MAINE REPORTS

93

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

1899—1900.

CHARLES HAMLIN

REPORTER

PORTLAND, MAINE

WILLIAM W. ROBERTS

1900

PRESS OF THOMAS W. BURR,
BANGOR, MAINE.

JUSTICES

OF THE

SUPREME JUDICIAL COURT,

DURING THE TIME OF THESE REPORTS.

HON. JOHN A. PETERS, CHIEF JUSTICE. *
HON. ANDREW P. WISWELL, CHIEF JUSTICE. †
HON. LUCILIUS A. EMERY.
HON. THOMAS H. HASKELL.
HON. WILLIAM PENN WHITEHOUSE.
HON. SEWALL C. STROUT.
HON. ALBERT R. SAVAGE.
HON. WILLIAM H. FOGLER.
HON. FREDERICK A. POWERS. †

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.

*Resigned January 1, 1900.
†Appointed January 2, 1900.

ASSIGNMENT OF JUSTICES

FOR THE JUDICIAL YEAR 1899.

LAW TERMS.

MIDDLE DISTRICT, at Augusta, Fourth Tuesday of May.

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

EASTERN DISTRICT, at Bangor, Third Tuesday of June.

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

WESTERN DISTRICT, at Portland, Third Tuesday of July.

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

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CASES

IN THE

SUPREME JUDICIAL COURT,

OF THE

STATE OF MAINE.

ALICE BOARDMAN, Admx.

vs.

JOHN M. CREIGHTON, and others.

Knox. Opinion May 23, 1899.

Pleading. Negligence. Death by Wrongful Act. Master and Servant. Agent. Stat. 1891, c. 124.

A declaration in case to recover damages for injuries sustained, or for death occasioned by the alleged negligence of the defendant, should state the facts upon which the supposed duty of the defendant is founded. It is not enough to allege that the defendant has been guilty of negligence, without alleging in what respect he was negligent and how he became bound to use care to prevent the injury to the person injured or killed.

A declaration by an administratrix, containing a single count, alleging that her intestate was killed through the negligence of the defendants when he was "legally at work" in the defendants' quarry, and when he was "employed and lawfully at work in the defendants' quarry by the license and permission and at the request of the defendants," held bad on demurrer.

Held; that such a declaration is insufficient, for the reason that it does not apprise the defendants, or the court, in what capacity the plaintiff's intestate was employed in the quarry, whether as servant of the defendants, or the servant of an independent contractor, or as a licensee, or in some other capacity.

ON EXCEPTIONS BY DEFENDANTS.

This was an action against the defendants for alleged negligence by reason of which the plaintiff's intestate was instantly killed. The defendants at the first term filed a general and special demurrer to the declaration, which demurrer, after joinder on the part of the plaintiff, was overruled.

To this ruling the defendants excepted.

(Declaration.)

"In a plea of the case, for that the said defendants on the eighteenth day of December, A. D. 1895, at Thomaston were, and for a long time prior thereto had been, the owners, occupants and operators of a certain limerock quarry, and were then and there engaged in quarrying limerock in which they employed a large number of men; and it was the duty of the defendants in the operation of said quarry to provide suitable tools and machinery and other appliances for the carrying on of said work, and also a safe and secure place for all persons employed therein, either by themselves, their agents or contractors, as said defendants, on said eighteenth day of December, 1895, and for a long time prior thereto, reserved to themselves as operators of said quarry, the full and absolute control of said quarry in the management thereof, and were liable to all persons who were working therein whether employed by themselves or their agents, or to whomever was working therein by the license and permission of said defendants; and it was the legal duty of the defendants to see that the walls and bluffs of said quarry were examined from time to time to see if any rocks were loose or liable to fall upon the workmen employed and working therein, and to keep on hand suitable apparatus to examine said bluff or walls of said quarry to see if the same were safe and secure for all persons legally at work therein; and the said Frank E. Boardman, then in full life, on the eighteenth day of December A. D. 1895, was then and there employed and was lawfully at work in said defendants' quarry in said Thomaston by the license and permission and at the request of said defendants, was then and there employed and working in said quarry in breaking and handling limestone in said defendants'

quarry; that said quarry before and on the day aforesaid had been excavated to a great depth, to wit: to the depth of seventy-five feet below the surface of the earth, and it was the duty of the defendants to keep said quarry and its sides and walls and all parts thereof in a safe, secure and suitable condition so that said Boardman and all persons working therein could safely perform their work therein; but the defendants, regardless of their duty on said eighteenth day of December aforesaid, and for a long time before that day, had not kept and maintained said quarry, its sides and walls and all parts thereof in such safe and secure condition, but on the contrary had negligently and carelessly excavated and removed limestone therefrom on the westerly side thereof so that the westerly side wall of limestone in said quarry was then and there so nearly perpendicular from the surface of the earth to a depth of seventy-five feet that sheets and masses of stone were liable to fall from said wall into said quarry to the great danger of all persons at work and employed therein, and negligently and carelessly to use or supply any means or precautions to prevent the falling of stones from the walls and bluff of said quarry upon the workmen employed therein and have carelessly and negligently neglected to make any examination of the walls of said bluff in said quarry to see and ascertain if said walls were secure and in a safe and suitable condition, or whether rocks from any portion thereof were liable to fall therefrom and that the said defendants by themselves as operators of said quarry, and having full and absolute control thereof while said side wall was in such unsafe and dangerous condition continued to quarry limestone and in said quarrying to fire and explode heavy blasts of powder and dynamite near the foot of the westerly side wall whereby and by force of the concussion of said blasts sheets and masses of limestone in said walls or bluff of said quarry were loosened or detached therefrom and by reason thereof became and were more liable to fall therefrom into the bottom of said quarry where men were working and employed, and that by the negligence and carelessness of said defendants as aforesaid, said westerly wall was on the eighteenth day of December aforesaid and for a long time before that day had

been in an unsafe, defective and dangerous condition by reason of loosened sheets and masses of limestone being in and upon said walls which then were and for a long time before had been liable at any moment to fall into the bottom of said quarry to the great danger of all persons working therein.

"Yet the said defendants, well knowing the premises, and the great danger to which all persons working in said quarry were exposed, suffered said wall to remain in said unsafe and dangerous condition on said eighteenth day of December aforesaid and took no means to ascertain its unsafe and dangerous condition; and the said Frank E. Boardman, not knowing the unsafe, dangerous and defective condition of said bluff or wall and not knowing the loosened and insecure condition of said limestone in said walls, on said eighteenth day of December, A. D. 1895, then in full life, and being then and there in the exercise of ordinary care, and legally at work in said quarry, and having no means of knowing its unsafe condition, and while so working, a large mass of lime-rock fell from the westerly bluff about forty feet above where said Boardman was working in the bottom of said quarry, through the carelessness of the defendants, without warning or notice, upon said Boardman, causing instant death.

"And the plaintiff avers that said Frank E. Boardman was killed and his death was caused by the wrongful acts and default of the defendants; and the plaintiff avers that she is the widow of said Francis E. Boardman, and has three minor children, etc., ... " "whereby an action hath accrued to the plaintiff to have and recover of the defendants for the exclusive benefit of herself and her said children a fair and just compensation, not to exceed five thousand dollars with reference to the pecuniary injury resulting from the death of said Francis E. Boardman."

L. M. Staples, for plaintiff.

The owner and operator of a quarry is liable to the plaintiff for any injury which he may receive through the negligence of the defendants when at work therein by the license and permission of defendants. A land owner is responsible in damages to one, who using due care, comes upon his premises at the invitation or

inducement, express or implied, on any business to be transacted or permitted by him, for injuries sustained by the unsafe condition of such premises known to him, and which he has suffered to exist, or might have known by reasonable diligence or caution to have existed.

If the owner of premises under his control employs an independent contractor to do work upon them, which from its nature is dangerous to persons who may come upon them by the owner's invitation, the owner is not by reason of the contract, relieved from liability, and is bound to see the premises safe for all persons. *Curtis* v. *Kiley*, 153 Mass. 126; *Stewart* v. *Putnam*, 127 Mass. 403; *Sturges* v. *Theological Education Society*, 130 Mass. 414, 415; *Woodman* v. *Metropolitan Railroad*, 149 Mass. 335, and cases there cited.

It is also held in *Woodman* v. *Metropolitan Railroad*, 9 Allen, 92, that the corporation was liable for the injury; and the fact that the work was done by an independent contractor would not exonerate it from liability—holding that the owners can not shift their liability upon any other person; and that the owners are liable.

Counsel also cited: *Sweeny* v. *Old Colony, etc., R. R. Co.*, 10 Allen, 368; *Elliott* v. *Pray*, Id. 378; *Zoebisch* v. *Tarbell*, Id. 385.

The only question presented here is: are the defendants as owners liable to any person who is legally at work, and who came there, in this quarry, by the license and inducement and permission of the owners, regardless of who hires the man?

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

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

FOGLER, J. This is an action on the case in which the plaintiff as administratrix of the estate of Francis E. Boardman, her husband, sues to recover of the defendants damages for the death of her husband and intestate under Public Laws of 1891, c. 124. The statute provides that whenever the death of a person shall be

caused by wrongful act, neglect or default, and the act, neglect or default, is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then the person who, or corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages brought by the personal representatives of such deceased person; and the amount recovered in every such action shall be for the exclusive benefit of his widow, if no children, and of the children, if no widow, and if both, of her and them equally, and, if neither, of his heirs.

The declaration, which contains a single count, alleges that the plaintiff's intestate while engaged in working in a limerock quarry of which the defendants were the owners and operators, was instantly killed by reason of a large mass of limerock falling upon him from the bluff or wall of the quarry; and that such death was caused through the neglect of the defendants in not making necessary examination of the walls of their quarry and not taking proper precautions to prevent the falling of stone therefrom upon the plaintiff's intestate and others engaged in the quarry. The declaration further alleges that the plaintiff's intestate was legally at work in said quarry; and, in an amendment allowed by the court, that he was then and there employed and was lawfully at work in the defendants' quarry by the license and permission and at the request of the defendants.

The defendants demur generally and specially to the declaration, and assign by way of special demurrer, first, that it does not appear by the declaration whose servant or agent the plaintiff's intestate was, or by whom he was employed in said quarry; and, second, that it does not appear by the declaration what contractual or other relations, if any, the plaintiff's intestate sustained to the defendants, or whether he was in the employ of the defendants, or of an independent contractor. The defendants contend that the declaration is insufficient for the reason that they are not therein informed whether the plaintiff claims that her intestate was their servant, or the servant of some other person, or was a mere licensee; in other words, whether it is claimed that he was under the con-

trol of the defendants, or of some other person, or as a licensee under the control of no one. The presiding justice overruled the demurrer, and the defendants except.

It is sound law, as contended by the plaintiff's counsel, and sustained by the authorities cited by him, that the owner of a quarry or other premises owes to persons lawfully employed therein certain duties, and under a sufficient declaration is liable in damages for injuries received by a person so employed through a neglect of such duties; but the issue raised by the demurrer in the case at bar is not as to the liability of the defendants, but is one of pleading. The question is whether it is necessary that the declaration should allege by whom, and under whom, and under what circumstances the deceased was employed, and what relations, contractual or other relations, existed between him and the defendants when he met his death. The degree and kind of care which the owner of premises owes to a workman employed therein vary according to the relation existing between the parties. The care which the owner owes to his servant over whom he exercises control and who acts under the master's direction, differs in degree from that which he owes to a mere licensee and from that which he owes to the servant of an independent contractor.

"The principal rule as to the mode of stating the facts is, that they should be set forth with certainty; by which term is signified a clear and distinct statement of the facts which constitute the cause of action or ground of defense, so that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court who are to give judgment." 1 Chitty on Pl. 256. See *Bean* v. *Ayers*, 67 Maine, 488, 489. "The plaintiff cannot by the common law rule, in order to sustain a single demand, rely upon two or more distinct grounds or matters, each of which, independently of the other, amounts to a good cause of action in respect of such demand." 1 Chitty Pl. 249.

"When the plaintiff's right consists of an obligation to observe some particular duty, the declaration must state the nature of such duty, which we have seen may be founded either on a contract

between the parties, or on the obligation of law, arising out of the defendants' particular character or situation; and the plaintiff must prove such duty as laid." Id. 397.

The foregoing principles laid down by Mr. Chitty have been uniformly recognized and adopted in this country and in England. In *Cantret* v. *Egerton*, L. R. 2 C. P. 371, the requisites of a good declaration in an action for negligence are well stated by Willis J. "It ought," he says, "to state the facts upon which the supposed duty is founded, and the duty to the plaintiff, with the breach of which the defendant is charged. It is not enough to show that the defendant has been guilty of negligence, without showing in what respect he was negligent, and how he became bound to use care to prevent injury to others." In *Smith* v. *Tripp*, 13 R. I. 152, the court, after quoting the foregoing language of Willis J. adds, "So too, it is not enough to state a relation from which the duty may arise under certain circumstances, but, unless the duty necessarily results from the relation, the circumstances which give rise to it must likewise be stated."

So, in *Addison* v. *L. S. & M. S. Ry. Co.*, 48 Mich. 155, the court held that a declaration in a case for a fatal railway injury is demurrable if it does not so state the cause of action that the defendant could, with reasonable certainty, ascertain in what respect it is charged with negligence, or if it does not count specifically upon some particular duty and breach thereof as causing the injury; and that it is not enough to refer to matters in an uncertain, doubtful and ambiguous manner as a kind of general drag to meet whatever evidence may be presented.

In *Kennedy* v. *Morgan*, 57 Vt. 46, the court says: "If the pleader merely alleges the duty in his declaration, he states a conclusion of law, whereas the elementary rule is that the facts from which the duty springs must be spread upon the record so that the court can see that the duty is made out."

In *Penn. Co.* v. *Dean*, 92 Ind. 459, the plaintiff claimed to recover damages for injuries received on a railway train through the alleged negligence of the defendant's servants. The complaint was adjudged insufficient because it did not state in what capacity

the plaintiff was upon the train. The court says: "The rights and liabilities of the appellant could not be intelligibly adjudicated without the knowledge and consideration of the fact thus sought to be developed."

To the same effect are *Buffalo* v. *Holloway*, 7 N. Y. 493; *Sweeny* v. *O. C. & N. R. R. Co.*, 10 Allen, 372; *Matthews* v. *Bensel*, 51 N. J. L. 30; *Fay* v. *Kent*, 55 Vt. 557; *Trott* v. *Norcross*, 111 Mo. 630; *Hounsell* v. *Smyth*, 97 E. C. L. 731; *Di Marcho* v. *Builders' Iron Foundry*, 18 R. I. 514; *Lawler* v. *And. R. R. Co.*, 62 Maine, 467.

Applying to the case at bar the rules established by the foregoing authorities, we are of opinion that the declaration is insufficient for the reason that it does not apprise the defendants or the court in what capacity the plaintiff's intestate was employed in the quarry, whether as servant of the defendants or the servant of an independent contractor, or as a licensee, or in some other capacity.

Exceptions sustained. Demurrer sustained.

CHARLES D. HILL, and another *vs.* BERTHA REYNOLDS.

Washington. Opinion May 24, 1899.

Exceptions. Practice. Sheriff's Deed. Sales. Execution. Misnomer. Evidence. R. S., c. 76, § 36; c. 84, § 22.

All questions not raised by exceptions are presumed to have been decided correctly; and all facts necessarily found are presumed to have been shown by competent proof. In this case, a real action on a sheriff's deed, the court assumes that all the prior proceedings touching the sale, up to the execution of the deed, were regular and sufficient according to statutory requirements and were properly proved by competent evidence.

A sheriff's deed is not invalid merely for the reason that it does not disclose the date of the execution upon which the land was sold, nor the amount of the judgment, debt and costs, nor the name of the court from which the execution issued. These facts may be shown by the return on the execution. The judgment and the execution and return, as well as the deed, are constit-

uent elements of the evidence of title. The deed may be aided, if necessary, by the return, and such omissions supplied.

Nor is such a deed invalid, in this case, for the reason that two sales upon two executions in favor of the same creditor are embraced in one deed. Where proceedings upon two executions appear to have been simultaneous throughout and no objection was made to the sufficiency or regularity of the proceedings prior to the execution of the deed, it must be assumed that they were regular; and that it so appeared by the returns upon the executions; that the proceedings, though simultaneous, were separate; that there were separate seizures, separate notices and separate sales for separate prices upon the two executions.

When, as in this case, there are two sales of the same property, at the same time, to the same purchaser, upon executions in favor of the same creditor, the sales may be embraced in one deed.

Nor is such a deed inoperative for the reason that it purports to convey the land of Bertha J. Reynolds, while at the same time it recites that the executions ran against Bertha Reynolds. The difference in the name was not fatal. It was competent to prove the identity of the person by evidence aliunde.

ON EXCEPTIONS BY DEFENDANT.

This was a real action referred to the court with leave to except. The plaintiffs' claim of title was under a sale upon executions from this court against the defendant. The only objection made by the defendant against this title was the insufficiency of the sheriff's deed, which appears in full below.

The court overruled the objection and held that under the judgment, execution, return of the officer on the execution and the deed, the plaintiffs had a prima facie title against the defendant.

After the judgment and seizure, upon the execution, viz: on February 23, 1898, the defendant was adjudged an insolvent debtor upon her petition filed on that date in the court of insolvency.

The court ruled that the insolvency proceedings were not a bar to this action.

The court thereupon rendered judgment for the plaintiffs, and the defendant took exceptions to the foregoing rulings.

(Sheriff's Deed.)

Know all men by these presents, That I, William J. Mahlman of Lubec in the County of Washington and State of Maine a Deputy Sheriff under Isaac P. Longfellow, Sheriff of said County

of Washington, at a public vendue held at the office of J. H. Gray in Lubec in said County of Washington aforesaid on this first day of March A. D. 1898 having given notice in writing of the time and place of sale to the judgment debtor in the executions hereafter mentioned and having given public notice of the time and place of sale by posting up notifications thereof in a public place in the town of Lubec and also by posting up notifications thereof in one public place in each of the adjoining towns of Eastport (City) and Trescott thirty days before the time of sale and having caused an advertisement of the time and place of sale to be published three weeks successively before the day of sale in the Lubec Herald, a public newspaper printed in Lubec in said County, have by virtue of two executions in my hands in favor of Charles D. Hill and Willard H. Pike both of Calais in our said County of Washington, Co-partners at said Calais under the firm name and style of Hill, Pike & Co. against Bertha Reynolds of Lubec in our said County of Washington in consideration of four hundred and thirty & 68-100 Dollars paid to me this day by Charles D. Hill and Willard H. Pike both of Calais in said County of Washington, they being the highest bidders therefor, and do hereby give, grant, bargain, sell and convey to them the said Charles D. Hill and Willard H. Pike the following described real estate, and all the right, title and interest, which the said Bertha Reynolds has, in and to the same, or had on the twenty first day of January A. D. 1898, at four o'clock in the afternoon, the time when the same was taken as seized on both executions against Bertha Reynolds as aforesaid to wit. . . . Land situate in said Lubec with all buildings thereon in that part of the town called North Lubec bounded as follows to wit. . . . Commencing on the northerly side of the town road easterly from the barn yard fence at a stake and stones and running northerly five rods to the southerly corner of a small house occupied by Simon Mahar: thence south easterly three rods and eight links to the town road: thence south westerly five rods to the place of beginning containing twenty and four fifths (20 4-5) square rods.

The above described real estate is recorded in Book 200. Page

42 in our Washington County Registry of Deeds at Machias (Oct. 7, 1891) in the name of Bertha J. Reynolds which Bertha J. Reynolds and the Bertha Reynolds mentioned in the above described executions and judgments are one and the same person and the premises herein described are and were taken to satisfy the aforesaid executions and judgments. In witness whereof I have hereunto set my hand and seal this first day of March in the year of our Lord one thousand eight hundred and ninety eight.

William J. Mahlman, Deputy Sheriff. SEAL.

Signed, sealed and delivered in presence of Harry L. Smith.

WASHINGTON SS. March 1, A. D. 1898.

Then personally appeared the above named William J. Mahlman and acknowledged the above instrument by him subscribed to be his free act and deed. Before me,

Harry L. Smith, Justice of the Peace.

Received March 4, 1898, at 7 A. M.

Attest: H. R. Taylor, Register.

J. H. Gray, for plaintiffs.

A. D. McFaul, for defendant.

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

SAVAGE, J. Real action, heard by the presiding justice, with right of exception. The plaintiffs claimed title under a sale on execution against the defendant. The presiding justice held that under the judgment, execution, return of the officer on the execution, and the sheriff's deed, the plaintiffs had a prima facie title against the defendant. The only objection raised by the defendant was that the deed was insufficient. The question presented is not whether a sheriff's deed alone is prima facie evidence of title —a question which must be answered in the negative,—but whether this sheriff's deed is sufficient in form. The deed is made a part of the case; but the judgment, execution and return are not, although they were introduced in evidence.

All questions not raised by exceptions are presumed to have been decided correctly; and all facts found are presumed to have been shown by competent proof. We must assume, therefore, that all the prior proceedings touching the sale, up to the execution of the deed, were regular and sufficient, according to statutory requirements, and were properly proved by competent evidence. And we have here only to inquire whether, upon this assumption, the deed in this case, upon its face, is sufficient so far as form is concerned, to show prima facie title in the plaintiff. It is objected that it is insufficient, (1) because it does not disclose the dates of the executions upon which the land was sold, the amount of the judgment debt and costs in each execution, and the name of the court from which the executions issued; (2) because the deed shows that two sales, upon two executions, are embraced in one deed; and (3) because it appears by the deed that the land of Bertha J. Reynolds was sold upon executions against Bertha Reynolds. We will consider these objections in their order.

I. The statute declares that the officer shall execute and deliver to the purchaser a "sufficient" deed. R. S., ch. 76, § 36. But it does not define what shall be deemed a "sufficient" deed. Undoubtedly a sheriff's deed, in order to be itself alone prima facie evidence of a sale, must show upon its face that the officer had authority to make the sale, and must show all the essential requirements of a valid sale. But in this case it is important to notice that the plaintiffs did not rely upon the deed alone to establish a prima facie title. They introduced the judgment, and the executions and returns thereon. The executions, which are presumed to be regular in form, showed their dates, the amount of the debts and costs, and the court from which they issued. The returns, if regular and complete, showed all of the officer's doings upon the executions. And in view of the fact that no objection was made to the returns, but only to the deed, we must assume that the returns were sufficient to show valid liens by seizure, and that the liens continued until the time of sale.

The question now arises whether it is necessary that a sheriff's

deed should show such facts as it is objected are wanting in this deed, if they are shown by the return on the execution. The judgment and the execution and return, as well as the deed, are constituent elements of the evidence of title. And we think the deed may be aided, if necessary, by the return. In the opinion in *Welsh* v. *Joy*, 13 Pick. 477, Shaw, C. J., said, "An officer's deed may be aided by a return upon the execution showing that the statute has been duly complied with and the power pursued." In *Stinson* v. *Ross*, 51 Maine, 556, our own court held that it is unnecessary that a sheriff's deed should show that the statute requirements in regard to notice have been complied with, when the officer's return on the execution shows that the proper notices have been given. "That is sufficient," said Justice WALTON. The defendant here cites and relies upon *Pratt* v. *Skolfield*, 45 Maine, 386, in which case the recitals in the deed as to notice being defective, it was held inoperative. But in *Stinson* v. *Ross*, supra, it was pointed out that in *Pratt* v. *Skolfield* the deed was the only evidence relied upon to prove the sale. And it was held that the decision in *Pratt* v. *Skolfield* was not applicable to a case where there was a good and sufficient return on the execution. It was held in *Hayward* v. *Cain*, 110 Mass. 273, that the omission in a sheriff's deed to state from what court the execution issued does not invalidate the deed nor render it void, if the deficiency in that respect is fully supplied by the writ of execution and the return thereon. See also Rorer on Judicial Sales, § 1011.

We think *Stinson* v. *Ross* is decisive of the first point raised by the defendant. The return supplies what the deed lacks. This objection cannot be sustained.

II. The deed shows that the officer seized the land and sold it upon two executions in favor of Hill, Pike and Company, and against Bertha Reynolds. The proceedings upon these two executions appear to have been simultaneous throughout. No objection having been made to the sufficiency or regularity of the proceedings prior to the execution of the deed, we must assume, as before, that the sales were regular, and that it so appeared by the returns

upon the executions; that the proceedings, though simultaneous, were separate; that there were separate seizures, separate notices, and separate sales for separate prices, upon the two executions; for if it appeared otherwise, the returns would have been objectionable. *Stone* v. *Bartlett*, 46 Maine, 438; *Smith* v. *Dow*, 51 Maine, 21. It only remains to inquire then whether, when an officer has made, at the same time, two sales upon two executions, in favor of the same creditors, against the same debtor, the sales being to the same purchaser, he may complete the proceedings by executing and delivering one deed for both sales. We perceive no good reason why he cannot. That the proceedings were simultaneous is no objection. *True* v. *Emery*, 67 Maine, 28. It was held in *Chapman* v. *Androscoggin Railroad*, 54 Maine, 160, that an equity of redemption could not be sold upon two or more executions jointly, in favor of two creditors. But that is not this case. Here the sales were not joint, and the creditors were one and the same, —a marked distinction. Sales made as these were, were not prejudicial to the debtor. We think the reasoning in *True* v. *Emery*, supra, is applicable to this case. We quote:—"No injury need be suffered by the debtor in selling his equity in this way. It may be an advantage to him. He can redeem from one sale and forego a redemption from the other, if he desires to. . . . . If the debtor redeems from both sales, his property is restored to him. If he redeems from one sale only, he becomes tenant in common with the purchaser." So in this case. The officer might have sold the property on one execution, for the full amount of both, and have applied the excess to the satisfaction of the other. R. S. ch. 84, § 22. In which case, the debtor could not have redeemed in part without paying the whole. Now he may redeem from one sale, and not from the other, unless he chooses to redeem from both. If the sales are upheld, the debtor's right of redemption is not affected by the fact that both the sales are embraced in one deed. The sales are separable, and the debtor can redeem from either. The amount to be paid to redeem from either, though not found in the deed, may be found in the returns on the executions. We hold, therefore, that where, as in this case, there are two sales of

the same property, at the same time, to the same purchaser, upon executions in favor of the same creditors, the sales may be embraced in one deed.

III. There is no question raised but that the Bertha Reynolds named in the executions, and the Bertha J. Reynolds whose land was sold, are the same person. Indeed, that fact was necessarily found by the presiding justice. But the defendant claims that when a sheriff's deed purports to convey the land of Bertha J. Reynolds, and recites that the executions ran against Bertha Reynolds, the deed is inoperative ipso facto. In this deed, the officer attempted to remedy the difficulty by inserting a recital that "Bertha J. Reynolds," the owner of the land, and "Bertha Reynolds," the debtor, were identical. But it was no part of the officer's duty to make such a recital, and it is not evidence of the truth of the fact stated. *Innman* v. *Jackson*, 4 Maine, 237; *Phillips* v. *Sherman*, 61 Maine, 548. Still, we think that the difference in the name was not fatal to the deed, and that it was competent to show the identity of the person by evidence aliunde. Persons sometimes use, and are known by, two or more names; and when that is so, it is always competent to show the identity of the person by parol. So, if Bertha J. Reynolds was known as well by the name of Bertha Reynolds, that fact could be shown by parol. Even the strictness of the criminal law allows such proof upon the plea of misnomer. The parol evidence goes to the question of identity. The same principle applies as would in case there were two John Smiths in a town, in which case parol evidence would be admissible to show which one was the grantee in a deed to "John Smith," that is, to show the identity. If a person is known by one name as well as by another, and is sued in the former name and execution issue, it surely cannot be said that property held by him in the latter name is beyond seizure and sale on the execution, especially, as here, where no rights of third parties have intervened. In *Dutton* v. *Simmons*, 65 Maine, 583, where an attachment was held void, because in the return of the officer to the registry of deeds, the defendant was described as

Henry "M." Hawkins, when his true name was Henry "F." Hawkins, by which latter name he was sued, this court said that the party claiming under the attachment "would have had, probably, less difficulty to contend with, had the error been the omission of the middle letter, (as if written Henry Hawkins), or if only the initials of the Christian name had been written, but correctly given, (as H. F. Hawkins). In such case perhaps the omission could have been supplied by parol proof. A person may have different names by reputation. Proceedings have been sustained in important cases where a person is described in either one or the other of the above ways." And the court pointed out the distinction between a diminished description of a name and a description which was essentially and positively false. In the case at bar the name was diminished, but not false. We think it was competent to show aliunde that Bertha J. Reynolds and Bertha Reynolds were the same person. Hence there was no fatal variance in the names given to the debtor in the deed.

The defendant's counsel in his brief raises the point that the deed runs to Charles D. Hill and Willard H. Pike in their individual capacities, while this suit is in favor of the firm of Hill, Pike and Company. The latter fact does not appear in the bill of exceptions; and if it did, the point would not be tenable.

The defendant does not press her exceptions to the ruling that her insolvency proceedings commenced after judgment and seizure were not a bar to this action.

Exceptions overruled.

HENRY A. PRIEST *vs.* CHARLES AXON.

Kennebec. Opinion May 26, 1899.

Practice. Record. Judgment. Nonsuit.

When a nonsuit has been entered by order of the presiding judge and judgment has been entered thereon, it does not lie within the discretion of the judge, at a later term, to order the case to be brought forward on the docket, and the entry of nonsuit to be stricken off.

ON EXCEPTIONS BY DEFENDANT.

The case appears in the opinion.

H. A. Priest, for plaintiff.

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

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

SAVAGE, J. This action was entered at the September term of the Superior court for Kennebec county, 1897, and was continued from term to term until the December term of the same year, when, on motion of the defendant, a nonsuit was ordered. To this order no exceptions were taken. But at the June term of the court 1898, the presiding judge, on application of the plaintiff, ordered the action to be brought forward, and the nonsuit to be stricken off. To these orders the defendant excepted.

It is true that every court of record has power over its own records and proceedings to make them conform to its own sense of justice and truth, so long as they remain incomplete, and until final judgment has been entered. *Lothrop* v. *Page*, 26 Maine, 119; *Stetson* v. *Corinna*, 44 Maine, 29. It is also true that judgments irregularly and improvidently entered may be corrected. *West* v. *Jordan*, 62 Maine, 484.

But this case does not fall within either of these principles. A nonsuit was regularly entered upon motion. The court adjourned. No further judicial proceedings remained to be done. It not

appearing that any special order for judgment was made, it must be taken that judgment was rendered the last day of the term. *Chase* v. *Gilman*, 15 Maine, 64. The parties were then out of court. Judicial power was exhausted. *Shepherd* v. *Rand*, 48 Maine, 244.

The case was brought forward, not to correct an improvident or erroneous entry of judgment, but to reverse an entry regularly and deliberately entered.

The language of the court in the case last cited is peculiarly appropriate to this case: "The party dissatisfied cannot afterwards resort to another jurisdiction, to be created by nullifying a final judgment, not by any process known to the law, such as review or error, not for the purpose of making the records and proceedings conform to the court's own sense of justice, but for the sole object of allowing a negligent party to take advantage of such negligence. A judge at nisi prius has no such discretion."

Exceptions sustained.

CUMBERLAND NATIONAL BANK

vs.

MADAN K. ST. CLAIR, and others.

Cumberland. Opinion May 29, 1899.

Assumpsit. Action. Implied promise by purchaser of mortgage.

The holder of a promissory note secured by mortgage may recover the contents of his note from the purchaser of the mortgaged property, who assumes the mortgage debt and agrees with the maker of the mortgage note by writing, not under seal, to pay the same. In such case, where the transaction fairly imports such to have been the intention of the parties, an implied promise by the purchaser results from equitable considerations to pay the debt to the holder of it.

ON EXCEPTIONS BY DEFENDANTS.

This was an action of assumpsit upon the following guaranty executed by the defendants:—

"Whereas Wilson & Berry, copartners of Camden, Knox Co., Maine, have sold to us all their right, title and interest in and to the machinery, pulleys, belts, couplings, hangings, and 16 feet of shafting now in the mill in said Camden occupied by them and known as the 'Bakery Building,' said machinery being mortgaged to Chase & Son & Co. of Portland, and sold to us subject to said mortgage.

"Now therefore in consideration thereof we hereby guarantee to said Wilson & Berry that we will assume said mortgage debt and pay the notes secured by said mortgage and hold all parties to said notes harmless from all damage on account of said notes.

November 29, 1892.

M. K. ST. CLAIR & CO."

The case was heard by the presiding justice without the intervention of a jury, the right of exception being reserved, who found as follows:—

"I find as a matter of fact that Wilson and Berry, to whom the defendants gave the guaranty in question, succeeded by purchase to all the rights which Wilson, Berry & Co. the makers of the note described in the writ, had in the property described in the mortgage therein named, and that the defendants, by virtue of their purchase, entered into possession and enjoyment of the said property subject to said mortgage. There being no controversy in relation to any of the averments of fact in the declaration, judgment is rendered for the plaintiff for the sum of sixteen hundred & one 70-100 dollars ($1601.70)."

L. M. Webb, for plaintiff.

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

While courts have held that actions may be maintained by third parties for whose benefit a promise has been made, when the agreement is made to parties directly liable to them, they have disallowed such actions when not made to parties directly liable to the plaintiff.

The earliest and most constant courts to maintain the doctrine are the courts of New York. But that court says, "in every case

in which an action has been sustained there has been a debt or duty owing by the promisee to the party claiming to sue upon the promise." *Vrooman* v. *Turner*, 69 N. Y. 280; *Merrill* v. *Green*, 55 N. Y. 270.

In *Bohanan* v. *Pope*, 24 Maine, 93, it was agreed that the plaintiff was hired by Whitney and worked upon the logs in hauling and cutting them. Before hiring the writing was shown to him wherein defendant promised to pay.

In *Lewis* v. *Sawyer*, 44 Maine, 332, the money was put into defendant's hands for the use of the plaintiff.

In *Maxwell* v. *Haynes*, 41 Maine, 559, defendant received funds for which he promised to pay a debt of A. to C.

In *Dearborn* v. *Parks*, 5 Maine, 81, money was left in the hands of defendant to pay plaintiff a debt owed to him by A.

Meech v. *Ensign*, 49 Conn. 191, 44 Am. Reports, 225, is the argument against the doctrine and reviews the cases with great clearness.

Mellen v. *Whipple*, 1 Gray, 317, is also in line.

"It is not every contract for the benefit of a third person that is enforceable by the beneficiary. It must appear that the contract was made and was intended for his benefit. The fact that if the contract is carried out according to its terms would inure to his benefit, is not sufficient for him to demand its fulfillment. It must appear to have been the intention of the parties to secure to him personally the benefit of its provisions." *Sayward* v. *Dexter, Horton & Co.*, 72 Fed. Rep. 765.

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

HASKELL, J. Assumpsit to recover from the purchaser of mortgaged property, who assumed the mortgage debt and agreed to pay the mortgage notes, the contents of a promissory note secured by the mortgage.

The promise to pay the note was made with two persons, who with another were makers of it and personally liable therefor. The promise was for the benefit of the holder as well. Had the

promise to pay been a covenant under seal with the covenantee, to pay either to him or to the beneficiary, the covenantee alone could sue, for the covenant would have been with him, and damages for the breach thereof would arise to him only, although for the benefit of another, who might bring the suit in the name of the covenantee, but for his own benefit. *Brann v. Maine Benefit Life Association*, 92 Maine, 341, and cases cited. If the deed contain no covenant to pay, but merely recitals from which a promise to pay would arise, or be implied, then assumpsit would lie in favor of either the grantee or beneficiary. *Baldwin* v. *Emery*, 89 Maine, 498. So where the promise is by parol, as in the case at bar, to assume the debt and pay it, the promise is with the debtor, and for his benefit, because payment will relieve him from the debt. So, too, it is for the benefit of the creditor, as an additional security. No good reason can be given why the creditor may not recover his debt upon a promise to pay it, impliedly to him. The law implies assumpsit where money is due and ought to be paid, if there be no express promise, but an express promise excludes an implied one. *Wirth* v. *Roche*, 92 Maine, 383; *Billings* v. *Mason*, 80 Maine, 496; *Wood* v. *Finson*, 89 Maine, 459. In the case at bar there was an express promise with the debtor to pay the debt. The law implies a promise to the creditor also. He therefore may sue. It is true, that the beneficiary may not always sue where the fruits of a promise with another inure to his benefit, but only where the transaction fairly imports that right to have been the contemplation of the parties, for an implied promise results from equitable considerations, that many times gives a remedy to prevent circuity of action, unnecessary delay, and perhaps the failure of justice altogether. For illustration, reverse the situation. A man, without request of the debtor, voluntarily pays the debt. The law will not imply a promise of the debtor to repay him. *Ames* v. *Coffin*, 89 Maine, 300; *Lafontain* v. *Hayhurst*, 89 Maine, 388; *Sanderson* v. *Brown*, 57 Maine, 308; *Hill* v. *Packard*, 69 Maine, 158.

Exceptions overruled.

JOSEPH BRETON, Petr. for Habeas Corpus.

Androscoggin. Opinion May 29, 1899.

Simultaneous and Cumulative Sentences. Mittimus. R. S., c. 27, § 54; c. 135, § 9.

In the absence of any statute, if it is not stated in either of two sentences imposed at the same time that one of them shall take effect at the expiration of the other, the two periods of time named in them will run concurrently, and the two punishments be executed simultaneously.

The petitioner on the first day of June, 1897, was convicted in the municipal court of Lewiston upon two complaints for illegally keeping intoxicating liquors for sale, and received an alternative sentence of sixty days' imprisonment in each case. It was not stated which imprisonment should be suffered first, nor that sentence in either case should begin at the expiration of the sentence in the other. The petitioner duly appealed in each case to this court sitting below at nisi prius where upon default the judgment of the municipal court was affirmed and a mittimus ordered to issue; but there was no order of the court declaring which imprisonment should be suffered first, or that either should begin only at the expiration of the sentence in the other. The petitioner was committed to jail on the same day that judgment was affirmed, by virtue of a mittimus issued by the clerk on that day while court was in session. At the expiration of the sixty days named in that mittimus the clerk, without any special order of the court, issued a mittimus in the second case; and from imprisonment under it the petitioner sought to be released upon habeas corpus.

Held; that the terms of imprisonment in both cases began to run concurrently from the day of the sentences and expired at the same time; and the prisoner should be discharged.

ON EXCEPTIONS BY PETITIONER.

Petition for habeas corpus, in which it appeared that the petitioner was twice convicted in the municipal court for the city of Lewiston, of the crime of keeping intoxicating liquors with intent to sell the same in violation of law, and sentenced therefor. From each conviction and sentence the petitioner appealed to the Supreme Judicial Court. The appeals were entered, and the petitioner being defaulted, the judgment of the lower court in each case was affirmed. Mittimus was issued in one case, and the petitioner served that sentence, his imprisonment expiring December

6, 1897. Mittimus was issued in the second case December 6, 1897, and it is from imprisonment under the second mittimus that the petitioner sought to be released by his petition for this writ of habeas corpus. It was admitted that the facts stated in the two mittimuses are true.

At the hearing, the presiding justice ruled, as a matter of law, that the petitioner's imprisonment was lawful, and ordered the petitioner, for that reason, to be remanded.

From this ruling the petitioner excepted.

M. L. Lizotte and S. J. Kelley, for petitioner.

We contend in this case that the two sentences run concurrently. A sentence to imprisonment must be certain as to the time when it shall commence and end. *Mims* v. *State*, 26 Minn. 498; 98 Ill. 269; *People* v. *Whitson*, 74 Ill. p. 20. For one term of imprisonment to begin at the expiration of another, the sentence must so state, otherwise it will run concurrently with it. 21 Am. & Eng. Enc. of Law, p. 1075; 1 Bishop Crim. Procd. 1310; *In re Jackson*, 3 McArthur, (D. C.) p. 24; *State* v. *Smith*, 5 Day, 175, (5 Am. Dec. 132); *Kite* v. *Com.* 11 Met. 582; *McCormick, Pet. for Habeas Corpus*, 24 Wis. p. 492; *Brown, alias Potter* v. *Com.* 4 Pa. (Rawle) 259.

There is no certain time as to when the second sentence should begin. The record shows that the mittimus is to issue, but does not say when it should issue, therefore the time for sentence to begin is uncertain and incapable of application.

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

The case involves a construction of this section of the statute: "If a claimant or other respondent fails to appear for trial in the appellate court, the judgment of the court below, if against him, shall be affirmed." R. S., c. 27, § 54. The question is, whether, when a respondent has two cases defaulted at the same term of court under this statute, a mittimus can lawfully be issued in the second case after he has served sentence in one case.

The case should be distinguished from those cases where a prisoner is personally present before the court and sentenced in

two cases; and if it be admitted for the sake of the argument that the two sentences thus imposed would run concurrently unless otherwise specified, it does not follow that the sentences in a case like this must run concurrently. A construction of law that would practically nullify it, and relieve criminals from just punishment, is not to be received with favor. The plain statute was followed. The petitioner was defaulted, and respective sentences of the lower court were affirmed.

The mittimus was lawfully issued at the expiration of the first sentence. It will be seen that in no other way could proper punishment be inflicted. Any other practice would directly tend, not to punish crime, but afford criminals an easy means of escape *Scott* v. *Spiegel, Sheriff*, 67 Conn. 349; and *Taintor* v. *Taylor*, 36 Conn. 242.

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

WHITEHOUSE, J. On the first day of June, 1897, the petitioner was convicted in the municipal court of Lewiston upon two complaints for illegally keeping intoxicating liquors for sale, and received an alternative sentence of sixty days imprisonment in each case. It was not stated which imprisonment should be suffered first, nor that sentence in either case should begin at the expiration of the sentence in the other.

The petitioner duly entered an appeal in each case in the supreme judicial court at the September term of 1897, and on the 15th day of that term, being the 8th day of October, he was defaulted in each case, and the judgment of the court below affirmed and mittimus ordered to issue. Here again there was no order of the court declaring which imprisonment should be suffered first, or that either should begin only at the expiration of the sentence in the other. It appears that the petitioner was in fact committed on the same day that judgment was affirmed, by virtue of a mittimus issued by the clerk on that day, while court was in session. At the expiration of the sixty days named in that mittimus

the clerk, without any special order of the court, issued a mittimus in the second case bearing date December 6, 1897; and it is from imprisonment under this second mittimus that the petitioner asks to be released upon this writ of habeas corpus.

It is a familiar rule of the common law with respect to misdemeanors, that the court may order the imprisonment on one count or indictment to begin on the expiration of that on another. Among the earliest cases in which this doctrine was applied, was the famous libel case of *Rex* v. *Wilkes*, 4 Burrows, 325; but in *Reg.* v. *Cutbush*, 2 Law Rep. Q. B. 379, it was declared that a statute was necessary to give the court such power in cases of felony. In some of our states it has been denied that the court has such a power in any case, unless given by statute. 1 Bishop's Crim. Prac. 1317; *Prince* v. *State*, 44 Texas 480; *James* v. *Ward*, 2 Met. (Ky.) 271; and see opinion of Chief Justice Cooley in *Bloom's case*, 53 Mich. 597, and *Lampheris case*, 61 Mich. 105. But the great weight of authority is undoubtedly the other way. 1 Bishop Crim. Proc. 1327; *Kite* v. *Commonwealth*, 11 Met. 581; *U. S.* v. *Patterson*, 29 Fed. Rep. 775. And such power has uniformly been exercised in this state with respect to sentences in cases of felony as well as of misdemeanor.

All the authorities agree, however, that in the absence of any statute, if it is not stated in either of two sentences imposed at the same time that one of them shall take effect at the expiration of the other, the two periods of time named will run concurrently, and the two punishments be executed simultaneously. Such Mr. Bishop declares to be the rule of the common law, (1 Bish. Cr. Pr. 1310) and such has been the unquestioned rule of procedure in this state. It is familiar practice that wherever the court imposing several sentences desires to have one begin on the expiration of another, that fact is expressly stated in the sentence; and whenever the court inadvertently fails to have the sentence recorded in that form, or from leniency intentionally omits to add such a provision, and the convict is committed in pursuance of such sentences, he is either voluntarily released by the jailer, or discharged on habeas corpus at the expiration of the longest term named in either of the sentences.

Nor has this rule ever been changed or its operation in any manner modified by the statutes of this state. The provision of Rev. Stat. ch. 27, § 54, expressly empowering the court to affirm the judgment of the court below upon the default of the defendant in appealed cases, was manifestly not designed to have, and cannot reasonably be construed to have, any relation whatever to the question of cumulative sentences.

If no appeals had been taken in the cases now in question, and the petitioner had been committed in pursuance of the sentences imposed by the municipal court, in the form set out in the record, the two terms of imprisonment as above shown must have run concurrently. But the accused duly entered his appeals, and being defaulted, the judgment in each case was affirmed by the supreme court precisely as it was imposed in the lower court, without specifying which sentence should be suffered first, or that either should succeed the other. If the accused "had been at the bar of the court or in actual custody" at the time these sentences were thus re-imposed, he would have stood committed in execution of the sentences; and it has been seen that in such a case the terms of imprisonment in both cases would have begun to run concurrently from the day of the sentences, and would have expired at the same time.

It appears from the record that the respondent was in fact committed to jail on the 8th day of October, the same day that the sentences in question were imposed. If he had been at large at that time, he should have been under bail, and when the default was entered, according to the correct and uniform practice, the clerk's docket would have had the entry: "Principal and sureties defaulted." But in these cases the docket only shows that the defendant himself was defaulted. The inference therefore seemed to be justified that he was not at large, but was in fact in custody on the day of the sentences. But in order to remove any doubt upon this point, a copy of the jail calendar, or "committal book" for that period has been examined, which shows that the petitioner was in fact committed to jail on the sixth day of October, on some other process, and that he was actually "taken before the supreme

court" on the eighth day of October, the day when the sentences in question were imposed, and recommitted on that day.

