchange street, in said Bangor, a part of which said stock consisted of intoxicating liquors that were included in said purchase, and formed a part of said balance.

(2) because said mortgage was given to secure the balance of the purchase money for the purchase of said restaurant, stock and fixtures, situated as aforesaid, which said balance was made up in whole or in part, of a debt contracted for the purchase and sale of intoxicating liquors, in this State, in violation of law.

(3) because said mortgage was assigned to said plaintiffs to secure them for a debt, contracted in whole or in part, for intoxicating liquors sold in this State, in violation of law; and that the plaintiffs received said assignment, together with the notes thereby secured with full knowledge of the illegality of said notes and mortgage.

All of the evidence and pleadings were made a part of the exceptions.

After the evidence was fully received, the presiding justice directed the jury to return a verdict for the plaintiffs; to which ruling the defendants excepted.

The case appears in the opinion.

M. Laughlin and L. C. Stearns, for plaintiffs.

Where a contract of sale has been consummated by writing, the presumption is that the writing contains the whole contract, and parol evidence is inadmissible to vary it. 17 Am. & Eng. Ency. 425.

If the court had permitted defendant to put every question excluded, and the answers had been responsive, there would still remain this fatal objection to all the proffered evidence, and also to the evidence that was received: nowhere is the legality of the consideration of the mortgage indebtedness attacked. The examination of witnesses on both sides shows that defendants' object was to show (if permitted) that the transfer from Stewart to Leavitt and Coffey consisted of some articles of intoxicating liquors. Supposing it did, defendants cannot invoke the statute (R. S., c. 27,) because no action is brought upon that contract. If it is admitted, for the purposes of discussion, that evidence was improperly excluded, there is no question put and admitted, or put and excluded, that contains either in precise language, or substantially, this vital question: was the consideration of the debt, secured by the mortgage, intoxicating liquors sold in violation of law.

The fact, if such it be, that liquors were separately given away, or transferred by parol, or written agreement, if distinct from the other goods, would not vitiate the sale of the other articles under any aspect of the case. *Boyd* v. *Eaton*, 44 Maine, 51.

It is very questionable whether the case, as carried up, presents anything for the consideration of the court, excepting the single fact whether upon the evidence received the justice presiding was justified in directing a verdict. The exceptions certified to by the court are clearly only to the ruling of the justice directing a verdict.

Peregrine White, for defendants.

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

WISWELL, J. On November 2, 1896, one Stewart sold to the defendants, by a written bill of sale, the furniture and trade fixtures of a restaurant in Bangor for the consideration of $1100, of which $600 was paid in cash and the balance by the defendants' notes, secured by a bill of sale, outright in form but intended as a mortgage, of the same articles. Upon the same day the mortgagee transferred the notes and assigned the mortgage to the plaintiffs in

payment of indebtedness of about the same amount, of which indebtedness $100 was for borrowed money and the balance for intoxicating liquors previously sold by the plaintiffs to Stewart, the mortgagee.

At the trial of the action, replevin for the articles named in the mortgage, the defendants made two objections to its maintenance: first, that as the transfer and assignment of the notes and mortgage to the plaintiffs were in payment of an indebtedness for intoxicating liquors in part, it gave no title to the plaintiffs; second, that the original transaction between Stewart and the defendants included the sale of intoxicating liquors and that the notes, for a portion of the consideration, were in part for intoxicating liquors; and consequently that both the notes and the mortgage given to secure them were void in the hands of the plaintiffs who had knowledge of the illegality of the transaction. After the evidence upon both sides had been closed the presiding justice ordered a verdict for the plaintiffs; the case comes here upon exceptions to that direction.

I. It is apparent that there is no merit in the first point made in the defense. While the statute makes a claim, demand or promissory note given for intoxicating liquors uncollectible, except in the case of a note in the hands of a holder for a valuable consideration and without notice of the illegality of the contract, it does not forbid the payment of such indebtedness. A debtor may pay indebtedness of that character either in money or by the transfer of any property or chose in action. Certainly, one who has given his note for a legal and valuable consideration can not avoid payment because the payee has transferred it in payment of a debt which the law would not have compelled him to pay.

II. Both in the bill of sale to the defendants and the mortgage back, intoxicating liquors were expressly excepted, but it was claimed by the defendants at the trial that, as a matter of fact, the sale to the defendants included not only the furniture and fixtures of the restaurant, but as well, the intoxicating liquors at the time in the restaurant and that the consideration for the whole, liquors

included, was the entire sum of $1100. If this is true, the notes given back for a portion of the purchase price were in part for intoxicating liquors, sold in violation of the laws of the state, and by R. S., c. 27, § 56, could not be enforced by the plaintiffs if they had knowledge of the original transaction.

It is clear that if Stewart sold to the defendants a quantity of intoxicating liquors, together with various other things, for one entire purchase price and notes were given back for a portion of the same, such notes would be uncollectible by the payee or by an indorsee with notice; and it is undoubtedly competent, when such a defense is interposed, to show the real transaction to the extent even of contradicting the written evidence of sale.

The rule which forbids the introduction of parol evidence to contradict, add to or vary a written instrument does not extend to evidence offered to show that the contract was made in furtherance of objects forbidden by statute, by common law or by the general policy of the law. *Martin* v. *Clarke*, 8 R. I. 389; *Friend* v. *Miller*, 52 Kan. 139; *Sherman* v. *Wilder*, 106 Mass. 537; 1 Greenleaf on Evidence, § 284.

In the present case many questions asked by defendants' counsel for the purpose of showing what,—as they claimed,—the whole transaction was, were excluded, and although exceptions were noted at the time, no exception was subsequently taken to such rulings; so that the only question presented by the bill of exceptions is, whether enough evidence appears in the record, in support of the defendants' position to have entitled them to go to the jury upon that issue. We think there does.

It appears from the testimony on the part of the defendants that there were liquors in the restaurant at the time and just before the sale, that before the sale the defendants took an account of these liquors, that after the sale to them the defendants took possession of the stock including the liquors that were in the restaurant before and at the time of the sale; that after the papers were drawn and upon their being read to the parties before their execution when all of the parties were present, the question was asked by one of the purchasers, "if the mortgage and bill of sale carried every-

thing, liquors and all?" and that reply was made that "everything went including intoxicating liquors for $1100."

It is true, that the plaintiffs deny this and claim that no part of the consideration for the notes and mortgage was intoxicating liquors, that such liquors were, not only in form but in fact, excluded from the transaction; but this controversy raised a question of fact; the defendants were entitled to show the entire transaction and sufficient evidence was introduced to have entitled them to have the jury pass upon this issue. There was also evidence that the plaintiffs had knowledge of the original transaction. The ruling of the court at nisi prius, in directing a verdict for the plaintiffs, was consequently erroneous.

Exceptions sustained.

STATE *vs.* JAMES BARTLEY.

Piscataquis. Opinion January 23, 1899.

Pleading. Indictment. Intox. Liquors. Former Conviction. R. S., c. 27, § 63.

While the legislature may modify and simplify the forms in criminal proceedings, and may authorize the omission of allegations in indictments which do not serve any useful purpose, either by enabling the court to see without going out of the record, what crime has been committed, if the facts alleged are true, or of apprising the accused of the precise crime with which he is charged so as to enable him to meet it in his defense, yet it cannot deprive a person accused of crime of such rights as are essential to his protection and which have been guaranteed to him by the constitution of the state. One of the most important of these rights, is that the accusation against him shall be formally, fully and precisely set forth, so that he may know of what he is accused and be prepared to meet the exact charge against him.

An indictment against the respondent charged him with being a common seller of intoxicating liquors, the crime being set out in appropriate language and with all necessary allegations. It also contained what was intended to be an allegation of a former conviction for a violation of the same statute, in this language: "and the jurors aforesaid, upon their oath aforesaid, further present that said James Bartley has been once before convicted as a common seller under the laws for the suppression of drinking houses and tippling shops in said County of Piscataquis." The form used is precisely

that prescribed by statute. To this indictment the respondent filed a general demurrer which was overruled by the court at nisi prius. *Held;* that the demurrer was properly overruled, as the main charge was sufficiently set out in the indictment, but that the attempted allegation of a former conviction for a violation of the same statute was insufficient for that purpose.

ON EXCEPTIONS BY DEFENDANT.

This was an indictment against the defendant in which he was charged with being a common seller of intoxicating liquors, and also alleging a prior conviction for the same offense. The indictment following the form prescribed by statute is as follows:—

STATE OF MAINE.

PISCATAQUIS, SS.

At the Supreme Judicial Court, begun and holden at Dover, within and for the County of Piscataquis, in said state, on the last Tuesday in February, in the year of our Lord one thousand eight hundred and ninety-eight.

The jurors for said State upon their oath present that James Bartley of Greenville, in said county of Piscataquis, at Greenville, aforesaid in said county of Piscataquis, on the first day of October, in the year of our Lord one thousand eight hundred and ninety-seven, and on divers other days and times between said first day of October aforesaid and the day of the finding of this indictment, without lawful authority, license or permission therefor was a common seller of intoxicating liquors, against the peace of said state and contrary to the form of the statute in such case made and provided; and the jurors aforesaid upon their oath aforesaid further present that said James Bartley has been once before convicted as a common seller under the laws for the suppression of drinking houses and tippling shops in said county of Piscataquis. A true bill. ELBRIDGE T. DOUGLASS, Foreman.

CHARLES W. HAYES, County Attorney.

The defendant demurred to the indictment, but the court overruled the demurrer and the defendant took exception to this ruling of the court.

The case is stated in the opinion.

C. W. Hayes, County Attorney, for State.

The legislature has an undoubted right to modify and simplify the forms of pleading both civil and criminal, provided in criminal pleadings the essential elements which constitute the offense, the substance of it, are retained. *State* v. *Learned*, 47 Maine, 433; 10 Am. & Eng. Ency. p. 460. In *State* v. *Learned*, the court gives a very full opinion of the powers of the legislature in such cases.

The offense for which the respondent is indicted, is that of being a common seller on a certain day and on divers other days ending the last Tuesday of February. For the crime of which it is alleged he has been formally convicted, he has already been punished. He cannot be tried nor punished for the old crime again, but it is the new offense for which he is being tried, and the crime is aggravated by the fact of the former conviction. The former conviction, therefore, is not such an act, or part of the crime, as to require it to be set forth with a time certain. *State* v. *Dolan*, 69 Maine, 577. The crime is the acts charged during the period alleged. The rest is only an aggravation.

Respondent says the time should have been laid with certainty, and proved as laid, so that he could better defend. He would be in no better condition as to his defense, had the time of the former conviction been alleged with certainty, had it been done so in such manner as not to have had the time descriptive of the record, for the government could prove any conviction during the whole lifetime of the respondent. The statute of limitations does not apply. *State* v. *Dolan*, supra.

Respondent says further that the indictment should have alleged that he had been before convicted as "common seller of intoxicating liquors" under the laws, etc., the words "of intoxicating liquors," not being in the allegation of former conviction. The whole law from its inception has always been known as the law for the suppression of drinking houses and tippling shops. The crime of being a common seller, under that law, has acquired a technical meaning during the forty years it has been on the statute

books, and no uncertainty can possibly arise because the words are those of the statutory form.

An unbroken line of decisions in this State from the time of the enactment of the law to the present time supports the above positions. *State* v. *Learned*, 47 Maine, 426; *State* v. *Wentworth*, 65 Maine, 234; *State* v. *Gorham*, Ibid. 270; *State* v. *Dolan and Hurley*, 69 Maine, 576, 577; *State* v. *Wyman*, 80 Maine, 117; *State* v. *Hall*, 79 Maine, 501.

In *State* v. *Gorham*, the time of the former conviction was not alleged and the indictment was sustained. See also *Com.* v. *Miller*, 8 Gray, 484; *State* v. *Lashus*, 79 Maine, 504.

J. B. Peaks and E. C. Smith, for defendant.

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

WISWELL, J. The indictment against the respondent charged him with being a common seller of intoxicating liquors, and contained what was intended to be an allegation of a former conviction of a violation of the same statute. To this indictment the respondent filed a general demurrer, which was overruled and the case comes here upon exception to such ruling.

It is not denied that the crime of being a common seller of intoxicating liquors is sufficiently set out in appropriate language and with all necessary allegations; the demurrer therefore was properly overruled. If the averment of a former conviction is insufficient, it would not affect the other allegations of the indictment which sufficiently set out the main crime. So much of the indictment as relates to the alleged former conviction might be stricken out and still the crime would be fully charged with all necessary particularity. It may, therefore, if insufficient for the purpose intended, be rejected as surplusage. *State* v. *Mayberry*, 48 Maine, 218; *State* v. *Chartrand*, 86 Maine, 547; *State* v. *Dorr*, 82 Maine, 341.

But the statute prescribes a greater penalty in the case of a second and every subsequent conviction, and it may not be improper

to here discuss the question, especially as it is presented in a number of cases now before the court, intended to be raised, as to whether the greater or the lesser offense is charged in this indictment; or, in other words, whether the following is a sufficient allegation of a former conviction for another violation of the same statute; "and the jurors aforesaid, upon their oath aforesaid, further present that said James Bartley has been once before convicted as a common seller under the laws for the suppression of drinking houses and tippling shops in said County of Piscataquis."

However deficient in certainty and in averment this may be, it is precisely the form prescribed by statute, R. S., c. 27, § 63, so that the question resolves itself into this, whether or not the legislature, in prescribing this form, has transcended its constitutional power.

It is well settled in this state that while the legislature may modify and simplify the forms in criminal proceedings, and may authorize the omission of allegations in indictments which do not serve any useful purpose, either by enabling the court to see without going out of the record, what crime has been committed, if the facts alleged are true, or of apprising the accused of the precise crime with which he is charged, so as to enable him to meet it in his defense, it can not deprive a person accused of crime of such rights as are essential to his protection, and which have been guaranteed to him by the constitution of the state. One of the most important of these rights, is that the accusation against him shall be formally, fully and precisely set forth, so that he may know of what he is accused and be prepared to meet the exact charge against him. In *State* v. *Learned*, 47 Maine, 426, the question as to the extent of the power of the legislature in this respect is fully discussed and the law clearly stated. See also *State* v. *Mace*, 76 Maine, 64.

By the adoption of this form has the accused been deprived of his constitutional rights or not? We think he has been. It must be remembered that the allegation is a material one in charging the commission of the greater offense;—without it the accused could only be convicted and punished for the lesser offense. It is

an elementary principle of pleading, both in criminal and civil proceedings, that every traversable material allegation must be laid with some certain time. Here neither the time nor the court nor the term of court of the alleged former conviction is stated. The allegation is material, it is traversable and raises an issue of fact to be determined by a jury if denied by the respondent. In such a case he should be apprised of the time when, as claimed, he had been convicted of another violation of the same statute. The objection is not merely technical nor fanciful. One important issue raised by this allegation is as to the identity of the accused with the person who had been previously convicted, in any case a prosecuting attorney might make a mistake upon this matter of identity; and the accused should be enabled, by an allegation of time, to prepare his defense by showing that he was not the person named in the record of the previous conviction. We think that in this respect the form provided by the legislature is so deficient as to deprive the accused of his constitutional right.

Such was the conclusion of the court in *State* v. *Small*, 64 N. H. 491. Under a provision of the statute that the record of a former conviction need not be set forth particularly in an indictment for a second offense and that it should be sufficient to allege briefly that the accused had been convicted of the violation of any of the provisions of the chapter, the court said: "The judgment need not be set forth literally, but he is entitled to a description that will enable him to find the records, to apply for the correction or reversal, and to make preparation for the trial of the question whether he is the convict. A construction less favorable to him would not be consistent with his constitutional rights. The averment giving him no information of the time, court or county in which the judgment was rendered is insufficient. See also *State* v. *Adams*, 64 N. H. 440.

In *State* v. *Conwell*, 80 Maine, 80, a former conviction was alleged as of the May Term of the Superior Court, "to wit, on the tenth day of August A. D. 1885." The May Term of the Superior Court finally adjourned on June first, 1885. The averment was held insufficient.

In *State* v. *Dorr*, 82 Maine, 341, an averment of a prior conviction upon an impossible date was held an insufficient allegation. And in *State* v. *Wentworth*, 65 Maine, 234, it is said by the court in discussing the sufficiency of an allegation of a prior conviction: "The time when the court before which, the chapter and section under which the conviction was had, are briefly set forth." All of these averments are wanting in the indictment in this case.

It is true that in *State* v. *Gorham*, 65 Maine, 270, an allegation of a prior conviction, which contained no averment as to time, although much preferable to the form adopted in this case in other respects, was held sufficient, but it is evident from the opinion that this particular objection was not urged in that case, the attack upon the indictment being based upon other grounds.

The form adopted is deficient in other respects. The allegation is that the respondent has been once before convicted as a "common seller", of what is not stated, nor is this lack of averment cured by reference to chapter and section of the statutes as in *State* v. *Wentworth*, supra. The qualification, "under the laws for the suppression of drinking houses and tippling shops," is too indefinite. We do not think that the allegation is sufficient to apprise the respondent that he is charged with the commission of the greater offense, because of a former conviction of another violation of the same statute.

As we have before said, the demurrer was properly overruled, but the indictment does not allege a former conviction.

Exceptions overruled.

Judgment for state for first offense.

AUGUST N. ANDERSON *vs.* STANDARD GRANITE COMPANY.

Waldo. Opinion January 23, 1899.

Accord and Satisfaction. Offer and Acceptance. Payment. R. S., c. 82, § 45.

If an offer of money is made to one, upon certain terms and conditions, and the party to whom it is offered takes the money, though without words of assent, the acceptance is an assent de facto and he is bound by it. The acceptance of the money involves the acceptance of the condition. Under such circumstances the assent of the creditor to the terms proposed by the debtor will be implied, and no words of protest even can affect this result.

In an action to recover a balance due on a cargo of paving blocks sold by the plaintiff to the defendant, it appeared that a controversy existed between the parties as to the amount due the plaintiff. In the original written contract the price was fixed at $45 per thousand for blocks to be delivered by the plaintiff on board vessels at a particular wharf, at which the plaintiff stipulated that there was a certain depth of water. After the first cargo had been shipped and paid for, the defendant complained that there was not the depth of water at the wharf that the contract called for, and that by reason thereof it was put to additional expense in relation to the first cargo and could not procure vessels for subsequent cargoes at reasonable freight rates. Considerable correspondence between the parties resulted, during which the president of the defendant company wrote the plaintiff: "You may charter a vessel to your own liking so that the blocks will not cost me exceeding $58 per M. alongside of the dock in Phila. exclusive of insurance. I will insure them myself. You can have a chance to get a vessel of the draught you desire, and the size, and to come on a hightide, etc." Subsequently, on November 22nd, 1894, the plaintiff procured a vessel and shipped to the defendant the cargo of blocks sued for. On December 20, 1894, the defendant sent a statement of account to the plaintiff charging itself with this quantity of blocks at $58 per M. less $17 per M. freight paid and showing a balance due the plaintiff of $1046.67. Accompanying this statement, the defendant sent the plaintiff a check for $1046.67 which check contained these words, written into the body thereof: "Being payment in full balance for cargo Gr. pav. Blks. per schr. J. Henry Edmunds, shipped Nov. 22, 1894." The plaintiff received this check, indorsed it and collected the proceeds on December 25, 1894 and has since retained the amount.

Held; that the payment by the check of December 20th in view of all of the circumstances of the case, must be considered a full satisfaction of the plaintiff's claim; that the amount having been offered in full settlement and having been accepted as such, impliedly at least, the plaintiff cannot treat this sum as a payment pro tanto and recover the balance as due on the original claim;

and that under our statute, R. S., c. 82, § 45, payment so made and accepted is in full satisfaction whether the claim is liquidated or unliquidated.

ON REPORT.

The case appears in the opinion.

F. W. Brown, for plaintiff.

R. F. Dunton, for defendant.

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

WISWELL, J. Prior to the payment hereinafter referred to, and relied upon by the defendant as a full satisfaction of the plaintiff's claim, a controversy existed between these parties as to the amount due the plaintiff for a quantity of granite paving blocks made by the plaintiff and delivered by him to the defendant. The original written contract fixed the price at $45 per thousand for blocks to be delivered by the plaintiff "on board vessels at Lane's wharf, in Searsport, Me., at which wharf there is ten feet of water or more." But after the first cargo had been shipped, which, so far as the case shows, was paid for without dispute, the defendant complained that there was not the depth of water at the wharf where the blocks were to be delivered by the plaintiff on board vessels provided by the defendant, that the contract called for; and that by reason thereof it was put to additional expense in relation to the first cargo and could not procure vessels for subsequent cargoes at reasonable freight rates.

Considerable correspondence between the parties resulted. In the first letter thereafter, the president of the defendant company, C. J. Hall, wrote the plaintiff: "I can not afford to pay rates to get vessels to load with the detention you gave the Oliver." Later he wrote the plaintiff: "You may charter a vessel to your own liking so that the blocks will not cost me exceeding $58 per M. alongside of the dock in Phila. exclusive of insurance. I will insure them myself. You can have a chance to get a vessel of the draught you desire, and the size, and to come on a high tide, etc." Still later, and shortly before the cargo in dispute was shipped,

Hall again wrote: "The only alternative I can give you is the same I gave Gray & Martin, that is to charter a vessel yourself, and that the price of the blocks added to the freight you pay, shall not exceed $58 per M."

After this, on November 22nd, 1894, the plaintiff procured a vessel and shipped to the defendant the cargo of blocks sued for, consisting of 26,748 blocks according to the count in New York, about which there is no dispute. On December 20, 1894, the defendant sent a statement of account to the plaintiff charging itself with this quantity of blocks at $58 per M., less $17 per M. freight paid, leaving $41 per M., amounting to $1096.67 due the plaintiff. In the same statement of account the plaintiff was charged with the sum of $50, about which there is no controversy, and with a check on the Belfast National Bank for $1046.67 to balance the account, which amount did balance the account according to the statement and contention of the defendant. Accompanying this statement the defendant sent to the plaintiff a check dated the same day for $1046.67, which check contained these words written into the body of the check: "Being payment in full balance for cargo Gr. pav. Blks. per schr. J. Henry Edmunds, shipped Nov. 22, 1894." The plaintiff received this check, indorsed it and collected it on December 25, 1894, and has since retained the amount. He now sues to recover the balance of $4 per thousand upon this cargo of blocks, amounting to $106.99. The suit is brought in his name as assignee because of the fact that he subsequently went into insolvency and later bought of the assignee and took an assignment of this and other claims for a consideration of $6.

It is unnecessary to here investigate the merits of the controversy between the parties as to whether the plaintiff was entitled to the sum of $45 per thousand for the blocks, as he claims, or to only $41 per thousand, which amount he received. The payment by the check of December 20, in view of all of the circumstances of the case, must be considered a full satisfaction of the claim. That it was so intended by the defendant company was made as clear and emphatic as it could well be. Before the blocks were

shipped the plaintiff was notified most distinctly of the defendant's position, that it was willing to pay $58 per thousand including freight, and nothing else. The plaintiff procured a vessel and shipped the blocks, knowing perfectly well the defendant's position and subsequently he was notified by the statement of account and by the check that the latter was sent in full payment.

If an offer of money is made to one, upon certain terms and conditions, and the party to whom it is offered takes the money, though without words of assent, the acceptance is an assent de facto and he is bound by it. The acceptance of the money involves the acceptance of the condition. Under such circumstances, the assent of the creditor to the terms proposed by the debtor will be implied, and no words of protest even can affect this result. *Reed* v. *Boardman*, 20 Pick. 441; *Donohue* v. *Woodbury*, 6 Cush. 148; *Fuller* v. *Kent*, 138 N. Y. 231; *McDaniels* v. *Bank of Rutland*, 29 Vt. 230.

The amount having been offered in full settlement, and having been accepted as such, impliedly at least, the plaintiff can not treat this sum as a payment pro tanto and recover the balance as due on the original claim. *Bisbee* v. *Ham*, 47 Maine, 543. And under our statute, R. S., c. 82, § 45, payment so made and accepted is in full satisfaction, whether the claim is liquidated or unliquidated.

It is true that the plaintiff claims in his testimony that he was unable to read writing very well and didn't know of the language above quoted in the check; but, in view of all of the circumstances and correspondence between the parties, we are unable to believe that the plaintiff was not aware that this check was sent him upon the condition that if accepted it would be in full payment of the claim.

Judgment for the defendant.

STATE *vs.* WILLIAM C. MONTGOMERY.

Franklin. Opinion January 27, 1899.

Pleading. Hawkers and Pedlers. License. Exemptions. Constitutional Law. Stat. 1889, c. 298; 1893, c. 282 and c. 386. Mass. Anc. Chart. c. 21, § 5. R. S., c. 6, § 1, par. VIII; c. 24, § 3; c. 144.

In a complaint for going from place to place, exposing for sale pictures and picture frames, without being licensed therefor under the Laws of 1889, chapter 298, relating to Hawkers and Pedlers, the exceptions in the enacting clause of the statute are sufficiently negatived by the use of the expression "other than such as he is by the statutes allowed to grow for sale and expose for sale without a license."

Another employee of the defendant's employer had solicited and secured from citizens in the state orders for the enlargement of pictures. With each customer he left a contract, stating that the picture will be delivered in an appropriate frame, which the customer is advised, but not compelled, to buy. When the pictures were completed, they were returned to this State, accompanied by frames adapted to the size of the enlarged pictures. The defendant in the course of his employment, received the pictures and frames. He then delivered the pictures, going to each customer who had given an order, and taking to each, his picture, which the defendant had placed in one of the frames that had accompanied the pictures. At the time of delivery, he offered for sale, exposed for sale, and endeavored to sell, a frame to each person who had ordered a picture. He called upon no other parties, and made no attempt to sell otherwise. He had no license to peddle in this State.

Held; that the defendant's acts were sufficient to constitute the crime of peddling picture frames without a license.

The Hawkers and Pedlers' Act, Laws of 1889, chap, 298, is constitutional.

ON REPORT.

This was a complaint made in the Farmington Municipal Court under the Hawkers and Pedlers Act of 1889, c. 298, as amended by Stat. 1893, c. 282, and c. 386, in which the material averments were as follows:—"that W. C. Montgomery commorant at Farmington, within the county of Franklin at Farmington, on the fifteenth day of January, A. D. 1898, then and there without any authority, license or permission therefor, did go about from place to place in said town of Farmington, then and there carrying for sale and exposing for sale, goods, wares and merchandise other than

such as he is by the statutes allowed to carry for sale and expose for sale without a license, to wit: pictures and picture frames; the said W. C. Montgomery not being then and there exempt from obtaining a license to carry for sale and expose for sale, said goods, wares and merchandise, to wit: pictures and picture frames; against the peace of the State, etc."

The defendant having been convicted, thereupon appealed to this court at nisi prius; and the case, which is stated in the opinion, was reported by the presiding justice upon an agreed statement of facts.

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

Jos. C. Holman, for defendant.

If defendant was a pedler then the statute in question exempts parties from selling various kinds of goods and chattels such as fruit grown in the United States, fruit trees, brooms, etc., and various products of a man's own labor or of his family, etc. Such a distinction is arbitrary and renders the statute void. *State ex rel. Luria* v. *Wagener*, (Minn.) N. W. Rep. vol. 72, No. 1, August 7, 1897.

The statute in question by § 6 discriminates between its own citizens and however commendable it may be in the legislature which passed the law, and however much we may favor the sentiments expressed in the section, which everybody does, it is a discrimination among its own citizens and renders the whole law in question void, for a state cannot pass laws discriminating in favor of one class and against another. 13 Am. & Eng. Ency. p. 520.

Defendant was agent of a foreign corporation. He was delivering pictures on orders previously taken. He sold frames for the pictures when those who had ordered the pictures desired them. It was practically one and the same transaction. He called upon no one except those who had ordered pictures enlarged or made copies in accordance with the contract with the advance agent or advertising solicitor. The delivery of the pictures and the sale of the frames were practically one transaction in accordance with the original order and the acceptance of the same by the corporation

in Chicago. *Brennan* v. *City of Titusville*, 153 U. S. 289, and cases cited.

The statute discriminates against goods brought from foreign countries and is void upon that ground. *State* v. *Furbush*, 72 Maine, 493, and cases cited.

The complaint is not sufficient. Respondent could do all the complaint says and still not violate any statute. It does not negative the fact but what the goods were the product of his own labor or the labor of his family, or a patent of his own invention, etc. That is, it does not enumerate the excepted articles in the statute. *State* v. *Godfrey*, 24 Maine, 232; *State* v. *Keen*, 34 Maine, 500; *State* v. *Hutchinson*, Id. 500; *Bohanan* v. *Pope*, 42 Maine, 93; *State* v. *Gurney*, 37 Maine, 149; *State* v. *Philbrick*, 31 Maine, 401.

Counsel also cited *State of Tennessee* v. *Scott*, 14 Pickle, 254; *State* v. *Coop*, (So. Car.) 30 S. W. Rep. 609, July 5, 1898.

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

SAVAGE, J. Complaint against defendant for going from place to place in the town of Farmington, exposing for sale pictures and picture frames, without being licensed therefor under the Laws of 1889, c. 298, relating to Hawkers and Pedlers. It is averred in the complaint that these pictures and picture frames are "goods, wares and merchandise other than such as he [defendant] is by the statutes allowed to carry for sale and expose for sale, without a license." This case comes up in the form of a report upon facts agreed, and we are called upon to determine (1) the sufficiency of the complaint; (2) whether the facts agreed upon are sufficient to show that the crime charged in the complaint has been committed; and (3) whether the Hawker and Pedler statute is constitutional.

I. It is objected that the complaint is insufficient in that it fails to negative certain exceptions contained in the enacting clause of the statute under which it is brought. The articles excepted, and which may be peddled without a license, are "fruit grown in

the United States, fruit trees, provisions, live animals, brooms, agricultural implements, fuel, newspapers, books, pamphlets, agricultural products of the United States, the product of his [pedler's] own labor, or the labor of his family, any patent of his own invention, or in which he has become interested by being a member of any firm, or stockholder in any corporation which has purchased the patent." Sect. 1.

It is well settled in criminal pleading that it is necessary to aver all of the elements which constitute the crime and to negative all the exceptions contained in the enacting clause of the statute which describes or creates the offense. *State* v. *Godfrey*, 24 Maine, 232. But we think in this complaint the exceptions in the enacting clause of this statute are sufficiently negatived by the use of the expression, "*other* than such as he is by the statutes allowed to grow for sale and expose for sale without a license." The exceptions are the articles allowed to be peddled without license. The averment that the articles peddled in this case are "*other*" than those allowed by statute to be so peddled necessarily excludes the excepted articles, and is a sufficient negative of the exceptions. The precise language of the statute need not be negatived. It is sufficient if the words used reach the same result with equal certainty. *State* v. *Keen*, 34 Maine, 500.

II. It is next claimed that the facts agreed upon do not constitute an offense within the meaning of the statute. It appears that the defendant was an employee of the Chicago Portrait Company, a foreign corporation having its place of business at Chicago. The business of the Company was to make, reproduce, buy and sell pictures and pictorial reproductions, together with picture frames, and other articles pertaining to a general art business. About the middle of November, 1897, an employee of the company other than the defendant, solicited and secured from citizens of Farmington orders to the number of sixty for the enlargement of pictures. With each customer he left a contract, in which among other things it is stated that the picture will be delivered in an appropriate frame, which the customer is advised, but not com-

pelled, to buy. The prices of frames are given. When the pictures were completed, they were returned to Farmington by freight, addressed to the Chicago Portrait Company, and accompanied by twenty-seven frames adapted to the size of the enlarged pictures. The defendant, on presentation of a bill of lading and invoice, secured the pictures and frames. The defendant delivered the pictures so obtained, going to each customer who had given an order, and taking to each his picture, which the defendant had placed in one of the frames accompanying the pictures. And at the time of delivery, he offered for sale, exposed for sale, and endeavored to sell, a frame to each person who had ordered a picture. The defendant called on no parties except those who had given orders for pictures, and made no attempt to sell to any other parties. Both employees of the company resided without the state. The defendant had no license to peddle in this state. We think the acts of the defendant were sufficient to constitute the crime of peddling picture frames without a license. He went from place to place in Farmington. He carried these picture frames. He exposed them for sale. They were not within the "exceptions" in the statute. He had no license. Here seem to be all the elements of the statute offense. The fact that the frames were appropriate for the pictures which had been ordered, or that when the pictures were delivered they were encased in the frames, can make no difference. It is the same as if they were exposed separately, or at another time. The frames had not been previously ordered. The customers had made no previous contract to purchase picture frames, nor had the defendant's employer made any previous contract to sell picture frames. The selling or exposing for sale of picture frames was not incidental to the business of enlarging pictures, but was additional to it. The defendant had the frames in his possession to expose for sale, and then to sell if he could. This case differs from those relied upon by the defendant. In *Brennan* v. *Titusville*, 153 U. S. 289, Brennan, the agent of a foreign corporation, was complained of for violating a city ordinance which required all canvassers to be licensed by the mayor. The court held in that case that under the particular statute of Pennsylvania,

authorizing the ordinance, the license fee was a tax, and so under the facts of the case, a tax upon interstate commerce, and hence that the ordinance was void. But that is not this case. In *Commonwealth* v. *Ober*, 12 Cush. 493, the defendant in delivering, for his employer, goods previously ordered, sometimes delivered to customers goods of the same description in addition to those they had ordered. The court said: "It seems to us that the defendant was a carrier, delivering goods to persons who had previously ordered them, but who when the goods were brought desired to enlarge their order, or take more than they had previously ordered, upon the same terms in all respects, as to prices and credits. It was in effect a purchase of the same buyer from the same seller, of the same commodity, to a larger amount than previously ordered. It wants the essential characteristics of carrying about for sale, offering them to purchasers, fixing the prices and terms of sale, or receiving payment, and therefore their acts were not within the prohibition of the statute." Neither is that this case.

III. The final contention of the defendant is that the Hawkers and Pedlers Act, Laws of 1889, c. 298, is unconstitutional. It has been many times decided that it is within the province of the legislature to regulate the business of hawking and peddling by requiring those engaged in it to be licensed and to pay proper fees. Such has been the practice from the very earliest times in this country. Mass. Ancient Charters, c. 21, § 5. Licenses of this sort may be sustained on either or both of two grounds: 1. On the police power of a state for regulation; and 2, on the power of taxation for revenue. See cases cited in note to 52 Am. Dec. 331. We think the Hawker and Pedler Act of this State may fairly be said to be an exercise of the police power of the State, and being such, it is not in violation of any requirement that taxation shall be equal and uniform. See same cases. *Morrill* v. *State*, 38 Wis. 428, (20 Am. Rep. 12.)

As expressive of the reasons why it has been deemed advisable in times past to regulate the exercise of the business of hawkers, we quote from Jacob's Law Dictionary, title "Hawkers." "Those

deceitful fellows who went from place to place, buying and selling brass, pewter and other goods and merchandise, which ought to be uttered in open market; and the appellation seems to grow from their uncertain wandering, like persons that with hawks seek their game where they can find it." The object of such legislation has also been well stated by Baron Graham to be "to protect on the one hand fair traders, particularly established shop-keepers resident permanently in towns and other places, and paying rent and taxes there for local privileges, from the mischiefs of being undersold by itinerant persons to their injury; and on the other hand to guard the public from the impositions practiced by such persons in the course of their dealings." *Attorney General* v. *Tongue*, 12 Price, 51. So by Judge Cooley, "that the regulation of hawkers and pedlers is important if not essential, may be taken as established by the concurring practice of civilized states. They are a class of persons who travel from place to place among strangers, and the business may easily be made a pretense or a convenience to those whose real purpose is theft or fraud. The requirement of a license gives opportunity for inquiry into antecedents and character, and the payment of a fee affords some evidence that the business is not a mere pretense." *People of the City of Coldwater* v. *Russell*, 49 Mich. 617, (43 Am. Rep. 478). See also *Commonwealth* v. *Ober*, supra; and *Emert* v. *Missouri*, 156 U. S. 296; *State* v. *Express Co.*, 60 N. H. at page 260; *Huntington* v. *Cheesbro*, 57 Ind. 74; *Borough of Warren* v. *Geer*, 117 Pa. St. 207.

Nor is this statute susceptible of the interpretation that it discriminates in favor of goods manufactured in this state, and against goods manufactured in other states, as was the case of the statute in *State* v. *Furbush*, 72 Maine, 493. And it is not in that sense an interference with the power vested in congress to regulate commerce, and thus obnoxious to the federal constitution.

Nor is the license fee prescribed by the statute a tax upon interstate commerce. The statute has no reference to the business of soliciting orders for, or offering for sale, property situated without the state, to be followed by a transfer of the goods from one state to another, as was the case in *Brennan* v. *Titusville*, supra;

Crutcher v. *Kentucky*, 141 U. S. 47; *Robbins* v. *Shelby Co.*, 120 U. S. 489; *Corson* v. *Maryland*, 120 U. S. 502, all of which cases were cited by the defendant. The statute contemplates the business of an itinerant pedler, going about from place to place, having his goods with him, exposing them for sale, selling them. Unless he has them with him, he cannot expose them for sale; he cannot sell them, within the meaning of the statute. The goods, if ever without the state, were within the state when exposed for sale, and thus had ceased to be the subject of interstate commerce. By breaking the packages and traveling with them as an itinerant pedler, the owner or possessor had mixed them with the general property of the state. *Brown* v. *Maryland*, 12 Wheat. 419. The distinction is clearly pointed out in *Emert* v. *Missouri*, supra, at page 311. Emert was the agent of the Singer Mfg. Co., a New Jersey corporation, which had forwarded to him in Missouri the machines in question, and which it was alleged he unlawfully sold, in violation of the pedler's license law of that state. The court said: "There is nothing in this case to show that he (the pedler) ever offered for sale any machine that he did not have with him at the time. His dealings were neither accompanied nor followed by any transfer of goods, or of any order for their transfer *from one state to another;* and were neither interstate commerce within themselves, nor were they in any way directly connected with such commerce. The only business or commerce in which he was engaged was internal and domestic; and as far as appears, the only goods in which he was dealing had become part of the mass of property within the state. Both occupation and the goods, therefore, were subject to the taxing power and to the police power of the state."

The goods which this defendant is complained of for exposing for sale had been received by him within this state. He had broken the packages. He was traveling with them as a pedler. They had become a part of the general mass of property in the state. Hence a statute regulation of their sale would not be a regulation of interstate commerce.

Again, the defendant claims that the statute in question is in

violation of our own constitution, in that it discriminates between citizens in this state. It is no objection that certain classes of articles are excepted from its provisions. It is within the legislative discretion to say what goods may and what may not be peddled without a license. But it is contended that it is not competent for the legislature to exempt certain classes of persons from the operation of the law and permit them to peddle without a license, while all others must be licensed. Peddling is a lawful business, and to peddle without a license was not at common law an offense. The statute itself creates the offense. And the argument is that the legislature may not properly say that acts which if committed by one person are a crime, if committed by another are not a crime. It is undoubtedly true that police regulations of this kind, to be valid, must be uniform, and must not discriminate against one class and in favor of another. In other words, in an act to regulate pedlers, all pedlers of the same kind, under the same circumstances, must be regulated alike. It is a "natural, inherent and inalienable right" of every man that he shall be subject only to the same burdens, limited only by the same restraints, regulated only by the same laws, as is his neighbor, situated under the same conditions as he is. Is this right abridged by this statute? It is contended that the exception which permits one to peddle without license "the products of his own labor, or the labor of his family, any patent of his own invention, or in which he has become interested by being a member of any firm, or stockholder in any corporation which has purchased the patent," is a discrimination in favor of some and against others. We do not think so. If one may peddle freely the products of his own labor, so may all. The products may be unlike, but the freedom to prosecute one's own business and to peddle his own products is free alike to all. So of the other exceptions. While it may happen that various producers may peddle each the product of his own labor without license, but not of the labor of another, still we think this fairly answers the requirements of uniformity. The legislature is the sole judge of the extent to which the business of peddling should be regulated, and its conclusions are final, so long as the

burdens imposed do not bear unevenly upon citizens. *Ex parte Thornton*, 12 Fed. Rep. 538.