It is immaterial, however, whether he was in custody or at large when the sentences were imposed, except that in the latter case the term of imprisonment would not commence until he was actually committed in execution of the sentences. When arrested and committed in vacation in execution of such sentences as these, the two terms must run concurrently from the time of commitment, precisely the same as if committed during a term of court. It makes no difference whether he is taken from the street or the court room. If the sentences are in the same form, they must have the same operation. The court omitted to state which sentence should be served first, and whether either should succeed the other. The "mittimus" is only a "transcript of the minutes of the conviction and sentence duly certified" by the clerk. R. S. Ch. 135, § 9. The clerk has no power to control the effect of the sentences of the court by changing the time of issuing the mittimus. To determine which sentence shall be served first and whether one shall succeed the other, is clearly a judicial act which the clerk has no power to perform. He can only certify to the order of the court. In this case it is sufficient to say that the clerk was not directed or authorized by the court to perform any such act. It is a question to be determined by the court, because important rights of the accused may depend upon it. In *U. S.* v. *Patterson*, 29 Fed. Rep. supra, (1887) the accused was sentenced to imprisonment for the term of five years upon each of three indictments "said terms not to run concurrently;" but the court said in the opinion: "It is manifest that the judgment or sentence in this case is uncertain in this respect. . . . It does not specify upon which indictment either of said terms of imprisonment is to be undergone. If the prisoner is to be detained in prison for three successive terms, neither he nor the keeper of the prison, nor any other person, knows, or, can possibly know, under which indictment he has passed his first term, or under which he will have to pass the second or the third. If for any reason peculiar to either of said indictments, as for example, some newly-discovered evi-

dence, there should be a different face put upon the case, so as to induce the executive to grant a pardon of the sentence on that indictment, no person could affirm which of the three terms of imprisonment was condoned.

"If a formal record of any one of the indictments, and the judgment rendered thereon, were, for any reason, required to be made out and exemplified, no clerk or person skilled in the law could extend the proper judgment upon such record. He could not tell whether it was the sentence for the first, the second, or the last term of imprisonment. Without the last words of the sentence, declaring that the terms of imprisonment should not run concurrently, it would be sufficiently clear and certain. It would then, by force of law, be a sentence of five years' imprisonment on each indictment, and each sentence would begin to run at once, and they would all run concurrently. Such a sentence is lawful and proper. But the addition that they were not to run concurrently, without specifying the order in which they were to run, is uncertain, and incapable of application. It seems to me that the additional words must be regarded as void."

In the case at bar the mandate must therefore be,

Exceptions sustained.
Prisoner discharged.

JAMES R. LYNN *vs.* FRANCES HOOPER.

Penobscot. Opinion May 31, 1899.

Way. Nuisance. Frightening Horses. Hay Cap. Negligence.

While it is true that the adjacent owner, owning presumptively to the centre of a highway may, subject to the public easement, make a reasonable use of the land, even within the location; yet a use which involves the placing of objects of such a character that will naturally frighten horses ordinarily gentle and well broken is not reasonable. Such a use is unlawful and constitutes a nuisance. The court, in such case, will not set aside a verdict for the plaintiff when the jury have not erred in finding that the defendant's hay cap, by reason of its color, shape, situation and motion, was an object naturally calculated to frighten a horse of ordinary gentleness. It is unlawful to place such a hay cap where it was, and the defendant is responsible for the natural consequences.

A motion for a new trial will not be granted when it appears from a careful examination of the whole case, that a jury would be warranted in finding that the plaintiff's horse was ordinarily gentle and well broken, that the horse was frightened by the appearance of the hay cap complained of, that thereby the injury to the plaintiff was occasioned, that the hay cap was within the located way, and by reason of its color, its fluttering, flapping movement when disturbed by the breezes, and its proximity to the traveled way was an object naturally calculated to frighten horses of ordinary gentleness, and that the defendant permitted the hay cap to remain where it was after she had had notice that it was likely to frighten horses and that horses had actually been frightened thereby.

ON MOTION BY DEFENDANT.

This was an action on the case, brought by the plaintiff to recover damages for injuries which he received September 19, 1896, while traveling upon the public highway, along the defendant's premises in the town of Hermon. The plaintiff's injuries were caused by his horse becoming frightened by a white cloth cap placed by the defendant over a bunch of hay which she had placed within the limits of the highway, near the traveled part, and allowed to remain there for several days. The corners of the white cloth cap were fastened with ropes to four stakes driven in the ground, having the appearance of a small white cloth tent.

The plaintiff contended that this object was about fifteen feet from the nearest wheel track. As the hay under this white cloth cap settled and the wind crept under it, it would move up and down. The plaintiff contended that it was an object which from its character, appearance and location, was naturally calculated to frighten horses of ordinary gentleness passing along and over the highway; that it had frightened a considerable number of horses that were driven or attempted to be driven past it during the time it remained there, including the plaintiff's horse, and that it thereby rendered travel along and over the highway unsafe and dangerous. The plaintiff further contended that the defendant knew of the dangerous character of this object which she had placed there, not only by being informed two days and a half before the accident by a man whose horse it had frightened and who asked her to remove it, and also later on by another person, but that a half a day at least before the accident, she saw with her own eyes a horse frightened by it, and yet, notwithstanding all this, neglected to remove it, but permitted it to remain there until noon on the nineteeth day of September, 1896, when the accident occurred.

The plaintiff introduced evidence proving that, at the time of the accident, he and his wife were driving along the highway, in the exercise of due care; that his horse was gentle and safe; his harness and wagon strong; that he was driving with both hands; and that no fault of his in any way contributed to his injury. The plaintiff's evidence also tended to show that his horse took fright at this object and jumped suddenly to the opposite side of the road, throwing him and his wife from the wagon, dislocating his shoulder and breaking his arm about three inches below the shoulder joint. The jury returned a verdict of $1000 for the plaintiff.

The defendant contended that the hay cap was not the proximate cause of the injury; and also that the defendant was not making an unreasonable, unwarrantable or unlawful use of her premises. She introduced evidence to disprove that the horse was gentle and that the hay cap was located upon her own land and not in the highway.

F. J Martin, for plaintiff.

P. H. Gillin and C. J. Hutchings, for defendant.

Counsel cited: *Farrell* v. *Old Town*, 69 Maine, 73; *Davis* v. *Bangor*, 42 Maine, 522; Woods, Nuisance, p. 76; 16 Am. & Eng. Ency. p. 926; *Com.* v. *Boston*, 97 Mass. 555; *Everett* v. *Marquette*, 53 Mich. 450; *People* v. *Rochester*, 44 Hun, 166; *Jenks* v. *Williams*, 117 Mass. 217; *Hexamer* v. *Webb*, 101 N. Y. 377; *Staples* v. *Dickson*, 88 Maine, 366; 1 Pollock, Torts, p. 324; *King* v. *Morris & Essex R. R. Co.* 18 N. J. Eq. 397; *Corthell* v. *Holmes*, 87 Maine, 24; *Soltau* v. *DeHeld*, 2 Sim. N. S. 133.

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

SAVAGE, J. Action for personal injuries occasioned by an alleged nuisance. The plaintiff claims that while traveling upon the highway adjacent to the defendant's land, his horse became frightened by a hay cap placed by the defendant over a bunch of her hay standing upon or near the highway, and that the horse bolted against a fence on the opposite side of the road, whereby the plaintiff was thrown out of his wagon and sustained the injuries complained of. The verdict was for the plaintiff. The defendant asks us to set the verdict aside as being contrary to the law and the evidence. Several issues of fact were sharply contested before the jury; among them, the character of the horse for gentleness, the location of the hay cap, its distance from the traveled way, and whether the horse's fright was occasioned by the hay cap or otherwise.

If the action is maintainable upon proof of such facts as a jury would be warranted in finding from the evidence in the case, the verdict must be sustained. A discussion of the evidence in detail is unneccessary. From a careful examination of the whole case, we think a jury would be warranted in finding the following facts: That the plaintiff's horse was ordinarily gentle and well broken; that the horse was frightened by the appearance of the hay cap; that thereby the injury was occasioned; that the hay cap, because

of its color, its fluttering, flapping movement when disturbed by the breezes, and its proximity to the traveled way, was an object naturally calculated to frighten horses of ordinary gentleness; that the defendant permitted the hay cap to remain where it was after she had had notice that it was likely to frighten horses, and that horses had actually been frightened thereby.

The evidence tends to show that the cap covering the bunch of hay was a square piece of white cloth, and that its four corners were attached to ropes, which in turn were tied to four stakes driven in the ground in the form of a square. The evidence also tended to show that the cloth cap would move up and down by the action of the breezes, like the fluttering of a tent. The plaintiff testified that the hay cap was in motion at the time his horse became frightened. The bunch of hay was situated on land about three feet lower than the traveled way. Its distance from the nearest wheel track is in dispute. The defendant contends that it was twenty-eight feet. The plaintiff is equally certain that it was only from fifteen to seventeen feet. There was no fence between the traveled way and the hay cap. We think the weight of evidence supports the contention of the plaintiff as to distance, or at least that a jury would have been warranted in so finding. Eight witnesses, several of them apparently disinterested, testified for the plaintiff on this point, and the farthest distance testified to by any of them is seventeen and one-half feet. There is also a controversy whether the hay cap was within the limits of the location of the highway. The defendant contends that it was without the location, upon her own land, and that therefore she had a lawful right to place it and keep it there without liability; that it was a reasonable use of her own property. But the plaintiff contends that the hay cap was within the located way. As we have already suggested, the balance of the weight of the evidence tends to support the contention of the plaintiff that the hay cap was not farther than seventeen and one-half feet from the nearest wheel track, and an examination of the surveyor's plan, introduced and used by the defendant at the trial, shows that the side line of the located way, at the point where the hay cap was, was more than

seventeen and one-half feet from the nearest wheel track. Therefore, we must assume that the hay cap was within the way. Under these conditions, then, the next question which arises is whether the hay cap was so near the traveled part of the highway, and was of such a character as naturally to frighten horses of ordinary gentleness lawfully driven thereon. Was it, as the plaintiff claims, a nuisance?

It is true that the owner of land adjacent to a way and owning presumptively to the centre of the way may, subject to the public easement, make a reasonable use of the land, even within the location. *Farnsworth* v. *Rockland*, 83 Maine, 508. But we think that a use which involves the placing of objects of such a character as naturally to frighten horses, ordinarily gentle and well broken, is not reasonable. Such a use is unlawful, and constitutes a nuisance. The land owner may not make erections or excavations within the located way, of such a character as to imperil public travel, by frightening horses lawfully driven along the way.

Whether in fact the hay cap was an object naturally calculated to frighten horses of ordinary gentleness is stoutly controverted. To show that it was such an object, the plaintiff relies not only upon the appearance and proximity of the hay cap, but also upon the fact that other horses, claimed to be ordinarily gentle, had been frightened by this very cap. *Crocker* v. *McGregor*, 76 Maine, 282; *House* v. *Metcalf*, supra; *Brown* v. *Eastern and Midlands Ry. Co.*, 22 Q. B. Div. 391. The hay was bunched and the cap placed over it Wednesday; the plaintiff was injured the following Saturday. There is testimony that between these dates no less than seven or eight other horses became frightened by this same cap.

Was this cap of such a character and so placed as to constitute a nuisance? "A nuisance," said this court in *Norcross* v. *Thoms*, 51 Maine, 503, "consists in a use of one's own property in such a manner as to cause injury to the property, or other right, or interest of another. It is the injury, annoyance, inconvenience or discomfort thus occasioned, that the law regards, and not the particular business, trade or occupation from which these result. A

lawful as well as an unlawful business may be carried on so as to prove a nuisance. The law in this respect looks with an impartial eye upon all useful trades, avocations and professions. However ancient, useful or necessary the business may be, if it is so managed as to occasion serious annoyance, injury or inconvenience, the injured party has a remedy." *Davis* v. *Winslow*, 51 Maine, 264. These are general principles. In this case, if the hay cap was a nuisance, it was so because it endangered the public use of the way. *Staples* v. *Dickson*, 88 Maine, 362. A thing may be a nuisance because it interferes with or endangers public travel, although it does not of itself constitute an obstruction in the highway. An object at the side of a highway of such a character that it is naturally calculated to frighten horses of ordinary gentleness may constitute a nuisance. Elliott on Roads, 482; Cooley on Torts, 617.

It is impossible to state a general rule by which it can be determined whether any particular object constitutes a nuisance or not. The question must depend upon the conditions and circumstances in each case. Conditions vary. No two cases are alike. Hence it is rare that one case can be a binding precedent for another.

Its distance from the traveled path, its relation to fences and other objects, its height or depth from the road, its color, whether it is customarily found in similar places and under similar conditions, whether it is so situated that horses being driven come suddenly in sight of it, whether it is in repose, or whether it is fluttering like a living thing,—these and many other considerations must be taken account of in determining whether the object is a nuisance or is dangerous to public travel. This suggestion is fully borne out by an examination of cases concerning objects causing fright, some of which we cite: A pile of shingles, *Merrill* v. *Hampden*, 26 Maine, 234; *Lawrence* v. *Mt. Vernon*, 35 Maine, 100; evergreen tree standing in cart, *Davis* v. *Bangor*, 42 Maine, 522; a rock, *Card* v. *Ellsworth*, 65 Maine, 547; a cow, *Perkins* v. *Fayette*, 68 Maine, 152; a hole, *Spaulding* v. *Winslow*, 74 Maine, 528; a pile of stones, *Clinton* v. *Howard*, 42 Conn. 294;

a pile of plastering, *Dimock* v. *Suffield*, 30 Conn. 129; a tent, *Ayer* v. *Norwich*, 39 Conn. 376; a watering-trough painted red, *Cushing* v. *Bedford*, 125 Mass. 526; bales of hay charred by fire, *Morse* v. *Richmond*, 41 Vt. 435; a hollow log blackened by fire, *Forshay* v. *Glen Haven*, 25 Wis. 288; sled with tubs on it, *Judd* v. *Fargo*, 107 Mass. 264; rubbish, *Burgess* v. *Gray*, 1 Man. Gr. & Scott, 578. See also cases in note in Elliott on Roads, 449. Most of these objects were held to be nuisances, or imperiling travel.

In the present case, the court is of opinion that a jury might properly find that the defendant's hay cap was situated within the highway, and that by reason of its color, shape, situation and motion, it was naturally calculated to frighten a horse of ordinary gentleness. If so, it was unlawfully there, and the defendant is to be held responsible for the natural consequences. There are no legal impediments to the maintenance of the action. The facts have been passed upon by the jury, and we perceive no sufficient reason for disturbing their finding.

Motion overruled.

BOSTON EXCELSIOR COMPANY

vs.

BANGOR AND AROOSTOOK RAILROAD COMPANY.

Piscataquis. Opinion June 1, 1899.

Railroads. Fires. Negligence. License. R. S., c. 51, § 64. R. S., Mo. § 2165; Rev. Code, Iowa, 1897, § 2056.

It is provided by the statutes of this state that "when a building or other property is injured by fire communicated by a locomotive engine, the corporation using it is responsible for such injury and it has an insurable interest in the property along the route for which it is responsible, and may procure insurance thereon. But such corporation shall be entitled to the benefit of any insurance upon such property effected by the owner thereof, less the premium and expense of recovery."

In an action on the case to recover damages for the destruction of the plaintiff's property by fire communicated by a locomotive engine operated and owned by the defendant, the plaintiff claimed to recover; first, by virtue of this statute; and secondly, at common law for the negligent condition and management of the defendant's locomotive engine.

A portion of the property destroyed consisted of split poplar wood, a part of which, estimated by the jury in a special finding at two hundred cords, was piled upon the defendant's land and the balance upon the adjoining land of the plaintiff. The railroad company contended that the plaintiff was a trespasser in thus piling its poplar on the defendant's land and permitting it to remain there after the defendant had requested its removal; and also claimed that inasmuch as the fire was first communicated to this portion of the wood so piled on defendant's land and spread therefrom destroying the other property of the plaintiff, it was not liable for any of the property thus destroyed. The jury returned a special finding upon this issue, that the poplar on the defendant's land, at the time of the fire, was there under the license or consent of the defendant; and also, returned a general verdict for the plaintiff in the sum of $4966.10, exclusive of insurance effected on the property of the owners, to the amount of $3100.

It appeared that from August, 1895, to May, 1896, the time of the fire, no intimation was given by the station or other agent of the defendant, that the plaintiff's foreman was expected to remove the wood. Under these circumstances and upon this evidence *it is considered by the court* that the plaintiff's foreman was justified in assuming that the defendant acquiesced in such continued occupation of the land, and that the special finding of the jury on this point is warranted by the evidence.

Held; That the testimony of the land surveyor and engineer called by the plaintiff, with other corroborating evidence, was sufficient to authorize the jury to find that no part of the wood was piled within the defendant's roadway. But if the land on which the wood was piled was occupied by the plaintiff under the license of the defendant, then such occupation was lawful, and the plaintiff's rights and the defendant's liability with respect to injury by fire from a locomotive, are the same as they would be if the plaintiff was the owner of the land.

Held; That, under these circumstances, even where the action is founded on the common law liability of the defendant for the negligence in the management of its trains, the great weight of authority, both American and English, supports the proposition that a land owner is not justly chargeable with contributory negligence for such reasonable and legitimate use of his own land.

Held; That after a careful examination of all the facts in the case having any material relation to the question of negligence on the part of the plaintiff that if the defendant was entitled to the instruction "that the plaintiff cannot recover in this action because it was guilty of contributory negligence in depositing its wood in such close proximity to the railroad track with full knowledge of the danger from fire to which it would be subjected,"—still, there was sufficient evidence to authorize the finding of the jury that the

plaintiff was not guilty of negligence, or if so, that it did not contribute as a proximate cause to the loss of the plaintiff's property.

The fact that the destroyed property was located near the line of the railroad does not deprive the owners of the protection of the statute; certainly if it was placed where it was under a license from the defendant; and the doctrine of contributory negligence is not applicable to this class of cases.

ON MOTION AND EXCEPTIONS BY DEFENDANT.

This was an action on the case to recover damages for the loss of real and personal property belonging to the plaintiff company and alleged to have been destroyed by fire communicated by a locomotive engine then owned and operated by defendant company. Part of the personal property destroyed consisted of split poplar wood of which there was several hundreds of cords and which was piled in part upon the defendant's land and in part upon the adjoining land of the plaintiff. The plaintiff claimed that it had a lawful right to pile its poplar wood upon defendant's land as licensee, claiming that right by virtue of a long continued prior use of said premises for piling purposes and an alleged acquiescence therein by defendant company. The defendant contended that such license, if any could be implied, was revoked by its notifying and directing the plaintiff company not to pile said poplar upon its land and claimed that the plaintiff company in piling said wood was a trespasser and that, as to so much of said wood as was upon defendant's land, it was unlawfully there.

Evidence was introduced by the defendant tending to show that the fire which consumed plaintiff's property was first communicated to the pile of wood standing upon defendant's land next nearest the railroad track and that it spread therefrom to the other piles of poplar wood, destroying the same together with other property.

The defendant claimed that, if the plaintiff's wood which was first consumed was unlawfully upon its land and was destroyed, the plaintiff could not recover for its destruction or for the destruction of other property of which it was the primary cause. Plaintiff claimed the right to recover upon two grounds; first, under the statute; second, at common law, alleging the defective condition of defendant's locomotive and that the same was negli-

gently, improperly and carelessly managed and operated, and that by reason thereof fire was communicated therefrom to its property and it was thereby destroyed. Upon the plaintiff's right to recover under the statute, if its wood was wrongfully upon the railroad location or railroad land, the court instructed the jury as follows:

"I instruct you that the statute only contemplates liability for such property as is lawfully and not wrongfully wherever it may be, but lawfully where it may be burned as in this case upon the company's own land. So that upon the counts which set forth the statute liability, as I say, I instruct you that the plaintiff cannot recover for so much of the wood as was within the railroad land if it was there wrongfully, but that would be only a small portion perhaps of the entire amount of wood destroyed; and I instruct you further, that the plaintiff can recover for the balance under the statute cause of action, if the placing of the wood where it was did not contribute to the injury.

"I am speaking now of the wrongful act, and I say to you, they cannot recover for wood which was wrongfully upon the railroad location at the time of the fire under these counts; but they can recover, other things being proved, for so much of the wood and property as was on plaintiff's own land, providing the wrongful act of the plaintiff in permitting the wood to stay there and be there at the time of the fire did not contribute to the injury, and some things I have said in regard to contributory negligence in the former instance, apply equally well in this."

Upon the plaintiff's right to recover at common law, if the wood was wrongfully placed upon the defendant's land, the court instructed the jury as follows:

"But if the railroad company was guilty of negligence in allowing their train to be run, causing it to be run, or allowing the engine to be out of order in the particulars set forth in the writ and by that negligence the fire was occasioned, then you have got to proceed a step further. If the plaintiff contributed to the injury by the wrongful placing of the wood where it was, then the plaintiff cannot recover.

"If the wrongful placing of the wood did not contribute to the injury and it was occasioned by the negligence of the defendants as alleged in the plaintiff's writ, then the plaintiff may recover even for the wood which was wrongfully on the railroad land."

Defendant requested the court to give the following instruction:

"Defendant asks the court to instruct the jury that if any wood of plaintiff was on defendant's land by trespass, and the fire from the engine went either through the air or along the ground and first set fire to plaintiff's wood thus on defendant's land then the plaintiff cannot recover."

This requested instruction the court declined to give. To these several instructions of the court to the jury and its refusal to give said requested instruction, the defendant took exceptions. The whole charge of the court to the jury, together with the special findings of the jury, is included in the report of the case.

The jury returned a verdict of $4966 for the plaintiff.

H. Hudson and F. E. Guernsey for plaintiff.

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

As to the destruction of the wood which was piled in trespass upon the defendant's land, the defendant is not liable under the statute because the wood destroyed was not lawfully "along its route."

Nor would it be liable at common law unless it was proven that the injury was wilfully or wantonly inflicted by the defendant company.

A railroad corporation owes no duty to trespassers anywhere within its location beyond abstaining from reckless and wanton conduct towards them. *McCreary* v. *Boston & Maine R. R.*, 156 Mass. 316; S. C. 153 Mass. 300, and cases cited.

This is the general rule as laid down by nearly all the courts of last resort in the country, where injury is done to the person of a trespasser,—and we assume, of course, that no stricter rule would obtain where the injury or damage done was to the property of a trespasser.

No action will lie for an injury to person or property by reason of negligence or want of due care, unless it is shown that there is

some obligation or duty towards the plaintiff which the defendant has left undischarged or unfulfilled. *Sweeny* v. *Old Colony R. R.* 10 Allen, 372.

The defendant company owed no duty to this plaintiff who was a trespasser and cannot be held liable unless it is shown that it was guilty of wanton and willful or reckless conduct. 3 Elliot on Railroads, 1233; *Phila., etc., R. R. Co.* v. *Weiser*, 8 Pa. St. 366; *Frost* v. *Eastern R. R.*, 64 N. H. 220; *Nolan* v. *New York, etc., R. R.*, 53 Conn. 416.

It is not alleged nor claimed that the injury or damage was wilfully or wantonly inflicted, and no statement of facts was established which can be the foundation of such a contention. So that, at common law as well as under the statute, the defendant company is not liable for the destruction of the wood piled in trespass upon its land.

This is an action brought by a trespasser to recover for the destruction of property which in part was rightfully on its own land, and in part wrongfully on defendant's land. It was all destroyed by one and the same fire which started in the wood wrongfully on defendant's land, toward which the defendant company owed no duty or obligation, except not to wilfully or wantonly inflict injury thereon. The fire so started, spread to the property rightfully on plaintiff's land, and destroyed it. The trespasser was the owner of all the property so consumed. The injury was made possible only by the owner's own wrong. For these reasons, we submit no recovery can be had by the plaintiff company in this action, either under the statute or at common law for the wood or other property rightfully upon its own land, which was destroyed by the fire kindled in and spreading from the wood piled in trespass upon defendant's land.

Finally, plaintiff company cannot recover because it was guilty of contributory negligence in depositing its wood in a place of known danger.

The plaintiff having placed his lumber in a dangerous place with the full knowledge of the danger, was guilty of contributory negligence and cannot recover. *Post* v. *Buffalo, etc., R. R. Co.*, 108 Pa. St. 585.

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

WHITEHOUSE, J. This is an action on the case to recover damages for the destruction of the plaintiff's property in the town of Milo, May 21, 1896, by fire communicated by a locomotive engine then owned and operated by the defendants.

Section sixty-four of chapter fifty-one of the revised statutes declares that "when a building or other property is injured by fire communicated by a locomotive engine, the corporation using it is responsible for such injury, and it has an insurable interest in the property along the route for which it is responsible, and may procure insurance thereon. But such corporation shall be entitled to the benefit of any insurance upon such property effected by the owner thereof, less the premium and expense of recovery."

In the writ the plaintiff claims to recover in the first place by virtue of the absolute responsibility imposed upon the defendant by this statute, and secondly by reason of the liability of the defendant at common law on the ground of negligence respecting the condition and management of its locomotive engine.

A portion of the plaintiff's property destroyed consisted of a large quantity of split poplar wood, a part of which, estimated by the jury in a special finding at two hundred cords, was piled upon the defendant's land, and the balance upon the adjoining land of the plaintiff. The defendant's right of way at the point in question was sixty-six feet in width, and it had acquired by purchase an additional strip of land, known as the Moore land, adjoining its location on the easterly side. The plaintiff's evidence tended to show that the most westerly tier of the wood was thirty-three feet from the centre of the main line of the railroad, and hence that no part of the poplar wood piled on the defendant's land was within the defendant's right of way, but that all of said two hundred cords was on the "Moore land" adjoining the right of way. On the other hand the testimony of the defendant tended to show that the westerly line of the poplar was nearly eight feet within the limits of the location.

It was not controverted by the defendant, however, that these piles of poplar wood were "along the route" of the defendant's railway, and had all the conditions of permanency in their character requisite to establish the responsibility of the defendant under the statute, if the other elements of statute liability were shown to exist. *Thatcher* v. *Maine Central Railroad Co.*, 85 Maine, 502. But it was earnestly contended, in behalf of the defendant company, that in thus piling its poplar on the defendant's land, and in permitting it to remain after a request by the defendant for its removal, the plaintiff was a trespasser on the defendant's land; and inasmuch as the fire was first communicated to the most westerly tier of wood, and thence spread to the other property of the plaintiff company, that the defendant is not responsible, either for the wood thus wrongfully piled on its lands or for any part of the property thus destroyed. The plaintiff sharply controverted this position, claiming that it had a lawful right to use the defendant's land for a piling ground to the extent shown by virtue of an uninterrupted use of the premises for that purpose with the license and permission of the defendant company for twelve years prior to the time in question, and that such license was never revoked by the defendant. Whether or not such license was revoked in August, 1895, by a notice from defendants not to pile any more wood there, and to remove such part of that already piled as was found to be on the defendant's land, was an issue of fact submitted to the jury, and they returned a special finding that the poplar on the defendant's land, at the time of the fire, was there by the license or consent of the defendant. The jury also returned a general verdict for the plaintiff in the sum of $4966.10, exclusive of insurance effected on the property by the owners, to the amount of $3100.

The case now comes to the court on exceptions by the defendant, and also on a motion to set aside the verdict and special finding as against the evidence.

I. In regard to the special finding that the poplar was on the land of the defendant company by its license and consent, it was not seriously controverted that the land in question had been used

as a piling ground for lumber by the permission of the defendant company for more than ten years prior to August, 1895; but in regard to the alleged revocation of such license and a request to remove the wood already piled there, the testimony is somewhat conflicting. The defendant's station agent, Drake, who had charge of the yard, testifies that in August, 1895, he notified the plaintiff's foreman, Moore, after he had piled up a portion of the westerly tier of poplar, that he must remove his wood from the company's land, as it was proposed to extend the platform at that point, and he had not left sufficient room for the teams to go around. Moore admits that a conversation took place between Drake and himself about that time, in regard to the proposed extension of the company's platform, and the space required for it, but denies that he was ordered to remove the wood already piled there or forbidden to pile more there, and states that he then told Drake that if the wood was on the company's land and it was needed for the platform he was there with his men ready and willing to remove it. Moore is corroborated by Bradeen who heard the conversation. It is true that three section men, Lyford, Kerr and Hodgkins testify that the next day a further notice of similar purport to that given by Drake was given to Moore by Lyford at the request of Cummings, the general manager of bridges and platforms; but Cummings was not called as a witness and Moore denies that he ever received any such notice from Lyford. Neither Drake, Moore nor Lyford appears to have known the location of the dividing line, but it is fairly to be inferred from all the evidence on this branch of the case, that Drake was evidently willing that Moore should continue to pile on the defendant's land as he had been accustomed to do in previous years, unless the wood should be found to interfere with the proposed extension of the platform; and on the other hand if any of the wood was on the defendant's land, Moore was ready and willing to remove it if the space was required for the platform. Such undoubtedly was the mutual understanding of the parties. There was no suggestion from either Drake or Lyford that there was any purpose or desire on the part of the defendant to change the established practice in

regard to the piling ground except upon the contingency of extending the platform. The platform was not in fact extended; the wood remained as originally piled until it was burned in May, 1896; and in the meantime, from August, 1895, to May, 1896, no intimation of any kind appears to have been given by Drake or any other agent of the defendant, that Moore was expected to remove the wood. Under these circumstances and upon this evidence it is the opinion of the court that Moore was justified in assuming that the defendant acquiesced in such continued occupation of the land, and that the special finding of the jury on this point was warranted by the evidence.

The instructions to which the defendant's exceptions were taken related solely to the rights and liabilities of the parties in the event that the wood piled on the defendant's land was wrongfully there. As it is now found to have been lawfully there by consent of the defendant, it becomes unnecessary to consider the exceptions.

II. But the defendant further contends that the plaintiff company cannot recover in this action because it was guilty of contributory negligence in depositing its wood in such close proximity to the railroad track with full knowledge of the danger from fire to which it would be subjected.

The question whether the contributory negligence of a plaintiff, who is not a trespasser, can be successfully invoked in defense of an action founded upon the statute in question, has never been determined by the law court of this state. In every instance in which an instruction has been given to the jury that contributory negligence of the plaintiff was a defense to such an action, the verdict has been for the plaintiff and the law court appears to have had no occasion to reconsider the question as a matter of law. In *Sherman* v. *Maine Central R. R. Co.*, 86 Maine, 422, an action based on the statute, the building destroyed by fire extended on to the location of the defendant's roadway some six or eight feet, and the presiding judge instructed the jury "that if there was a want of ordinary care on the part of the plaintiff in allowing his goods to remain in a building a part of which was within the located

limits of the defendant's roadway, whether there by license or otherwise, and such want of care caused or contributed to the result, the plaintiff could not recover." In the opinion of this court it is said: "Could the railroad company rightfully claim more? Can the proposition be maintained that the mere fact that one corner of a building, in which goods are kept or stored, extends a few feet over one of the side lines of the roadway (though placed there or permitted to remain there by express license of the railroad company or its officers) will exonerate the company from all liability for injuries to the goods by fire communicated by its locomotive engines? . . . . We think not. The statute contains no such exemption in express terms and we think none is implied;" *Ingersoll* v. *S. & P. Railroad Co.*, 8 Allen, 438, and *Grand T. Railway* v. *Richardson*, 91 U. S. 454, being cited in support of that conclusion. The former case, *Ingersoll* v. *S. & P. Railroad Co.*, was based on a statute of the same purport as our own, and the court said: "There is nothing in this statement to show that any fault of the plaintiff contributed to the loss, if the buildings were lawfully placed where they stood. The fact that a building or other property stands near a railroad, or partly or wholly on it, if placed there with the consent of the company, does not diminish their responsibility in case it is injured by fire communicated from their locomotives. The legislators have chosen to make it a condition of the right to run carriages impelled by the agency of fire, that the corporations employing them shall be responsible for all injuries which the fire may cause." The latter case, *Grand T. Railway* v. *Richardson*, was a writ of error to the circuit court of the United States for the district of Vermont. The action by the defendant in error was founded on a statute of Vermont of the same scope and effect as those in Maine and Massachusetts. Evidence was admitted to show that such of the buildings destroyed as were within the lines of the railway, had been erected there by the license of the company, and exceptions were taken to the refusal of the presiding judge to give the following instructions: "If the jury should find that the erection of the plaintiff's buildings, or the storing of their lumber so near the defendant's railroad track as

the evidence showed was an imprudent or careless act, and that such a location in any degree contributed to the loss which ensued, then the plaintiffs could not recover, even though the fire was communicated by the defendant's locomotive." In their opinion the U. S. Supreme Court say: "We think the court correctly refused to affirm this proposition. The fact that the destroyed property was located near the line of the railroad did not deprive the owners of the protection of the statute, certainly, if it was placed where it was under a license from the defendant. Such a location, if there was a license, was a lawful use of its property by the plaintiff; and they did not lose their right to compensation for its loss occasioned by the negligence of the defendant."

In New Hampshire a statute like ours makes the railroad company liable "for all damage which shall accrue to any person or property by fire or steam from any locomotive or other engine on such road," and gives the company an insurable interest in property exposed along the line. In *Rowell* v. *Railroad*, 57 N. H. 132, it was distinctly held in separate opinions by two of the justices, that the liability thereby imposed is that of insurers, and that the doctrine of contributory negligence does not apply. In the leading opinion of Ladd, J., it is said: "The liability of the railroad is made absolute by statute. No questions of care or negligence on their part is left open. If they throw sparks or fire upon the land of an adjoining owner, or allow fire from their engines to escape upon land of such owner, they are made responsible in the same way as the owner of cattle whose nature it is to rove, is liable for the damage they do in case they escape upon the land of another; and in the same way one is liable for damage caused by filth or noxious odors originating or accumulating upon his land, and passing therefrom to that of another. There is no rule of law that requires the plaintiff to so use his land that it shall not be exposed to injury from the act of another, especially when that act is impliedly forbidden by law. And even without the statute, the throwing of a spark or a coal of fire upon a pile of shavings which I have negligently suffered to accumulate near a house I am building, is as much a trespass as would be the throw-

ing of a spark or coal upon shavings which I have packed away, using ordinary care to ensure their safety." . . . .

So in *Fero* v. *The Buffalo & S. L. R. R. Co.*, 22 N. Y., 215, Bacon, J., says: "It is difficult to maintain the proposition that one can be guilty of negligence while in the lawful use of his own property upon his own premises. The principal contended for by the defendant's counsel, if carried to its logical conclusion, would forbid the erection of any building whatever upon premises in such proximity to a railroad track as would expose them to the possibility of danger from that quarter."

"In *Vaughan* v. *Taff Vale Railway Co.*, 3 H. & N. 750, Martin, B. says (arguendo): 'It would require a strong authority to convince me that because a railway runs along my land I am bound to keep it in a particular state.' And Bramwell, B. in delivering the opinion of the court in the same case says: 'It remains to consider another point by the defendants. It was said that the plaintiff's land was covered with very combustible vegetation, and that he contributed to his own loss. We are of opinion that this objection fails. The plaintiff used his land in a natural and proper way for the purpose for which it was fit. The defendants come to it, he being passive, and do it a mischief.' . . . . I think the manifest intention of the legislature was to cast upon the proprietors of railroads the substantial liability of insurers against fire with respect to the property specified; and that being so the same rule as to contributory negligence by the plaintiff that obtains between the parties to a fire policy in case of loss, should be applied." In the concurring opinion in *Rowell* v. *Railroad*, supra, Chief Justice Cushing says: "It seems to me that the effect of this legislation is to make the proprietors of a railroad liable as insurers. This construction of the statute makes the liability exactly commensurate with the indemnity which the proprietors are entitled to provide for and to claims under the statute. . . . . Negligence either of the railroad or of the landowner would not, according to the authorities, be a defense to an action by the proprietors to recover on their policy the amount of the loss insured. It would be odd enough if the proprietors could

recover on their policy and then turn round and defeat the property owner on the ground of contributory negligence. . . . . The jury ought to have been instructed that no negligence of the plaintiff would discharge the defendants unless so great as to be equivalent to fraud."

In 1887 a statute of precisely the same effect as those above considered was enacted in Missouri. It is section 2165 of the revised statutes of Missouri of 1889, and is substantially a transcript of the Massachusetts act. In 1893 it came before the supreme court of that state for construction in the case of *Mathews* v. *St. Louis & S. F. Ry. Co.*, 121 Mo. 298. At the trial of the cause the defendant company contended, among other grounds of defense, that the plaintiff was guilty of contributory negligence in permitting large quantities of dry grass, leaves, weeds, and other inflammable matter to remain upon his premises adjacent to the railroad and near the buildings destroyed. After considering the evidence and reviewing the authorities applicable to it, the court held that the conduct of the plaintiff in the respect named did not constitute such contributory negligence as would bar the plaintiff of his right of recovery, and added: "But there is another ground upon which this plea should have been denied, and that is by virtue of section 2615 the defendant is made an insurer against fire set by its engines; and it is a familiar rule that contributory negligence, short of fraud, does not furnish any defense to an action by the insured on his policy of insurance, and this was the view taken and enforced in *Rowell* v. *Railroad Co.*, 57 N. H. 132."

In Iowa, under a similar statute, which appears as section 2056 in the revised code of 1877, it was also held by the court of last resort in that state, in *West* v. *Chicago & N. W. R. Co.*, 77 Iowa, 654, that the rule of contributory negligence was not applicable. In the opinion the court said: "The instructions made the defendant liable regardless of the question of contributory negligence. . . . . It may be conceded that prior to the statute contributory negligence on the part of the plaintiff in a case like this would defeat his recovery. . . . . But the statute we think changed the rule. The statute, we think, was designed to settle a

vexed question upon which the court had been divided. The language is clear."

In Wood on Railroads, Vol. 3, page 1602, the author says: "In some of the states railway companies are made liable irrespective of the question of negligence, for fires set by their engines, and as a compensation for this extraordinary liability are given an insurable interest in such property. . . . . Under these statutes the plaintiff is only required to show that the fire was communicated from the defendant's engines; and no degree of care on the part of the defendants will defeat its liability; the company's liability is that of insurer, and the contributory negligence of the plaintiff, unless it amounts to actual fraud by an intentional exposure of the property, will not therefore operate as a defense."

So also in 1 Thompson on Negligence, 171, referring to statutes which impose such an absolute liability on railroads, the author says: "In an action under them the defense of contributory negligence is not good."

In Michigan the statute of 1872 required every railroad company to erect and maintain fences on each side of its road, and provided that until such fences were duly erected the corporation should be "liable for all damages done to cattle, horses or other animals thereon, and all other damages which may result from the neglect of such company to construct and maintain such fences." In *Flint, &c., Ry. Co.* v. *Lull*, 28 Mich. 510, an action to recover damages sustained before the erection of such fences, it was held that negligence of the plaintiff in the care of his property, contributory to the injury, constituted no defense. In the opinion of Judge Cooley the court say: "Were this a common-law action it is clear that such contributory negligence would be a defense. . . . . But this is not a common law action. It is an action given expressly by a statute the purpose of which is not merely to compensate the owner of property destroyed for his loss but to enforce against the railway company an obligation they owe to the public. . . . . And the decisions may almost be said to be uniform that in cases like the present, arising under such statutes, the mere negligence of the plaintiff in the case of his property,

can constitute no defense. . . . . Indeed, if contributory negligence could constitute a defense, the purpose of the statute might be in a great measure, if not wholly, defeated, for the mere neglect of the railway company to observe the directions of the statute, would render it unsafe for the owner of beasts to suffer them to be at large or even on his own grounds in the vicinity of the road, so that if he did what, but for the neglect of the company, it would be entirely safe and proper for him to do, the very neglect of the company would constitute its protection, since that neglect alone rendered the conduct of the plaintiff negligent."

It is undoubtedly true, as stated by the court in *Hussey* v. *King*, 83 Maine, 568, that the rule of contributory negligence "applies only to actions given by the common law, but also to those given solely by statute, where the gist of the action is the default, omission or carelessness of the defendant." Of this class are the actions authorized by statute for damages "suffered through any defect or want of repair in any highway." They are based essentially on the fault of the town in not keeping its ways "safe and convenient." So also is the action based on section 23 of chapter 17 of the revised statutes, which provides that "persons engaged in blasting limerock or other rocks shall before each explosion give seasonable notice thereof;" and makes any person violating this provision "liable for all damages caused by any explosion." Here the ground of liability is obviously an omission or neglect to give the seasonable notice required by the statute, and in *Wadsworth* v. *Marshall*, 88 Maine, 263, it was accordingly held that the rule of contributory negligence on the part of the plaintiff was applicable. See also *Taylor* v. *Carew Manf'g Co.*, 143 Mass. 470.

"There is, however, another class of actions in tort not based on negligence, in which the defendant's care or want of care, is not in issue; in which some direct, positive act of the defendant makes the cause of action. In this class of actions there is no reason nor place for such a rule." *Hussey* v. *King*, 83 Maine, 568, supra.

Actions based on the statute in question in the principal case, making a railroad corporation responsible for loss by fire communicated by its locomotive engine, fall naturally into this class. The

question of the defendant's negligence is not an issue. It is immaterial that the locomotive is equipped with the most ingenious spark arrester that human ingenuity can devise, and its construction otherwise of the most suitable material and approved design. It is immaterial that it is operated and managed in the most skillful and prudent manner known to experienced firemen and engineers. The simple fact that the fire causing the injury was communicated by one of the defendant's locomotive engines is sufficient to establish the cause of action. The absolute liability thereby cast upon the defendant cannot be defeated by proof of the highest possible degree of care in the management of its railroad trains. As a compensation for this extraordinary liability it has been seen that the statute gives the railroad corporation "an insurable interest in the property along the route." No case has been cited by counsel, or otherwise brought to the attention of this court from which it appears that the contributory negligence of the plaintiff has in fact been successfully invoked in defense of an action based upon such a statute, or in which it has been directly determined as a matter of law, by the court of last resort in any state, that the doctrine of contributory negligence is applicable to such an action. The only case cited by counsel for defendant upon this branch of the case is *Post* v. *Buffalo, &c., R. Co.*, 108. Pa. St. 585, and that was an action to enforce the defendant's liability for negligence at common law.

In the case at bar, however, the justice presiding at the trial, in his charge to the jury clearly and distinctly gave the defendant company the full benefit of this rule of contributory negligence. Yet by returning a general verdict for the plaintiff corporation the jury necessarily found as a matter of fact that under the circumstances disclosed by the evidence, there was no want of ordinary care and prudence on the part of the plaintiff corporation in occupying land adjacent to the defendant's roadway in the customary manner, for the purposes of a piling ground; or if there were, that such want of care did not proximately contribute to the destruction of the property.

It is true, as noted at the beginning of this opinion, that there

was a conflict of testimony as to whether any part of the plaintiff's poplar was piled within the defendant's roadway; but the positive testimony of Wm. P. Oakes, the land surveyor and civil engineer, called by the plaintiff, that the westerly tier of poplar, the location of which was still plainly marked by the "remnants of the pile," was thirty-three feet from the centre of the main track, with other corroborating evidence, was sufficient to authorize the jury to find that no part of the wood was piled within the defendant's roadway. The land on which the wood was piled was occupied by the plaintiff by license of the defendant, as it had been occupied by the plaintiff company and its predecessors, for more than ten years prior to that time. It was a lawful occupation, and the plaintiff's rights and the defendant's liability, with respect to injury by fire from a locomotive, were precisely the same as they would have been if the plaintiff had been the owner of the land. *Ingersoll* v. *S. & P. Railroad*, 8 Allen, 438; *Grand T. R. Co.* v. *Richardson*, 91 U. S. 354, supra. Under these circumstances, even when the action is founded on the common law liability of the defendant for negligence in the management of its trains, the great weight of authority in this country and in England supports the proposition that a land owner is not justly chargeable with contributory negligence for such a reasonable and legitimate use of his own land. 3 Wood on Railroads, § 338, and cases cited. "He is not required to anticipate the defendant's negligence, nor to give up the lawful use of his property in such manner as would be deemed prudent under ordinary circumstances. . . . . Neither will the knowledge of an adjacent land owner that engines on the road are habitually so mismanaged or defective as to cause frequent fires upon or near the track, make any difference. Such a fact may add to the evidence of defendant's negligence, but cannot add to the plaintiff's duties." 2 Sherman & Red. on Neg. 5th Ed., § 680. Such ordinary rights of the adjacent land owner are presumably considered in the estimation of damages for the land originally taken for the defendant's roadway.

After a careful examination of all the facts in this case having any material relation to this question of negligence, on the part

of the plaintiff, it is the opinion of the court that if the defendant had been entitled to the instruction given in its favor upon this point, there was sufficient evidence to authorize the finding of the jury that the plaintiff was not guilty of negligence, or if so, that it did not contribute as a proximate cause, to the loss of the plaintiff's property.

The fire appears to have caught from coals falling upon the track and to have been thence communicated through the dry grass to the bottom of the nearest pile of wood; but the defendant had full knowledge, from daily observation, of the location of this wood and of all the existing conditions at that station. And it is a principle of familiar application in cases of negligence where the plaintiff's negligence is also connected with the injury, that if, by the exercise of ordinary care and skill, the defendant might have avoided the injury, the plaintiff's negligence cannot be set up in defense of the action. 2 Wood on Railroads, § 319a; Addison on Torts, 41. "For however nearly related two negligences may be, the one cannot bar an action for the other unless it is contributory, and although an unseen position might contribute to an accident, a discovered one cannot." Bishop on Non-Contract Law, § 66. See also *Davies* v. *Mann*, 10 M. & W. 546; *Grand T. R. Co.* v. *Ives*, 14 U. S. 408; *O'Brien* v. *McGlinchy*, 68 Maine, 557; *Pollard* v. *Maine Central R. Co.*, 87 Maine, 51; *Atwood* v. *Orono, &c., R. Co.*, 91 Maine, 399. It was a question between two corporations, with respect to which the deliberations of the jury would not probably be influenced by sympathy or prejudice, and this court would not be warranted by the facts in setting aside their verdict.

Motion and exceptions overruled.

MARGARET SULLIVAN

vs.

CITY OF LEWISTON.

Androscoggin. Opinion June 3, 1899.

Paupers. Support by Inhabitant. Notice. R. S., c. 24, § 43. Lewiston City Ordinance.

The notice and request to overseers required by the statute to authorize an inhabitant of a town or city to recover expenses necessarily expended for the relief of a pauper in such town or city, may, in the city of Lewiston, be given to the clerk or agent of the overseers; an ordinance of the city providing that its overseers may appoint "a clerk or agent" to act for them under their direction and approval.

ON EXCEPTIONS AND MOTION BY DEFENDANT.

This was an action brought by Margaret Sullivan to recover from the city of Lewiston the sum of $821 for board, care and nursing of her brother, Daniel McCarty, from November 3, 1891, to February 3, 1894, 821 days at $1 per day. At the trial at the April term in Androscoggin county, however, the plaintiff admitted her inability to prove the required notice upon the overseers of the poor prior to May 31, 1892, and made no claim to recover from November 3, 1891, to that date. The verdict was for the plaintiff, damages being assessed at $413.87, and the defendant sought for a new trial on the customary grounds.

Ralph W. Crockett, for plaintiff.

John L. Reade, city solicitor, for defendant.

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

PETERS, C. J. This is an action brought by one of its inhabitants against the city of Lewiston under this statutory provision: "Towns shall pay expenses necessarily incurred for the relief of paupers by an inhabitant not liable for their support, after notice

and request to the overseers, until provision is made for them." A question arose at the trial whether notice to a clerk or agent of the overseers is a notice to the overseers themselves. We think so, in all cases where the municipality authorizes the overseers to employ a clerk or agent at its expense, and clothes him with such ministerial functions as did the city of Lewiston in the present case. Chapter 14 of the revised ordinances of the city, sec. 1, reads thus: "The mayor and aldermen shall constitute the overseers of the poor and as such shall have the right to appoint a clerk or agent to act for, and under the direction and approval of said overseers; and said clerk or agent shall receive such compensation for his services as the city council shall prescribe." Section two of the same chapter provides that such agent or clerk shall be sworn, keep a fair and intelligent record of the doings of the board, and perform generally such services as in the line of their duties they might impose on him. He was habitually in attendance at their office and they were rarely there except at stated meetings. Their own convenience as well as that of the public was better served by communicating notices to them through one who was their agent as well as clerk.

The verdict is manifestly too large. The plaintiff is entitled to compensation for her services in the case of her sick brother for, as nearly as may be reckoned, ninety-two days, although she performed similar services for a previous period for which she cannot recover for failure of giving seasonable and necessary notice. A calculation based on the different votes of the city and the admissions of the plaintiff, after deducting sums already received, will give the plaintiff $162.12, instead of $418.37, the amount of the verdict.

Exceptions and motion overruled if plaintiff remits as indicated, otherwise motion to be sustained.

STATE *vs.* JOHN BOARDMAN, Appellant.

Knox. Opinion June 3, 1899.

Town By-Law. Approval. Use of Highway. Law and Fact. R. S., c. 3, § 59.

An ordinance, or town by-law, which sets apart and designates a certain portion of the street or highway over and upon which may be transported on wheels lime-stone and other materials, where the load, exclusive of cart or vehicle, exceeds 2,500 pounds in weight, and prohibiting under a penalty all persons from using any other portion of the street for such purposes, is not required to be approved by the county commissioners or a justice of this court in order to become valid.

Such a by-law is not inconsistent with any law of the state. It does not deprive a person of any right,—it simply regulates the exercise of it, and affords all travelers much better opportunities for travel than they would otherwise enjoy.

Whether such a by-law is reasonable and valid with reference to the way and locality in this case, *held;* that the portion of the street which may be used by heavily loaded vehicles must be reasonably suitable for the purpose; and the by-law will be valid or invalid—depending upon whether that portion of the way to which such vehicles are restricted is or is not reasonably suitable for the purpose.

Where the defendant charged with violating such a by-law offered evidence to prove that the portion of the street, to which his heavily loaded team was restricted, was absolutely impassable, *held;* that the evidence should have been admitted, because, if true, the by-law became unreasonable.

The question of the reasonableness of a by-law is for the determination of the court. Certain facts are to be passed upon by the jury, but the standard upon the question of the reasonableness or otherwise of the by-law is established by the court.

ON EXCEPTIONS BY DEFENDANT.

This was a complaint for alleged violation of a by-law of the town of Rockport prohibiting the use of a certain portion of Union Street in that town by heavily loaded teams. The defendant was convicted before a trial justice and appealed to this court sitting at nisi prius.

In addition to other grounds of defense, which are stated in the opinion of the court, the defendant offered evidence to show "that the portion of the street covered by the by-law, under which this complaint was made, was, at the time the offense was alleged to have been committed, and for years prior thereto, had been con-

stantly used by the teamsters in hauling lime-rock from the quarries near the Camden line to the kilns at Rockport, a distance of some half mile; that the constant hauling of such heavy loads of rock, averaging three or four tons per load, exclusive of weight of the team, over and upon said fifteen foot space of reserved or specified part of the road, had cut deep ruts in that part of the road and thrown up great ridges of earth, making it very difficult or well nigh impossible to keep that portion of the road in suitable repair for the passage of ordinary teams at all times; that the defendant carrying on the business of freighter or teamster, hauling freight between Camden and Rockland, used the kind of cart or team in common use for carriage of miscellaneous freight, to wit, a jigger or slung body, having the body of the cart less than eight inches from the ground when light, the body hung low for convenience in loading and unloading heavy freight; that owing to the rutted and ridged condition of this said fifteen foot space he found it impossible during the greater part of the time to drive over it with his loaded jigger, the weight of a heavy load causing the body of the jigger to 'squat' or settle some two inches or more; that upon the day named in the complaint he drove over said Union Street with his jigger loaded with a seven thousand pound anchor, the body of the jigger by reason of this weight being pressed down to within six inches of the level ground; that when he came up to the quarry road, where the quarry road comes up into the main road, as was his custom, he drove into that fifteen foot limit; that he drove there a short distance before he found that the body was very likely to drag in a very short time; that the ruts were there ahead of him as far as he could see. He knew the minute the body dragged that he was stalled and couldn't get out; that he couldn't yank it out by putting on horses, that it would break the jigger, and rather than that he got out of the ruts when he could."

The defendant also offered evidence tending to show that the rutted and ridged condition of the said fifteen foot strip of road, making it impassable for a loaded jigger, was its constant and normal condition during all that portion of the year when lime-rock

was hauled over that portion of the road on wheels, making it an absolute impossibility for him to comply with the terms of the by-law; and that if compelled to comply strictly with its terms, his business as freighter must be either entirely given up, or so far injured as to result in serious financial loss to him. But the presiding justice excluded the evidence on the ground that it was immaterial, it not being claimed that the condition of the highway within fifteen feet of the westerly rail of the electric road was due to any sudden or unforeseen emergency.

To the rulings of the presiding justice relating to the by-law, and excluding the evidence offered, the defendant after a verdict of guilty, as directed by the court, took exceptions.

Washington R. Prescott, County Attorney, for State.

If the road set apart for heavy travel was out of repair it was the duty of the town to repair it. Section 52 of chap. 18, R. S., provides that town ways and streets shall be kept open and in repair so as to be safe and convenient for travelers with horses, teams and carriages, and in default thereof it may be indicted, convicted and a fine imposed. The next section provides that if a town unreasonably neglects to keep in repair, after one of the municipal officers has had five days' notice or actual knowledge of the defective condition, any three or more persons may petition the county commissioners, and a hearing ordered, and if adjudged out of repair, the town be given a time in which to repair the same with judgment for costs. If a way be out of repair by neglect of the officers of the town, and not because of any unforeseen emergency, the law offers ample remedy to travelers which will result in speedy repair of the way. There is no claim that the condition complained of and to show the existence of which the evidence was offered by the defendant was the result of any unforeseen emergency. The exceptions show and claim that the defective condition complained of was the result of long and continuous neglect by the road commissioner of the town of Rockport. But there is no suggestion in the exceptions that the defendant ever notified the road surveyor or the municipal officers of the town of the alleged defective condition of the road.

M. T. Crawford, for defendant.

This by-law is prohibitive upon its face, restrictive of the rights of the public to free passage over public streets, tends to check and delay and annoy those doing business over the public streets, is burdensome, oppressive and unreasonable because of its logical and necessary consequences and effects upon the public.

It is the policy of the law to require of municipal corporations a strict observance of their powers. Any doubt or ambiguity arising out of the terms of the legislature in making a grant of power must be resolved in favor of the public; and a power cannot be exercised where it is not clearly comprehended within the words of the act, or determined therefrom by necessary implication. XV Am. and Eng. Ency. of Law, page 1041 and notes.

Towns may prohibit rapid driving over the streets, as in *Com.* v. *Worcester*, 3 Pick. 461; may regulate the use of omnibuses and stage coaches for the carrying of passengers, as in *Com.* v. *Stodder*, 2 Cush. 562; may compel licenses of cartmen, as in *Brooklyn* v. *Breslin*, 57 N. Y. 591; may limit the time during which hacks or public carriages may stand in certain places, as in *Com.* v. *Robertson*, 5 Cush. 438; may designate certain places for public teams to stand while waiting for hire, as in *Com.* v. *Matthews*, 122 Mass. 60, and in a thousand ways may seek the public benefit by wisely drawn and wisely applied by-laws. XV Am. and Eng. Ency. of Law, p. 1168 and notes, and Ib. XVII, p. 248 and notes.

But this by-law is not a regulation, it is an absolute prohibition; it has not in view the public health, safety or convenience, but simply the benefit of that one town and its officers, the saving of work and money in properly caring for a public highway, and the result is oppression and hinderance and delay and burdens for the general public.

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

WISWELL, J. Complaint for the alleged violation of the following ordinance or by-law of the town of Rockport: "All of

that portion of Union Street in Rockport situated Northerly and Westerly and within fifteen (15) feet of the Northerly and Westerly rail of the Electric R. R. track, is hereby set apart and designated as the portion of said street over and upon which lime-stone may be transported on wheels, also all other material on wheels, where the load, exclusive of cart, wagon or vehicle, exceeds 2,500 pounds in weight; and all persons are prohibited from using any other portion of said street for the purposes aforesaid; and any person engaged in transporting lime-stone on wheels or other material of the weight aforesaid, on wheels, using any other portion of said street for such purpose, shall be fined not less than two nor more than five dollars for each offense, to be recovered, by complaint, to the use of the town of Rockport."

The respondent attacks the validity of this by-law upon three grounds, namely, because it had never been approved by the county commissioners of Knox county or by a justice of the Supreme Judicial Court; because it is inconsistent with the laws of the state; and because it is unreasonable. Must such an ordinance be approved by the county commissioners or by a justice of this court? We think not.

The legislature of this state has by various enactments at different times given to municipalities the power to adopt by-laws in regard to a large number of matters, all of which different enactments have been condensed into c. 3, § 59, of the present revised statutes. As that section now reads municipalities are authorized to adopt such ordinances for the purposes named in twelve separate paragraphs. By paragraph I, "For managing their prudential affairs," such by-laws must be approved by the county commissioners or by a judge of this court; but in regard to by-laws in relation to the purposes, enumerated in the other eleven paragraphs of the section, no such approval is made necessary.

The words "prudential affairs" are certainly very indefinite and unsatisfactory, and it might be a very difficult matter in many cases to determine just what is or is not included within the meaning of the expression. This term was taken from the Massachusetts statute where the same difficulty has been appreciated. In

the case of *Spaulding* v. *Lowell*, 23 Pick. 71, Chief Justice Shaw said: "The ambiguity lies in the indefinite term, 'prudential affairs,' and the difficulty arises in each case in settling what concerns fall within it." But however indefinite the term may be, that it was not intended to cover the matters enumerated in the other paragraphs of the section, is shown, we think, both by the language of the original enactments and the text and arrangement of paragraphs in the section of the revision, by which towns are empowered to make by-laws in regard to police regulations; respecting infectious diseases; for setting off portions of streets for sidewalks; in regard to the erection of wooden buildings; and as to various other matters.

The authority of a municipality to adopt such an ordinance as the one here under consideration is given, we think, by paragraph IX: "For the regulation of all vehicles used therein, by establishing the rates of fare, routes and places of standing, and in any other respect."

So therefore it only remains to inquire whether this by-law is inconsistent with law or is unreasonable. We are unaware of any law of the State which it contravenes. All public ways and streets are for the accommodation primarily of travelers of all classes and kinds, but the traveler is not in all, or in many cases, entitled to the whole width of the street for his accommodation. He is entitled to a reasonably safe, convenient and practicable opportunity for travel and passage. A portion of a way as located, not being needed for travel, may be left outside of the wrought road, another portion may be set off for sidewalks and the use of the remaining width of the way so regulated that heavily loaded teams and other vehicles shall use exclusively different portions thereof, and still no one would be deprived of his rights, but upon the other hand all might be very much benefited in the exercise of them.

Highways and streets are of course for the public use, they are not alone for the people of the municipality in which they are located, and such ways can not be considered in any sense the easement or property of the town; but the municipality in which a public way is located has been vested by the legislature with the

supervision and control of such ways for public use, and are charged with the responsibility of keeping them in repair and reasonably suitable and sufficient for use by the public for purposes of travel. The power to properly regulate the use of ways so as to preserve for all the rights of all is not inconsistent with any provision of law.

Such a by-law does not deprive a person of any right, it simply regulates the exercise of it and it can be readily seen that such a regulation may afford to all travelers much better opportunities for travel than they could otherwise enjoy.

In *Commonwealth* v. *Stodder*, 2 Cush. 562, the court said: "We cannot doubt that a by-law, reasonably regulating the use of the public streets of the city as to carriages of an unusually large size, or as to those which from the mode of using them would greatly incommode, if not endanger, those having occasion to use such public streets, would be valid and legal; and that such regulations might prescribe certain streets as the route of travel for such vehicles, and provide for their exclusion from certain other streets."

Was this by-law reasonable? By its terms all persons passing over the street named, with any vehicle on which there were loads exceeding 2,500 pounds in weight, are restricted to the use of fifteen feet of the width of the street next to the electric railroad track. That this would be a reasonable, and in many cases a most salutary regulation, we have no doubt; but such a by-law might be unreasonable, if that portion of the way to which such vehicles were restricted was allowed to become in such a condition as to be impassable, that is, if the only portion of the way which the by-law allowed to be used for heavily loaded vehicles could not be at all used, because it had been allowed to become in such a condition of want of repair as to be impassable, then that portion of the public, who had occasion to use the way for this purpose, would be absolutely deprived of their right to use the way for the purpose of travel.

For such a by-law then to be reasonable and valid, with reference to such a way and in such a locality as in this case, that portion of the street which may be used by heavily loaded vehicles

must be reasonably suitable for the purpose; and the by-law will be valid or invalid depending upon whether that portion of the way, to which such vehicles are restricted, is or is not reasonably suitable for the purpose.

Here the defendant offered evidence tending to prove that the fifteen feet in width of street next to the railroad track was absolutely impassable. The evidence was excluded. We think it should have been admitted because, if true, the by-law became unreasonable.

It is true that the question of the reasonableness of a by-law is for the determination of the court, and this conclusion does not take away from the court the determination of the question: certain facts will have to be passed upon by the jury; but the standard upon the question of the reasonableness or otherwise of the by-law is established by the court.

Exceptions sustained.

JOHN A. GILLIN

vs.

THE PATTEN AND SHERMAN RAILROAD COMPANY.

Aroostook. Opinion June 2, 1899.

Railroad. Negligence. Assumption of Risk. Blocking of Guard Rails. Stat. 1889, c. 216.

The Stat. of 1889, ch. 216, requiring each railroad company to fill or block the frogs and guard rails on its track before January 1, 1890, does not require a railroad company, organized and constructing its railroad after that date, to fill or block its frogs and guard rails before allowing trains to be operated over its tracks. Such company is entitled to a reasonable time for compliance with that statute.

A brakeman who has worked as section man and brakeman for two years on a railroad where the frogs and guard rails were not filled or blocked must be presumed to appreciate the danger of getting his foot caught in such frogs and guard rails while stepping about and over them.

Such a brakeman having occasion to work as brakeman on the trains of his employer while passing over another railroad just constructed (since Jan'y 1, 1890,) cannot rightfully assume that the frogs and guard rails of the new railroad are filled or blocked, and hence dismiss all thought of them from his mind.

If such brakeman, under such circumstances, continues to work without requiring the frogs and guard rails to be filled or blocked, he must be held to have waived the right and to have assumed the risk of injury from stepping into them.

For such a brakeman, under such circumstances, to move about over frogs and switches while coupling and uncoupling cars, even in moving trains, without taking any thought of the frogs and guard rails or as to where he may be stepping, is negligence on his part contributing to the catching his foot in them.

ON MOTION BY DEFENDANT.

This was an action on the case to recover damages for personal injuries sustained by the plaintiff while employed as a brakeman upon the track of the defendant company at Sherman Junction, and in attempting to take certain cars there situate upon the line of the connecting railroad, the Bangor and Aroostook railroad. In attempting to do so and while uncoupling cars in the yard of the defendant company the plaintiff, as he alleged, having pulled the pin, the train still moving, undertook to step out from between the cars. In doing so, he caught his left foot in the flare of the main rail and a guard rail which were not filled or blocked, and received an injury to the foot which necessitated the amputation of a large portion of it.

The jury returned a verdict of $1,750 for the plaintiff and the defendant filed a general motion for a new trial.

The case appears in the opinion.

Ira G. Hersey and P. H. Gillin, for plaintiff.

Counsel argued that it was a question for the jury whether the unblocked and unfilled guard rail was in an unsafe condition; also whether plaintiff knew it and assumed the risk. *Turner* v. *Boston & Maine R. R.*, 158 Mass. 261.

The plaintiff testified that he had been only once before in the yard and junction of the defendant, and then at a point distant from that where the injury was received; and that although he

knew from general knowledge that there were guard rails within the yard, yet he knew nothing about their unblocked condition and had no knowledge of the danger. No evidence was produced by the defendant to show that plaintiff had any knowledge of the condition of this yard before or at the time he received his injury.

Louis C. Stearns and P. P. Burleigh, for defendant.

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

EMERY, J. The defendant company, The Patten and Sherman R. R. Co., had recently built a short railroad from Patten to Sherman where it formed a connection with the Bangor and Aroostook railroad from Old Town to Caribou. To facilitate the work of transferring freight cars from one road to the other, the defendant company permitted the Bangor and Aroostook company to use its main track and side tracks at the junction for shifting or leaving cars. The plaintiff was in the employ of the Bangor and Aroostook company as head brakeman on a freight train between Old Town and Houlton passing Sherman junction. On November 24, 1896, when his train on its way from Old Town to Houlton arrived at Sherman junction, there was occasion to take into the train some freight cars standing on the tracks of the defendant company. The locomotive with some cars of the train, and under the plaintiff's direction, was switched over on these tracks and backed down over them to a point where it was desired to detach the end car to take in front of it some of the cars there standing. As the train was slowly backing, the plaintiff, without special order but in the line of his duty, stepped in between the end car and the one next to it to pull the coupling pin, and while at work on the pin he walked along with the train. Having pulled the pin, the train still moving, he undertook to step out from between the cars. In doing so he caught his left foot in the flare of the main rail and a guard rail and was injured by his foot being forced through between the two rails by the moving train behind. The guard rail was necessarily there as a protection to a switch at that place.

The plaintiff was aware that guard rails necessarily accompanied a switch and that switches accompanied side tracks. He testified that he did not take any notice of the switches or guard rails at this place, at the time of the accident, and did not think about them or their condition.

It may be assumed that, under the arrangement of the two railroad companies for the use of the tracks of the defendant company by the other as above described, the defendant company in relation to its tracks etc. owed the same duty to the employees, including the plaintiff, of the Bangor and Aroostook R. R. Co. that it owed to its own employees, or the same duty that the Bangor and Aroostook R. R. Co. owed to its employees. The plaintiff was more than a licensee. He was on the defendant company's tracks in the course of his employment under a business arrangement between the two companies. *Turner* v. *Boston & Maine R. R.* 158 Mass. 261; *Nugent* v. *B. C. & M. R. R. Co.*, 80 Maine, 62.

The only breach of duty alleged against the defendant company was the lack of blocking in the flare of the guard rail. The plaintiff claims that such blocking would have prevented the catching his foot in the rails as he stepped between them. The case therefore comes down to the usual questions between the railroad company and its employees:—(1) Whether the defendant company owed to the plaintiff the duty of thus blocking the guard rail:—and (2) Whether the plaintiff had given the defendant to understand that he waived the performance of that duty and assumed the risk of working there without such blocking. These two questions may be resolved into one, viz: Was the plaintiff by the law and the facts justified in assuming that the guard rail was blocked and therefore justified in omitting all care or thought about it as he says he did? If he was, he is entitled to recover. If not, he should have declined to unshackle cars at that place, or if consenting to do so, he should have been sufficiently careful not to step in the flare.

The plaintiff invokes the act of 1889, Ch. 216, which specifically provided that every corporation operating a railroad in this state "shall before January 1st, 1890, adjust, fill or block the frogs

and guard rails on its track, with the exception of guard rails on bridges, so as to prevent the feet of employees being caught therein." But this statute is not conclusive upon the defendant company because its road was not in operation in 1890. It was only just built and was still unfinished at the time of the injury to the plaintiff. The company was entitled to a reasonable time within which to comply with the requirement of the legislature. Indeed the legislature gave the old roads nearly a year. It could not have intended to give new roads no time at all. The statute alone, therefore, did not justify the plaintiff in assuming that the guard rail was blocked or filled.

In the absence of a controlling statute the relations between a railroad company and its employees, including brakemen, and their relative duties are the same as those between other employers and their employees. These have been defined and explained so lately that no iteration need be made here except very generally. The company must make its track and switches reasonably safe for the careful employee, so that the employee using ordinary care may avoid injury. The company however need not as toward its employees use the highest degree of care possible and have the newest or best appliances. Things must be as strong and safe as they appear to be. There must be no weakness or want of repair that ordinary care would have detected. There must be no hidden nor even obscure peril attending the use of the appliances. Where all these conditions exist, and the peril of use is an obvious one which the employee should have known and could avoid by care, there is in that respect no further duty on the company to him. Things being just what they seem, peril and all, if the employee requires more he should make that requirement known. If he does not, but makes use of the appliances as they are, he practically gives the company to understand that he is satisfied with them and will take the risk and rely upon his own carefulness to avoid injury. He cannot afterward, if injured by his own carelessness or by accident, effectually insist that the company took the risk.

The plaintiff was twenty-four years old and of average intel-

ligence. He had worked two summers as section hand and laborer on the Canadian Pacific R. R. He then went into the employ of the Bangor and Aroostook R. R. Co. in April, 1895, as brakeman. He first worked as brakeman on a ballast train, then in July, 1895, he was taken as brakeman on the through freight train from Old Town to Houlton. At intervals afterward he worked as brakeman on other trains on the same road, but his regular work was on this freight train. His railroad experience as section hand and brakeman was thus about two years. As brakeman he was daily shifting switches and coupling and uncoupling cars near them.

It must be assumed, therefore, that he was familiar with the construction and operation of side-tracks and switches on that road. There is no claim that he was not. It appears in the case that all the numerous switches, frogs and guard rails on the line from Old Town to Houlton were like those on the Patten and Sherman road at the junction, and unblocked. The chance of injury from stepping between an unblocked guard rail and main rail while shackling or unshackling cars in a moving train is perfectly obvious at a glance, and must have been obvious to him. It would be derogatory to his mental capacity to suggest that he did not know it, or appreciate it. If he had been asked during his employment whether there was any danger in such an operation he would undoubtedly have answered that there was,—that the brakeman should be careful not to step in such a place.

With this experience of over a year as freight brakeman upon a long line of railroad with numerous switches and guard rails all unblocked, he came in the course of his employment to shift switches and uncouple cars upon the tracks of the defendant company with their frogs and guard rails similarly unblocked. The use of these tracks by the plaintiff's employer for the purpose of taking on and setting off cars undoubtedly began as soon as trains began running on the defendant company's road, which was in the previous September. The plaintiff therefore had worked upon the defendant company's tracks and switches at the junction for two months prior to his injury, though he says he does not remember of using this particular switch more than once before he was hurt.

Now, when on the day he was injured he went in between the cars of the moving train near this switch and walked along with the train to a point opposite the guard rail, could he rightfully or reasonably assume that the rail was blocked, and therefore rightfully dismiss all thought about it from his mind?

We think not. We think, on the other hand, that the defendant company could rightfully assume he understood the situation, appreciated the obvious risk, and undertook to protect himself from it. As he almost daily passed Sherman Junction he saw the defendant company's railroad in process of construction. At the time of the injury the work was still going on. The blocking of guard rails and frogs was comparatively a new device which had not long been in use in this State at least. It was not in use at all upon the connecting road, the Bangor and Aroostook, and had never been seen or heard of by the plaintiff till after the injury. The time had not come for him to assume that it was in use upon this new incomplete road, and to dismiss all thought of the danger from his mind. Under all the circumstances he must be held to have assumed the risk of working about the unblocked guard rail, and if he thoughtlessly stepped into the flare of it while between moving cars the risk went against him and not against the company. A few cases will illustrate our reasoning.

In *Wood* v. *Locke*, 147 Mass. 604, (1888), the plaintiff, a brakeman, while coupling cars caught his foot in an unblocked frog and was injured. It was held that, having no reason to believe that the frog was blocked, the injury was one of which he had assumed the risk and hence he could not recover. In *Appel* v. *B. N. Y. & P. R. R. Co.*, 111 N. Y. 550, while the plaintiff's intestate, a switchman, was engaged in uncoupling cars his boot was caught in an unblocked frog and he was run over and killed. It was held that the risk was obvious and must have been known to the deceased, and hence was his risk. In *Mayes* v. *C. R. I. & P. R. R. Co.*, 63 Iowa, 563, the plaintiff's intestate had been a switchman or brakeman for six weeks, and was injured through the omission of the railroad company to place blocks between the rails and the guard rails at the switches. It was held that the defect, and

the danger were obvious, and that he should have guarded against them. In *Turner* v. *B. & M. Railroad*, 158 Mass. 261, cited by the plaintiff, it was in evidence that the defendant company had assumed the duty of blocking all its frogs and keeping them blocked. The plaintiff, therefore, could rightfully assume that the frog at the place where he was working at the time was blocked. In this case there is no evidence that the defendant company had assumed the duty of blocking its guard rail, and no evidence that would lead the plaintiff to suppose so.

Motion sustained.
Verdict set aside.

SAMUEL BUNKER, In Equity, *vs.* WILLIAM BARRON.

Somerset. Opinion June 3, 1899.

Mortgages. Future Advances. Subsequent Purchaser. Bond. Notice. Interest.

A mortgage may properly be made to secure future advances in addition to present indebtedness.

When the present indebtedness is for money hired upon the security of a farm, other money subsequently hired by the mortgagor of the mortgagee with which to purchase other land for the enlargement of the farm, may appropriately be covered by a clause in the mortgage that it shall secure "also all other debts which the mortgagor may contract with the mortgagee."

Where the mortgage consists of an absolute deed duly recorded and a conditional bond back for reconveyance which has not been recorded, an after-purchaser is not bound by a provision in the bond securing future advances, unless he had actual notice of the terms of the bond when his own conveyance was taken.

A promise to pay interest in excess of six per cent per annum does not in this state bind the promisor unless the agreement be in writing.

Parties to a mortgage, cannot, as against subsequent parties in interest, stipulate by an unrecorded agreement for any terms not a part of the original contract.

See *Bunker* v. *Barron*, 79 Maine, 62.

ON REPORT.

Bill in equity to redeem land in Embden, Somerset county. This cause came on for hearing on bill, answers, proofs, master's

report, exceptions to the master's report, and evidence before the master as reported by him; the principal question being to determine the amount due upon the mortgage set forth in the plaintiff's bill. And important questions of law arising for consideration, the cause, with the consent of the parties, was reported to the law court for decision, to determine the whole amount due upon the mortgage, and all questions of costs between the parties, and enter such decree, or decrees, as will be in accordance with the law of the case and the equitable rights of the parties.

The principal facts set out in the report are as follows:—The suit was originally brought against William Barron and entered at the December term of the Supreme Judicial Court, 1887. At the September term, 1889, a master was appointed to report the amount due upon the mortgage.

Hearings were had in 1890, and written arguments were subsequently submitted by both parties to the master, the principal questions argued being the amount of rents with which the mortgagee should be charged, and the amount of debt to which he would be entitled under the clause in the condition of the mortgage relating to future debts.

In July, 1895, William Barron died, no report having then been made by the master. But the knowledge of his death did not come to the master, or to the counsel of either party until near, or during, the following December term of the court.

Just at the close of the September term, 1895, the master, without previous notice to the parties, and without submitting to them a draft of his proposed report, filed his report. The counsel for William Barron, not then being aware of his death, immediately filed a motion to have the report re-committed to the master with instructions to report the evidence submitted to him by the parties. The counsel for the plaintiff not being present at the close of the term, the court directed the motion to stand over to December term for argument. In the meantime, on October 17, the master filed his report of all the evidence submitted to him by the parties. At the December term following, the death of William Barron was suggested to the court, and duly entered of record, and the

plaintiff's counsel moved for, and obtained leave to summon in Josiah C. Holway, Executor of William Barron, and J. Frank Barron, his son, to whom he had conveyed the mortgaged premises, and other real estate.

Upon motion of the plaintiff's counsel, the previous motion of the counsel for William Barron, that the report of the master be re-committed with instructions to return with it a report of the evidence, was overruled by the court. To this ruling exceptions were taken by the counsel for William Barron, and are considered in connection with this report of the case. In those exceptions are printed a copy of the bill in equity, the master's report, and his report of the evidence before him, including the original mortgage and all the subsequent transactions between the mortgagor and mortgagee and the subsequent conveyances of the mortgaged property until it came into the hands of William Barron, the original defendant. And it was agreed that reference to these papers may be made by the parties. The report of the evidence in *Bunker* v. *Barron*, 79 Maine, 62, was before the master by agreement of the parties at the hearing, and all the evidence and documents in that report were made evidence for him. And that report was referred to as part of the evidence before the master. And it contained all the evidence submitted by both parties to the master, with the exception of the parol evidence taken by him, as to the income of the land and the repairs and taxes. The parties also agreed that in determining the amount due upon the mortgage, the report of the master as to the value of the rents and profits should be taken as it stood.

The present defendants, Josiah C. Holway, Executor, and J. Frank Barron, grantee, in obedience to the summons of the court, duly appeared and filed answers, and also filed exceptions to the master's report. The evidence upon which both parties rely to sustain their several positions and contentions, is to be found in the master's report, his report of the evidence before him, including the report of the evidence in *Bunker* v. *Barron*, 79 Maine, 62 and the decision of the court in that case. The foregoing constitutes the report of the evidence in the present case.

Other facts appear in the opinion of the court.

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

When a mortgage is given to secure further advances it means that the future advances are to be made upon the security pledged by the mortgage; and if the mortgagee makes other loans, taking other property, not included in the mortgage, as security for the later loans, he cannot, in a suit to redeem, throw the whole debt upon the mortgaged property which the junior mortgagee desires to redeem, and compel him to pay the loans upon both pieces of property by merely asserting that the second loan was a future advance under the first mortgage. 1 Jones on Mortgages, §§ 364–378. For a very complete discussion of the law on this subject see also 11 Am. Law Reg. (1872) 273.

Paine cannot tack to his original mortgage any debt not secured thereby, and require its payment by the junior mortgagee as a condition of his right to redeem that property. 1 Jones on Mortgages, § 360, citing *Bacon* v. *Cottrell*, 13 Minn. 194.

The law does not allow interest upon interest, even where a promissory note is made payable "with interest annually." *Doe* v. *Warren*, 7 Maine, 48; *Bannister* v. *Roberts*, 35 Maine, 75; *Kittredge* v. *McLaughlin*, 38 Maine, 513; *Parkhurst* v. *Cummings*, 56 Maine, 155; *Whitcomb* v. *Harris*, 90 Maine, 206; 2 Jones on Mortgages, § 1139.

"Although the amount received in any year be insufficient to pay the interest accrued, the surplus of interest must not be added to the principal to swell the amount on which interest shall be paid for the following year; for that would result in the charging of interest upon interest, which is not allowed; but the interest continues on the former principal until the receipts exceed the interest due. These are the principles upon which the mortgagee's interest account is everywhere made up; and the cases in which they are stated are many and in general accord." *Dean* v. *Williams*, 17 Mass. 417.

D. D. Stewart, for defendants.

A note given for the annual interest falling due on another note, is equivalent to bringing a suit for such interest, and such

new note is secured by the mortgage. *Parkhurst* v. *Cummings*, 56 Maine, 160.

What is the amount now due on this mortgage? The defendant submits that Bunker, having full notice for the provision for further advances, has no other or greater rights than Quint would have. Even a verbal agreement by the mortgagor that future advances should be considered as secured by the mortgage, will be enforced by the court sitting in equity, under a bill to redeem the mortgage brought by the original mortgagor, or by his grantee who has notice of such verbal agreement. Such grantee has his rights and nothing more, and must pay all such advances made under such verbal agreement before he will be allowed to redeem. *Joslyn* v. *Wyman*, 5 Allen, 62; *Stone* v. *Stone*, 10 Allen, 74; *Hilton* v. *Lothrop*, 46 Maine, 297. A fortiori, when the mortgage itself provides in express terms for such future advances. That mortgages to secure future advances are valid has long been settled. *Bank* v. *Cunningham*, 24 Pick. 270; *Lawrence* v. *Tucker*, 23 How. 15; *Googins* v. *Gilmore*, 47 Maine, 9; *Hill* v. *Farrington*, 6 Allen, 80; 1 Jones on Mortgages, §§ 365, 373.

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

PETERS, C. J. On May 7, 1868, Mary Quint and her sons William and Draxey Quint, being possessed of a farm in Embden, the same real estate described in the complainant's bill, conveyed the property to John S. Paine by warranty deed which was immediately duly recorded. Lydia Quint, wife of William, not joining in the deed, afterwards conveyed her dower interest to Paine, by her deed duly recorded, for the consideration of $100.00.

On the same day of the conveyance, and as a part of the same transaction, Paine gave the Quints a bond for the re-conveyance of the property to them upon their payment to him of the sum of $300.00, $100.00 in three years from date, $100.00 in four years and $100.00 in five years from date, with interest annually, "and also all other debts which the said Quints shall contract with the said Paine." This bond was not recorded until May 26, 1876.

The court has declared this transaction to be a mortgage. *Bunker* v. *Barron*, 79 Maine, 62. The Quints gave no notes for the moneys to be paid by them for the re-conveyance, but on January 7, for each of six successive years afterwards gave Paine a note of $36.00 for the interest on the $300.00 at twelve per cent interest thereon, said notes themselves being on interest, but never a cent being paid on either the notes or the bond to the end.

November 7, 1874, the Quints, having purchased another lot of land called the Eli Walker lot, borrowed $225.00 more of Paine to complete payment on that lot, and gave Paine a warranty deed of the lot as security for the money advanced for such purchase.

But before the date of this last transaction, namely, September 12, 1874, William Quint had mortgaged the farm to the complainant for $400.00, the mortgage being at once recorded; and the complainant, acquiring all the rights of William and Draxey Quint, Mary having in the mean time deceased, leaving William and Draxey her sole heirs, brings this bill to redeem the property from the Paine mortgage.

On February 1, 1875, Paine and the Quints met for the purpose of computing the indebtedness to Paine, one Thomas Gray having been called in to ascertain for them the amount due. In this settlement was included the amount of the first loan $300,00 with interest compounded annually at twelve per cent; the amount of the second loan, $225.00 with twelve per cent interest; also the $100.00 paid by Paine for Lydia Quint's right of dower in the farm, together with the six notes of thirty-six dollars each; twelve per cent being computed and compounded annually on all the items without exception. The result was that William Quint gave Paine a new note for $872.34 and took a new bond to himself, covering the home farm and the premises purchased of Walker.

Mr. James O. Bradbury was appointed master to ascertain the amount to be paid for redemption; and as Paine took possession of the home farm in the spring of 1878, it became necessary to ascertain the rents and profits of the place annually, and to apply them in settlement of the principal. In this way the master allowed simple interest on the first principal, the $300.00, and also on the $100.00

paid for the release of the dower, no one objecting to the allowance of the latter item, and the result of his figures brought Paine indebted to the farm in a net balance of $32.70 at the end of the year 1893. And so the master finds there was nothing due on the debt secured by the mortgage, but that it had been overpaid in the above sum of $32.70. This result allows simple interest annually on all principal.

The master's report correctly disallows anything more than simple interest. The small notes were without consideration so far as double interest was concerned, and simple interest was received which was all the contract called for. The law of usury was in force when the contract was made, and the law of to-day even is that only six per cent is recoverable unless it is agreed in writing to pay more. Counsel for the defense cites this phrase for *Parkhurst* v. *Cummings*, 56 Maine, 160: "He may take a note when the interest becomes due and the mortgage may be a security for such note." In that case the note called for interest annually, and the new note covered six per cent interest while these notes covered twelve. The court further says in that case: "But, after the principal becomes due, annual interest cannot be recovered in a separate suit." Several of these small notes were given after the principal was due.

But a conclusive answer to the recovery in full of these small notes is the principle that "parties to a mortgage, cannot, as against subsequent parties in interest, stipulate by an unrecorded agreement for a higher rate of interest than that provided in the mortgage as recorded; nor can they incorporate into the mortgage any additional indebtedness." Jones Mort. § 361. Paine cannot impose terms and conditions upon the second-mortgage holder which were not properly a part of the contract between him and the Quints.

The master rejected the claim of Paine to recover under his mortgage the sum of $225.00 advanced for payment of the Walker place. We are not ourselves free of doubt on the point, though we incline in favor of its allowance. The objection to its allowance is that it is an independent transaction and not naturally

a part of the first mortgage. The words in the bond providing for the security of further advances are: "and also all other debts which the Quints shall contract with the said Paine." The Quints got Paine to pay this sum, and about three months afterwards included the sum in a general note of William Quint. It was for the purchase of a wood lot to supply the farm, as is somewhere stated, and from indications without any direct statement, is, we should judge, adjoining or near to the farm. This lot alone would not presumably be worth relatively so much when separated from the ownership of the farm.

It is contended that this was a separate and distinct transaction between the parties because Paine took an absolute title to the lot by a warranty deed from the Quints. That cannot be a conclusive fact. Paine seemed to have his money secured by all the possible properties.

The more important proposition of the whole case is whether the complainant, when he took his mortgage, September 12, 1874, had at the time notice of Paine's bond to Quints and the terms of it; for, if he did not, the bond not being at the time recorded there would be no notice on the record that the transaction was a mortgage to secure present and also future advances. It is well settled that the record must disclose the fact. Jones Mort. § 364. We are however assuming that actual notice is equivalent to a disclosure by record.

The evidence on notice is within a brief compass. The complainant had possession of both bonds, the one dated May 7, 1868, made before the mortgage to himself, and the one dated February 1, 1875, made five months after his mortgage, the complainant procuring both bonds to be recorded May 26, 1876. He says he got both of Quint, but does not know when. Nor does Quint remember when he delivered them to him. The complainant could not have received both bonds before taking his own mortgage, because the second one was not in existence until afterwards. And the case on this material point hinges right here. Unless the complainant had seen or knew of the bond why should he have taken a mortgage of the farm in September, 1874, when the records

disclosed that the absolute title had stood in Paine since 1868? And this presumption is strengthened by the fact that the bond was in the complainant's possession at a later if not an earlier date than his own mortgage.

Though the mortgage to the defendant calls only for optional and not obligatory future advances, still the intervening mortgage to the complainant is only constructive notice of an intended termination of the right of the defendant, and such notice is not enough as it must be direct and personal. Such seems to be the prevailing doctrine of the authorities, though there are cogent and finely reasoned cases in some of the leading courts to the contrary. Jones Mort. § 372, and cases.

Some technical points have been emphasized in the arguments, but none of them seem to be now material. There was a loud call for the production of the evidence exhibited before the master, and that was sent in. It is now agreed in the report, that, "in determining the amount due upon the mortgage the report of the master as to the value of the rents and profits is to be taken as it stands." His report therefore is to be accepted and acted on in all respects as correct, excepting where we have determined upon a departure from it in this opinion. Objections have been urged against the master's report in matters merely of form which are no longer worth consideration, as every essential question broached on either side has been fully considered by the court.

The conclusion therefore is that a new marshaling of the figures must be made before a final result can be reached. And for that purpose the case must be referred again to the old or to a new master. Such master will allow the defendant the item of $225. and interest thereon at the rate of twelve per cent (agreed by Quints) from Nov. 7, 1874, the date when the money was advanced by Paine. Against this item there will be calculated $32.70 the balance found due the farm for balance of rents and profits over principal received by Paine at end of the year 1893, and also further deductions will be allowed for such rents and profits as have been received from that date (1893) down to the date of the final findings by the master; and also further charge

against the defendant will be reckoned for the reasonable rents and profits enjoyed by the defendant of the Walker lot so called for such time as he has been in possession of that lot; and, if a redemption is decreed from the mortgage in suit, the defendant will be required to assign to the complainant his title to the Walker lot, so that the complainant may have a lien thereon for the amount he may be required to advance thereon; and no final decree will be filed in the case until the facts and results are finally found as are indicated in this opinion.

Case remitted to a single justice for further order and proceedings before him.

THE BOWKER FERTILIZING COMPANY

vs.

WILLIAM C. SPAULDING, and another.

Aroostook. Opinion June 3, 1899.

Trustee Process. Trust.

Trustees who receive a trust primarily for their own benefit and secondarily for other creditors are held to absolute good faith and strict fidelity in the execution of the trust.

The defendants took the title to land subject to a mortgage, which they assumed and agreed to pay, and to certain chattels to secure themselves and then hold the balance for the other creditors. They did not pay the mortgage but permitted a friend to get an assignment of it and then foreclosed it and gained absolute title to the land. *Held;* That such proceedings must be regarded as a sale of the equity for cash to be applied to their debt together with cash from a sale of the chattels; thus leaving a balance in their hands subject to attachment, as the trust was voluntary and no other creditors had assented thereto.

Held; on scire facias that the defendants, who were trustees in the original suit, are liable to the plaintiffs.

ON REPORT.

This was scire facias against trustees who did not disclose in the original action. The plaintiff contended that the defendants in

this case did not by their disclosures exonerate themselves from liability, and this question was submitted to the decision of the law court by the parties.

The transactions between the parties were evidenced by no writings except the bill of parcels of personal property and deed of land mentioned in the opinion of the court.

F. A. and Don H. Powers, for plaintiff.

Louis C. Stearns, for defendants.

If the land was taken in trust, the trustee cannot be held as to that, unless it has been converted into money or something has been received by way of rents and profits. *Bissell* v. *Strong*, 9 Pick. 562; *Tucker* v. *Clisby*, 12 Pick. 22. Nor could they be held though the land were sold before disclosure made, but after service upon them. *Sanford* v. *Bliss*, 12 Pick. 116.

When any trustee's disclosure is not contradicted by other evidence and appears to be full and true, it is to be deemed true in deciding how far he is chargeable. *Hamilton* v. *Hill*, 86 Maine, 137.

The land has gone into the hands of an assignee of the mortgagee and nothing has ever been received therefrom from the defendants. If it be suggested that the defendants could be held because the conveyance is absolute, they would clearly be liable only for its value. It had no value above the mortgage.

The defendants cannot be held because of their taking the personal property. The total amount received for it and its total value were less than the debts severally due the defendants. By the terms of the trust their debts were to be paid in full.

The defendants have fully and frankly disclosed. The court must hold the defendants' disclosure to be true. *Chase* v. *Bradley*, 17 Maine, 89; *Hinckley* v. *Hinckley*, 43 Maine, 440.

There was no arrangement between these parties that anything should be returned to the vendor or retained for his use. Whatever there was after paying the vendees, was to be paid to the creditors to the last penny. There was no proposition or purpose whatsoever to hinder or delay creditors. On the contrary it was provided that the property was to be converted into money in the

creditors' interest. Unfortunately, as it turned out, there was not enough to pay the defendants, but they are not responsible for that.

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

HASKELL, J. Scire facias against trustees. Plaintiff's debtor, being insolvent and about to leave home, conveyed certain chattels to defendants, from which they realized in cash $767.79, and also an equity of redemption by deed for the expressed consideration of $3000, containing a clause: "Said premises are hereby conveyed subject to a certain mortgage owned by the Union Mutual Life Insurance Company, on which the sum of $1800, with interest from November 12, 1895, is now due, (the deed was dated March 3, 1896), which mortgage the grantees, their heirs and assigns, are to assume and pay, the said amount forming a part of the above named consideration." The grantor owed the grantees, at the date of the deed, about $926.89. All the evidence, taken together, shows a purpose on the part of the debtor to prefer defendants and then secure his other creditors by the trust he had raised in defendants' hands. There seems to have been no fraud on the debtor's part. The defendants became trustees for creditors and were bound to execute their trust according to its terms with strict fidelity. Any evasion or attempt not to do so would become a fraud upon the other creditors. The terms of their trust required them to pay the mortgage and then hold the chattels and land conveyed to them to secure themselves for their original debt and the amount paid to redeem the mortgage and apply the balance to other creditors. Did they perform their trust? No. Spaulding, one of the trustees, and Geo. I. Trickey, originally took the mortgage and afterwards transferred it to an insurance company and indorsed the notes waiving demand and notice. Trustees, instead of paying the mortgage as they had engaged to do, permitted Trickey to take an assignment of the mortgage and then, by foreclosure, gain title to the farm, which he did. To permit him to hold this title for his own benefit would be a fraud by the trustees

upon the other creditors, to whom their engagement in their deed to pay the mortgage inured. *Cumberland Nat. Bank* v. *St. Clair*, ante, p. 35.

One view only shows good faith, and that is, trustees to be held, by their conduct, to have sold the equity in the farm to Trickey at a fair value and for cash, which became assets in their hands in execution of their trust, and which, together with cash received from the sale of the chattels conveyed to them, should be applied to the payment of their own debts, leaving the balance subject to attachment, because the trust was voluntary and no creditor had become a party thereto, so that his rights became fixed. *Pleasant Hill Cemetery* v. *Davis*, 76 Maine, 289. The action is scire facias, and the plaintiffs should have judgment against the trustees as defendants herein.

Defendants defaulted for $236.90.

CHARLES E. RACKLIFF

vs.

INHABITANTS OF GREENBUSH.

Penobscot. Opinion June 5, 1899.

Burial of Soldiers. Liability of Towns. Municipal Officers. Stat. 1887, c. 33, §§ 1, 2.

Whenever a statute gives a right, the party shall by consequence have an action to recover it, although the statute prescribes no specific remedy.