But it is further contended that the statute is unconstitutional and void by reason of the provisions of section 6, which provides that: "Any soldier or sailor disabled in the war for the suppression of the rebellion, or by sickness or disability contracted therein or since his discharge from service, shall be exempt from paying the license fees required by this chapter." The defendant contends that this section creates an arbitrary, unlawful and unjust discrimination in favor of certain persons, and necessarily against others; that soldiers and sailors who served in the war of the Rebellion as a class have no connection with the business of peddling, or rather that they constitute no class, but are composed of all classes of citizens; and that to exempt such from any of the provisions of the law is to select here one and there one of the citizens of the State and bestow upon them special privileges with which their former service in the army or navy has no connection; that there is no natural or reasonable ground for the exemption. But it will be observed that the soldiers and sailors are not exempted from the necessity of procuring license. They, like all other applicants for license, must file in the office of the secretary of state "a certificate signed by the mayor of a city, or by the majority of the selectmen of a town, stating to their best knowledge and belief that the applicant therein named is of good moral character." "The mayor or selectmen before granting such certificate shall require the applicant to make oath that he is the person named therein, and that he is a citizen of the United States." Without such certificate of good moral character, not even the soldier or sailor can obtain a license to peddle. Sect. 2. The same restrictions are thrown around them as are thrown around all others. The same safeguards are exacted from them as from all others. They are exempted only from the payment of license fees. And in this connection it must be noticed that this exemption is applicable only to soldiers and sailors who have become "disabled." It is not general. It must be presumed that the exemption is made to disabled soldiers and sailors *because* of their disability. It has been

the policy of the State for many years to treat sick and disabled soldiers and sailors of the war of the Rebellion in a sense as wards of the State. They are indeed entitled to grateful consideration. By statute it is declared that they are not to be deemed paupers, nor are they to be disfranchised by reason of being dependent on a town. R. S., ch. 24, § 8. The State appropriates for them and distributes among them annually many thousands of dollars as pensions. R. S., ch. 144. Dying in destitute circumstances, the State pays the necessary expenses of their burial. Laws of 1887, ch. 33. Those receiving state pensions are exempt from the payment of a poll tax, in common with other persons who by reason of age, infirmity and poverty are unable to contribute towards the public charges. R. S., ch. 6, § 1, par. VIII, as amended by Laws of 1895, ch. 64. The propriety or legality of these statute provisions has never been questioned. Neither, we think, can there be any question of the validity of the statute which exempts them from paying fees from pedlers' licenses. License fees, when paid, belong to the State, or its governmental subdivisions, the counties and towns. To remit their payment is nothing more nor less than a contribution to disabled soldiers and sailors by reason of their disability. We think it is both patriotic and constitutional.

Case to stand for trial.

MAINE TRUST AND BANKING COMPANY

vs.

SOUTHERN LOAN AND TRUST COMPANY, and others.

Kennebec. Opinion January 30, 1899.

Corporations. Stockholder's Double Liability. R. S., c. 45, 46, 47; Spec. Laws 1889, c. 443.

The shareholders of the Southern Loan & Trust Company under its charter granted by the State of Maine, are individually responsible, equally and ratably, and not one for the other, for all contracts, debts and engagements of the corporation to a sum equal to the amount of the par value of the shares owned by each, in addition to the amount invested in such shares.

Upon a creditor's bill to compel stockholders to ratably contribute to the payment of corporate debts under a charter provision making them individually responsible equally and ratably, and not one for another, in a "sum equal to the amount of the par value of the shares owned by each, in addition to the amount invested in said shares", *held;* that equity is the most appropriate, if not the exclusive remedy.

In such proceeding, stockholders cannot avail themselves of the defense that the corporation commenced business before one-half of its capital stock had been subscribed for and paid in, in cash, as required by their charter.

It appeared that the loan obtained from the plaintiff, out of which the debt arose and here sought to be enforced, was secured by a mortgage containing full covenants of title of land belonging to the defendant corporation, but subject to prior incumbrances which the plaintiff was compelled to pay off. *Held;* that the defendant's charter creates a liability on the part of stockholders for an amount equal to the par value of stock held by each, if needed to pay corporate debts. *Also;* that this charter liability is separate and distinct from that created by the general statutes pertaining to corporations, (R. S., c. 46, 47) and under which stockholders who have not fully paid for their stock may be, under certain conditions, exempt from personal liability, e. g. when the debt of the corporation is a mortgage debt.

Although the defendant company never exercised all the powers granted by its charter, it bought real estate, borrowed money and executed mortgages, all of which were authorized by it. *Held;* that the stockholder's liability, provided by section 6 of the charter, applied to all "contracts, debts and engagements" of the corporation and is not limited merely to its banking features.

The assets of the corporation must first be exhausted before this personal liability of the stockholder in such a corporation is incurred. *Held;* that

the liability can be enforced by creditors only, and not by the corporation as in the case of unpaid subscriptions; and the liability attaches to all stockholders when judgment has been obtained and the assets of the corporation are exhausted, having no reference to the date of the debt; but that the liability will not be increased if any stockholder shall prove to be insolvent or beyond the reach of process.

Where several of the defendant stockholders appear to have paid to the complainant their ratable proportion of its claim or debt, no decree against them should be entered in favor of the complainant; but as there may be other creditors to whom they may be responsible, a creditor's bill will be retained as against them to meet such contingency.

ON REPORT.

This was a creditor's bill in equity, heard on bill, answers and proofs, to enforce the liability of the stockholders of the Southern Loan & Trust Company under section 6 of its charter, which reads as follows: "The shareholders of this corporation shall be individually responsible, equally and ratably, and not one for the other, for all contracts, debts and engagements of said corporation to a sum equal to the amount of the par value of the shares owned by each, in addition to the amount invested in said shares."

Briefly stated, the case is this: The Southern Loan & Trust Company borrowed $14,300 of the plaintiff, giving to it three mortgages to secure the same. After plaintiff had paid off incumbrances on the property, the existence of which was not known by the parties at the time of making the loans and exhausting the collateral security by sales, there remained due to the plaintiff, as appears by the judgment recovered, a balance of $11,875.17, for which it had no security; and it was not denied that the defendant corporation had no assets out of which the debt could be collected.

H. M. Heath and C. L. Andrews; *J. W. Symonds, D. W. Snow and C. S. Cook*, for plaintiff.

Construction and rule of adjustment under § 6: *U. S.* v. *Knox*, 102 U. S. 422, citing *Crease* v. *Babcock*, 10 Met. 525; *Atwood* v. *Bank*, 1 R. I. 376; *Re Hollister Bank*, 27 N. Y. 393; *Adkins* v. *Thornton*, 19 Ga. 325; *Wiswell* v. *Starr*, 48 Maine, 401.

Equity procedure: 2 Morawetz, 2nd Ed. §§ 884 and 897.

Corporation and all shareholders made parties: 2 Morawetz, §

903; *Coleman* v. *White*, 14 Wis. 700; *Pollard* v. *Bailey*, 20 Wall. 525; *Torrey* v. *Little*, 101 U. S. 216. A suit in the nature of a creditor's bill, brought by one creditor in behalf of all is always the proper proceeding to enforce the charter liability of stockholders, in the absence of a statute prescribing a particular remedy. *Umsted* v. *Buskirk*, 17 Ohio St. 113; Thompson, Liability of Stockholders, 353; *Adler* v. *Milwaukee Mfg. Co.*, 13 Wis. 57; *Young* v. *Erie Iron Co.*, 65 Mich. 111; *Griffith* v. *Mangam*, 73 N. Y. 611; *Erickson* v. *Nesmith*, 46 N. H. 371; *Wetherbee* v. *Baker*, 35 N. J. Eq. 506; *Pollard* v. *Bailey*, 20 Wall, 520; *Andrews* v. *Bacon*, 38 Fed. Rep. 777.

That debt is a mortgage debt, immaterial: *Barron* v. *Paine*, 83 Maine, 312, and cases. *Hathorn* v. *Calef*, 53 Maine, 471, is not in point. It simply holds that a general law expressly referred to would govern questions of liability. R. S., c. 46, § 47, does not govern. It gives a remedy exclusively confined to stockholders receiving their stock originally from the corporation. Second holders or takers not liable. *Libby* v. *Tobey*, 82 Maine, 397.

While certain classes of stockholders are liable upon their unpaid stock upon all debts, except those not contracted during ownership and except mortgage debts, the special provisions of the charter in this case impose an additional double liability upon all stockholders for deficits in all debts. *Came* v. *Brigham*, 39 Maine, 35. The double liability of the charter is additional to the liability growing out of failure to pay for stock in full and is to be measured by the stock held. *Root* v. *Sinnock*, 120 Ill. 350, (60 Am. Rep. 558); *Pettibone* v. *McGraw*, 6 Mich. 441; *In re Empire City Bank*, 18 N. Y. 199; *Lewis* v. *St. Charles Co.*, 5 Mo. App. 225; *Preston* v. *Cin. C. & H. R. R. Co.*, 36 Fed. Rep. 54; *McDonnell* v. *Alabama Gold L. Ins. Co.*, (Ala.) 26 Am. & Eng. Corp. Cases, 256.

Stockholders who organize themselves as a corporation, transact business, and hold themselves out to the world as such corporation, cannot in suits to enforce personal liability set up irregularities in organization or otherwise as a defense. Stockholders may be

estopped from denying that requisite capital was paid in. *Burns* v. *Beck*, 83 Ga. 471; *Autman* v. *Waddle*, 40 Kans. 195.

W. R. Anthoine & T. L. Talbot; G. E. Bird & W. M. Bradley; B. D. & H. M. Verrill, for defendants.

1. The plaintiff corporation is estopped from invoking for its relief the powers of a court of equity:

All other powers of the corporation are apparently subordinate to its power to do business as a trust and banking company, and its power to hold and mortgage and sell real estate is expressed in a few lines of a long section in the act, and rather as an incident to its trust and banking business than otherwise.

The defendant company in all its business transactions violated the spirit and for a long time the letter of its charter. It was organized apparently to transact the business of a loan and trust company involving fiduciary relations to the public, and therefore it was entirely proper that the legislature in granting the charter should attach to the stockholders the double liability on their stock which is usual in corporations of that nature. No one would contend, however, that it was in the contemplation of the legislature in granting this charter that the corporation should engage only in speculation in real estate, or that if the charter had been granted for real estate business exclusively, the stockholders would have been charged with a double liability for its debts, or without any liability different from that of stockholders in other similar corporations.

2. The plaintiff cannot prevail because its debt is a mortgage debt:

Our contention is that the plaintiff's claim falls within chapter 46, R. S., by the provisions of which the liability of stockholders for debts of their corporations is restricted to debts which are not mortgage debts. That chapter "applies to all corporations organized by special acts of the legislature or under the general laws of the state, except so far as it is inconsistent with such special acts, or with public statutes concerning particular classes of corporations." R. S., c. 46, § 1. And this is emphasized by the provi-

sion of chapter 443, § 1, Private Laws of 1889, chartering the Southern Loan and Trust Company, that said corporation shall be "subject to all duties and obligations conferred on corporations by law except as otherwise provided herein." It is clear that there are no public statutes relating to any particular class of corporations which are inconsistent with said chapter 46 in their application to the complainant's claim. R. S., c. 46 and c. 443, Private Laws of 1889, must therefore be read together. It was held in *Hathorn* v. *Calef*, 53 Maine, 482, that a general act which applied to all corporations created thereafter applied to the corporation involved in that suit chartered by special act, "and controlled the duties of its members as fully as language could make it, though no reference had been made to it in the charter."

It is true that in the special act there is in terms no exception of mortgage debts. But the general statute which "applies to all corporations organized by special acts of the legislature," except so far as it is inconsistent with such special acts, and thus controls the special act under consideration, provides in effect that mortgage debts are not the "debts" of the corporation, or in other words are not its "contracts, debts, or engagements" for which its stockholders are liable. This being so, it is immaterial that the special act does not except mortgage debts. See *Hathorn* v. *Calef*, supra.

It may well be argued that if mortgage creditors should not hold stockholders up to the par value of stock held by them, a fortiori, mortgage creditors should not be allowed to enforce against stockholders a liability up to a sum equal to the par value of their stock, in addition to the sum paid for such stock, as is sought by the plaintiff corporation in this proceeding.

SITTING: PETERS, C. J., HASKELL, WHITEHOUSE, STROUT, SAVAGE, FOGLER, JJ.

STROUT, J. The Southern Loan & Trust Company was chartered by an act of the Legislature in 1889, c. 443.

Among other powers it was authorized "to borrow money, to loan money on credits or real estate or personal security, and to

negotiate loans and sales for others . . . to hold by grant, assignment, transfer, devise or bequest any real or personal property . . . and to hold and enjoy all such estates, real, personal and mixed, as may be obtained by the investment of its capital stock or any other money or funds that may come into its possession in the course of its business and dealings, and the same sell, grant, mortgage and dispose of", except property or money held in trust; and "to do in general all the business that may lawfully be done by a trust or banking company."

The capital stock was fifty thousand dollars, in shares of one hundred dollars each. It was provided in section 5, that the corporation should not commence business until stock to the amount of twenty-five thousand dollars had been subscribed for and paid in, in cash.

Section 6 provided an individual liability of stockholders for debts of the corporation.

On the twenty-second of August, 1889, defendant company borrowed of plaintiff eighteen hundred dollars, for which it gave a note, and as collateral a mortgage upon certain real estate in Denver, Colorado. At this time, only thirteen thousand dollars of stock had been subscribed and paid for. On August twenty-fifth, 1890, defendant company borrowed of plaintiff another sum of sixty-five hundred dollars, for which it gave its note and a mortgage on certain lots in "Wyman's addition to the city of Denver", and on October first, 1890, it borrowed another sum of six thousand dollars of plaintiff, for which it gave its note and a mortgage on other lots in Wyman's addition.

At the time of the two last loans, it appears that defendant company's capital stock had been taken to the amount of twenty-five thousand dollars.

All the mortgages contained warranties of title. They were represented to be first claims upon the property, and taken as such by plaintiff, without examination of the records. An abstract of title to these lots in Wyman's addition, down to March fifth, 1890, was shown plaintiff, by which it appeared that the title at that date was in Wilbur S. Raymond. On that day Raymond con-

veyed them to defendant company. At the time the mortgages on these Wyman lots were given plaintiff, there was an existing mortgage upon them and other lots for $12,500, given by defendant company to Raymond for part of the purchase money, the entire price being about $18,000. The existence of this mortgage was unknown to plaintiff, and it did not acquire knowledge of the fact till February, 1894.

To protect its interest in the Wyman lots, plaintiff paid eight thousand seven hundred dollars on June second, 1894, in satisfaction and discharge of that mortgage then existing on those lots. It is admitted that plaintiff has legally sold all the real estate covered by its three mortgages, and that the sum realized therefrom failed to satisfy the three mortgage debts, by the sum of $11,863.15, for which it obtained judgment against the Loan Company on March twenty-seventh, 1896. The execution thereon was returned wholly unsatisfied. It is admitted that defendant corporation has no assets.

This is a creditors' bill, to compel the stockholders ratably to contribute to the corporate debts, under the liability provided in section 6, of the charter. It is resisted upon several grounds.

There is no merit in the suggestion that the remedy is not in equity. On the contrary, the most appropriate, if not the exclusive, remedy is in equity. In that forum, the rights of all creditors can be ascertained and adjusted, and the ratable liability of stockholders determined in one suit, without the vexation and expense of multiplied suits at law. *Pollard* v. *Bailey*, 20 Wall. 521; *Hatch* v. *Dana*, 101 U. S. 205; *Crease* v. *Babcock*, 10 Met. 525; *Mills* v. *Scott*, 99 U. S. 25.

So the objection that defendant corporation commenced business, and made the first loan before twenty-five thousand dollars was subscribed to its capital stock, cannot avail the stockholders. They had control of the corporation, and are responsible for its acts. They cannot set up the illegal acts of the directors, their agents, to defeat an executed contract of the corporation, within its chartered powers, made with an innocent party, nor to relieve themselves from legal liability as stockholders to such party. *New-*

comb v. *Reed*, 12 Allen, 362; *Wiswell* v. *Starr*, 48 Maine, 405; *Perkins* v. *P. S. & P. R. R.* 47 Maine, 573; *Walworth* v. *Brackett*, 98 Mass. 100.

Although the Loan Company never exercised all the powers granted by the charter, they did buy real estate, borrow money and execute mortgages, all of which were authorized by it. The stockholder's liability, provided by section 6 of the charter applied to all "contracts, debts and engagements" of the corporation, and cannot be limited to its banking features. But it is strenuously urged that the complainant's debts were mortgage debts, and that as to them, no liability attached to the stockholders; and reliance is placed upon R. S., c. 46, § 47.

Equity treats the capital stock of a corporation as a fund for the security of creditors. If the stock is not fully paid to par value, and there is a failure of assets of the corporation to pay its creditors, the stockholder may be compelled to make payment upon his stock to its par, if so much is necessary to pay the debts. This liability may be enforced by the corporation, or by the creditors, but it applies only to parties taking the stock directly from the corporation; a purchaser in the market for less than par value is not liable. *Libby* v. *Tobey*, 82 Maine, 405.

This equitable doctrine is now statute law in this state. R. S., c. 46, § 45. Section 47 of the same chapter provides a method for enforcing payment to par, by the subscriber for stock who has paid the corporation less than par; and in the same section makes the exception that "no stockholder is liable for the debts of the corporation not contracted during his ownership of such unpaid stock, nor for any mortgage debt of said corporation."

It may be conceded that this general statute applies to corporations subsequently chartered, unless the charter contains provisions inconsistent therewith. But this section is dealing with unpaid stock only. It applies to the subscriber for stock, and limits the liability to him. The purchaser of stock in the market is not affected. The exemption of mortgage debts cannot be eliminated from the subject matter of the section, and made to do duty as an independent statute to relieve all stockholders, when disaster over

takes the corporation, from the other and different liability imposed by section 6 of defendant's charter. That liability attaches to all stockholders when judgment has been obtained and the assets of the corporation are exhausted, having no reference to the date of the debt. The purchaser of stock takes the risk of the business. If unsuccessful, he must pay its debts to the amount of his stock, in addition to its par value. The corporation might be in debt, and yet perfectly solvent, when stock is bought. Subsequent mismanagement or a bad market may render it insolvent. The then holder of stock, becomes liable, even if the debt existed before he became a stockholder. *Curtis* v. *Harlow*, 12 Met. 3. Not so with the subscribers referred to in R. S., c. 46, § 47. There he is only liable to make his payment up to par, as to debts contracted while he was owner. *Longley* v. *Little*, 26 Maine, 165; *Marcy* v. *Clark*, 17 Mass. 330.

But if this were not so, it is clear that the charter provision excludes, as to this corporation, the exemption referred to. Section 6, of the charter is, "the share holders of this corporation shall be individually responsible, equally and ratably, and not one for the other, for all contracts, debts and engagements of said corporation to a sum equal to the amount of the par value of the shares owned by each, in addition to the amount invested in said shares."

This language is too plain to be misunderstood. A mortgage debt is as much a debt as any other. It is true, the mortgage security must be applied to the debt, and the stockholders are liable only for the excess of debt over the collateral. So must the assets of the corporation be exhausted before this liability is incurred. It can be enforced by creditors only, and not by the corporation as in case of unpaid subscriptions.

The complainant recovered judgment upon the notes for the excess above the amount realized from the security; but it had paid eight thousand seven hundred dollars to relieve the mortgaged property from a prior incumbrance to Raymond, given by the Loan Company. If complainant had sued upon the Loan Company's warranty, it would have recovered this amount. That was not a

mortgage debt within the exception in R. S., c. 46, § 47. *Barron* v. *Paine*, 83 Maine, 323. It has recovered the same amount in its suit upon the notes. Equity looks to substance. As to this amount, it is immaterial whether the suit was upon the notes or warranty.

The first loan was a mortgage debt of the Loan Company, but the loss upon the other two loans was not.

To the argument that because subscribers for stock, when called upon to make their payments up to par, for the benefit of creditors, mortgage debts are excepted, it is a sufficient answer to say, that this charter made stockholders liable for all debts and contracts, and the promoters accepted that charter, and took their stock under its provisions, and must be bound by them.

The Maine Trust Company accepted the mortgages without examination of the title. They relied upon the representation of the Loan Company that they were first incumbrances, and received the warranty of that company that the title was perfect. Upon that warranty complainant had a right to rely. For its breach the Loan Company was responsible, and in case of failure of its assets, the stockholders became responsible. They are not released by the negligence of the Trust Company, nor would they be, if that Company had had knowledge of the Raymond mortgage, which the Loan Company was under obligation to satisfy, to avoid breach of its warranty to the Trust Company.

It follows that all the stockholders of the Southern Loan & Trust Company, at the time of the judgment and failure of assets, are ratably responsible for the debts of the Company. That liability will not be increased if any stockholder shall prove insolvent or beyond the reach of process. The cause must go to a master, to ascertain and report all debts and liabilities of the Loan Company, and the names of all stockholders, and the number of shares held by each, and make a ratable apportionment upon each stockholder for his proportion of the debt due to each creditor, and report whether there are any and what assets of the corporation.

The bill must be dismissed as to Charles W. Jordan, administra-

tor of Rachel J. Milliken, the claim against that estate being barred by limitation of statute. As to all other defendants, bill sustained.

It also appearing that certain defendants have paid complainant their ratable proportion of its debt, no decree against them is to be entered; but as there may be other creditors to whom they may be responsible, the bill is retained as against them to meet that contingency.

Bill dismissed as to Charles W. Jordan, Adm'r, and sustained as to all other defendants with costs. Master to be appointed.

Decree accordingly.

JOHN MCKAY, Admr., *vs.* NEW ENGLAND DREDGING COMPANY.

Knox. Opinion January 31, 1899.

Death by wrongful act. Damages. Stat. 1891, c. 124; Eng. Stat. 9 & 10 Vict. c. 93, (1847.)

The statute of 1891 c. 124, giving a right of action for the death of a person "caused by the wrongful act, neglect or default" of another is to be construed as a new statute creating a new right and not as affirming or reviving an ancient right.

The injury occasioned by such death must be wholly to the beneficiaries named in the statute, and the damages to be recovered for such injury are limited to the pecuniary effect of the death upon them.

It is not essential to the right of the beneficiaries to recover damages for such death, that they should have had any legal claim against or upon the deceased.

Wherever there exists a reasonable probability of pecuniary benefit to one from the continuing life of another, however arising, the untimely extinction of that life is a pecuniary injury.

In estimating the amount which shall be the "fair and just compensation" for such injury provided by the statute, the various circumstances of the beneficiaries and the deceased and the relations between them are to be ascertained;—the certainties, probabilities and even possibilities of the future are to be considered; and from these data the amount of the compensation is to be estimated by a careful calculation of what would have been the reasonably probable pecuniary benefit to the survivor from the continued life of the deceased.

The statute makes the jury in such cases the judge of what amount will be a "fair and just compensation." The court can cut the jury's estimate down to such sum only as it thinks reasonable unbiased men would concede to be sufficient;—to a sum more than which would be manifestly excessive.

ON MOTION AND EXCEPTIONS BY DEFENDANT.

This was an action brought by an administrator to recover damages for the loss of the life of his intestate by reason of the alleged negligence of the defendant corporation. The action is brought under the provisions of chapter 124 of the public laws of 1891, for the benefit of the father and mother, they being the sole heirs of the intestate.

The verdict was for the plaintiff for $2,000.

At the conclusion of the charge of the presiding justice, counsel for the defendant requested the following instruction to the jury, which was refused:

"That the plaintiff not having proved facts and circumstances sufficient to enable the jury to return a verdict which would approximate reasonable certainty, the plaintiff is entitled to recover only nominal damages."

To the refusal to so instruct the jury the defendant took exceptions.

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

"The damages recoverable for negligently causing the death of a person must in every case depend largely upon what would probably have been the earnings of the deceased if he had not been killed. Other elements enter into the calculation; but the earning capacity of the deceased is always an important factor." Per WALTON, J., in *Welch* v. *M. C. R. R. Co.*, 86 Maine, 570.

The pecuniary damage, which, as we have shown, can alone be recovered in most of the states for the death of any person must be something of definite and almost commercial value. It is not necessary, however, to show that the deceased was under legal obligations to the next of kin. If they had reasonable expectation of pecuniary advantage from the continuance of his life, they may recover it. Thus if he was in the habit of making them presents at regular intervals, this would constitute a valid basis for damages.

2 Shear. & Redf. on Neg. 769; *Dalton* v. *Southeastern R. R. Co.*, 4 C. B. N. S. 269.

The statute does not limit the recovery to the actual pecuniary loss proved on the trial. *Ihl* v. *The Forty-second St. Ry. Co.*, 472 N. Y. Ct. of Appeals, 321. The court say in the case of *Oldfield* v. *N. Y. & Harlem R. R. Co.*, 14 N. Y. 310: "The jury are not limited to the assessment of damages for the actual present loss that may be proved, but they may go further and compensate for the relative injury with reference to the future. They may compensate for pecuniary injuries present and prospective." "The jury who had all the circumstances of the casualty, and the precise condition and relationship of the parties before them, should give such a compensation as they deem fair and just, keeping in view that it was to be measured by the injury done to the next of kin." The statutes of New York and Maine are almost precisely alike.

In an action for death by wrongful act, the jurors' common knowledge as to life expectancy is sufficient for the admeasurement of damages, on proof of deceased's age, habits and earning capacity, and the disposition of his earnings. *Louisville & Nashville R. R. Co.* v. *Morgan*, 22 Ala. 20.

Counsel also cited: *Kelley* v. *Chi. Mil. & St. P. Ry. Co.*, 50 Wis. 381; *Berket* v. *Knick. Ice Co.*, 110 N. Y. 504; *Armour* v. *Czeschki*, 59 Ill. 17; *Antonio St. Ry. Co.* v. *Renkin*, (Texas Civ. App.) 38 S. W. 829; *Johnson* v. *Chi. & Northern Ry.* 64 Wis. 425; *Railroad Co.* v. *Barron*, 5 Wall. (U. S.) 90.

Clarence Hale, and Mervyn Ap Rice, for defendant.

Counsel argued: (1.) The verdict of the jury was against the whole evidence in the case, and against the instruction of the presiding justice. The evidence did not warrant any verdict for the plaintiff, as no pecuniary loss was shown to the survivors.

(2.) If the court should allow any damages to be recovered in the case, it must be merely nominal damages.

The whole theory upon which the statute is founded is that the basis of the action is pecuniary damage and not solace, not penalty. The legislature provided distinctly that the damages should be with

reference to the pecuniary injuries, and it thereby negatives any other consideration for a jury in assessing damages.

The only cases sustained are cases where the verdict had been distinctly formulated upon exact, positive testimony as to the amount of pecuniary loss which the plaintiff's intestate was capable of rendering to his survivors. *Hutchins* v. *St. Paul M. & M. Ry. Co.*, 44 Minn. 5; *Hall* v. *Galveston, H. & S. A. R. R. Co.*, 39 Fed. Rep. 18; *Chicago* v. *Major*, 18 Ill. 349; *Demarest* v. *Little*, 47 N. J. L. 28; *Blake* v. *Midland Ry. Co.*, 18 Q. B. 93; *Chicago, etc., R. Co.*, v. *Harwood*, 80 Ill. 88; *Wynning* v. *Detroit, etc., R. Co.*, 59 Mich. 257; *Richmond* v. *Chicago, etc., Co.*, 49 N. W. Rep. 621; *Houston and T. C. Ry. Co.* v. *Cowser*, 57 Texas, 293; *Winnt* v. *International & G. N. Ry. Co.*, 74 Texas, 32, (11 S. W. Rep. 907); *Cooper, Admr.*, v. *Lake Shore, etc., Ry. Co.*, 66 Mich. 261; *Balch, Admr.*, v. *Grand Rapids, etc., Ry. Co.*, 67 Mich. 394; *State* v. *M. C. R. R. Co.*, 76 Maine, 369. See Tiffany's Death by Wrongful Act, § 168, and cases cited, especially *Mo. Pacific Ry. Co.* v. *Lee*, 70 Texas, 496.

Since the damages are based upon the pecuniary loss of the beneficiaries, where no pecuniary loss is shown the action cannot be maintained for the recovery even of nominal damages. Tiffany, § 180; *Duckworth* v. *Johnson*, 4 Hurl. & N. 653, and cases cited; *Hurst* v. *Detroit City Ry. Co.*, 84 Mich. 539.

Nominal damages: *Chicago & Northwestern Ry. Co.* v. *Swett*, 45 Ill. 205; *City of Chicago* v. *Scholten*, 75 Ill. 471; *Quincy Coal Co.* v. *Hood*, 77 Ill. 68; Tiffany, § 180.

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

EMERY, J. The jury found that the death of the plaintiff's intestate, William McKay, was "caused by the wrongful act, neglect or default" of the defendant, according to the Act of 1891, ch. 124. This finding does not seem to us so unmistakably wrong as to require us to set it aside.

The question of the amount of damages to be recovered requires

more consideration. The action is "for the exclusive benefit" not of the estate, but of the father and mother of the deceased, they being his only heirs, he having left no widow nor children. The father and mother are entitled to "a fair and just compensation, not exceeding five thousand dollars, with reference to the pecuniary injuries resulting to them from such death."

The right to any compensation is wholly created by the statute, and the amount of the compensation is to be measured solely by the standard prescribed by the statute. At common law in cases like this there was no right of action in the widow, children or heirs for any compensation. Our statute is evidently derived from the English Statute of 9 & 10 Vict. ch. 93, (1847) known as Lord Campbell's Act, as were similar statutes in others of the United States and the Canadian Provinces. By some writers it has been suggested that these statutes are a re-appearance of the ancient *Wer-gild*, the compensation paid by a slayer to the family or clan of the person slain. This however is purely fanciful. The statute is to be construed as a new statute, creating a new right, and not as affirming or reviving an ancient right.

As to the measure of damages under the statute several propositions are already well established and familiar. No punitive damages can be recovered, nor any damages by way of penalty. No damages can be recovered for any suffering by, nor injury to, the deceased himself or his estate. His creditors cannot be heard to complain that his estate has been diminished to their injury, nor that they have lost the chance that he would have earned something with which to pay them. No damages can be recovered for any grief, distress of mind, loss of mere companionship or society, or injury to the affections, suffered by the beneficiaries. Nor can damages be recovered for the value of the life to the deceased, to the State or community. The injury for which damages can be recovered must be wholly to the beneficiaries themselves, and it is limited to the pecuniary effect of the death upon them.

It does not follow, however, that the death must cause an actual subtraction from the estate or income of the beneficiaries or from their earning power. It is not necessary that the beneficiaries

should have any legal claim against or upon the deceased. They have no rights under the statute as creditors. In every person's life are matters of actual value to him which form no part of his estate and have no market value. The education and training which children may reasonably expect to receive from a parent are of actual and commercial value to them as better fitting them to obtain an income or estate. The loss of that education and training through the death of the parent from the fault of a defendant would be in the statute sense a pecuniary injury. So the attentions and kindness of children to parents though adding nothing to their estate may add much to the physical comfort or ease of their life, independent of the affections or of the joy of companionship. The loss of these might under some circumstances be a pecuniary injury.

Of course loss of income or loss of estate would be pecuniary injuries. So would be the loss of a reasonable prospect of additional income and estate in the future. If a son had settled an annuity during his own life upon his parents, his death would be a pecuniary loss to them, as well as to his wife and minor children.

Generally where there exists a reasonable probability of pecuniary benefit to one from the continuing life of another, whether arising from legal, or family relations, the untimely extinction of that life is a pecuniary injury.

It is evident that the pecuniary damages to be recovered under this statute can never be ascertained with exactness nor with any satisfactory degree of approximation. Unlike ordinary questions of the legal measure of damages, this relates wholly to the future. There can never be knowledge. The conclusion arrived at must be based on probabilities instead of facts. The only facts that can be ascertained are those which occurred before or at the time of the death. From that data, what would probably have occurred had not the wrongful act or neglect of the defendant intervened, must be conjectured as carefully as possible. The circumstances of the deceased and the beneficiaries are to be ascertained. The legal, family or other ties are to be considered. The age, capacity, health, means, occupation, temperament, habits and disposition of

the deceased and of the beneficiaries are material to be known. There is some probability that these various circumstances shown to be existing at the time of the death would have continued in more or less degree had not the death occurred. They would be subject however, to acceleration, retardation, interruption and even extinction by other circumstances which may possibly, or probably, or even surely occur after the death. These inevitable, probable, and even possible subsequent circumstances are therefore to be looked for and considered. Whatever result is arrived at must be reached from a careful balancing of the various probabilities.

It remains to make the conjecture, to balance the probabilities, for this case. At the time of the death of William McKay, his father and mother were past middle life. The mother had been an invalid for some six years, unable to do any work or to walk, and for some time had been unable to feed herself. The father was somewhat infirm from rheumatism, being at times unable to work. They were too poor to employ a nurse, and the mother was cared for by the father and the two younger sons aged fifteen and seventeen. The deceased son was aged twenty-three and a half years at the time of his death. He had learned the stone cutter's trade during his minority. After arriving at his majority he worked at his trade for the most of his time in Quincy, the home of his parents, and turned all of his earnings into their home. He also worked at his trade for a little time at Hallowell and at Leadbetter's Island and occasionally sent home little sums of money to his mother. He did not have constant employment, but does not appear to have been lazy or unusually idle. He sought at various places for work at his trade, and failing to obtain that, he worked as a laborer in the defendant's quarry where he was killed. It is not shown that he sent home any money while in defendant's employ. His wages as laborer were fifteen cents an hour, out of which he had to pay his board of $20 per month. What wages he got at his trade was not shown, but the father at the same trade was paid $2 per day. The only home the deceased had was with his parents in Quincy, to which he seems to have returned in the intervals of employment, and paid his board there.

He was of some pecuniary assistance to his parents, though evidently quite small. He rendered this assistance after he became of age. In view of the increasing age and infirmity of his parents, there is a probability that he would have continued to furnish more or less money or service during their lives according to their needs. When at home with them it is probable he would have aided in the care of his invalid mother, and otherwise have aided his parents by personal services. True, he might not. He might have died, might have become sick, crippled or dissipated, and a burden rather than a help to his parents. He might have married and this marriage, while it might have brought to the parents the service and attention of a daughter, might on the other hand have absorbed all his earnings. The parents themselves might have died the next day. Still he had a regular expectancy of life and so had they. There was a probability that things for a while at least would continue somewhat as they were,—that marriage even would not end his assistance to his parents.

In fine, parents in their condition would be accounted more fortunate pecuniarily with such a son alive than with him dead. So far as their condition was made less fortunate pecuniarily by the wrongful act or default of the defendant, they are entitled to recover enough damages to make them "a fair and just compensation." Such damages would evidently be more than nominal, and hence the defendant's contention on this point cannot be sustained.

The jury assessed the damages at $2000. This is manifestly disproportionate and extravagant. Assuming the parents to have been forty-five years old, (there being no direct statement of their age in the evidence) $2000 would procure them an annuity of nearly $140 during the life of the survivor. It is not at all probable that the deceased would have averaged that much each year in contributions of money and services. His employment was not at all constant. He had to go about seeking employment, and at the time of his death was working as laborer at fifteen cents an hour. His expenses for board at that time were $20 per month. His yearly margin over expenses would probably not have been over $100 at the most. It is not to be expected, however, that

he would limit himself to absolutely necessary expenses, and send the surplus to the parents. It would be natural and therefore probable that he would give himself some indulgences, especially as there were two other nearly grown sons with his parents.

In fine, we think that $70 per year would be the extent of any probability of his contribution in money and services during the lives of his parents. To produce that sum as annuity for a person at the age of forty-five would require somewhat less than $1000. The chance that he would have accumulated an estate which his parents would live to inherit is too remote for consideration.

But it would not be accurate nor just to assume that the parents would receive the value of $70 per year with the regularity and certainty of an annuity from a responsible annuity company. There were many contingencies threatening even that sum. Industrial changes might throw him out of employment at his trade, and reduce him to a mere laborer. He might die from other causes, become sick or dissipated. He might marry and have to struggle to support a family of his own, or he might weary of well-doing for his parents, and practically cease caring for them any farther, however well able to do so. Other contingencies might also be suggested.

Figuring upon all the probabilities it seems to us that a comparatively small sum would be "a fair and just compensation" for the pecuniary injury to the parents. But the amount of such compensation is not for us to determine. The statute makes the jury the judges of that amount, and we must and do yield much respect to their judgment. We cannot cut down their award to what seems to us fair and just. We can only cut it down to a sum which we think reasonable, unbiased men will concede to be sufficient—to a sum more than which would be manifestly excessive. After much reflection and conference, we fix that sum at $750, though a minority think that too much. The plaintiff must accept that amount or submit to a new trial.

New trial granted unless plaintiff will remit all above $750 within thirty days after filing of the rescript.

WYLEY C. CONARY, by Prochain Ami, *vs.* HOWARD F. SAWYER.

Hancock. Opinion February 13, 1899.

Insolvency. Partnership. Infant Partner. Guardian ad Litem. R. S., c. 70. §§ 57, 58.

All the property of a partnership, including the share of an infant partner, upon insolvency proceedings instituted by creditors of the partnership, is holden for payment of partnership debts, and passes to the assignee appointed by the insolvent court, though the infant partner repudiate his liability for such debts.

In such case, when the petitioning creditors neither seek nor obtain an adjudication by the insolvent court against the infant partner or against his individual estate, the appointment of a guardian ad litem to him in the insolvent proceedings is not required.

AGREED STATEMENT OF FACTS.

The case appears in the opinion.

H. E. Hamlin and C. H. Drummey; F. H. Appleton and H. R. Chaplin, for plaintiff.

The plaintiff, in this action, is not seeking to use his minority as a means of holding goods for which he has not paid. It is not a case where the minor disaffirms and tries to hold the consideration for his debt. It is simply a case where this minor seeks to recover the value of goods for which he has fully paid and owned and which the defendant converted to his own use and sold.

The minor having disaffirmed his contracts and debts individually and as a member of the firm of Conary & Dow, he is no longer personally liable for those contracts and debts and his property cannot be taken to pay them. He can disaffirm during his minority, and need not return the consideration. *Towle* v. *Dresser*, 73 Maine, 252; *Chandler* v. *Simmons*, 97 Mass. 508; *Morse* v. *Ely*, 154 Mass. 458.

It may be that so much of the firm assets as were not paid for can be held by the creditors for the payment of firm debts; but this is not the question here and we do not argue it.

In the case of *Pelletier* v. *Couture*, 148 Mass. 269, it will be seen that before any adjudication of insolvency was made by the court, a guardian was appointed for the minor. It was not done in our case and we say that for this reason the insolvency proceedings against the firm are void.

It is true that no warrant issued against the individual estate of the minor; but he was a member of the firm, interested in the insolvency proceedings and entitled to appear and be heard before adjudication of insolvency against the firm. He could not appear in person; it was absolutely necessary in order to bind him to appoint a guardian ad litem; this not having been done the whole proceedings are void as to him. *Crockett* v. *Drew*, 5 Gray, 399; *Marshall* v. *Wing*, 50 Maine, 62. See also, Parsons on Partnership, (4th Ed.) § 17.

"Proceedings in insolvency, in invitum, against an infant, who is not represented by a guardian ad litem, are void." *Farris* v. *Richardson*, 6 Allen, 118; *Johnson* v. *Waterhouse*, 152 Mass. 585; *Winchester* v. *Thayer*, 129 Mass. 129.

A. W. King, for defendant.

An infant member of a partnership, who repudiates all the partnership debts, cannot maintain trover against the assignee appointed under insolvency proceedings against the partnership, for the partnership assets.

Creditors are entitled to have all the assets of the firm applied to the payment of its indebtedness notwithstanding the infancy of one of the partners. 17 Am. & Eng. Ency. p. 923; citing *Bush* v. *Linthicum*, 59 Md. 344; *Whittemore* v. *Elliott*, 7 Hun, 518. See *Craig* v. *Van Bebber*, 100 Mo. 584, (18 Am. St. Rep. 601,) where will be found a discussion of this particular question, and many cases are there reviewed and considered.

Counsel also cited: *Yates* v. *Lyon*, 61 N. Y. 344; *Moley* v. *Brine*, 120 Mass. 324; *Page* v. *Morse*, 128 Mass. 99; *Dunton* v. *Brown*, 31 Mich. 182; *Furlong* v. *Bartlett*, 21 Pick. 401; *Pelletier* v. *Couture*, 148 Mass. 269; *Chandler* v. *Simmons*, 97 Mass. 508, 514.

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

FOGLER, J. This is an action of trover in which the plaintiff sues to recover the value of certain goods which were part of the assets of the former firm of Conary & Dow. The plaintiff, a minor, and one Dow, an adult person, were engaged in trade at Bluehill as copartners under the above named style. June 9, 1897, certain creditors of the firm filed in the insolvent court, for the county of Hancock, a petition alleging that said firm was insolvent and praying that a warrant of attachment and injunction issue against the estate of said firm and that other proceedings be had in accordance with the insolvent statutes of the state. Upon such petition, on the 10th day of June, 1897, a warrant of attachment and injunction was issued from the insolvent court, addressed to the sheriff of said county, directing him to attach the estate of said firm and of Dow, the adult copartner; and the sheriff, on the same day, attached and took possession of all the property of said firm, including the goods described in the plaintiff's declaration. On the 14th of July, 1897, the insolvent court adjudged the copartnership insolvent and the defendant was duly chosen assignee, and the judge of the insolvent court executed and delivered to him an assignment of all the assets of the firm, in pursuance of which the defendant received from the sheriff and took possession of all the property of the firm, including the goods sued for in this action. The plaintiff seasonably notified the petitioning creditors, and also the sheriff and the defendant, that he was a minor and disaffirmed all and every liability and responsibility for the debts and contracts of the firm and of the individual members thereof; and that he claimed to hold and did hold all his interest in the copartnership property free and exempt from any and all claims of copartnership creditors, and at the hearing on the 14th of July protested against any action by the court upon the creditors' petition. The plaintiff demanded of the sheriff, and of the defendant, possession with them respectively of all the goods and effects of the firm and particularly of the goods sued for and described in the declaration.

The defendant took and held exclusive possession of all the property of the firm, including the goods sued for, and prior to the date of the writ sold all said property and still retains exclusively the proceeds thereof. It is admitted by the agreed statement that all the goods described in the declaration were fully paid for by the firm prior to the commencement of said insolvency proceedings, and were partnership assets at the time when the insolvency proceedings were instituted. The plaintiff claims to own thirteen-fourteenths, undivided, of the property described in the declaration, and that he owned such fractional interest during all the proceedings above named.

The case is reported to the law court upon the stipulation that if, upon the evidence, pleadings and agreed statement, assuming that the defendant did own an interest in the goods described in the declaration, the action is maintainable, the case is to be sent back to nisi prius for trial upon the question of the plaintiff's actual title and interest thereto; otherwise judgment is to be for defendant.

The question to be determined is: Can an infant member of a partnership, who has disaffirmed his liability for the partnership debts, maintain an action against an assignee duly appointed under insolvency proceedings instituted by creditors against the partnership, for goods of the partnership which had been fully paid for by the firm prior to the commencement of such proceedings and which were at such time partnership assets?

By the adjudication of the insolvency of the firm, the copartnership was dissolved. Story on Part. § 313. The plaintiff, having disaffirmed all liability for partnership debts because of his minority, became absolved from any personal liability to the creditors of the firm. Upon the issuance of the warrant of insolvency all the property and estate of the partnership came into the hands and possession of the messenger and were properly returned by him to the assignee. R. S., c. 70, § 57. The net proceeds of the partnership property are to be appropriated to pay the creditors of the partnership. R. S., c. 70, § 58. The assignee had, therefore, the right of possession and disposal of all the partnership property

including that involved in this suit, for the benefit of partnership creditors.

The plaintiff, however, contends that inasmuch as he was a minor and had disaffirmed his personal liability for the debts of the firm, he has an individual interest in such of the partnership property as had been fully paid for at the time when the insolvency proceedings were instituted.

We do not think such contention is maintainable either upon principle or authority. A partner has no individual property in any specific assets of the firm. He has an interest in partnership property to receive therefrom only what remains after partnership debts are satisfied.

Partnership property cannot be applied, as against creditors of the firm, to the payment of the private debts of a partner. *Johnson* v. *Hersey*, 70 Maine, 74. It cannot be attached as the property of a partner. *Sanborn* v. *Royce*, 132 Mass. 594. The equities of parties in the partnership property are subservient to their partnership creditors. The latter have in equity an inherent priority of claim to be discharged from the joint property. *Menagh* v. *Whitwell*, 52 N. Y., 165, (11 Am. Rep. 683.) The interest of the plaintiff in the partnership assets was in what might be remaining of such assets after the payment of the debts of the firm. The fact that the plaintiff was a minor does not take his case out of the general principles above stated. It will be observed that he did not and does not disaffirm his contract of copartnership, but only his liability for firm debts. He claims title to the goods sued for as a partner, such goods having been paid for by the firm, and being partnership assets.

The case of *Pelletier* v. *Couture*, 148 Mass. 269, is directly in point and practically decisive of the case at bar. In that case, as in this, the firm and the adult partner were declared insolvent and warrants were issued against the firm assets and the property of the adult partner, but no adjudication was made or warrant issued against the infant partner or against his individual estate. The court held that the property of the partnership, including the share of the infant partner, may, after its dissolution and his

repudiation of its debts, be devoted to the payment of partnership debts upon proceedings in insolvency instituted by his copartner. The court says, p. 271, "If he, [the infant partner] enters into business with another as a partner, and contracts are made and assets thus obtained, he may deny his liability on the contracts by which they have been obtained, and relieve himself from the debts thus incurred. He will thus throw the liability for the whole debts on his partner, and make such partner solely responsible, but the assets thus obtained should be devoted to the satisfaction of the contracts by which they have been procured. Having placed the whole responsibility on another, having extricated himself from all liability, to allow him to retain the property, or to assert and maintain a title to it, or any portion of it, until the debts are satisfied, would be manifestly unjust."

In *Yates* v. *Lyon*, 61 N. Y. 344, a case involving the validity of an assignment for the benefit of creditors, made by copartners, one of whom was an infant, the court, per Reynolds, J., says, p. 346, "It cannot be doubted but that the law would devote the assets of this firm to the discharge of the partnership obligations, whenever any court should be appealed to for that purpose, and I do not see that the supposed equity of an infant partner should in such case prevail against that of the creditors of the firm." . . . . "It is not too much to say that if an infant goes into a mercantile adventure which proves unsuccessful, he ought, at least, to be held so far that the assets acquired by the firm should be applied to the payment of the debts of the concern."

As bearing on the question here in issue we cite: *Gay* v. *Johnson*, 32 N. H. 167; *Moley* v. *Brine*, 120 Mass. 324; *Page* v. *Morse*, 128 Mass. 99; *Bush* v. *Linthicum*, 59 Md. 344.

It is further contended, in behalf of the plaintiff, that the insolvency proceedings are void as against him for the reason that no guardian ad litem was appointed to represent his interest in such proceedings. As the petitioning creditors neither sought nor obtained any judgment or adjudication against the plaintiff personally, or against his individual estate, we are of opinion that no guardian ad litem was required. The adjudication and warrant

issued against the partnership property and the property of the adult partner. In the cases cited by the plaintiff's counsel insolvency proceedings were instituted and prosecuted against the infant and his individual estate. He was a party to the proceedings. A court can appoint a guardian ad litem only when the infant is a party defendant. The plaintiff was not a party in these insolvency proceedings.

We are of opinion that the title to the entire partnership property vested in the defendant by the assignment to him by the judge of the insolvent court, and that this action is not maintainable.

Judgment for defendant.

JAMES E. BEAN *vs.* MAINE WATER COMPANY.

Washington. Opinion February 14, 1899.

Water Company. Town. Way. Plan. Evidence.

When a municipality under legislative authority has designated the place in a street where a water company may erect and maintain a hydrant, the burden is upon the water company to show that it maintains the hydrant in the particular place designated, in case the hydrant is found to be a dangerous obstruction to lawful travel on the street.

When the proper officers of the municipality, acting in accordance with its instructions, have made such designation by marking the place upon a plan of the streets, and have filed with the municipal clerk the plan so marked as the record evidence of their action in the premises, such plan, or a copy thereof, becomes the official and best evidence of what place was designated. Parol evidence is not admissible instead of such plan until the absence of the plan is sufficiently accounted for.

If parol evidence were admissible without the plan, it is insufficient to sustain the water company's burden of proof, when the witnesses testify only that they "think it likely" the hydrant is in the place designated. A mere probability is not enough. The evidence should show it to be a fact.

ON MOTION BY DEFENDANT.

Action on the case brought by the plaintiff to recover damages for injuries claimed to have been received by him, in the evening

of February 6, 1897, while walking upon a sidewalk on North street in the city of Calais, by striking his left knee against a hydrant maintained by the defendant. Plea, general issue, and a verdict of $874.75 for the plaintiff.

From the evidence introduced by the plaintiff it appears that he is about seventy years of age and has lived in and about the city of Calais for a long time. At the date of his injury and for several months prior thereto, he lived upon North street at a place less than four hundred feet east of the hydrant. Upon the evening of the sixth of February he started from his house on North street, and walked to a grocery store on the same street about ninety feet west of the hydrant. After buying a few groceries he started for home and on his way struck the hydrant, falling and injuring his knee. The sidewalk is four feet and nine inches wide, measuring from the fence to the curb. The space between the back side of the hydrant and the fence is about nine inches. The hydrant itself is nine inches in diameter at the widest part. The largest part of a hydrant is at the bottom, so that any object passing by the bulging portion of the hydrant would more than clear the two nozzles that point diagonally up and down the street. The plaintiff claimed that the measurement from the fence to the outer portion of the hydrant was twenty inches.

Aside from the issues of want of due care, contributory negligence and excessive damages, the defendant relied upon chapter 14 of the Special Laws of 1887; and claimed that being a public corporation, engaged in performing a public duty, it was permitted by legislative authority to place its hydrants in such portions of the public streets of Calais as might be selected by its municipal officers, acting as the servants of the state in the performance of a public duty imposed upon them by the legislature. The defendant accordingly claimed that travelers upon any highway injured by coming in contact with lawfully located hydrants, there being no claim whatever of negligence in the character of the hydrant or its maintenance, are without remedy.

C. B. Rounds and R. J. McGarrigle, for plaintiff.

H. M. Heath and C. L. Andrews; J. F. Lynch and G. A. Curran (with them,) for defendants.

When a public corporation acting under the authority of the legislature of the State properly places a properly built hydrant at a point in the street designated by the municipal officers acting under legislative authority, there can be no liability for damages resulting from the bare location of the hydrant itself and unattended with negligence.

The legislative decision that public convenience and necessity required the erection of this hydrant upon such a place upon this public street as the municipal officers might approve is conclusive. *State* v. *Noyes*, 47 Maine, 189; *Spring* v. *Russell*, 7 Greenl. 273; *Talbot* v. *Hudson*, 16 Gray, 417; *Murtha* v. *Lovewell*, 166 Mass. 393.

The court has no power to review such decisions except where given by statute. *Old Colony R. R. Co., Pet'r.*, 163 Mass. 358. The municipal officers acted as the servants of the State. *Brimmer* v. *Boston*, 102 Mass. 19. All questions of expediency were finally left to the individuals to whom the State delegated the duty. *Lynch* v. *Forbes*, 161 Mass. 302; *Old Colony R. R. Co.* v. *R. & A. St. Ry.*, 161 Mass. 416; *Larcom* v. *Olin*, 160 Mass. 110; *Gilpatrick* v. *Biddeford*, 86 Maine, 539; *Bryant* v. *Westbrook*, 86 Maine, 453; *Gove* v. *Biddeford*, 85 Maine, 395.

When lawful acts are performed under the charter of the state no action can be maintained for injurious consequences unless so done as to constitute actionable negligence. *Lawler* v. *Baring Boom Co.*, 56 Maine, 443; *Brooks* v. *Cedar Brook Co.*, 82 Maine, 17; *Boothby* v. *R. R. Co.*, 51 Maine, 318; *Morrison* v. *Bucksport & Bangor R. R. Co.*, 67 Maine, 353; *Whittier* v. *P. & K. R. R. Co.*, 38 Maine, 26; *Cushman* v. *Smith*, 34 Maine, 247; *Rogers* v. *P. & K. R. R. Co.*, 35 Maine, 319; *Spring* v. *Russell*, 7 Greenl. 289; *Sumner* v. *Richardson Lake Dam Co.*, 71 Maine, 106; *Hamlin* v. *R. R. Co.*, 61 Wis. 510; *Rochette* v. *R. R. Co.*, 32 Minn. 201; *Lane* v. *No. Chi. City Ry. Co.*, 32 Fed. Rep. 270; *Struthers* v. *R. R. Co.*, 87 Penn. St. 282; *Richardson* v. *Vermont Central R. R. Co.*, 25 Vt. 465, (60 Am. Dec. 283, note); *Callender* v.

Marsh, 1 Pick. 418; *Burroughs* v. *Housatonic R. R. Co.*, 15 Conn. 124, (38 Am. Dec. 64); *Carson* v. *Western R. R. Co.*, 8 Gray, 423.

The essential point of the plaintiff's position is that the defendant's hydrant was a public nuisance, but a public nuisance cannot arise from the lawful use of a right granted by law. *Western Union Tel. Co.* v. *Hewett*, 4 Mackey, (D. C.) 424; *North Vernon* v. *Voegler*, 103 Ind. 314; *Randle* v. *Pac. R. R. Co.*, 65 Mo. 332.

There can be no nuisance so long as the corporation is lawfully acting under a legislative charter. The legislature is a final judge of what the public good requires. *Murtha* v. *Lovewell*, 166 Mass. 393; *Old Colony R. R. Co.* v. *R. & A. Ry.*, 161 Mass. 416.

A legislative permit for the use of a particular part of a street by a public corporation for a public purpose for a public use, prevents the possibility of the maintenance of such an action as this. The remark of the court in *Charlotte* v. *Pembroke Iron Works*, 82 Maine, 393, is peculiarly pertinent: "Highways and streets are for the public use and not alone for the people of the town or municipality where they are located. The whole community have an equal interest and right to all the privileges and advantages of the public ways."

The town maintains public roads as a public duty, not for its own peculiar gain. It has no proprietorship in the roads and bridges built and maintained by taxes upon its inhabitants. The roads and bridges belong to the public. All public rights are to be regulated by the legislature, the trustee for the public rights of the people. *Woodman* v. *Pitman*, 79 Maine, 456. Counsel also cited: *Young* v. *Yarmouth*, 9 Gray, 386.

In *Commonwealth* v. *Boston*, 97 Mass. 555, where the contention was made that the poles might be treated as a public nuisance, the court held that the determination of the mayor and aldermen was conclusive and not reviewable by a jury in any form of action whatever. Among other things the court said: "The Commonwealth has committed the rights of the public in this behalf to the exclusive cognizance and protection of the public officers having jurisdiction of the subject."

Upon the contention that the rule that points not raised in argument below would not apply to a case like this, brought up upon motion and invoking the existence of a public statute as a perfect defense, we cite: *Robinson* v. *Edwards*, 70 Maine, 158; *Webber* v. *Dunn*, 71 Maine, 331; *Wilson* v. *Borstel*, 73 Maine, 273; *Eaton* v. *Telegraph Co.*, 68 Maine, 63.

In *State* v. *Rogers*, 2 Greenl. 303, the court held that if a statute creating a corporation also contains provisions for punishment of public offenses in relation to such corporation, it is to be deemed a public statute and need not be proven. *New Portland* v. *New Vineyard*, 16 Maine, 69.

The defendant has a right to raise fundamental questions at a hearing on a motion for new trial when it appears, as it does in the case at bar, that on the undisputed facts the motion is not maintainable. *Wyman* v. *Banton*, 66 Maine, 171; *Rockland* v. *Morrill*, 71 Maine, 455; *Mathews* v. *Fisk*, 64 Maine, 101; *Rhoades* v. *Cotton*, 90 Maine, 454.

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

EMERY, J. The defendant company was maintaining a hydrant in the sidewalk of a public street in Calais, not on either edge of the walk so as to be out of the way of the foot travel, but so near the middle of the walk as to be a vexatious and dangerous obstruction to the travel. The plaintiff while rightfully and (as the jury found) carefully walking along the sidewalk in the evening fell over the hydrant and was injured.

In defending against the plaintiff's action for such injury it is not enough for the defendant company to show lawful authority to maintain the hydrant in the street or even in the sidewalk. It must show lawful authority to maintain the hydrant at that particular and peculiar place in the sidewalk however dangerous it might be to persons lawfully using the sidewalk for traveling.

The only authority set up is that the city council of Calais, acting under powers conferred by the legislature for that purpose,

designated that spot in the sidewalk as the lawful position of the hydrant. It is not necessary to consider the validity of the action of the city council until it is made to appear by competent evidence that it did in fact designate that spot. To establish this proposition of fact, the defendant company introduced certain records of the city council, showing,—(1) that March 9, 1896, the city council "Ordered, That the Committee on Fire Department, with the Chief Engineer, and Willis E. McAllister, locate the eighty hydrants to be placed on the streets of the city, and designate where each hydrant shall be placed. Said location to be made by said Committee and reported to the city council at the next meeting."—(2) that March 22 following, the committee thus appointed made report as follows: "To the City Council. Your committee to which was referred the laying out of the hydrants submits the accompanying plan.

George Kalish, W. E. King,
Josiah H. Pineo, Willis E. McAllister,
Committee.

Voted, To accept the report and that the said 'Plan' be placed on file."

The natural inference from this action is that the committee located the positions for the hydrants, marked these positions on a plan, and returned the plan as their report. It is to be presumed that the positions marked on the plan were the positions designated upon the surface of the earth. Indeed a member of the committee called by the defendant company testified that such was the fact. Therefore, this plan, thus officially made and returned to the city council as the report of the committee and by the council accepted and placed on file, became the official and record evidence of the particular places on the surface of the earth where the company could lawfully maintain its hydrants. The production of this plan, and evidence fitting it to the earth's surface, would have determined whether this hydrant was in the position authorized by the city council.

But the plan was not produced, nor any certified or other copy of it; nor was its absence in any way accounted for. The city

clerk was not called, nor was there any evidence of any effort to obtain the plan or a copy. The defendant therefore utterly failed to adduce the best evidence that this hydrant was being maintained in the position designated by the city council. The defendant company's contention not being sustained by legally competent evidence must be overruled.

The defendant company, however, while not producing or accounting for the official plan, offered to show by the oral testimony of one of the committee that the hydrant was in fact in the position designated for it by the committee. This testimony was objected to by the plaintiff but was admitted. The witness then testified on the direct examination as follows:

Q. What did you do as a member of that committee?

A. I made a tracing of the city streets, and with the committee located the hydrants on them, and afterwards whenever the matter of location of hydrants came up, I went with the water company's engineer and definitely located that hydrant.

Q. Were you present at the location of all the hydrants?

A. Practically all of them.

Q. Were you present when the hydrant on North street, in front of the McCoy house, was located?

A. I can't remember that hydrant specially; but I located every hydrant that there was any question about.

Q. Would that hydrant be included in the number?

A. I think very likely it was.

And upon the cross-examination as follows:

Q. You said that you didn't know where that hydrant was located exactly?

A. I said I did not know whether I had to go there and make a special location for it. I thought very likely I did.

Q. You state now that you didn't know distinctly where that hydrant was put in?

A. I don't think I said just that.

Q. Did you know exactly where that hydrant was put in?

A. I might have at the time.

Q. Do you know?

A. I cannot say positively that I did.

We think this testimony, even if admissible without accounting for the plan, falls short of proof that the dangerous place in which the hydrant was found was the place designated by the committee and marked on its plan. The witness disclaims any recollection of designating that particular position for that particular hydrant. At the most he thought it very likely that he did. If a water company desires to maintain a hydrant so near the middle of a sidewalk, in a position so dangerous to the public using the sidewalk, it may properly be held to make full legal proof of its authority to do so. The oral testimony of one witness that "very likely" that was the position designated by the committee is manifestly insufficient.

The verdict of the jury upon all the other propositions of fact was sufficiently sustained by the evidence.

Motion overruled. Judgment on the verdict.

MAINE SHORE LINE RAILROAD COMPANY

vs.

MAINE CENTRAL RAILROAD COMPANY.

Cumberland. Opinion February 20, 1899.

Corporation. Charter. Action. Limitations. R. S., c. 46, § 24. Spec. Laws, 1887, c. 21.

In an action brought by the plaintiff company against the defendant company to recover damages for the violation of an alleged contract, the defendant filed a motion to dismiss the suit upon the ground that the plaintiff's charter had expired and that the three years subsequent thereto, within which, under R. S., c. 46, § 24, the corporation could prosecute and defend suits, close its business and distribute its capital, had also expired, *held;* that the plaintiff corporation has its existence only by virtue of its charter and that its continued life for three years more under the general statute has expired. The plaintiff having no corporate existence can neither recover judgment nor suffer one against itself; and the action was rightfully dismissed.

The court considers that the plaintiff corporation has expired from the following facts: The Maine Shore Line Railroad Company, by its conveyance of October 22, 1888, to the Maine Central Railroad Company, authorized by the act of 1887, chapter 21, carved out of the charter of the Maine Shore Line Railroad Company that portion of its road then already constructed from Brewer to Hancock Point, and made the same subject to the charter of the Maine Central, so that thereafter the Shore Line charter remained just as if the railroad conveyed had never been included in it. Its western terminus became Hancock instead of Brewer.

By the terms of the remaining charter of the Maine Shore Line Railroad Company, its powers and franchises were to lapse on January 28, 1895, unless some part of its line should have been constructed on that date. No part of the line had been constructed on that date, and its powers then became extinct. Its charter ceased to exist; it had expired by its own limitation; it was dead, except so far as section 24 of chapter 46 of the Revised Statutes continued its existence for three years, "to prosecute and defend suits," to settle and close its concerns, to dispose of its property and to divide its capital.

ON EXCEPTIONS AND REPORT.

This was an action at law brought by the Maine Shore Line Railroad Company against the Maine Central Railroad Company to recover damages in the sum of $300,000 for violation of an alleged contract, relating to the construction of the Maine Shore Line Railroad from a point in connection with the Maine Central Railroad in the town of Hancock to the water front in the town of Eastport, now the city of Eastport. At the January term, 1898, at which the action was assigned for trial, the plaintiff moved to be allowed to make two amendments to the declaration in its writ; the first changing the date of the alleged contract and striking out the allegation that the contract was in writing, and the second adding a new and different claim or specification of damage. The first of these amendments was allowed by the presiding justice, and the second disallowed. Exceptions were thereupon filed by the defendant to the allowance of the first amendment, and by the plaintiff to the disallowance of the second amendment. The two bills of exceptions were duly allowed.

At the following April term of the court, the defendant filed a motion to dismiss the suit upon the ground that by the terms of the acts constituting the charter of the Maine Shore Line Railroad Company, said charter expired and became void on the 28th day

of January, 1895, and that the three years subsequent thereto, within which, under the general statutes of Maine, (R. S., ch. 46, § 24,) the corporation could prosecute and defend suits, close its business and distribute its capital, had also expired on the 28th day of January, 1898; and that therefore thereafter the plaintiff corporation had no right or power to prosecute or maintain this suit, and that no judgment could be lawfully rendered for or against it. This motion, by agreement of parties, was reported by the presiding justice to this court, to be heard with the exceptions.

Clarence Hale, C. A. Hight and A. F. Belcher, for plaintiff.

Section 24 of c. 46, R. S., giving a three years limitation to corporations whose charters are terminated does not apply to corporations which have begun suits within said three years. Such corporations have a right to prosecute the suits which they have begun within the three years.

The intention of the legislature in this statute seems to have been to provide a time after a charter has been terminated for the corporation to settle and close its concerns, and begin its judicial proceedings. It seems clear that, with all the complications arising in the winding up of a corporation, and with all the uncertainty of time required for the ending of suits, that a legislature would not say that a corporation that had conscientiously entered into the matter of closing its accounts, and winding up its affairs, and completing its suits, should have those suits cut off in mid air and thus lose the whole benefit of its efforts in bringing its affairs to a close. A more natural interpretation of the statute is that it intends the three years for the instituting of suits, and that, if these suits are begun, the legislature does not intend that they shall be abated and terminated by this statute. In *Hunt* v. *Columbian Ins. Co.*, 55 Maine, p. 290, the court held that a judgment of another state decreeing dissolution and appointing receivers of a corporation, will not prevent an action commenced against such corporation in this state prior to such dissolution from proceeding to judgment, unless it can be shown that the corporation is utterly extinguished. The principle involved in this suit is precisely like that in the case at bar. If a suit will not be prevented from proceeding to judgment

against a corporation, which suit had been begun properly, clearly the suit of a corporation which had been begun within the proper time, namely, within the three years, should not be prevented from going to judgment by this provision. Certain courts in other states have held in reference to certain statutes somewhat similar to this, that the three years was the whole time given for the winding up of the affairs of the corporation; but we think that the decision of these courts have been based upon a different state of facts than those arising in this case. There are many reasons also why such rule may apply to private corporations, and cannot apply to public corporations organized by statute.

J. W. Symonds, D. W. Snow and C. S. Cook; and J. H. and J. H. Drummond, Jr., for defendant.

After January 28th, 1895, there was no right remaining to the defendant corporation under its charter. The corporation was as one dead, except so far as its corporate existence, for the purpose of maintaining and defending suits and settling its business, was extended for three years by force of section 24, ch. 46, of the Revised Statutes. At the expiration of these three years, to wit, after January 28, 1898, its corporate existence, rights and powers were absolutely at an end. The authorities upon this point are clear. The rule as stated in 5 Thomp. Cor. § 6651 is as follows:

"If the charter or governing statute of the corporation fixes a definite period of time at which its corporate life shall expire, when that period is reached, the corporation is ipso facto dissolved, without any direct action to that end, either on the part of the state or of its members; and no powers created by the charter or governing statute can thereafter be exercised, except such as are continued, by force of the statute law, for the purpose of winding up its affairs."

In the same volume, § 6722, it is further stated as follows:

"By the principles of the common law, in the absence of any saving statute, the dissolution of a corporation has the effect of abating all actions pending against a corporation at the date when the dissolution takes effect, as hereafter explained. . . . . The effect of this principle was such, that where, in an

action by a corporation, the plaintiff introduced in evidence its articles of incorporation, although no issue as to its corporate existence had been raised, and these articles showed that its charter had expired during the pendency of the action,—it was held that the court could not render a judgment in favor of the corporation upon the verdict which had been returned by the jury."

In the same line are various decisions in this state. *Reed v. Frankfort Bank*, 23 Maine, 318; *Whitman* v. *Cox*, 26 Maine, 340; *Merrill* v. *Suffolk Bank*, 31 Maine, 57; *Rankin* v. *Sherwood*, 33 Maine, 510.

The case of *Thornton* v. *Marginal Freight Railway Company*, 123 Mass. 32, is precisely in point. The general statutes of Massachusetts contained a provision similar to that contained in section 24 of ch. 46 of the Revised Statutes of Maine. In the former it was provided that for three years after the termination of the charter of a corporation by repeal or otherwise, its corporate existence should continue for the purpose of prosecuting and defending suits and settling the business of the corporation, and it was held that a judgment recovered against the company, subsequent to the expiration of said three years, was wholly void "as if it had been rendered against a dead person."

See also: *E. Remington & Sons* v. *Samana Bay Co.*, 140 Mass. 494; *Richards* v. *Attleborough National Bank*, 148 Mass. 187.

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

HASKELL, J. Did the charter of plaintiff corporation expire by limitation after this action had been commenced, so as to abate the same?

The Maine Shore Line Railroad Company was chartered by the legislature of Maine, Act of 1881, c. 91, and authorized to construct a railroad from Calais to Ellsworth with a branch to Eastport, and to consolidate with any connecting railroad, and, if upon completion of the railroad before named, there had not been constructed a standard gauge railroad from Ellsworth to Bangor, it might construct one. The act also provided that the charter should

become void unless the road from Calais to Ellsworth shall have been completed for travel February 1, 1886, except as to completed portions of the road.

By act of 1883, c. 165, the charter was continued in force for the completion of its railroad until February 1, 1887, and it was also authorized to construct and complete a railroad from Ellsworth to Brewer by February 1, 1885. Under this act it did construct its railroad from Brewer, via Ellsworth, to Hancock Point, and on May 1, 1883, leased the same to the Maine Central Railroad Company for nine hundred and ninety-nine years.

By act of 1887, c. 21, approved January 28th, the Maine Shore Line Railroad Company was authorized to "sell, transfer and convey" to the Maine Central Railroad Company its roads from Brewer to Hancock Point, together with its wharves and other terminal facilities in Hancock, and the Maine Central Railroad Company was invested "with the power to own, maintain and operate said railroad, as fully and completely as if the same were embraced in and covered by the charter of said Maine Central Railroad Company." The act reserved to the Shore Line Company the right to connect its road from the east, with the road to be conveyed, at Hancock, and extended the time for constructing its road easterly four years, or to January 28, 1891. Under authority of this act the conveyance named therein was made October 22, 1888, and the Maine Central Railroad Company, already having possession of the property, has operated it hitherto.

It should be noticed that the Shore Line Company was not authorized unconditionally by its original charter to construct a railroad from Brewer to Ellsworth. Authority for that purpose was given by subsequent act of 1883, and authority to convey it, together with a few miles east of Ellsworth, was given by act of 1887. The power to construct and to dispose of were both added to the original charter. By the exercise of the latter power, that road was carved out of the Shore Line charter and made subject to the charter of the Maine Central; so that thereafter the Shore Line charter remained just as if the railroad conveyed had never been included in it. Its western terminus became Hancock instead

of Brewer. This construction is apparent from the fact that the act reserved to the Shore Line Company the right of connection, with the road conveyed, at Hancock for its line easterly thereof, and that the time for its construction was enlarged four years, to January 28, 1891. The very language of the act, 1891, c. 11, is decisive of the construction here given. It is:—"The time for the location and construction of the Maine Shore Line Railroad, extending easterly from the town of Hancock, is hereby extended four years from the date of the approval of this act," January 28, 1891. That was the only corporate power continued in the company, viz., to construct its road easterly from Hancock. Of all other corporate powers it had been shorn.

By the terms of the remaining charter of the Shore Line, its powers and franchises were to lapse on January 28, 1895, unless some part of its line shall have been constructed on that date. No part of the line had been constructed on that date, and its powers then became extinct. Its charter ceased to exist. It had expired by its own limitation. It was dead, except so far as sec. 24, c. 46, of R. S., continued its existence for three years, "to prosecute and defend suits;" to settle and close its concerns; to dispose of its property; and to divide its capital.

This suit was commenced within the three years, and, upon the expiration thereof, the defendant moved to dismiss the action, because the same abated for the want of a plaintiff. It is stoutly contended that the plaintiff's corporate existence continues, after the expiration of the three years and until judgment shall be recovered. The statute does not say that it shall. Its only corporate existence is by virtue of that statute, and that continued its life three years and no more. The legislature has not seen fit to intervene, and the court cannot vivify that which the legislature has allowed to expire. The plaintiff has no corporate existence and can neither recover judgment nor suffer one against itself. Its action has abated, and there is no one who can revive it. It must be dismissed from the docket. The authorities cited at the bar sustain this result.

Motion sustained. Action dismissed.

ANDREW HAWES, Admr., in Equity,

vs.

HIRAM B. WILLIAMS, Admr., and others.

Somerset. Opinion February 20, 1899.

Equitable Mortgage. Distribution. Equity. Probate. Costs. R. S., c. 65, §§ 32, 33, 35; c. 90, § 12.

A conveyance of land in fee, with an agreement in writing from the grantee to the grantor that, upon payment by the grantor to the grantee of a sum of money at a stated time, the grantee shall reconvey the land, and that the grantor may occupy the premises so long as he fulfill his part of the agreement, but that upon breach of any part of it he should forfeit all right to the land and money paid on account of it as well, creates an equitable mortgage.

R. S., chap. 90, § 12, relative to "land mortgaged" applies both to legal and equitable mortgages.

Equitable mortgages, where there is no evidence of a debt from the mortgagor that can be enforced at law, independent of the security, may well be inventoried as real estate, and only when reduced to cash by redemption or sale, would the proceeds become chargeable to the executor or administrator.

Held; in this case, that the money received by the administrator of an equitable mortgagee, in redemption of an equitable mortgage, should be charged by the probate court to the administrator and ordered distributed as personal estate. That court only having jurisdiction, a bill in equity, therefore, cannot be maintained; but the defendants, who detain assets to which they are not entitled, should not recover costs.

ON REPORT.

Bill in equity, heard on bill, answers and proof, brought for the recovery of $509.16, and interest alleged to be wrongfully diverted from the estate and heirs of Emeline Williams.

The material facts are as follows: —

October 9, 1888, Ira W. Page obtained from Lawrence Williams, since deceased, fifteen hundred dollars, and gave the latter an absolute deed of a lot of land and buildings in Hartland, taking back a written agreement, which was not sealed or acknowledged and not recorded, to convey the same premises by quitclaim deed to said Page if the latter paid him or his legal representatives fif-

teen dollars per month,—with the option of paying more and oftener,—until he should have paid fifteen hundred dollars with interest monthly on the same, and should pay all taxes and insurance on the premises, which he was meantime to occupy. The agreement provided that in case of failure on the part of Page to pay as stipulated the sums paid were to go as rent and his rights of occupancy and to a deed were to be forfeited. This agreement is as follows:

"Hartland, October 9th, 1888.

If Ira W. Page or his legal representatives shall pay or cause to be paid to me or my legal representatives fifteen dollars per month until he shall have paid fifteen hundred dollars with interest monthly on the same, and pay all taxes and insurances on the buildings and lot in Hartland village that he has this day deeded to me, keep said buildings in good repair I hereby bind myself my heirs and assigns to give him his heirs or assigns a quitclaim deed of said premises—the first payment to be made this day and a payment of fifteen dollars on or before the same day of each succeeding month until the above named sum and interest shall be fully paid. It is also agreed and understood that said Page has the right to pay larger sums and oftener if he chooses to. But all payments for the purpose of reckoning interest will be considered as if paid at the end of each year. I also agree that said Page shall occupy and have the use of said premises so long as he performs the above conditions and no longer and if he fails to perform all of said conditions the sums that may have been paid are to go as rent and thereby forfeits all claim to a deed or right to occupy said premises.

Lawrence Williams."

Page made his payments regularly to Lawrence Williams during the latter's life and after his decease to Hiram B. Williams, the administrator and one of the defendants. He also paid the taxes and insurance and never forfeited any of his rights under the terms of said agreement.

When Lawrence Williams died, intestate, March 22, 1893, Page had paid eight hundred and ten dollars. Then he paid Hiram B.

Williams installments amounting to one hundred and fifty dollars; and finally the balance of said fifteen hundred dollars and interest, to wit, eight hundred and sixty-eight dollars and thirty-two cents, was paid to said Hiram B. Williams about June 13, 1895, upon delivery of a quitclaim deed from the heirs of Lawrence Williams to said Page.

Hiram B. Williams, who was the administrator of the estate of Lawrence Williams, claimed in this transaction to act as agent and attorney of the other heirs and as an heir himself of Lawrence Williams, treating said land and buildings as real estate of the deceased with which his administrator had no concern.

Lawrence Williams left a widow, Emeline Williams, but no heirs of his body.

Said Emeline Williams died October 31, 1893, intestate. The plaintiff is her administrator de bonis non, and claimed that the deed of the premises held by said Lawrence Williams and his said agreement held by Page constituted an equitable mortgage of the property, and that the balance of money coming to him from Page under said agreement was an unpaid balance of money lent which was payable to the administrator of said Lawrence Williams as his legal representative, and should have been treated and administered as personal assets of said estate.

The defendants contended that Lawrence Williams, deceased, was the lawful owner of the Page premises and that the same descended to them as real estate. The answer of the defendants so asserted; and admitted that they have taken the money received from Page by said Hiram B. Williams, both the balance of said fifteen hundred dollars and interest paid by Page when their quitclaim deed was delivered to him and the one hundred and fifty dollars previously paid in installments by said Page to said Hiram B. Williams.

The plaintiff thereupon contended that the heirs of Lawrence Williams have thus obtained the whole amount due him, when he died, from said Page on account of said fifteen hundred dollars and interest, to wit, ten hundred eighteen dollars and thirty-two cents; whereas they were in law and equity entitled to have and receive

only one-half of the same, and the other moiety should have been paid to the plaintiff as administrator of the estate of said Emeline Williams for distribution among her heirs.

S. J. and L. L. Walton; B. D. and H. M. Verrill, for plaintiff.

The proof is conclusive not only that the deed from Page to Williams was given as security for a loan, but also that Page paid and performed as he agreed and as Williams stipulated. Had he failed to do so equity would have preserved his rights in spite of the forfeiture clause in the agreement. *Reed* v. *Reed*, 75 Maine, 264. But no question of forfeiture is raised or can be raised in this case. The absolute deed held by the deceased was, in view of the whole transaction, an obligation for money due to him. The court in *Rice* v. *Rice*, 4 Pick. 349, says: "It is not the less a mortgage because there was no collateral personal security, (promise) for the debt taken at the time." There was no necessity for Williams to take a note. The property being worth $2,100 and the loan only $1,500 this gave Williams security. The transaction was between a borrower and a lender, and not a real purchase of the land by the defendant Williams. *Campbell* v. *Dearborn*, 109 Mass. 130, 139; *Knapp* v. *Bailey*, 79 Maine, 195; *McPherson* v. *Hayward*, 81 Maine, 329. The transaction was more than a mere agreement to convey, or conditional sale. *Eaton* v. *Green*, 22 Pick. 526; *Klinck* v. *Price*, 4 West Va. 4; *Lewis* v. *Small*, 71 Maine, 552; *Stinchfield* v. *Milliken*, 71 Maine, 567; *Reed* v. *Reed*, 75 Maine, 264; *Libby* v. *Clark*, 88 Maine, 32.

As between Page and Lawrence Williams and the latter's heirs and legal representatives there can be no question that the realty remained the actual property of Page subject only to the lien which said Williams had as security for his loan. The defendants tacitly admitted this to be so and recognized Page's right to redeem by reconveying the premises upon payment of the balance of the loan. But in order to overreach the heirs of Emeline Williams they claimed, that the Page premises descended to them as a realty, that the installments of the loan paid by Page after the decease of Lawrence Williams were rent, and that the balance of Page's indebtedness was the purchase price which he paid them

for the premises. The heirs took the legal title to the premises in trust only to secure the payment of the debt secured. *Smith* v. *Dyer*, 16 Mass. 21; *Kinna* v. *Smith*, 3 N. J. Eq. 14. Counsel also cited: *Adams* v. *Green*, 34 Barb. 176; *Moore* v. *Burrows*, Id. 173; *Sutter* v. *Ling*, 25 Pa. 466; *Loring* v. *Cunningham*, 9 Cush. 87; Croswell Exors. & Admrs. p. 185, § 332; 7 Am. & Eng. Ency. p. 281.

If the claim or the money received was personal assets one half of it would go to the heirs of Emeline Williams. If realty the heirs of Lawrence Williams took the whole of it. Mortgages, as well as deeds of trust to secure the payment of debts to the decedent, go to the executor or administrator. 1 Woerner on Am. Law of Administration, p. 595; Croswell Exors. & Admrs. p. 189, § 339.

If there were any sound reason for drawing a line of distinction between legal and equitable mortgages, where only the parties and no third persons are concerned, such distinction would appear to be excluded by the language of the statute in question. R. S., c. 90, § 12. It is not the mortgages but "lands mortgaged to secure the payment of debts and the debts so secured" which are "assets in the hands of the administrator who shall have control of them as a personal pledge," etc. Whether the mortgage is legal or equitable is immaterial. In either case the premises are "lands mortgaged to secure the payment of debts," etc. *Stinchfield* v. *Milliken*, 71 Maine, 567–570.

As the administrator Williams was one of the heirs and claimed to have received the money of Page as heir and as agent for the other heirs, a bill in equity is necessary to reach it. It is a process in aid of the probate court. *Gilman* v. *Gilman*, 54 Maine, 531; 2 Beach on Modern Eq. Jurisp. pp. 1111, 1114; *Lawes* v. *Bennett*, 1 Cox Ch. 167.