Chapter 33 of the Public Laws of 1887 provides that whenever any person who served in the army, navy or marine corps of the United States during the rebellion and was lawfully discharged therefrom, shall die, being at the time of his death a resident of this State and being in destitute circumstances, the State shall pay the necessary expenses of his burial not exceeding thirty-five dollars; and that the municipal officers of the city or town in which such deceased had his residence at the time of his death, shall pay the expenses of his burial; and that, upon satisfactory proof, the state shall refund said town or city the amount so paid. The plaintiff, an undertaker, provided a casket and robe of the value of twenty-four dollars for the burial of such deceased soldier which the municipal officers of the defendant town, in which

the deceased had his residence at the time of his death, refused to pay. *Held:*

1. That the statute does not require that such burial shall be provided, or that the expenses of such burial shall be authorized, by the municipal officers:
2. That it is the duty of the municipal officers to pay such burial expenses from the funds of the town:
3. That upon a refusal of the municipal officers to pay such expenses, they may be recovered of the town in an action of assumpsit.

ON REPORT.

The case appears in the opinion.

Clarence Scott and Hugo Clark, for plaintiff.

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

This action cannot be maintained unless by virtue of c. 33, statute of 1887. Under this statute the town cannot be holden for two reasons. 1st. In that statute no action is given against the town. *Mitchell* v. *Rockland*, 52 Maine, 118. 2nd. No duty is by that statute put upon the town, but the duty, if any there be, is upon the municipal officers. The duty of paying, in the case of an unincorporated place is upon a town, but the duty of paying in the case of a city or town is upon the municipal officers. No other conclusion is admissible unless the court shall say that the words municipal officers mean the same thing as cities or towns. The duty thus being upon the municipal officers they are the tribunal to decide whether the case of the person who dies comes within the statute, whether payment shall be made. The municipal officers not being agents of the town and the town not having the power to control their action, it is contrary to the letter and spirit of the statute to say that any duty rests upon the town; and therefore no action lies against the town. The municipal officers, then, act in the performance of a duty put upon them as municipal officers by the state for purposes of its own; they act for the state, for the public generally. *Young* v. *Yarmouth*, 9 Gray, 386; *Bulger* v. *Eden*, 82 Maine, 352; *Farrington* v. *Anson*, 77 Maine, 405; *Brown* v. *Vinal Haven*, 65 Maine, 402. The fact that the municipal officers are to use the town's money to pay, does not affect the question. *Cushing* v. *Bedford*, 125 Mass. 256; *Young* v. *Yarmouth*, supra.

In order to maintain this action, the court must find that the municipal officers have no discretion whatever, and that they and the town refuse to pay at their peril.

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

FOGLER, J. Chapter 33 of the Public Laws of 1887, § 1, provides that whenever any person who served in the army, navy or marine corps of the United States during the rebellion and was honorably discharged therefrom, shall die, being at the time of his death a resident of this state, and being in destitute circumstances, the state shall pay the necessary expenses of his burial, not exceeding thirty-five dollars, and the burial shall be in some cemetery not used exclusively for the burial of pauper dead. Section 2 of the same chapter provides that the municipal officers of cities and towns in which such deceased has his residence at the time of his death, shall pay the expenses of his burial, and upon satisfactory proof by such town or city to the governor and council of the fact of such death and payment, the governor shall authorize the state treasurer to refund said city or town the amount so paid.

Andrew Oakes, who, it is admitted, served in the army of the United States during the rebellion and was honorably discharged therefrom, died on the thirtieth day of November, 1890, in Greenbush, in which town he had his residence at the time of his death. The testimony proves that he died in destitute circumstances. He had been a sick man and unable to perform labor for several years. His only property was a parcel of real estate which was mortgaged to its full value, or more, to secure the payment of his attending physician. The plaintiff, an undertaker residing in Old Town, furnished at the request of one John C. Hinckley, a brother-in-law of Oakes, for the burial of Oakes, a casket, the price of which was twenty-two dollars, and a robe, the price of which was two dollars. At the time of ordering the casket and robe, Hinckley informed the plaintiff that "the state allowed thirty-five dollars for burial money and it came through the town; the town paid it and drawed it back." Oakes was buried in the

casket and robe in a general burying ground in the town of Greenbush. When the casket and robe were delivered, the plaintiff gave Hinckley a bill of them and subsequently Hinckley presented the bill to the municipal officers of the town of Greenbush who refused payment, saying, "why didn't you come and tell us that he was dead so we could go and bury him;" and, further, that they didn't know that the state furnished any money to pay it and they were not going to pay it out of their own pockets. The plaintiff brings this suit to recover payment for the casket and robe. Is the action maintainable? We think it is.

It is true, as a general rule, that no man can make himself, by his own act, a creditor of a town. The rule obtains in all cases where the statute imposes upon the officers of a town the performance of some duty, the doing of some act, as in cases of furnishing pauper supplies, of pauper burials, the repair of highways, or in case of contagious diseases, etc. In such cases no person, other than the proper officers of the town, can perform such duties or do such acts at the expense of the town. Thus a town is required by law to furnish relief through its overseers of the poor to any person found within its limits destitute and in need of relief, but, in the absence of any statute authorizing it, no other person can furnish relief, however urgent the necessity may be, on the credit and at the expense of the town. But, in the case at bar, the statute does not require or authorize either the town or its officers to take charge of or provide a burial for the deceased soldier, nor is it required that the expenses of the burial shall be authorized by the municipal officers, or by any officer representing either the town or the state. The state undertakes, through the instrumentality of the town, to "pay" the burial expenses of the soldier. The municipal officers are required to perform no duty, to do no act in the matter of the burial, but are simply required to "pay" the burial expenses; and the state "upon satisfactory proof by such town or city . . . of the fact of such death and payment" undertakes to refund said town or city the amount so paid. The obvious intention of the statute is that the town shall pay the expenses of burial to whomsoever shall incur them. The case is somewhat analagous

to the payment of the expenses of the burial of any deceased person by any proper person, in which this court has held that such expenses, so incurred, are a proper charge against the estate of the deceased, though no one is authorized to bind the estate. *Phillips* v. *Phillips*, 87 Maine, 324; *Fogg* v. *Holbrook*, 88 Maine, 169.

In the case last cited the court says: "The services must be rendered; it is better that those things should be done upon the credit of the estate, than that there should be hesitation and inquiry as to who is liable to pay."

This construction of the act is in accord with the manifest intention of the legislature, which was that no honorably discharged soldier who had served his country during the war of the rebellion, should, at his death, fill a pauper's grave; and that there should not be even the semblance of a pauper burial, as would be the case if the municipal officers, who, in towns, are usually overseers of the poor, were required to provide for the burial. If the municipal officers are, under the act in question, in the first instance, to provide or authorize the expenses of such soldier's burial, they can only do so upon proof of his services and his honorable discharge. The obtaining of such proof may require days or weeks, especially when the deceased served in the navy or marine corps, or in the army in a regiment of another state. Could it have been the intention of the legislature that, in such case, the soldier should remain unburied during the time required for obtaining such proof?

When a bill for such burial expenses is presented to the municipal officers of a town, they then have ample opportunity to investigate and determine whether they come within the purview of the statute. If payment is refused, what is the remedy of the party who provided the burial? He has none against the state, for the state authorities are required to refund to the town. He has none against the municipal officers who have no remedy against the state. His remedy, if he has any, and it is not to be presumed that he is without remedy, can only be by a suit against the town, in which the question of the soldier's service and of his honorable discharge and of his destitute circumstances at the time of his death can be determined.

In the case at bar, the defendant town does not deny that the soldier served in the army of the United States during the war of the rebellion, or that he was honorably discharged therefrom, or that he died in destitute circumstances; but all these essential facts are admitted or proved. The defense is technically that the town is not liable because it says that the burial should have been provided or authorized by the municipal officers to enable the plaintiff to recover against the town.

The defense says further that no action will lie against the town for such burial expenses because by the statute no right of action is given against the town. It is true that the statute prescribes no specific remedy. It is a familiar maxim that "whenever a statute gives a right, the party shall, by consequence, have an action to recover it." *Stearns* v. *Atlantic & St. L. R. R. Co.* 46 Maine, 115. "It is a vain thing," says the court in the case above cited, "to imagine a right without a remedy, for want of right and want of remedy are reciprocal." In *Farwell* v. *Rockland*, 62 Maine, 296, it was held that an action of assumpsit was maintainable against the city of Rockland by the judge of the police court of that city for his salary, though he had no contract with the city and no right of action was given by statute. The court say, quoting from *The People* v. *The Mayor, etc., of New York*, 23 Wend. 685, "an action on the case or assumpsit will lie for neglect of corporate duty."

It cannot be presumed that the statute in question imposes upon the municipal officers the duty of personally paying the burial expenses of the deceased soldier, nor that the plaintiff's remedy, if any he has, is against such officer.

A statute must be construed as a whole, and the construction ought to be such as may best answer the intention of the legislature. Such intention is to be sought by an examination and consideration of all its parts, and not from any particular word or phrase that may be contained in it. This is the guiding star in the construction of any statute. Such a construction must prevail as will form a consistent and harmonious whole. *Berry* v. *Clary*,

77 Maine, 482; *Smith* v. *Chase*, 71 Maine, 164; *Lyon* v. *Lyon*, 88 Maine, 395.

It is true that the statute makes it the duty of the municipal officers to pay the burial expenses in a case like that at bar, but it also provides that the state shall refund, not to the municipal officers, but to the town, the amount so paid. The legislature should not be held to the absurdity of requiring a payment by the municipal officers, in their individual capacity, and a refunding to the town of the amount so paid. The word "refund" implies a payment to the town of money previously paid by the town. The obvious meaning of the statute, in this respect, is that such burial expenses shall be paid by the municipal officers, not in their individual capacity, but from the funds of the town, at the charge of the town, to be refunded to the town by the state.

The defendant's counsel contended further that the municipal officers are not in respect to the statute, agents of their town, and that, therefore, the town is not bound by their acts, or their failure to act.

Assuming this to be correct, the plaintiff does not seek to recover by virtue of any contract with, or through any act of, the municipal officers. He sues to recover under and by virtue of a liability which the law has imposed upon the town. It is true that the legislature has designated the officers of the town whose duty it is to see that the burial expenses shall be paid. It has done the same in other instances. In the case of state paupers the statute makes it the duty of overseers of the poor of towns to furnish relief to such paupers, the expenses so incurred to be reimbursed to the town by the state. Will it be contended that the overseers of the poor in the relief of state paupers, are not acting in behalf of their town, and that no liability attaches to the town for the relief furnished? If it be true; as argued by the defendant's counsel, that the municipal officers were not the agents of the town, in the transaction, the town by their refusal to pay, cannot be absolved from the liability which the statute has imposed upon it.

We are of opinion that the duty of paying a soldier's burial expenses in a case within the terms of the statute is upon the

town; and that the plaintiff, having furnished a casket and robe for the burial of the soldier, Oakes, can recover therefor against the defendant town.

Judgment for plaintiff for twenty-four dollars with interest from date of writ.

Defendant defaulted.

WILLIAM S. HENRY, JR.

vs.

DAVID DENNIS.

Kennebec. Opinion June 7, 1899.

False Representations. Deceit. Sales.

The defendant, in order to obtain credit of the plaintiffs for the Gardiner Woolen Company, of which the defendant was a director, represented in writing to the plaintiffs that "the mill was doing well" and that all the cloth they make is sold at a good, fair profit." Upon motion for a new trial heard before the full court it appeared that the testimony showed conclusively that, at the time when such representations were made, the company was hopelessly insolvent; that it was not doing well and that its cloth was not sold at a profit.

Held; that the verdict, which was for the defendant, was manifestly against evidence and the verdict is set aside and a new trial ordered.

ON MOTION AND EXCEPTIONS BY PLAINTIFF.

This was an action on the case to recover damages from the defendant for alleged false and fraudulent written representations made by him in relation to the standing of the Gardiner Woolen Company.

The case was tried to a jury in Kennebec county who returned a verdict for the defendant. The plaintiff filed a general motion for a new trial and took exceptions to certain portions of the charge to the jury. No report of the exceptions is required, as they were not considered by the court.

The case appears in the opinion.

L. C. Cornish, for plaintiff.

A. M. Spear, for defendant.

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

FOGLER, J. This is an action on the case to recover damages from the defendant for alleged false and fraudulent representations made by him in writing in relation to the standing and financial responsibility of the Gardiner Woolen Company of Gardiner, a corporation engaged in the manufacture of woolen goods.

August 14, 1896, the company ordered a quantity of wool of the plaintiffs, merchants doing business in Boston. The plaintiffs, having no knowledge as to the condition of the company, on the 14th of the same month, wrote to the company a letter of inquiry as to its standing and responsibility. In reply to that letter the defendant, who was a director of the company and president of the Merchants National Bank of Gardiner, wrote and sent to the plaintiffs the following letter:

"GARDINER, ME., Aug. 24, 1896.

Messrs. W. S. Henry & Co., Boston.

Dear Sirs: Mr. Brown has handed me your letter of 15th but was sick at time and unable to answer. In regard to the Gardiner Woolen Co., any bill which you contract will be paid—the company lost considerably by Lewenburg & Co. which puts them behind and makes them 'hard up', but the directors have too much at stake to lose all for the small amount they owe outside of themselves—besides the mill is doing well. All the cloth they make is sold at a good profit. Yours Truly,

DAVID DENNIS."

After the receipt of that letter the plaintiffs sold wool on credit to the company as ordered until December 7, 1896, the date of their last shipment. December 12, 1896, the company closed its mill and ceased to do business. It was owing the plaintiffs at that time $1812.21 for wool so sold and shipped. No part of the debt has been paid and the plaintiffs claim to recover of the defendant damages to that amount.

In our opinion the testimony proves conclusively that at the date of the defendant's letter, August 24, 1896, the Gardiner

Woolen Company was hopelessly insolvent and that such insolvent condition was known, or ought to have been known to the defendant who had been an active director of the company from its organization.

The Gardiner Woolen Company was incorporated in the interest of the Merchants National Bank in November, 1893, for the purpose, as its treasurer testifies, "of working out and saving a debt from W. C. Jack & Co. to the Gardiner National Bank." The capital stock was fixed at $75,000, of which two hundred and twenty-five shares, of the par value of $22,500, were issued to W. C. Jack & Co. in payment of the mill and plant theretofore owned and occupied by them, and then transferred to the company. Jack & Co. immediately transferred said shares to the Merchants National Bank as collateral for a debt of $7,500, which they owed to the bank. The only other stock issued by the company was issued and deposited as collateral for money borrowed by the company on its notes indorsed by its directors. The real estate conveyed to the company by Jack & Co. was subject to a mortgage for $7,400. The company shortly after receiving the conveyance from Jack & Co., having put in new machinery, commenced the manufacture of woolen goods and continued such manufacturing until it ceased to do business in December, 1896. It appears by a strong preponderence of the testimony that the business was unprofitable from its inception to its close. The company was unable, from lack of means during the period in which it was engaged in business, to meet its current expenses. It was obliged to give notes indorsed by its directors to pay insurance premiums and for steam power and various other current expenses; it was unable to pay even the interest on the mortgage debt existing upon its plant. The defendant had advanced nearly $2300 to meet a pay roll, and to pay over-due bills for stock in order to procure further credit from its creditors. On the 24th of August, 1896, the liabilities of the company were $39,741.70 of which about $30,000, was secured by the indorsement of the directors or guaranteed by them, and the balance unsecured. The defendant contends that the assets of the company amounted to $45,708.38.

In this estimate of assets several hundred dollars of worthless debts due the company are included. The mill, machinery, etc., are estimated at $39,000, which included the value of the plant at an appraisal when the property was purchased of Jack & Co. and paid for in stock by the company and the original cost of the additional machinery put in by the company. Nothing is deducted for depreciation in the value of the mill and machinery during its use of nearly three years by the company.

That the plant was of much less value than this estimate is evidenced by the fact that the Merchants National Bank, holding $10,000 of the company's notes, sued and attached upon only $7,000, the reason why attachments were not made on the other $3,000 being, as testified by Mr. Farrington, treasurer of the company and cashier of the bank: "No object in bringing suit. Nothing to attach." No part of the principal of the mortgage debt and no interest had been paid from November, 1892. Proceedings for a foreclosure of the mortgage had been commenced by the mortgagor, and judgment for possession had been recovered at the March term, 1896, of the Supreme Judicial Court in Kennebec county. The evidence satisfies us that the statement in the defendant's letter that "the mill is doing well" was untrue in fact and fradulent in law. The testimony discloses that the mill was not "doing well" at the date of the letter and had not done well during any portion of the time that it was in operation. The further statement that, "all the cloth they make is sold at a good fair profit," is of the same character. The defendant undertakes to justify this latter statement by testifying that he expected to sell their goods at a profit. This, if true, would not authorize the statement. But the basis of such expectation was that if the goods could be sold at certain prices, and could be manufactured at a certain cost, there would be a profit. Unfortunately for the company both factors upon which the hope was based, failed to materialize.

Relying on the defendant's false and fraudulent statements the plaintiffs are out of pocket to the amount of their unpaid bills. The defendant, after the final collapse of the company, received

payment in full for $2,300, which he had advanced for the company, from the proceeds of cloth manufactured from the plaintiffs' wool.

The verdict is so manifestly against evidence that it is set aside and a new trial granted.

Motion sustained.

IDA M. FLEMING *vs.* KATAHDIN PULP & PAPER COMPANY.

Penobscot. Opinion June 12, 1899.

Disseizin. Co-Tenant. Tax-Deeds. Statutory Notice. Conversion. R. S., c. 95, §§ 5, 18, 19.

One who, under a claim of sole ownership of a lot of wild land, has, for over twenty years, made partial clearings on portions of the lot, but whose occupation has been somewhat casual and intermittent, connected a good deal with lumbering operations, does not thereby effect a disseizin of the true owners who stand in relation of co-tenants with him; nor is his claim of title made any better by tax-deeds from the state or county which are defective and thereby void.

The plaintiff acquired title by deed to one-sixteenth in common and undivided of a tract of wild land while the other owners, or persons claiming under them, were carrying on a lumbering operation on the tract, without permission of the one-sixteenth owner or any statutory notice to him, a portion of the cutting having been before the date of the plaintiff's deed and a portion afterwards, but all before the deed was recorded, the deed containing a clause that the grantor "assigned, sold and conveyed to the grantee, all his rights and claims for stumpages for trespasses on and from said land from October 1888." *Held;* that the deed and assignment in it gave to the plaintiff title to one-sixteenth in common of all the lumber cut during the operation; that it was immaterial whether the deed was recorded or not; and that the plaintiff can maintain an action of trover for his one-sixteenth interest in the logs against the defendants who purchased the same and (evidently) converted them into pulp before the action was brought.

ON REPORT.

This was an action of trover brought to recover the value of six thousand pieces of spruce pulp-logs which were cut upon Lot No. 13, in Woodville Plantation, during the lumber season of 1895. The evidence in the case shows that the logs were cut by one W. L. Hughes for Butterfield and Gates of Lincoln, and by Butterfield

and Gates sold to the defendant company. While the action is brought to recover the value of personal property, it involves the title to the lot of land upon which the logs were cut. The action came on for trial at the October term, 1897, and after the evidence for the plaintiff was in, the defendant's counsel moved for a nonsuit upon the ground that the plaintiff had shown no cause of action: 1. Because there was no evidence that the plaintiff owned the logs. 2. Because if she had any interest in the logs under her deed, it was an undivided interest and she owned them in common with the defendant company, which company had committed no act of conversion.

The other facts appear in the opinion.

M. Laughlin, for plaintiff.

Counsel cited: *Hazen* v. *Wight*, 87 Maine, 233; *Maddox* v. *Goddard*, 15 Maine, 218; 2 Addison on Torts, § 1289; *Baker* v. *Whiting*, 3 Sumner, 475; *Freeman* v. *Underwood*, 66 Maine, 229; *Wing* v. *Milliken*, 91 Maine, 387; *Carpenter* v. *Lingenfelter*, 32 L. R. A. 422; *Waller* v. *Bowling*, 12 L. R. A. 261; 2 Greenl. Ev. § 636; 1 Chitty on Pleading, p. 66; 17 Am. & Eng. Ency. of L. p. 600; *McGee* v. *McCann*, 69 Maine, 79; Jones Law of Real Property in Conveyancing, § 1928.

E. C. Ryder, for defendant.

Timber trees cut down and lying untrimmed upon the land, will pass by a deed of the premises, if there is no reservation. But, after they have been cut into logs they do not pass by deed unless included in it, or unless it is the intention of the parties that they should. *Brackett* v. *Goddard*, 54 Maine, 309-313; *Cook* v. *Whitney*, 16 Ill. 481.

Giving the description in the deed its full force and meaning, it conveys no interest in any property for the value of which an action in trover will lie. It at the most simply assigns the right to recover the price of logs taken off the lot, either by permission or otherwise. It simply assigns the right to recover of parties who have trespassed upon the lot, or the right to recover the price to be paid for the right of operating upon it.

"Stumpage means the sum by agreement to be paid an owner

for trees standing (or lying) upon his land, the party purchasing being permitted to enter upon land and to cut down and remove the same. In other words, it is the price paid for a license to cut." Per PETERS, C. J., in *Blood* v. *Drummond*, 67 Maine, 476.

In order to maintain the action, the deed must have conveyed property in the logs, for, in order to maintain an action of trover for property, the plaintiff must have been in possession of the goods, or he must have such a property in them as draws to it the right of immediate possession.

Counsel also cited: *Haskell* v. *Jones*, 24 Maine, 222; *Burke* v. *Savage*, 13 Allen, 408; *Ekstrom* v. *Hall*, 90 Maine, 186; *Ames* v. *Palmer*, 42 Maine, 197; *Winship* v. *Neale*, 10 Gray, 382; *Clark* v. *Rideout*, 39 N. H. 238; *Hunt* v. *Holton*, 13 Pick. 216; *Foster* v. *Gorton*, 5 Pick. 185; *Hart* v. *Hyde*, 5 Vt. 238.

Tax deeds: *Griffin* v. *Creppin*, 60 Maine, 270; *Larrabee* v. *Hodgkins*, 58 Maine, 412; *Greene* v. *Lunt*, 58 Maine, 518; *Bank* v. *Parsons*, 86 Maine, 514; *Straw* v. *Poor*, 74 Maine, 53; *Briggs* v. *Johnson*, 71 Maine, 235.

A deed of land conveys no greater title than the grantor has. *Litchfield* v. *Ferguson*, 141 Mass. 97. Deeds acknowledged and recorded operate as livery of seizin only when the grantor has good right and lawful authority to convey. Trowbridge, J., on "Registering of Deeds and Conveyances under Provincial Statute of Massachusetts Bay," 3 Mass. 574 & 575; *Bates* v. *Norcross*, 14 Pick. 224–231; *Goodwin* v. *Hubbard*, 15 Mass. 212; *Blethen* v. *Dwinel*, 34 Maine, 134; *Roberts* v. *Richards*, 84 Maine, 1.

Adverse possession: *Chadbourne* v. *Swan*, 40 Maine, 260; *Sch. Dist.* v. *Benson*, 31 Maine, 381; *Hudson* v. *Coe*, 79 Maine, 83; *Chandler* v. *Wilson*, 77 Maine, 76; *Brown* v. *King*, 5 Met. 173; *Heemans* v. *Schmaltz*, 10 Biss. (U. S.) 323; *Huntington* v. *Whaley*, 29 Conn. 391; *Brown* v. *Hanauer*, 48 Ark. 277; *Core* v. *Faupel*, 24 W. Va. 238; *Stillwell* v. *Foster*, 80 Maine, 333; *Sawyer* v. *Kendall*, 10 Cush. 244; *Hollingsworth* v. *Sherman*, 36 Minn. 152.

One partner or joint tenant of a chattel cannot maintain trover against his co-tenant for any interference with his right of possession, unless there has been a destruction of the chattel or some-

thing equivalent to it. *Wickham* v. *Wickham*, 2 K. & J. 496; *Mayhew* v. *Herrick*, 62 E. C. L. 929; *Bleaden* v. *Hancock*, 4 C. & P. 152; *Fennings* v. *Granville*, 1 Taunt. 241.

Trover cannot be brought by one tenant in common against another tenant in common for cutting and selling hay on the land without his permission. *Jacobs* v. *Seward*, L. R. 4 C. P. 328; *Gilbert* v. *Dickerson*, 7 Wend. 449; *Dain* v. *Cowing*, 22 Maine, 347; *Wheeler* v. *Wheeler*, 33 Maine, 347; *Weld* v. *Oliver*, 21 Pick. 559; *Whitmore* v. *Alley*, 46 Maine, 428; *Kilgore* v. *Wood*, 56 Maine, 150–155; *Estey* v. *Boardman*, 61 Maine, 595; *Carter* v. *Bailey*, 64 Maine, 458–464; *Richards* v. *Wardwell*, 82 Maine, 345.

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

PETERS, C. J. The plaintiff sues to recover against the defendants in an action of trover for the conversion of six thousand pieces of spruce pulp-logs cut in the winter of 1895–6 upon lot 13 in the town of Woodville in Penobscot county. She claims to recover according to her title to the premises upon which the lumber was cut, and while she supposed at the time of her purchase that she was obtaining a title to the whole of lot 13, or to a major part of it, it turns out, according to the admission of her counsel, that she became an owner by her deed of only one-sixteenth in common and undivided of the tract.

To be sure there is considerable evidence in the case showing some patches of cuttings and partial clearings by the plaintiff's predecessors under claims of ownership during the last twenty or more years, but such acts were somewhat casual and intermittent, consisting a good deal of lumbering operations, and were ineffectual to establish any title by disseizin of the true owners; especially when such owners stood in the relation of co-tenants with the persons in possession.

The plaintiff also submits in evidence certain tax-deeds from the state and county as supporting her assumed title to the whole lot, but they are on their face clearly void.

The defendants contend that the plaintiff has not even a one-

sixteenth interest in the lumber in question, or in the stumpage on it, because the lumber was in part cut, as they allege, before she received her deed, and at all events wholly cut long before her deed was recorded. The deed was delivered January 2, 1896, and recorded May 25, 1896. The operation on the tract commenced in November, 1895, and terminated on the last of January, 1896. We do not see that it is at all material when the deed became recorded, or that it was of any concern to the defendants, or to the persons of whom they made their purchase, whether the deed was ever recorded or not, inasmuch as they represented no right or title dependent upon the deed. The question is who was the owner in fact at the time of the cuttings.

From the statement thus far it appears that the plaintiff's ownership would attach to only such portion of the lumber as was cut in the month of January, 1896, and not to the portion cut prior to that time. But appreciating that point when the conveyance was taken the plaintiff insisted upon a clause in the deed to cover the operation and these words were inserted by her grantor: "I also hereby assign, sell and convey to her all my rights and claims for stumpage for trespasses on or from said land from October, 1888." Consistently with this construction was the verbal talk of the parties at the time. None of the lumber had been removed from the land when the deed was delivered, and having been wrongfully cut either because the operators were naked trespassers, or because they were acting as owners who had not given the statutory notice to co-tenants required by § 5 of ch. 95, R. S., in either case the language of the assignment was sufficient to preserve to the plaintiff an interest in all the lumber cut equivalent to her ownership in the land, whether cut before or after the deed.

It does not appear by what right or title those carrying on the lumbering operation acted. But it does appear that the defendants bought the lumber in good faith of their neighbors, the firm of Butterfield & Gates, who by their servants and employees conducted the operation in the woods; and it nowhere appears, even upon suggestion merely, that the plaintiff or her grantor consented to the operation or received any statutory or other notice of it.

Upon these facts the counsel for the plaintiff sets up the claim that there was such an infringement of his client's rights as to authorize her to recover of the defendants in this action the entire value of all the logs cut, or else the value of her proportion of them, notwithstanding the defendants at the date of plaintiff's writ may not have converted the logs to their own use by a sale or the manufacture of them.

We hardly see how such a right exists in the present facts. If the operation was carried on by co-tenants, an action inures to the plaintiff to sue for treble damages under § 5, ch. 95, R. S. And if carried on by strangers without any possession or title, by mere intruders, then a right is conferred, by sections 18 and 19 of the same chapter, upon any tenant in common to institute an action of trespass for the benefit of all the owners, in which the plaintiff can obtain execution for her share of the injury, the other co-tenants having a right jointly or severally to obtain theirs by scire facias on the common judgment to be rendered in behalf of all the co-tenants. In the case of a trespass by cutting down trees by a stranger the owners would no doubt have a right to seize the lumber into their possession, or they could enjoin the trespass by injunction in a chancery proceeding. And there may be even other remedy for such a flagrant invasion and abuse of property.

But the plaintiff does not see fit to avail herself of any of those remedies, but brings an action of trover for the conversion of her personal property such as may belong to her as a one-sixteenth owner of the land from which the property was taken. And if the defendants or those under whom the defendants claim were mere intruders and trespassers upon the lot in question, operating without any title whatever or claim of title, we are not prepared to say that the plaintiff would not be entitled to maintain her action at once for her share of the converted property. But there is nothing in the case authorizing us to infer that the defendants were naked trespassers. They appear to be in possession under a claim of right. As the facts relied on by the defense were not reached, the case going up on the plaintiff's proofs, all the actual conditions are not perhaps presented to us.

The remaining question is whether at the date of the writ (March 2, 1897,) the defendants, who perhaps may be properly regarded as owners of fifteen-sixteenths of the logs in common and undivided, had converted the plaintiff's share of the property by converting the logs into pulp or other manufactures. We think the evidence sufficiently proves a conversion.

The defendants' pulp mill is situated in Lincoln, fifty miles above Bangor on Penobscot river. These logs were run down to Lincoln in rafts and not singly, and long in advance of logs which were to go into the Penobscot boom. E. B. Waite testified that the men commenced driving the logs out of the stream in April, and that they were rafted at the mouth of the stream and run down Penobscot river. On June 8, 1896, the logs were evidently in defendants' boom at Lincoln, for they wrote the plaintiff on that day as follows: "Our scaler is now scaling these logs and we will note your claim against them." The logs were therefore at the very beginning of the manufacturing season in defendants' possession for the purpose of being manufactured.

On June 11, 1896, the defendants deprecating a lawsuit over the property and urging the plaintiff to make some settlement with the parties of whom they purchased, wrote thus: "We shall not use this wood for several months, and will agree not to use it until some time during the latter part of the coming fall or early winter, as we have a large quantity of loose logs in our booms that we must take care of." Here is a clear admission by the party itself, that it will not postpone the threatened conversion later than the late fall or early winter of 1896. And such would be the natural supposition, that a season's supply has been exhausted during the season. Such would be the ordinary course of business. Lapse of time is always a forcible factor.

When we consider, therefore, that the defendants were holding in their possession property of the plaintiff for the very purpose of manufacturing and converting it, property forcibly obtained from the plaintiff against her consent, and that it would be difficult for the plaintiff to ascertain whether and when the logs had been manufactured, a fact easily ascertainable by the defense, it would

seem reasonable to allow a jury to regard all the foregoing facts occurring in 1896 as at least prima facie proof in 1897 that the defendants were guilty of conversion of plaintiff's property, leaving the defense to rebut the presumption if it can. And if the plaintiff's presumption is wrong the defense can disprove it very easily.

Action to stand for trial.

SARAH H. FURBISH, Petr. for Mandamus,

vs.

COUNTY COMMISSIONERS.

SAME, AND WILLARD B. ARNOLD, Petrs. for Mandamus,

vs.

SAME.

Kennebec. Opinion June 23, 1899.

Eminent Domain. Damages. Vested Rights. Mandamus. Statutes. Priv. and Spec. Laws, 1881, c. 141; 1887, c. 59; Stat. 1881, c. 53, § 7; R. S., 1871, c. 78, §§ 7, 15; R. S. 1883, c. 1, § 6, par. XXVI; c. 18, §§ 7, 10; c. 78, § 18.

When a private or special act of the legislature adopts and incorporates by reference the provisions of an existing general statute, such provisions of the general statute become a part of the special statute as if they were written into the special act; and they are not affected by subsequent amendments or repeal of the general statute.

This court has authority by its writ of mandamus to compel county commissioners to issue a warrant of distress to enforce payment of damages awarded by them for land and rights taken by water companies.

The Maine Water Company is the successor of the Waterville Water Company and has the same rights and is subject to the same liabilities as that company under its charter, and which was authorized to take and hold by purchase or otherwise any land or real estate necessary for its purposes; and damages for such taking, when the person sustaining damages and the company do

not mutually agree upon the sum to be paid therefor, are to be ascertained in the same manner and under the same conditions, restrictions and limitations as are by law prescribed in case of damages by the laying out of highways.

October 14, 1896, the directors of the Maine Water Company voted to take for its purposes certain real estate and water rights of the petitioners and on the 17th of the same month filed in the office of the county commissioners for Kennebec County a plan and description of the land and rights so taken; and on the 19th of the same month made application to the county commissioners to estimate and award damages therefor. After notice and hearing the commissioners made an award of damages to be paid by the company to the petitioners. After the time in which an appeal might have been taken from such award, the company executed and delivered to each of the petitioners notices of abandonment of the property so taken. July 6, 1897, after the time for taking an appeal from the award of the commissioners had expired, the petitioners filed with the commissioners a motion for a warrant of distress against the company and its property to enforce payment of the damages awarded, which motions were denied; whereupon the petitioners, on the 6th day of October, 1897, filed petitions for writ of mandamus in this court below to compel the county commissioners to issue such warrants. *Held:*

1. That when the award of damages had been finally adjudicated, the petitioners had a vested right to the damages awarded.
2. That the damages were assessable in the manner prescribed for assessment of damages in case of laying out a highway by the statutes in force at the date of the charter.
3. That after the damages had been finally adjudicated by the county commissioners, the water company could not avoid payment of such damages by an abandonment, or attempted abandonment of the property taken.
4. That the county commissioners were authorized, and it was their duty, to issue a warrant of distress to enforce payment of the damages awarded by them.
5. That this court has authority by its writ of mandamus to compel the county commissioners to issue such warrant.

On Report.

These two cases, heard together and depending on the same facts, were petitions for mandamus. The Maine Water Company, the party in interest, assumed the defense of both actions. By agreement of the parties the cases were reported to the law court for argument and determination,—the petitions to be taken as the alternative writs and returns thereto.

The cases appear in the opinion.

S. S. & F. E. Brown; O. D. Baker and F. L. Staples, for plaintiffs.

Where mandamus is the only process which will yield to the party the precise remedy which the statute has given him, and where the act is not discretionary, and the debt is plain, then mandamus will lie to restore to the party the specific remedy which the statute has given him. If the statute gives him two remedies he is entitled to his option between them, and if he is deprived of either, he is deprived of the very thing which the statute has given him. There is no possible way of restoring him to the position in which the statute has left him, except in the last resort by mandamus. In such a case, mandamus, we submit, is the only effectual remedy for restoring to the party the very right or option which the statute has expressly given. *Adams* v. *Ulmer*, 91 Maine, 47; *Post Master General* v. *Trigg*, 11 Pet. 173.

E. F. Webb; H. M. Heath and C. L. Andrews, for Maine Water Company.

The Water Company is entitled to make answer and to stand as the real parties. R. S., c. 102, § 18.

The writ of mandamus is a prerogative writ, granted at discretion and not of right. *Woodman* v. *Co. Com.* 24 Maine, 151; *Davis* v. *Co. Com.* 63 Maine, 396; *Baker* v. *Johnson*, 41 Maine, p. 20; *Townes* v. *Nichols*, 73 Maine, 517.

"A party for whose benefit a judgment is rendered by them (county commissioners) may recover the amount in an action of debt founded upon such judgment." R. S., c. 78, § 19.

The petition does not allege facts sufficient, if proved, to authorize a writ of mandamus. *Hoxie* v. *Co. Com.* 25 Maine, 333. There is no averment in the petition of the time within which the damages awarded were to be paid, after the proceedings were closed. *Davis, ex parte*, 41 Maine, 39.

It was within the judicial discretion of the county commissioners to issue or decline to issue the warrant of distress. R. S., c. 78, § 18; *Davis* v. *Co. Com.* 63 Maine, 398.

If the rights claimed by the petitioners are doubtful, or involve

the necessity of litigation to settle them, the mandamus will not be granted. *Townes* v. *Nichols*, supra. The court does not know what the rights of the parties are in relation to the use of water in the stream, and those rights cannot be investigated or determined in these proceedings.

Right of revocation: Counsel cited and commented upon *Kimball* v. *Rockland*, 71 Maine, 157; *Perkins* v. *Me. Cent. R. R. Co.*, 72 Maine, 95; *Riche* v. *Bar Harbor Water Co.*, 75 Maine, 91; *New Bedford* v. *Co. Com.* 9 Gray, 348. Until actual payment of the compensation or until the company has actually entered into possession of the land, the land owner acquires no vested interest in the damages assessed and the company may abandon it at any time prior thereto; and the right of abandonment is not lost unless the company reduces the land to possession and constructs its public improvements thereon or allows some private rights to attach which would be prejudiced by the abandonment. *Denver & N. O. R. R. Co* v. *Lamborn*, 8 Colo. 389; S. C. 23 Am. and Eng. R. R. Cas. 115; *Peoria & R. I. R. R. Co.* v. *Rice*, 75 Ill. 329; *P. M. R. R.* v. *Sater*, 1 Iowa, 421; *Black* v. *Baltimore*, 50 Md. 235; *N. M. R. R.* v. *Lackland*, 25 Mo. 515; *State* v. *C. I. R. R.* 17 Ohio St. 103; *Stacy* v. *Vt. C. R. R. Co.*, 27 Vt. 39; 2 Dillon Mun. Corp. (3rd Ed.) § 609, and cases. The old rule that a land owner has a vested right in the damages is not the law of to-day. The existing statute changes the rules laid down in *Kimball* v. *Rockland*, supra, and similar cases. *Riley* v. *City of Lowell*, 117 Mass. 76; *Custy* v. *Lowell*, 117 Mass. 78; *Perrysburgh Canal Co.* v. *Fitzgerald*, 10 Ohio St. 513; *Kugler's Appeal*, 55 Pa. St. 123; *Chandler* v. *Jamaica Pond Aqueduct Corp.*, 125 Mass. 544; *Emerson* v. *Western Union R. R. Co.*, 75 Ill. 176; *Baldwin* v. *City of Newark*, 38 N. J. L. 158; *Durham R. R. Co.* v. *Railroad Co.*, 106 No. Car. 16; *Hamor* v. *Bar Harbor Water Co.*, 78 Maine, 127; *In re Vernon Park*, 163 Pa. St. 70; Endlich, Statutes, p. 696, § 493.

A proceeding to condemn real estate for public use may be abandoned, even after the damages are assessed, if before the payment thereof or deposit for the owner, when the property has

remained unmolested; and no execution can be awarded for the collection of the sum so assessed; and the court will not compel the payment of the compensation even by mandamus. *City of Chicago* v. *Barbain*, 80 Ill. p. 482.

Under legislative power to take by condemnation, at a price to be fixed by another body, as commissioners or a jury, the party has an election whether to pursue or abandon the condemnation, after the price is fixed, unless a contrary legislative intent is clearly indicated. *State* v. *Halsted*, N. Y. L. 640, U. S. Digest, A. D. 1879, p. 134, No. VII.

Whenever land is sought to be taken for a public purpose, the public authorities, in the absence of any satisfactory provision to the contrary, have a reasonable time, after ascertaining the expense of the scheme, to decide whether to accept or refuse the land at the fixed price. *O'Neil* v. *Hudson County Freeholders*, 41 N. J. L. 161.

Affirming: *Maborn* v. *Halsted*, 39 N. J. L. 640; *Kennedy* v. *Indianapolis*, 103 U. S. 599.

County commissioners no authority to issue warrants in any event: *Russell Mills* v. *Co. Com.* 16 Gray, 347; *Bigelow* v. *Turnpike*, 7 Mass. 202: *Jeffrey* v. *Turnpike*, 10 Mass. 368.

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

FOGLER, J. Petitions for mandamus in which the petitioners pray that a writ of mandamus issue to the county commissioners of Kennebec County commanding them to issue warrants of distress against the Maine Water Company and its property to enforce payment of the sums awarded by the commissioners to the petitioners respectively for real estate taken by the company as for public use. The Water Company comes in as a defendant in interest. The cases were heard together, the rights of the respective parties depending upon the same facts.

The Maine Water Company is the successor of the Waterville Water Company and has the same rights and is subject to the

same liabilities as that company. The last named company was chartered by ch. 141, Private and Special Laws of 1881, which was approved March 16, 1881. By § 3 of said act it was authorized "to take and hold by purchase or otherwise any land or real estate necessary for erecting and maintaining dams and reservoirs, and for laying and maintaining aqueducts for conducting, discharging, distributing and disposing of water, and for forming reservoirs therefor." Section 4 provides that the company shall be liable to pay all damages that shall be sustained by any person or corporation in their property by the taking of any lands or mill privileges, or by flowage, or excavating through any land for the purpose of laying down pipes, building dams, or constructing reservoirs; "and if any person sustaining damages, as aforesaid, shall not mutually agree upon the sum to be paid therefor, such person may cause his damages to be ascertained in the same manner and under the same conditions, restrictions and limitations as are by law prescribed in case of damages by the laying out of highways." By an amendment to its charter, chapter 59, Private and Special Laws of 1887, the Company was authorized to take and hold sufficient water of the Messalonskee Stream, so called, in the towns of Waterville and Oakland. In 1896, the respondent, the Maine Water Company, successor to the Waterville Water Company, owned and occupied, as a pumping station, certain lands situate on the westerly side of the Messalonskee Stream in Waterville, and possessed certain rights in the waters of the stream; and the petitioners were then the owners of certain lands, mills, machinery and other property connected therewith situate in Waterville on the easterly side of the same stream, and possessed also certain rights in the waters of the stream.

August 18, 1896, the petitioner, Sarah H. Furbish, filed in the Supreme Judicial Court in Kennebec County a bill in equity against the Maine Water Company in which she alleged that the Company was then, and for a long time, had been using a larger quantity of the water of the stream than it was entitled to by right and, thereby had diverted and was then diverting from her mill a large quantity of water to the use of which she was entitled; and

prayed that the company be temporarily and perpetually enjoined from further diverting the water of the stream to her injury. A hearing on the prayer for temporary injunction was appointed on September 8, 1897.

October 14, 1896, at a special meeting of the directors of the water company, legally called, it was voted, "That whereas the company is authorized by its charter to take and hold sufficient water of the Messalonskee Stream, so called, in the city of Waterville, for supplying the inhabitants of the said city of Waterville, the towns of Winslow and Benton, in said county of Kennebec, and the town of Fairfield, in the county of Somerset, with pure water for domestic, manufacturing and municipal purposes, including the extinguishing of fires and sprinkling of streets; and whereas the reasonable accommodation of the appropriate business of the Maine Water Company, makes it necessary that the said Company shall take and hold, as for public use, for the purposes aforesaid, the following described real estate, mill privilege, dams, penstocks, water and water power, situate in said Waterville on the Messalonskee Stream at Crommett's Mills, so called, and bounded as follows: [Here follows description of the property described in the petitions for mandamus.] "Therefore, on motion, it was voted: To take the above described real estate and other property, for the above described uses and purposes of said company; and to file in the office of the county commissioners in the county of Kennebec, where said land and other property is situated the plans and descriptions of all such lands and other property so taken; and that the president of the company be authorized to execute, for and in behalf of the company, all papers necessary for the taking of said real estate and other property as above." The title to the property described in the foregoing vote was in these petitioners. October 17, 1896, the company filed in the office of the county commissioners a plan and description of the real estate and other property mentioned in said vote, alleging that the property and lands were taken and were necessary for its purposes, October 19, 1896, the company made application to the county commissioners for an estimation of damages which the company

should pay by reason of taking the property taken as aforesaid. Upon such application the county commissioners, after notice and hearing, made and filed at their December term, 1896, the following report, signed by them.

"AWARD OF COUNTY COMMISSIONERS.

County Commissioners Court, Dec. Term, 1896.

31st day of Dec. A. D. 1896.

Maine Water Company, Petitioners, vs. W. B. Arnold and Sarah H. Furbish.

"We make no determination upon the question as to the necessity for taking the land and privileges described in said petition. We estimate the damages which the petitioners shall pay to Sarah H. Furbish for the taking of the first parcel of land described in said petition at seven thousand five hundred dollars without costs. We estimate the damages that the petitioners shall pay to Sarah H. Furbish and Willard B. Arnold for the taking of the second parcel of land described in said petition at two hundred and fifty dollars without costs."

"From this report no appeal was taken and at the April term of the Commissioners Court, being the next term after the filing of the report, their report was accepted and the proceedings closed. April 26, 1897, the petitioners in the case at bar, by their counsel, requested payment of the damages awarded by a letter addressed to the president of the company. At a special meeting of the directors of the company, legally called, it was voted, "To rescind the vote of the directors of this company passed October 14, 1896, whereby it was voted to take and hold, as for public use, and for the purposes of this company, certain water, water power and mill rights in Waterville," etc., and "that Weston Lewis, President of this company, be authorized to execute to said Sarah H. Furbish and Willard B. Arnold a notice of abandonment and surrender of all our rights to said premises, if any, under and by virtue of said vote." In pursuance of such vote, on the 6th day of May, 1897, an instrument of the tenor following was executed, caused to be recorded and delivered to the petitioner, Sarah H. Furbish."

"NOTICE OF ABANDONMENT AND SURRENDER.

"To Sarah H. Furbish of Waterville, in the County of Kennebec and State of Maine:

"Whereas, the Maine Water Company, a corporation established by law and having its place of business at Waterville, in said county, on the seventeenth day of October, A. D. 1896, filed in the office of the County Commissioners of Kennebec County a plan and description of certain real estate, mill privileges, dam, penstocks, water power and water, situated in said Waterville, with a view of taking the same for the purposes of said corporation as for public use. Said premises being described as follows: Commencing at an old iron bolt set in the ledge in east bank of the Messalonskee Stream on the dividing line between the old grist mill lot and the old fulling mill lot; thence south 41 deg. 23 min. east 61 5-10 feet to a granite monument in the westerly line of the Pearson tannery road; thence north 48 deg. 7 min. east 77 83-100 feet to a granite monument set in the easterly line of said Pearson tannery road; thence northerly 62 deg. 23 min. west 65 17-100 feet to an old iron bolt set in the ledge; thence westerly in the same direction to the center of said Messalonskee stream; thence down the center of said stream to a point which shall be opposite or coincident with the first line mentioned in this description; thence southerly 41 deg. 23 min. east to the point begun at.