D. D. Stewart, for defendants.

There was no element of a mortgage, either equitable or legal, in the final agreement between Lawrence Williams and Page. By the final agreement Williams acquired the title to property worth $2,100,—a margin of $600 above the cost,—which made Wil-

liams' purchase perfectly safe. He neither needed nor wished any claim on Page, but preferred to rely wholly upon the purchase of the property and its value. There was no element of oppression, or of advantage, taken of Page. He was under no obligation to pay a dollar unless he chose to; but the $600 margin was always as much of an object for him as for Williams. Williams certainly took more chances, and run more risks, than Page. Any depreciation, or loss, must fall on Williams; and if it went below $1,500, he had no remedy, for Page was under no obligation to take it. *Flagg* v. *Mann*, 14 Pick. 478.

"To deny," says Chief Justice Marshall in *Conway* v. *Alexander*, 7 Cranch, 236, "the power of two individuals, capable of acting for themselves, to make a contract for the purchase and sale of lands defeasible by payment of money at a future day, or in other words, to make a sale with a reservation to the vender of a right to repurchase the same land at a fixed price, at a specified time, would be to transfer to the court of chancery, in a considerable degree, the guardianship of adults as well as of infants." *Campbell* v. *Dearborn*, 109 Mass. 141, 143.

No Maine or Massachusetts statutes cover equitable mortgages. They are therefore left as at common law; and upon the death of the mortgagee, the legal title descends to his heirs, or devisees, in case of a will; and unless the real estate is needed for payment of his debts, like any and all other real estate, his administrator has no interest in an equitable mortgage, and should not be made a party to a bill to redeem, or to enforce such mortgage. *Woodbury* v. *Gardner*, 77 Maine, 75. No right of redemption under an equitable mortgage is given by any statute of Maine. No time is fixed by any statute within which such right must be exercised. *Richardson* v. *Woodbury*, 43 Maine, 213, 214; *Bank* v. *Stimpson*, 21 Maine, 195, 198. In a suit by writ of entry by the mortgagee upon an equitable mortgage, no conditional judgment can be rendered. *Brown* v. *Kelleran*, 4 Mass. 443; *Eaton* v. *Green*, 22 Pick. 530; *Jewett* v. *Mitchell*, 72 Maine, 28, 29, 30. Williams while living could have obtained no conditional judgment in a writ of entry against Page. A fortiori his administrator could not. And no

title vests in him, but descends to the heirs of the equitable mortgagee. *Wilson* v. *Black*, 104 Mass. 406, 407; *Jewett* v. *Mitchell*, 72 Maine, 28.

Even in a legal mortgage it has been often held that if there is no promise in the mortgage to pay and no note or collateral promise outside, the mortgagee has no claim upon the mortgagor personally. His only remedy is against the property itself. *Brookings* v. *White*, 49 Maine, 486; *Salisbury* v. *Phillips*, 10 Johns. 57; *Culver* v. *Sisson*, 3 Comst. 264, 265, 266. Under a mortgage at law, payment of the debt at the time fixed by the condition, of itself revests the title in the mortgagor, and no deed from the legal mortgagee is necessary. *Holman* v. *Bailey*, 3 Met. 55, 58; *Richardson* v. *Cambridge*, 2 Allen, 121. But under an equitable mortgage, payment at pay day revests no title in the mortgagor. It requires a reconveyance from the equitable mortgagee, or his heirs, which can only be enforced by a suit in equity. *Wilson* v. *Black*, 104 Mass. 407; *Richardson* v. *Woodbury*, 43 Maine, 210. No good conveyancer would have advised Page to pay out his money for a deed from the administrator alone after the death of Lawrence Williams. He would advise that the deed must come from the heirs and the widow. If the heirs, the widow, and the administrator of Williams all agreed in refusing to give Page a deed would his remedy be a bill in equity against the administrator to redeem from an equitable mortgage? The bill must be against the heirs and the widow to compel a conveyance under the agreement given by Williams to Page. *Wilson* v. *Black*, 104 Mass. 407. The money so received from Page would go one half to the heirs absolutely and the use of one half during life to the widow, with reversion to the heirs at her decease. The same result would follow if Page had presented a petition to the probate court under § 17, c. 71, R. S., asking the court to authorize the administrator of Mr. Williams to make a conveyance in accordance with the terms of Mr. Williams' contract with Page. Assuming that the plaintiff's theories are correct, then the deed of the heirs to Page conveyed no title whatever; and the title still remains in the administrator. *Douglass* v. *Durin*, 51 Maine, 121; *Taft* v. *Stevens*,

3 Gray, 504, 506; *Palmer* v. *Stevens*, 11 Cush. 147; *Haskins* v. *Hawkes*, 108 Mass. 379; *Bird* v. *Keller*, 77 Maine, 271; *Hemmenway* v. *Lynde*, 79 Maine, 301.

Proper remedy in probate court: *Foster* v. *Foster*, 134 Mass. 120, 121, 123; *Wilson* v. *Leishman*, 12 Met. 316; *Sever* v. *Russell*, 4 Cush. 517; *Hallowell* v. *Ames*, 165 Mass. 124, 125.

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

HASKELL, J. One Ira W. Page being the owner of certain land conveyed the same in fee to Lawrence Williams then alive, but now dead. At the same time Williams gave Page a writing, not under seal, agreeing, among other things, that if Page should pay him fifteen dollars a month until he shall have paid $1500 with interest, that he, Williams, would reconvey the land. The writing contained a stipulation that Page might occupy the premises so long as he fulfilled his part of the agreement, but that upon breach of any part of it he should forfeit all right to the land and money paid on account of it as well.

It appears that Page was owing $1500 secured on the land; that he applied to Williams for a loan of that amount on a mortgage, but that Williams said "he was not in the habit of taking mortgages on property at all; he would rather not if he could fix it in some other way"; thereupon he advanced the money, took a warrantee deed of the property and gave back the writing before mentioned. "A legal mortgage was avoided; an equitable mortgage was made." "If a transaction resolve itself into a security, whatever may be its form, and whatever name the parties may choose to give it, it is in equity a mortgage." *Flagg* v. *Mann*, 2 Sum. 533; *Stinchfield* v. *Milliken*, 71 Maine, 567. "Equity deals with the substance of things regardless of form or methods." *Gray* v. *Jordan*, 87 Maine, 140; *Libby* v. *Clark*, 88 Maine, 32.

II. Revised Statutes, c. 90, § 12, provides: "Lands mortgaged to secure the payment of debts, or the performance of any collateral engagement, and the debts so secured, are on the death of the

mortgagee, or person claiming under him, assets in the hands of his executors or administrators; they shall have the control of them as of a personal pledge; and when they recover seizin and possession thereof, it shall be for the use of the widow and heirs, or devisees, or creditors of the deceased, as the case may be; and when redeemed, they may receive the money, and give effectual discharges therefor, and releases of the mortgaged premises."

No good reason appears why the above statute should not apply to equitable mortgages as well as to legal mortgages. They are both security. In neither one is the title absolute in the mortgagee. They are both subject to redemption and foreclosure. In substance, they more nearly represent money than land. Redemption turns them into money. Foreclosure of a legal mortgage produces a fee, while foreclosure of an equitable mortgage, which is sometimes by sale, yields money. Indeed, the equitable mortgage is more nearly akin to money than a legal mortgage, when its nature is fairly considered. We think the statute applies to "lands mortgaged," just as it reads; whether they are mortgaged in equity or in law, and that such mortgages are assets in the settlement of estates of deceased persons to be applied and distributed as personal estate.

III. Mortgages are assets, and mortgage debts are credits. The latter should be included in the inventory of estates of deceased persons and charged to the executor or administrator like all personal estate, and until redemption has expired, they hold the land "in trust for the persons who would be entitled to the money if paid," but if not paid, they may sell the debt and mortgage as personal estate and assign both. R. S., c. 65, § 32. "Any such real estate may, for the payment of debts, legacies or charges of administration, be sold by a license of the probate court like personal estate." Sec. 33. If neither redeemed nor sold "it shall be distributed among those who are entitled to the personal estate, but in the manner provided in this chapter for the partition of real estate; or the judge of probate or the supreme court may order it sold by the executor or administrator, and the money received distributed as personal estate. Sec. 35. But, if the mortgage be

equitable, and there be no writing or other evidence of a debt from the mortgagor that can be enforced at law independent of the security, the land may as well be inventoried as real estate, and only when reduced to cash, by redemption or sale, would the proceeds become chargeable to the executor or administrator. All this logically follows from the provisions of the statute before named. By its terms, lands mortgaged and the debts secured thereby upon the death of the mortgagee, become assets in the hands of his executors or administrators. The statute speaks of both security and of the debt, which from its nature is an asset. They, the executors and administrators, shall have control of them, the lands, as a personal pledge, and their possession shall be for the widow and heirs or devisees, or creditors, and when redeemed are to receive the money and give the proper discharge or release. When mortgages become foreclosed in such cases, the lands become vested in the widow and heirs or devisees as tenants in common until sold for the benefit of the creditors or otherwise in administration. *Longley* v. *Longley*, ante, p. 395. When redeemed the money, of course, becomes assets in the hands of the executors or administrators and should then be charged to them, unless the mortgage debt has already been inventoried as before stated, and of course charged to them as included in the inventory.

In the case at bar, Page redeemed the land and paid the money to the administrator of the mortgagee, who claimed to receive it as agent for the heirs of whom he was one, and omitted to charge himself with it as assets of the estate as he should have done. The plaintiff brings this bill, as administrator de bonis non of the widow of the deceased, to collect her moiety of the heirs who have received the money. His remedy is in the probate court, where such matters are heard and determined. He sues for a distributive share of an estate. Such action does not lie before the amount to be distributed has been ascertained in the probate court. The case of *Graffam* v. *Ray*, 91 Maine, 234, is in point. There the residuary legatee sued the administrator for devastavit. The doctrine of the case is that all distributive shares must be determined in the probate court, before they become payable to the distribu-

tee. This bill therefore cannot be maintained, but the defendants, who detain assets to which they are not entitled, should not recover costs.

Bill dismissed.

BRUNSWICK GAS LIGHT COMPANY

vs.

BRUNSWICK VILLAGE CORPORATION.

Cumberland. Opinion February 20, 1899.

Towns. Village Corporations. Municipal Officers. Sewers. R. S., c. 16, § § 1-16; Priv. & Spec. Laws, 1887, c. 172, § 2.

Under the provisions of section 2 of chapter 172 of the Private and Special Laws of 1887, incorporating the Brunswick Village Corporation, that corporation is responsible for acts of trespass or tort committed in the construction of a sewer, only when a town would be responsible under the same circumstances.

The construction of sewers is not within the scope of the corporate authority of a town. The municipal officers are the only tribunal authorized to construct sewers at the expense of a town. For the torts of this tribunal, the town is not responsible.

A town is not liable for the torts of its own servants, agents and contractors, while engaged in work beyond the scope of corporate municipal authority, even if directed by vote of the town.

Held ; that the Brunswick Village Corporation is not liable to the Brunswick Gas Light Company for disturbing the gas pipes of that company while constructing sewers in the streets of Brunswick. And this is so, whether the sewer was constructed by direction of its assessors acting in the name of the corporation, or whether it was constructed under the authority of a vote of the corporation itself, and by virtue of a contract with the corporation.

ON EXCEPTIONS BY PLAINTIFF.

The case appears in the opinion.

Geo. E. Hughes, for plaintiff.

This is not the case of error in judgment when the defendant corporation decided when and where they would lay the sewers.

That was a judicial determination. When they put their plans in execution and entered into a contract, which repeatedly shows it held supervision through their engineer, that was a ministerial act, and for all violations of the rights of private citizens which this corporation was lawfully bound to respect and protect, it made itself responsible not only by the general principles of common law, but by the excessive caution expressed in its contract reserving to itself the immediate control and supervision of the work through its agent, the engineer.

Where a municipal corporation constructs sewers and keeps them in repair, their acts in so doing are ministerial and bind them to exercise all needful diligence, prudence and care in exercising such powers. *Barton* v. *City of Syracuse*, 36 N. Y. Ct. of Appeals, page 54. A corporation is liable for injuries occasioned by the negligence, unskilfulness or malfeasance of its agents or contractors engaged in the construction of its public works. As where a contractor in building a sewer piled the excavated earth over a vault there lawfully situate, whereby the vault was broken. *Delmonico* v. *Mayor of New York*, 1 Sanford, 222.

Barrett Potter, for defendant.

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

SAVAGE, J. This is an action of trespass in which the plaintiff claims that its pipes, lawfully in the streets of Brunswick village, were broken by the defendant in the course of the construction of sewers. The sewers were constructed by one John H. Flanagan under a contract in writing which is made a part of the case. The excavations in the streets for sewers were made by license of the municipal officers of Brunswick, and of the assessors of the defendant corporation. The contract with Flanagan appears to have been made in the name of the defendant, but by what authority it was made does not appear. The case was submitted to the presiding justice upon an agreed statement of facts. He ruled that the action was not maintainable, and the plaintiff took exceptions.

I. The act incorporating the defendant, Private and Special Laws of 1887, chap. 172, contains in section 2, the following provisions: "Said corporation within its territorial limits shall have all the rights, powers and privileges which towns have under the first sixteen sections of chapter sixteen of the revised statutes, and shall be subject to all the obligations, responsibilities and penalties which the same sections impose upon towns. All powers and privileges granted by the same sections to the municipal officers of towns are hereby granted to the assessors of said corporation." The sections of the revised statutes referred to are those which prescribe and limit the duties and responsibilities of towns, and the powers and privileges of municipal officers with respect to the construction and maintenance of sewers.

If it be assumed that the sewers in question were constructed by direction of the defendant's assessors alone, as they might have been under the foregoing provisions of its charter, it is clear that the defendant is liable for acts of trespass or tort committed in the process of construction only when a town would be responsible under like circumstances. Under section 2 of its charter, the defendant has the same authority that a town has, no more. Its assessors are vested with all the powers of municipal officers in this respect. And the same principles must apply in the case of this village corporation as apply in the case of a town.

The powers and responsibilities of towns in the construction and maintenance of sewers were fully examined and stated by this court in *Bulger* v. *Eden*, 82 Maine, 352, and more recently in *Gilpatrick* v. *Biddeford*, 86 Maine, 534. The statute imposes no duty upon a town as such to build sewers. The construction of sewers is not within the corporate authority of a town. The municipal officers are the only tribunal authorized to construct sewers at the expense of a town. *Darling* v. *Bangor*, 68 Maine, 106; *Bulger* v. *Eden*, supra. For the torts of this tribunal, the town is not responsible. *Bulger* v. *Eden*, supra. It follows that if the sewers in this case were constructed by authority of the assessors alone, the defendant is not liable for the torts complained of.

II. But it is provided in section 3 of the defendant's charter, that the corporation may "authorize its assessors or its special committee to contract in its behalf for any of the purposes aforesaid." The "purposes" referred to are those specified in the preceding section of the charter, from which we have already quoted, relating to sewers. It would seem that the defendant was, by section 3, granted corporate authority to construct sewers. Although this latter section was not alluded to by counsel in argument, still we think it should be considered, for the case does not show explicitly under the provisions of which section the sewers were built. Now, if we assume that these sewers were constructed by the defendant, by virtue of its corporate authority, will the plaintiff be placed in a better position? We think not.

The plaintiff, by its charter, Private and Special Laws of 1854, chap. 291, obtained "the right to lay gas pipes in any of the public streets and highways of the town of Brunswick, the consent of the selectmen of said town having first therefor been obtained." But this was not an absolute right. It was only a qualified right. It was not paramount, but subordinate. The placing of its pipes in the streets, with the consent of the selectmen, did not give the plaintiff the vested right to have them remain as placed undisturbed. Its right was subordinate to the rights of the public in the use of the streets; and it was subject to the power of the legislature to authorize additional public uses of the streets, and that, without providing for the payment of compensation for incidental and consequential damages occasioned by such uses. Notwithstanding the provisions in the plaintiff's charter, we think it cannot be successfully claimed that the legislature did not still possess the power to authorize the construction of sewers in the streets, although by such construction, the plaintiff might be put to inconvenience, damage and loss.

These doctrines are sustained by a general concurrence of authority. *Portsmouth Gas Light Co.* v. *Shanahan*, 65 N. H. 233; *Middlesex R. R. Co.* v. *Wakefield*, 103 Mass. 261. *In the matter of Deering*, 93 N. Y. 361; *National Water Works* v. *City of Kansas*, 28 Fed. Rep. 921; *Rockland Water Co.* v. *Rockland*, 83

Maine, 267; *Belfast Water Co.* v. *Belfast*, ante, p. 52; Elliott on Roads and Streets, 368. The legislature exercised its power by granting the defendant's charter. The defendant, then, clearly had the right to construct sewers in its streets. If it did so reasonably and properly, it was only in the lawful exercise of its right. It is well settled that when a public corporation does only what by its charter it is authorized to do, and is free from fault or negligence, it is not liable for consequential damages. *Darling* v. *Bangor*, supra; *Sumner* v. *Richardson Lake Dam Co.*, 71 Maine, 106; *Rogers* v. *Kennebec & Portland R. R. Co.*, 35 Maine, 319. We think this rule is applicable here.

Now what are the facts? The claim of the plaintiff as set forth in the agreed statement of facts is simply this,—"that its pipes, lawfully in the Brunswick streets, were broken by the defendant in the course of the construction of sewers in said streets." This is the whole of it. It is not claimed that the acts of the defendant were negligent, unreasonable, unnecessary, or in excess of its statutory rights, and of course we cannot assume them to have been so. The question is squarely presented, whether the defendant, having constructed its sewers in a reasonable and proper manner, can be held responsible for damages which were the natural or necessary result of the exercise of its lawful powers. We think the question must be answered in the negative.

As these conclusions necessarily dispose of the case, it is unnecessary to consider the other questions discussed by counsel.

Exceptions overruled.

MILTON G. SHAW, et. als. *vs.* COUNTY COMMISSIONERS.

Piscataquis. Opinion February 21, 1899.

Way. Petition. Appeal. Commissioners. Jurisdiction.

Upon a petition to county commissioners praying that they will "discontinue all or so much of said highway as is not demanded by the public or required by common convenience and necessity, *or* alter the same as in their judgment is required' it was objected that the county commissioners made no adjudication upon so much of the petition as prays for a discontinuance. *Held;* that the petition does not request unconditional discontinuance, but either that or alteration. As the latter was granted, the objection is not tenable.

In this case an appeal was taken by the petitioners from the action of the commissioners, and a committee was appointed to review their action, who reported that the judgment of the commissioners should be affirmed. Among the objections against the acceptance of the committee's report are these: "Because the highway (laid out between Lily Bay on Moosehead Lake and Roach River Pond in Piscataquis county) asked to be discontinued or altered does not connect with any public way or thoroughfare;" and "because the county commissioners had no authority to locate said highway, as it does not connect with any (other) highway. It commences in one unincorporated township and ends in another." *Held;* that the objections are not tenable or meritorious.

The question whether the commissioners, who laid out the road ten years ago or more, had jurisdiction to lay out the road as it was laid out in the beginning, is not now an open question; and cannot be revived or considered in such proceedings as these. The petition in this case under consideration does not, by its terms or by implication, pretend to present such a question; nor is there anything indicating that such a question was presented or discussed before the commissioners or the committee.

ON EXCEPTIONS BY APPELLANTS.

This was a petition for the discontinuance or alteration of a highway. It was submitted to a committee, who have heard the parties and filed their report, affirming the doings of the county commissioners. And thereupon, upon motion that the same be accepted, the appellants filed objections thereto, and introduced in support thereof a copy of the record of the petition and return of the commissioners thereon in locating said way. After hearing the parties the court ruled and ordered that the report be accepted.

To this ruling the appellants excepted.

The case is sufficiently stated in the opinion.

Henry Hudson, for appellants.

J. F. Sprague, for county commissioners; *W. E. Parsons*, for John Morrison.

SITTING: PETERS, C. J., EMERY, WHITEHOUSE, WISWELL, STROUT, FOGLER, JJ. SAVAGE, J., having been a member of the road committee did not sit.

PETERS, C. J. The petitioners allege that a highway was laid out, in 1886, between the shore of Lily bay on Moosehead lake and Roach river pond in Piscataquis county, by the county commissioners of that county, the road and its termini being (as they say) within the limits of unincorporated townships; and they pray that the county commissioners will "discontinue all or so much of said highway as is not demanded by the public or required by common convenience and necessity, *or* alter the same as in their judgment is required."

After due notice and hearing, the commissioners adjudged "that common convenience and necessity do require that an alteration in said way as prayed for in said petition be made, and that the prayer of said petition relating to said alteration be granted." And the commissioners proceeded to locate and establish the alteration prayed for accordingly.

An appeal having been taken by the petitioners from the action of the commissioners, and a committee appointed to review their action, who reported that the judgment of the commissioners should be affirmed, objection is now alleged by the petitioners against the acceptance of the report of the committee on several grounds, none of which seem to us to be tenable or meritorious.

The first objection is that the county commissioners made no adjudication upon so much of the petition as prays for a discontinuance of the road. The answer to this objection is that the petition does not request unconditional discontinuance, but either that or alteration, and the latter is granted. Both alteration and discontinuance would be inconsistent. If a mechanic constructs

an article for a customer, and on its presentation to the customer he requires the constructor to either make an alteration or take it back, could it be understood that the article should be altered and amended as required and also be taken back? When the petitioners here have requested the commissioners to discontinue so much of the road as is not required by convenience and necessity, or alter the same as in their judgment is required, and the commissioners respond to the petition that its prayer relating to such alteration be granted, do they not clearly declare that in their judgment a discontinuance is not necessary and is refused? We think the inference is irresistible. The omission, if it be such, is a silence that speaks loudly. And the maxim applies: Expressio unius est exclusio alterius.

The other objections against the acceptance of the report of the committee are: "Because the highway asked to be discontinued or altered does not connect with any public way or thoroughfare;" and "because the county commissioners had no authority to locate said highway, as it does not connect with any (other) highway. It commences in one unincorporated township and ends in another." These two propositions are but one objection, namely, that the road does not subserve the public by connecting with any other county way, a doctrine discussed in *King* v. *Lewiston*, 70 Maine, 406, and in previous cases. This objection is met by opposite counsel with the suggestion that the road does adjoin another public way, because it starts from Lily bay on Moosehead lake, a great public way. And it is further argued that the doctrine contended for by the petitioners does not apply to roads laid out wholly over unincorporated territory.

But in our judgment whether these points presented by the respondents are available or not, they are unnecessary. The question whether the commissioners, who laid out the original road ten years ago or more, and who have been, to our official knowledge, teased with oppositions and litigations frequently since respecting it, had jurisdiction to lay out the road as it was laid out in the beginning, is not an open question here. That question was settled, or might have been, in the long ago contentions between the

parties, and cannot be revived or considered in proceedings such as these. The petition now under consideration does not, by its terms or by implication, even pretend to present such a question, and there is nothing indicating that such a question was presented or discussed before the commissioners or the committee. Certainly the maxim, interest reipublicæ ut sit finis litium, applies here.

Exceptions overruled. Costs for respondents.

ANGIE CUNNINGHAM, Admx. *vs.* THE BATH IRON WORKS.

Sagadahoc. Opinion February 27, 1899.

Negligence. Master and Servant. Unguarded Machinery. Instructions. Assuming Risk. Burden of Proof.

While it is the duty of the master to exercise ordinary care and foresight in providing safe machinery and a reasonably safe place in and about which the "helpers" and other laborers are required to work, yet the fulfillment of this duty must be tested by the experience of employees who are themselves in the exercise of due care and vigilance, and not with reference to those who are themselves negligent or venturesome, or the unfortunate victims of simple and unaccountable accidents. Absolute safety is not guaranteed to the laborer by the contract of employment.

The failure of the master to have cog-wheels in a machine shop covered and guarded by a hood, cannot be deemed negligence, under the following conditions and circumstances: The cog-wheels and their gearing in connection with which the injury was received, were of the usual and familiar type. There was nothing peculiarly dangerous about them. All the laborers in the shop were constantly reminded both by sight and hearing of the power as well as of the existence of these wheels. The helpers were not required to operate the angle-iron shears, or to perform any duty within three feet of the wheels on the inward-rolling side.

Whether a failure to establish or enforce a regulation for the removal of debris consisting of scraps of angle-iron and other waste material on the shop floor at the time of the accident, could be held negligence; and if so, whether it must be deemed the negligence of a fellow-servant, *held;* that it is unnecessary to consider, where there is no evidence of its existence at the time of the injury in question.

The obligation resting upon the employer to give his employees such instructions as are reasonably necessary to enable him to understand the perils to

which he is exposed, must be considered with reference to the reciprocal obligation resting upon the laborer to exercise the senses and faculties with which he has been endowed in order to discover and comprehend these perils for himself. He is not bound to inform the laborer of what he already knows, or what by the exercise of ordinary care and attention, he might have known.

It affirmatively appears in this case that the helper, who was injured, was a bright and intelligent youth who had just entered upon his eighteenth year. He clearly had the opportunity to observe the revolving cog-wheels from day to day, and the capacity to comprehend the danger of coming in contact with their gearing. He had all the information upon that subject which could have been derived from the most elaborate instructions. It is accordingly *held;* that if a laborer continues in the service of his employer under such circumstances, he will be deemed to have waived all objections to the machinery and appliances, and to have voluntarily assumed the risks incident to the service performed.

An action, brought by an administrator, to recover damages for the death of his intestate, alleged to have been caused by the negligence of the employer, cannot be maintained when the plaintiff wholly fails to show affirmatively, either by direct evidence, or by legitimate inference from any evidence in the case, that the intestate was in the exercise of due care, and did not negligently contribute to the injury. Such deficiency of proof is alone fatal to the plaintiff's action.

On Motion and Exceptions by Defendant.

This was an action of tort, brought by the mother, as administratrix of the estate, of Mark W. Cunningham, to recover damages for injuries sustained by her son while in the employ of the defendant, and as a result of which he died on the sixth day of June, 1896. The plea was the general issue. The case was tried to a jury at the December term, 1897, of this court, in Sagadahoc county, and a verdict returned for the plaintiff in the sum of $2,162.62.

The alleged acts of negligence on the part of the defendant are stated in the declaration as follows:

In a plea of the case, for that on the sixth day of June, 1896, the said defendant was a corporation engaged in the manufacture of iron and steel products in various forms at said Bath, and in the prosecution of said business it possessed and operated a large amount of machinery, and especially a certain machine for the purpose of cutting its iron and steel into required lengths, which machine was known as an angle-iron machine and was equipped

with divers wheels, belts, pulleys, knives and cog-gear for the purpose aforesaid; that in its said business the defendant employed a large number of servants including the plaintiff's intestate, and was bound by law to use all diligence to provide for each of them a safe place in which to work, and reasonably safe machinery and gears in connection with which to work, and to supply and maintain all proper guards to insure the reasonable safety of its said workmen and especially of the plaintiff's intestate; that on said sixth day of June, 1896, the plaintiff's intestate was a minor of the age of seventeen years, and was then in the employ of said defendant, and as a part of his duties in said employment was set to work as assistant upon said angle-iron machine; but that in disregard of the defendant's duties aforesaid, said machine was so dangerously and negligently constructed with reference to its wheels and gears that any one coming in contact with the same was exposed to great and unnecessary danger of limb and life; that said machine and its dangerous wheels and cog-gears aforesaid were negligently left by the defendant wholly unguarded; and that in addition the floor about said machine and where the plaintiff's intestate was obliged to work in connection with said machine was negligently left obstructed by scraps and jagged pieces of iron and steel which the workman must necessarily pass over, and by reason of which he was in constant danger of falling upon said unguarded gears; and that the plaintiff's intestate, being ignorant of the dangers aforesaid, and being of tender years and inexperienced in machinery, was on the day aforesaid set to work upon said dangerous and unguarded machine without any proper warning or instructions; in consequence whereof on the day aforesaid said plaintiff's intestate, while engaged in the performance of his work in connection with said machine, and while in the exercise of due care himself in all respects, by reason wholly of the defendant's negligence in the construction and operation of said machine, in the particulars above described, tripped upon said jagged pieces of iron and steel and was thrown against said unguarded gears, and by them drawn into said machinery in such a way that both his arms were mangled, crushed and cut off and his skull cracked; that by reason

thereof said plaintiff's intestate suffered great agony of mind and body, was obliged to submit to the amputation of both his arms in the effort to save his life, and after surviving for many hours in great agony and being subjected to great expense for medical attendance and medicines finally died; all of which was without fault on his part and by reason wholly of the defendant's negligence as aforesaid, to the damage of the said plaintiff (as she saith) the sum of ten thousand dollars, etc.

The disposition of the case by the court upon the motion renders a report of the exceptions, taken to the admission of testimony, unnecessary.

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

L. C. Cornish and J. M. Trott, for defendant.

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

WHITEHOUSE, J. In this action the plaintiff, as administratrix on the estate of her son, seeks to recover damages for injuries sustained by the intestate on the sixth day of June, 1896, while in the employment of the defendant, resulting in his death on the same day.

The jury returned a verdict for the plaintiff in the sum of $2,162.62, and the case comes to the law court on motion and exceptions by the defendant.

The defendant was engaged in building iron vessels, and for the purpose of cutting off pieces of angle iron to be used in their construction, a powerful machine was employed known as the "angle-iron-shears." This machine was located in the southwest corner of a large building called the "plate shop," one side of the machine being coincident with the exterior wall of the building. It was provided with two knives, one on either side, which could be used together or independently, each being operated by its own lever, by which the "clutch" could be thrown in or out at pleasure. For the purpose of giving more effective operation to the machine, a heavy fly wheel was hung upon a shaft which transmitted the

power to the knives by means of cog-wheels. The larger wheel was three feet in diameter, the bottom of it being two feet and ten inches from the floor, and its gear or connection with the smaller wheel was five feet and four inches from the floor. The intestate is described as of about the average height. The large wheel made ten revolutions, and the small one thirty-four revolutions per minute. Being in the corner of the building, these wheels on the front side were in plain view from all parts of the shop. On this side the cogs turned inward and were not provided with any shield or guard. On the back side the wheels were in a comparatively dark place within three or four feet of the wall, and there the cogs turned outward. These cog-wheels were in constant motion during the working hours of the day; but the knives were only operated when the cutting of the angle-iron was actually required, and this might be once or many times each day.

This machine was operated by one of the "fitters" whose duty it was to adjust the angle-iron fittings in their proper places in the vessel; and the mechanism of the gearing and levers was so arranged that the operator stood outside of the building, while the pieces of angle-iron, as they were cut from long bars, fell to the floor on the inside through a slot or trough inclined downward and forward.

At the time of the accident in question the intestate had been employed one month and one day in the capacity of helper or second hand to one of the fitters. It was the duty of the helper, as the word implies, to accompany the fitter in his work, look after his tools and otherwise aid him in a general way. It was one of his duties to pick up the pieces of angle-iron as they fell to the floor when cut by the fitter, and to carry them to any point desired; but he had no duty to perform in direct connection with the operation of the machine; and in removing the pieces of iron from the floor he was not required to come within three feet of the cog-wheels on the inward-turning side.

About eight o'clock on the morning of the accident, Mr. Tuck, one of the fitters, took his position on the outside of the building and set in motion the knife on the front side for the purpose of

cutting some angle-iron. The intestate was present in his capacity of helper and as the cutting proceeded, he passed around the end of the machine, picked up the pieces of iron as they fell and carried them to the base of a column about six feet distant. He had removed three pieces and returned to pick up the fourth. In doing so he had to pass behind the side of the machine and was momentarily out of the view of Mr. Tuck, who was looking down at his work on the outside. But he heard an outcry from the boy and looking up saw him with his arms in the gears. He had no other knowledge of the manner or the cause of the accident, and there was no other direct evidence in the case in relation to it.

It was not in controversy that the angle-iron machine itself was of a standard pattern and in general use in iron-working establishments like that of the defendant throughout the country. It was not claimed on the part of the plaintiff that the machine was improperly constructed or was in any respect defective or out of repair. But it was contended that there was actionable negligence on the part of the defendant in three particulars:—First, in allowing the cog-wheels in which the intestate was injured to remain unguarded and unprovided with a hood or shield of any kind to prevent accident and injury; second, in allowing the basal flange of the machine and the bolt and nut which secured it to the floor to project above the level of the floor, and in permitting the waste scraps of iron to accumulate on the floor, at points near which the intestate was required to go in picking up the angle iron; and, third, in omitting to give the intestate appropriate and sufficient instruction and warning in regard to the perils of the revolving cog-wheels on their in-rolling side.

On the part of the defendant it is strenuously and confidently urged that the evidence utterly fails to establish either the defendant's negligence on the one hand, or the intestate's due care and want of appreciation of the risk, on the other.

The principles of law applicable to these several contentions and to the respective rights and obligations of the parties, have so frequently been examined and distinguished in recent years by our court, as well as the courts of last resort in other states, that no

extended discussion of them is required in the consideration of this motion for a new trial as against the evidence.

It was the unquestioned duty of the defendant to exercise ordinary care and foresight to provide safe machinery and a reasonably safe place in and about which the helpers and other laborers were required to work; but the question of the fulfillment of this duty must be tested by the experience of employees who are themselves in the exercise of due care and vigilance, and not with reference to those who are themselves either negligent or the unfortunate victims of simple and unaccountable accidents. The fact that a laborer sustains a serious injury in the place of his service has no necessary tendency to prove the machinery unsafe or the place unsuitable. No machinery can be deemed safe for those who are thoughtless and inattentive or reckless and venturesome. Pure accidents will also continue among the inexplicable factors in the problem of life. Again, the fact that the accident might have been avoided by the exercise of extraordinary precautions on the part of the defendant has no necessary tendency to prove that the existing conditions did not meet the requirement of reasonable safety. Absolute safety under all circumstances is not guaranteed to the laborer by the contract of employment. The employer is not an insurer. He is not bound to furnish the safest machinery, nor to provide the best possible methods for its operation, in order to relieve himself from responsibility. He is only required to furnish instrumentalities that are reasonably and ordinarily safe and well adapted to the purpose for which they are designed. *Conley* v. *American Express Co.*, 87 Maine, 352; *Wormell* v. *Maine Central R. R. Co.*, 79 Maine, 397.

In the principal case the cog-wheels in question were of the usual and familiar type. There was nothing peculiarly dangerous about them. They were exposed to plain view from all parts of the building and a loud rumbling sound was produced by their motion. All the laborers in the shop were thus constantly reminded by both sight and hearing of the power as well as of the existence of these wheels. None of the employees were required to labor in close proximity to them. The helpers had no responsi-

bility whatever for the operation of the machine, and were not required to perform any duty within three feet of the wheels on the in-rolling side. Under these circumstances the failure of the defendant to have these wheels covered and guarded by a hood, cannot be deemed actionable negligence.

In *Rock* v. *Indian Orchard Mills*, 142 Mass. 522, the plaintiff was a boy of thirteen and was injured by getting his hand into the unguarded and rapidly revolving cylinders of a winder in a cotton mill; and it was held that as there was nothing in the nature of the machine which rendered it peculiarly or especially dangerous except to one who puts his hands on it, the defendant could not be held liable for his omission to fence it. The same doctrine was laid down in *Murphy* v. *American Rubber Co.*, 159 Mass. 266, and *Hale* v. *Cheney*, Ibid. 268. In each of these cases, the plaintiff was injured by coming in contact with an uncovered horizontal shaft near the floor. In the latter case, the court said: "Upon the evidence the defendant did not owe to the plaintiff the duty of boxing the shaft. It cannot be successfully contended that the shaft placed near the floor with the screw projecting was unsuitable for the purpose. The evidence was uncontradicted that such a device was in ordinary and common use and preferable to any other. The fact that the collar could be secured to the shaft without a projecting screw or nut, was not evidence from which a jury would be warranted in finding that the defendant was not justified in using the device which he had in his shop. We fail to see any evidence that there was a breach of any duty on the part of the defendant which he owed to the plaintiff."

In *McGuerty* v. *Hale*, 161 Mass. 51, the plaintiff, a boy of eighteen, had his arm caught in the unguarded gearing of a machine, but as the gearing was in plain sight, it was held that there was no absolute duty on the part of the defendant to cover it.

In *Wilson* v. *Mass. Cotton Mills*, 169 Mass. 67, the plaintiff's hand was caught between two unguarded revolving wheels of a machine used for hoisting and piling cotton, and the court said: "Nor do we see any evidence that the machine was defective. So far as we see, all parts of it were in perfect working order. Even if the

accident would not have happened had the cog-wheels been covered, this would not make the defendant liable as he was not bound in law to cover them." See also *Sullivan* v. *India Mfg. Co.*, 113 Mass. 396; and *Shanny* v. *Androscoggin Mills*, 66 Maine, 420.

It is further contended that the defendant negligently allowed waste scraps of iron and steel to accumulate on the floor and obstruct the passage of the helpers in the vicinity of the cog-wheels. It appears in evidence that when the bar from which angle-iron was to be cut, was not perfectly square, or of the proper shape at the end, a small scrap would be cut off to secure the angle desired; and that in the ordinary operation of the machine in the course of the day a dozen small pieces might thus be trimmed off and fall to the floor at the foot of the inclined groove. But there is no evidence that it was necessary to trim the end of the bar for every angle-iron that was to be cut. It is not shown that any such trimming had in fact been done on the morning of the accident, and the case fails to disclose any evidence whatever that there were any such scraps or other waste material on the floor at the time of the accident. Whether, therefore, a failure to establish or enforce a regulation for the removal of scraps similar to the debris around a blacksmith's forge, could be held negligence; and if so, whether it must be deemed the negligence of a fellow-servant, it is unnecessary to consider. There is no evidence of their existence at the time in question.

The claim that the projections above the floor of the bottom flange of the machine, and of the bolts and nuts by which it was fastened to the foundation, was a negligent obstruction, must be considered hypercritical and untenable. The machine was firmly secured to the floor in the ordinary way. There was no occasion for the helper to come in contact with that part of it. His pathway was around it and not over it. It is furthermore wholly improbable that this could in any event have been the cause of the accident; for if he had tripped and stumbled over that part of the machine, he must have fallen before reaching the cog-wheels.

Finally, it is contended that the defendent failed in its duty to

the intestate in not giving him positive and specific instructions in regard to the danger connected with the revolving cog-wheels. It appears that on one occasion while standing near a punching machine a general admonition was given him by the fitter "to look out for himself around the machinery;" but it is admitted that no special warning was given him respecting the danger of coming in contact with the cog-wheel gearing.

It is the opinion of the court that, upon the facts disclosed by the evidence in this case, the defendant was not bound to give such information or warning. The obligation resting upon the employer to give the laborer such instructions as are reasonably necessary to enable him to understand the perils to which he is exposed, must be considered with reference to the reciprocal obligation resting upon the laborer to exercise the senses and faculties with which he has been endowed in order to discover and comprehend these perils for himself. He is not bound to inform the laborer of what he already knows, or what by the exercise of ordinary care and attention, he might have known.

In *Ciriack* v. *Merchants' Woolen Co.*, 146 Mass. 182, a boy twelve years of age became entangled in the gearing of cog-wheels and was injured. At the first trial, in the absence of testimony upon that point, the boy was presumed to be of average intelligence and the court said: "His injuries arose from coming in contact with the revolving cog-wheels of the machine, and the instruction which he was entitled to receive must therefore have been concerning the danger from that cause; but it seems to us that it must be fairly assumed that the plaintiff had all such knowledge as it was the duty of the defendant to impart to him. There was no peculiar or secret source of danger; anybody seeing the machine in motion must soon become aware of the danger which would arise from coming in contact with it. In order to show actionable negligence on the defendant's part, it was incumbent on the plaintiff to show an omission to inform him of something which he needed to know in order to be safe. In absence of anything to show the contrary, the plaintiff must be assumed to have the intelligence and understanding which were usual with the boys of his

age. There is nothing to show that he did not know the danger of coming in contact with the revolving wheels of the machine. It must be assumed that he was well aware of it. The accident happened in consequence of his omitting to guard against a known peril. He had been employed in the same room for a period of nearly two months. There is no reason to suppose that explicit instructions if given to him, at the beginning of his employment, with reference to the danger of touching these wheels when in motion, would have added anything to what he himself must fairly be presumed to have known at the time of the accident." See also *Coullard* v. *Tecumseh Mills*, 151 Mass. 85; *Ruchinsky* v. *French*, 168 Mass. 68; *Wilson* v. *Mass. Cotton Mills*, 169 Mass. 67; and *Tinkham* v. *Sawyer*, 153 Mass. 485.

It has been noted that, in the case at bar, the situation and character of the powerful machine in question were such that all employees in the building, seeing and hearing it in motion, must be at once impressed with a sense of its danger as well as of its power. The peril of coming in contact with the cog-gearing was neither peculiar nor concealed but obvious and familiar. The intestate was not a lad of tender years, but a youth who had just entered upon his eighteenth year. In addition to the presumption of average intelligence it affirmatively appears from the testimony of his mother and of the fitter, that he was "bright and intelligent," and "handy and industrious." He had been at work a full month in his capacity as helper and thus frequently brought into proximity to the angle-iron machine. He clearly had the opportunity to observe the revolving cog-wheels from day to day, and the capacity to comprehend the danger of coming in contact with their gearing. He had all the information upon that subject which could have been derived from the most elaborate instructions.

But if any failure of duty on the part of the defendant had been shown, there is another principle of law decisive of the plaintiff's case, to which the considerations last presented are equally applicable. The law is now familiar and well settled that if a laborer continues in the service of his employer after he has knowledge of the defective, unsuitable or unguarded condition of

any machinery in connection with which he is required to labor, and it appears that he fully comprehends and appreciates the nature and extent of the danger to which he is thereby exposed, he will be deemed to have waived the performance of the employer's obligation to furnish safe and suitable appliances, and to have voluntarily assumed all risks incident to the service performed under such circumstances. Such an assumption of the risks of an employment by a laborer will bar recovery independently of the principle of contributory negligence. *Conley* v. *American Express Co.*, 87 Maine, 352; *Mundle* v. *Hill Mfg. Co.*, 86 Maine, 400; *Miner* v. *Connecticut River Railroad Co.*, 153 Mass. 398; *Sullivan* v. *India Mfg. Co.*, 113 Mass. 396.

No reason has been shown in the case at bar why the intestate was unable to comprehend and appreciate the danger of coming in contact with the cog-wheel gearing in the defendant's shop, and all the evidence tends to show that he had the opportunity and capacity to comprehend and appreciate it. He must, therefore, be deemed to have assumed the risks of the service which he performed.

Furthermore, it has been an established principle of substantive law since its enunciation in the leading case of *Butterfield* v. *Forrestor*, 11 East, 60, that there can be no recovery for injuries suffered by one person from the negligence of another if the injured person by his own want of care contributed to produce the injury; and in this state since the decisions in *French* v. *Inhab. of Brunswick*, 21 Maine, 29, and *Kennard* v. *Burton*, 25 Maine, 39, it has also been the recognized and firmly established rule of evidence of governing the burden of proof, that the plaintiff must establish the fact affirmatively, as a necessary part of his case, that at the time of the accident he was in the exercise of due care. This rule was reaffirmed in unqualified terms in *Gleason* v. *Inhab. of Bremen*, 50 Maine, 222, and carefully analyzed in its application to facts analogous to those at bar, in *State* v. *Me. Central R. R. Co.*, 76 Maine, 357; and *Chase* v. *Me. Central R. R. Co.*, 77 Maine, 62. The doctrine has also been critically reviewed and forcibly illustrated in the lucid opinion of the court in the recent case of *McLane* v. *Perkins*, ante, p. 39.

Like all facts, which are the subject of judicial inquiry, the plaintiff's freedom from contributory negligence, though it must be established affirmatively, may be proved by all kinds of legitimate evidence whether direct or circumstantial. But as stated in the case last cited: "It is not to be presumed. If sought to be established by inference, it must be by inference from facts in evidence in the case. It cannot be inferred from general conduct, nor from the habits or instincts of mankind, nor from the argument that men are likely to be careful in danger. It is as true that men are careless, as that they are careful. It is as true that men negligently contribute to their own injury as that they do not."

In the case at bar, if culpable negligence on the part of the defendant had been shown, the total absence of any evidence showing affirmatively that the plaintiff's intestate was in the exercise of due care at the time of the accident, must be held a bar to the plaintiff's recovery. The intestate was not merely passive in the defendant's care at the time of the injury, like a passenger in his seat in a railway car at the time of a collision. He was himself in the exercise of an active agency of his own, involving the right and duty to regulate and control his movements in such manner that no want of care on his part should contribute to his injury. Whether in fact he was reasonably attentive and alert to avoid unnecessary contact with the dangerous machinery, or on the other hand was momentarily thoughtless and inattentive at the time of the accident, does not appear in evidence. No person saw the accident itself and no witness has informed the court how it happened that the boy was entangled in the powerful gearing. Whether, as suggested by the plaintiff, he slipped or stumbled in his walk and was thus precipitated against the wheels; or thoughtlessly went so near the gearing that his clothing was caught by the cogs, or from mere curiosity was experimenting with the action or strength of the gearing, is all a matter of conjecture. Only the painful and shocking result is known. True, the case does not show affirmatively that the plaintiff's intestate was guilty of contributory negligence; but it fails to show affirmatively either by direct evidence, or by legitimate inference from any evidence in the case, that he was in

the exercise of due care and did not negligently contribute to the injury. This deficiency in the proof would alone be fatal to the plaintiff's action.

Motion sustained. Verdict set aside.

WILLIAM M. HALL *vs.* DANIEL CRESSEY.

Cumberland. Opinion March 1, 1899.

Deed. Estate Tail. Vested Remainder. Children. R. S., c. 73, § 4.

A father conveyed certain real estate to his two sons Stephen and George "their heirs and assigns forever, one-third to Stephen and two-thirds to George." The habendum was to the same effect. Among the provisions in the deed were these: "Said Stephen and George to come into possession of said property after the decease of me and my wife Margaret, and not before. This deed is to take effect and go into operation on the decease of me and my wife, and not before; and if my son Stephen die without children, then Stephen's third part is to go to my son George." Stephen died leaving an illegitimate child, but no legitimate children.

Held; that the estate in Stephen created by the deed was a vested remainder in fee simple, determinable upon the contingency of Stephen's dying without legitimate children, which contingency happened, and therefore that the title vested in George and passed from him to his grantee.

Held; that the word "children" in the deed is to be construed as meaning legitimate children.

See *Watson* v. *Cressey*, 79 Maine, 381.

AGREED STATEMENT OF FACTS.

Real action submitted to the law court on facts agreed by the parties and which are stated in the opinion.

F. M. Ray, for plaintiff.

Wm. Lyons, for defendant.

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

SAVAGE, J. In 1847, James McIntosh conveyed certain real estate in Gorham to his two sons Stephen and George, "their heirs

and assigns forever," one-third to Stephen and two-thirds to George. The conveyance was expressed to be on certain conditions subsequent, all of which have since been performed. Among the provisions in the deed were these: "Said Stephen and George to come into possession of said property after the decease of me and my wife Margaret and not before." . . . . "This deed is to take effect and go into operation on the decease of me and my wife and not before; *and if my son Stephen die without children, then Stephen's third part is to go to my son George.*" This same deed was before the court in *Watson* v. *Cressey*, 79 Maine, 381, and its general effect was considered. It was there held that the grantees took vested remainders in the granted premises. The case at bar presents a new issue, and the controversy arises concerning the present ownership of "Stephen's third part."

Stephen died in 1881, having never married, but leaving an illegitimate child to whom he had given statutory recognition. The plaintiff claims title through mesne conveyances from Stephen; the defendant claims through mesne conveyances from George. The rights of the parties depend upon the proper construction to be given to the clause in the deed above quoted, "and if my son Stephen die without children then Stephen's third part is to go to my son George."

The plaintiff contends in the first place that Stephen took a vested remainder in tail in the demanded premises; that upon the death of his father and mother, he became seized as tenant in tail; and that by subsequent conveyance the entail was barred, and the title in fee simple passed to Stephen's grantee, and so on to the plaintiff. R. S., c. 73, § 4. On the other hand, the defendant's contention is that Stephen took a vested remainder in fee simple, determinable upon a contingency, namely the death of Stephen without children; and that upon the death of Stephen without legitimate children, the title passed to George, and so on to the defendant.

The plaintiff contends in the second place, that if Stephen's remainder was not an estate in tail, then inasmuch as Stephen died leaving surviving him a child born out of wedlock, he did not in legal contemplation "die without children," and so the contingency

provided for in the deed did not happen; and in that event, the plaintiff says that Stephen took only a life estate and that the remainder in fee passed by inheritance to his illegitimate child, who had then been legitimated and who subsequently conveyed to the plaintiff.

The first important question is: did Stephen "die without children?" Unless he did the defendant has no title in any event. By the common law, a bastard was filius nullius. He possessed no inheritable blood. The sins of the father were visited upon the child. Modern sentiment as expressed in modern statutes is more merciful to the unfortunate offspring of illicit intercourse. In this state, as in most others, by pursuing statutory methods, a bastard may be legitimated and may acquire rights of inheritance, and some or all of the usual consequences of consanguinity. So it was in the case at bar. Stephen gave his daughter statutory recognition. But that conferred only statutory rights and privileges. We are not concerned with the status of this child under a statute, but are endeavoring to ascertain the legal meaning of the word "children" in a deed. We do not perceive how that meaning can be enlarged in this case; nor how the interpretation of the word can be aided by reference to a statutory condition which was created many years after the deed was executed. Unless there is something in this deed,—and there is not,—to show that the grantor contemplated that his son Stephen would become the father of a bastard child, and intended that child to be included in the term "children," we must give to the word its ordinary, common law signification. The authorities are to the effect that the word "child" in a will or deed means a legitimate child. In *Bolton* v. *Bolton*, 73 Maine, 299, the late Judge VIRGIN, after stating that the word "widow" in a life insurance policy meant the lawful widow, used the following language: "The foregoing rules find numerous illustrations in the construction of wills wherein legacies and devises are given to a 'child' or 'children' of some person named, and such person has legitimate and illegitimate child or children, in which case the legitimate and not the illegitimate issue take. The word 'children' it is said means prima facie legitimate

children, as much as if the word 'legitimate' were written before it." An illegitimate child was not permitted to take under a bequest in a will which gave a legacy to "nephews" as a class, in *Lyon* v. *Lyon*, 88 Maine, 395. So in the construction of the statute which provides, after the payment of debts, funeral expenses, etc., that "if there be no kindred to the said intestate, then she (the widow) shall be entitled to the whole of said residue" it was held, in *Hughes* v. *Decker*, 38 Maine, 153, that the term "kindred" meant lawful kindred. In *Blacklaws* v. *Milne*, 82 Ill. 505, (25 Am. Rep. 339) it was held that the word "children," in a statute regulating descent, had reference to lawful children only. In construing the Massachusetts statute which provided that "where any testator shall omit to provide in his will for any of his children, they shall take the same share that they would have been entitled to if he had died intestate," the court held that the word "children" did not include illegitimate children. See also *Cooley* v. *Dewey*, 4 Pick. 93; 2 Jarman on Wills, 217. The rule of interpretation drawn from the foregoing cases of wills and statutes seems to be equally applicable in cases of deeds. We therefore hold that Stephen McIntosh died "without children," so far as the construction of the deed is concerned.

We are now brought to inquire what was the legal character of the estate conveyed to Stephen by the deed in question. Was it an estate tail? The plaintiff says that the word "children" in the clause under consideration is equivalent to "heirs of the body," and that so considered, the clause created an estate tail. In support of this claim, the plaintiff cites the well known definition and examples of an estate tail given by Mr. Washburn in 1 Washburn on Real Property, *72, *73, *74. He also cites our own cases of *Fisk* v. *Keene*, 35 Maine, 349, and *Richardson* v. *Richardson*, 80 Maine, 585. A devise of an estate to a person and his heirs, with a devise of it over, in case he should die without issue, vests in the first devisee an estate in fee tail, with a remainder to the second devisee. *Fisk* v. *Keene*, 35 Maine, 349. The words "dying without issue" are construed to mean an indefinite failure of issue.

Fisk v. *Keene*, supra. The estate goes "to the heirs of the donee's body, which means his lawful issue, his children, and through them to his grandchildren in a direct line, so long as his posterity endures in a regular order and course of descent; and upon the extinction of such issue, the estate determines." Washburn on Real Property, supra. An estate tail may be created by definite and express words, or it may be by construction or implication. An estate tail created by construction or implication, said Mr. Chief Justice PETERS, in *Richardson* v. *Richardson*, supra, is one "where the testator's meaning is not declared in express terms, but is fairly and clearly enough to be inferred from what he does say." Mr. Washburn by way of illustration says:—"An instance of an estate tail by construction, where there is no direct limitation to the heirs of the donor's body, would be an estate to A, with a proviso that if he shall die without heirs of his body, the property shall revert to the donor, or go over to one in remainder." Wash. on Real Prop., supra. The reason of the rule in cases of constructive estates tail is said to be that the language used implies an intention of the testator that the issue of the first taker should take the estate, after their father, as heirs of his body, and that the devise over should not take effect until the indefinite failure of such issue.

If the clause we are now considering creates an estate tail, it must be so by implication or construction; one certainly is not created by definite and express words. But this of itself is no objection; for as stated in *Richardson* v. *Richardson*, supra, the former are "much more common." And it may be conceded that similar language in a devise has been held to create a constructive estate tail. If we should assume that this deed is to be construed by the same rules as are applicable in construing wills, and by which estates tail are held to be created in devises by implication, that would not necessarily decide the question. The intention of the testator as legally ascertained is to govern. The implication may be rebutted. *Whitcomb* v. *Taylor*, 122 Mass. 243; *Schmaunz* v. *Goss*, 132 Mass. 141; *Pratt* v. *Alger*, 136 Mass. 550; *Trumbull* v. *Trumbull*, 149 Mass. 200. In *Richardson* v. *Noyes*, 2 Mass. 56,

we find the following language: "If, by the devise to the 'survivor or survivors' he [the testator] meant that he or they should take, whenever there should be an indefinite failure of issue, and not till then, however distant that period might be, then he intended a fee tail; and, if by this expression, he contemplated events that were to take place in the lifetime of the devisees, then he did not intend a fee tail." So in *Hooper* v. *Bradbury*, 133 Mass. 303, the language under consideration was the following devise: "The part coming to Eliza, I wish placed in trust, and at her decease, if she leaves no children, paid to her sister Mary Susan." The court said: "It was the definite failure of children, at the decease of Eliza, and not the indefinite failure of issue, that the testator had in mind, and it was at the decease of Eliza that the limitation over to Mary Susan was to take effect, if at all."

It will be observed, however, that the illustrations we have selected are all cases involving the construction of devises. So are the authorities cited by the plaintiff.

Our attention has been called to no case of a deed, and we have been able to find none, in which it has been held that an estate tail was created by implication.

That there is none results in part from the ordinary mode of creation of an entail, and in part from the difference in the rules of construction as applicable to deeds on the one hand, and to devises on the other. The purpose of an entail is to regulate and limit in a particular manner the descent of property from father to son, from generation to generation, to keep property in the same line of descent through successive generations, and this is, and always has been, accomplished usually by means of wills and family settlements.

To be sure, entails can be created by deed, by the use of express and definite terms, but we are speaking here of entails by construction. The distinction between wills and deeds in this particular is noted by Mr. Washburn, in the following language: "In a will, the testator may use the word "children" as meaning heirs of the body; possibly a grantor may do this, but his intention must be clearly shown. 2 Wash. Real Prop. *274.

Blackstone after saying (of grants,) that "as the word heirs is necessary to create a fee, so in further limitation of the strictness of the feodal donation, the word body, or some other words of procreation are necessary to make it a fee tail, and ascertain to what heirs in particular the fee is limited," added, "If, therefore, either the words of inheritance, or words of procreation be omitted, albeit the others are inserted in the grant, this will not make an estate tail. As, if the grant be to a man and the issue of his body, to a man and his seed, to a man and his children or offspring; all these are only estates for life. . . . . Indeed, in *last wills and testaments*, wherein greater indulgence is allowed, an estate tail may be created by a devise to a man and his seed, or to a man and his heirs male, or by other irregular modes of expression." 2 Black. Com. 115. So in discussing the difference in the rules of construction between wills and deeds, Blackstone further says in the same volume at page 381, that one rule is "that a devise be most favorably expounded to pursue if possible the will of the devisor, who for want of advice or learning may have omitted the legal or proper phrases. And, therefore, many times the law dispenses with the want of words in devises that are absolutely required in all other instruments. Thus a fee may be conveyed without words of inheritance, and an estate tail without words of procreation. By will, also, an estate may pass by mere implication, without any express words to direct its course." We hold, therefore, that an estate tail was not created by the deed.

It is our duty to give effect to the intention of the grantor, James McIntosh, if we can do so without violating legal principles. *Lincoln* v. *Wilder*, 29 Maine, 169; *Moore* v. *Griffin*, 22 Maine, 350. We think it can be done. He granted this estate to Stephen his "heirs and assigns forever." The habendum of the deed is to the same effect. As held in *Watson* v. *Cressey*, supra, the grant took effect as a vested remainder in Stephen. But the estate was determinable. We think it was the intention of the grantor, that Stephen's estate should determine if he died without legitimate children; that it should determine upon and at the death of Stephen; that it was the definite failure of issue at that time,

and not an indefinite failure of issue which should determine the estate; and to that intention we give effect.

The result is that the estate in Stephen created by the deed was a vested remainder in fee simple determinable upon a contingency, which contingency happened, and thereupon the title vested in George, and passed from him to the defendant.

Judgment for defendant.

JOHN LEAVITT *vs.* CHARLES FAIRBANKS.

Piscataquis. Opinion March 11, 1899.

Sales. Waiver. Ratification. Estoppel.

The defendant bought a horse of a third person who was in possession of the animal, claiming to be the owner thereof, and without knowledge or notice of the plaintiff's title. The plaintiff gave no notice to the defendant of his title until seventeen months after learning of the sale, and instead of making a demand for the horse or its value, he wrote several letters to the person who had made the sale in regard to an adjustment of the matter and received four payments on account from him. In an action of trover, *held;* that the plaintiff had waived all objection to thus disposing of the horse, and had ratified and confirmed the sale.

Also; that by reason of the plaintiff's long silence when he should have spoken, if he intended to assert his claim against the defendant, the latter was thereby deprived from taking prompt measures to protect himself against loss, and the plaintiff is estopped from maintaining his action.

ON MOTIONS BY DEFENDANT.

This was an action of trover, commenced by writ, September 4, 1896, to recover the value of a mare, claimed to have been the property of the plaintiff, and alleged to have been converted by the defendant on October 31, 1894. The case was tried to a jury in Piscataquis county on the second day of the September term, 1897, and resulted in a verdict for the plaintiff, for $33.10. The case came to this court on two motions; first, a general motion for a new trial; second, on the ground of newly-discovered evidence, filed at the February term, 1898.

Defendant pleaded the general issue and filed a brief statement denying the plaintiff's title to the property.

The facts are stated in the opinion.

J. S. Williams, for plaintiff.

Defendant cannot prevail by showing title in third parties. 7 Lawson, Rights and Remedies, p. 5665, and cases; 26 Am. & Eng. Ency. p. 716 (Trover.)

One who buys property must, at his peril, ascertain the ownership; and if he buys of one who has no authority to sell, his taking possession, in denial of the owner's right, is a conversion. *Miller* v. *Thompson*, 60 Maine, 322; *Gilmore* v. *Newton*, 9 Allen, 171; *Webber* v. *Davis*, 44 Maine, 147; 7 Lawson, Rights & Remedies, p. 5689, and citations; and it is no answer that the purchaser believed in good faith that the seller was the owner. *Porter* v. *Foster*, 20 Maine, 391; *Baker* v. *Page*, 11 Maine, 381.

Purchasing a horse from one in good faith, who had no right to sell him, and subsequently exercising dominion over him will amount to a conversion, and no demand by the owner is necessary before commencing an action therefor. *Gilmore* v. *Newton*, 9 Allen, 171.

A. M. Goddard; *J. Williamson, Jr., and L. A. Burleigh*, for defendant.

Estoppel: *Pickard* v. *Sears*, 6 Ad. & E. 469; Roberts on Frauds, p. 130; Bigelow on Estoppel, (5th ed.) p. 556; *Hope* v. *Lawrence*, 50 Barb. 258; *Turner* v. *Kennedy*, 58 N. W. Rep. 823.

It is not incumbent upon the defendant in this case to show that the plaintiff intended to work any hardship upon the defendant by his long continued silence. "It is not necessary to an equitable estoppel that the party design to mislead." *Bank* v. *Hazard*, 30 N. Y. 226,

"Where one assumes to act for another without authority, and makes a contract disposing of his property, if the latter, with a knowledge of what has been done, ratifies the contract, it will bind him, and a ratification may be shown by his acts, notwithstanding, he expressly declared he would not sanction it." *Hatch* v. *Taylor*, 10 N. H. 538.

"A vendor must exercise his right of election to affirm or disaffirm a fraudulent sale within a reasonable time after the discovery of the fraud, and before the rights of innocent third parties become involved." *Cullum* v. *Casey*, 9 Porter, 131, (33 Am. Dec. 305, and cases there cited.)

New trial: *Putnam* v. *Woodbury*, 68 Maine, 58. In this case the newly-discovered evidence was within the knowledge of the plaintiff and he suppressed it. Counsel also cited: *Strout* v. *Stewart*, 63 Maine, 227.

Defendant may disprove plaintiff's title by showing a paramount title in a stranger, or otherwise; or he may prove facts showing a license; or a subsequent ratification of the taking, etc., 2 Greenl. Ev. (15th ed.) § 648, and cases.

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

WHITEHOUSE, J. The verdict in this case is manifestly wrong. It was an action of trover for the conversion of a horse. The verdict was for the plaintiff, and the case comes to this court on a motion to set it aside as against the evidence, accompanied by a second motion for the same purpose based on newly-discovered evidence.

The defendant purchased the horse in good faith of Corydon A. Sawyer, of Vienna, the husband of the plaintiff's niece. The plaintiff resided in Guilford, and in August, 1894, owned the mare in question, but allowed Sawyer to take her to Vienna, as he says, to keep until the following May, to be returned "all sound and smooth as she was then . . . . or money to make her so."

On the twelfth day of November following, Sawyer being still rightfully in possession of the mare, and claiming to own her, sold and delivered her to the defendant, who had no knowledge of the plaintiff's title, and no reason to suspect it. The plaintiff learned of the sale in January following, but gave the defendant no notice of his title until June 20, 1896, nearly seventeen months afterwards. In the meantime instead of making a demand upon the

defendant for his horse or the value of her, the plaintiff wrote several letters to Sawyer in regard to an adjustment of the matter, and received from him four payments amounting in the aggregate, according to the plaintiff's own admission, to at least $45, on account of the horse.

From this evidence of the plaintiff's conduct, considered in the light of the relationship and friendly feelings between Sawyer and himself, the inference is irresistible that he waived all objection to the act of Sawyer in thus disposing of the horse and intended to ratify and affirm the transactions and rely upon Sawyer for payment. Furthermore, by reason of the plaintiff's long silence when he should have spoken, if he intended to assert his claim against the defendant, the latter was deprived of the opportunity to take prompt measures to protect himself against loss, and the doctrine of estoppel can now equitably be invoked for the defendant's protection.

But the newly-discovered evidence strikingly illustrates the strength of the presumptive evidence above relied upon, and the wisdom of the doctrine of equitable estoppel. The defendant finally succeeded in obtaining the testimony of Sawyer, who was out of the state at the time of the trial, together with the plaintiff's letter to Sawyer in relation to the mare:—and for failure to obtain this evidence at the trial neither the defendant nor his attorneys appear to be chargeable with a want of reasonable diligence.

According to Sawyer's testimony it was distinctly understood between the plaintiff and himself when he took the mare to Vienna, that he should sell her for the plaintiff if he had a chance; and this testimony is confirmed by the plaintiff's own letter to Sawyer of October 7, 1894, in which he expressly authorized Sawyer to "trade the mare into a larger pair," and pay the plaintiff what would be satisfactory to Sawyer. It also appears from the plaintiff's letters to Sawyer on December 8, 1894, and April 23, 1895, that he fully and effectually ratified the sale of the mare to the defendant Fairbanks and accepted Sawyer as paymaster, after he had received definite knowledge of the terms of that sale.

Upon this evidence it is clear that the plaintiff's action against Fairbanks for the conversion of the horse is not maintainable, and it would be gross injustice to allow this verdict against him to stand.

The entry must therefore be,

Motion sustained.

CHARLES O. EMERY *vs.* INHABITANTS OF SANFORD.

York. Opinion March 11, 1899.

Taxes. Assessment. Omission. Remedy. R. S., c. 6, § 142; c. 77, § 6; R. S., 1841, c. 14, § 88.

Section 142 of chapter 6 of the revised statutes provides that no error, mistake or omission of assessors of taxes shall render their assessment void, but gives to the taxpayer a right of action to recover any damages which he has sustained by reason of such mistakes, errors or omissions.

Held; that the word "omission" in this statute was intended to signify an absence of the requisite formalities in assessments and commitments, and a failure to observe the regulations of the statute which were intended to promote system and uniformity in the mode of proceeding; and that it is not to be extended so as to apply to cases of omission to include in the assessment all the property which ought to be taxed.

Among the adequate remedies, which are available for property owners to secure equal and legal taxation, is that prescribed in section six of chapter 77, R. S., giving to this court full equity jurisdiction of all complaints relating to the unauthorized exemption of property from taxation, upon application of ten taxable inhabitants of the town.

ON EXCEPTIONS BY PLAINTIFF.

Action on the case, under R. S., c. 6, § 142, against the town of Sanford to recover special damages by reason of the failure, neglect and omission of the proper town officers to assess upon certain taxable property in that town any tax for the year of 1893, thus causing the plaintiff, as he alleged, to pay more than his just proportion of town, county and state taxes.

DECLARATION.

In a plea of the case: for that the plaintiff heretofore, to wit: on the first day of April A. D. 1889 and before that time was a citizen of the town of Sanford in said county of York, and in said town on said day and during said year, owned and enjoyed certain property the subject of taxation, and upon which, for said year he paid a tax; that in said town of Sanford during said year there was other property subject to taxation, and that upon all of said property there was assessed a tax for town purposes and for the payment of the share of said Sanford of the state and county tax, which said tax for said year of 1889 was assessed equally upon all the taxable property in said town of Sanford.

And the plaintiff alleges that heretofore, to wit: on the twenty-fourth day of August A. D. 1889, at a meeting of the voters of said town of Sanford then and there held, a certain vote was passed, to wit:

"On motion, voted to exempt from taxation for ten years or abate the taxes for ten years on any lands, buildings, machinery or stock, raw, manufactured or in the process of manufacture, anywhere in the town of Sanford which shall be constructed within five years from the date hereof. And the plaintiff alleges that thereafterward, to wit: on the first day of April, A. D. 1893, there was purchased, erected, set up, manufactured, in process of manufacture and in use, in said town of Sanford, certain land, buildings, machinery, stock raw, manufactured and in process of manufacture, the subject of taxation in said town, to wit: A certain shoe shop known as the Fogg & Vinal shop with its lands, buildings, machinery, fixtures, stock raw, manufactured and in process of manufacture of certain value, to wit: $37,500; a certain shop known as the Burleigh & Usher shop, with its land, buildings, machinery, fixtures, stock raw, manufactured and in process of manufacture of a certain value, to wit, $20,000; and the land, buildings, machinery, fixtures, stock raw, manufactured and in process of manufacture of the Goodall Worsted Company of a certain value, to wit: $500,000; all of said property being of a certain value, to wit: $557,500; upon which said property there

should have been assessed a tax proportionally in common with all the other taxable property in said town of Sanford.

Nevertheless, the plaintiff alleges the said defendant, by its officers thereto duly chosen and qualified, not regarding the lawful rights of this plaintiff, failed, neglected and omitted to add the said value of the said property, to wit: the said shop known as the said Fogg & Vinal shop, with its said land, buildings, machinery, fixtures, stock raw, manufactured and in process of manufacture; said shop known as the Burleigh & Usher shop with its said land, buildings, machinery, fixtures, stock raw, manufactured and in process of manufacture, and the said land, buildings, machinery, fixtures, stock raw, manufactured and in process of manufacture of the Goodall Worsted Company, to the value of the other said taxable property in said town in establishing a basis of taxation in said town for said year for the purpose of raising money for lawful town purposes and for the payment of the said town's proportional part of the state and county tax for said year; and failed, neglected and omitted to assess upon said property a tax proportionally equal to the tax assessed upon the said other taxable property in said town, and neglected and omitted to assess upon said Fogg & Vinal property, said Burleigh & Usher property, and said Goodall Worsted Company's property any tax, but unlawfully exempted said property from any tax in said town for said year.

And the plaintiff alleges that the tax upon his said property in said town for said year 1893, as returned to the collector of taxes for said town for said year, was a certain sum, to wit: $138.14, which sum he alleges, was not the amount fairly and justly due as his tax for said year 1893, but that his said tax, but for said neglect, failure and omission, should have been a certain sum, to wit: $95.38, and that the said increase in the amount of his said tax was by reason of the unlawful exemption aforesaid of said property from taxation, the omission aforesaid to assess upon said property a just proportion of the said tax for said town for said year, and the unequal assessment of the entire tax aforesaid upon the remaining taxable property in said town. And the plaintiff alleges that heretofore, to wit: on the 17th day of September A. D. 1895, he paid to the selectmen

of said town for said year 1895 the said sum of $138.14 and that he then and there protested against the payment of same on account of the said errors, mistakes and omissions of said officers in the said unequal assessments of said taxes in said town for said year 1893, and the exemption aforesaid; and that he paid sum under protest for said reasons. And the plaintiff alleges that by reason of the said errors, mistakes and omissions of said town by its said officers and the payment of said sum as aforesaid, he has sustained great injury and damage, to wit: to the damage, as he says, the sum of three hundred dollars, and that an action has accrued to him to have and recover of the said defendants said sum.

The defendant town filed a general demurrer to the declaration which the presiding justice sustained. To this ruling the defendant took exceptions.

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

There is no provision of law by which the town can exempt. But the assessors omitted to tax such property as is described in the writ. When the town attempts to do this, or the assessors, by reason of mistake, error or omission fail to do their duty, § 142 of c. 6 provides a remedy. This court has held in *Hayford* v. *Belfast*, 69 Maine, 63 (65) that "errors or omissions of the assessors do not affect the tax, but having paid that, he is entitled to an action . . . not to recover his money back," but for his "damages sustained by reason of such errors or omissions," citing this statute.

In *Rogers* v. *Greenbush*, 58 Maine. p. 292, referring to this same section, the court says "the apparent intent of the section is . . . . to leave the party, as to errors, mistakes and omissions by the town officers, to his action in the case for his special damages." In *Gilman* v. *Waterville*, 59 Maine, p. 493, "for such errors no action can be sustained against the town except as provided in R. S., ch. 6, § 114, [now § 142.] Under that provision, if the plaintiff has suffered damage by reason of the mistakes, errors or omissions of the assessors, etc., the tax is not void but he may recover such damages in a proper action against the town." In *Smith* v. *Readfield*, 27 Maine, 145, the court is of opinion that

where a person pays a tax under the circumstances set forth in the case at bar, he should make such payment under protest.

Inasmuch as the value of this exempted property went to make up the state valuation of the town of Sanford, it was illegal for the town to pass a vote exempting this property from the payment of its due proportion of the state and county tax, because such a vote carried into effect made this plaintiff pay a proportion of the tax which was really due from, and should have been borne by, this exempted property. And further, the value of this exempted property should have paid its due proportion of the tax for lawful town purposes. It was illegal for the town to vote (in substance) that this plaintiff should pay, in addition to his own tax, a proportional part of the amount this exempted property should have paid.

But, whatever the town did, the statute makes it the plain duty of assessors to assess upon all property, not by law exempt, its due proportion of all taxes; and when they omit to do this section 142 gives a remedy. The action should not be for money had and received, but an action for special damages.

G. W. Hanson, for defendant.

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

WHITEHOUSE, J. In this action the plaintiff, a taxpayer in the defendant town, seeks to recover damages alleged to have been sustained by him in consequence of the omission of the assessors to include in their assessment a large amount of property belonging to other persons which was legally liable to taxation in the defendant town. At the return term of the writ the defendants filed a general demurrer to the declaration, and the case comes to this court on exceptions to the ruling of the presiding judge, sustaining the demurrer.

The plaintiff contends that his action is maintainable under the provisions of section 142 of chap. 6, R. S., which are as follows: "If money not raised for a legal object, is assessed with other moneys legally raised, the assessment is not void; nor shall any error, mis-

take or omission by the assessors, collector or treasurer, render it void; but any person paying such tax, may bring his action against the town in the supreme judicial court for the same county, and shall recover the sum not raised for a legal object, with twenty-five per cent interest and costs, and any damages which he has sustained by reason of the mistakes, errors or omissions of such officers."

In view of the mischief obviously designed to be prevented and the object sought to be accomplished by this statute, it is the opinion of the court that it is not fairly susceptible of the interpretation contended for by the plaintiff; and that it could never have been intended to authorize an action for damages by every taxpayer in the town, for failure of the assessors to reach and include in their assessment all the taxable property in the town. It was evidently the primary purpose of this enactment to provide that assessments of taxes should not be vitiated by mere errors, mistakes and irregularities on the part of assessors in making their assessments and commitments. Prior to the enactment of this statute it had been held that the omission of the assessors, through error of judgment or mistake of law, to tax any particular individual who might be liable to taxation, did not render the whole tax illegal and void. *Williams* v. *Sch. Dist., in Lunenburg*, 21 Pick. p. 81; and it has repeatedly been so held since that time. *Watson* v. *Princeton*, 4 Met. 599; *Dover* v. *Maine Water Co.*, 90 Maine, 180. Since the passage of the act in question (see R. S., 1841, ch. 14, § 88) it has been the avowed policy of the law to insure the collection of the tax and to place upon the taxpayer the burden of showing that he has actually suffered damage by reason of any failure of the assessors to observe the directions given as to the manner of the assessments. *Boothbay* v. *Race*, 68 Maine, 351. The word "omission" in this statute should be considered in connection with the words "error" and "mistake" which precede it, and be interpreted with reference to the rule of ejusdem generis. It was intended to signify an absence of the requisite formalities in assessments and commitments, and a failure to observe the regulations of the statute which were intended to promote method, system and

uniformity in the mode of proceeding. It was clearly never in the contemplation of the legislature that it would be extended to apply to cases of omission to include in the assessment all the property which ought to be taxed. As observed by the court with reference to the analogous question in *Dover* v. *Maine Water Co.*, 90 Maine, supra: "The consequences of such a doctrine are enough to condemn it." There is scarcely an assessment in the state that would not be open to assault for some such omission of property, either accidental, or otherwise, and suits for damages in behalf of dissatisfied taxpayers would multiply with vexatious rapidity. No authority cited by the plaintiff's counsel supports such a doctrine. In every case cited by him in which reference is made to a right of action under this statute, the question turns upon an "omission" of the requisite formalities in the assessment or commitment of the taxes and in no instance upon an "omission" to tax all the property which ought to be taxed.

Among the adequate remedies, however, which are available to property-owners and taxpayers to secure equal and legal taxation, is that prescribed in paragraph 9 of Sec. 6, Ch. 77, R. S., in which, on application of not less than ten taxable inhabitants of a town, full equity jurisdiction is conferred upon this court to hear and determine all complaints relating to any unauthorized votes of such town to raise money by taxation or to exempt property therefrom. But upon the facts stated in the present declaration, this action is not maintainable and the demurrer was properly sustained.

Exceptions overruled.

EMILY A. GOODWIN *vs.* DANIEL C. NORTON.

York. Opinion April 1, 1899.

Deed. Alteration. Evidence. Estoppel. Disseizin.

George M. Freeman, at one time the owner of the demanded premises, conveyed them, in fraud of his own creditors, to his son Gersham. Later, the father and son joined in a deed of the same to one Asahel Goodwin. Still later, Asahel Goodwin, in the presence of George M. Freeman, and with his consent, erased his own name as grantee from the deed, and inserted in place thereof the name of Harriet, his wife. The deed had not then been recorded, but was recorded after the alteration, in 1870. Gersham the son was not present when the deed was altered, and it does not appear that he ever knew of the alteration. Harriet was not then present, nor did she at the time have knowledge of the transaction. Afterwards, in 1879, the premises were attached as the property of Asahel, and by levy and deed the demandant claimed that the title had come to her. Harriet conveyed to the tenant in 1894, by deed of gift.

Held; (1) that by the evidence in this case, title by disseizin is not shown in either party as against the other; (2) that the testimony of George M. Freeman, one of the grantors, is admissible to show the alteration in the deed; (3) that the alteration was ineffectual to vest the title in Harriet; (4) that the demandant claiming under Asahel Goodwin, is not estopped to set up title against the tenant, claiming under Harriet.

ON REPORT.

This was a real action brought to recover possession of a lot of land with the buildings thereon, situated in the village of Cape Neddick, in the town of York. Plea, general issue.

The plaintiff introduced evidence to show that on the 20th day of October, 1869, Gersham C. Freeman and George M. Freeman by warranty deed conveyed the premises in dispute to Asahel Goodwin; but not recorded until after alteration. The defendant contended that the deed was made running to Harriet Goodwin, wife of Asahel. The plaintiff claimed that in 1870 Asahel Goodwin went to Chester, N. H., where the Freemans were then living, and in the absence of Gersham, told George that he was in difficulty, and wanted to change the deed; and in the

presence of George, took the deed from his pocket and erased his name as grantee, and inserted the name of his wife, Harriet Goodwin; and that Gersham knew nothing of this change and never consented to it. When Asahel returned from Chester he caused the deed to be recorded, which showed the title in his wife Harriet. Before this transaction, judgment had been recovered against Asahel Goodwin in the U. S. Court at New York for the sum of $29,410 debt or damage, and $182.12 costs of suit. This judgment was recovered in May, 1868, and suit was brought on that judgment in the U. S. Circuit Court, District of Maine, returnable to the April term, 1871, and judgment was rendered for the plaintiff for the sum of $26,395.24 debt or damage, and $107.33 costs of suit. Execution did not issue until August 26, 1879. On the 14th day of July, 1879, John Goodwin, a brother of Asahel, brought suit in the Supreme Judicial Court of this state and an attachment of Asahel's real estate was made and duly recorded. The plaintiff, John Goodwin, at the January term, 1880, of the Supreme Judicial Court recovered judgment against Asahel for the sum of $1,241.48 debt or damage, and $11.75 costs of suit. Judgment was recovered on the 6th day of February, 1880, and on the 25th day of the same month the premises in dispute were levied upon as the property of Asahel, and set off to John Goodwin, the creditor, on the 28th day of February, 1880.

Emily Goodwin, the plaintiff in this action, and sister to John and Asahel Goodwin, offered further evidence showing that at the solicitation of Asahel Goodwin, on the 9th day of June, 1881, she purchased the premises from John Goodwin, and paid him $1,000. There were present at the time John and Asahel Goodwin, Nathaniel Marshall, the attorney of Asahel, and Mrs. Emily Goodwin. Asahel's wife was in and out of the room where the business was being transacted, the business being done in the house upon the premises, where Emily was living with Asahel and his wife, Harriet.

Asahel died in 1883. Emily and Harriet, Asahel's wife, continued to live upon the premises until Harriet's death in July, 1896, except in winters, when they both went to visit relatives.

December 27, 1894, Harriet Goodwin, while on a visit to Daniel C. Norton, the defendant, made a will giving to said Norton all her property, and appointing him executor of her will; at the same time she executed and delivered to said Norton a warranty deed of the premises, which deed was not recorded until July 9, 1896, two days after Harriet's death, and about nineteen months after it was delivered. There was evidence that no consideration was paid for the deed to Norton. Immediately after the death of Harriet the defendant took possession of the premises.

The contentions of the defendant and other facts are stated in the opinion.

Geo. F. and Leroy Haley; Josiah Chase; for plaintiff.