"And whereas, said Maine Water Company has never entered upon said premises or taken possession thereof.

"Now therefore, know all men by these presents, and you will take notice, that said Maine Water Company hereby abandons, surrenders and yields up to you all its rights, title and interest, if any, in said premises; and hereby notifies you of its intention not to take said property, or make any claim thereto, under said proceedings.

"In witness whereof, the said Maine Water Company has caused the corporate seal to be affixed and these presents to be subscribed by Weston Lewis, its president, thereto duly authorized this 6th day of May, A. D. 1897.

MAINE WATER COMPANY.

L. S. By Weston Lewis, President."

STATE OF MAINE.

Kennebec ss. May 6, A. D. 1897.

Then personally appeared the above named Weston Lewis, and acknowledged the foregoing to be the free act of said Maine Water Company. Before me,

W. E. MAXCY,
Justice of the Peace."

A like instrument (with proper description of premises) was executed and recorded and delivered to W. B. Arnold and Sarah H. Furbish. Both instruments were received and retained by the petitioners.

July 6, 1897, these petitioners filed with the county commissioners a motion for a warrant of distress to issue against the company and its property for the payment of the damages awarded to them by the commissioners, which motion was denied August 5, 1897; and October 22, 1897, they filed their petitions for a writ of mandamus. The answer of the commissioners is in effect that they are not informed as to their duty in this respect and that they were and are ready to issue such warrant if so directed by this court, to which they refer the questions raised by the parties. The answer of the Water Company sets up several points of defense which are hereinafter referred to and discussed.

The Water Company has not taken actual possession of the property which it sought to condemn, but have continued to use the water of the stream as theretofore. At the time of the filing of the certificate in the office of the county commissioners, the premises therein described were occupied by the petitioner's tenants who have since continued in such occupation.

The Maine Water Company was authorized by the acts of the legislature hereinbefore referred to, to take the property of the petitioners, and its proceedings in that respect, as well as those for an award of damages, were in accordance with the statutes of the State.

It is contended in behalf of the defense that the damages are not payable until the land has been entered upon and possession

taken by the company for construction and use, and that, as the company has not made such entry and taken such possession, no warrant of distress can issue to enforce payment of damages. By the terms of the charter of the Waterville Water Company damages for lands taken by it, when the amount cannot be mutually agreed upon, shall be "ascertained in the same manner, and under the same conditions, restrictions and limitations as are by law prescribed in case of damages by the laying out of highways." To sustain their position that damages are not payable until the land is taken, counsel for defense rely upon § 7, ch. 18, R. S., 1883, which provides that the commissioners "shall not order such damages to be paid, nor shall any right thereto accrue to the claimant, until the land . . . . has been entered upon and possession taken, for the purpose of construction and use." The statute of 1871 did not contain this provision, but provided, ch. 18, § 7, that "payment of damages may be suspended until the land, for which they are assessed is taken." By ch. 53 of the Public Laws of 1881, § 7 was amended so as to read as it appears in the revision of 1883, above quoted. This act of amendment was approved March 12, 1881. As no different time was named therein, it became effective in thirty days after the recess of the legislature passing it. R. S., ch. 1, § 5. The act granting the charter to the Waterville Water Company was approved March 16, 1881, and became in force on the date of its approval. R. S., ch. 1, § 6, p. XXVI.

It follows that the law, in this respect, at the date of the charter of the Waterville Company was that of 1871, and not the law as amended in 1881 and now contained in the present statute. The question is whether, with respect to the time when the damages awarded to the petitioners became payable, the statute of 1871, or the statute as amended in 1881, shall control. We have no doubt that the statute of 1871 must govern. We regard it as an established principle, that when a private or special act of the legislature incorporates by reference the provisions of an existing general statute, it means that the provisions of the general statute, in their exact form, become a part of the special statute, precisely as though

such provisions were written into the special act, which is not affected by the amendment or even by the repeal of the general statute.

This has been so held by this court in *Collins* v. *Blake*, 79 Maine, 218, and the principle is fully sustained by the authorities. *In re village of Sing Sing*, 98 N. Y. 457; *Darmstaetter* v. *Moloney*, 45 Mich. 625; *Crosby* v. *Smith*, 19 Wis. 472; *Flanders* v. *Merrimac*, 48 Wis. 567; Endlich on Interpretation of Statutes, §§ 85, 233, 492.

The commissioners might, therefore, in the case at bar, have suspended the time of payment until the land was entered upon by the company for its purposes, but they were under no obligation to do so. The power conferred upon them was permissible, not mandatory.

In *Kimball* v. *Rockland*, 71 Maine, 137, the plaintiff sued to recover damages awarded him for land taken by the city of Rockland for street purposes. The land had not been actually taken or entered upon by the city. There, as here, the record was silent as to the time when the damages should be paid. The court held that the plaintiff was entitled to recover and gave him judgment. We regard this case as decisive against the defendant upon this point, and are of opinion that the damages became payable to the petitioners when the report of the county commissioners was accepted and the proceedings closed.

It is further contended by the defense that, notwithstanding the proceedings for the condemnation of the petitioners' property and for the awarding of damages, it had the right to revoke and renounce such proceedings and abandon and surrender the property to the petitioners at any time before actually entering upon and taking possession of the premises, and that, by its instrument of May 6, 1897, it did so revoke and renounce such proceedings and did abandon and surrender the premises to the petitioners and that thereby it is relieved from the payment of the damages awarded.

A corporation, public or private, by taking land as for public use by lawful condemnation proceedings, does not acquire legal, permanent possession thereof until compensation therefor is paid or

waived. Constitution of Maine, Art. 1, § 21; *Perkins* v. *Me. Cent. R. R.*, 72 Maine, 95.

But we regard it settled by the great weight of authority that, after such proceedings have been perfected and the damages for the land taken have been finally ascertained and adjudged by the proper tribunal, the corporation thereby acquires a vested right to hold and use the land taken on payment of the compensation awarded, and that the land owner acquires a vested right to have and recover the damages awarded. The corporation cannot evade payment of damages by revoking the proceedings or by surrendering the land without the consent and agreement of the land owner. The English courts have maintained the doctrine, as well in public street improvements as in railway and other corporations, that where, by act of Parliament, street commissioners or the managers of railway or other corporations, are authorized to acquire title to land by appraisement, after giving notice to the owner to treat or submit to an appraisement, the mere giving the notice is an election to purchase at an appraisal; and that this election, being binding on the owner of the land, is also binding on the street commissioners or corporation. *The King* v. *Commissioners of Manchester*, 4 B. & A. 335; *The King* v. *Hungerford Market Company*, 4 B. & A. 327; *Stone* v. *Commercial Railway Company*, 4 Mylne & Craig, 122; *Walker* v. *Eastern Counties Ry.*, 6 Hare, 594, In *Hallock* v. *County of Franklin*, 2 Met. 559, the law is thus stated by Shaw, C. J.: "By the judgment establishing and locating the highway, before any act done towards fitting it for use, the rights of the parties are fixed and vested, and the public acquire a right to the public easement; and the right of the owner of the land over which it passes, to his compensation, is complete." The same learned jurist had previously said in *Harrington* v. *Co. Coms.* 22 Pick. 267, "The court are of opinion, that when the highway is once completely established, and the damages of the land once settled by the modes pointed out by law, the right of the public to a perpetual easement in the land for a highway . . . . becomes complete, and the right of the owner to his damages or compensation for the lien or qualified right acquired by the public in his land, becomes complete."

The law thus laid down has been sustained by numerous cases in Massachusetts, the latest case being that of *Imbescheid* v. *Old Colony Railroad*, 171 Mass., 210, in which an array of authorities of that state are cited.

In New York the court has maintained the doctrine above laid down. In *People* v. *Gas Light Co.*, 78 N. Y. 56, the court held that when land has been taken for public uses under the right of eminent domain and the proceedings have so far progressed that the amount of compensation to the owner has been fixed as a finalty, the proceedings cannot be discontinued or abandoned, and the owner has a vested right to the compensation. See cases there cited.

It is held in New Jersey, *Butler* v. *Sewer Commissioners*, 39 N. J. L. 665, that when the amount of compensation for land taken is once fixed by the tribunal which the law has provided, even the legislature cannot authorize postponement of payment. Reed, J. says: "I am clear that, when the amount of compensation is once fixed, the owner, as constrained vendor, is entitled to recover his price."

Mills on Em. Dom., § 319, states the rule as follows: "The ancient rule was that when a street had been laid out, the damages were due, although no entry had been made for the purpose of construction. The rights of the parties were considered as fixed by the laying out, although the highway was forthwith discontinued, or was never, in fact, opened."

The rule laid down in the authorities cited appears to have been recognized by this court in *Westbrook* v. *North*, 2 Maine, 179; *Kimball* v. *Rockland*, supra, and *Millett* v. *County Coms.* 80 Maine, 428, 429, and we regard it to be the law of this state except so far as it has been modified by statute. The only legislative enactments of the state restricting the rule is § 10, ch. 18, R. S., which is as follows: "When the way is discontinued before the time limited for the payment of damages, the commissioners may revoke their order of payment and estimate the damages actually sustained, and order them paid." If this section applies to cases other than those for land taken for ways, which we doubt, it can

have no bearing in the case at bar. As before stated, the damages awarded to the petitioner became due when the proceedings were closed at the April term of the commissioners' court; the notices of abandonment were not executed till May 6, 1897, after the time limited for the payment of damages.

We do not think that the petitioners by receiving and retaining the "Notices of Abandonment" waived their claims for the damages awarded them. Those notices were sent to the petitioners by mail unaccompanied by any request to accept or return them. They purported to be notices of abandonment and the petitioners were justified in regarding them merely as notices. They have made no claim under them but have consistently insisted upon payment of the sums awarded them. We therefore hold that the Water Company's attempted revocation and abandonment were ineffectual, and that neither the rights of the petitioners nor the liabilities of the company are thereby affected.

The fact that the premises condemned have remained in the possession and occupancy of the petitioners' tenants since the proceedings for condemnation were commenced, does not preclude the petitioners from collecting their damages nor in any way affect their rights. *Imbeschied* v. *Old Colony Railroad*, supra.

Our conclusion is that the damages awarded to the petitioners became due when the proceedings on the petition to estimate damages were closed, and that the Maine Water Company are liable to pay the same.

The county commissioners had authority to issue the warrant of distress prayed for by the petitioners. Section 18, ch. 78, R. S., 1883, which is in the same language as Sec. 15, ch. 78 of R. S., 1871, is as follows: "Warrants of distress, on judgments legally rendered by the county commissioners, may be originally issued within two years after judgment and made returnable to the clerk's office within ninety days from their date." Following the rule laid down by this court in *Low* v. *Dunham*, 61 Maine, 566, and *Monmouth* v. *Leeds*, 76 Maine, 28, we think this section is mandatory upon the commissioners, and makes it their duty to issue warrants of distress to enforce their judgments. In *Low* v. *Dunham*,

the language construed was, "the court may issue an order to the attaching officer to sell," etc. The court held that it was not the intention of the legislature that it should be left to the discretion of the court whether an order should issue or not, and stated the rule as follows: "The word 'may' in a statute is to be construed 'must' or 'shall' where the public interests or rights are concerned, and the public or third persons have a claim de jure that the power shall be exercised." The case of *Monmouth* v. *Leeds* is to the same effect. The rule thus laid down is fully sustained by the authorities cited by the court in those cases. So we hold that it was the duty of the commissioners to issue to the petitioners a warrant of distress to enforce payment of the damages awarded them and that the petitioners had a claim de jure that such duty should be performed.

The commissioners denied the motion of the petitioners for such warrant of distress and refused to issue the warrant. Has this court authority to compel the commissioners to perform their duty in this respect? We think it has. Mandamus is defined by High's Extra. Legal Rem. § 1, to be "A command issuing from a common law court of competent jurisdiction, in the name of the state, directed to some corporation, officer, or inferior court, requiring the performance of some particular duty therein specified, which duty results from the official station of the party to whom it is directed, or from operation of law." The definition is substantially that given by 3 Blackstone, Com. 110. The writ of mandamus has frequently been granted to compel an inferior court to issue process to enforce its judgments. In *State, ex rel. Bauman* v. *Hoboken Dist. Court*, 49 N. J. L. 537, the writ was issued to the District Court, commanding it to issue execution improperly withheld. In *People* v. *Common Council*, 78 N. Y. 56, it was issued to the respondents to compel them to proceed to the assessment and collection of a tax to pay damages awarded by the council for land taken for street purposes. *Postmaster Gen.* v. *Trigg*, 11 Peters, 173, was a petition for mandamus to compel the Judge of the District Court to issue execution on a judgment entered up by that court. The court refused the writ on grounds

stated in the opinion, but did not intimate a want of jurisdiction to order the writ if a proper case had been made out. Writs of mandamus were issued to justices of the peace to compel the issuance of executions on judgments rendered by them in *Terhune* v. *Barcalow*, 11 N. J. L. 38, and in *Laird* v. *Abrahams*, 15 N. J. L. 22. *Harrington* v. *Co. Coms.* supra, is a case in point. A highway had been laid out and damages awarded. *Held;* that the land owner had a vested right to such damages, and that he was entitled to a writ of mandamus to the commissioners to compel them to draw an order for the payment thereof. In *Waldron* v. *Lee*, 5 Pick. 323, it was held that a writ of mandamus lies to compel a town treasurer to issue his warrant of distress against a collector of taxes neglecting to collect and pay over the same at the time fixed in the assessors' warrant to the collector.

The recent case in this state of *Adams* v. *Ulmer*, 91 Maine, 47, is very nearly in point. The court granted the writ directed to the clerk of the county commissioners court, commanding him to issue a warrant of distress, as directed by the commissioners for the collection of a judgment rendered by the county commissioners.

It is objected by the defense that the court cannot compel the issuing of a warrant of distress by its writ of mandamus because the petitioners have an adequate legal remedy at law by an action of debt to recover their damages. It is a general rule that mandamus will not be granted when the petitioner has an adequate specific legal remedy at law, but to such rule there are exceptions. 3 Blackstone, Com. 110, says that the writ "may be issued when the injured party has also another more tedious method of redress; but it issues in all cases when he hath the right to have anything done and hath no other specific means of compelling its performance." Mr. High, (High's Extra. Legal Rem., § 17,) states the law as follows: "It is to be borne in mind, however, that the existing legal remedy relied upon as a bar to interference by mandamus, must not only be an adequate remedy in the general sense of the term, but it must be specific and appropriate to the particular circumstances of the case. That is, it must be such a

remedy as affords relief upon the very subject matter of the controversy, and if it is not adequate to afford the party aggrieved the particular right which the law accords him, mandamus will lie, notwithstanding the existence of such other remedy. . . . . And by a remedy at law, such as will operate as a bar to mandamus is understood such a remedy as will enforce a right or performance of a duty; and unless it reaches the end intended and actually compels a performance of the duty in question, it is not an adequate remedy within the rule under discussion."

In the case at bar, the statute requires of the commissioners the performance of a particular duty. The petitioners have the right to the performance of such duty. They have no other remedy than mandamus to compel its performance. We do not think that their right to recover their damages by an action at law precludes the court from compelling the commissioners to perform the duty imposed upon them by statute.

By agreement of parties the pleadings are to be regarded as the alternative writ and the court is authorized to grant the peremptory writ. No damages are claimed or assessed.

Peremptory writ to issue as prayed for.
Petitioners to recover costs against the Maine Water Company, defendants in interest.

JOHN GEORGE

vs.

WASHINGTON COUNTY RAILROAD COMPANY.

Washington. Opinion July 22, 1899.

Railroad. Sub-Contractor. Lien. Notice. R. S., c. 51, § 141.

The statute, R. S., ch. 51, § 141, authorizing laborers employed by contractors in building a railroad to maintain an action against the railroad company for unpaid wages, includes laborers employed by sub-contractors.

Though such laborers are to be paid monthly by the contractors employing them, they are not required by the statute to notify the railroad company

of the non payment of each month's wages within twenty days after the end of the month. It is sufficient if the notice be given within twenty days after the completion of their labor under their employment.

AGREED STATEMENT.

The parties agreed to the following facts:

The plaintiff was a laborer on the defendants' railroad, working under the firm of Hilton and Watson, who were sub-contractors under E. J. Colley & Company, who were sub-contractors under William E. Kenefick, who was a sub-contractor under the J. P. McDonald Company, who were contractors with these defendants. He worked continuously for the same sub-contractors during June, July, August and September, 1898. July 27th, he received a time check showing sixty-five dollars as due him for his June labor. For the work done in July and August he received his pay in the usual and regular way. For the work done in September he received a time check for forty-five dollars and seventy-five cents.

He has not been paid for either his June or September labor. Within twenty days of his stopping labor on the railroad, he gave notice to the defendants and suit was commenced within six months thereafter.

E. C. Ryder, for plaintiff.

The purpose of R. S., c. 41, § 141, is to secure to the laborer, who labors for dishonest or unfortunate contractors, the wages he has earned, and the statute should be so construed as to give full effect to such purpose.

Mechanic's and laborer's lien statutes are remedial, and after the lien has once attached, are to be construed liberally to advance the just and beneficial object in view at the time of their enactment. 2 Jones on Liens, § 1556; 2 Houk on Liens, §§ 66, 68; *De Witt* v. *Smith*, 63 Mo. 263.

A lien attaches from the commencement of the work and embraces all the work done under such contract. 2 Jones on Liens, § 443; *Monroe* v. *West*, 12 Iowa, 119; *Jones* v. *Swan*, 21 Iowa, 181.

If the contract is a continuous one the limitation for notice commences on the date when the last work has been performed. 2 Jones on Liens, § 1443; *Boylan* v. *Steamboat Victory*, 4 Mo. 244; *Fulton Iron Works* v. *Centre Creek Mining & Smelting Co.*, 80 Mo. 265; *Ballou* v. *Black*, 17 Neb. 389; *Jones* v. *Swan*, supra.

The statute does not require notice to be given within the stipulated time after each item of the work is performed or each item of the materials furnished, but within the stipulated time after the labor has been completed or the last materials have been furnished.

When labor is performed under a contract by the month or year and the laborer continues beyond the term of the month or year, he is not required to give the statute notice within the required time after the expiration of each item of the month or year, but may file it within the proper time after the whole period of service. 2 Jones on Liens, § 1433; *Alford* v. *Hendrie*, 2 Mont. 115.

W. R. Pattangall, for defendant.

The statute does not mention employees of sub-contractors, much less sub-contractors in the third or fourth degree. It was meant to apply, therefore, only to the principal contractors and their immediate employees. This point was raised in *Blanchard* v. *Portland & Rumford Falls R. R. Co.*, 87 Maine, 246. In that case the court said: "It may not be out of place to add that the statute under consideration is not strictly remedial. The correct rule is to neither extend nor restrict its operation beyond the fair meaning of the words used."

The point now raised was left undecided in that case. Vide argument of defendant. Ib.

The statute is in derogation of the common law and must be strictly construed. *Lord* v. *Woodward*, 42 Maine, 497.

By a strict construction of the statute, the phrase "in their employment" can refer only to the laborers in the employment of the principal contractors; therefore this plaintiff cannot hold the defendant company liable under the statute.

The legislatures of the several states have deemed it necessary to definitely distinguish between contractors and sub-contractors by inserting the word "sub-contractors" in the statute.

If the defendant company is liable at all, it is only liable for the labor performed by the plaintiff in the month of September. Although the plaintiff was continuously at work upon the railroad during the months of June, July, August and September, the labor for which this claim is made upon the defendant company was not continuous, and the close of the labor in June, for which claim is made, within the meaning of the statute, occurred on the last day of June, and no notice was served upon the treasurer of the defendant company within twenty days thereafter, as required by the statute.

The case here presented in many respects resembles that of a mechanic's lien, and the law governing it is subject to a similar construction.

Counsel cited: *Henry & Coatsworth Co.* v. *Bond*, 55 N. W. Rep. (Neb.) 643; *Buchanan* v. *Selden*, 43 Neb. 559; *Darrington* v. *Moore*, 88 Maine, 570; *Baker* v. *Fessenden*, 71 Maine, 294.

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

EMERY, J. This action is based on R. S., ch. 51, § 141, which is as follows:—

"Sec. 141. Every railroad company, in making contracts for the building of its road, shall require sufficient security from the contractors for the payment of all labor thereafter performed in constructing the road by persons in their employment; and such company is liable to the laborers employed, for labor actually performed on the road, if they, within twenty days after the completion of such labor, in writing, notify its treasurer that they have not been paid by the contractors. But such liability terminates unless the laborer commences an action against the company, within six months after giving such notice."

I. The defendant company contends that the plaintiff is not within the statute, because, though a laborer on the railroad in the work of its construction, he was not in the direct employment of the firm or company with which the railroad made its contract,

but was in the employment of a sub-contractor once or twice removed. We have no doubt, however, that the plaintiff is plainly within the spirit of the statute. We said in *Rogers* v. *The Dexter and Piscataquis Railroad Company*, 85 Maine, 373, that the statute was plainly intended for the benefit of laborers. We now say, with the court of Massachusetts construing a similar statute, that the design of the statute was to give to the laborer a right of action, not only against the contractor who employed him, but also against the owners of the railroad whose structure received an added value from the labor furnished. . *Hart* v. *Boston, Revere Beach & Lynn Railroad*, 121 Mass. 511;—also with the court of Appeals of New York, that it seems clear that the legislature intended to make provision for all laborers who should perform work in constructing the road for any contractor, whether such contractor entered into a contract immediately with the railroad company or with one who had thus contracted with that company. *Kent* v. *N. Y. Central R. R. Co.*, 12 N. Y. 632. Any other interpretation would nullify the statute. It is common knowledge that contracts for building railroads are nearly always taken in the first instance by construction companies or syndicates, who then let out the entire work in various divisions to sub-contractors, without themselves directly employing any laborers. The most, if not all the work of building the railroad, is thus done by laborers directly employed by sub-contractors. If these should be excluded from the statute by interpretation, its evident purpose would be defeated.

II. The defendant company further contends that the plaintiff should have given the statute notice within twenty days from the end of each month in order to recover of the railroad company his unpaid wages for that month, and hence cannot recover his wages for June. The statute, however, only requires him to give one notice and that within twenty days after the completion of the labor. This plaintiff worked continuously on the railroad during June, July, August and September under the same sub-contractor. He gave the notice within twenty days after the completion of those four months. This was sufficient. The statute makes no

requirement of any notice at stated times during the progress of the laboring. The notice given seasonably at the end relates back and covers all unpaid wages accrued since the beginning of the continuous employment. The unpaid wages in this case amount to $110.75.

Judgment for the plaintiff.

GEORGE W. PICKERING and others, Petitioners for Review,

vs.

JOHN CASSIDY.

Penobscot. Opinion July 22, 1899.

Review. Accident, Mistake or Misfortune. R. S., c. 89, § 1, par. VII.

1. The words "accident, mistake or misfortune" used in paragraph VII of § 1, ch. 89, R. S., authorizing the court to grant reviews, ordinarily import something outside of the petitioner's own control, or at least something which a reasonably prudent man would not be expected to guard against or provide for. Mere omissions, or blunders, or errors of judgment on the part of the petitioner are not within the purview of the statute.

2. It is the duty of the litigant parties to be diligent in searching for and producing to the court in the first instance all the data they desire the court to consider in making up its judgment.

3. A judgment of the court afterward shown to be erroneous because of imperfect and too scanty data furnished by the parties is not therefore unjust, as to those parties.

4. A mere error in reasoning on the part of the court or tribunal, where none of the material data furnished by the parties has been overlooked, is not sufficient ground for re-opening a litigation once regularly concluded and set in a judgment.

5. The mere fact that an unsuccessful litigant by new and greater efforts made after a trial has discovered more and better evidence, which would probably change the result, does not entitle him to a new trial.

6. A new trial will not be granted for newly-discovered evidence when it appears probable that the same efforts that were made after the trial, if made before, would have discovered the same evidence.

7. A review of a real action, once tried and ended in a judgment where the issue was as to the existence of an old boundary line upon the earth's surface, will not be granted to let in evidence of surveyor's marks and other indicia of such a line discovered after the trial, when it is not made to appear that they could not have been discovered before the trial by the same amount of diligence and effort.

See *Stetson* v. *Adams*, 91 Maine, 178.

ON REPORT.

This was a petition for review dated January 21, 1898. The facts are stated in the opinion.

Charles H. Bartlett, for petitioners.

The statute applies to cases decided by a referee under rule of court. *Gooding* v. *Baker*, 60 Maine, 52.

In *Morrell* v. *Kimball*, 1 Maine, 322, (1821), WESTON, J., on page 324, says: "As reviews no longer exist as a matter of right, it has become the more necessary that the Court should be governed by liberal principles in the exercise of their discretion, that there may be no occasion again to resort to the legislature for the restoration of this process as a writ of right, which was formerly productive of much mischief in practice."

Newly-discovered evidence which should be passed upon by the jury and which has a tendency to change the result is ground for a review, if the petitioner is not guilty of negligence or laches in not having presented it at the trial. *Wilbur* v. *Dyer*, 39 Maine, 169, (1855); *Dwinel* v. *Godfrey*, 44 Maine, 65, (1857). The great object in view is the furtherance of justice and the prevention of injustice. APPLETON, C. J., in *Gooding* v. *Baker*, supra, p. 53. A review may be granted for a mistake of law. *Bowditch Mutual Fire Insurance Company* v. *Winslow*, 3 Gray, 415, (1855).

The court may grant a new trial if the verdict of a jury is against the law. The referee stands in the place of the jury, and a review is nothing more than a new trial in another form. In specifying the cases in which reviews may be granted, it was not the intent of the legislature to restrict the power of the court. The tendency of legislation has been in the direction of increasing the power of the court in granting reviews, in order to

prevent the triumph of wrong. APPLETON, C. J., in *Gooding* v. *Baker*, supra, p. 54.

The period of six years was fixed upon as a fair compromise between contending claims of public policy. On the one hand, to end litigation at some reasonable time; on the other, to reasonably preserve the rights of litigants, that justice might be done.

The referee did not determine the real question submitted to him. The real question in the case was: Where was the Weston line of 1794 located on the face of the earth between these two towns?

As far as that line extended, it was the division line, until it came to the territory last lotted by agreement to a more southerly line. It had never been abandoned. *Stetson* v. *Adams*, 91 Maine, 178.

The question was as to location of that spotted line of 1794 wherever it went. Although Weston left no field notes, yet he did leave a spotted line through the woods and a plan. Nothing is more firmly established in this State than that, in such case, the survey must govern when its location can be shown; when it cannot be, then the plan may locate it. *Bean* v. *Bachelder*, 78 Maine, 184; *Stetson* v. *Adams*, supra.

The petitioners submit that, upon the facts he had before him, not one of the referee's findings or decisions of law was correct.

(1.) That he utterly misconceived the question submitted to him for decision;

(2.) That he began at the wrong end of the line, to wit, to the east at the end of a compromise line not on the Weston range line, instead of at the west, or the original range line;

(3.) That he erroneously concluded that Weston did not run a range line where Sewall himself found the spotted trees;

(4.) That he refrained from referring to the Weston spots he cut out of the trees and admits were made in 1794;

(5.) That, while in the report he denies they were evidence of a line, he now admits the line was run to Endless Lake and that there was a poorer line to the eastward of the Lake. His decision

should have been in favor of the plaintiffs west of the Lake anyway according to his own testimony;

(6.) That he abandoned a well defined line for an incorrect map;

(7.) That his method of determining the course of trees by platting bunches of them and taking the general course, instead of running a long try line, is incorrect;

(8.) That he failed to get a proper course with his compass;

(9.) That, instead of finding the true line, he adopts an arbitrary one drawn by himself;

(10.) That he erroneously concluded that the line of 1794 was abandoned.

No negligence can be found against the plaintiffs; they employed one of the best surveyors of his time, who testified that the line, after a personal examination thereof, was as the plaintiffs claimed.

This newly-discovered evidence is vital, admissible, would entirely change the result of the action, and could not have been discovered in season before the other suit. When it is considered that these spots were made more than a century ago by men who were operating in a trackless forest, far from the smallest settlements, with unimproved means of survey, it is not strange that lines should waver considerably or that errors should have been made. Mr. Oakes testifies that this is one of the best old woods lines he ever saw.

When it is considered that it requires the utmost skill to find these old spotted trees, that even the most skillful man will pass them by at one time of the day and on some days, and at another time and another day, will see them, the only wonder is that the line is ever found at all.

C. P. Stetson and H. Hudson, for defendant.

Mr. Sewall, the referee, and whose report is sought to be reversed is a civil engineer of great skill and experience; he gave to the case great and continued care and labor, going upon the land in controversy at three different times, examining all records in Maine and

Massachusetts bearing upon the question, sparing no expense and labor, which would give him a thorough knowledge of the question in controversy and enable him to render a correct decision. The plaintiffs in the original action based their claim to the land in controversy upon the statements and testimony and deposition of Noah Barker, a surveyor. Sewall had in his examination of the case that deposition, Barker's field notes and all the facts, information and evidence which Barker had. The alleged newly-discovered evidence, which the petitioner relies upon, was known to Barker and to Sewall. This is not such a case as comes within the statute entitling the petitioner to a review.

The petitioner does not show any fraud, accident, mistake or misfortune, or that a further hearing would be just and equitable.

A writ of review is an unusual remedy, given when justice seems to require it, in cases where without fault or negligence one has lost or has failed to obtain an adequate remedy in the ordinary forms of procedure which were open to him in the original action, cases of accident, or mistake, or of a discovery of material facts which could not be presented at the trial, are familiar instances in which this kind of relief is granted. But it is the policy of the law to make an end of litigation when the parties have once had an opportunity to be fully and fairly heard. *Stillman* v. *Donovan*, 170 Mass. 360.

Courts are reluctant to grant a new trial for the discovery of new testimony. They require vigilance on the part of those in litigation in discovering and procuring material and important testimony. *Trask* v. *Unity*, 74 Maine, 208.

Courts will not grant a review to try a case over again when it is claimed there is an error of judgment only, in the original verdict or decision.

The plaintiffs were moved to institute this petition by the verdict and decision in the case of *Stetson* v. *Adams*, 91 Maine, 178.

But that case is not like this.

No new evidence was introduced by petitioners which, were the case re-opened, would give grounds for different conclusions from those given by referee.

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

EMERY, J. The history is this: The petitioners were the owners of the west half of Township No. 3, Range 8, North of the Waldo Patent in Penobscot county. The respondent was the owner of the half township next north viz:—the west half of Township No. 3, Range 9. Hence the original division line between the two tracts was the original range line running east and west between Range 8 on the south and Range 9 on the north. This original range line, if ever actually run between the townships, (Nos. 3 in each range) was run in 1794 by Samuel Weston appointed surveyor for that purpose by the proper officers of Massachusetts. Weston's plan showed a range line from a town corner of the east line of "The Million Acre Tract," so-called, in Somerset county through what is now part of Piscataquis county and what is part of Penobscot county to the Penobscot River on the east at a place known as the "Three Islands," a natural monument. This plan shows the range line between the two townships Nos. 3 to be equally distant from the south line of Range 8 and the north line of Range 9, and hence the two tracts in question to be of equal length north and south. For many years there was what was, at least, a conventional line recognized by the owners between the two tracts, corresponding substantially to the line upon the Weston plan.

In 1878, however, Noah Barker, an eminent surveyor of that day, was sent on this territory by parties interested (including these petitioners) to find and trace if possible the original Samuel Weston range line as actually run on the earth's surface. Mr. Barker reported that he found an old east and west line across the tract comprising the two townships Nos. 3 something over a mile north of the conventional line, or the line shown on the plans. This line, from various indications and for various reasons, he concluded to be on the original line actually run by Weston as the Range line in 1794. Upon the strength of these indications and reasons the petitioners afterward, in 1887, brought a real action against the respondent in which they demanded the parcel between

the conventional or plan line on the south, and a line "one mile, thirty-four chains and seventy-four links" distant northerly therefrom, on the north. This north line of the demanded parcel the plaintiffs described as "the northerly line of said township (No. 3. R. 8.) as run by Samuel Weston in 1794." This action was entered in Penobscot county and continued along till the January term, 1889, when it was referred by the parties generally and unconditionally to James W. Sewall, a surveyor. There does not appear to have been any formal trial before the referee. After learning the contentions of the parties, he was left by them to make his own investigations of records, plans, field notes, documents, etc., and also to make his own investigations upon the surface of the earth, by examining indicia theretofore found and by searching for additional indicia. He was also furnished with the deposition of the surveyor, Barker, taken in the case. At the January term, 1892, after a lapse of three years, the referee made his award in favor of the defendant and against the plaintiff's claim that the line found by Barker in 1878 was a line run by Weston as a range line in 1794. He filed with his award a detailed statement of his investigations and discoveries and his conclusions therefrom leading him to the resulting award. It does not appear that either Mr. Sewall, or Mr. Barker, made any research west of townships Nos. 3. Judgment was rendered at that term on this report without objection, and there this matter rested for a while.

A few years later the owners of the township next west of the respondent's township, viz: Township No. 4 in the same range, R. 9, perhaps induced thereto by the result of the real action between these parties, brought a real action against the owners of the township next south, No. 4 in Range 8, being the township next west of the petitioners' township. The parcel demanded was substantially that between the line found by surveyor Barker in 1876 extended west as the north line, and, as the south line, the "plan line" or the extension west of the line thus adjudged to be the line between the two townships Nos. 3. At any rate, in this latter action, as in the former action, the question was as to the location

upon the earth's surface across the Townships of the range line between Range 8 and Range 9. That line by the plans was as claimed by the owners of the north township, and the burden was upon the owners of the south township to show that, notwithstanding the plan, a line was actually run by Samuel Weston in 1794 across these townships Nos. 4 and north of the demanded parcel as and for the range line between Range 8 and Range 9. They assumed this burden and with great industry and much expense discovered and traced an ancient line bearing surveyor's marks as old as 1794 from the east line of the "Million Acre Tract" in Somerset county, east between various towns and townships, and across townships Nos. 4 and even farther, across townships Nos. 3. At the trial of the case before a jury in the court in Piscataquis county (townships Nos. 4 being in that county) the owners of the south township produced the evidence of this discovery and tracing of a line showing ancient spots and other indicia all along from the "Million Acres" to the east line of townships Nos. 3 and across the townships Nos. 4 so strongly indicating that the line thus found was the line run by Samuel Weston in 1794, as and for the range line between Range 8 and Range 9, the jury readily found in their favor. This finding was approved by the court upon a motion for a new trial, and January 3, 1898, judgment was ordered on the verdict. *Stetson* v. *Adams*, 91 Maine, 178.

Within thirty days after the opinion in the Piscataquis case was announced, the unsuccessful litigant in the Penobscot case before described, that concerning the location of the range line between townships Nos. 3, brought this petition for leave to review the old action in that case which had gone to judgment in 1892, almost six years previously. The petition is based on the seventh clause of § 1 of chap. 89, R. S., viz:—

Chap. VII. "A review may be granted in any case where it appears that through fraud, accident, mistake or misfortune, justice has not been done, and that a further hearing would be just and equitable, if a petition therefor is presented to the court within six years after judgment."

There is no suggestion of any failure of justice through fraud;

and, therefore, the only question for the court is whether it appears from the evidence that there has been any such failure of justice "through accident, mistake or misfortune" that "a further hearing would be just and equitable."

Undoubtedly, as contended by the petitioners, the statute confers upon the court a broad power and one the court should exercise freely to grant relief from unjust judgments. But a judgment ultimately discovered to be erroneous because based upon too few data is not therefore unjust. It is the duty of litigants to supply the data, to adduce evidence and argument. It is their duty to be diligent in this work. If judgment goes against a litigant by reason of his neglect to appear, or by reason of the insufficiency of his evidence or argument, he has not thereby suffered an injustice, but rather the natural consequences of his own neglect. The words "accident, mistake or misfortune," used in the statute, to describe the source of the injustice which would make a further hearing just and equitable, ordinarily import something outside of the petitioners' own control, or at least something which a reasonably prudent man would not be expected to guard against or provide for. It has long been regarded as essential to public order, security, and confidence that, when parties have once had their full day in court when and where they had full opportunity to bring forward their evidence and the evidence produced has been fully and fairly considered, they should abide the result, even though renewed efforts afterward should secure other and better evidence which if seasonably obtained might have changed the result. It cannot have been the intention of the legislature to destroy this rule and destroy all reliance upon court judgments, by requiring or even authorizing the court to open them as often as the defeated party discovers some new evidence or argument.

Nor is every mistake, either of the tribunal or the party, such a mistake as the statute contemplates. Mere mistakes in opinion or judgment are outside of the statute, where no data were accidentally overlooked. If a party was erroneously of the opinion that a particular piece of evidence was valueless, and so omitted to produce it, such a mistake does not entitle him to a new trial. Even

if the court of last resort, without overlooking any data before it, draws erroneous conclusions in reasoning, its judgment should not for that cause alone be subject for reversal after having been deliberately rendered. For such mistakes, which at the most are mere errors in reasoning, to be allowed as causes for reversing solemn judgments after hearing and deliberation, would destroy all their value as authoritative adjudications of title and rights. It never could be known how long any reasoning would be regarded as sound. A third process might reverse the second and affirm the first and so on ad infinitum.

The meaning of the words "accident, mistake or misfortune" as used in the statute can be illustrated by some of the decided cases. In *Warren* v. *Hope*, 6 Maine, 479, it was said that an exception to the rule refusing new trials was where a witness, whose testimony was against the petitioner, subsequently ascertained that he was mistaken and that the facts he testified to did not actually exist. In *Knight* v. *Bean*, 19 Maine, 259, the appellant erroneously supposed the clerk would send the necessary papers to the commissioner appointed to take the recognizance for appeal. Immediately upon learning that this had not been done, he procured the papers, entered into the recognizance and transmitted it to the clerk, but it did not reach the office in season. It was held that such a mistake could be relieved against. In *Starbird* v. *Eaton*, 42 Maine, 569, it was said that reviews would be granted to correct mistakes in computation. In *Shurtleff* v. *Thompson*, 63 Maine, 118, a review was granted because the attorney, upon whom the petitioner relied to appear for him in the original action, mistakenly supposed that another attorney was to appear in that case, and so failed to enter his own appearance. All these were cases of clear accidents or mistakes within the statute. In *Howard* v. *Grover*, 28 Maine, 97, the action was against a surgeon for alleged malpractice. After verdict against him the defendant asked for a new trial to let in expert evidence of surgical facts, before unknown to him. The motion was denied, the court observing that the defendant should have learned those facts before the trial. In *Hunter* v. *Randall*, 69 Maine, 183, there was

a question whether certain letters were in the defendant's handwriting. After verdict against him, the defendant sought for a new trial to enable him to put in expert evidence in support of his denial of the handwriting, none such having been offered at the trial. The motion was denied on the ground that the defendant should have secured such evidence for the first trial. In *Blake* v. *Madigan*, 65 Maine, 522, there was a question as to the quantity of water used by the defendant's water wheels. After verdict against him the plaintiff sought for a new trial upon the ground that he had found experts in hydraulics who would support his contention. The court held that such evidence could have been found in season for the first trial. In *Maynell* v. *Sullivan*, 67 Maine, 314, a new trial was refused to let in testimony of witnesses found since the trial as to the condition of the planking on the bridge, that being one of the issues. In *McLaughlin* v. *Doane*, 56 Maine, 289, a new trial was refused to let in testimony of witnesses found since the trial who saw the collision in question. *Hunter* v. *Heath*, 67 Maine, 507, was a real action where the question was as to the location of a boundary line on the earth's surface. After verdict against him the plaintiff discovered certain deeds affecting the case, and also had a new survey made. He asked for a new trial that he might offer in evidence the facts thus discovered. The court held that he was bound to have sought for and produced all this evidence at the first trial,—that the same efforts made after the trial, if made before, would have produced the same results in the discovery of evidence. In *Carpenter* v. *Sellers*, 38 Maine, 427, parol evidence of the contents of a deed was excluded upon the ground that the loss of the deed itself was not sufficiently proved and thereupon the defendant was defaulted. After judgment against him he found the deed itself and asked for a review that he might put it in evidence. The petition was denied, the court observing: "The petitioner chose to risk the issue of his suit upon the evidence which was adduced." *Brooks* v. *Belfast & Moosehead Lake Railroad Co.*, 72 Maine, 365, was originally an action upon the town's subscription to the railroad company's capital stock. The town admitted that enough stock had been

subscribed for to comply with that condition. After the judgment in favor of the railroad company, the town petitioned for a review alleging that its admission as to amount of stock subscribed for was made by mistake and in ignorance of some of the circumstances,—that the subscriptions of certain other towns supposed to be valid were in fact invalid, and hence the necessary amount was not in fact subscribed for. The petition was denied upon the ground that all the facts were accessible and could have been ascertained by the town before the trial. In *Feder* v. *Iowa State Traveling Men's Association* (Iowa) 43 L. R. A. 693, it was said that the fact that a result was not designed, foreseen or expected does not make it accidental, if it was the natural and direct effect of voluntary acts or omissions or of conditions voluntarily assumed.

Recurring to the circumstances of this case, it must be evident there was no "fraud, accident, mistake or misfortune" within the purview of the statute as above explained. The petitioners' burden in the original action was to establish the fact that Samuel Weston, in 1794, actually ran a now ascertainable line across townships Nos. 3 north of the demanded parcel as and for the range line between those two townships. They contented themselves with surveyor Barker's discoveries between the east and west lines of the townships. As to other evidence, they intrusted the entire task of making further researches for evidence to the referee. He considered all the evidence he found and all that was submitted to him, drew his inferences, and made his award. With the reasons for the award on file accessible to the parties, the award was accepted and judgment rendered upon it. So far as appears, any mistake of the referee was a mistake in reasoning which alone, as already stated, is no ground for disturbing the judgment. So far as he overlooked any data in his researches, his neglect was that of the party intrusting him with the duty of research, and is no ground for relief. So far as the new evidence is concerned, it is as to the existence of traces of the Samuel Weston line of 1794 on the earth's surface all along from the "Million Acres" to the eastward of the demanded parcel and along its north line. All these traces existed before the trial, and were as accessible to the peti-

tioners, as they were to the diligent party who searched for them, found them, and successfully availed himself of them in the trial of *Stetson* v. *Adams*, supra. They are such traces and in such places as would naturally be sought for by a party desiring to establish such a line. There is no suggestion that the petitioners by illness, poverty, or other misfortune, or even accident, were unable to make the search. They simply relied voluntarily upon insufficient evidence when they might have procured more, better and perhaps sufficient evidence. Reserving to the court the full power of the statute to grant a review in any other case where it may seem that justice has not been done, in this case for the reasons given we think that power should not be exercised.

Petition denied with costs.

PATRICK H. GILLIN, and another, Assignees in Insolvency,

vs.

CHARLES H. SAWYER.

Penobscot. Opinion July 22, 1899.

Corporation. Stock. Insolvency. Action. Limitations. R. S., c. 46, §§ 45, 46, 47.

1. When a corporation issues shares of its capital stock in exchange for property delivered to it by the subscriber in full payment therefor, and no fraud is shown, the corporation cannot question the sufficiency of the consideration thus paid for the shares, at least without returning the property.
2. If the corporation is afterwards upon proper proceedings adjudged insolvent in a court of insolvency and assignees are appointed by that court to administer its estate, such assignees cannot, in behalf of the corporation or its stockholders nor under the insolvency statutes alone, maintain an action against a subscriber to recover the difference between the actual and agreed value of the property paid by him for shares where no fraud is shown.
3. Such assignees, however, in behalf of the creditors of the corporation and under the principles expressed and enacted in the statute R. S., c. 46, §§ 45, 46 and 47, can go behind even the honest judgment of the parties as to the value of property paid in for shares, and can recover of the subscriber the difference between the actual value and the agreed value.

4. The liability of the stockholder to thus answer to the creditors of the corporation, or their representatives, for the full actual par value of his shares for which the corporation itself has without fraud accepted property in full payment, is a secondary liability only, analogous to that of a guarantor, and arising only after the default of the corporation has been judicially ascertained.

5. As an individual creditor has no right of action to enforce this secondary liability until he has obtained a judgment against the corporation showing a judicial determination of the fact and amount of the default of the corporation to him,—so assignees in insolvency have no right of action until the fact and amount of the default of the corporation to creditors generally is likewise judicially determined in the insolvency court.

6. When the assignees have settled, and the insolvency court has approved, an account showing a complete administration of the assets of the corporation by their reduction to cash and showing the net amount available for the payment of claims,—then, if claims have been proved and allowed in excess of that net amount, the fact and amount of the default of the corporation, as to such creditors, at least, is ipso facto judicially determined. The right of action to enforce the secondary liability of the stockholder then first accrues to the assignees in behalf of creditors.

7. This secondary liability of the stockholder is limited to the deficiency of the assets, and hence the amount, as well as the existence of a deficiency of the assets, must be shown to authorize a recovery against a stockholder upon his secondary liability. An admission by the stockholder merely of some deficiency of assets does not relieve the assignees from showing the amount of the deficiency as judicially determined in the proper court.

ON MOTION BY DEFENDANT.

This was an action on the case brought by the assignees in insolvency of the Bangor Pulp & Paper Company to recover the value of fifty shares of stock of the insolvent company, which they allege the defendant either agreed to take or did take, soon after the organization of the corporation, and for which he has never paid.

The Bangor Pulp & Paper Company was organized under the laws of the State of Maine, January 14, 1892, with a capital stock of one hundred and fifty thousand dollars, the par value of each share being one hundred dollars; which capital stock was afterwards increased to three hundred thousand dollars. October first, following its organization, the company leased the plant of the Orono Pulp & Paper Company, located at Orono, which it operated until April, 1896. June 4th, 1896, upon a petition filed by

its creditors, the company was declared insolvent, and on the twenty-fifth day of June, the plaintiffs were duly appointed assignees of the insolvent corporation.

The circumstances under which the stock in question was issued appear as follows: December 7, 1891, the Orono Pulp & Paper Company entered into an agreement with H. S. Rice and B. F. Hosford in which they agreed, upon completion of a paper mill to be thereafter completed and ready for operation, to execute a lease of all its property and rights, including a pulp mill then in successful operation at Orono to said Rice and Hosford, or to a corporation to be formed by them, for a term of twenty-five years at a rental thereon stipulated, and on January 14, 1892, the Bangor Pulp and Paper Company was incorporated.

March 1st, 1892, Robert W. Sawyer was elected treasurer and on the 1st of August, 1892, Messrs. Hosford and Rice assigned to the Bangor Pulp & Paper Company their contract with the Orono Pulp & Paper Company for a lease of their plant, etc., and on the same day, the directors of the Bangor Pulp & Paper Company voted that the assignment of the said contract be accepted, subject to all the obligations therein contained, and that the clerk be directed to notify the Orono Pulp & Paper Company of said assignment, and that "the lease referred to in said contract is to be issued to this corporation."

At the same time, the Bangor Pulp & Paper Company, the plaintiff corporation, voted "that whereas H. S. Rice et als. (others being Hosford) have this day assigned to this company the contract above referred to, this company issue to H. S. Rice et als. 600 shares of the capital stock in payment therefor, said stock to be issued as follows: 50 shares to H. S. Rice or order, and 550 shares to B. F. Hosford or order."

No stock was issued to Hosford, who without the knowledge of the defendant as he claimed, directed R. W. Sawyer in writing as follows: "Of the 550 shares of stock voted to-day to be issued to my order, please make out as follows: 50 shares, Charles H. Sawyer." The paper also contained directions how the remaining shares should be made out. The shares were made out in accord-

ance with the memorandum and a certificate was made unbeknown to the defendant, as he claimed.

The defendant testified that this certificate was never delivered to him; was never accepted by him and that he never knew that such certificate had been made out until the following spring, in April, 1893. It remained undetached from the stub in the stock book as late as September 15, 1893, a period of nearly fourteen months.

The defendant also testified that he first learned of the existence of the certificate in April, 1893, and that he told the treasurer, R. W. Sawyer, that he would not take it, and on the 29th day of May following he notified Mr. Whitman, the new treasurer, that he would not accept the stock; and he also notified Hosford July 14, following, that he would not take it. The list of stockholders of the company made and returned by its treasurer December 7, 1892, to the Secretary of State, as required by law, does not contain the name of the defendant as a stockholder.

The plaintiff introduced evidence showing that the defendant was present at a meeting of the board of directors of the Bangor Pulp & Paper Company, held in Boston, April 21, 1892, at which meeting he was unanimously elected a director and was present at a meeting August 1, 1892, when it was voted to issue to H. S. Rice and others six hundred shares of the capital stock of the company; also to issue 50 shares of this 600 to H. S. Rice, or order, and 550 shares to B. F. Hosford, or order. The record of the company shows that the defendant was present and voted for the issuing of the stock. The plaintiff further proved by the testimony of one Corbett, of Boston, that he purchased of the defendant the 50 shares in question for $1500 in July, 1893. The defendant, on the other hand offered evidence to prove that the treasurer R. W. Sawyer, who resigned May 9, 1893, had a claim against the company for $2000 for money lent; that the defendant was in Boston in July, 1893, in negotiation with Hosford trying to get his brother's money; Hosford said there was a certificate of 50 shares of stock standing in his name and asked him why he did not take it. The defendant told him, as he told Whitman, that he

did not consider it belonged to him, that he would not have it and would not have anything to do with it. Hosford said it was of value—was worth to the company $2500 and defendant told him he had better sell it and send the money down to Bangor and pay some bills the company owed down there. Hosford said it was in defendant's name and they could not sell it; and upon his solicitation Hosford brought out the stock book and asked defendant to indorse it, which defendant did and turned it into the company where, as he says, he supposed it belonged. He left the certificate in that condition with Hosford and it remained in possession of the company and was attached to the stub as late as September 15, 1893. The defendant also proved that the funds with which to pay off the indebtedness of the company to the treasurer R. W. Sawyer, were obtained by him at this time of Corbett and another stockholder through the intervention of Hosford.

For the purpose of showing the indebtedness of the insolvent corporation during the time of the defendant's alleged ownership of the stock, the plaintiff proved that the Agawam National Bank of Springfield, Mass., was a creditor of the insolvent corporation during the years 1892 and 1893; and further put in evidence a judgment recovered in the Supreme Judicial court, Penobscot county, by Bertha L. Whitmore, administratrix of the estate of Austin J. Whitmore, against the insolvent corporation rendered June 1, 1896, for $1852 damages. The damages thus recovered were a verdict against the insolvent company for the injuries received by Austin J. Whitmore, October 11, 1892, while employed in the mill of the insolvent company by the explosion of a digester in its mill; and he afterwards died from the effects of the injury. This execution was returned in no part satisfied. See *Whitmore* v. *Pulp Co.*, 91 Maine, 297.

Plaintiffs also offered the proof of debt filed by Bertha L. Whitmore in the insolvent court based upon the foregoing judgment. This evidence was objected to and admitted subject to the defendant's exception.

"Mr. Gillin—In order to protect our rights, we wish to show that the amount of indebtedness proved against this company in the

court below exceeded the amount of assets which have been returned.

Mr. Appleton—We object. We admit that the assets are not sufficient to discharge the liabilities."

The jury returned a verdict for the plaintiffs of $5000.

P. H. Gillin, Charles J. Dunn and E. C. Ryder, for plaintiffs.

The actual taking of shares in a corporation is equivalent to a subscription for, or an agreement to take them, under R. S., c. 46, § 47. *Barron* v. *Burrill*, 86 Maine, 72. The mere acceptance of shares of stock would have this effect. Thompson's Law of Corporations, § 1142; *Dayton* v. *Borst*, 31 N. Y. 435.

Hosford was the medium through which the stock was distributed. Neither the defendant, to whom the stock was issued, nor Hosford, through whose order the stock was distributed, paid anything for it. In other words: Hosford was simply a dummy who had no interest whatever in the stock and through whom a division of stock was made without payment. An attempt was made to show that a certain lease was a consideration for the sale of the stock to Hosford and Rice. If Hosford had received any consideration for the stock or had retained any part of it, this claim might have been set up with some expectation that it would be believed; but as a matter of fact, he never retained one single share of the 550 shares voted to him or his order. In other words: He gave away, in one day, $55,000 worth of stock which the defense attempts to show was worth that much or more and for which he never received any consideration whatever. The proposition is too improbable to be believed.

The stock ledger shows that certificate No. 2 was issued to the defendant and that it was afterwards, in July, 1893, surrendered by him. Book admissible to show defendant was, at one time, a stockholder. *Glenn* v. *Orr*, 96 N. C. 413; *Liggett* v. *Glenn*, 51 Fed. Rep. 381; *Hoagland* v. *Bell*, 36 Barb. 57; *Turnbull* v. *Payson*, 95 U. S. 418; *Webster* v. *Upton*, 91 U. S. 65; *Glenn* v. *Springs*, 26 Fed. Rep. 494; *Holland* v. *Duluth Iron Co.*, 65 Minn. 324; 1 Cook, Stocks & Stockholders, § 55.

It is not necessary that the certificate of stock be issued. 1 Cook, Stocks & Stockholders, § 192; *Barron* v. *Burrill*, 86 Maine, 66.

Rice, Hosford and others were promoters: *Bosher* v. *Richmond, etc., Land Co.*, 89 Va. 455, (37 Am. St. Rep. 879); *Ex-Mission Land & Water Co.* v. *Flash*, 97 Cal. 610; Alger, Law of Promoters, etc., § 1. The rule is that the relation of the promoter to the corporation and its members is one of trust. Buckley's Company's Acts, (5th Ed.) 543; *Yale Gas Stove Co.* v. *Wilcox*, 64 Conn. 101–119. What Hosford, Rice and others did, they did for the company. They had nothing to sell, and whatever sum that agreement or lease was worth, above the consideration paid for it, by the company, belonged to the company. Alger, supra, 28; *In re Ambrose, etc., Mining Co.*, 14 Ch. D. 398; *Ladywell Mining Co.* v. *Brookes*, 35 Ch. D. 400; *Pittsburg Mining Co.* v. *Spooner*, 74 Wis. 307, (17 Am. St. Rep. 149); *Plaquemines Tropical Fruit Co.* v. *Buck*, 52 N. J. Eq. 219.

The directors of a corporation occupy a position of the highest trust and confidence and the utmost good faith is required in the exercise of the powers conferred upon them. *Mallory* v. *Mallory Wheeler Co.*, 61 Conn. 131, 137; *E. & N. A. Ry. Co.* v. *Poor*, 59 Maine, 277.

A trustee or agent cannot purchase on his own account, what he sells on account of another; nor purchase on account of another, what he sells on his own account. Thompson's Corporations, § 458; *Parker* v. *Nickerson*, 112 Mass. 195; Ib. 137 Mass. 487.

The agreement between the Orono Company and Rice and others, shows that these parties were acting for the corporation afterwards to be formed, and the fact that within five weeks a corporation was formed, and that the lease provided for in the agreement was made directly to the Bangor company, shows that these parties were acting for the company; that the agreement was made for and in behalf of the company. Whether they are acting as promoters, or agents, is immaterial, because the same rules of law, which will apply to a promoter acting for a corporation, will apply to an agent also acting in the same capacity. In both

instances it is a position of trust. Thompson's Corporations, § 480; *Stowe* v. *Flagg*, 72 Ill. 329.

The Bangor company was to pay for the lease a yearly rental of $24,680, ten per cent upon the capital stock of the Orono company, also to deposit a certain amount annually for a sinking fund, and to build and equip, as part of the plant, a paper mill. The Orono company received for that lease a rental of $72,000, the sinking fund of $18,000, and a paper mill, which cost $100,000; so that for the lease, which the Bangor company held a few months over three years, the Orono company received $190,000, and also received back its original plant. If the position of the defendant is sustained, it paid for that lease, which it held a few months over three years, $240,000,—almost $100,000 more than its original capital stock.

The officers of a corporation are the trustees of the subscriptions to its stock, and hold them as a trust fund. And the trust cannot be defeated by any device short of actual payment in good faith. Thompson's Corporations, § 1606; *Wetherbee* v. *Baker*, 35 N. J. Eq. 501.

All agreements between the subscriber and a corporation, its officers, agents, promoters or members by which payment is dispensed with in whole or in part, or by which colorable or nominal payments are accepted, are void. Thompson's Corporations, § 1582; *Joy* v. *Manion*, 28 Mo. App. 55; *Ollesheimer* v. *Thompson Manufacturing Co.*, 44 Mo. App. 172.

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

The statute contemplates that there must be a transaction or contract with the corporation in accepting, subscribing for, or agreeing to take stock. *Libby* v. *Tobey*, 82 Maine, 405.

No person can be made a stockholder in a corporation and subjected to all the liabilities incident thereto, without his agreement or consent. He must either subscribe for the stock, take it, or agree to take it, or do some act which is tantamount to an acceptance of the stock before he becomes a stockholder.

A mere charge of shares of stock to a certain person, made upon the stock book of a corporation without some evidence that such

person admitted the charge to be correctly made, or sanctioned the same, cannot make him an owner thereof, so as to render him individually liable to the creditors of the corporation. *Fowler* v. *Ludwig*, 34 Maine, 455, 459.

One who never accepts, but refuses to accept any stock in a corporation, is not a stockholder even though the secretary enter his name in the books as such. *Mudgett* v. *Horrell*, 33 Cal. 25. There must be some evidence that he sanctioned the entry or admitted it to be correct. *Fowler* v. *Ludwig*, supra.

Plaintiff must prove: 1st. That the defendant was a stockholder in said insolvent corporation and the owner of 50 shares, and that he became such stockholder August 1, 1892; 2nd. That said stock was not "paid for bona fide in cash or in any other matter or thing at a bona fide and fair valuation thereof;" 3rd. That the Whitmore judgment based upon a tort and the claim of the Agawam National Bank are "debts" within the meaning of the statute contracted during the defendant's alleged ownership of such unpaid stock.

No stockholder is liable under c. 46, of R. S., § 47, for the debts of a corporation not contracted during his ownership of unpaid stock. The Whitmore judgment is based on a tort committed by the Bangor company October 11, 1892. Action was brought July 16, 1894, tried and a verdict for plaintiff January term, 1895, carried to law court and judgment rendered June 1, 1896. A tort is not a debt contracted. 2 Morawetz Corporations, § 880; *Bohn* v. *Brown*, 33 Mich. 257; *Child* v. *Boston, etc., Iron Works*, 137 Mass. 516, 519; *Cable* v. *McCune*, 26 Mo. 371. A tort claim cannot be a debt contracted by a corporation until it has been reduced to a judgment. *Zimmer* v. *Schleehauf*, 115 Mass. 52. A disputed claim for damages sounding in tort, is not a debt before it has been prosecuted to judgment. *Hill* v. *Bowman*, 35 Mich. 191; *Detroit, etc., Co.* v. *Reilly*, 46 Mich. 459; *Stone* v. *Boston & Maine R. R.*, 7 Gray, 539.

Under our insolvent law such a claim could not be proven against this insolvent corporation unless reduced to a judgment, and hence is not a debt until judgment is rendered.

Counsel also argued that the debt held by the Agawam National Bank was contracted after defendant's ownership of stock in this corporation. The note held by this bank, dated July 5, 1894, for $2500 was not a renewal of a previous note or notes, as argued by plaintiffs.

The defendant on July 14, 1893, transferred the certificate of stock in blank to put it back into the hands of the company. If this constituted an acceptance of the stock, the same act that made him a stockholder unmade him—and no debts were or could have been contracted by the company in that instant of time, and hence he cannot be held in this action.

The fifty shares of stock made out in defendant's name were paid for by an assignment of the agreement of August 1, 1892, to the Bangor company. That assignment, on that day, was worth 600 shares of stock of par value of $100 each—or in other words $60,000, "at a bona fide and fair valuation." *Libby* v. *Tobey*, 82 Maine, 405. The value of this manufacturing plant can be measured only by its net earning capacity. The earning power of property is the barometer of its value. The evidence shows that this plant had the power to earn and was actually earning the net profit of $6000 per month, or $72,000 per year, and had been earning at that rate for fourteen months prior.

Out of this $72,000 the Bangor Pulp & Paper Company had to pay to the Orono as rental and for sinking fund $30,850, leaving a clean profit to the Bangor of $41,150 per year out of which it could have paid a dividend of 12½ % on its own capital stock of $150,000, and had $22,400 left in its treasury for repairs, insurance and incidental expenses.

Can there be any doubt, then, that the assignment of such an agreement taken at a bona fide and fair valuation on August 1, 1892, was at least full payment for the 600 shares of stock issued to Hosford and Rice?—taking into consideration that this was a new mill, had been run and tested by actual operation for eighteen months,—with a trial balance showing profits as above stated,—was not the assignment August 1, 1892, with conditions as they existed on that day at its true value, worth the par value of the 600 shares voted as aforesaid?

The assignees cannot maintain this statute action until they have first administered the corporate assets and found out what the deficiency of such assets is. The deficiency measures a defendant's liability, and the extent of the liability cannot be ascertained unless the extent of the deficiency is first ascertained. A defendant cannot be legally held beyond his statutory liability. Supposing after an insolvent estate has been fully administered, it should appear that the deficiency of assets amounted to the sum of $500. The statute says, in such a case, that that sum would be the measure of the stockholder's liability; and by what process of reasoning, or by what considerations of justice, could a stockholder be made amenable to a judgment for any amount in excess of such sum? *Hewett* v. *Adams*, 54 Maine, 206.

Mr. Ryder in reply: The statute gives the assignee no power to bring suit, no additional rights which he did not have before at common law, but simply limits the right of the assignee to recover only when there is a deficiency of assets. The most that the assignee can be called upon to show, under the statute, is that there is a deficiency and that the deficiency equals the amount of unpaid stock. The plaintiffs offered to show this, and it was admitted by the defendant. *Terry* v. *Tubman*, 92 U. S. 156. In *re Glen Iron Works*, 17 F. R. 324, it was held that the corporation being insolvent, the money was not simply owing but presently due, and the opinion holds that no other question could have been presented. Recovery cannot be had without proof of insolvency, but this fact can be readily determined; it need not be determined in advance of the writ.

Mr. Gillin in reply: When the aggregate amount due upon shares from all the stockholders, solvent and insolvent, is not sufficient to liquidate the debts of the company, the assignee may bring an action against stockholders without there having been any previous assessment either by the corporation or by the court. See 3 Thompson on Corporations, § 3664, and the case *Boeppler* v. *Menown*, 17 Mo. App. 447, 455.

In the case of *Sanger* v. *Upton, Assignee*, 91 U. S. p. 62, the court says: "A separate action in law in each case against stock

holders is much to be preferred as against a bill in equity jointly against all the stockholders, it is cheaper, more speedy and more effectual." See also *Potts* v. *Wallace*, 146 U. S. p. 689, to the point that "no assessment is necessary, and it becomes a question for the jury whether the whole of the unpaid subscription was required to pay debts of the corporation or not," p. 700–1.

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

EMERY, J. The Bangor Pulp and Paper Company was a corporation under the laws of Maine and doing business in this State. Certain of its creditors believing it to be insolvent asked the proper court of insolvency to so adjudicate, and to cause its assets to be administered under the direction of that court. The corporation, upon that petition and regular proceedings under it, was on the 4th day of June, 1896, adjudged to be an insolvent debtor, and on the same day the usual warrant was issued for the sequestration of its assets. On the 25th day of the same June the plaintiffs were appointed and qualified as assignees of the corporation under the insolvency proceedings. They received the usual instrument of assignment of the debtor's estate and entered upon the duty of administering it. On the 18th of June, 1897, they brought this action at law against the defendant to recover the par value ($100) of fifty shares of the capital stock of the corporation alleged to have been taken by the defendant and not paid for.

The plaintiffs claim to recover, independent of any statute creating a liability of the stockholder for debts of the corporation, upon the ground that the defendant stockholder was a debtor to the corporation for the unpaid stock, and that this debt was an asset of the corporation which they could recover as a debt due the corporation like any other debt due it.

It appears, however, from the uncontradicted evidence, that if the defendant did take the fifty shares of stock as alleged, it was under an agreement with the corporation that the shares were fully paid for by the assignment of a lease of a business

plant to the corporation by the defendant and his associates. The lease was assigned to the corporation and the board of directors voted to accept such assignment in full payment for these fifty and other shares. There is no evidence of any intent to defraud the corporation or its stockholders by this transaction. So far as appears, the parties believed that the assignment of the lease was a sufficient consideration for the shares, and there was considerable evidence that it was in fact a sufficient consideration.

Assuming, what was not disputed, that the directors had the powers of the corporation in this respect, the defendant did not owe the corporation anything for the stock. As between those two parties the stock was paid for. The corporation had no claim against him on that account, at least until it rescinded the contract and restored the property received in exchange for the stock, and this does not appear to have been done. *Handley* v. *Stutz*, 139 U. S. 417; *Foreman* v. *Bigelow*, 4 Cliff. 508.

But the plaintiffs also claim, and rightly, that the creditors of the corporation are not bound by the contract above described and that they, as representing the creditors, have rights in respect to these shares superior to the rights of the corporation itself. They invoke the principle of law expressed in the statute, R. S., ch. 46, § 45, that the capital stock of any corporation is and stands for the security of all its creditors; and that no payment or agreement for shares of the capital stock shall be deemed a payment as against creditors, unless bona fide made in cash, or in some other matter or thing, at a bona fide and fair value thereof.

This principle enables the creditors of the corporation to go behind even the honest opinion of the directors of the corporation and to question the actual sufficiency of the consideration paid for the shares taken by the defendant. By virtue of §§ 46 and 47 of the same chapter, the plaintiffs, being "persons appointed to close up the affairs of an [this] insolvent corporation," may maintain an action at law against the defendant for that purpose, and to recover any deficit in the actual sufficiency of the consideration. The defendant thus may be liable to pay to a creditor of the corporation or to the persons appointed to close up the affairs of the

corporation a greater sum, not exceeding the par value of his shares, than he was liable to pay to the corporation itself.

This liability to creditors, however, is not a direct primary liability like that to the corporation upon subscribing for its shares. The insolvency statute alone does not authorize assignees to enforce it. It is a secondary liability somewhat like that of a guarantor. *Hicks* v. *Burns*, 38 N. H. 141. The authority to enforce it is conferred by the statute defining it. Sections 46 and 47, supra. The creditor of the corporation cannot at once upon the maturity of his debt proceed against the delinquent stockholder. He must obtain a judgment against the corporation, and only in case the judgment remains unpaid can he maintain an action at law or in equity against the stockholder for his individual claim, and then only for the amount remaining unpaid on the judgment. (Section 47.) The stockholder cannot be considered delinquent or in default until the creditor has recovered and holds such an unpaid judgment. The right of action against him then first accrues. *Libby* v. *Tobey*, 82 Maine, 397. The nature of the liability is the same when sought to be enforced by receivers, trustees or other persons appointed to close up the affairs of an insolvent corporation By the express terms of the statute (section 47) the liability is limited to "the deficiency of the assets" of the insolvent corporation. As the individual creditor must first have the fact and amount of his unpaid debt, that is, the fact and amount of the default of the corporation to him, judicially ascertained and adjudicated before he can move against the stockholder,—so receivers, trustees, etc., must first have the fact and amount of the deficiency of the assets that is, the fact and amount of the default of the corporation to all its creditors, judicially ascertained and declared before they can move against stockholders. In either case there is no right of action against the stockholder until the corporation makes default, and the amount of the default is judicially established. The statute limitation of the right of action against the stockholder does not begin to run in favor of the stockholder until that has been done.

There is usually no question in what court the individual

creditor may proceed to establish the fact and amount of the default of the corporation to him, but it may be an important question in what court, the receivers, trustees, etc., should proceed to establish the fact and extent of the default of the corporation to all its creditors, or the fact and amount of the deficiency of the assets.

In this case, the creditors, instead of pursuing their individual remedies, or invoking the equity powers of this court, elected to have the estate of the insolvent corporation administered in the court of insolvency under the insolvency statutes. That court lawfully acquired jurisdiction of the parties and of the subject matter. The plaintiffs derive their powers of such administration from that court and those statutes, and are accountable to the corporation, its stockholders and its creditors in that court for the faithful and efficient exercise of those powers. What assets they are chargeable with, and what claims they shall recognize as liabilities of the corporation are questions primarily determinable by that court. It follows that the existence and extent of any deficiency of the assets of the corporation are likewise primarily determinable there.

This determination, however, must be once for all, and hence only after a full administration of the estate of the corporation. The question of the amount of the deficiency of the assets, which is one measure of this secondary liability of the stockholder, evidently cannot be litigated anew and perhaps with a different result in the case of each stockholder. That amount must be the same as to all delinquent stockholders. The only difference in the amount of their several liabilities is in the amount unpaid on their stock. It follows that the fact and amount of the deficiency of the assets of the corporation must be determined finally in and by the court of insolvency before any action at law is begun against the stockholder on his secondary liability. This determination can be made only upon the settlement and approval of an account by the assignees showing a complete administration of the assets by their reduction to cash, and showing the net amount available for the payment of claims. If, at that date, claims have been

proved and allowed in excess of that amount, the fact and amount of the corporation's default, as to those creditors at least, are then ipso facto judicially ascertained and declared. It is at the date of that decree of approval by the insolvency court that the right of action against the stockholder upon his secondary liability to such creditors accrues, and the two years limitation (section 47) upon the right of action begins to run in his favor. *Scovill* v. *Thayer*, 105 U. S. 143; *Hawkins* v. *Glenn*, 131 U. S. 319.

To prevent possible misconception of the scope of this opinion we iterate that we are only considering the case of the secondary liability of a stockholder, who has paid to the corporation the agreed price for his stock and is not indebted to the corporation itself for any part of the price, but who is summoned to answer to creditors for the difference between the par value of his stock and what he actually paid for it. We are not considering at all the primary liability of a stockholder to the corporation or its successors, the assignees, upon his stock subscription. That liability and its enforcement are governed by other rules and principles.

The position of insolvency assignees in respect to a right of action against delinquent stockholders is analogous to that of an administrator who has paid a creditor in full under a mistaken impression that the estate was solvent. In such case, if the estate afterward proves to be insolvent, the administrator is entitled to recover back from the creditor a pro rata share; but an action cannot be maintained by him for that purpose until the existence of the insolvency of the estate, and its extent have been ascertained and adjudicated in the probate court in which the estate is being administered. *Morris, Admr.*, v. *Porter*, 87 Maine, 510. The plaintiffs' position is also somewhat analogous to that of the receiver of a national bank who is closing up its affairs under the authority and direction of the Comptroller of the Currency, according to the provisions of the National Bank Act. Such receiver cannot maintain any action against a stockholder to enforce his liability, until the Comptroller has determined the existence and amount of the deficiency of assets, and made an assessment therefor on the stockholders. *Kennedy* v. *Gibson*, 8 Wall. 498. Indeed,

the adjudication of the Comptroller upon these questions is conclusive. *Casey* v. *Galli*, 94 U. S. 673.

We do not mean, however, that the insolvency court in this case should apportion the deficiency of assets and make assessments on delinquent stockholders. The liability of the stockholder in this case is not pro rata as in the case of National Banks, but is absolute. As soon as the fact and amount of the deficiency of assets are ascertained in that court, there is a right of action in this court against any delinquent stockholder. That other delinquent stockholders are not also sued is immaterial under our statute.

In this case, there is no evidence that the plaintiffs before bringing this action had proceeded so far in the administration of the estate in the insolvency court, that the existence and extent of a deficiency of the assets had been authoritatively ascertained and declared in that court. The mere fact that the corporation had been declared insolvent at the instance of the creditors is not proof of the existence of any actual deficiency of assets upon the settlement of the estate. An estate at first supposed to be insufficient, and hence subjected to the jurisdiction of the insolvency court, may under prudent administration turn out to be sufficient to pay all proved claims in full.

The plaintiffs urge, however, that they offered such evidence, but that the defendant objected to it and admitted that there was a deficiency of assets. We find that the following occurred at the trial: The counsel for the plaintiffs offered the records of the insolvency court in the case of the Bangor Pulp and Paper Co., insolvent debtor, to show the insolvency of the company and "to show the amount of the assets." The counsel for the defendant admitted the corporation to be insolvent but objected "to the amount of assets as immaterial." The plaintiffs' counsel did not press the matter nor ask for any ruling by the court. A little later in the trial the plaintiffs' counsel said: "In order to protect our rights, we wish to show that the amount of indebtedness proved against this company in the court below (the insolvency court) exceeded the amount of the assets which have been returned."

The defendant's counsel objected, and said: "We admit the assets are not sufficient to discharge the liabilities." The court did not rule. The plaintiffs' counsel did not insist, but seemed to be content with the admission.

There was no admission, nor offered evidence even, that the estate of the insolvent corporation had been settled in the insolvency court, and that the existence and extent of a deficiency of the estate had been there judicially ascertained and declared. The admission and the offered evidence went only to the single point that the corporation was in fact insolvent, that its assets would not in fact meet its liabilities. There was no suggestion that there had been any action by the insolvency court in the premises, or that the assets had been so far realized, or even appraised and accounts so far settled, that the extent of the deficiency of assets was ascertained or could be ascertained before this action was begun. This however was the essential pre-requisite to the maintenance of the action. No right of action would accrue until then.

The verdict must be set aside and the case sent back for the production of the requisite evidence, if any, of "the deficiency of assets," judicially ascertained prior to the beginning of this action.

Motion sustained.

LEWIS OUELETTE *vs.* FRANK PLUFF.

ALEXANDER LAPOINTE, and others, *vs.* SAME, and Wood.

Androscoggin. Opinion July 31, 1899.

Lien. Action. Judgment. R. S., c. 91, §§ 29, 38.

Where a person performs labor in cutting cord-wood and lumber (logs) from a tract of land and sawing and piling the same, he may, in an action to enforce a lien for his services, have a single in rem judgment against both the wood and the lumber, although the laborer's lien on lumber and that on cord-wood were established at different times by different legislatures; the two liens in the circumstances of the case, becoming amalgamated and in effect one.

Where three men were employed to work together in clearing the growth from a parcel of wood-land, each to have seventy-five cents per cord for such

amount as should be cut by himself, the men working separately but piling the wood and lumber indiscriminately together on the land under the direction or with the assent of their employer, a joint action may be maintained by the three, personally against the employer and in rem against the wood and lumber cut by them, for their services. The defendant admits his liability by consenting to a default if the lien be not maintained.

AGREED STATEMENT.

This was an action of assumpsit upon an account annexed as follows:

"Frank Pluff to Alexander, Ernest and Charles Lapointe, Dr.
For cutting 184 19-24 cords of wood and lumber in 4 foot lengths on lot of land above described at $.75 per cord, $138.59."

The officer was directed by the writ to attach "the goods and estate of Frank Pluff, of Lewiston, in our said county of Androscoggin, and particularly and especially 224 tiers of hard and soft, cleft and round, cord-wood and pine bolts or lumber, containing about 184 19-24 cords, cut in length of 4 feet, and each tier having 3 sticks therein marked on the scarf or end with a red chalk the letter H. the same being situated on a lot of land owned by one Annie H. Garcelon, situated in said Lewiston and bounded as follows, to wit: Lot No. 11 and part of Lot No. 10 in said Lewiston, more fully described in deed from said Annie H. Garcelon to R. C. Boothby, dated Feb. 20, 1897, recorded in Androscoggin County Registry of Deeds, book 173, page 121, which deed and record are hereby made a part of this description, and which said lot, is known as the Daniel Holland wood lot, that part of said premises in which the wood is piled being more particularly known as the Larrabee lot and lying South-easterly of Emma J. Read's farm. And which said wood belongs to one R. C. Boothby, of East Livermore, in said county, or to persons unknown."

The declaration is in the usual form of a declaration upon an account annexed, and further alleges that "this action is brought under §§ 29 and 38 of chapter 91 of the Revised Statutes of the State of Maine, as amended, for the purpose of enforcing the lien of said Alex., Ernest and Charles Lapointe upon said cord-wood and lumber for the amount due for their personal services, in cut-

ting said cord-wood under contract with the said Frank Pluff, who is not the owner thereof, but which said cord-wood is owned by the said R. C. Boothby, or parties unknown."

The writ was dated the tenth day of December one thousand eight hundred and ninety-seven, and was made returnable to the January term of the Municipal Court for the City of Auburn. The officer's return stated that on the twenty-ninth day of December, A. D. 1897, he attached "224 tiers cord-wood and pine bolts marked the letter H containing about 184 cords and piled on land of Annie H. Garcelon and known as the Daniel Holland wood-lot and situated in Lewiston in said County, and South-easterly of the farm of Henry A. Read, and said wood and bolts belong to R. C. Boothby or parties unknown. This suit is brought to enforce the plaintiffs' lien claim for cutting and piling said wood and bolts."

At the return term of said writ, R. C. Boothby, the owner of the property on which the lien is claimed, voluntarily appeared and became a party to said suit. The said Pluff and Boothby pleaded the general issue, and the said R. C. Boothby also filed a brief statement denying that any lien had attached to the property attached on said writ, and that if the plaintiffs ever had any lien for their personal services upon the property attached on said writ, said lien is waived by the plaintiffs.

The judge of the Municipal Court, upon trial, rendered judgment in favor of the plaintiffs for one hundred and nine dollars and fifty-five cents ($109.55), and adjudged that the plaintiffs had a lien therefor upon the wood and lumber described in said writ. The said Boothby seasonably appealed to this court, sitting below at nisi prius. This action was one of sixteen actions now pending by different plaintiffs, to enforce alleged liens upon wood cut upon the same premises described in this writ.

For the purposes of this report only, it was agreed that the facts are as follows: "But it is expressly stipulated by all parties hereto that this agreement as to the facts shall not be construed to be an admission of such facts binding in any subsequent proceeding in any other of the sixteen suits above named, and said facts are agreed upon for the purposes of this report only.

"It is agreed that R. C. Boothby, who became a party to said suit, as aforesaid, was the owner of the wood and lumber upon the premises described in said writ, and that he contracted with said Pluff to cut the same. That Pluff hired the plaintiffs to cut upon said wood lot, and agreed to give each of them seventy-five cents a cord for cutting, sawing and piling the wood and lumber, and that the plaintiffs together cut the number of cords specified in their writ, and piled the same in two hundred and twenty-four piles or tiers, as therein stated. Before the plaintiffs began to cut, Pluff assigned to the plaintiffs a certain definite strip of the wood lot upon which plaintiffs were to cut, and upon which the 184 19-24 cords were afterwards cut. In cutting upon said strip, each plaintiff worked by himself upon separate trees, and not upon the same trees, except that in sawing up the pine logs two plaintiffs worked together with the cross-cut saw, but the wood and bolts so cut by each plaintiff were piled by each together with that cut by the other plaintiffs into the 224 piles, and all were marked in the manner described in the writ. A portion of said piles consisted of ordinary round and cleft, hard and soft wood, cut in lengths of four feet for firewood; the remainder of said piles consisted of pine logs sawed into lengths of fifty-two inches, sixty-eight inches and seventy-two inches, called bolts, and these bolts were left in the round log suitable for conversion into manufactured lumber. And if the fact is in the opinion of the court admissible, it is agreed that said logs were so sawed to render them suitable for manufacturing into box boards, and that they were sold for that purpose. None of the bolts were cut in lengths of four feet.

"It is further agreed that the attachment of said property on this writ was made within thirty days after plaintiffs ceased to perform any labor upon the wood and lumber in question, and that the two hundred and twenty-four piles attached by the officer, marked H. was the same wood cut by the plaintiffs in the manner aforesaid. The owner of the wood and lumber, R. C. Boothby, paid Pluff for the cutting, and plaintiffs have not been paid.

"If upon the foregoing facts the law court is of the opinion that the plaintiffs are entitled to judgment against the property

attached, the cause is to stand for trial; otherwise, judgment shall be rendered, against the defendant Pluff alone for the amount found due by the judge of the court below, and not against the property attached.

It is agreed that four other suits, prosecuted by various plaintiffs against said Pluff, Nos. 545, 549, 553 and 554, on the docket of this court for Androscoggin county, shall be continued without costs to abide the decision of the law court upon this report."

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

The only objections which can be raised under this report, are first, that these men worked together, when the statutes say it must be personal labor. Second, that the action purports to be under the two sections of the statutes. Third, that there was cord-wood and pine bolts. To the first objection we say that they were partners, and under the contract, one person. To the second objection we say that while this is true, the amounts of wood and bolts respectively can be definitely ascertained. So that if the lien is perfected, the owner can redeem from either or both; and so far as the maintenance of the lien is concerned, the apportionment between the wood and bolts does not present the slightest difficulty. Third. There is a lien for each. Each can be definitely ascertained. And proper judgment can be apportioned between them. If the court should decide that both could not be maintained, then the case must of necessity be remanded for trial, because the plaintiffs have the right to amend the writ at any time before final judgment. See *Sands* v. *Sands*, 74 Maine, 239, and cases cited.

Lien statutes remedial: *Kelley* v. *Kelley*, 77 Maine, 135; *Murphy* v. *Adams*, 71 Maine, 113 (118); *Spofford* v. *True*, 33 Maine, 284. Apportionment of judgment: *Stratton* v. *Jarvis*, 8 Pet. 4.

John A. Morrill, for Boothby, owner.

The two enactments upon which the plaintiff relies are independent statutes. Section 29 gives a lien upon cord-wood for the labor spent in cutting it. It does not give a lien upon both cord-wood and logs for the labor spent in cutting the cord-wood.

Section 38, in like manner, only gives a lien on logs and lumber for the labor spent in cutting such logs and lumber, but it does not give a lien upon cord-wood and logs for the labor spent in cutting the logs.

Any judgment which can be rendered for the entire amount of this claim against the property attached will include property upon which no lien exists by § 29; and will likewise include a claim for labor performed upon property other than that upon which the lien is given by that section; likewise, it will include property upon which no lien exists by § 38, and will also include a claim for labor performed upon property other than that upon which the lien is given by that section. A judgment under either section must, under the facts stated in the report, unite lien and non-lien items, contrary to the decisions of this court. *Coburn* v. *Kerswell*, 35 Maine, 126; *McCrillis* v. *Wilson*, 34 Maine, 286.

It is clear that the plaintiff might have easily ascertained how many piles and cords of cord-wood he had cut, and made a lien claim therefor under § 29. And likewise under § 38, he might have made a claim for the exact number of piles and cords of the logs which he had cut, and that is the only legal way in which his lien could be enforced. The log owner has the right undoubtedly to redeem from either lien at his option. The two liens cannot be intermingled and deprive him of that right. But each lien must be enforced, and the judgment must be so rendered that he can exercise his option to redeem one or both, as he may see fit, and to leave the plaintiff to enforce his judgment against one class of property or both, as he sees fit.

Having intermingled in the claim, under either section, property for which he has a lien under each section with property for which he has none, and likewise, having claimed a lien upon, and attached property upon which no lien is given by one section or the other, without any discrimination, the plaintiff is not entitled to a lien judgment against the whole property; and no valid lien judgment for his entire claim can be rendered.

It is manifestly impossible in Lapointe's case to render any valid judgment in rem. The statute gives a lien to a laborer for his

personal services upon the property upon which he labored. *Reddington* v. *Frye*, 43 Maine, 578; *Coburn* v. *Kerswell*, 35 Maine, 126; *McCrillis* v. *Wilson*, 34 Maine, 286. There is no lien for labor performed by others. *Hale* v. *Brown*, 59 N. H. 551, 558.

There is no joint lien given by the statute. These plaintiffs should have kept their respective cuttings separate, and marked them with individual marks, if necessary, and then each could have maintained his action on his own claim, and the owner could have redeemed from either claim, as he has the undoubted right to do at his option.

The plaintiffs have so intermingled the wood and logs cut by each that the identity of their respective cuttings has been destroyed, and this intermingling has been caused by the action of the plaintiffs alone, without any participation express or implied on the part of the owner of the property, and accordingly the plaintiffs must stand the loss. *Spofford* v. *True*, 33 Maine, 283–295.

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

PETERS, C. J. Two sets of claims and two cases are here presented together. In one case, *Ouelette* v. *Pluff*, the following facts are agreed upon: One Boothby, being the owner of a tract of land, contracted with Pluff to take the growth from it, the growth consisting of both hard and soft wood fitted for cord-wood only, and some short pine fitted for bolts from which shooks or heading could be manufactured. The plaintiff was hired by Pluff to help clear the tract, and he cut and piled 47 3-4 cords and piled the same in 41 piles, under an agreement that he should be paid for his labor at the rate of seventy-five cents per cord for all that he should cut and pile, no part of which payment has he ever received. He sues Pluff and seeks in the ordinary process to establish a judgment of lien against the property for his wages. The owner contends that no lien for the laborer's wages attaches against the common property, that is against the wood and the logs together, for the reason that the lien for cutting cord-wood and

that for cutting logs are two distinct and independent liens, granted at different times by separate enactments of the legislature.

The argument is that the owner has the privilege of redeeming the product cut under one lien without redeeming that cut under the other. If that be so, the purpose can be effectuated without any loss to the laborer by giving him separate judgments against the wood and lumber for the amounts respectively due on each. The kinds are easily separated and the case finds that the bolts and cord-wood are in separate piles. The idea of a double judgment, or a judgment in two parts, is sustained in the case of *Oliver* v. *Woodman*, 66 Maine, 54, where a judgment was allowed against different lots of logs separately according to different ownership. And the court there says: "The plaintiff's claim for services rendered upon the logs by contract with Woodman is entire and has been rightfully brought as such. But it does not follow that the judgment in rem must be against all the logs jointly. On the contrary, it must be apportioned upon the logs of the several owners according to their respective interests. This will do exact justice to all parties as in cases of salvage." The court in the same case further says: "Woodman having been defaulted, the plaintiff will be entitled to judgment against him for $379.05 and interest from the date of the writ, and a judgment in rem for that amount against all the logs, to be apportioned among the several parcels thereof according to the quantity of each owner, ... and costs to be apportioned in the same manner." So in the case at bar, judgment, if need be, could be awarded against all the materials cut and removed from the soil, to be apportioned upon the wood and lumber according to the quantity of each kind upon which the plaintiff's labor was expended.

But we are of opinion that, on the facts of this case, a single lien exists upon the wood and lumber taken together. The two liens became amalgamated,—became one. The circumstances require such a conclusion. The cuttings were at the same time, promiscuously on the same tract, at the same price, for the same party, and without any notice to the laborer of any unusual conditions. He could only see that he was engaged with others in

clearing a tract of land, cutting down the growth as he came to it, presumably not even deciding whether a tree as he felled it would go into wood or into lumber, leaving that question for the owner or surveyor. There is nothing indicating any selection of trees to be cut, but the entire growth was taken as the work proceeded. The contract with the laborer was simple and unqualified, that he was to go into the woods and cut down the growth as he came to it. One statute gives him a lien on pine, and another on cord-wood, and between the two he had a lien on all that was cut. As the owner made no distinction until the laborer's services were received and enjoyed by him, he should not be permitted to make any now. The idea of any desire to redeem any lien upon one sort of the cuttings and not upon another is the merest suggestion; although there is really an opportunity for the owner to do so, if desirable, as shown before.

Suppose a lien be provided by the legislature for a laborer who is engaged in cutting pine timber, and a lien is afterwards given for labor in cutting spruce, and still afterwards another for labor in cutting cedar and hemlock. Are there in such a case three different and separate liens, or is there but a single lien for all the work done on all the varieties of lumber named? It would no doubt be regarded as an extension of the lien first granted, an enlargement of its application merely. So here, under the circumstances of this case, we think there is only one lien affecting this transaction, while the result might not be the same under different conditions and relations.

An in rem process like the present is really an equitable procedure, largely governed by equitable principles. In *Shaw* v. *Young*, 87 Maine, 271, EMERY, J., says, speaking of in rem proceedings: "Courts will now construe them liberally to further their equity and efficacy when it is clear that the lien has been honestly earned, and the lien claimant is within the statute." Lord Eldon said in a case: "The difficulty must be overcome on this principle, that it is better to go as far as possible towards justice than to deny it altogether." The facts of this case make a strong appeal in behalf of the laborer. This is only one case of quite a number

in waiting, and for all the services of all the laborers not a cent has been received.

In the other case, (*Lapointe et als.* v. *Pluff and property*,) the same question arises as in the preceding case, and also an additional question. In this case there are three plaintiffs instead of one. The three were hired by Pluff to cut upon a specified portion of the lot in question, Pluff assigning the parcel of territory upon which they were to jointly operate, agreeing to give each of them seventy-five cents per cord for the work done by him, and the three of them cut, sawed and piled two hundred and twenty-four piles of wood and lumber in all. The plaintiffs worked separately, but piled their cuttings together. The defense contends that there were three contracts instead of one, the plaintiff's contending there was but one. While the transaction has some features of a separate contract we think it may fairly be construed as a joint contract. To be sure, each was to be paid by Pluff for what he should do himself, but that would be a fair division of the proceeds of their labor even if the contract were a joint one. They jointly undertook a specified piece of work on a specified tract, piling their cuttings together undoubtedly under the direction of their employer. The plaintiffs had no means of identifying what was cut by each and put into the common piles, and the owner must either by design or acquiescence have known it to be so.

The employer Pluff cares nothing for his personal liability, for the case requires his default provided the property be not held. As to the property the process is no more or less than an equitable proceeding, and in equity there is no objection to joining homogeneous claims in one process. To construe the contract of the plaintiffs as a joint contract can work no wrong or injury to any party. It is our opinion that the plaintiffs are entitled to recover both against the person sued and the property attached.

By the agreement of submission the cases are to stand for trial.

Actions to stand for trial.

CITY OF ROCKLAND *vs.* LUCY C. FARNSWORTH.

Knox. Opinion August 21, 1899.

Tax. Assessment. Evidence. Agent. R. S., c. 6.

(1) Assessors of taxes are not agents of the town, but public officers. Their acts in omitting to assess a tax against an individual are but expressions of their opinion, and not only do not conclude the town as to the fact of residence, but are not entitled to be considered as evidence upon that question.

(2) *Held;* that an instruction to the jury to the effect that no weight should be given to such acts of the assessors is correct.

(3) In an action to recover a tax upon defendant's personal property, which was resisted upon the ground that defendant was not an inhabitant of Rockland, the plaintiff city, on April 1, 1894, the year for which the tax was assessed, it appeared that at the trial the defendant introduced, without objection, the assessor's records from 1885 to 1893 inclusive, from which it appeared that for those years she was not taxed as an inhabitant of Rockland. *Held;* that this evidence, if objected to, should have been excluded.

ON EXCEPTIONS BY DEFENDANT.

This was an action of debt to recover a tax assessed upon defendant's personal estate as an inhabitant of the city of Rockland, in the year 1894, for the sum of twelve hundred and sixty dollars, with interest from the date of the writ. The tax assessed upon defendant's real estate in Rockland had been paid prior to the commencement of the action. The plea was the general issue, with a brief statement denying that she was an inhabitant of Rockland at the time of the assessment of the tax, and setting forth that she was an inhabitant of the town of Camden in the same county, and that she had been such inhabitant since some time in the month of March, 1885, at which time she claimed to have left Rockland and taken up her abode in Camden and then became an inhabitant of that town.

In the record books and lists of the assessors of Rockland for the years from 1885, to and including the year 1893, which were introduced in evidence, it appeared that the real estate of the defendant in Rockland was assessed and taxed to her as a non-resident; and

that during all of said years her name was entered on the list of non-residents and designated therein as a resident of Camden.

The counsel for the defendant, among other requests, asked the presiding judge to instruct the jury as follows:—

7th. The statute of this State makes it the duty of assessors of towns and cities "to assess upon the polls and estates in their towns all town taxes and their due proportion of any state or county tax," and "to make perfect lists thereof under their hands," and also "to make a record of their assessment and the invoice and valuation from which it is made." [Ch. 6, §§ 97, 98, 99 and 100.]

"Therefore, if you (the jury) find, as matter of fact, that the assessors of Rockland, in making the lists and record of assessments for the year 1885, entered the name of the defendant on the list of non-resident tax payers of Rockland and that yearly from and after that date till after April first, 1893, they continued to so enter her name and assess a tax upon her as such non-resident and not as an inhabitant, the plaintiff city is now estopped from contending that she was an inhabitant of Rockland during that period of time, and the plaintiff must now satisfy you (the jury) that she returned to Rockland at some time after April first, 1893, and before April first, 1894, with an intention of again becoming an inhabitant of Rockland, because a fact admitted by a municipal corporation through its officer, duly and properly acting within the scope of his authority, binds the corporation."