1. The deed having been delivered to Asahel Goodwin, he having paid the consideration, he being named therein as grantee, the title passed to him, and the alteration of the deed without the consent of all the grantors, did not divest him of his title. *Bartlett* v. *Thorndike*, 1 Maine, 70; *Hall* v. *McDuff*, 24 Maine, 311; *Howe* v. *Wilber*, 51 Maine, 226; *Bassett* v. *Bassett*, 55 Maine, 127; *Chessman* v. *Whittemore*, 23 Pick. 231; *Kendall* v. *Kendall*, 12 Allen, 92.

2. If the change of the grantee's name in the deed without the consent of Gersham, could pass the title to Harriet, in this case, if Asahel was insolvent, it was a fraudulent transfer, as the debt for which the judgment of John Goodwin was entered, was due at that time, and the Cartwright judgment was in full force, showing that his indebtedness was at that time at least $30,000. The land could be levied upon as Asahel's. R. S., (1871) c. 76, § 13.

Norton, the defendant, claims under Harriet Goodwin by gift. The evidence shows that Asahel Goodwin and John Goodwin took plaintiff's money and deeded her this property. Harriet Goodwin, under whom defendant claims, was in and out of the room. She must have known that plaintiff was buying these premises. When she deeded to Norton, they did not place the Norton deed upon record, nor did they until two days after her death, for fear that the plaintiff would learn of it. Harriet knew the plaintiff was

purchasing this property; she saw her pay $1,000 for the property; she and those claiming under her, without consideration, are estopped to deny her title. *Chapman* v. *Pingree*, 67 Maine, 198.

H. H. Burbank and J. C. Stewart, for defendant.

Parol testimony is inadmissible to contradict deed: *Kimball* v. *Morrell*, 4 Greenl. 371; *Richardson* v. *Field*, 6 Greenl. 305; *Clark* v. *Waite*, 12 Mass. 439; *Jewett* v. *Persons unk.*, 61 Maine, 413; *Moses* v. *Morse*, 74 Maine, 474; *Farrar* v. *Farrar*, 4 N. H. 191.

Asahel Goodwin is estopped from setting up his own fraud; and the parties to that transaction are also estopped to deny that Harriet Goodwin paid the consideration named in the deed, in fact any part of the deed. Kerr on Fraud, p. 374; *Campbell* v. *Knight*, 24 Maine, 334; *Foster* v. *Dwinel*, 49 Maine, 48; *Davis* v. *Callahan*, 78 Maine, 320; *Trull* v. *Skinner*, 17 Pick. 215; 8 Amer. and Eng. Enc. p. 23; *Parker* v. *Crittenden*, 37 Conn. 148; *Farrar* v. *Farrar*, 4 N. H. 191; *Tomson* v. *Ward*, 1 N. H. 9.

All parties named in the deed consented to the change made, by actual participation or subsequent acquiescence, including Harriet Goodwin who had no knowledge of the alteration at the time, (so far as appears in evidence,) but who subsequently accepted the delivery of the deed recorded May 14, 1870, and was until her death in possession of the premises conveyed.

Thus is her title valid; good as between all parties until equity intervenes. *Com.* v. *Dudley*, 10 Mass. 403, and note p. 407; *Dana* v. *Newhall*, 13 Mass. 500; (a material alteration by consent is valid.) *Hewins* v. *Cargill*, 67 Maine, 555; *Tomson* v. *Ward*, 1 N. H. 9; *Farrar* v. *Farrar*, 4 N. H. 191; *Penny* v. *Corwithe*, 18 Johns. 501; *Speake* v. *U. S.* 9 Cranch, 37; *Holbrook* v. *Tirrell*, 9 Pick. 105; 1 Addison's Contr. p. 551 (citing § 388, Pigot's case); *Boston* v. *Benson*, 12 Cush. 63; *Trull* v. *Skinner*, 17 Pick. 215; 1 Greenl. Ev. § 568, a; *Master* v. *Miller*, 1 Smith's L. C. 963–5; *Smith* v. *Crooker*, 5 Mass. 538; *Chadwick* v. *Eastman*, 53 Maine 16; *Willard* v. *Clark*, 7 Met. 437; *Adams* v. *Frye*, 3 Met. 104.

These premises, having been thus conveyed to Asahel Goodwin's wife Harriet, by his procurement, even if paid for by him, cannot

be held by his heirs or assigns, nor taken as his property by subsequent creditors. R. S., (1857) c. 61, § 1; R. S., (1883) p. 524; *Spring* v. *Hight*, 22 Maine, 408; *Johnson* v. *Stillings*, 35 Maine, 428; *Davis* v. *Herrick*, 37 Maine, 398; *Winslow* v. *Gilbreth*, 50 Maine, 93; *Low* v. *Marco*, 53 Maine, 45; *Holmes* v. *Farris*, 63 Maine, 318; *Call* v. *Perkins*, 65 Maine, 442; *French* v. *Holmes*, 67 Maine, 195; *Hilton* v. *Morse*, 75 Maine, 258; *Merrill* v. *Jose*, 81 Maine, 23; *Berry* v. *Berry*, 84 Maine, 541; *Danforth* v. *Briggs*, 89 Maine, 319.

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

SAVAGE, J. Real action. At one time, George M. Freeman was the owner of the demanded premises. "To protect himself from his creditors," he conveyed them to his son Gersham C. Freeman. Later the father and son joined in a deed of the same to Asahel Goodwin, who went into possession. At a still later date, as appears by the testimony of George M. Freeman, Asahel Goodwin took this last named deed, which had never been recorded, to George M. Freeman, who was one of the grantors, and said he "had got into difficulties, and would like to alter it." Thereupon, in the presence of this grantor, he erased his own name, "Asahel," from the deed, and inserted in its place the name of "Harriet," his wife. Harriet was not present, and it does not appear that she, at that time, had any knowledge of the transaction. This deed in its altered form was recorded May 14, 1870, and has since become lost. On July 14, 1879, the premises were attached as the property of Asahel Goodwin in the suit of John Goodwin, who subsequently levied upon the same. No objection is raised to the regularity of the levy. John Goodwin conveyed to the demandant in 1881. Harriet Goodwin conveyed to the tenant in 1894, and he is now in possession.

Asahel Goodwin and his wife Harriet, and his sister Emily, the demandant, lived together upon the premises for many years, and we think there is not sufficient evidence upon which to base a title

by disseisin in either Harriet or Emily as against the other. In fact, neither party seriously claims it.

The first point made by the tenant is that the testimony of George M. Freeman, one of the grantors, is inadmissible to show the alteration in the deed. We think otherwise. His testimony does not tend to vary or contradict or avoid the deed which he made. It serves rather to show exactly what that deed was. Nor do his statements come within the rule excluding declarations, to which the tenant has cited several authorities. His statements are found in his sworn testimony. They are not declarations. They support the original deed, and prove that Asahel was the grantee named therein.

Furthermore, the tenant contends that the effect of the alteration in the deed, and the acceptance of it in its altered form by Harriet, was to vest the title in her. We do not think so. It is unnecessary to inquire what might have been the effect if all of the parties to the unrecorded deed had consented to the alteration and to the delivery to Harriet. Such is not this case. Prior to the execution and delivery of the deed to Asahel, the title was in Gersham C. Freeman. Although it had been conveyed to him by his father to defraud the latter's creditors, still, as against his father, his title was absolute. He alone could convey.

It does not appear that Gersham, the essential grantor, ever consented to the alteration, or even knew of it. It seems clear to us that without his consent, no alteration by the grantee could have been effectual to vest the title in Harriet. She therefore took no title by grant from Gersham. The alteration was ineffectual. We think the rule is as stated by Mr. Greenleaf: "If the grantee of land alter or destroy his title deed, yet his title to the land is not gone. It passed to him by the deed; the deed has performed its office as an instrument of conveyance, and its continued existence is not necessary to the continuance of the title in the grantee; but the estate remains in him until it has passed to another by some mode of conveyance recognized by the law." 1 Greenl. on Evidence, § 568.

Lastly, the tenant insists that the demandant, claiming under

Asahel, is estopped to set up a title against those claiming under Harriet. If we assume that Harriet had no knowledge that the deed ran originally to Asahel and had been altered by inserting her name as grantee instead (an assumption not supported by any great degree of probability under the circumstances of this case,) still we think the tenant cannot be aided by the doctrine invoked. There is no proof that Harriet was deceived, or misled, or prejudiced by the conduct of Asahel. There is no proof that she did any act in consequence of it, or any act whatever with reference to the premises, except to continue to live upon them with Asahel, her husband. There is no proof nor presumption that she paid any part of the consideration for the original conveyance, nor that she paid any consideration for the attempted transfer to herself. The transactions were without consideration, so far as she was concerned. There is an entire lack of some of the essential elements of an equitable estoppel. The tenant stands in no better position than Harriet, his grantor. He is merely her donee. He took only such title as she had.

It is the opinion of the court that the title to the demanded premises remained in Asahel, notwithstanding the alteration of the deed, and passed by levy from him to John Goodwin, and from John to the demandant.

Judgment for demandant.

JOHN C. SMALL, Appellant, *vs.* GEORGE E. THOMPSON.

Cumberland. Opinion April 4, 1899.

Will. Life Estate with power of disposal. Accounting. Exceptions.

A testator devised and bequeathed to his widow, for her life, all of his estate after the payment of debts, funeral expenses and the charges of administration, with a power of disposal of the same as she might deem necessary, the remainder to his children and their heirs. She was also named as executrix of the will. This life estate with power of disposal was repeated afterward and expressly confirmed by a codicil of the testator.

After the death of the widow, she having survived the testator some ten years, her executor presented to the probate court her account as executrix, which was objected to by the appellant, the administrator de bonis non of the estate of the testator, with the will annexed. Upon a hearing in the probate court the executrix was charged with the sum of $12,215.75. She was credited with items amounting to $1484.53 for debts of the testator, expenses of his last sickness and funeral and with certain charges of administration. She was also credited with a large number of items aggregating $10,320.25 for expenses incurred and paid by the executrix for her own support, comfort and use. Items amounting to $4223.27 for taxes and repairs upon the real estate of the testator were also allowed to the credit of the executrix, and she was credited with a certain amount for depreciation of household goods and of bonds and with other allowances, so that in the account as finally settled and allowed in the probate court, she was credited in all with the sum of $18,163.37, leaving a balance in favor of the deceased executrix of $5947.62.

From the allowance of this account an appeal was taken by the administrator de bonis non with the will annexed, and at the hearing in the Supreme Court of Probate the court held that the will and codicil gave to the widow a life estate in all the property of the testator after payment of debts, funeral expenses and charges of administration, with a power of sale and disposal thereof as she might choose; and that at her decease any property of the testator remaining in her hands goes to his heirs at law; and that any personal property so remaining should be delivered to his administrator de bonis non for that purpose. The court found that at the time of the death of the executrix there remained in her hands, undisposed of, certain articles of personal property, enumerated in the decree, which were a portion of the estate of the testator.

The Supreme court of Probate also made a decree in which the appeal was sustained, the decree below reversed and the cause remanded to the probate court to proceed in accordance with the decree as follows: "So as to

charge the appellee with the personal property above enumerated which may be subjected to the charges of administration not actually paid by the executrix in her lifetime and then paid or delivered to the administrator of the testator, Horatio N. Small, de bonis non, by him to be applied to the payment of the debts of said Harriet N. Small (the deceased widow) and her funeral expenses, the charges of administration and then distributed among the heirs at law of said Horatio N. Small (the testator,) as provided in his will."

Upon exceptions to this decree *held;* that the principle which should control the settlement and allowance of this account depended upon the will of the testator and the construction placed thereon, and that the Supreme Court of Probate could not have passed intelligently upon the questions before it on appeal without first ascertaining, by a construction of the will, the rights of the devisees thereunder; and that nothing further was done by the court in this respect than was necessary for that purpose:

That under the will and codicil the widow took a life estate with an unlimited power to dispose of any portion of it "for her benefit, so far as she may deem necessary." That she was the absolute judge of the necessity, but that this power of disposal must be exercised during the enjoyment of the life estate, except to the extent, because of the provision in the will, of the payment of debts owing by the life tenant at the time of her death, and her funeral expenses:

That the objection of the appellee to the finding of fact by the justice presiding at nisi prius, who heard the appeal without a jury, as to the existence in specie of certain articles of personal property belonging to the estate of the testator, is not open to the appellee upon his exceptions.

That the decree is sufficiently definite to determine the rights of all persons affected by it.

Held; that the deceased executrix by the decree is not made chargeable with any portion of the estate of the testator which she had disposed of during her life, as she had a right to under the will, but only with such articles of personal property belonging to the estate of the testator as the court found had been undisposed of by her and which remained in specie at the time of her death; and the only duty to be performed by her personal representative, according to the decree, is to account for such articles. This duty and its extent is clearly expressed in the decree.

ON EXCEPTIONS BY APPELLEE.

Exceptions by the defendant appellee to a decree of the Supreme Court of Probate, sustaining an appeal from the allowance of an account by the probate court, for the county of Cumberland.

The appeal arose in the following manner: Dr. Horatio N. Small, a resident of Portland, died in 1887, testate, possessed of certain real and personal property, and of certain life insurance policies. His will was duly probated in the county of Cumberland, and his

widow, Harriet N. Small, nominated therein as executrix, was appointed by the court to that office, and seasonably filed an inventory of the estate. Mrs. Small survived her husband ten years, dying in April, 1897, never having filed any account as executrix, and never having taken any other proceedings in the probate court with reference to this estate. The appellant was then appointed administrator de bonis non, c. t. a. Mrs. Small nominated in her will, which was duly proved and allowed, George E. Thompson, the appellee, to be executor, and he took possession of all property which had belonged to Mrs. Small, and of all personal property which then remained of the estate of Horatio N. Small. On the twenty-seventh day of November, 1897, Mr. Thompson filed in the probate court an account of his testatrix as executrix of Horatio N. Small. A hearing was had thereon, and the account with some amendments thereto, was allowed by the probate court. To the decree of the probate court allowing this account, the appellant appealed to the Supreme Court of Probate, and after a hearing thereon at the April term, 1898, of said court, the appeal was sustained. The case came before the law court upon exceptions by the appellee to the decree of the Supreme Court of Probate sustaining the appeal. This decree is stated in the opinion.

Richard Webb, for plaintiff appellant.

Counsel cited: *Manning* v. *Devereux*, 81 Maine, 560; *Jones* v. *Bacon*, 68 Maine, 34; *Taylor* v. *Brown*, 88 Maine, 56; *Stuart* v. *Walker*, 72 Maine, 145; *Copeland* v. *Barron*, 72 Maine, 206; *Welsh* v. *Woodbury*, 144 Mass. 542; *Hall* v. *Otis*, 71 Maine, 326; *Hatch* v. *Caine*, 86 Maine, 283; *Ford* v. *Ticknor*, 169 Mass. 276.

Clarence W. Peabody, for appellee.

The finding that there remained in the hands of the executrix at the time of her death certain bonds and chattels belonging to the estate of Horatio N. Small is erroneous.

1. It erroneously assumes as matter of law that, because the property was in esse and was in the hands of Harriet N. Small at the time of her death, it was the property of the estate of Horatio N. Small; on the contrary it belongs to the estate of the deceased

executrix by reason of payments and advancements properly made by her in excess of the total value of the personal estate with which the law charged her. 1 Williams on Ex'rs, 572, 573; Schouler, Ex'rs & Adm'rs, § 243; *Munroe* v. *Holmes*, 13 Allen, 109; *Foster* v. *Bailey*, 157 Mass. 160; *Woods* v. *Ridley*, 27 Miss. 119; *Watson* v. *McClanahan*, 13 Ala. 57; *Matter of Bolton*, 146 N. Y. 257; *Pettingill* v. *Pettingill*, 60 Maine, 411.

2. Even if it is determined that the executrix was not justified in making such payments and advancements, she was certainly authorized to deliver the property to herself as beneficiary or legatee under the will which would equally complete the administration. *Pierce* v. *Stidworthy*, 79 Maine, 234.

The construction given to the will of Horatio N. Small by the Supreme Court of Probate so far as it related to the tenure of the legatees was not material in the decision of any issue properly raised by the reasons of appeal.

1. It was not necessary to determine the nature of the bequest to the wife of the testator.

2. A construction by the equity court may be ultimately necessary to determine the title to the remaining property of the estate by deciding whether Mrs. Harriet N. Small was a life tenant or tenant in fee, and at the hearing upon the construction of the will her devisees would have a right to be heard. R. S., c. 77, § 6. *Penobscot R. R.* v. *Weeks*, 52 Maine, 456.

SITTING: EMERY, WHITEHOUSE, WISWELL, STROUT, FOGLER, JJ.

WISWELL, J. Horatio N. Small died in 1887, leaving a will by the terms of which all of his estate, after the payment of debts, funeral expenses and the charges of administration, was devised and bequeathed to his widow for her life with a power of disposal for her benefit as she might deem necessary, and the remainder to his children and their heirs. She was also named as executrix of the will.

After the death of Harriet N. Small, the widow, in 1897, her executor, the appellee, presented to the probate court her account as executrix, which was objected to by the appellant, the administrator de bonis non of the estate of Horatio N. Small, with the will annexed. Upon a hearing in the probate court the executrix was charged with the sum of $12,215.75. She was credited with items amounting to $1,484.53 for debts of the testator, expenses of his last sickness and funeral and with certain charges of administration. She was also credited with a large number of items aggregating $10,320.25 for expenses incurred and paid by the executrix for her own support, comfort and use. Items amounting to $4,223.27 for taxes and repairs upon the real estate of the testator were also allowed to the credit of the executrix, and she was credited with a certain amount for depreciation of household goods and of bonds and with other allowances, so that in the account as finally settled and allowed in the probate court she was credited in all with the sum of $18,163.37, leaving a balance in favor of the deceased executrix of $5,947.62.

From the allowance of this account an appeal was taken by the administrator de bonis non with the will annexed, and at the hearing in the Supreme Court of Probate the court held that the will and codicil gave to the widow a life estate in all the property of the testator after payment of debts, funeral expenses and charges of administration, with a power of sale and disposal thereof as she might choose, and that at her decease any property of the testator remaining in her hands goes to his heirs at law; that any personal property so remaining should be delivered to his administrator de bonis non for that purpose. The court found that at the time of the death of the executrix there remained in her hands undisposed of, certain articles of personal property, enumerated in the decree, which were a portion of the estate of the testator, and made the following decree: "It is therefore ordered, adjudged and decreed that the appeal be sustained and that the decree below be reversed and the cause be remanded to the probate court to proceed in accordance with this decree, viz,—So as to charge the appellee with the personal property above enumerated which may be sub-

jected to the charges of administration not actually paid by the executrix in her lifetime and then paid or delivered to the administrator of the testator, Horatio N. Small, de bonis non, by him to be applied to the payment of the debts of said Harriet N. Small and her funeral expenses, the charges of administration and then distributed among the heirs at law of said Horatio N. Small, as provided in his will."

To this decree the appellee has alleged various exceptions. It is urged by him that the Supreme Court of Probate had no jurisdiction for the construction of the will further than was necessary in determining the issues before it and that the construction of the will by the court was erroneous.

It seems to us that the principle which should control the settlement and allowance of this account depended absolutely upon the will of the testator and the construction placed thereon, and that the Supreme Court of Probate could not have passed intelligently upon the questions before it upon appeal without first ascertaining by a construction of the will the rights of the devisees thereunder. Nothing further was done by the court in this respect than was necessary for that purpose.

As to the particular construction of the will given by the court at nisi prius, we are unable to see how any other conclusion could have been arrived at. That the testator gave all of his estate, after the payment of debts, funeral expenses and charges of administration, to his widow for her life, with an absolute power of disposal for her use and benefit, and at her death and "after payment of her just debts and funeral expenses," the remainder, if any, to his children, seems to be sufficiently clear from the language of the will itself. But in order to remove any possibility of doubt the testator added a codicil in which this language was used, "but to make more clear my intention therein I declare that my will is, that the gift, bequest and devise to my said beloved wife is not to be absolute or an estate in fee but an estate for and during her natural life, with the right to dispose of the property so given, bequeathed and devised to her, by full title under the authority of the said will as therein provided, for her benefit, so far as she may deem necessary."

There can be no possible question as to the testator's intention and it is equally clear that appropriate language was used in the will and codicil to carry this intention into effect. As was said by this court in *Hatch* v. *Caine*, 86 Maine, 282: "It is settled law in this state that, under wills similar to the one now before us, the widow takes only a life estate, and that whatever remains of the estate at her decease, goes to the beneficiaries named in the will, and that a bill in equity may be maintained by the administrator de bonis non cum testamento annexo, to obtain possession of the remainder."

If an estate is given for life in express terms, it is not to be extended by implication arising from an annexed power of disposal, however unqualified. *Copeland* v. *Barron*, 72 Maine, 206.

In this case the widow took a life estate with an unlimited power to dispose of any portion of it "for her benefit, so far as she may deem necessary." She was the absolute judge of the necessity. *Richardson* v. *Richardson*, 80 Maine, 585.

But this power of disposal must be exercised during the enjoyment of the life estate, except in this case because of the provision of the will, to the extent of the payment of debts owing by the life tenant at the time of her death, and her funeral expenses. The very recent case of *Ford* v. *Ticknor*, 169 Mass. 276, is remarkably like the one under consideration. In that case the court said: "We regard the power in the present case as one only to be exercised during the active enjoyment of the life estate, and in aid of that enjoyment."

It is urged that the finding of fact by the justice presiding at nisi prius, who heard the appeal without a jury, as to the existence in specie of certain articles of personal property belonging to the estate of the testator was erroneous and unauthorized, but this objection is not open to the appellee upon his exceptions. *Manning* v. *Devereux*, 81 Maine, 560.

Again, it is said that the decree made at nisi prius was too indefinite, that it should have allowed certain items or classes of items and disallowed others, or it should have directed the judge of probate in what particulars he should require a modification of the

account. We do not think that these objections are tenable. By this decree the deceased executrix is not made chargeable with any portion of the estate of the testator which she had disposed of during her life, as she had a right to under the will, but only with such articles of personal property belonging to the estate of the testator as the court found had been undisposed of by her and which remained in specie at the time of her death, and the only duty to be performed by her personal representative, according to the decree, is to account for such articles.

This duty and its extent is clearly expressed by the decree. It adopts a principle for the settlement of the account entirely different from that upon which the allowance of the account in the probate court was based. It is in accordance with well settled rules of law and is sufficiently definite to determine the rights of all affected by it.

Decree affirmed with costs.

BENJAMIN B. TOOTHAKER *vs.* GILBERT M. GREER.

Waldo. Opinion April 4, 1899.

Trespass. Judgment. Evidence.

In an action of trespass q. c. wherein the plaintiff, for the purpose of establishing his right to maintain the action, relies upon a judgment as of mortgage rendered by this court against this defendant for certain premises including the locus upon which the acts complained of as trespasses were committed, it is not competent for the defendant to show that the judgment should not have included the locus for the reason that it was not covered by the mortgage which was the basis of the judgment.

The validity of such a judgment can not be impeached in this collateral proceeding. So long as it remains unreversed it is conclusive. The facts sought to be proved by the defendant are inadmissible as their only effect is to show that the judgment was erroneously rendered through accident or mistake, and this can not be done collaterally.

But the defendant is not without remedy. In a proper proceeding, brought for the purpose of reversing the judgment, he would be entitled to relief.

ON REPORT.

The case appears in the opinion.

R. F. Dunton, for plaintiff.

W. H. McLellan, for defendant.

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

WISWELL, J. Action of trespass q. c. reported for the decision of the law court upon so much of the evidence as is legally admissible.

The acts complained of as trespasses are admitted; the only question is as to the plaintiff's right to maintain the action. He claims that, at the time of the alleged trespass, he was rightfully in possession of the locus as owner, or, at least, that he was entitled to the immediate possession thereof.

To sustain this proposition the plaintiff introduced in evidence the record of a judgment of this court in a real action against this defendant, from which it appears that at the April term, 1896, of the court in Waldo county, the administrators of the estate of Daniel C. Toothaker entered a real action against the defendant to recover, "a certain lot or parcel of land with the buildings thereon, situated in said Belmont, on the road leading from Belmont corner to North Searsmont, being the homestead farm on which said Gilbert M. Greer (the defendant) now lives, containing one hundred and sixty acres more or less." At the return term the defendant appeared and consented to a default, whereupon a conditional judgment as of mortgage was rendered against him for the premises described in the writ, "the homestead farm upon which the said Gilbert M. Greer now lives."

Subsequently a writ of possession was issued and placed in the hands of the sheriff of the county, who, on the ninth of July, 1896, executed the same by placing the plaintiffs in that action in possession. At this time an arrangement was made between the plaintiffs in the real action and the defendant, that the latter should remain in possession as their tenant, he to cut the hay upon the farm and they to have one-half of it.

On May 13, 1897, this plaintiff, to whom on May 12th, an assignment had been made of the mortgage given by the defendant to Daniel C. Toothaker, and of the judgment rendered thereon, gave to the defendant a written notice to terminate the tenancy on June 13th, 1897, in accordance with which the defendant vacated the premises, but later returned and cut the hay upon a portion of the premises, the trespass complained of. It appearing from the evidence in the case that the lot upon which this hay was cut was a portion of the homestead farm upon which the defendant had been living for many years up to the time of the service of the writ of possession, the action is maintainable and the plaintiff is is entitled to judgment unless this result should be affected by the following facts which appear in defense.

On December 23rd, 1858, the defendant acquired title to two adjoining lots of land by two separate deeds from one Daniel A. Greer. In January, 1868, he purchased of one Nehemiah Abbott a third lot, adjoining the land previously conveyed to him. He paid for this lot by giving Abbott a mortgage, dated January 6th, 1868, of the two lots first acquired, and immediately went into possession of the lot purchased of Abbott, occupying it with the other two lots as his homestead, but through some inadvertence the defendant never obtained a deed of this lot that he purchased, fully paid for, and had the exclusive possession of continuously after January, 1868.

April 5th, 1884, the defendant paid the mortgage to Abbott with money borrowed by him of Daniel C. Toothaker for that purpose, to secure which the defendant gave Toothaker a mortgage of the two lots conveyed to the defendant by Daniel A. Greer; the mortgage did not cover the lot purchased of Abbott. This mortgage is the basis of the judgment relied upon by the plaintiff, but the lot purchased of Abbott, and not included in the mortgage, it is agreed, is the one upon which the acts complained of as trespasses were committed.

In other words, the judgment in the real action relied upon by the plaintiff is for the homstead farm occupied by the defendant, and the lot upon which the alleged trespass was committed is a

part of that homestead farm, none the less owned by him, prior to the judgment, and a portion of his homestead, because his title was acquired by purchase and possession rather than by deed; but the mortgage which was the basis of the judgment did not cover that lot, and the judgment was consequently erroneous in that respect.

Can these facts be shown as a defense to this action? Unfortunately they can not be. The validity of the judgment referred to can not be impeached in this collateral proceeding. The judgment, so long as it remains unreversed, is conclusive. The facts above referred to, shown in defense, are all inadmissible in this case; their effect is to show that the judgment was erroneously rendered through accident or mistake. This can not be done collaterally. This defense in this suit is not open to the defendant. These principles are all too well settled to admit of controversy or require the citation of authorities.

But the defendant is not without remedy. In a proper proceeding, brought for the purpose of reversing the judgment, he would be entitled to relief.

The plaintiff is accordingly entitled to judgment. It is agreed that the damages should be assessed at ten dollars.

Judgment accordingly.

WILLIAM E. KEITH *vs.* THEODORE BOLIER, and others.

Penobscot. Opinion April 4, 1899.

Poor Debtor. Bond. Penalty. R. S., c. 113.

By statute a poor debtor's bond is a valid statute bond although the penalty varies not exceeding five per centum from double the amount due on the execution. This percentage of difference allowed is to be computed upon the penal sum of the bond. Where the difference between the penalty of the bond in suit and the amount that it should have been is less than five per centum, *held;* that the bond is a valid statute bond.

In the return of the officer upon the execution his fees are stated to be $2.12, while in the bond the amount of his fees is given at $2.06. This variance in addition to that previously considered with reference to the first objection, is still within the percentage of difference allowed by statute. *Held;* that it did not affect the validity of the bond as a statute bond.

ON EXCEPTIONS BY DEFENDANTS.

The case is stated in the opinion.

C. Scott, for plaintiff.

W. H. Powell, for defendants.

SITTING: PETERS, C. J., EMERY, WISWELL, SAVAGE, FOGLER, JJ.

WISWELL, J. Action upon a poor debtor's bond. Neither of the conditions of the bond have been complied with, but it is claimed in defense that the bond is not a statute bond for two reasons.

I. Because the penal sum of the bond is not exactly double the amount due on the execution. The amount due on the execution at the time the bond was given was $12.49, the penalty of the bond is $24. But by R. S., c. 113, § 25, such a bond is a valid statute bond although the penalty varies not exceeding 5% from double the amount due on the execution. Double the amount due on the execution in this case is $24.98, the difference between the penalty of the bond and the amount that it should have been is

less than 5% of the penalty. This difference is allowed by statute. The percentage of difference is to be computed upon the penalty of the bond.

II. Because in the return of the officer upon the execution his fees are stated to be $2.12, while in the bond the amount of his fees is named at $2.06. The court at nisi prius ruled that this variance was not fatal to the validity of the bond as a statute bond. We have no question of the correctness of this ruling. The defendants were not injured by this trifling difference, which was in the debtor's favor. Moreover this variance, in addition to that previously considered with reference to the first objection, is still within the percentage of difference allowed by statute.

Exceptions overruled.

BENJAMIN F. HASKELL, and another,

vs.

CHARLES C. TUKESBURY.

Cumberland. Opinion April 5, 1899.

Stat. of Frauds. Evidence. Contract. Consideration. R. S., c. 111, § 1, Par. 2.

The defendant signed and delivered to plaintiffs' agent a writing, the material part of which is as follows: "Friend Geo.: Pop Dyer has been up to see me about a bill that he owes your concern. If they will give him time I will see that the bills is paid with interest." *Held;* that the writing is sufficient to satisfy the Statute of Frauds; that parol evidence is admissible to identify the parties and the subject matter of the writing and to show that the person to whom the writing is addressed was the plaintiffs' agent; and that the forbearance of the plaintiffs, for six months, to sue the bill referred to is a sufficient consideration for the defendant's promise.

ON REPORT.

This case was certified to the law court under R. S., c. 77, § 43, by the justice of the Superior Court, for Cumberland county. It

was an action of assumpsit, originating in the Municipal Court for the city of Portland, to recover against an alleged guarantor forty-one dollars and fifty cents for clothing sold to F. H. Dyer. The declaration is as follows:

In a plea of the case, for that the plaintiffs sold and delivered certain goods according to the account annexed to one F. H. Dyer, formerly of Portland on or about the twentieth day and eighteenth day of July A. D. 1896; that on or about the seventh day of November A. D. 1896, an effort was made to collect said account whereupon and upon the said seventh day of November the defendant in consideration of forbearance from enforcing the collection of said claim and of giving more time to the said Dyer in which to pay said account, guaranteed to pay said account with interest to the said plaintiffs by a written guaranty delivered to the plaintiffs through their agent, of the following tenor, to wit:

Portland Theatre, Nov. 7–96.

Friend Geo. (meaning George Goold, the agent of the plaintiffs.)

"Pop" Dyer (meaning F. H. Dyer) was up to see me about a bill that he owes your concern (meaning the plaintiffs.) He is having a "fit."

If they (meaning the plaintiffs) will give him time I will see that the bills is paid with int. (meaning interest.) Now that McKinley is elected he has got a sure thing and I know it.

Yours, C. C. Tukesbury.

And the plaintiffs aver that on account of said guaranty they delayed collecting said claim giving said Dyer more time in which to pay the same, but that the said Dyer has never paid said account and that since the giving of said guaranty the said Dyer has left the State and that his whereabouts are unknown to the plaintiffs; that the plaintiffs have notified the said defendant since the giving of the said guaranty of the failure of the said Dyer to pay the said account and of the departure of the said Dyer from the State and have frequently requested the said defendant to pay the said account according to the terms of his said guaranty but he has refused to do so, whereby and in consideration of the facts above

stated at said Portland on the day of the purchase of this writ the said defendant being indebted to the plaintiffs in the sum of forty-three dollars and fifty-seven cents according to the account annexed then and there promised the plaintiffs to pay them said sum on demand.

Portland, Maine, May 27th, 1897.

F. H. Dyer

To Haskell & Jones, Dr.

1896.		
July 18.	To one suit, ...	$35.00
20.	" two Negl. Shirts, ...	6.50
	Interest to date, ...	2.07
		$43.57

Plea, general issue, and brief statement that the statute of frauds is a bar to the action.

Calvin E. Woodside, for plaintiffs.

D. A. Meaher, for defendant.

Counsel cited: *Williams* v. *Robinson*, 73 Maine, 186; *Stewart* v. *Campbell*, 58 Maine, 439, 444, & 449; *O'Donnell* v. *Leeman*, 43 Maine, 158; *Jenness* v. *Mount Hope Iron Co.*, 53 Maine, 20; 1 Chitty on Contracts, p. 96 and note pages 146 & 147; 1 Greenl. Evidence (14 Ed.) pp. 361 & 354; *Myer* v. *Casey*, 57 Mississippi, 615; 1 Addison on Contracts, (Morgan's Ed.) pp. 309 & 324; *Stone* v. *Symmes*, 18th Pick. 467; *Curtis* v. *Brown*, 5 Cush. 488; *Harrington* v. *Rich*, 6 Vt. 666.

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

FOGLER, J. Assumpsit upon a writing signed by the defendant of the following tenor:

"Portland Theatre, Nov. 7, '96.

Friend Geo.—

"Pop" Dyer was up to see me about a bill that he owes your concern. He is having a "fit." If they will give him time I will

see that the bills is paid with interest. Now that McKinley is elected he has got a sure thing and I know it.

Yours, C. C. Tukesbury."

The defendant pleads the general issue and by brief statement the statute of frauds. The case comes to this court from the Superior Court of the county of Cumberland on report.

Dyer owed the plaintiff for merchandise described in the writ. After unsuccessful efforts to collect the debt of Dyer, the plaintiffs placed the bill in the hands of George M. Goold, their salesman and agent, for collection. Mr. Goold had a conversation with the defendant in which the defendant said he thought Dyer was all right and would pay the bill if they would give him time. In a subsequent conversation Mr. Goold asked the defendant if he would not fix it so the concern would not sue Dyer. Thereupon the defendant wrote and signed the writing in suit and sent it to Goold who handed it to the plaintiffs' book-keeper. The plaintiffs brought no suit against Dyer and made no further effort to collect of him, and May 27, 1897, Dyer having left town, after demanding payment of the defendant, commenced this suit.

The plaintiffs seek to charge the defendant for the debt of another, and the question is whether the writing declared on is sufficient to satisfy the statute of frauds. Revised Statutes, ch. 111, § 1, p. 2, provides that "no action shall be maintained to charge any person upon any special promise to answer for the debt, default or misdoings of another unless the promise, contract or agreement, on which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith, or by some person thereunto lawfully authorized; but the consideration thereof need not be expressed therein, and may be proved otherwise."

The defendant contends that the action is not maintainable because, as he says, no consideration is expressed in the writing declared upon and no sufficient consideration is proved. The statute does not require that the consideration be expressed in the writing but expressly provides that it "may be proved otherwise."

The consideration may be proved by parol. *Williams* v. *Robin-*

son, 73 Maine, 186. The statute of frauds, even before the amendment expressly declaring it unnecessary, did not require the consideration to be recited in the note or memorandum signed by the party to be charged, but it might be proved by parol. *Cummings* v. *Dennett*, 26 Maine, 397; *Gilligham* v. *Boardman*, 29 Maine, 79; *Williams* v. *Robinson*, supra.

A promise to forbear and give further time for the payment of a debt, though no definite time be named, if followed by actual forbearance for a reasonable time, is a valid and sufficient consideration for a promise guaranteeing the payment. *Moore* v. *McKenney*, 83 Maine, 80.

In the case at bar the defendant in writing promised to see the debt of Dyer paid with interest if the plaintiffs would give him time. Hiram L. Jones, one of the plaintiffs, testified, and his testimony is uncontradicted, that on the receipt of the writing declared upon he notified the defendant that the proposition of the defendant was accepted, and it appears that the plaintiffs did actually forbear to enforce payment of the debt from November 7, 1896, to May 27, 1897, when the present suit was commenced. We are of opinion that the plaintiffs agreed to forbear and did forbear suit for a reasonable time, and that a sufficient consideration for the defendant's promise is proved.

The defendant further contends that the writing declared on is not sufficient to satisfy the requirements of the statute inasmuch as the plaintiffs are not named or referred to therein; that the names of the parties are not sufficiently expressed; that the subject matter of the agreement is not sufficiently described; and that parol testimony is not admissible to supply such omissions.

George M. Goold was the agent of the plaintiffs in the transaction under consideration and the fact was known to the defendant. The writing states that Dyer had been to see the defendant about "a bill that he owes your concern"; and states "if *they* will give him time I will see that the bill is paid"; showing that the defendant well understood that he made the proposition contained in the writing, not to Goold individually, nor to an undisclosed principal, but to the plaintiffs, disclosed principals. "Contracts of

guaranty differ from other ordinary simple contracts only in the nature of the evidence required to establish their validity. The statute requires every special promise to answer for the debt, default or miscarriage of another to be in writing subscribed by the party to be charged thereby, and no parol evidence will be allowed as a substitute for these requirements of the statute. But, in other respects, the same rules of construction and evidence apply to contracts of this character which apply to other ordinary contracts." *Union Bank* v. *Coster's Ex'rs*, 3 N. Y. 203. "The statute of frauds does not change the law as to the rights and liabilities of principals and agents, either as between themselves, or as to third persons. The provisions of the statute are complied with if the names of competent contracting parties appear in the writing, and if the party be an agent it is not necessary that the name of the principal shall be disclosed in the writing. Indeed, if a contract, within the provisions of the statute, be made by an agent, whether the agency be disclosed or not, the principal may sue or be sued as in other cases." *Kingsley* v. *Siebrecht*, ante, p. 23. In the case last cited, in which the authorities are exhaustively cited and examined, this court has decided that it is competent to prove by parol that a party named in a writing relied upon to satisfy the requirements of the statute acted as agent of another, and that the principal has the same rights and is under the same liabilities as though he had acted in his own proper person.

The defendant, however, contends that, conceding that the agency may be proved by parol, the name of the agent is not expressed in the writing. The writing signed by the defendant is addressed "Friend George." Is it competent to prove by parol that the person so addressed was George M. Goold, the plaintiffs' agent? We think it is. It is not a case in which no person is named or referred to as a party. The words "Friend George" must be held to intend some person. Parol evidence is always necessary to identify the parties to a contract. Whether a party makes a contract in his own name, or in the name of another, or in a feigned name, are inquiries not different in their nature from the question, who is the person who has just ordered goods from a shop, and this

rule applies in case of a contract of guaranty or other contract within the statute of frauds, as in other ordinary contracts. *Trueman* v. *Loder*, 11 Ad. & Ell. 589. In *Salmon Falls Mfg. Co.* v. *Goddard*, 14 Howard, 446, the memorandum was held sufficient though signed by the initials of the parties, it being proved by parol who the parties actually were. To the same effect is *Sanborn* v. *Flagler*, 9 Allen, 474. In *Fessenden* v. *Mussey*, 11 Cush. 127, it was decided that the omission of the middle letter of the party's name was not fatal if it should be shown by parol that he was the person intended. The writing in question in the present suit was written by the defendant at the solicitation of George M. Goold; it was sent to him by the defendant and was received by him; the case shows that Goold was sufficiently intimate with the defendant, that he generally addressed him as "George." There can be no doubt that when the defendant wrote "Friend George," George M. Goold, the plaintiff's agent was intended.

The same reasoning applies to the proof of the identity of the person referred to as "Pop" Dyer. The testimony shows that F. H. Dyer, the plaintiffs' debtor, was commonly known as "Pop" Dyer. It is not claimed that F. H. Dyer is not the person referred to, the contention being that parol evidence is not competent to establish such identity. This contention is not sustained for the reason and upon the authorities hereinbefore stated.