This requested instruction was not given, and in respect to said requested instruction the presiding judge instructed the jury as follows:—

"Well, no tax upon her property can be collected for those years because the assessors did not assess one against her, wherever her domicile may have been; further than that, the action or non-action of the assessors of Rockland has no effect in this case whatever. The city of Rockland is not estopped by the action of a tribunal constituted by law for the purpose of the distribution of the burdens of taxation; the assessors of Rockland are not the agents of Rockland; the city of Rockland is not the principal in

any sense, and is not liable for any action of the assessors. This question is one for your determination; and in its determination you do not need the action or advice of any other tribunal, however constituted. The question for your determination is a simple one, whether or not on this day which I have named, Miss Farnsworth was liable to have her personal property taxed in this city. Whether the assessors did their duty during these years from 1885 to 1893, inclusive or not, I do not care and you should not care. Whether they believed that she resided in Camden, or in Union, or in Thomaston, or Rockland, makes not a whit difference in this case. It is for you to decide whether, under the rules which I have given you, she did live in Rockland, have her domicile in Rockland or not, on the first day of April, 1894."

To this instruction and refusal to instruct the defendant excepted.

The charge of the presiding judge to the jury in full was made part of the case.

The verdict was for the plaintiff.

Washington R. Prescott, city solicitor, for plaintiff.

The exceptions do not show how or in what manner the defendant was injured, if she was injured; how or in what manner she was induced to act upon the alleged conduct of the assessors, or how she will be injured if the rule of estoppel be not applied. The exceptions show no error made by the presiding judge. *Pullen* v. *Glidden*, 68 Maine, 567.

If the defendant was in reality an inhabitant of the town of Camden during the years from 1885 to 1893, it would be immaterial to her whether she were taxed in Rockland during those years as a non-resident or not. If she were a non-resident in Rockland during those years and were taxed as a resident, she would not be injured by such action of the assessors, as that action would be simply void. But she was taxed as a non-resident, and the case now before the court does not show that the defendant was injured and does not claim even that the defendant was injured, and does not allege in any manner that the defendant was influenced by the action of the assessors; in fact, it is her claim that they did what

was right, and therefore there should be no application of the rule of estoppel. See *Piper* v. *Gilmore*, 49 Maine, 149.

The general rule of law is that a party will be concluded from denying his own acts or admissions, which were expressly designed to influence the conduct of another, and did so influence it, and when such denial will operate to the injury of another. *Piper* v. *Gilmore*, 49 Maine, 149; *Wood* v. *Pennell*, 51 Maine, 52; *Stanwood* v. *McLellan*, 48 Maine, 275; *Starrett* v. *Rockland F. & M. Ins. Co.*, 65 Maine, 381, in which the court says: "In order to constitute an estoppel by these acts of the officers of the company it must appear that the plaintiff has been thereby induced to change his position. The conduct of the plaintiff was not changed by these acts. He predicated no action upon them, made no payments, assumed no liabilities, nor was he in any way prejudiced by or in consequence of these acts. There is therefore no estoppel."

Town officers possess a two-fold character. In part they are the officers, agents and servants of the town, and bind the town by their acts, when done within the scope of their duties. And as to other acts done and performed by them, they are governed by statutes of the State, are independent public officers, the city or town having no control over them in the performance of these duties. As to this latter class of acts, the town is not bound and they are not the agents or servants of the town. They are public officers performing public duties which the State has imposed upon them.

Selectmen are clothed with this two-fold character, as are also overseers of the poor and health officers. The court say in *Mitchell* v. *Rockland*, 52 Maine, 123: "The principle seems fully established that a town is not liable to an individual for its neglect or omission to perform or its negligent performance of these duties, which are imposed upon all towns, without their corporate consent and for public purposes, unless the right of action be conferred by statute." *Brown* v. *Vinal Haven*, 65 Maine, 404; *Bulger* v. *Eden*, 82 Maine, 357, and cases cited; *Alger* v. *Easton*, 119 Mass. 77, and cases; *Maximillian* v. *Mayor*, 62 N. Y. 163.

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

A fact admitted by officers of a municipal corporation, duly and properly acting within the scope of their authority, is binding upon the corporation. 1 Dillon, Mun. Corp. 238.

The assessors are the agents and servants of the city. *Westbrook* v. *Bowdoinham*, 7 Maine, 365; *Harpswell* v. *Phipsburg*, 29 Maine, 315, in which the court use the following language: "What is done by the officers of a town, within the scope of their authority, must necessarily affect the town in the same manner as if done by the town itself." The uniform line of authorities holds that the acts and admissions of selectmen, overseers of the poor and assessors are all admissible in evidence. The question is res adjudicata in this state. *Weld* v. *Farmington*, 68 Maine, 306; *Fairfield* v. *Old Town*, 73 Maine, 576. See also *Thornton* v. *Campton*, 18 N. H. 20; *Leach* v. *Tilton*, 40 N. H. 473. The instruction given did not permit the jury as in *Weld* v. *Farmington*, supra, to weigh the evidence introduced and showing defendant resided in Camden for the nine years previous to 1894. The jury were in substance told to disregard this important evidence. The instruction given was an expression of opinion as to its weight and value in evidence.

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

STROUT, J. April 1st, 1894, a tax was assessed to defendant, as an inhabitant of Rockland, upon her real and personal estate. She paid the tax upon real estate, but resisted the tax upon her personal property, on the ground that she was not an inhabitant of Rockland, but was an inhabitant of Camden, and was not taxable for personal property in Rockland.

This action is brought to recover that tax.

The assessors' records from 1885 to 1893, inclusive, were introduced in evidence, apparently without objection, and from them it appeared that during those years defendant's real estate in Rockland, "was assessed and taxed to her as a non-resident, and that

during all of said years her name was entered on the list of non-residents, and designated therein as a resident of Camden." Counsel for defendant claimed that thereby the city of Rockland was "estopped from contending that she was an inhabitant of Rockland during that period of time," and that plaintiff must show "that she returned to Rockland at some time after April 1st, 1893, and before April 1st, 1894, with an intention of again becoming an inhabitant of Rockland," and asked an instruction to that effect, which was refused, to which exception was taken.

It is also claimed that the instruction given the jury withdrew from their consideration this evidence, to which also exception is taken.

Assessors of taxes, though chosen by the city or town, are public officers. Their duties are imposed by law and clearly defined by statute. In the discharge of those duties, they are not subject to the direction or control of the municipality. They must determine the persons and property, and its value, subject to taxation, under the provisions of law. If they omit from any cause to assess a person or property that by law should be assessed, the municipality must bear the loss. To this extent their acts and omissions bind the municipality. The error cannot be corrected by it. The assessor's tenure of office is fixed by law. It cannot be changed by the city government or by the electors. No element of principal and agent exists in their relations to the municipality. It is not liable to an action for their omissions or mistakes, unless made so by statute. No statute imposes a liability upon the municipality for an omission to assess a particular person or property. *Harpswell* v. *Phipsburg*, 29 Maine, 316; *Walsh* v. *Macomber*, 119 Mass. 73; *Rossire* v. *Boston*, 4 Allen, 57; *Emery* v. *Sanford*, 92 Maine, 525.

The acts of the assessors, as shown by their records, were inadmissible upon the question at issue. If objected to, they should have been excluded. They were not admissions of the City of Rockland, nor of its agents, and were not entitled to any weight as evidence for or against either party. Being inadvertently introduced, and being inadmissible, it was the duty of the court to

instruct the jury to disregard them. The assessors' acts reflected their opinion, founded perhaps upon erroneous information, or resulting from inadvertence or neglect of duty.

Upon the question of defendant's residence on April 1st, 1894, it was immaterial what the assessors believed in prior years. Their opinion was not entitled to weight in determining the controverted fact. The city is not only not estopped, but was entitled to have the evidence itself excluded. The refusal to instruct as requested, and the instructions actually given were correct.

There are cases which hold that some acts of overseers of the poor may be considered as having probative force upon the question of a pauper settlement. Among them are *Fairfield* v. *Old Town*, 73 Maine, 576; *Weld* v. *Farmington*, 68 Maine, 306; *Thornton* v. *Campton*, 18 N. H. 20.

But overseers of the poor stand in a different relation to the town from assessors of taxes. While not general agents, within certain limits, they are agents of the town, and bind it by their acts. They have care of the paupers, and may "cause them to be relieved and employed at the expense of the town," and may bind the town by contract to these ends, unless the town has otherwise directed. R. S., c. 24, § 11. They may bind as apprentices or servants, "minor children of parents chargeable, or of parents unable in the opinion of the overseers to maintain them, and minors chargeable themselves . . . . to continue until the males are twenty-one and the females eighteen years of age, or are married." Section 21. So they may "set to work, or by deed bind to service upon reasonable terms, for a time not exceeding one year, persons having settlements in their town." Section 27.

So overseers are to relieve destitute persons, and in case of death, bury them, and to this end they may contract debts binding upon the town. Section 35.

In these, and perhaps other cases, they act as agents of the town, and bind it by their contracts within the scope of their authority. Their acts, therefore, within the limits of such authority, being in law the acts of the town, may well be treated as evidence of some

weight, but not conclusive against the town. *New Vineyard* v. *Harpswell*, 33 Maine, 193.

Such considerations do not apply to assessors of taxes.

The defendant was not prejudiced by the instructions. They were in strict accordance with law. But, she did have the benefit, to which she was not entitled, of the evidence of the acts of the assessors presented to the jury. She has no cause of complaint.

Exceptions overruled.

JONATHAN S. WILLOUGHBY

vs.

ATKINSON FURNISHING COMPANY.

Knox. Opinion August 22, 1899.

Practice. Amendment. Lease. Damages. R. S., c. 82, § 10; c. 94, §§ 2, 10.

Courts are liberal in the allowance of amendments, and by the statute, R. S., c. 82, § 10, mere defects in form and circumstantial errors and mistakes may be amended. But this statute does not permit of an amendment which will add a new or different cause of action, and this court has in numerous cases held that such amendments are not allowable.

Held; that as the amendment offered in this case would introduce new and additional causes of action, they cannot be allowed.

A lease to the defendant for a term of three years contained this clause, "with the privilege, at the end of said term, of re-leasing for a term of ten years or any part thereof at the same yearly rental." Upon the last day of the original term the tenant gave to the landlord the following written notice: "In accordance with the option contained in our lease of the Willoughby Block, we desire to notify you that we will re-lease the said Block for the space of three months from the expiration of the lease." *Held;* that the clause quoted from the lease should be construed as a present demise to take effect in the future at the option of the lessee; and that the notice given by the tenant to the landlord, accompanied by a continuation of possession, was sufficient, without other act, to continue the tenancy under the lease for the period named in the notice.

Also; that the tenancy under the lease having terminated on December 1, 1896, upon which day the defendant company vacated the premises and tendered the keys to the plaintiff, the defendant is not liable for any rent subsequent to that day.

A lease contained the usual covenant upon the part of the lessee to quit and deliver up the premises to the lessor at the expiration of the term, "in as good order and condition, reasonable use and wearing thereof, or inevitable accident, excepted, as the same are or may be put into by the said lessor, and not make or suffer any waste thereof." It also contained this provision, "with the privilege of removing whatever partition said company may desire to remove during their term of occupancy, provided said company replace said partition in as good condition as they find them."

The property leased was a brick building of three stories and an attic, when the lessee took possession; it consisted of two stores upon the ground floor, offices on the second floor and halls with anterooms upon the third and attic floors. For the purpose of using the whole building as one store, the lessee took down partitions, changed the locations of stairways and made numerous other alterations.

In an action under R. S., c. 94, § 10, to recover damages, among other things, for the defendant's failure to comply with the terms of its covenants to restore the building to the same condition as when rented, *held;* that the measure of damages is the cost of doing what the defendant covenanted to do but did not do,—the cost of replacing the partitions and restoring the building to the same condition, so far as these voluntary alterations are concerned, as it was in when leased.

The court does not decide whether the plaintiff would have been entitled, if he had sued for it, to have included in his recoverable damages a reasonable sum for the loss of the use of the premises during the time necessary to restore the building to its former condition, because this claim is not specified in the account which the statute requires to be annexed to the writ.

The plaintiff also sought to recover in the same action the expense incurred by him in placing an elevator in the building and in removing the same. *Held;* that the case does not disclose any contractual or other liability, upon the part of the defendant, to reimburse the plaintiff for such expense.

ON REPORT.

This was an action of assumpsit upon an account annexed, brought under R. S., c. 94, § 10, to recover certain rents claimed to be due under a written lease; and also for damages done to the plaintiff's premises during their occupancy by the defendant.

The facts appear in the opinion.

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

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

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

WISWELL, J. Action of assumpsit under R. S., c. 94, § 10, to recover rent and damages to the premises rented.

I. The action is upon an account annexed in which, among others, there is an item of rent for three months from December 1, 1896, to February 28, 1897, $490.64 and an item for damages to the premises, and for failure to comply with the terms of a written lease by restoring the building to the same condition as when rented, of $2094.57. Before the commencement of the trial the plaintiff moved to amend his declaration by so changing the item for rent that it would read from December 1, 1896, to May 31st, 1897, $980.33, and by adding to the item for the cost of restoring the premises to the condition in which they were when leased, the sum of $600.

The report of the case contains a stipulation that the court shall pass upon the question as to whether these amendments are allowable. We think that they are clearly not. Courts are liberal in the allowance of amendments, and by the statute, R. S., c. 82, § 10, mere defects in form and circumstantial errors and mistakes may be amended. But this statute does not permit of an amendment which will add a new or different cause of action, and this court has in numerous cases held that such amendments are not allowable. That is exactly what is desired in this case. The plaintiff sues to recover a quarter's rent ending February 28, the amendment proposed would allow him to recover another quarter's rent ending May 31st, an entirely new cause of action, and therefore can not be allowed. This is also true as to the other amendment offered. The statute allowing the maintenance of this action requires that the account annexed to the writ should specify "the items and amount claimed." There is such a specification of items in this case, in which are enumerated the several sums expended and estimated for the purpose of restoring this building to its condition when rented, the aggregate of which items is exactly the

amount claimed under this branch of the case. To increase that amount would be to add a new sum for an item not originally specified nor sued. It would consequently add a new cause of action and is consequently not allowable.

II. As to the claim for rent. On August 15, 1893, the defendant took a written lease of the premises for the term of three years from September 1, 1893, "with the privilege, at the end of said term, of re-leasing for a term of ten years or any part thereof at the same yearly rental." This term expired September 1, 1896. But the defendant company continued to occupy the premises until December 1, following, at which time it vacated them and tendered the keys to the plaintiff who refused to accept them, or to take possession of the building. The stipulated rent was paid to December 1. Whether or not the defendant is liable for any rent after that date depends upon the nature of the tenancy subsequent to the expiration of the term of the lease. If the defendant was a tenant at will, then by statute, R. S., c. 94, § 2, the tenancy could only be terminated by mutual consent or by thirty days' notice in writing given for that purpose.

But, during the original term, upon August 31st, 1896, the defendant gave written notice to the plaintiff as follows:—"In accordance with the option contained in our lease of the "Willoughby Block," we desire to notify you that we will re-lease the said Block for the space of three months from the expiration of the lease." It is claimed that this was a re-leasing; that thereby the lease was extended for three months and that the term expired, without further notice or other act, upon December 1st, the day upon which the defendant vacated the store, tendered the keys to the plaintiff, and up to which time the payment of rent is admitted.

We think that this contention must be sustained. The lease gave to the defendant the option of re-leasing the premises "for a term of ten years, or any part thereof."

The tenant seasonably and formally gave written notice to the landlord of his election to continue the tenancy under the lease for a

further period of three months; this, accompanied by a continuation of possession, was sufficient for the purpose. According to the weight of authority, the clause in the lease already quoted should be construed as a present demise to take effect in the future at the option of the lessee.

In *Sweetser* v. *McKenney*, 65 Maine, 235, the lease was "for five years and as much longer as he desires." The court held that between the parties to such lease, the right of occupation by the lessee, so long as he fulfills its condition, is not liable to be defeated at the option of the lessor.

In *Holley* v. *Young*, 66 Maine, 520, the lease was for one year with this further provision: "We further agree to lease to said Young (the tenant) said premises situated in Farmington Village at the price and conditions named as long as he wishes to occupy the same." It was held by the court that the remaining in possession by the tenant, at the expiration of the year, was an election that the tenancy was to continue.

The tenancy therefore, was terminated upon December 1st, 1896, the day upon which the premises were vacated; and the defendant was not liable for rent subsequent to that day.

III. The lease contained the usual covenant upon the part of the lessee to quit and deliver up the premises to the lessor at the expiration of the term, "in as good order and condition, reasonable use and wearing thereof, or inevitable accident, excepted, as the same are or may be put into by the said lessor, and not make or suffer any waste thereof." It also contained this provision, "with the privilege of removing whatever partitions said company may desire to remove during their term of occupancy, provided said company replace said partitions in as good condition as they find them."

The property leased was a brick building of three stories and an attic situated on one of the principal business streets in the city of Rockland. When the lessee took possession it consisted of two stores upon the ground floor, offices on the second floor, and the third and attic floors were finished as halls with anterooms. For

the purpose of using the whole building as one store, the lessee took down partitions, changed the locations of stairways and made numerous other alterations. It is not claimed that the defendant replaced the partitions removed by it, or that it restored the building in other respects to the same condition in which it was at the time of the lease. This work has been subsequently done to some extent by the landlord. The only question presented is as to the rule of damages to be adopted for this branch of the case.

The defendant contends that the measure of damages is the injury, if any, to the market value of the property; that if the alterations made by the lessee enhance the market value of the property, no damages would be recoverable upon this branch of the case. We do not think that this is the correct rule. The plaintiff was the owner of the building so arranged as to consist of two stores, offices, and halls. In his lease he allowed the defendant, at its own expense, to make such alterations as would convert the whole building into one store, but the lessee was required by the provisions in the lease already referred to, at the expiration of the term to replace any partitions removed and to deliver up the building in as good condition as when leased. The defendant can not say in answer to a claim for damages for non-performance of its covenants, that the radical changes voluntarily made by it enhanced or did not diminish the value of the property. The owner was entitled to exercise his own judgment as to the interior arrangement of his own building. He allowed the alterations to be made, but he protected his rights by the clauses in the lease which required the lessee to restore the building in the same condition, so far as voluntary alterations are concerned, as when leased.

The rule as to the measure of damages is a simple one, it is the cost of doing what the defendant covenanted to do but did not do; the cost of replacing the partitions and restoring the building to the same condition, so far as these voluntary alterations are concerned, as it was in when leased. In an English case decided by the Court of Queen's Bench, in 1891, it was decided that the measure of damages for a breach of a covenant to leave demised premises in repair is the amount of money necessary to put the

premises into the state of repair required by the covenant. *Joyner* v. *Weeks*, 2 Q. B. 31.

It is unnecessary to inquire whether the plaintiff would have been entitled, if he had sued for it, to have included in his recoverable damages a reasonable sum for the loss of the use of the premises for the time necessary to restore the building to its former condition, because, as we have seen, this claim is not specified in the account which the statute requires to be annexed to the writ.

Some months after the defendant went into possession under the lease, a conference was had between the plaintiff and certain representatives of the defendant company, at which time permission was given by the plaintiff for the defendant to make further alterations to the building than those referred to in the lease, upon the agreement that the defendant should upon the expiration of the tenancy restore the building to the same condition as when leased, and subsequently upon February 15, 1894, a written agreement was signed by the plaintiff and by the defendant's local manager, by the terms of which the original lease was somewhat modified under certain contingencies; but as we construe this written agreement it in no way affects the question of the defendant's liability, under the circumstances of the case, and it is consequently unnecessary to decide the question raised as to the authority of the defendant's local representative to sign this agreement in the name of the defendant.

IV. During the term, sometime prior to March 1, 1895, the plaintiff at his own expense put an elevator into the building. The cost of this, some $1600, together with the cost of its removal, he seeks to recover of the defendant. The case does not disclose any liability upon the part of the defendant to pay either of these sums. The plaintiff was induced to make this outlay for placing the elevator in the building by the representatives of the defendant company, and was perhaps led to believe that by doing so it would insure the continuation of the tenancy for a long term of years; but the only liability which the defendant assumed with respect to the elevator was to pay an additional yearly rent equal to ten per cent of the cost of the elevator.

In accordance with the terms of the report, the case is remanded to the court, at nisi prius, for the assessment of damages in accordance with this opinion.

Case remanded.

FARMINGTON VILLAGE CORPORATION

vs.

FARMINGTON WATER COMPANY.

Franklin. Opinion October 5, 1899.

Sales. Contract. Option. Water Company. Spec. Performance.

The defendant water company contracted in writing to supply the plaintiff village corporation with water for a term of years and also agreed in the same writing to terms by which, at the expiration of the term, the plaintiff might take over the defendant's rights and works, at an appraisal to be fixed by three disinterested men, one to be selected by each of the parties and a third one by the two so selected, said appraisal to be the sum at which the plaintiff "shall have the right to buy said rights and works, and for which said company agree to sell said corporation the works and rights aforesaid."

At the expiration of the term the corporation voted "to proceed to ascertain the price at which it may purchase the works and rights" of the water company as provided in the contract, and selected a disinterested appraiser. The defendant company though notified thereof and requested to select an appraiser on its part declined so to do, insisting that it was not required to do so by the terms of the contract until the village corporation had first bound itself to purchase at whatever sum might be fixed by the appraisers.

Upon a bill in equity by the plaintiff to obtain specific performance of the contract by compelling the water company to select such an appraiser, *held;* that the defendant water company clearly and expressly yielded an agreement to sell at the appraisal; that the village corporation did not even by inference yield an agreement to buy at the appraisal; that it, however, retained the right to buy; and that this option of purchase was to be exercised after the appraisal.

ON REPORT.

Bill in equity, heard on bill, answer and testimony to compel specific performance of a contract, dated October 17, 1891, between the parties, by which the plaintiff claimed it had the right to purchase, and the defendant was obliged to sell, the rights and works

of the defendant at the plaintiff's option after an appraisal. The plaintiff's contention, as stated by it, appears in the eleventh paragraph of its bill, as follows:— "That your complainants are desirous of ascertaining the price at which they shall have the right to purchase said company's entire works, rights and franchise and for which the said company agreed to sell said corporation its entire works, rights and franchise aforesaid, and which contract and agreements therein contained, the said corporation are desirous of having fulfilled by said respondents; but as the Farmington Water Company will not appoint a man to assist in fixing the value of its works and rights, in accordance with the terms of said contract, your complainants are deprived of their legal rights, and are remediless in the premises, and that they have no adequate remedy at law, whereas the remedy in equity is ample."

The prayer of the bill was that the defendant "may be required to select a disinterested man, and in fixing an appraisal of the said Farmington Water Company's entire works, rights and franchise, as provided in its contract, etc. . . . ."

The plaintiffs relied principally on article 10 of the contract between them and the defendant water company which provided, among other things, for an appraisal of the works and rights of the Farmington Water Company, "and said appraisal shall be the sum at which the said corporation shall have the right to buy said works and rights, and for which the said company agree to sell to said corporation the works and rights aforesaid."

Article 11 of the contract is as follows: "And in consideration of the above premises and agreements of said company, the said corporation hereby agrees to pay to said company for the use of water for the purposes aforesaid, and in the manner and on the conditions aforesaid, the sum of twelve hundred dollars ($1200) per annum for the said term of five years, said sum to be paid in ten equal semi-annual payments, as follows, viz: . . . ."

The defendant water company refused to choose an appraiser upon the ground, as it alleged, that the corporation had failed in the performance of a condition precedent, to wit, to vote to purchase the system of the company at the price to be ascertained by

the appraisers. And contended that it was not legally, or equitably, bound to proceed with an appraisal under article 10 of the contract, until the corporation had signified its intention to purchase, or voted to purchase, or in some legal manner bound itself to purchase and pay for the water system at the sum found by the three disinterested appraisers.

The issue thus presented on the part of the defendant company is thus stated in their answer, with other defenses:

"And the defendant company admits that it was the intention of the parties thereto, as therein expressed, that the Farmington Village Corporation should have the right to purchase the entire works and rights of the said Farmington Water Company at the expiration of said contract, at an appraisal to be made as therein set forth, but, that whatever right or option to purchase was thereby given to said complainant company must and should be exercised before the said appraisal had been made; and that to entitle the said Farmington Village Corporation to an appraisal, it must signify its consent to and agree to purchase said entire works and rights at the sum to be found, or that might be found, by said appraisers.

"That the said complainant corporation has not only neglected so to do, but has expressly refused to so signify its consent and agreement, and the said defendant company refers to the records of the meetings of the Farmington Village Corporation, held December 7, 1897, and January 19, 1898, annexed to the complainant's bill in proof thereof, ...

"That whether the person chosen, viz: Hon. Enoch Foster, was ready at the time of the service of said notice to discharge the duties required of him as a member of said committee of appraisal, the defendant has no knowledge.

"That at the time of the service of said notice his appointment or choice by said committee had not been approved by the corporation, and though requested by the defendant company to give the name of the appraiser so chosen, and referred to in said notice, the committee of said corporation, and the officers thereof, refused so to do.

"The defendant company further avers that it was not the intention of the parties to said contract, as therein set forth in said article 10, that the said complainant could exercise its right of purchase after the value of the said works and rights had been fixed by the appraisers, thus leaving it to the option of the corporation to purchase at the sum so fixed, and in case of refusal to purchase entailing upon the defendant the large and unnecessary expense attending such appraisal, but that said corporation must exercise such right before the commencement of proceedings to secure such appraisal, or at least before it could require the defendant company to appoint a disinterested person as appraiser under said section."

It was admitted that the counsel for the Farmington Village Corporation was notified several times by the counsel for the defendants, after the expiration of the contract, and before the bringing of the bill in equity, that they were willing to proceed to an appraisal and sell their property after plaintiff corporation had voted to buy the same.

It was also admitted that the notices of the Farmington Village Corporation to the Farmington Water Company, of the appointment of an appraiser, were seasonably given.

A witness called by the defendants testified, subject to objection:—

"I was acting for the Farmington Water Company at the time this contract was made.

Q. "Will you state the circumstances and the situation of the parties to the contract at the time of the making?"

A. "There were several meetings of the corporation held at different times, and it was a long time before the corporation voted to purchase the water rights of the company, and the question arose as to future monopoly in case the water company established its works. . . . . And the question arose as to whether the water company would not have a monopoly in it later, and the corporation wanted an option to purchase. As I recollect it, that was one of the strong inducements held out to the corporation in order to obtain a vote of the corporation—that they could have an option to buy. And as to the terms of the contract, it was

suggested how they should come at the appraisal, and the reference was suggested, and, as was intended to be, incorporated into the terms of the contract. As an inducement for the corporation to purchase, the water company inserted in the contract the provision giving them the right to purchase, as I remember it."

By the court:

Q. "Whether the question was discussed at all, that the agreement to purchase on the part of this corporation should be a condition precedent to the exercise of this right?"

A. "I don't know that that question ever arose in that form. I think the question arose as to how the matter should be determined in case the corporation should want to buy, and a reference was suggested, and the reference was put in that form. I could only state the understanding, and as the understanding has been incorporated."

Q. "As I understand you, the principal question discussed, and the principal desire indicated by the parties at that time, was to protect themselves against future monopoly?"

A. "Yes, your Honor. It was urged at the time, at the different hearings, and the question arose, whether the corporation was in a legal position so it could construct a plant of its own."

It was admitted that Enoch Foster was ready and willing to act as one of the appraisers.

Jos. C. Holman and Frank W. Butler, for plaintiffs.

The rights of purchase were as much a part of the consideration as the water to be furnished; the company could as legally have shut off half the hydrants provided for in its contract, as to refuse to proceed with the corporation to fix the valuation as therein agreed upon; both were promised the corporation, and both were parts of the entire whole, which the corporation were to receive. Had the water company closed half its hydrants after entering into the contract, equity would have immediately opened them. If it would have enforced that part of the contract, it certainly ought to enforce this part.

The corporation is asking for nothing which it has not paid for and it is not entitled to receive; it has already paid for the right

to have an appraisal made as provided in the contract, and asks that it may be done.

Article 11 of said contract provided, "in consideration of the above premises and agreements of said company, the said corporation agree to pay," etc. Not in consideration of the water alone, but in consideration of all the premises and agreements, including the agreement for an appraisal.

The corporation could not intelligently vote to buy before an appraisal was made, as the amount fixed might exceed the sum which the corporation could legally raise, and as a matter of precaution the agreement for an appraisal was made, reserving to the corporation the right to first fix the value and then vote to buy, if they see fit.

If defendant's contention is correct, then the sum might be much larger than the constitutional limit of indebtedness; and then the corporation could not buy the property for this reason, and it might then be liable in damages to the defendants.

E. E. Richards, for defendant.

The language of article 10 is ambiguous, the terms and conditions incomplete, leaving much to implication. There is in it no express provision as to the point in issue, and what the intent of the parties may have been as to the relative time of the exercise of this option on the part of the corporation, is left to implication. This circumstance in itself is significant. The article seems now of importance to the parties. But it is evident that, at the time it was drafted, it could not have been carefully considered, or it would have been drafted in more specific and clear terms, and at greater length. The inference would be fair that it was drafted and adopted as a minor feature of the contract lightly viewed by the parties.

The legal and proper inference from the language itself is, that the vote or agreement to buy must precede any act on the part of the company towards ascertaining the value. It was merely intended, by the language used, to fix the obligation of the company to sell, and make certain the right of the corporation to purchase.

Rules of construction: *Worcester Gas Light Co.* v. *Worcester*, 110 Mass. 353; *Newton* v. *McKay*, 29 Mich. 1; *Hayes* v. *O'Brien*, 149 Ill. 403; *Gray* v. *Clark*, 11 Vt. 583; *Veazie* v. *Forsaith*, 76 Maine, 179; *Snow* v. *Pressey*, 85 Maine, 408; *Corwin* v. *Hood*, 58 N. H. 401; *Plano Manf. Co.* v. *Ellis*, 68 Mich. 101; *Davis* v. *Belford*, 70 Mich. 120; *Hoerath* v. *Brooks*, 41 Ill. App. 554; *Hawes* v. *Smith*, 12 Maine, 429; *Ricker* v. *Fairbanks*, 40 Maine, 43; *Smith* v. *Blake*, 88 Maine, 241; *Field* v. *Leiter*, 118 Ill. 26; *Merrill* v. *Gore*, 29 Maine, 348.

Among the questions and objections which arose, on the part of the corporation, was that of the future monopoly of the company in case the company established its plant.

To obviate this objection article 10 was introduced into the contract. In the light of this situation, the main object being simply to prevent a monopoly, and in order to do so to give the corporation an opportunity to purchase the same at a value which three disinterested persons found to be a fair one, is it to be presumed from the language used that the intent of the parties was to impose upon the defendant company the burden and expense and uncertainty of an appraisal, and at the same time preserving to the corporation the privilege of acceptance or rejection after the result of the appraisal had been made known to them?

If the purpose of the article in question is to furnish an opportunity to the corporation to buy, at a fair price, and nothing more, the construction placed upon it by the defendant company meets that intention.

If the vote or agreement to purchase must precede the choice of appraiser, this bill cannot be maintained, as the corporation has not only neglected to agree to buy, or vote to purchase, but has refused to do so at a legal meeting of its voters. Having therefore failed in the performance of a condition precedent incumbent on it to perform, it is not entitled to specific performance on the part of the water company. *Warren* v. *Wheeler*, 21 Maine, 484; *Dana* v. *King*, 2 Pick. 155.

Construction of similar clause in contract:—*Montgomery Gas Light Co., Applt.*, v. *City Council of Montgomery*, 4 L. R. A. 616.

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

EMERY, J. In a written instrument of contract between the Farmington Village Corporation and the Farmington Water Company, dated October 17, 1891, (in which are various provisions as to the nature and extent of the water supply services to be rendered by the water company for the term of five years,) is the following provision as to the right of the village corporation to take over the company's rights and works at the end of the five years, viz:

"Article 10. It is further agreed that the said corporation shall have the right to purchase the said Company's entire works and rights at the expiration of the term of this contract, or during the term of any renewal thereafter, at an appraisal to be fixed by three disinterested men, one to be selected by the said Corporation, one by the said Company, and the third by the two so selected;—and said appraisal shall be the sum at which the said Corporation shall have the right to buy said works and rights and for which said Company agree to sell said corporation the works and rights aforesaid."

At the expiration of the term of five years, the village corporation voted "to proceed to ascertain the price at which it may purchase the works and rights" of the water company as provided in the contract, and selected a disinterested man as appraiser upon its part. The water company, though notified of the action of the village corporation and requested to select an appraiser upon its part, declines to do so, and insists that it is not required by the terms of the contract to do so, until the village corporation first binds itself to purchase at whatever sum might be affixed by the appraisers.

This bill is brought to obtain a specific performance of the contract, by compelling the water company to select an appraiser under Article 10. The question raised is whether by the terms of the contract the village must bind itself to purchase at the appraisal before obtaining an appraisal, or may obtain an appraisal and then elect whether to purchase at the sum fixed.

Various arguments of more or less cogency have been advanced upon either side, but the last clause of Article 10, seems to us decisive.

It is first provided in the article, that the village corporation "shall have the right to purchase the said company's entire works and rights . . . . at an appraisal to be fixed by three disinterested men, one to be selected by said corporation, one by the said company, and the third by the two so selected." This is all the language as to the rights and obligations of the parties before the appraisal. Had the parties stopped there, this language alone might indicate perhaps that the village corporation must elect and bind itself to purchase at the appraisal, as was held in *Montgomery Gas Light Company* v. *City Council of Montgomery*, 87 Ala. 245, (4 L. R. A. 616) by the defendant. The parties, however, were not content with this language. They did not leave to inference from it the rights and obligations of the parties after the appraisal. They proceeded to expressly describe them by the following additional language, "and said appraisal shall be the sum at which the said corporation *shall have the right to buy* said works and rights and for which the said company *agree to sell* said corporation, the works and rights as aforesaid." The antithesis is conspicuous and we must assume that it was designed. The water company clearly and expressly yielded an agreement to sell at the appraisal. The village corporation did not even by inference yield an agreement to buy at the appraisal. It expressly retained however "the right to buy." This option of purchase was to be exercised after the appraisal. There was no such clause or language in the contract construed by the Alabama court in *Montgomery Gas Light Co.* v. *City Council of Montgomery*, supra, cited by the water company. The water company must at the request of the village corporation co-operate in an appraisal. After such appraisal the village corporation may or not, as it deems best, exercise its "right to buy." Such was the express contract of the parties.

Bill sustained with costs.

JOHN MCKAY, Administrator,

vs.

NEW ENGLAND DREDGING COMPANY.

Knox. Opinion October 20, 1899.

New Trial. Verdict. Practice. Damages.

A verdict as to the defendants' liability for damages should stand and judgment be eventually rendered thereon for the plaintiff, when the law court has twice granted a new trial, upon motion of the defendant solely upon the ground that the damages are excessive.

The assessment of excessive damages by the jury upon a second trial may be set aside by the court, and damages will be assessed anew by a jury unaffected with any contention over the question of the defendants' liability.

See *McKay* v. *Dredging Co.*, 92 Maine, 454.

ON MOTION BY DEFENDANT.

This was the second trial of an action brought by an administrator, to recover damages for the loss of the life of his intestate by reason of the negligence of the defendant corporation, and in which the jury returned a verdict of $1,990 for the plaintiff. The action is brought under the provisions of chapter 124 of the statute of 1891, for the benefit of the father and mother, they being the sole heirs of the intestate.

At the trial of the first action the jury returned a verdict of $2000, which was set aside on account of the damages being excessive, the law court having ordered a new trial unless the plaintiff would remit all of the verdict above $750. The material facts will be found in the opinion of the court in the former report of the case in *McKay* v. *Dredging Co.*, 92 Maine, 454.

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

"No suggestion of error or misdirection on the part of the presiding justice is made, but the case is presented upon a report of the evidence; so the only consideration is whether the verdict is supported by the weight of evidence, and that depends upon what testimony was believed by the jury, and whether they were justi-

fied in believing it. It is common learning that the credit to be given witnesses is a matter peculiarly suited for a jury to decide. They see them on the stand, note their appearance and observe many indications of truth or falsehood, accurate memory or indistinct and unreliable impressions,—helps wholly wanting in the perusal of cold type." *Lewis* v. *Dwinell*, 84 Maine, 498.

Negligence: When the relation of master and servant exists, a special duty devolves upon the master to provide for the safety of his servant in many important respects. In such relationship the servant assumes the risk of injury from all ordinary dangers that necessarily accompany the employment of which he has notice before voluntarily exposing himself to them. Where the servant is injured by the failure of his master to exercise ordinary care, for his safety, his assumption of the risks of the employment will not prevent a recovery if he was in the use of ordinary care, at the time of his injury, and was discharging his duties in a usual and ordinary manner. 4 Am. & Eng. Enc., p. 50.

It is not contributory negligence for the servant to obey the orders of the master, whereby he is exposed to an unusual and unexpected danger out of the line of his employment, unless the danger was fully realized by him, and was so imminent and obvious that it was apparent to a person of ordinary prudence that an injury would follow. A servant does not stand upon the same footing as the master as respects the matter of care in inspecting and investigating the risk to which he may be exposed. He has a right to presume that the master will do his duty in that respect, so that, when directed by proper authority to perform certain services, or to perform them in a certain place, he will ordinarily be justified in obeying orders without being chargeable with contributory negligence, or with the assumption of the risks of so doing. 4 Am. & Eng. Enc. p. 66; *Cook* v. *St. Paul, etc., R. Co.*, 34 Minn. 45.

"The principal is liable, unless to obey the order was plainly to imperil life or limb. Obedience is the primary duty of the servant and he may, within reasonable bounds, trust to the superior judgment of the master." 4 Am. & Eng. Enc. note 66. *Stephens* v. *H. & St. Joseph R. R.*, 86 Mo. 221; *Keegan* v. *Cavanaugh*, 62

Mo. 230, cited in *Haley* v. *Case*, 142 Mass. p. 323; *Coombs* v. *New Bedford Cordage Co.*, 102 Mass. 572; *Campbell* v. *Eveleth*, 83 Maine, 50; *Malcomb* v. *Fuller*, 152 Mass. 160.

In case of *McKee* v. *Tourtelotte*, 167 Mass. 69, the plaintiff was told by defendant's agent that it was safe for him to work in a ditch, the sides of which afterward caved in upon him. In the opinion in that case the court say: "When we say that a man appreciates a danger, we mean that he forms a judgment as to the future, and that his judgment is right. But if against this judgment is set the judgment of a superior, one, too, who, from the nature of the callings of the two men and of the superior's duty, seems likely to make the accurate forecast, and if to this is added a command to go on with his work and to run the risk, it becomes a complex question of the particular circumstances whether the inferior is not justified as a prudent man in surrendering his own opinion and obeying the command." *Hennessy* v. *Boston*, 161 Mass. 502; *Coan* v. *Marlborough*, 164 Mass. 206.

Appreciation of risk and danger. Counsel cited: *Burgess* v. *Davis Sulphur Ore Co.*, 165 Mass. 71, in which the facts were as follows: A rock fell on plaintiff while digging in defendant's mine. Defendant's superintendent knew the rock was loose and told plaintiff to work where he did. In reply to plaintiff's question, was the rock all right, superintendent said, "yes it is all right: we tried to bar down same rock and it would not come." And the court says: "It was the duty of the superintendent, and not of the plaintiff to see that the line was safe. We are of the opinion that it was a question of fact for the jury whether the plaintiff was reasonably careful in working where he did at the time of the accident." The court further says: "In regard to dangers arising from an employee's negligence, the doctrine that a voluntary assumption of the risk precludes recovery is of practical application only when the risk is understood and appreciated by the employee, and is not assumed under such constraint of any kind as deprives the act of its voluntary character." *Fitzgerald* v. *Conn. River Paper Co.*, 155 Mass. 155; *Mahoney* v. *Dore*, 155 Mass. 513.

Damages: *Welch* v. *Me. Cent. R. R. Co.*, 86 Maine, 570; *McKay* v. *N. E. Dredging Co.*, 92 Maine, 454; 2 Sher. & Redf. Neg. §§ 709, 772; *Dalton* v. *Southeastern Ry. Co.*, 4 C. B. (N. S.) 296; *Houghkirk* v. *Del. & Hudson Canal Co.*, 92 N. Y. 224; *Oldfield* v. *N. Y. & Harlem R. R. Co.*, 14 N. Y. 310; *Louisville & Nash. Ry. Co.* v. *Morgan*, 22 Ala. 20; *Kelley* v. *Chic. Mil. & St. Paul Ry. Co.*, 50 Wis. 381; *Birket* v. *Knickerbocker Ice Co.*, 110 N. Y. 504; *Amour* v. *Czischki*, 59 Ill. App. 17.

Clarence Hale, *Joseph E. Moore*, *A. F. Belcher and Frederick Hale*, for defendant.

Counsel argued: First. The verdict of the jury was against evidence in the case, said evidence showing that the survivors suffered very small pecuniary loss if any, by the death of the plaintiff's intestate. The damages assessed were manifestly disproportionate and extravagant.

Second. The evidence discloses that the plaintiff's intestate assumed whatever risk he was taking, and so was guilty of contributory negligence. No verdict for the plaintiff can be sustained.

Third. The evidence does not disclose any negligence on the part of the defendant company.

Counsel cited: Stat. 1891, c. 124; Act 9 and 10 Vict. c. 93; *Sawyer* v. *Perry*, 88 Maine, 42; Tiffany's Death by Wrongful Act, p. 21; *McKay* v. *N. E. Dredging Co.*, 92 Maine, 454; *Ferren* v. *Old Col. R. R.*, 143 Mass. 199; *Coombs* v. *New Bedford Cordage Co.*, 102 Mass. 572; *Mundle* v. *Hill Mfg. Co.*, 86 Maine, 400, 405; *Leary* v. *Boston & Albany R. R.*, 139 Mass. p. 584; *Sullivan* v. *India Mfg. Co.*, 113 Mass. 398; Wharton, Negligence, §§ 12 & 14, and cases cited.

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

EMERY, J. When this case was first before the law court, as reported in 92 Maine, 454, we declared that the finding of the jury upon the question of the defendant's liability for the death of the plaintiff's intestate was not made to appear so unmistakably wrong

as to require us to set it aside. We did set the verdict aside, however, because of the excessive damages assessed by the jury.

A second jury has assessed the damages at nearly the same sum that was assessed by the first jury, although the evidence upon the question of damages at the second trial did not preponderate any more for the plaintiff. We think this question must have been more or less obscured by the smoke of the battle over the question of liability which the defendant again raised; and that the jury thus lost sight of the rules governing the assessment of damages.

The verdict as to the question of liability should stand, and judgment be eventually rendered thereon for the plaintiff. The assessment of damages, however, must be set aside and damages be assessed anew by a jury unaffected with any contention over the question of liability. This the court has the power to do. *Boyd* v. *Brown*, 17 Pick. 453; *Kent* v. *Whitney*, 9 Allen, 62; *Negus* v. *Simpson*, 99 Mass. 388.

The assessment of damages set aside and a new trial ordered for the assessment of damages only.

L. JEROME WILSON *vs.* LEONARD ROWE.

Kennebec. Opinion October 21, 1899.

Evidence. Deed. Boundaries.

The declarations of ancient persons while in the possession of land owned by them, pointing out the boundaries on the land itself, and who are deceased at the time of the trial, are admissible evidence when nothing appears to show that they were interested in thus pointing out their boundaries.

ON EXCEPTIONS BY DEFENDANT.

This was a real action to recover the possession of a strip of land, two rods wide and eighty rods long, used as a lane leading from the plaintiff's premises in Oakland to the Neck Road.

It was not denied by the defendant that the plaintiff had the title to a lane two rods wide, but he claimed that it was easterly of

a stone wall which marked the easterly line of the lane as it had been used and traveled, whereas the plaintiff claimed that the stone wall marked the true easterly line of the lane, and also the westerly line of land of Charles Tupper.

In the deed which the plaintiff's father received of this two-rod strip, it was bounded on the east by land of William Tupper, the father of Charles Tupper, so that it became important to fix the westerly line of land of Charles Tupper.

William Tupper and another formerly owned this land, the two-rod strip and the land of the defendant Leonard Rowe, and in 1841, upon the petition of said William Tupper for partition, a certain part was set off to him. After this partition the two-rod strip was conveyed to the plaintiff's father by the owner, to whom the remainder of the undivided land had been set off by the commissioners appointed by the court to make the partition, and this two-rod strip was bounded on the west by land of William Tupper.

It was proved that William Tupper died several years before the trial, and his two sons Sanford J. Tupper and Charles Tupper were allowed to testify, against the objection of the defendant, that when he was the owner of and in possession of this land of Charles Tupper and while on the land and negotiating with them for its sale, he pointed out to them its boundaries, and showed them a stone bowlder in a stone wall which had been built between his land and said two-rod strip, and told them that the bowlder covered a stone monument which marked his northwest corner. They also testified that they had removed this bowlder and found the monument described by their father. The question in dispute was where is Charles Tupper's west line.

The defendant claimed that this Tupper west line was thirty-three rods west of and parallel to the stone wall, as described in the report of the commissioners, and he disclaimed as to all land lying between a line drawn two rods west of what he claimed to be the Tupper west line.

To the admission of the testimony of Sanford and Charles Tupper the defendant's counsel objected and seasonably took exceptions. The verdict was for the plaintiff.

C. F. Johnson, for plaintiff.

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

Counsel cited: *Royal* v. *Chandler*, 83 Maine, 150; *Curtis* v. *Aaronson*, 49 N. J. L. 68; *Ellicott* v. *Pearl*, 10 Pet. 412, 423; *Smith* v. *Forrest*, 49 N. H. 230; *Lawrence* v. *Tennant*, 64 N. H. 532; *Bethea* v. *Byrd*, 95 N. C. 309; 2 Taylor, Evidence, § 634.

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

FOGLER, J. This is a real action to recover possession of a strip of land lying next westerly of a parcel of land owned by one Charles Tupper. The controversy between the parties was as to the location of Tupper's west line. The Tupper lot was formerly owned by William Tupper, who, at the time of the trial, had been dead several years. He conveyed the premises to his two sons, Charles and Sanford. These sons were called as witnesses by the plaintiff and were permitted by the presiding justice to testify, against the defendant's objection, that while they were negotiating with their father, William Tupper, for the purchase of said Tupper lot, he, being the owner in possession and being on the premises, pointed out to them a stone bowlder in a wall, weighing some two tons, and told them that under that bowlder was a rock that marked the western bounds of his parcel of land; and that they, the witnesses had recently removed said bowlder and found under it such a rock as their father had described to them. To such admission of testimony the defendant excepts.