We are of opinion that the subject matter of the contract is sufficiently expressed in the writing to satisfy the requirements of the statute. It is therein described as "a bill that he owes your concern." "The subject matter may in any case be identified by reference to an external standard, and need not be in terms explained. Thus to describe it as the vendor's right in a particular estate, or as the property which the vendor had at a previous time purchased from another party is sufficient. And it is very common to identify the debt of a third person for which the defendant has made himself responsible, as the debt then owing, or to become owing, by said third person to the plaintiff, without further description." Brown on St. of Frauds, § 385. The rule thus laid down is supported by numerous authorities. *Williams* v. *Robinson*, 73

Maine, 186, in which the court says, p. 197: "Parol evidence identifying the subject matter of the contract does not destroy the sufficiency of the memorandum, but when the subject matter is thus ascertained, the memorandum may be construed to apply to it."

In 1 Greenl. on Ev. § 286 the learned author says: "As it is a leading rule in regard to written instruments, that they are to be interpreted according to their subject matter, it is obvious that parol or verbal testimony must be resorted to in order to ascertain the nature and qualities of the subject to which the instrument refers. Evidence which is calculated to explain the subject of an instrument is essentially different in its character from evidence of verbal communications respecting it." See further, Id. § 288; *Barry* v. *Coombe*, 1 Pet. 640; *Hurley* v. *Brown*, 98 Mass. 545; *Stoops* v. *Smith*, 100 Mass. 63; *Mead* v. *Parker*, 115 Mass. 413; *Slater* v. *Smith*, 117 Mass. 96; *Giles* v. *Swift*, 170 Mass. 461.

The subject matter of the writing signed by the defendant is referred to as a debt which Dyer owed the plaintiffs. We think it is competent for the plaintiffs to prove by parol the nature and amount of the debt. The testimony shows that the indebtedness was for merchandise sold and delivered and amounted to forty-one dollars and fifty cents. The defendant expressly agreed to pay interest.

Judgment for plaintiffs for $41.50 and interest from Nov. 7, 1896.

Judgment accordingly.

HADASSAH J. BANGS

vs.

WATERVILLE AND FAIRFIELD RAILWAY AND LIGHT COMPANY.

Kennebec. Opinion April 5, 1899.

Lease. Water. Recoupment. Evidence.

In defense to two suits to recover the rent, for different periods of time, reserved by a written lease, the defendant set up, in the nature of a recoupment, an alleged breach of this covenant in the lease; "Said lessor hereby covenants and agrees to furnish said lessee or its assigns, from the canal next above Ticonic bridge, and at a point in said canal opposite the building above described, and during the continuance of this lease, and for any term for which the same may be renewed, water for power sufficient to run a water-wheel or wheels having a capacity of and producing at least two hundred horse power."

Held; That the burden of proving this alleged breach was upon the defendant: that although the defendant satisfactorily proved that the power actually transmitted by the water-wheels operated by it fell short of the amount stipulated in the plaintiff's covenant, that this proof does not sustain the defendant's proposition, as this lack of power transmitted might result from a variety of causes wholly within the control of the defendant; and the court is satisfied from all the evidence in the case that sufficient water was furnished in the canal opposite the building leased to produce at least 200 horse power.

The plaintiff's right to use the water of the Kennebec river at this point for power was created by a lease from the Ticonic Water Power and Manufacturing Company, the predecessor in title of the present owner of the dam to the water right at this dam, whereby there was leased "at the raceway in Waterville of the Reddington Grist Mill (so-called) water equal to a one hundred horse power, also at the same place water equal to another one hundred horse power if so much may be obtained at that place, but so much as shall equal two hundred horse power in all, if there attainable." *Held;* that there is no evidence in the case tending to show that water to the full extent named has not been obtainable at this place.

Also, held; that if according to the true construction of this lease under which the plaintiff's rights were acquired, the amount of the water for power obtainable depends upon and is limited by the capacity of the tail-race at the Reddington Grist Mill to vent water from the wheel-pit, that the great preponderance of the evidence in the case is to the effect that the capacity of the tail-race is sufficient to vent water enough to produce two hundred horse power.

ON REPORT.

The case appears in the opinion.

C. F. Johnson, H. M. Heath and C. L. Andrews, for plaintiff.

E. F. Webb, for defendant.

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

WISWELL, J. Two actions of assumpsit to recover the rent reserved, for different periods of time, in a written lease, dated November 5, 1887, from the plaintiff to the Waterville Electric Light and Power Company, and assigned to the defendant, November 1, 1891. The two cases were tried together and are reported for this court to order such judgment in each case as the law and the evidence may require.

The lease demised, for a term of twenty years, premises situated on the west side of the Kennebec river in the city of Waterville, known as the Reddington Grist Mill. The lease contains this clause: "Said lessor hereby covenants and agrees to furnish to said lessee or its assigns, from the canal next above Ticonic bridge, and at a point in said canal opposite the building above described, and during the continuance of this lease, and for any term for which the same may be renewed, water for power sufficient to run a water wheel or wheels having a capacity of and producing at least two hundred horse power."

The defendant sets up as a claim in the nature of recoupment a breach of the plaintiff's covenant above quoted in regard to the amount of water to be furnished. The burden of proving the alleged breach is upon the defendant. It is claimed that this burden has been sustained by evidence both as to the amount of water furnished for power and also as to the nature and extent of the plaintiff's rights in the water power at this point, which, it is claimed, shows that she did not and could not control the water of the Kennebec river for power to the extent named in her covenant.

It is true, that the defendant introduced satisfactory evidence to the effect that the power actually transmitted by the water-wheels

operated by it fell short of the amount provided for in the plaintiff's covenant. This is shown by tests, as to the substantial correctness of which there appears to be no controversy. But the difficulty with the evidence is that it does not sustain the defendant's proposition. The fact that substantially accurate measurements of the power developed shows less than two hundred horse power, does not prove that water sufficient to develop that amount of power was not furnished. This might result from a variety of causes wholly within the control of the defendant, such as the kind, quality and number of water-wheels used, their location, arrangement and management, the manner in which the water was turned from the "point in said canal opposite the building" into the wheel-pit. So that evidence of this nature can not be considered sufficient to prove the breach of covenant relied upon. While upon the other hand, we are satisfied from the whole evidence in the case that sufficient water was furnished in the canal opposite the building leased to produce at least two hundred horse power.

The plaintiff's right to use the water of the Kennebec river at this point for power was created by a lease from the Ticonic Water Power and Manufacturing Company, the predecessor in title of the present owner, the Lockwood Company, to the water rights at this dam. The important portion of which lease is as follows: The Ticonic Water Power and Manufacturing Company, for the considerations hereafter mentioned, hereby let and lease to Dennis L. Milliken of Waterville, his heirs and assigns, at the raceway in Waterville of the Reddington Grist Mill (so-called) water equal to a one hundred horse power, also at the same place water equal to another one hundred horse power if so much may be obtained at that place, but so much as shall equal two hundred horse power in all, if there attainable, which horse power shall be rated at seventy-five per cent of the theoretical horse power of the head and fall as developed at the said Grist Mill raceway, which theoretical horse power shall be estimated by some competent Hydraulic Engineer, if the parties can not agree upon it.

There is no evidence in the case tending to show that water to the full extent named has not been obtainable at this place. This

lease having been given by the predecessor in title of the present owner of the dam, there would seem to be no reason why those holding under this lease should not have the first and superior right to use a sufficient amount of the water of the Kennebec River to create the two hundred actual horse power provided for.

But if according to the true construction of this lease, under which the plaintiff's rights were acquired, the amount of the water for power obtainable depends upon and is limited by the capacity of the tail-race at the Reddington Grist Mill to vent water from the wheel-pit, then the result would not be changed, because the great preponderance of the evidence in the case is to the effect that the capacity of the tail-race is sufficient to vent water sufficient in quantity to produce two hundred horse power.

In the lease from the plaintiff she covenants to furnish water sufficient to run "a water-wheel or wheels having a capacity of and producing at least two hundred horse power." In the lease under which she claims, she acquired, "if there attainable," water sufficient to produce two hundred actual horse power, the proportion between theoretical and actual horse power being fixed at 100 to 75; as the case shows that water-wheels of ordinary efficiency develop 80% of the theoretical power, it would follow that in the lease given by her she demised no more than she acquired under the lease from the Ticonic Company assigned to her.

The plaintiff is consequently entitled to a judgment in each case for the rent sued for, together with interest.

Judgment accordingly.

MALLIE C. THOMSON, and others, Appellants from decree of Judge of Probate.

Sagadahoc. Opinion April 5, 1899.

Probate. Practice. Reasons of Appeal.

In probating a will, the sanity of the testator must be proved and is not to be presumed. The burden of proving it lies on the proponent.

Where a proponent of a will is an appellant from the decree of the judge of probate disallowing such will, the reasons of appeal are invalid, if they do not contain an allegation that the testator was of sound mind when the will was executed.

ON EXCEPTIONS BY APPELLANTS.

The case is stated in the opinion.

Chas. D. Newell, for appellants, filed no brief.

Edgar M. Briggs and Wm. T. Hall, Jr., for appellees.

The appellants are limited at the hearing in the supreme court of probate to their reasons of appeal. No evidence is admissible except that which tends to prove the affirmative of the reasons of appeal. *Gilman* v. *Gilman*, 53 Maine, 184; *Barnes* v. *Barnes*, 66 Maine, 286; *Cooper* v. *Armstrong*, 3 Kansas, 78; *Kellogg's Accounting*, 104 N. Y. 648; *Simmon* v. *Goodell*, 63 N. H. 458.

The appeal must be legal and effective. *Deering* v. *Adams*, 34 Maine, 41.

This defect is not amendable. *Townshend's Appeal*, 85 Maine, 59.

The bond is not according to R. S., c. 63, § 24, our statute. *Mathews* v. *Patterson*, 42 Maine, 259.

Counsel also cited: *Briard* v. *Goodale*, 86 Maine, 101; *Moody* v. *Moody*, 11 Maine, 247.

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

PETERS, C. J. Ann E. Darrah made her will which was disallowed by the judge of probate for the county of Sagadahoc, for

the reason, as expressed in the record, that the judge finds "from the testimony of the subscribing witnesses to said instrument and others that said last will and testament was not the will of said deceased, that it was not legally executed, and that at the time of executing the same the said deceased was of full age."

The legatees who presented the will for probate appealed from the judgment below, assigning for their reasons of appeal that "said will was the last will and testament of said Ann Eliza Darrah and was duly and legally executed." Objection is taken to the sufficiency of the reasons of appeal in that they do not aver either in direct or equivalent terms that the testatrix was of sound mind when she executed such instrument. It appears that in the reasons of appeal, in reciting the terms of the decision below the judge is made to say that the testatrix was of full age "and sound mind." But the words "and sound mind" do not appear in the text of the written record now presented as a part of the case.

Another objection relied on by the heirs against the legatees is that the bond filed by the latter in support of their appeal does not appear to have been properly approved by the judge below, his indorsement thereon being as follows: "Sagadahoc ss. June 25, 1898. Examined and ordered that this instrument be placed on file. Wm. T. Hall, Judge of Probate." And the register of probate attests that the same was received and filed.

As soon as the appeal was entered in this court the contestants of the will moved that the appeal be dismissed upon several grounds named in the motion, two of which we have already spoken of, and the sitting justice granted the motion. Exceptions were taken to the ruling ordering the dismissal of the proceedings, which were ordered to be argued in writing and the arguments forwarded to the chief justice within sixty days. The contestants furnished a brief but none has been received from any other party. The case does not disclose upon what ground the motion was sustained.

We are unwilling to consider at this time the question whether the bond was or not approved by the judge by his indorsement thereon, as it is not necessary to do so. We are disposed to sus-

tain the ruling at nisi prius upon the point taken that one of the reasons of appeal should have averred the soundness of mind of the testatrix. The sanity of a testator must be proved and is not to be presumed, and the burden of proving it lies on the proponent. A proponent, when he is also an appellant, can be allowed to prove no more than he alleges in his reasons for appeal. Not alleging mental soundness he is not permitted to prove soundness, and without such proof the will cannot be sustained, and an appeal in such case may properly be dismissed. It is all the more reasonable that soundness or sanity should have been asserted in the reasons of appeal in this case, in view of the fact that the judge below expressly declares that the instrument in question "was not the will of the said deceased, nor legally executed," meaning either because of undue influence or unsoundness of mind. Whether any explanation could be given of the record presented, or whether any amendment would be admissible, affording relief to the proponent, we need not consider as none is offered.

Exceptions overruled.

HARRY A. JONES, Admr.

vs.

MANUFACTURING AND INVESTMENT COMPANY.

Kennebec. Opinion April 17, 1899.

Negligence. Master and Servant. Risks voluntarily assumed. Death-Liability Act of 1891, c. 124.

An employee of age, and not shown to be below the average of mental capacity and intelligence, is presumed to observe and appreciate the dangers obviously incident to the operation of exposed, unguarded machinery.

The liability of round sticks of wood four feet long to slip and fall from the hooks of an upright, exposed endless chain upon which they are held by force of gravity only, while being carried up a distance of over thirty feet, is a danger obviously incident to the operation of such a machine.

If such an employee, having some weeks acquaintance with such a machine and consequent knowledge of its dangers, makes no request for further safeguards but with such knowledge proceeds to work about the machine, *held;* that he assumes the duty of using a degree of care sufficient to avoid the evident danger; or, in other words, he takes upon himself the risk of injury from such danger.

If such an employee voluntarily, even in the line of his employment, exposes himself to the danger of the sticks of wood above described slipping and falling upon him from the hooks of the chain while being carried up, he assumes the risk of injury therefrom and cannot throw the risk upon his employer.

ON MOTION BY DEFENDANT.

This was an action brought under the Death-Liability Act of 1891, c. 124, to recover damages for the death of Fred Poitras while in the defendant's employment at Madison, March 17, 1897. The deceased was killed by a log falling upon his head from a hoisting apparatus which he was tending. The hoisting apparatus or elevator was used for taking pulp-wood logs from freight cars into the second story of the defendant's mill.

The jury returned a verdict of $600 for the plaintiff and the defendant moved for a new trial. The facts are stated in the opinion.

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

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

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

EMERY, J. The defendant company was engaged in the lawful business of manufacturing pulp paper stock from wood. The raw material, the wood, was in sticks of random size about four feet long and was brought on railroad freight cars alongside of a platform near the mill. To unload the sticks from these cars and transfer them to a convenient place in the mill was the work of the defendant company. To accomplish this purpose, they used upon the opposite side of the platform from the car a lift or elevator constructed as follows:—The frame work was 38 feet 6 inches in height from the level of the platform. The two rear upright

posts or timbers were practically vertical. The two front timbers starting from the outer edge of the platform sloped back so that their tops were about eight feet back from the platform. They were a little less than three feet apart. Up and down the upper side of each of these front timbers so inclined was cut a slot or groove about eight inches wide. In this groove ran an endless metal chain belt about seven inches wide passing over a sprocket wheel below the platform and another at the top of the machine. These belts each carried in line pairs of hooks or arms projecting out and curving upward, and which were twenty-nine inches in length, and were placed about four feet apart on the belts. The distance between the outside of one pair of hooks on one belt to the outside of the corresponding pair of hooks on the other belt was forty-six inches. The distance between the inside surfaces of the same hooks was about thirty-four inches. The machine was operated by power from the mill through a chain and sprocket at the top. It was controlled by a man standing on a small platform near the top.

The mode of unloading a car with this machine was something like this: The loaded car was run alongside of the platform which was five or six feet wide. On the other side of the platform opposite the car was this machine. A bridge, or gang-plank, some two feet wide was placed across this platform from the car to the sill of the machine between the belts, one end resting by iron clamps on the edge of the car and the other end temporarily fastened to the platform by a bolt or pin. A person standing over this bolt would be between the hooks on the two endless belts above described.

The person in charge of the machine being in his place on the upper platform, two men lifted or rolled the sticks of wood from the car to the platform; two other men then lifted or rolled them on the hooks or arms above described and they were carried on these hooks up over the machine to an incline plane or trough, down which they slid by gravity to the proper place in the mill. So far as appears in the case, the motion of the belts and hooks was uniform and steady, but the sticks were held in place on the hooks

only by gravity. When the car was unloaded, one of the four men at work there pulled out the bolt at the outer end of the gang-plank and took up the plank to let in another car, when the plank was again put down, and the operation repeated.

On the 17th day of March, 1897, the plaintiff's intestate was in the employ of the defendant company and, with three other employees, was engaged in unloading pulp wood from cars at the locality of this machine. He and one other transferred the wood from the car to the platform. The other two of the four placed the sticks on the hooks of the elevator to be carried over into the mill. As the last stick of that car load was going up and before it went over the top, the deceased went to pull out the bolt of the plank in order to let in another car, and in doing so was bent over between the lower hooks and nearly under the ascending stick of wood. At that instant one end of this last stick, which probably had been previously slowly slipping, slipped endwise off the hook, and the stick fell upon the deceased killing him instantly. The man on the upper platform noticed the slipping and gave the alarm, but the stick fell before the deceased realized the situation sufficiently to escape. The wood of this car load was about four feet long, besides the scarf, and was of various sizes, and was more or less slippery from frost and ice.

It does not appear that the deceased, or any employee, was ever directed or encouraged to pull out the plank bolt as soon as the last stick of a car load was on the hooks and before it had been carried over, or was ever warned against it. Nor does it appear that he was ever told there was danger of sticks falling off the hooks. In fact there was such danger, and sticks had previously so fallen, though the deceased was not shown to have known of those instances. The machine had been used at that particular place about two years, and at other places about the mill for the same purpose about six years. The deceased was twenty-eight years old. It does not appear how long he had been at work at the mill or in this particular place. He had lived in the same town for some years. He had been at work off and on about this machine for at

least some weeks. So far as appears he was of average intelligence and mental capacity.

Again, it does not appear what was the immediate cause of the sticks slipping and falling, whether because not properly placed on the hooks by the employees in the first instance, or because carried with an irregular motion, or because of some other circumstances. It is evident, however, that unless the sticks were placed quite evenly on the hooks at the start they would be likely to slip off.

This action is by the administrator for the benefit of the parents of the deceased under the Death-Liability Act of 1891, ch. 124,—but the plaintiff has the same burden of proof, and the defendant company can interpose the same defenses, as in an action by the deceased himself for his injuries had he survived. The plaintiff claims that the defendant was negligent in two respects,—(1st) that it omitted to put a casing or other safeguards about the machine as it might have done, and thus removed or greatly lessened the risk of injury to its employees,—and (2d) that it did not warn the deceased of the risk of injury he incurred by working with the machine or pulling out the gang-plank bolt while sticks were on the hooks. The defendant contends that whatever the risk it was obvious and one ordinarily attending the operation of the machine, and that under the law it rightfully presumed that the deceased saw and realized the risk and voluntarily assumed it. If this be true it is an available defense under the law.

In the absence of any stipulation or notice to the contrary, an employee of mature years and of ordinary mental capacity and intelligence is presumed to know, appreciate and assume the ordinary and apparent risks of injury from the machinery and appliances with or about which he is working. If he does not ask for further safe-guards, or otherwise so conducts himself as to assure his employer that he is content with the machinery and appliances as they are and will himself take the chance of injury, he cannot after an injury transfer the risk to the employer. This presumption is of course rebuttable, but is sufficient until circumstances are shown to the contrary.

The rule has been stated repeatedly with substantial uniformity

in various judicial decisions in this state and in harmony with the statements of the rule by the court of Massachusetts. In *Coolbroth* v. *Maine Central R. R. Co.*, 77 Maine, 165, at the beginning of the opinion the rule was stated in the following terms: "It is the well-settled law that a servant of mature age and common intelligence, when he engages to serve a master, undertakes as between himself and master to run all the ordinary and apparent risks of the service." In *Judkins* v. *Maine Central R. R. Co.*, 80 Maine, 418 it was said (p. 425): "Even where a master fails in his duty in respect to inspecting and repairing machinery or appliances to be used by the employee, and the servant voluntarily assumes the risks of the consequences of the master's negligence with knowledge or competent means of knowledge of the danger, he cannot recover damages of the master." In *Mundle* v. *Hill Mfg. Co.*, 86 Maine, 400, it was said (p. 406): "It is well settled that a servant by entering the service of the master assumes all known or apparent risks which are incident to it, however dangerous the service may be, even if it might be conducted more safely by the employer." In *Sullivan* v. *India Mfg. Co.*, 113 Mass. 396, it was said (p. 398): "When (the employee) assents to occupy the place prepared for him, and incur the dangers to which he will be exposed thereby, having sufficient intelligence and knowledge to enable him to comprehend them, it is not a question whether such place, might with reasonable care, and by a reasonable expense, have been made safe. His assent has dispensed with the performance on the part of the master of the duty to make it so." In *Ciriack* v. *Merchants Woolen Co.*, 146 Mass. 182, it was said (p. 190): "In the absence of anything to show the contrary, the plaintiff must be assumed to have had the intelligence and understanding which are usual with boys of his age. There is nothing to show that he did not know the danger of coming in contact with the revolving wheels of the machine. It must be assumed that he was well aware of it." In *Goodes* v. *Boston & Albany R. R. Co.*, 162 Mass. 288, it was said: "One entering the employment of another assumes the obvious risks arising from the nature of the employment, from the manner in which the business is car-

ried on and from the conditions of the ways, works and machinery, if he is of sufficient capacity to understand and appreciate them." In *Rooney* v. *Sewall, &c., Cordage Co.*, 161 Mass. 153 it was said (p. 159): "When the plaintiff entered the defendant's service, he impliedly agreed to assume all the obvious risks of the business, including the risk of injury from the kind of machinery then openly used. It is not material whether he examined the machinery before making the contract or not. He could look at it if he chose, or he could say, 'I do not care to examine it; I will agree to work in this mill, and I am willing to take my risk in regard to that.' In either case, he would be held to contract in reference to the arrangement and kind of machinery then regularly in use by his employer, so far as these things are open and obvious, so that they could be readily ascertained by such examination and inquiry as one would be expected to make if he wished to know the nature and perils of the service in which he was about to engage."

Some instances of the application of the rule may be cited. The employee was not cautioned against the danger in *Coolbroth* v. *Maine Central R. R. Co.*, supra, nor in *Judkins* v. *Same*, supra; yet in each case he was presumed to know it. In *Rooney* v. *Sewall, &c., Cordage Co.*, supra, the absence of boxing about the machine and the absence of warning to the employee were held not to transfer the risk to the employer. In *Downey* v. *Sawyer*, 157 Mass. 418, a boy of sixteen was held to have assumed without notice to him the risk attending his working near open gears in plain sight, and which confessedly might have been made less dangerous by guards. In *Gilbert* v. *Guild*, 144 Mass. 601, the rule was similarly applied to a boy of nineteen. In *Stuart* v. *West End Street Railway Co.*, 163 Mass. 391, a young man of twenty was set at work feeding hay into a hay cutter, though that was not his regular work. No warning or instruction was given him as to the danger. Held that the danger was so obvious that he must be presumed to have understood it. The court said (p. 393): "Where the elements of the danger are obvious to a person of average intelligence using due care, it would be unreasonable to require an employer to warn his employee to avoid dangers which

ordinary prudence ought to make him avoid without warning. The mere fact that he cannot tell the exact degree of the danger, if the nature and character of it can easily be seen, is not enough to require warning and instruction to a man of full age and average intelligence. Something may properly be left to the instinct of self-preservation, and to the exercise of the ordinary faculties which every man should use when his safety is known to be involved."

In *Ruchinsky* v. *French*, 168 Mass. 68, a woman of thirty, though unfamiliar with machinery, was held to know without instruction or warning the danger of getting her hand in unguarded cog wheels. In *Wilson* v. *Mass. Cotton Mills*, 169 Mass. 67, a young man, who had worked upon a hoisting machine, the gears of which were covered, was set to work without warning upon a similar machine the gears of which were not covered but exposed. After some hours he was injured by his hand catching in the cog gear. Held that he must be presumed to have known so obvious a danger. In *Williams* v. *Churchill*, 137 Mass. 243, a boy of 19 unused to ropes was not told of the danger of getting entangled in the loose end of a bow line he was making fast. Held that he must be presumed to know of that danger.

In considering whether the circumstances of this case bring it within the rule above stated and illustrated, we may lay aside the numerous judicial decisions in cases where the employee was injured through some structural weakness, some decay, some break or want of repair in the machinery or appliances, or through some hidden danger in their operation. In this case there was no weakness, no decay, no break, no want of repair, no hidden danger in the operation. The machine though crude was stout and serviceable. In all its parts it was strong enough for its work and in every respect was as strong and safe as it appeared to be. The mechanism was all exposed, and its operation was visible to the most casual looker-on. The danger from which the injury resulted, that of the sticks of wood slipping from the hooks, especially if not evenly laid on them in the first instance, would be appreciated at a glance with a moment's reflection. The condition of the

wood with its snow, frost or ice,—its length compared with the distance apart of the hooks or arms supporting it,—the mode of putting it on the hooks,—all rendered it apparent that there was danger of the sticks falling at times, especially if the employees were not careful to place the sticks evenly on the hooks at the start. The risk was certainly one ordinarily attending the operation of the machine by the average employee.

Again, the risk was so patent that knowledge and even full appreciation of it could have been avoided only through gross incapacity or inattention on the part of the employee. The deceased was twenty-eight years old, and so far as the case shows, must be presumed to have possessed average intelligence and mental capacity. He had lived in Madison several years. He had worked off and on at this same machine for two weeks or more. He may be assumed to have had the common knowledge of the slipperiness of round sticks of wood exposed to the frosts and storms of March. He must have known, had he thought about it at all, that such sticks four feet long placed by ordinary workmen on such arms and lifted thirty-eight feet were liable to slip off while ascending. We think he must be presumed to have known and appreciated a risk so incident and obvious. We find nothing in the evidence to rebut that presumption, except the fact that he did encounter the risk and it went against him. That fact however is manifestly insufficient. To hold that he did not see and appreciate the risk of injury he incurred by getting under such a stick, in such circumstances, is to hold that he was too unthinking and inattentive to be in the exercise of due care. In either alternative there can be no recovery.

Motion sustained. Verdict set aside.

RUMFORD FALLS PAPER COMPANY

vs.

THE FIDELITY AND CASUALTY COMPANY.

Cumberland. Opinion April 17, 1899.

Accident Insurance. Limit of Liability. Defending Suits.

A policy issued by a casualty company against employers' liability is a contract of indemnity, in which the parties have a legal right to insert any stipulations and conditions which they deem reasonable and necessary, provided no principle of public policy is thereby contravened.

Where by the terms of such a policy the assured was required to render "all reasonable aid" in "effecting settlements," *held;* that the insured is justified in employing all legitimate means, not prohibited by the policy, to convince the insurer of the wisdom and expediency of accepting an offer of settlement for a sum that he believes would be to the advantage of both parties.

The court holds in this case that the evidence fails to establish the charge of collusion between the injured employee and the employer, or to prove any omission on the part of the latter to perform the obligations imposed upon it by the stipulations in the policy.

The defendant issued to the plaintiff company a policy against liability for damages on account of fatal or non-fatal injuries accidentally suffered by an employee or employees of the assured, while engaged at the places and in the occupations mentioned in the application for the policy, subject to the following agreements and conditions:

"1. The company's liability for an accident resulting in injuries to or the the death of one person is limited to fifteen hundred dollars; and, subject to the same limit for each person, its gross liability for a casualty resulting in injuries to or the death of several persons is twenty-five thousand dollars.

"2. The assured, upon the occurrence of an accident, and also upon receiving information of a claim on account of an accident, shall give immediate notice in writing of such accident or claim, with full particulars to the company, at its office in New York city, or to the agent, if any, who shall have countersigned this policy.

"3. If, thereafter, any legal proceedings are taken against the assured to enforce a claim for damages on account of such accident, the company will defend the same at its own cost in the name and on the behalf of the assured.

"4. The assured shall not, except at his own cost, settle any claim nor incur any expense nor interfere in any negotiations for settlement with the injured person, nor in any legal proceedings without the consent of the company,

previously given in writing, but he may provide such surgical relief as may be imperative. The assured shall render to the company all reasonable aid in securing information and evidence and in effecting settlements."

An employee of the plaintiff sustained an injury within the terms of this policy and offered to settle his claim in full for one thousand dollars; but the defendant company exercised its exclusive right to defend the suit, "in the name and on behalf of the assured." Thereupon a trial in court was had which resulted in a judgment of twenty-five hundred dollars, and costs, which the plaintiff paid to its injured employee. In an action by the plaintiff on the policy to recover the money thus paid, *held;* that the policy does not relieve the assured from all responsibility whatever for damages resulting from injuries to its employees; but the policy was obviously devised with a view to an apportionment of the responsibility between the insurer and the insured.

Also; the company nowhere agrees to pay the judgment or indemnify the assured against any judgment that may be recovered against it beyond the limit of $1500 and the cost of defending the suit. It is therefore considered by the court that the plaintiff is entitled to recover in this action against the defendant company the sum of fifteen hundred dollars, the amount of insurance specified in the policy, with interest thereon from the time when the verdict was rendered in the former action, and the costs recovered in that action with interest thereon from the time when they were paid.

See *Sawyer* v. *Rumford Falls Paper Co.*, 90 Maine, 354.

On Report.

Action on a policy issued by a casualty company against employers' liability. The case was reported by the justice of the Superior Court, for Cumberland county, and the facts will be found in the opinion of the court.

W. H. Clifford, E. Verrill and N. Clifford, for plaintiff.

The policy says in effect: I will insure you for the sum of $25,000 with the limit of $1500 for my liability for a casualty to one person, but I reserve the right and privilege to determine whether to pay you the $1500 when the casualty takes place, settling with the injured party myself, or resisting the injured party's claim entirely, myself assuming the risk of defending against his suit. If I pay you the $1500 at the time set out in the policy for the casualty I am discharged; but if I decide without your concurrence to resist the claim brought by him for his claim, I will do that at my "own cost" just exactly as you, the assured, would be compelled to settle at your "own cost" if you independently settle with the injured party.

Rules of construction: If the policy contains two provisions on the same subject and they are inconsistent and contradictory, that provision most favorable to the assured will be accepted and the other disregarded. 1 Beach L. of Ins. § § 547, 548, p. 541; *N. W. Mut. Ins. Co.* v. *Hazelett*, 105 Ind. 22, and cases cited; *Am. Cr. Indemnity* v. *Wood*, 73 Fed. Rep. 88.

It is presumably the intention of the insurer in a policy that the insured shall understand in case of loss that he is protected to the full extent which any fair interpretation will give. 1 Beach L. of Ins. § 540, p. 542; Ib. § 548, p. 542; Ib. § 549, p. 542–3; Ib. § 554, p. 544.

If the words employed in a policy of themselves and in connection with other language employed in the instrument are susceptible of interpretation given them by the assured although in fact intended otherwise by the insurer, the policy will be construed in favor of the assured. 1 Beach L. of Ins., supra.

If words are uncertain in meaning they must be taken and construed most favorably to the assured. *Guaranty Co.* v. *Savings Bank*, 80 Fed. Rep. 772, 773.

As the "contract is a voluminous document prepared by the company, any ambiguity in its phraseology should be resolved against the draftsman." *Mer. Credit Co.* v. *Wood*, 68 Fed. Rep. 533.

If the instrument, considered as a whole, is ambiguous touching the precise loss which the policy covers, that meaning is to be given to it which is most favorable to the assured. *Allen* v. *Ins. Co.*, 85 N. Y. 475.

Paragraphs and clauses of a policy should not be construed so as to make them conflict with each other if such is possible. They should be construed so as to make them harmonize to give each and all the terms full force. Having indemnity for its object, the contract of insurance is to be construed liberally to that end. *Strafford, etc., Co.* v. *Sickness and Acc't Ass. Ass'n*, 1 Q. B. L. Rep. (1891), 402.

If the meaning of terms or words is made plain by the context, or by the use of said words in one part of the policy in relation to one party to the contract, the same meaning must be given to such

words in other parts of the instrument and in their relation to the other party to the contract. *So. Straffordshire* v. *Sickness & Acc. Ass. Ass'n*, 1 Q. B. L. Rep. (1891), p. 406; *Mer. Credit Guarantee Co.* v. *Wood*, 68 Fed. Rep. 533. In all cases the words of a policy are to be taken most strongly against the insurer. Wood, Fire Ins. (1st Ed.) p. 128; *Guarantee Co.* v. *Mechanics Bank*, 80 Fed. Rep. 778.

The first sense from which to infer the sense in which the parties in a contract have employed words is the contract itself, and the meaning of words under question may be ascertained by the use of the same words in other parts of the contract so used as to render their signification clear. Duer, Ins. (Ed. 1845), 165, § 10; *Hoffman* v. *Ætna Ins. Co.*, 32 N. Y. 43; Joyce, Ins., § 212.

Counsel argued: In electing to resist the suit of the injured party, the insurance company has assumed a responsibility and must take the consequences. *Dane* v. *Mort. Ins. Corp.*, 1 L. Rep. Q. B. D. (1894) 54; *Mandell* v. *Fidelity & Casualty Co.*; 170 Mass. 173; *Finlay* v. *Mexican Inv't Corp.*, (1897), 1 Q. B. 517.

This suit of Sawyer's was resisted by the insurance company, against the wishes of the Rumford Falls Paper Company—the nominal defendant—and with the full knowledge that it could have been adjusted and settled for one thousand dollars.

The fact that the defendant, when having decided to resist a claim of an injured person and defend against his suit, thus assumes the entire risk of such determination, is shown by the phraseology of the policy.

If defendant wishes to show that the agent (an attorney) solicited Sawyer's counsel to do an act improper or dishonorable, such is not within the scope of an attorney's general authority and special previous authority or subsequent ratification by principal must be shown. 2 Greenl. Ev. (15th ed.), § 68, p. 58; *McManus* v. *Crickett*, 1 East, 106; *Middleton* v. *Fowles*, 1 Salk. 282. This was not done.

The assured did not contract with the insurance company to give it supreme control over the question of resisting a suit by the injured party—surrender any management of such suits against

itself into the hands of the insurance company—and also bind itself to accept $1500 for whatever verdict might be rendered against it. The assured did not thus place itself in the power and at the mercy of an insurance company. No such provision appears in the policy. No such inference can be reasonably drawn therefrom and the law will not allow by mere construction such a power to be exercised by the insurance company without a corresponding responsibility.

N. & H. B. Cleaves and S. C. Perry, for defendant.

Alleged offers of compromise: *Beaudette* v. *Gagne*, 87 Maine, 534; *Marshall* v. *Jones*, 11 Maine, 58; *Webber* v. *Dunn*, 71 Maine, 340.

The contract: The reception, acceptance and retention of the policy, without objection, is conclusive evidence that the plaintiff knew its terms, and it is, therefore, bound by it. Counsel cited: *Davis* v. *Insurance Co.*, 13 Blatch. p. 462; *Richardson* v. *Maine Ins. Co.*, 46 Maine, 397; *Marshall* v. *Jones*, 11 Maine, 54, p. 57; *Sylvester* v. *Staples*, 44 Maine, 501; *Cocheco Bank* v. *Berry*, 52 Maine, 302; *Veazie* v. *Forsaith*, 76 Maine, 179; *Ames* v. *Hilton*, 70 Maine, 43; *Mutual Safety Insurance Co.* v. *Hone*, 2 N. Y. 235, p. 243; Cooke on Life Insurance, p. 235; Flanders on Fire Insurance (2nd ed.) p. 603; *Liscom* v. *Boston Mut. Fire Ins. Co.*, 9 Met. 205, 211; *Underhill* v. *Agawam Mut. Fire Ins. Co.*, 6 Cush. 440, p. 447; *Stevenson* v. *Piscataqua F. & M. Ins. Co.*, 54 Maine, 55, p. 71; *Blinn* v. *Dresden Mutual Fire Ins. Co.*, 85 Maine, 389; *Brown* v. *Quincy Mut. F. Ins. Co.*, 105 Mass. 396; *Ashland Mut. F. Ins. Co.* v. *Housinger*, 10 Ohio St. 10; *Whitehouse* v. *Cargill*, 88 Maine, 481; *Donnell* v. *Donnell*, 86 Maine, 518; *Illinois Mut. F. Ins. Co.* v. *Andes Ins. Co.*, 67 Ill. 363; *Bainbridge* v. *Nelson*, 10 East, 346; *Hamilton* v. *Mendes*, 2 Burr. 1210; *St. Louis A. & R. I. R. R. Co.*, 33 Ill. 189; *Insurance Co.* v. *Insurance Co.*, 38 Ohio St. 15; *Brierre* v. *American Indemnity Co.*, 67 Mo. App. 384; *Fidelity & Casualty Co.* v. *Fordyce*, 64 Ark. 174; 1 May on Insurance, (3d Ed.) § 1; *Com.* v. *Wetherbee* 105 Mass. 160; Wood, Fire Ins. p. 4; *Haley* v. *Dorchester Mut. Fire Ins. Co.*, 12 Gray, 552, S. C. 1 Allen, 536; 2 Phillips on

Insurance (5th Ed.) p. 418, § 1743; *Clark* v. *Bush*, 3 Cow. (N. Y.) 151; *Griffiths* v. *Hardenbergh*, 41 N. Y. 465, 470; *Lyon* v. *Clark*, 8 N. Y. 148, 152; *Warner* v. *Thurlo*, 15 Mass. 154; *Rice* v. *Nat'l Credit Ins. Co.*, 164 Mass. 285; *Mechanics Savings Bank & Trust Co.* v. *Guaranty Co. of North America*, 68 Fed. Rep. 459; *Catholic Knights of America* v. *Fidelity & Casualty Co.*, 63 Fed. Rep. 48, 58; *Glendale Woolen Co.* v. *Protection Ins. Co.*, 21 Conn. 18; *Anoka Lumber Co.* v. *Fidelity & Casualty Co.*, 30 L. R. A. 689.

Defendant was to defend any legal proceedings "at its own cost." 9 Vroom, (N. J. L.) 390; *Tillman* v. *Wood*, 58 Ala. 579.

Collusion: *Jeffrey* v. *Grant*, 37 Maine, 236; 1 Phillips on Ins. (5th ed.) p. 377; *Anoka Lumber Co.* v. *Fidelity & Casualty Co.*, supra; *Granger* v. *Clark*, 22 Maine, 129; *U. S.* v. *The Amistad*, 15 Peters, 594; *Richardson* v. *Maine Ins. Co.*, 46 Maine, 348; 9 Am. & Eng. Ency. of Law, 80; *Smith* v. *Keen*, 26 Maine, 423.

The acts of the plaintiff were a violation of the terms of the policy, and there should be no recovery. *Tuttle* v. *Travellers' Ins. Co.*, 124 Mass. 175; *Keen, Admx.*, v. *N. E. Mut. A. Ass'n*, 161 Mass. 149; *Gt. Falls Manuf. Co.* v. *Worster*, 45 N. H. 110; *Richards* v. *Protection Ins. Co.*, 30 Maine, 278; *Dolloff* v. *Phœnix Ins. Co.*, 82 Maine, 266; *Witherell* v. *Maine Ins. Co.*, 49 Maine, 200; *Wood* v. *Hartford Fire Ins. Co.*, 13 Conn. 533.

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

WHITEHOUSE, J. This is an action on a policy of insurance against "employers' liability," brought to recover of the defendant company the sum of $2763.90, being the amount of a judgment obtained against the plaintiff company by one Angus T. Sawyer as damages for an injury sustained by him while in its employment. See *Sawyer* v. *Rumford Falls Paper Co.*, 90 Maine, 354.

The present action comes to this court on a report of the evidence from the Superior Court of Cumberland county.

In the policy declared upon in the plaintiff's writ the defendant company agrees to indemnify the plaintiff company:

"Against liability for damages on account of fatal or non-fatal injuries accidentally suffered by any employe or employes of the assured, while engaged at the places and in the occupations mentioned in the application for this policy, subject to the following agreements and conditions:

"1. The company's liability for an accident resulting in injuries to or in the death of one person is limited to fifteen hundred dollars (1500;) and, subject to the same limit for each person, its gross liability for a casualty resulting in injuries to or the death of several persons is twenty-five thousand dollars.

"2. The Assured, upon the occurrence of an accident, and also upon receiving information of a claim on account of an accident, shall give immediate notice in writing of such accident or claim, with full particulars to the company, at its office in New York city, or to the agent, if any, who shall have countersigned this policy.

"3. If, thereafter, any legal proceedings are taken against the Assured to enforce a claim for damages on account of such accident, the Company will defend the same at its own cost in the name and on the behalf of the Assured.

"4. The Assured shall not, except at his own cost, settle any claim nor incur any expense nor interfere in any negotiations for settlement with the injured person, nor in any legal proceedings without the consent of the Company, previously given in writing, but he may provide such surgical relief as may be imperative. The Assured shall render to the Company all reasonable aid in securing information and evidence and in effecting settlements."

The other ten articles in the policy contain stipulations not material to be considered in determining the questions at issue between the parties to this action.

In its brief statement of special matter of defense, the defendant company avers that the assured failed to perform the obligation imposed upon it in article four, to render all reasonable aid in securing information and evidence for the defense of the action

brought against it by Angus T. Sawyer; and accordingly contends, in the first place, that the defendant company is exonerated from all liability to pay any part of the damages received by Sawyer; and, secondly, it contends that in any event, by the express terms of article one of the policy, the liability of the defendant for an accident resulting in injuries to one person is limited to fifteen hundred dollars.

I. Under the averment in the brief statement charging a failure on the part of the assured to "render reasonable aid in securing information and evidence" for the defense, the defendant especially complains that, during the progress of the trial of Sawyer's action against the assured in the Supreme Judicial Court holden at Paris, the superintendent of the plaintiff company made the following statement at the hotel in the presence and hearing of the presiding justice and of several jurors constituting the panel for the trial of the cause, viz: "We are not defending this case; this is the Fidelity and Casualty. They insure us and they are the ones who are responsible; we wouldn't defend this case." One of the defendant's attorneys, Mr. Smythe of New York, testifies that he was present and heard this statement, and that it was heard by the presiding justice who was sitting at the same table with himself. It does not appear, however, that the presiding judge administered any reproof to the superintendent at the time, or that he ever gave the jury any admonition against the prejudicial effect of such a remark. It does not appear that any request was made by the defendant's attorneys that such admonition should be given to the jury, or that any reference to the matter whatever was ever made in court. It does not appear that they sought to take advantage of the incident as a ground for claiming a mistrial or a motion for a continuance, or that any objection whatever was made to the further progress of the trial. Nor does this objection appear as one of the grounds for the motion for a new trial presented to the law court. The conduct of the defendant's attorneys, in this respect, is calculated to suggest a doubt whether it was then understood by them that any jurors, empanneled for the trial of the

cause, were within hearing at the time the objectionable remark is alleged to have been made by the superintendent. The remark was not necessarily a violation of the agreement to "render all reasonable aid in securing information and evidence;" and if offered simply as an indication of a hostile attitude on his part, there is no evidence that he knew that there were any jurors within hearing at the time of the remark.

It is conclusively shown by the evidence that Sawyer, the injured employee of the assured, before and after the commencement of his action, both by himself and his attorneys, informed the attorney of the defendant company as well as the managers of the assured, that he wonld accept one thousand dollars in full settlement of his claim for damages; and it undoubtedly was the opinion of the officers of the assured that a settlement on that basis would be wise and judicious and for the mutual benefit of the two companies. They were required, indeed, by the same stipulation in article four now in question, not only to "render all reasonable aid in securing information and evidence," but also, "in effecting settlements." It sufficiently appears from the report of *Sawyer* v. *Rumford Falls Paper Co.*, 90 Maine, supra, as well as from the evidence in the principal case, that the necessary "information and evidence" had all been secured long before the trial. There is no pretense that the assured concealed or withheld any information. The facts were all known. There was substantially no controversy in relation to them. The question at issue had reference rather to the appropriate inferences to be drawn from uncontroverted facts and to the legal consequences attaching to them. It was not in violation of any stipulation in the policy for the Paper Company to advise and assist in effecting a settlement which they believed in good faith to be for the interest of the insurer as well as of the insured.

But the defendant further complains that, at some time before the trial of Sawyer's actions against the assured, an attorney at law, who had been acting as attorney for the Paper Company, asked the attorneys for the plaintiff Sawyer if they would be willing to remit all above $1500 and hold the Paper Company harm-

less in case the verdict should exceed that amount, provided the Paper Company would assist the plaintiff in the prosecution of his suit. This remarkable suggestion appears to have been inconsiderately made in ignorance of the stipulations in the policy, and does not appear to have been made by authority of the Paper Company. In any event the "suggestion" was not adopted by Sawyer's attorneys, no such arrangement was in fact ever made, and the attorney who suggested it does not appear to have been present at the trial or to have had any connection with it whatever. The plaintiff company cannot be affected by such an unauthorized and unexecuted suggestion, however reprehensible in itself it may appear to have been. The defendant company was not in fact prejudiced or aggrieved by it.

Under the rigorous stipulations in articles three and four of the policy, it has been seen that, excepting the privilege of settling a claim "at his own cost," the assured retained no authority whatever to conclude settlements or manage legal proceedings. Under these articles full and absolute control over all defenses to actions brought, as well as all negotiations for the settlement of claims, was surrendered by the assured to the defendant company. In this case the defendant company refused to accept Sawyer's offer of settlement, and exercised its exclusive right to defend the suit "in the name and on behalf of the assured." Thus the assured helplessly awaited the determination of the question whether in that instance its policy of indemnity was to be a shield in its own hands, or a sword in the hands of its antagonist. For it has been seen that, as a result of the litigation, the plaintiff Sawyer, who offered to accept $1000 as a compromise settlement, recovered a verdict for $4250. This was reduced by the court to $2500, still entailing, however, a loss to the assured, according to the defendant's construction of the policy, of at least $1000, which would have been prevented by the proposed settlement. But the assured had no power to make a settlement "except at "his own cost." It only reserved the right to render all "reasonable aid" in effecting settlements. The power to decide the question of settlement had been surrendered to the insurance company. Under these cir-

cumstances, the managers of the assured, believing in good faith that an acceptance of the offer of settlement would be to the advantage of both the insurer and the insured, might be expected to make strenuous exertions and employ all legitimate means not prohibited by their policy, to convince the defendant company of the wisdom and expediency of the proposed adjustment; and their conduct in that respect should now be reviewed with reasonable liberality and charity.

Thus, when the facts relied upon by the defendant to establish the charge of collusion between Sawyer and the Paper Company, and to prove a violation on the part of the latter of the stipulations in the policy, are examined in the light of these negotiations for a settlement, and of the situation and circumstances of the parties, it is the opinion of the court that the evidence fails to disclose any want of good faith on the part of the assured, or any omission to perform the obligations imposed upon it by the terms of the policy. Indeed, it appears from the letter of one of the attorneys who tried the case for the defendant company, written immediately after the opinion of the law court was announced, that this evidence was not then deemed sufficient to maintain the defense now interposed. He then wrote: "As I understand it, our company is willing to pay $1500, and interest if it is demanded, also such proportional part of the costs as the $1500 bears to the $2500, or three-fifths.

II. It is also contended on behalf of the plaintiff company that the amount, which it is entitled to recover in this action, is not to be measured by the limitation of fifteen hundred dollars contained in article one of the policy. It is insisted that under the circumstances of this case, upon a reasonable construction of the several provisions of the policy, the plaintiff is now entitled to recover the full amount of the final judgment obtained by the original plaintiff, Angus T. Sawyer, viz., $2763.90. It is conceded that if the defendant had elected to pay the plaintiff company the sum of fifteen hundred dollars within a reasonable time after receiving notice of Sawyer's claim for damages, it might, by such payment,

have obtained complete exoneration from all further liability under this policy. But, it is urged that having declined to discharge its liability under the fourth article in the policy, and having elected to defend the legal "proceedings" commenced by Sawyer "at its own cost" by virtue of the stipulation in article three, the defendant must now pay not only the "cost" of defending the suit, but all the damages represented by the judgment recovered in the suit. Attention is called by the plaintiff to the provision in article four that "the assured shall not, except at his own cost, settle any claim, nor incur any expense nor interfere in any negotiations for settlement," where, it is said, the phrase "at his own cost" necessarily means the payment of the damages claimed by the injured party. It is earnestly contended in behalf of the plaintiff that the phrase "at its own cost" must have been employed to express the same purpose in article three where the defendant company agrees to defend legal proceedings "at its own cost," and that it should now be interpreted to mean not only that the defendant company would assume all the expense of defending the suit, but would also pay any judgment that might be recovered. It is insisted that this construction is a fair and reasonable one; that it gives to every article in the policy a clear field of operation and reconciles the different provisions and stipulations with each other; while on the other hand it is insisted that the construction placed upon the contract by the defendant, giving to that company absolute power to control litigation and settlements without adequate responsibility for the consequences, must result in hardship and injustice to the assured.

When considered from the assured's point of view this argument is calculated to produce a strong impression, and the question has accordingly been examined with the careful study and reflection which its importance and inherent difficulties require.

It must be remembered, in the first place, that this policy of insurance is a contract of indemnity in which the parties have a legal right to insert any conditions and stipulations which they deem reasonable or necessary, provided no principle of public policy is thereby contravened. Like all other contracts it is to be

construed in accordance with its general scope and design and the real intentions of the parties as disclosed by an examination of the whole instrument. *Philbrook* v. *N. E. Mut. Fire Ins. Co.*, 37 Maine, 146; *Blinn* v. *Dresden Mut. Fire Ins. Co.*, 85 Maine, 390. In case of ambiguity, or inconsistency, it is often said that the court will give the policy a construction most favorable to the assured, for the reason that as the insurer makes the policy and selects his own language he is presumed to have employed terms which express his real intention. Wood on Fire Ins. 128, and cases cited. But, as remarked by the court in *Imperial Fire Ins. Co.* v. *Coos Co.*, 151 U. S., 452, for the purpose of safeguarding this rule against any abuse of its application, it should be considered in connection with another rule equally well settled, "that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used; and if they are clear and unambiguous, these terms are to be taken and understood in their plain ordinary and popular sense."

With reference to the general scope and purpose of the policy in suit, it is manifest from an examination of the whole instrument that, while it was designed to be a contract of indemnity to the limited amount agreed upon, it was not the intention of the parties to relieve the assured from all responsibility whatever for damages resulting from injuries to its employees. In the discussion of the first proposition set up in defense, it has been seen that the arbitrary exercise of the power retained by the defendant company to control settlements and legal proceedings might indeed in some cases involve the assured in greater loss than the forfeiture of the policy. On the other hand, if the policy should be construed to impose upon the defendant company the obligation either to pay the assured the sum of fifteen hundred dollars, accept the employee's offer of settlement or defend the legal proceedings at the peril of being compelled to pay the full amount of any judgment for damages and costs that might be recovered, it is to be feared that the assured, being in most instances under no liability to pay any part of the damages, would have little incentive to defend against the claims of injured laborers, however devoid of legal merit. There

is also ground for apprehension that, under such a contract of indemnity, the sense of freedom from responsibility enjoyed by the assured would be such as to induce a relaxation of those rules of prudence and vigilance which are indispensable for the reasonable protection of the laborers engaged in its service.

It was undoubtedly in contemplation of these things that the policy in suit was devised with a view to an apportionment of the responsibility between the insurer and the insured. Whether the interests of the assured are in all respects sufficiently guarded by the stipulations in the contract, it is unnecessary to consider. These corporations had the same right that individuals have to make their own contract. The court has no power to add to it or take from it. The function of the court is to interpret it, not to make it. The first article in the policy declares that the defendant "company's liability for an accident resulting in injuries to or the death of one person is limited to fifteen hundred dollars." This language is clear and unambiguous, and would seem to be susceptible of only one interpretation. It measures the amount of the insurance and limits the risk of the defendant company in case of accident and injury to one person. There is no other stipulation in the policy which is inconsistent with it. The agreement in article three simply requires the defendant company to defend "any legal proceedings" at "its own cost" in the event that it elects not to pay the $1500 or accept any offer of settlement. It may be conceded that the word "cost" is here used in the same relative sense as in the succeeding article in the policy, where the assured is prohibited from settling any claim "except at his own cost." What it will cost to settle a claim is obviously the sum required to pay it. What it will cost to defend a lawsuit is the amount required to pay the fees of counsel and witnesses and other expenses involved in presenting the defense, including the taxable costs recovered by the plaintiff in that suit, if the defense is unsuccessful. What it will cost to make a defense to the suit is one thing; what it will cost to settle the judgment that may be recovered is another and a different thing. In each of these articles in the policy it is only the precise thing specified, and no more, that

is to be done by the policy "at his own cost." The defendant company nowhere agrees to settle any judgment, or to indemnify the assured against any judgment that may be recovered against it, beyond the specified limit of $1500, and the cost of defending the suit. This is clearly the contract which the parties made and the one which they are entitled to have enforced according to its terms.

The conclusion, therefore, is that the Rumford Falls Paper Company is entitled to recover in this action against the Fidelity and Casualty Company the sum of fifteen hundred dollars, the amount of insurance specified in the policy, with interest thereon from February 21, 1896, the time when the verdict was rendered in the action, *Sawyer* v. *Rumford Falls Paper Company*, and the costs recovered in that action, taxed at sixty-two dollars and seventy-two cents, with interest thereon from July 14, 1897, the time when the execution for the damages and costs in that action was paid by the plaintiff company.

Judgment for plaintiff accordingly.

ASENATH J. GOODWIN

vs.

JAMES W. SMALL, and others, Executors.

York. Opinion April 22, 1899.

Practice. Law Docket. Rule XVII. Judgment.

A verdict having been rendered against the defendants in January, 1898, in York county and a motion filed against the verdict at the same term, the defendants being allowed until April 1, 1898, to file a report of the evidence, *held;* that it is within the power of the justice sitting in said court at the January term, 1899, to strike from the docket the entry of "law on report" and to order judgment on the verdict for the reason that no report of the evidence had been filed; even although the case had been entered on the docket of the law court and set down for argument in 60, 30 and 30 days, but neither copies of the case nor arguments having been furnished within the time prescribed therefor, nor at any time.

ON EXCEPTIONS BY DEFENDANTS.

The bill of exceptions in this case certified from the January term, 1899, of York county, to the Chief Justice under R. S., c. 77, § 43, is sufficiently stated in the opinion of the court.

J. O. Bradbury, for plaintiff.

Frank M. Higgins, for defendants.

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

PETERS, C. J. The facts agreed are as follows: At the January term, 1898, of court in York county, the plaintiff recovered a verdict for $3377.44, and at the same term a motion was filed by the defendant for a new trial. There was an entry on the docket that a copy of the evidence should be filed by April 1, 1898, but none had been filed as late as the January sitting of the court in 1899. Whereupon at that term, on the second day thereof, the plaintiff moved that the entry of law on report be stricken from the docket and judgment be entered upon the verdict recovered a year before that time. This order was made by the justice sitting, the defendant excepting to such order.

The counsel for defense contends that, after a motion for new trial has been entered on the docket and a time fixed for filing a report of the evidence, the case then becomes transferred to the law court and can only be disposed of in that tribunal. But we think the entry allowing time for filing the report of evidence was conditioned upon a performance of that requirement within the time prescribed. Rule XVII, found in 72 Maine, 572, is expressly to that effect, for it provides that for such neglect "the motion may be regarded as withdrawn and the clerk be directed to enter judgment on the verdict." The argument of the defendant is that the trial court in such circumstances loses its control over the case in the same way that a municipal or probate court does when a case is carried from such court to a court above by appeal But the comparison does not hold good, as in those cases the appeal usually transfers the jurisdiction from the lower to the appellate court,

while in this case the effect is only a transference to another branch of the same court and for limited purposes.

But the defendant relies, in further support of his position, upon the fact that, at the law court for the Western District at its July term, 1898, the case was set down to be argued in writing, in 60, 30 and 30 days; contending that this act was a waiver of the requirement that the report of evidence should be filed by April 1, preceding that time. This fact does not appear in the bill of exceptions, but if we may take judicial notice of the fact, then we do not think the action of the judge at nisi prius should be disturbed. The entry upon the law docket must be regarded as provisional only, not precluding an inquiry into the condition of the case on the docket either above or below. The entry was permitted upon the supposition that both the copies and the arguments would be furnished within the time set therefor, and neither having been so furnished, and the proceedings being evidently intended merely for delay, the order at nisi prius correcting the docket according to the fact was in no sense objectionable.

Exceptions overruled.

CARO E. HILLIKER *vs.* MELVILLE P. SIMPSON.

Penobscot. Opinion April 26, 1899.

Pleading. Puis Darrein Continuance. Plea in Bar. Real Action. Rents and Profits. R. S., c. 104, § 11.

(1) It is a well-settled rule of pleading that, after the filing of a plea puis darrein continuance, all former pleas are regarded as stricken from the record and everything is confessed except the matter contested by this plea.

(2) Under the rules of special pleading established in the earlier stages of the common law great technical exactness and certainty were undoubtedly required in both the form and substance of such a plea.

Held; in this case, that the defendant's plea, both in substance and in form, fulfills all the requirements indicated by the most approved forms, and obviates all the objections which have been held fatal in any of the cases to which the attention of the court has been called.

(3) It is the established rule of law in this state that if, pending a real action, the title to the land and the right of possession become vested in the defendant by operation of law, without the concurrence of the plaintiff, this fact may be pleaded in bar of the further prosecution of the suit.

(4) The right to recover damages for rents and profits is a mere incident to the right to the land itself; and *held;* that the plaintiff's right to recover rents and profits, in this action, is defeated by the failure of the suit itself.

(5) Whether the character of the defendant's occupation was such as to entitle the plaintiff to recover her proportion of the income of the premises by virtue of R. S., ch. 95, § 20, or otherwise, is a question not now before the court.

ON EXCEPTIONS BY PLAINTIFF.

Real action to recover an undivided half of the homestead farm of George Simpson, the plaintiff's father, deceased, and which descended to her and the defendant as his heirs at law upon his death September 6, 1895, subject to the payment of debts and the widow's dower; also to recover two hundred dollars, yearly rents and profits received by the defendant. Writ dated August 3, 1897, returnable on the first Tuesday of October next following.

The administrator of George Simpson obtained at the May term, 1897, of the probate court, for Penobscot county, a license to sell the real estate described in the plaintiff's action and sold and conveyed the same to the defendant on November 3d, 1897. At the October term, when this action was entered in court, the defendant pleaded the general issue with a brief statement disclaiming title to the plaintiff's undivided half of the property, and alleging that he was in possession of the whole premises as tenant in common only with the plaintiff. The action was then continued to the next term of court, being the January term, 1898, when the defendant also filed the following special plea in bar:

"And now said defendant, Melville P. Simpson, at this day, to wit, on the 5th day of said term, the court in the exercise of its discretion permitting this plea to be filed at this term, comes and says that the said demandant ought not to have or further maintain her said action against him, because he says after plea filed by said defendant in this cause, and on the day of the last continuance of this cause, that is to say, on the twenty-sixth day of last October term of said court, being the third day of November,

A. D. 1897, from which day of said October term of this court this cause was last continued, and before commencement of this present term, to wit, at Levant, in said county of Penobscot, on the said third day of November, A. D. 1897, at about the same hour of said third day of November, 1897, that said continuance of said cause actually took place, or, at all events, at an hour of said third day of November, 1897, too late for the said defendant, Melville P. Simpson, to have filed this plea in court, Simon G. Jerrard, of said Levant, who was on said third day of November, 1897, the legal administrator of the goods and estate of George Simpson, late of said Levant, deceased, duly and legally appointed and qualified and acting as such administrator and clothed with full and lawful power as such administrator, (said George Simpson having died, seized and possessed in fee simple of the whole of the real estate described in said demandant's writ and declaration, one undivided half of which, said demandant has brought said action to recover) made, subject to widow's dower in his said capacity to said defendant, Melville P. Simpson, a sale and deed, in due and legal form of law, for a valuable consideration, to wit, eight hundred and fifty dollars ($850.00) paid to said administrator by said defendant, of all the real estate described in the said demandant's writ and declaration, duly signed, sealed, acknowledged and delivered to said defendant on said third day of November, A. D. 1897, and on the fourth day of November, 1897, duly recorded in said Penobscot Registry of Deeds, Book 640, p. 212, and here in court to be produced; said administrator having duly and legally obtained a license to make such sale and conveyance from the Honorable James H. Burgess, judge of probate, within and for the said county of Penobscot, a court having jurisdiction thereof, at the May term of said court, A. D. 1897, and said sale and conveyance having been duly and legally made in pursuance of said license and in accordance with law; whereby and by force of said sale, conveyance and deed from said administrator, said defendant acquired title to all said real estate in fee simple, and he, said defendant, became entitled thereby to the lawful and exclusive possession and occupancy of the whole of said real

estate, and the title to all the said real estate on said third day of November, A. D. 1897, became vested in him, said defendant, in fee simple, and that ever since said third day of November, 1897, he has held and now holds said title to all said real estate in fee simple, and that he made said purchase of said real estate in good faith, and by reason of all the same on the third day of November, A. D. 1897, said demandant became and is wholly divested of all right to the title and interest in all said real estate, and to the seizin and possession of all said real estate, and this the said defendant is ready to verify; wherefore he prays judgment if the said demandant ought further to have or maintain her said action against him. By his attorney, M. Laughlin."

The plaintiff demurred to this special plea in bar, but the court overruled the demurrer and sustained the plea. To this ruling of the court the plaintiff was allowed his exceptions.

D. D. Stewart, for plaintiff.

Rents and profits must be declared for in this action. *Pierce* v. *Strickland*, 25 Maine, 440; *Larrabee* v. *Lumbert*, 36 Maine, 443. This is done in the present case; and the amount due is not denied, but admitted. The statutes of Maine and Mass. are alike, and provide that the demandant in a real action, who shows a legal title to the land, or the undivided part which he claims, and a right of entry, shall recover the land; and shall also be entitled to recover in the same suit, "damages for rents and profits of the premises from the time when his title accrued." R. S., c. 104, §§ 1 to 11. This statute is made in terms to apply between tenants in common. Ib. §§ 10, 11.

A plea puis darrein continuance operates as an abandonment of all former pleas, and is an admission of all the allegations in the demandant's writ, and everything is "confessed except the matter contested by the plea puis." *McKeen* v. *Parker*, 51 Maine, 391–2; *Jewett* v. *Jewett*, 58 Maine, 234–236; *Morse* v. *Small*, 73 Maine, 565; *Augusta* v. *Moulton*, 75 Maine, 551, 556; *Field* v. *Cappers*, 81 Maine, 36, 37; *Shorey* v. *Chandler*, 80 Maine, 411, 412; *Dunn* v. *Hill*, M. & Wels. 470, 471, 474. The disseizin of the demandant by the defendant, and the rents and profits due her

from him under the statute, from the time her title accrued to the date of the writ, are confessed and admitted.

Special plea in bar: In *Jewett* v. *Jewett*, supra, this court says: "A plea puis darrein continuance requires extreme certainty. Such a plea must show facts happening after the last continuance, and the time and place when the defense arose." In *Field* v. *Cappers*, supra, a receipt in full settlement and discharge of the claims in suit was given by the plaintiff to the defendant while the suit was pending in court, the money having been paid to him. The defendant filed a plea puis darrein continuance to which the plaintiff demurred. PETERS, C. J., in delivering the opinion of the court said: "Great certainty is required in pleas of this description, both in substance and form. . . . . The plea here is defective in that no place is alleged where the release was made and delivered; time and place should be alleged." And it was held bad upon general demurrer.

The demandant's title comes by descent from her father. She takes as his heir. The defendant in this plea attempts to claim her inheritance under an alleged conveyance by an administrator on her father's estate. He must show that every step required by the statute has been strictly complied with. He must allege in his plea every thing which the statute requires to be done, in order to divest the title of the heir. He must show that the condition of the estate required a sale of the real estate, and then that every act required by the statute has been punctiliously complied with in making the sale. In *Alexander* v. *Pitts*, 7 Cush. 505, the supreme court of Massachusetts said: "It is of great importance to the rights of property, that positive regulations of statute, which authorize its seizure and sale, without the consent of the owner, should be strictly complied with. . . . . It is upon this principle that sales of real estate by executors and administrators for the payment of debts under a license of court, have uniformly been held invalid, as against those whose interests are affected thereby, unless every essential requisite and direction of law have been faithfully complied with."

Plea defective:

1. There is no allegation of time or place as to the appointment of Simon G. Jerrard as administrator; nor by what court, nor in what county. An important and traversable fact. No allegation that he gave any bond as administrator, or to account for the proceeds of the alleged sale, or took any oath before making the alleged sale:

2. No allegation that George Simpson owed a dollar to anybody:

3. None that the sale was made in order to pay his debts, or charges of administration:

4. None that the supposed administrator petitioned any probate court for license to sell: or

5. None that any notice of sale was given the plaintiff, or anybody else, or was ever published in any newspaper, or was ever ordered by any probate court:

6. No sufficient allegation of time, place or court, when or where, license to sell was obtained. *State* v. *Hanson*, 39 Maine, 341. All important and traversable facts:

7. No allegation that he did not leave personal estate:

8. No allegation that he did not leave personal estate enough to pay his debts and expenses of administration:

9. The homstead farm contained 122 1-2 acres as the writ and pleadings show. No allegation, or reason shown, for selling the whole of it by the alleged administrator:

10. No allegation that the sale of part would injure residue:

11. No allegation whether the sale was public or private. Nothing in the plea to show:

12. No allegation of the place where said alleged deed was delivered by said Jerrard to said defendant. *Field* v. *Cappers*, 81 Maine, 37:

13. As Chief Justice PETERS said in *Field* v. *Cappers*, supra: "The plea is defective in that it does not state the day of the last continuance" except in an "uncertain, involved and confused" way:

14. No part of the plea shows any legal ground or reason for the alleged sale:

15. The plea does not show that the provisions of the statute, or its requirements relating to the sale of real estate by an administrator, were complied with or executed, and it is therefore bad.

It is elementary law, both common and statute, that no sale of real estate can be lawfully made until it is shown that the personal estate is insufficient to pay the debts of the deceased, and the charges of administration. There is no such allegation in this plea. *Drinkwater* v. *Drinkwater*, 4 Mass. 358; *Ricard* v. *Williams*, 7 Wheat. 114.

The special plea in bar must answer every part of the declaration. In this suit the plaintiff demands of the defendant her land that descended to her from her father, and the rents and profits received by the defendant from it for nearly two years amounting to about $400. He admits that she is entitled to recover upon both grounds and for both causes, unless he can protect himself under his plea. But there is no allegation in the plea that the supposed administrator did, or could transfer and sell to the defendant any thing more than the real estate. The plea, therefore, is no sufficient answer to the declaration, and is bad upon demurrer. *Augusta* v. *Moulton*, 75 Maine, 551, 556; *Tufts* v. *Maines*, 51 Maine, 394; *Jackson* v. *Davenport*, 18 Johns. 295, 302; Adams on Ejectment, 34.

No title can be acquired by a defendant, or tenant, after the commencement of a suit, which can defeat the suit, except such title comes through the act or consent of the demandant. In *Andrews* v. *Hooper*, 13 Mass. 476, Mr. Justice Wilde, in delivering the opinion of the court said: "Nor can the tenant be permitted to set up a title made since the commencement of the present action. The evidence of a title thus acquired has been, I believe, uniformly rejected in our courts. A different course would operate unequally and unjustly by enabling the tenant to fortify a defective title, and avoid the payment of costs for which he might be otherwise liable, and which, in the course of an expensive suit, might even exceed the value of the land in litigation." This was the common law in Massachusetts in 1816, when we were a part of that state.

In *Jewett* v. *Felker*, 2 Maine, 340, MELLEN, C. J., said: "It is a well-settled principle that a tenant cannot defeat a demandant's action by purchasing in a title after the commencement of the action, unless such purchase be made of the demandant, or with his concurrence or consent," and referring to the case just quoted.

This was the common law of Maine in 1823—in a case in Somerset county. In *Parlin* v. *Haynes*, 5 Maine, 180, a case in Penobscot county, the same learned judge, in delivering the opinion of the court, quoted at length the foregoing extract from *Andrews* v. *Hooper*, 13 Mass. 476, and then added: "We admit that a conveyance of the demanded premises by the demandant directly to the tenant, is a fair exception from the general rule and would constitute a good plea in bar." But the court refused to admit a deed from the demandant to a third person, after action brought, and from such third person to the tenant.

The doctrine of *Andrews* v. *Hooper*, is approved by this court in *Manning* v. *Laboree*, 33 Maine, 347, by HOWARD, J.—quoted at full length again in *Chick* v. *Rollins*, 44 Maine, 114, by TENNEY, C. J.—by APPLETON, J., in *Larrabee* v. *Lumbert*, 36 Maine, 446, who said: "In real actions the rights of the parties are to be determined upon the state of the title at the time of the demandant's suing out his writ. Neither the plaintiff, for maintaining his title, nor the tenant in sustaining his defense, can invoke the aid of a subsequently acquired title." In *Clark* v. *Pratt*, 55 Maine, 549, this learned justice of this court reaffirmed the same principles, excepting only the case where the tenant after the commencement of the action purchases directly from the demandant.

In *Tainter* v. *Hemenway*, 7 Cush. 573, the supreme court of Massachusetts maintains the same doctrine. In the leading case of *Curtis* v. *Francis*, 9 Cush. 455, 456, Shaw, C. J., repeats these principles, and reaffirms them, citing at length *Andrews* v. *Hooper*, supra. They are reaffirmed in *Hall* v. *Bell*, 6 Met. 433; *Weston* v. *Spiller*, 2 Allen, 126; and in *Hooper* v. *Bridgewater*, 102 Mass. 512. Against this vast weight of authority stands *Leavitt* v. *School Dist. in Harpswell*, 78 Maine, 574,—and this court must determine which it will follow. In the case last cited, not one of

the foregoing authorities are referred to in the opinion, and none like it are cited—the only case mentioned being *Rowell* v. *Hayden*, 40 Maine, 582, in which the act of the demandant in conveying away the property after suit brought, was held to defeat his action. Nor was any notice taken of *Hooper* v. *Bridgewater*, 102 Mass. 512, a case exactly like *Leavitt* v. *School Dist. in Harpswell*, supra, and decided the other way by the supreme court of Massachusetts.

M. Laughlin, for defendant.

The defendant having filed a plea at the October term under R. S., c. 104, § 6, any new matter arising subsequently to that, although during the October term, would have to be pleaded puis darrein continuance, because in the language of RICE, J., in *Rowell* v. *Hayden*, 40 Maine, 385, the new matter would not then have arisen "before plea." Andrews' Stephen on Pleading, p. 156, says: "A plea since the last continuance is always pleaded by way of substitution for the former plea, on which no proceeding is afterwards had." "When the defendant at the common law within the time prescribed pleads the single plea allowed him, he is, as a rule, confined in his defense to the matter contained in that plea; he cannot withdraw the plea filed and substitute another as the cause progresses, but if any matter of defense arises after issue joined, whether in fact or in law, the defendant is at liberty to plead it." 18 Am. & Eng. Ency. p. 517. Plaintiff cannot take advantage of failure to plead puis darrein continuance in proper time by demurrer; it must be taken advantage of by motion to dismiss. *Rowell* v. *Hayden*, 40 Maine, 585. It is discretionary with the court to receive the plea, even after more than one continuance has intervened. 1 Chitty, Pleading, *660, note 2; 18 Am. & Eng. Ency. p. 517. In this case the plea opens with the statement (admitted to be true by the demurrer) that the court in the exercise of its discretion permitted the plea to be filed.

The conveyance to the tenant by an administrator during the pendency of the action was tantamount to a conveyance direct from the heir, (the demandant) to the tenant; consequently, this case falls within the rule adopted in *Clark* v. *Pratt*, 55 Maine, 546–549, and in *Parlin* v. *Haynes*, 5 Maine, 178–180. The

demandant took her title by virtue of the statute, which says, "Real estate of a person deceased intestate being subject to payment of debts, etc., descends, etc.," R. S., c. 75, § 1; Laws of 1895, c. 157. When she commenced her action she not only knew she was liable to be divested of her title by an administrator's conveyance, but she knew, or in law is presumed to have known, what the plea alleges, that license for sale was granted more than two months before date of writ. It is only when the demandant recovers judgment for the land that he may have damages for the rents and profits of the premises from the time when his title accrued. *Brigham* v. *Hunt*, 152 Mass. 257. If plaintiff had any right to maintain any action for rents and profits, she should have proceeded not by writ of entry, but either under § 20, of c. 95, R. S., or by the form of action allowable under the rules prescribed in *Richardson* v. *Richardson*, 72 Maine, 406, and *Cutler* v. *Currier*, 54 Maine, 81. Between heirs where there is no question of disseizin, or adverse possession, the bringing of a real action is not proper and should not be encouraged; petition for partition should be instituted, or some action as above suggested.

If the tenant had gone to trial upon his first plea of non tenure under the provisions of R. S., c. 104, § 6, and had prevailed upon that plea as he surely would have done, then clearly the demandant's action would have been defeated, and she could not have recovered for rents and profits. No provision is anywhere made whereby a demandant can recover judgment for rents and profits without first having recovered judgment for the land itself.

SITTING: HASKELL, WHITEHOUSE, WISWELL, SAVAGE, FOGLER, JJ.

WHITEHOUSE, J. This is a writ of entry whereby the plaintiff seeks to recover an undivided half of the homestead farm of George Simpson, which, at his death on September 6, 1895, descended to the plaintiff and defendant as his heirs at law, subject to the payment of debts, and to the widow's dower. The writ bears date August 3, 1897, and was duly entered at the October

term, 1897, of the Supreme Judicial Court for Penobscot county, to which it was made returnable.

At the return term the defendant appeared and filed his plea of the general issue with a brief statement disclaiming any right, title or interest in the plaintiff's undivided half of the property, and averring that he was in possession of the whole of the premises only as a tenant in common with the plaintiff, as he had a lawful right to be.

At the following January term of the court, the defendant also filed a special plea in bar of the further prosecution of the suit. In this plea, puis darrein continuance, the defendant avers that on the third day of November, 1897, after the filing of the general issue and brief statement above named, and on the day of the last continuance of the cause, at the October term of the court, the administrator on the estate of George Simpson, by virtue of a license therefor, granted by the probate court of Penobscot county, at the preceding May term thereof, sold and conveyed to the defendant, subject to the widow's dower, the entire homestead described in the plaintiff's writ, by deed duly executed and delivered on that day, in consideration of the sum of $850; and that thereby the plaintiff was divested of her title to one undivided half of the property described in the writ, and that the defendant thereby acquired title to the whole property and the right to the exclusive possession and occupancy of it.

It is a well-settled rule of pleading that a plea puis darrein continuance operates as an abandonment of all former pleas, on which no proceedings are afterwards had. After the filing of such a plea, in contemplation of law all previous pleas are stricken from the record, and everything is confessed except the matter contested by this plea. *McKeen* v. *Parker*, 51 Maine, 389; *Kimball* v. *Huntington*, 10 Wend. 675, (25 Am. Dec. 590); 1 Chitty on Plead. 690; Stephen on Plead. (1867) 66.

The plaintiff's counsel thereupon filed a general demurrer to the defendant's plea in this case. The presiding judge overruled the demurrer and the case comes to this court on exceptions to this ruling.

In support of the exceptions the plaintiff contends that the plea of the defendant, puis darrein continuance, is bad in form for fifteen different reasons specified in argument.

I. It is undoubtedly true that, under the rules of special pleading, established in the earlier stages of the common law, great technical exactness and certainty were required in both the form and substance of such a plea. But after a careful examination of the defendant's plea in this case, it seems to fulfill all the requirements indicated by the forms approved for a century past, and to obviate all the objections which have been held fatal in any of the cases to which the attention of the court has been called. It sets out with clearness and precision the facts happening after the last continuance, or the filing of the former plea, upon which the defendant relies, and definitely shows the time and place, when and where, the defense arose. It recites with detailed accuracy the facts respecting the last continuance of the cause and the time of filing the plea, and specifies the time and place of the execution and delivery of the deed from the administrator to the defendant, and the fact that it was recorded and the time and place of the record. It states that the administrator was duly and legally appointed and qualified to act in that capacity, and that the license for the sale of this property was legally granted by the court of probate in the county of Penobscot having jurisdiction of the matter; that the sale and conveyance were legally made by the administrator in pursuance of the terms of said license and in accordance with the requirements of law, and that the defendant was a purchaser in good faith for a valuable consideration; that the plaintiff thereby became divested of all her right and title to said real estate, and that the defendant thereby acquired title to the whole of it in fee simple. It was not incumbent upon the pleader to recite the proceedings of the probate court with any greater particularity, nor to state the evidence upon which that court based its conclusions of fact respecting the conditions of the estate and the duty of granting a license to sell the realty. It is accordingly the opinion of this court that the plaintiff's objections to the form of the plea ought not to prevail.

II. But the plaintiff earnestly contends further, that if not defective in form, the plea in question must be held bad in substance on the ground that the prosecution of her suit cannot be barred by a title acquired by the defendant after the commencement of the suit, unless obtained through the act or consent of the plaintiff.

It must be admitted that the learned counsel for the plaintiff was enabled to present numerous authorities from other jurisdictions which would ordinarily be entitled to great respect, as well as some decisions in the earlier history of this court, which tend strongly to support this contention. But in the more recent case of *Leavitt* v. *School District*, 78 Maine, 574, this court established the rule that if, pending a real action, the title to the land and the right of possession became vested in the defendant by operation of law without the concurrence of the plaintiff, this fact may be pleaded in bar of the further prosecution of the suit. In that case all of the leading authorities now cited by the counsel for the plaintiff were presented to the court in the argument of counsel, including the strikingly similar case of *Hooper* v. *Bridgewater*, 102 Mass. 512, in which the opposite view was adopted. But in a course of independent reasoning this court reached the conclusion above stated upon grounds deemed more in harmony with the obvious purpose of judicial proceedings, and more practical and satisfactory than those given for a contrary rule in the precedents cited. We find no occasion to question the soundness of that decision. "Why," said the court, "should the plaintiff recover the possession of land after his right to the possession is extinguished, and it is certain that he cannot hold it if it is given to him? And why should the defendant be deprived of the possession after he has in a lawful manner become the owner of the land, and entitled to the possession of it? It is believed no good reason can be given.

"It is perfectly well settled that such a defense . . . . must be specially pleaded. And it . . . . can be pleaded only in bar of the further prosecution of the suit. The effect then is not to defeat the suit ab initio, but to stay its further prosecu-

tion; in which case the plaintiff will recover his costs up to the time of the filing of the plea, and the defendant will recover his costs incurred subsequently. In one sense, such a plea may be said to divide the suit into two actions, in the first of which the the plaintiff is the prevailing party and entitled to costs, and in the second of which the defendant is the prevailing party and entitled to costs. This result avoids all supposed hardships, and deals out to both parties even-handed justice . . . ."

These considerations are peculiarly applicable and the absence of any hardships to the plaintiff especially marked in the case at bar; for here the plaintiff received her title to one undivided half of the property under a statute which especially declares the descent of real estate to be subject to the payment of debts, and she presumptively knew that a license for the sale of the homestead in question had been obtained by the administrator more than two months before the commencement of her action. There is therefore no temptation to depreciate the just value of the maxim, stare decisis et non quieta movere.

III. Finally, however, it is suggested that the defendant's plea is inadequate as the basis of a complete defense, because it fails to make any response to the claim in the plaintiff's writ to recover damages for the rents and profits of the demanded premises.

But the right to recover damages for rents and profits is a mere incident to the right to the land itself. Under our statute it is only when the plaintiff "recovers judgment in a writ of entry" that "he may therein recover damages for the rents and profits of the premises from the time when his title accrued." Rev. Stat. ch. 104. § 11. *Brigham* v. *Hunt*, 152 Mass. 257. According to the averments in the defendant's plea the plaintiff based her action on a defeasible title, and pending the action was by operation of law divested of her title and barred of the further prosecution of her suit. Her right to recover rents and profits in this action was thus defeated by the failure of the suit itself.

Whether the character of the defendant's occupation was such as to entitle the plaintiff to recover her proportion of the income

of the premises by virtue of Rev. Stat. ch. 95, § 20, or otherwise, is a question not now before the court.

It is the opinion of the court that, upon the pleadings now before the court in the case at bar, the judgment must be against the further maintenance of the plaintiff's suit.

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ERRATA.

After title of case *Penob. Lumber Assoc.* v. *Bussell*, ante p. 256, add "Penobscot, December 13, 1898."

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On p. 625, of Index-Digest, add the following under title of SALES:

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