The testimony was competent and properly admitted. This is settled in *Royal* v. *Chandler*, 83 Maine, 150, a case, in principle, precisely in point.

Exceptions overruled.

STATE *vs.* FRANK P. PARKS.

York. Opinion October 25, 1899.

Insanity. Evidence. Burden of Proof.

To establish a defense on the ground of insanity, in a criminal case, the burden is on the respondent to prove the fact of insanity by a preponderance of evidence.

ON EXCEPTIONS BY DEFENDANT.

The defendant, who was indicted for the murder of Mary Tarlton at Kittery, on January 23, 1899, was found guilty by a jury trial at the following term in York county.

At the trial the defendant offered evidence tending to show that at the time of the killing of deceased, and before, he had a mental disease called inebriety; that said mental disease manifested itself and was characterized by an uncontrollable, overwhelming craving for intoxicating liquors; that he drank liquor on the day of the killing and while he had such mental disease and in consequence of it; and that he drank so much liquor on that day, before the killing, that at the time of the killing he did not know what he was doing.

The court charged the jury that it was incumbent on the defendant to show by a preponderance of evidence, that he had the mental disease and that he drank the liquor and became intoxicated because of such disease, and that the killing was the result of the disease and of the drinking of the liquor in consequence thereof to such an extent that he did not know what he was doing when he killed the deceased. The defendant excepted to this part of the charge.

W. T. Haines, Attorney General, and W. S. Mathews, County Attorney, for State.

The one question raised in the exceptions in this case is as to the burden of proof where insanity is set up as a defense.

It seems that the courts of this country have accepted different

theories upon this question. (1.) That the defendant has not the burden of proof, and that the presumption of sanity only arises in absence of all evidence to the contrary, but that the defendant's only duty is to introduce evidence sufficient to raise the question, and thereby a doubt or uncertainty in the minds of the jury, which is considered a reasonable doubt as to his sanity; that such reasonable doubt is sufficient ground for acquittal, unless overcome by affirmative proof of his sanity adduced by the presumption.

(2.) Some state courts have declared that insanity must be proved by the defense beyond a reasonable doubt; but the (3d) and most modern and reasonable doctrine is, that the defendant has the burden of proof where insanity is alleged as a defense, and that he may establish his insanity by simply a preponderance of evidence, or such evidence that will satisfy the jury that he is insane, according to the measure of proof necessary in civil cases, and this is the general rule in this country. *State* v. *Lawrence*, 57 Maine, p. 574. There is no later case in which our courts have raised any doubt against this doctrine by any judicial opinion.

It rests upon the presumption that men as a rule are sane and like all other presumptions, relating to the rules of evidence, is based upon what mankind understand to be natural facts. Whart. Crim. Ev. § 337; 9 Am. & Eng. Ency. Law, 716, 731.

Thos. H. Simes and Saml. W. Emery, for defendant.

Since the decision in *State* v. *Lawrence*, the Massachusetts court has taken what we view as the logical and reasonable ground on this question, and has substantially overruled its former decisions cited in *State* v. *Lawrence*, and upon which that case was decided. See instructions to jury in *Com.* v. *Gilbert*, 165 Mass. 45, 50; *Com.* v. *Heath*, 11 Gray, 303.

And as following the rule contended for by defendant in this case see: *Davis* v. *United States*, 160 U. S. 499; *State* v. *Johnson*, 40 Conn. 136; *Hodge* v. *State*, 26 Fla. 11; *Hopps* v. *People*, 33 Ill. 385; *Chase* v. *People*, 40 Ill. 353; *Langdon* v. *People*, 133 Ill. 382; *Bradley* v. *State*, 31 Ind. 492; *Plake* v. *State*, 121 Ind. 433; *State* v. *Crawford*, 11 Kan. 32; *Smith* v. *Com.* 1 Duv. (Ky.) 224; *People* v. *Garbutt*, 17 Mich. 9; *Cunningham* v. *State*, 56

Miss. 269; *Wright* v. *People*, 4 Neb. 407; *State* v. *Bartlett*, 43 N. H. 224; *People* v. *Riordan*, 117 N. Y. 71; *Dove* v. *State*, 3 Heisk. (Tenn.) 348; *Revoir* v. *State*, 82 Wis. 295; *State* v. *Reidell*, (Del.) 14 Atl. Rep. 550.

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

FOGLER, J. The instruction of the presiding justice, to which the respondent excepts, is in accordance with the law laid down by this Court in *State* v. *Lawrence*, 57 Maine, 574.

We re-affirm the decision in that case, believing it to be sound in principle, and supported by the weight of authority in this country.

Exceptions overruled. Judgment for State.

CHARLES SHERER, Appellant,

vs.

FRED A. SHERER, Administrator.

Knox. Opinion November 1, 1899.

Probate. Appeal. Aggrieved. R. S., c. 63, § 23.

An administrator cannot appeal from a decree of the judge of probate authorizing an action on his bond.

He is not a person "aggrieved" in the statutory sense of that word, nor is he thereby concluded from asserting or defending his claims of personal or property rights in any proper court.

Bulfinch, Admr., v. *Waldoboro*, 54 Maine, 150, affirmed.

ON EXCEPTIONS BY APPELLANT.

This was an appeal by Charles Sherer, administrator of the goods and estate of Reuben Sherer, from a decree of the judge of probate for the county of Knox, authorizing Fred Sherer to commence a suit on the probate bond of said administrator, for the benefit of said estate.

When the appeal came on to be heard, the presiding justice ruled, as a matter of law, that Charles Sherer, the administrator, had no right to appeal from the decision of the judge of probate, authorizing the commencing of a suit on his probate bond, under any circumstances or upon any state of facts. To this ruling the appellant, Charles Sherer, excepted.

The exceptions present only the legal proposition as stated in the ruling of the court; the facts upon which the appeal was based are not stated.

The material portion of the statute, R. S., c. 63, § 23, under which the right of appeal was claimed, is as follows:—

"Sect. 23. The supreme judicial court is the supreme court of probate, and has appellate jurisdiction in all matters determinable by the several judges of probate; and any person aggrieved by any order, sentence, decree, or denial of such judges, except the appointment of a special administrator, may appeal therefrom to the supreme court to be held within the county, etc."

The decree of the judge of probate authorizing the commencement of a suit on a probate bond is by virtue of the provisions of R. S., c. 72, § 16, which reads as follows, so far as material:

"Sect. 16. The judge of probate may expressly authorize any party interested, to commence a suit on a probate bond for the benefit of the estate, and such authority shall be alleged in the process."

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

In *Wing* v. *Rowe*, 69 Maine, 282, the court holds that not only can the defendant, under such circumstances, recover no costs against the judge of probate, but that "there is no statute provision authorizing a judgment for costs against the person who originates the suit; and in the absence of such authority, the person originating the suit not being a party of record, the court has no power to render judgment against him for costs." By virtue, then, of the provisions of the statute, and the determination of the court in that case, it is clear that the reasons given by Judge BARROWS in the case of *Bulfinch, Admr.*, v. *Waldoboro*, 54 Maine, 150, why the administrator under such circumstances is not legally aggrieved,

fall absolutely to the ground; and inasmuch as the administrator, independent of his right of appeal, has no remedy whatever against a malicious, baseless, unjustifiable proceeding or suit thus commenced, by virtue of an authority thus obtained ex parte, the fact that he is legally aggrieved by such a decree is a necessary inference. If the administrator, under such circumstances, with the right of appeal, can successfully prosecute his appeal and establish the fact that the decree was unauthorized, he will avoid the expense of an unnecessary law suit. Any other construction of the statute submits an administrator to the whims and caprice, to be exercised practically without restraint, of all parties who can see that they may have an adverse interest in the estate which he is settling, and who may be inspired with a desire to vex, annoy and harrass him, as under the provisions of the statute and the decisions of the court such proceedings can be carried on ex parte without any embarrassment as to costs or expense of litigation that may be determined adversely to the parties thus promoting them.

L. M. Staples, for appellee.

SITTING: EMERY, HASKELL, WISWELL, STROUT, JJ. FOGLER, J., did not sit.

EMERY, J. The appellee cites the case *Bulfinch, Admr.*, v. *Waldoboro*, 54 Maine, 150, as conclusive authority against the claim of an administrator to appeal from a decree of the judge of probate allowing an action in the name of the judge upon the bond of the administrator. The appellant urges that the case cited was decided adversely to the administrator upon the ground that the administrator would be indemnified by the costs he would recover in case the action proved to be groundless. He further urges that this ground is untenable since, as he says, costs cannot be recovered by the defendant against the judge, or any one else, in such an action, and hence that the decision is erroneous and should not be followed.

It may not be amiss, therefore, to re-examine upon principle the question whether an administrator has a legal right to appeal from such a decree. Only persons "aggrieved" by a decree can

appeal therefrom, (R. S., ch. 63, § 23,) but it is now long and well settled that a person is not "aggrieved" in the statutory sense of that word unless he would be concluded by the decree from the assertion of some claim of personal or property right. The mere fact that a person is hurt in his feelings, wounded in his affections, or subjected to inconvenience, annoyance, discomfort or even expense by a decree, does not entitle him to appeal from it, as long as he is not thereby concluded from asserting or defending his claims of personal or property rights in any proper court. Thus a debtor of a deceased person cannot appeal from the appointment of a particular person as administrator, notwithstanding his argument that the person appointed would act oppressively toward him. *Swan* v. *Picquet*, 3 Pick. 443. A person claiming property under a gift to him causa mortis cannot appeal from a decree charging the administrator with the property and ordering its distribution among the next of kin, notwithstanding the argument that such decree would subject him to the annoyance and expense of a lawsuit. *Lewis* v. *Bolitho*, 6 Gray, 137. A creditor cannot appeal from a decree denying a petition for license to sell real estate for the payment of debts though such denial may compel him to incur the expense of an action and levy. *Newry* v. *Estey*, 13 Gray, 336. The stepmother of minor children, whose parents are both dead, cannot appeal from a decree appointing some other person as guardian, though such decree may deprive her of their custody and companionship. *Lawless* v. *Reagan*, 128 Mass. 592. Trustees of a fund bequeathed to a minor cannot appeal from a decree appointing a particular person as guardian for the minor however much they may prefer some one else, or even no guardian. *Deering* v. *Adams*, 34 Maine, 41. A sister to a person of unsound mind cannot appeal from a decree appointing some other person to be the guardian of her relative, unless at least she has an interest in the estate of her relative as heir. *Briard* v. *Goodale*, 86 Maine, 100.

Tested by the rule above stated and illustrated, the administrator in this case is not aggrieved by, and cannot appeal from, the decree allowing a suit upon his bond. He is not concluded by it from

asserting or defending any claim of personal or property right with respect to the estate, the heirs, legatees or creditors. It does not even conclude him from asking the court to allow him in his account the expenses of the suit. His appeal therefore was rightfully dismissed. The case of *Bulfinch, Admr.*, v. *Waldoboro* is affirmed.

Exceptions overruled.

ALBERT SMITH and others, Appellants,

vs.

JAMES H. CHANEY and another, Executors.

York. Opinion November 11, 1899.

Probate. Appeal. Will. Practice.

1. Persons named as legatees in a written instrument purporting to be the will of one deceased, though not presented for probate, can appeal from a decree of the judge of probate allowing another instrument of a later date as the will of the deceased.
2. When in such an appeal the appellants have inadvertently described themselves as heirs of the deceased, instead of legatees under a prior will, such misdescription does not bar the appeal and it may be corrected.

AGREED STATEMENT.

By agreement of the parties this case was submitted to the law court upon the following agreed statement of facts:

"Samuel N. Young, the alleged testator, died May 2d, 1898, in Berwick, York county, leaving surviving a son, a brother and Carrie E. Chaney, a niece, one of the residuary legatees under the instrument purporting to be said Young's last will, and the appellants who are nephews and nieces of said Young.

"June 7th, 1895, said Young made what purports to be a will, now in existence, in which the appellants, Albert Smith, and Sarah E. Smith, are residuary devisees and legatees. This will has not yet been offered for probate.

"In 1897 said Young made what also purported to be a will, in

which he made the appellant, Nellie E. Hern, as one of the devisees and legatees. This instrument was destroyed by said Young.

"Upon the above stated facts, and all inferences legitimately to be drawn therefrom, the court is to dismiss said appeal, or send back for trial, as the law and justice may require."

G. C. Yeaton and W. D. Hill, for appellants.

If an amendment be necessary, R. S., c. 82, § 10, provides that "no process shall be abated, quashed or reversed for want of form only . . . . when the person and case can be rightly understood." Vide *Waterman* v. *Dockray*, 79 Maine, 149. But appellees claim that no amendment can be allowed as this is another court and we are asking to amend process which is not in this court. Not so, for two reasons. (1) By R. S., c. 63, § 23, this court is the supreme court of probate. (2) We do not ask to amend any paper or proceeding in the lower court. We are here to redescribe the interest of the petitioner.

If it be claimed that petitioners have no such interest as will enable them to prosecute the appeal, then, of course, the test must be whether we are, in the language of R. S., c. 63, § 23, "aggrieved." What this means in this state has often been considered in the court in various cases, from *Deering* v. *Adams*, 34 Maine, 41, and *Paine* v. *Goodwin*, 56 Maine, 411, to *Shaw et als. Appellants*, 81 Maine, 207, and *Blastow* v. *Hardy*, 83 Maine, 28, and held to mean "one whose rights of property are operated upon or his 'interest' directly affected thereby." As to the interest necessary to enable a party to appeal, vide *Lawless* v. *Reagan*, 128 Mass. 592, and citations in *Pattee* v. *Stetson*, 170 Mass. 93, 95.

In *Lamson* v. *Knowles*, 170 Mass. 295, the interest of a guardian ad litem of a possible lineal next of kin was held sufficient.

Paine v. *Goodwin*, 56 Maine, 411, is not dissimilar to the case now at bar. In Massachusetts, in *Farrar* v. *Parker*, 3 Allen, 556, 559, the true test is said to be put by the court in *Lewis* v. *Bolitho*, 6 Gray, 137, thus: "Did the decree of the probate court conclude or in any way affect the right of the appellant?" For other citations vide Wilson's Maine Probate Law, p. 391, note 39.

We having an interest as legatees under a former will, find no law or practice directing that this interest shall be made manifest to the court by any one method of procedure. While the practice may not be on the whole objectionable to offer two instruments for probate purporting each to be the last will and testament of deceased, and carry them through the courts pari passu, we know of no reason or authority why this should exclude any other practice in many particulars much less cumbersome.

In *Hall* v. *Hall*, 17 Pick. 373, 378, a devisee under a former will not offered for probate was held to be interested to the extent of disqualifying him as a witness.

J. A. Edgerly, *W. S. Mathews and G. F. Haley*, for executors.

First duty of appellants is to establish their right to appeal, and unless this is made affirmatively to appear, the appeal should be dismissed without further examination. *Pettingill* v. *Pettingill*, 60 Maine, 419; *Briard* v. *Goodale*, 86 Maine, 101; *Deering* v. *Adams*, 34 Maine, 41; *Gray* v. *Gardner*, 81 Maine, 558; *Milliken* v. *Morey*, 85 Maine, 342.

Reasons of appeal, which are founded on an allegation of fact that does not appear upon the record, and of which no proof has been offered, cannot be maintained. *Moody* v. *Hutchinson*, 44 Maine, 63; *Lamb* v. *Lamb*, 11 Pick. 374.

Every appellant from a decree of a judge of probate must, as a preliminary proceeding, establish his interest in the subject matter from which he claims an appeal; and this is as essential to his standing in court as it is to show that he has duly claimed an appeal, and filed his bond and reasons thereupon according to law.

The right of appeal is conditional, and the appeal can be prosecuted only upon complying with the requisites of the statutes relating to appeals. *Veazie Bank* v. *Young*, 53 Maine, 560; *Bartlett*, *Appellant*, 82 Maine, 210; *Eddy's Case*, 6 Cush. 28; *Palmer* v. *Dayton*, 4 Cush. 270; *Clark* v. *R. R.*, 81 Maine, 477.

The legislature has declared upon what conditions a party claiming an appeal shall have a right to prosecute it. It is a statutory right, and the terms of the statute must be complied with before a

party appealing can proceed in the prosecution of his appeal. *Nowell* v. *Nowell*, 8 Maine, 220.

The appellant must be aggrieved by the decree from which he appeals. "In legal acceptation, a party is aggrieved by such a decree only when it operates on his property or bears upon his interest directly." *Deering* v. *Adams*, 34 Maine, 44.

The agreed statement shows that the testator left a son surviving him, consequently these appellants, who were only nephews and nieces of the testator, were not heirs at law, or interested in the estate as they alleged; and their appeal should be dismissed.

The case shows that Young made a will in 1897, which, of course, revoked the will of 1895, and that he subsequently destroyed this will, and there is nothing here to show that at the time he destroyed this will he intended to revive the earlier will, and in the absence of such evidence the destruction and consequent revocation of the will of 1897 operated to revoke the will of 1895 at the same time; and therefore no will was in existence, except the one appealed from, at the time of Young's death, and consequently none but heirs at law could be interested in said estate so as to take an appeal from the probate of this will.

If a will, which was duly executed, and which contained a clause expressly revoking former wills, is cancelled, it is a question of intention, to be collected from all the circumstances of the case, whether an earlier will, which has not been destroyed, is revived by such cancellation; and in the absence of affirmative evidence that the testator intended to revive the earlier will by the cancellation of the second, the earlier will will be held not to be revived. *Pickens* v. *Davis*, 134 Mass. 252; *Williams* v. *Williams*, 142 Mass. 515; R. S., c. 74, § 3.

SITTING: EMERY, HASKELL, WISWELL, STROUT, SAVAGE, FOGLER, JJ.

EMERY, J. Samuel N. Young died May 2, 1898, leaving in existence behind him two instruments in writing, each purporting to be duly executed by him as his last will and testament. In the

earlier instrument dated June 7, 1895, the appellants Albert Smith and Sarah E. Smith were named as residuary legatees. This instrument has not yet been presented for probate. The later instrument dated March 27, 1898, was presented for probate and was allowed as the last will of the deceased by probate decree in August 1898. Albert and Sarah E. Smith claimed an appeal, which appeal the executors under the later instrument asked to have dismissed.

I. The first question is whether the two Smiths, named as residuary legatees in the earlier instrument purporting to be a will, can appeal from the decree establishing the later instrument as the operative will. They can if they would be concluded by that decree, (if allowed to stand), from maintaining any claim of their own to rights or interests in the property of the deceased. The earlier instrument purported to give them rights and interests in the property which would become vested upon the allowance of that instrument as an operative will. If the decree in question had been against the later instrument, then the appellants could have presented the earlier instrument under which they claim and must have been heard as to its validity as the operative will. The decree as passed, however, by establishing the later instrument as the operative will, also establishes that the earlier instrument is without force or effect. So long as the decree stands, it is a bar against all proceedings to establish the earlier instrument as the operative will and the appellants, claiming under this earlier instrument, cannot be heard in its support. They are therefore "aggrieved." They are entitled to be heard in opposition to a decree that strikes down their written instrument of title which purports upon its face to be valid.

It is urged that the appellants cannot be heard to oppose the later instrument until they have presented the earlier instrument for probate, since non constat they would ever present it. It would be futile, however, to begin proceedings for the establishment of the earlier instrument until the validity of the later instrument was determined. If such proceedings were begun and the earlier

instrument established, the proceedings and decree might all be nullified by subsequent proceedings and decree establishing the later instrument. The natural and proper procedure would be to consider, first, the later instrument and only in case that is rejected, to consider, next, the earlier instrument. Parties claiming under the instrument to be last considered, if at all, are entitled to be heard against the instrument to be first considered, since only in case that instrument is rejected, can they bring forward their own with any permanent effect.

The question here determined was considered by the Connecticut court in *Buckingham's Appeal*, 57 Conn. 544, with the same result. In *Hall* v. *Hall*, 17 Pick. 373, it was held that a person named as legatee in a prior will not presented for probate had such an interest that he was disqualified from testifying in the hearing upon the probate of a later will.

II. In claiming an appeal, however, these appellants described themselves as heirs at law of the testator, while in fact they were not heirs, but their interest was solely under the earlier instrument as stated. They have asked leave to amend their statement of their interest accordingly. The appellees insist that their statement in that respect cannot be amended,—that they must stand or fall by it,—and if they have stated their interest incorrectly, however inadvertently, they must be dismissed without being heard, although in fact they may have sufficient interest in the matter. It may be that the "reasons of appeal" filed in the probate court below should be adhered to in this court without enlargement or change, so far as they are statements of the questions raised and the errors made in the court below. The errors of the court are the real reasons of appeal, and the appellee may perhaps insist that the appellant shall be confined to such errors as he has stated. But a mere description of the appellant's status or interest does not state an error of the court, nor a reason of appeal. While one cannot appeal without having an interest, he does not appeal because of that interest, but because of the errors of the court injuriously affecting that interest. We do not think a misdescrip-

tion of his interest, made perhaps inadvertently in his claim of appeal, shuts him out from alleging and showing in the appellate court, his true interest. In *Smith* v. *Bradstreet*, 16 Pick. 264, after an appeal had been dismissed for want of sufficient interest alleged, the appellant was allowed to amend his claim of appeal by stating other facts showing an interest and thereupon the court sustained the appeal. In *Danby* v. *Dawes*, 81 Maine, 30, it was contended that the original petition did not contain allegations of certain essential jurisdictional facts. The appellate court, however, found the essential facts to exist though not alleged in the petition and held that such findings would be as much a part of the record as the petition would be. The decree in favor of the petitioner was affirmed. In this case the appellants can file in the appellate court new and amended statement of their interest which, if found to be true by the appellate court, will become a part of the record, so far as necessary.

Motion to dismiss denied. Case to stand for trial.

SARAH A. CLARY *vs.* FILMORE R. CLARY.

Kennebec. Opinion November 16, 1899.

Assumpsit. Implied Promise. Contract of Marriage.

No binding promise to make compensation can be implied or inferred in favor of one party against another, unless the one party, the party furnishing the consideration, then expected and from the language or conduct of the other party under the circumstances, had reason to expect such compensation from the other party.

In an action to recover for defendant's board, it appeared that the plaintiff did not expect compensation in money or money's worth. *Held;* that the plaintiff could not recover.

In this case, the board was supplied in expectation of marriage with the defendant and without any expectation of other remuneration. *Held;* that an action of assumpsit to recover for the board so furnished will not lie, even though the defendant refuses to marry the plaintiff.

LaFontain v. *Hayhurst*, 89 Maine, 388, affirmed.

ON MOTION AND EXCEPTIONS BY DEFENDANT.

Assumpsit for defendant's board by the plaintiff on the following account annexed to the writ:—

Filmore R. Clary to Sarah A. Clary, Dr.

To board, care and nursing from December 25, 1896, to and inclusive of Apr. 1, 1897, 13 weeks and 5 days at $4.50 per week, $61.71

The case was tried to a jury in the superior court, for Kennebec county, where a verdict was returned for the plaintiff.

The case appears in the opinion.

E. W. Whitehouse, for plaintiff.

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

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

FOGLER, J. This is an action of assumpsit, upon an account annexed to the writ, wherein the plaintiff sues to recover for board and nursing furnished by her to the defendant. The verdict was for the plaintiff, and the case comes here on motion for new trial and on exceptions to the rulings and instructions of the judge of the superior court for the county of Kennebec, before whom the case was tried. The plaintiff and the defendant were formerly husband and wife but had been divorced sometime before the time included in the account sued. The testimony discloses that on or about the middle of January, 1897, the defendant, being sick and out of work, came to the plaintiff's house and boarded with her, with her consent, until the 20th of the following March, and was nursed by her during a portion of that time. Before the defendant so commenced to board with the plaintiff, the plaintiff and the defendant had mutually promised each other to re-marry, and such marriage contract existed during all the time that the defendant boarded with the plaintiff. Subsequently, and before the commencement of this suit the defendant married another woman. The plaintiff does not rely upon an express promise on the part of

the defendant to pay for such board and nursing, but claims that a promise is implied by law under the circumstances of the case. The plaintiff testified on cross-examination as follows: Q. "Now, when he came there the first of January, sick, as you say, and you had made up your mind to marry him again, and had promised to marry him again, did you intend to charge him pay for his board? A. No sir, if he married me. Q. Did you tell him that? A. No sir, because the bill was not talked over. Q. When he came there and when you washed his feet and nursed him and made up his bed and got his victuals for him, did you have any intention in your mind at that time to charge him for those things? A. No sir, I did not at that time. Q. When was it that you made up your mind to charge him? A. I never made up my mind to ask him anything for board until the last time I was down and settled with you. Q. What date? A. I think it was November 11th. Q. So that, as you say, you never intended to charge him anything for his board and nursing until you came to me in November? A. No sir, I did not."

On re-direct, the plaintiff testified: "When he came there there was an understanding that I should marry him. I never at any time agreed with him that he should not pay board. Nothing was said between Mr. Clary and me in regard to his board."

The case of *LaFontain* v. *Hayhurst*, 89 Maine, 388, is almost identical in point of fact and precisely identical in point of law with the case at bar, and is decisive against the right of the plaintiff to maintain this action. There, as here, the plaintiff sued the defendant for board; before such board was furnished the defendant had promised to marry the plaintiff but subsequently married another woman; the plaintiff testified that at the time such board was furnished she did not intend to charge the defendant therefor. In that case, as in this, board was not furnished in consideration of a promise of marriage, but, rather, on account of the relations existing between the parties by reason of such a prior promise.

In *LaFontain* v. *Hayhurst*, supra, the court, after stating the well-settled doctrine that no binding promise to make compensation

can be implied or inferred in favor of one party against another unless the one party, the party furnishing the consideration, then expected, and from the language or conduct of the other party under the circumstances, had reason to expect such compensation from the other party, held, that as the plaintiff did not expect compensation for the board furnished in money or money's worth, the plaintiff could not recover. Following the decision in that case it is clear that, in the case at bar, the action is not maintainable and the motion for new trial must be sustained.

We perceive no error in the rulings and instructions of the presiding judge to which exceptions are taken and the exceptions should be overruled.

Exceptions overruled.
Motion sustained. New trial granted.

SAMUEL N. GILE *vs.* JOHN ATKINS and Colt.

Piscataquis. Opinion November 23, 1899.

Lien. Time. Estoppel. Stat. 1895, c. 25.

1. Under chapter 25 of Statutes of 1895, a colt foaled on the 12th day of July, 1898, became "six months old" at the beginning of the 11th day of January, 1899; and the statutory lien upon a colt expires at that time.
2. A lien created solely by statute cannot be extended by any estoppel.

ON EXCEPTIONS BY PLAINTIFF.

Assumpsit to enforce a lien on the defendant's colt under the statute of 1895, c. 25; also for a personal judgment against the defendant. The action was tried in the Dover municipal court, Piscataquis county, where the judge denied the claim for a lien and signed a bill of exceptions under the provision of the act organizing the court, being c. 507, § 17, Private and Special Laws of 1889, as follows:

"In the above entitled action, tried at the March term of said Municipal Court, the judge of said court found as facts that

defendant's mare was served by plaintiff's stallion, and the price of such service was fifteen dollars; that by said service a colt was foaled from defendant's mare early in the morning of July 12, 1898, being first seen at four o'clock A. M. then playing and dry; that the lien attachment in the lien suit, brought for the recovery of said fifteen dollars, was made by the officer in the forenoon of January 12, 1899, at about ten o'clock A. M. being at an hour of the day later than that of his birth.

"The court ruled that he should reckon fractions of a day in such case and as the colt was a few hours more than six months old, he denied the lien.

"The said judge found as facts further, that about two months prior to said attachment, the plaintiff saw the defendant, and tried to adjust the matter, that the defendant told the plaintiff that said colt was foaled on the 20th day of July, 1898, and would not be six months old until January 20, 1899, and that plaintiff relied on said statement, and that plaintiff told defendant that he should not let the lien run out.

"Upon these facts the court ruled that the defendant was not estopped to set up the true age of the colt in defense of the lien, although the colt was all the time owned by the defendant.

"The court rendered judgment for plaintiff for amount sued for and costs but denied the lien."

To these rulings plaintiff excepted.

C. W. Hayes, for plaintiff.

The statute means that the lien continues in force for six months from the day of the birth of the colt. If the statute read in this way, there could be no doubt that the attachment was made in due season. Fractions of a day are never reckoned unless manifest injury or wrong would result. *Oatman* v. *Walker*, 33 Maine, 67; *Stewart* v. *Griswold*, 134 Mass. 391; *Hannum* v. *Tourtellott*, 10 Allen, 494; *Clark* v. *Flagg*, 11 Cush. 539.

If the construction fashioned after the Blackstone rule were applied, and the lien extended until the foal were one day old, the attachment must be made two days before his birth; and if it extended until he were three days old, the attachment must be

made on the very day when the foal is born. With that construction, two days are deducted from all benefit to be derived from the lien. See *Bemis* v. *Leonard*, 118 Mass. 502, for a full review of the cases, and which holds that where a statute required the return of the attachment of bulky property and copy of the writ be filed in the town clerk's office "within" three days thereafter, the first day is excluded, and the officer has the whole of the last day to do the act, and fractions of a day are not allowed.

It may be argued that the word "until" excludes the last day. This is a rule that is observed as much by breaking it as keeping it. The courts uniformly hold that the intent of the statute or contract must always govern.

Where a policy of insurance against fire protected the insured from the 14th day of February, 1868, "until" the 14th day of August, 1868, the court held that the insured was protected for the whole of the last named day, and without a renewal of the policy or premium, a loss by fire on the 14th day of August, 1868, rendered the company liable. *Isaacs* v. *Royal Ins. Co.*, L. R. 5 Exch. 296, cited in 26 Am. & Eng. Enc. of Law, p. 10. See also, *Houghwout* v. *Boisaubin*, 18 N. J. Eq. 315; *Kendall* v. *Kingsley*, 120 Mass. 95, and cases cited in note 4, 27 Am. & Eng. Enc. of Law, p. 698.

The time during which this lien should continue was what the legislature meant to fix, and according to the ordinary and popular meaning of words, it is evident the full period of six months was meant. *Dale Co.* v. *Gunter*, 4 Ala. 118.

Estoppel: *Copeland* v. *Copeland*, 28 Maine, 525; *Fogler* v. *Clark*, 80 Maine, 237; *Caswell* v. *Fuller*, 77 Maine, 105; *Shapley* v. *Abbott*, 42 N. Y. 443, (1 Am. Rep. 548); *Payne* v. *Burnham*, 62 N. Y. 69.

W. E. Parsons, for defendant.

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

EMERY, J. In this suit to recover for the service of a stallion, the plaintiff has attached the colt and asks for a specific lien judg-

ment against the colt, as well as a personal judgment against the defendant, its owner. He claims this lien judgment under chapter 25 of the statutes of 1895, which is as follows:—

Sect. 1. "A lien is hereby created on all colts hereafter foaled in this state, to secure the payment of the service fee, for the use of the stallion begetting the same. Such lien is to continue in force until the foal is six months old, and may be enforced during that time by attachment of such foal."

The colt was foaled on the morning of July 12th, 1898. When did it become "six months old" within the meaning of the statute? The answer must be that it became six months old on the 11th day of January, 1899, at the beginning of that day. Age has always been reckoned that way, at least since the judgment of Chief Justice Holt in *Fitzhugh* v. *Pennington*, 1 Salk. 44, and the rule there laid down was explicitly affirmed in *Bardwell* v. *Purrington*, 107 Mass. 410 (1871). It is to be presumed that the legislature in using that phraseology was aware how age had been reckoned and intended it to be so reckoned under the statute. The statutory lien, therefore, continued in force until the beginning of the 11th day of January, 1899, and then expired. The plaintiff's attachment was not made till the next day, January 12th, when the lien no longer existed.

But the plaintiff insists that the defendant is estopped from questioning the seasonableness of the attachment, because when apprised, some two months previous, of the plaintiff's intention to enforce his lien, he assured the plaintiff the colt was foaled on July 20th and thereby induced the plaintiff to delay the attachment. If the lien had been created by the defendant's stipulation or assertion in the first instance, it perhaps would have been extended by the defendant's statement as to a later time of foaling, (*Oakes* v. *Moore*, 24 Maine, 214); but the lien in this case was created solely by statute and had such duration only as the statute gave it. Its entire vitality was dependent on the terms of the statute. *Frost* v. *Ilsley*, 54 Maine, 345. It could derive no life, nor prolongation of life, from any statements of the defendant made subsequent to the foaling. Such statements might estop the

defendant personally and might subject him to various liabilities and disabilities, but they can not by estoppel enact or enlarge a statute. There was no lien on the colt of any kind or extent outside of the statute. There can be no lien judgment against the colt except upon the terms prescribed by the statute. One of those terms is that the attachment should be made before the colt was six months old. There is no provision that the parties, either or both, by estoppel or in any other way, may substitute a later date for the attachment.

Exceptions overruled.

JOSEPH H. RINES and others, Complainants,

vs.

CITY OF PORTLAND.

Cumberland. Opinion November 23, 1899.

Way. Damages. Appeal. Assignee. Portland City Charter. R. S., c. 18, § 40; c. 82 § 30. Priv. and Spec. Laws, 1863, c. 275, § 9.

The charter of the city of Portland (Private and Special Laws, 1863, c. 275) gives a claim for damages to the owner at the time the land was taken in the laying out or alteration of streets in that city. No other person except the owner at the time of the taking is damaged or aggrieved by the estimate and award of damages; and he is the only person who has a right to appeal, as far as relates to damages.

The city of Portland laid out or altered Portland street, and damages were awarded to the owner thereof for land taken. On the following day, the complainants purchased the land, which was conveyed to them by the owner, "together with all damages allowed or recovered for the taking by the city of Portland" of the land in question. The complainants seasonably appealed from the award of damages. At a term of court, later than the one at which the appeal was entered, the appellee filed a motion to dismiss.

Held; that the motion to dismiss was seasonably filed; also, *held;* that the complainants cannot maintain their appeal, either as subsequent purchasers of the land, or as assignees and owners of the "damages allowed or recovered," the award of which was appealed from.

ON REPORT.

The case is stated in the opinion.

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

Motion to dismiss: Where the right to sue is denied it should be by motion or plea in abatement. *Vose* v. *Manly*, 19 Maine, p. 331; *Kellar* v. *Savage*, 20 Maine, 199; *Clark* v. *Pishon*, 31 Maine, 503; *Brown* v. *Nourse*, 55 Maine, 230; *Dresden School District* v. *Etna Ins. Co.*, 66 Maine, 370; *Abbott* v. *Chase*, 75 Maine, 83; *Min. & Sch. Fund* v. *Kendrick*, 12 Maine, 381; *Savage Mfg. Co.* v. *Armstrong*, 17 Maine, 34; *Vose* v. *Manly*, 19 Maine, 331; *Strang* v. *Hirst*, 61 Maine, 9; *Page* v. *McGlinch*, 63 Maine, 472; *Pope* v. *Jackson*, 65 Maine, 162.

Matters which may be raised by plea in abatement are waived by a general appearance and the continuation of the action to the next succeeding term. *Cook* v. *Lothrop*, 18 Maine, 260; *Shaw* v. *Usher*, 41 Maine, 102.

Same argument applies to not seasonably filing the assigment from Clark. *Littlefield* v. *Pinkham*, 72 Maine, 369; *Webb* v. *Goddard*, 46 Maine, 505; *Thornton* v. *Leavitt*, 63 Maine, 384; *Demuth* v. *Cutler*, 50 Maine, 299.

Under the conveyance and assignment the appellants became the owners of Clark's claim for damages for the taking, and thereby under the provisions of R. S., c. 82, § 130, became entitled to take and maintain in their own name their appeal by this action. *Moore* v. *Boston*, 8 Cush. 274; *Neal* v. *Knox & Lincoln R. R. Co.*, 61 Maine, 298.

In *Sargent* v. *Machias*, 65 Maine, 591, the land owner sold his land but did not transfer any cause of action he might possess which accrued prior to the sale.

Carrol W. Morrill, city solicitor, for defendant.

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

SAVAGE, J. This is an appeal by the complainants, or appellants, from an estimate and award of damages made by the city

council of Portland for land taken in the laying out or alteration of Portland street. The appellee has filed a motion to dismiss, and by the stipulations of the report, we are to determine whether the appeal shall be dismissed or shall stand for trial.

The allegations in the appeal itself are to the effect that the legal title to the land, at the time of the taking, was in one George D. Clark, in trust for the benefit of himself and others. It appears from the case that Portland street was laid out or altered by the city council July 7, 1896, and on the same day damages to the amount of $1378 were awarded to Clark as owner. On the day following, by virtue of a decree of court, in certain proceedings in equity, to which Clark was a party, the entire parcel of land, of which a portion had been taken, was sold at public vendue to these appellants. Subsequently the sale was confirmed by the court, and on July 28, 1896, the land was conveyed to the appellants by Clark, "together with all damages allowed or recovered for the taking by the city of Portland" of the land in question. It does not appear whether Clark appealed from the award of damages. But the appellants, within the time limited for appeals, filed this appeal to the supreme judicial court in Cumberland county at its October term, 1896. The appellee's motion to dismiss was filed at the April term, 1898. The ground taken in the motion to dismiss is, that it appears by the appeal itself, that at the time the land was taken by the city, the appellants did not own it, nor any portion of it, nor any right, title or interest in it, and therefore that they were not "aggrieved" by the award of the city council.

The first contention of the appellants is that the motion to dismiss was not seasonably filed. Their learned counsel take the ground that this motion is in the nature of a plea in abatement, and should have been filed within the time limited for pleas in abatement. This ground is not tenable. This motion does not go to such things as are properly matters in abatement, but rather to the merits of the appeal, and is based upon the allegations in the appeal itself. Such a motion, in a proceeding like this, serves the purpose of a demurrer. The question raised by it is whether, assuming all the allegations in the appeal to be true, the appel-

lants are, as a matter of law, entitled to maintain it. It is a convenient and proper method of attacking the sufficiency of the allegations in the appeal, or, as in this case, of denying that the appellants, upon their own showing, have any ground for an appeal.

But the appellants further contend that they are entitled to maintain this appeal upon its merits. They say that, although they were not the owners of the land when it was taken by the city, still they were aggrieved by the award, within the meaning of the laws relating to appeals in such cases: (1) because they became the owners of the land taken within the period allowed for appeals as to damages; and (2) because, as the purchasers and assignees of the claim of their grantor, in whose favor the award appealed from was made, they were, at the time of their appeal, the owners of the claim which is the subject matter of the appeal.

We will consider these positions in their order, only premising that the right of appeal from an award of damages is limited to those who are "aggrieved" by the estimate and award. City Charter of Portland. Private and Special Laws of 1863, Chap. 275, § 9.

Were the appellants, as subsequent owners of the land, within the time for taking an appeal, "aggrieved" by the action of the city council? Certainly not. If aggrieved at all it must have been at the time the city council acted. If they were not aggrieved then, they could not be aggrieved afterwards. But they were not aggrieved then. They were not the owners of the land then. They had no interest in it then. They were in no way affected by the action of the city council. They could not be aggrieved by an action which did not concern them. Subsequently they bought the land and the grievance. In buying the land they took it subject to the easement created by the city council. They bought the interest which was left after the land for the street had been taken,—nothing more; and so far as the land is concerned, they paid for this interest, and no more. They lost nothing by reason of the fact that land had been taken for the street. They got what they purchased and paid for. And it follows that, as

subsequent purchasers of the land, they were in no sense "aggrieved" by the estimate of damages. *Sargent* v. *Machias*, 65 Maine, 591.

Nor do the appellants stand in any better position as purchasers and assignees of the "damages allowed or recovered," as it is expressed in the deed from Clark to them. It is undoubtedly competent for the owner of land, to whom damages have been awarded for a strip of land taken for a highway, to assign the right to recover the damages to the same person to whom he conveys his remaining interest in the land; or he may convey the land, and himself retain the right to recover the damages; or he may assign the right to recover the damages to another than the grantee of the land. The interests are separable and distinct. *Neal* v. *Knox & Lincoln R. R. Co.*, 61 Maine, 298; *Sargent* v. *Machias*, supra. By the provisions of the deed in this case, the appellants obtained the right to receive such damages as had been allowed, or as might be recovered for the taking of the land for Portland street. But it does not follow that an appeal for increase of damages will lie in their own names. At common law, assignees of choses in action, not negotiable, could bring suit to recover them only in the names of their assignors. By statute, however, such assignees may bring and maintain actions in their own names. R. S., chap. 82, § 30. But this proceeding is not an "action" within the meaning of this statute. *Webster* v. *County Commissioners*, 63 Maine, 27; *Belfast* v. *Fogler*, 71 Maine, 403; *Stetson* v. *County Commissioners*, 72 Maine, 17; *Counce* v. *Persons Unknown*, 76 Maine, 548; *Grand Trunk Railway* v. *County Commissioners*, 88 Maine, 225. The distinction may be illustrated in this way:— If the city of Portland neglects to pay the damages awarded in this case, then an "action" will lie to recover the same. R. S., chap. 18, § 40. This, on the other hand, is merely a statutory appeal. The right to take an appeal is limited by statute to "any person aggrieved by the decision or judgment of the city council." City Charter of Portland, supra. We cannot extend the right. No other person can appeal. But, as we have already pointed out, these appellants were not, and could not have been, "ag-

grieved" by the decision complained of, because at the time it was made, they had no interest whatever in the land taken.

We hold, therefore, that the appellants, as assignees of the claim for damages, are not entitled to maintain an appeal in their own names.

Appeal dismissed, with costs.

PHILANDO PORELL *vs.* FRED W. COUSINS.

York. Opinion November 24, 1899.

Jurisdiction. Municipal Court of Sanford. Recorder. Spec. and Priv. Laws 1897, c. 522, § 9.

The recorder of the Municipal Court of Sanford may exercise under c. 522, § 9, of the Special Laws of 1897, all the powers of the judge "in case of the absence from the court room or sickness of the judge."

Held; that the complaint in this case made to the recorder in the absence from the court room of the judge of the court,—the jurat containing the same statement and the warrant being signed with the same addition by the recorder,—is sufficient to show the authority of the recorder to exercise all the powers of the judge.

ON EXCEPTIONS BY PLAINTIFF.

This was an action of trespass q. c. heard by the presiding justice without a jury and with the right to except.

The defendant admitted the acts complained of as a trespass but justified under a search warrant, commanding the search of the locus for intoxicating liquors, issued by the recorder of the Sanford municipal court. The only question made, as to the sufficiency of the search warrant, was that it was issued by the recorder of said court without any sufficient allegation of the authority of the recorder to issue the same.

The complaint upon which the warrant was issued and which is annexed to the latter, was addressed as follows: "To Geo. E. Allen, Esquire, Recorder of the Sanford Municipal Court of Sanford in the County of York, in the absence from the Court Room

of the Judge of said Court." And the warrant after the signature of Geo. E. Allen, Recorder, contained the following: "In the absence from the Court Room of the Judge of said Court."

The court ruled that the warrant was properly issued and afforded a justification to the defendant for the acts complained of and thereupon awarded judgment for the defendant.

To this ruling the plaintiff excepted.

John S. Derby, for plaintiff.

Nothing can be taken by intendment as to the jurisdiction of inferior courts; every jurisdictional fact must be affirmatively alleged. *Peacock* v. *Bell*, 1 Saunders, 73; *State* v. *Paul*, 69 Maine, 215; *State* v. *Whalen*, 85 Maine, 472; *Brooks* v. *Adams*, 11 Pick. 441.

Complaint must show by affirmative allegations the conditions under which recorder can act. *Guptill* v. *Richardson*, 62 Maine, 257.

The introductory address to the magistrate is no part of the complaint. The "commencement" or "caption" is not a part of the pleadings. 1 Bish. Crim. Proc. § 151; *State* v. *Creight*, 1 Brev. 169; *State* v. *Gilbert*, 13 Vt. 647; *State* v. *Thibeau*, 30 Vt. 100; *State* v. *Conley*, 39 Maine, 78.

The pleadings "must set forth affirmatively and clearly all facts necessary to show jurisdiction." *Brooks* v. *Adams*, supra; *Hall* v. *Howd*, 10 Conn. 514, (27 Am. Dec. 696).

Must "expressly set forth" the jurisdictional facts. *Turner* v. *Bank*, 4 Dall. 11; *Walker* v. *Turner*, 9 Wheat. 541.

Must "substantiate" every such fact. *Williams* v. *Blunt*, 2 Mass. 213; *Kempe's Lessee* v. *Kennedy*, 5 Cranch, 173.

Must allege them in express language. *Gray* v. *Larrimore*, 2 Abb. N. S., 542; *Dole* v. *Felker*, 16 Cal. 432; *Morrow* v. *Weed*, 4 Iowa, 77, (66 Am. Dec. 122); *Denning* v. *Roberts*, 11 Wend. 647.

The mere parenthetical clause, even if inserted in the complaint, "in the absence, etc.," is not an allegation. *State* v. *Whalen*, 85 Maine, 472.

The provision that the "signature of the recorder shall be sufficient evidence of his right to act," does not change the rules of pleading.

"Sufficient" evidence means "satisfactory,"—that is prima facie evidence; sufficient to throw the burden upon the respondent. 1 Greenl. Ev. § 2. *Thayer* v. *Boyle*, 30 Maine, 481.

But there must be some allegation of which it can be evidence. Respondent has a right to question the jurisdictional facts. This provision simply throws the burden upon him. And he may raise the question under the general issue. 1 Bish. Crim. Proc. § 414.

The warrant contains no averment whatever of the necessary facts. It refers to the "complaint" only.

Fred J. Allen, for defendant.

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

STROUT, J. Section 9, of chapter 522 of the special laws of 1897, authorizes the recorder of the municipal court of Sanford "in case of the absence from the court room or sickness of the judge," to exercise all the powers of the judge. The complaint in this case was made to the recorder, "in the absence from the court room of the judge of said court," was sworn to before the recorder, whose jurat contains the same statement of absence of the judge, and the warrant was signed by the recorder, with the addition, "in the absence from the court room of the judge of said court." And the last part of the same section provides that "the signature of the recorder as such shall be sufficient evidence of his right to act instead of the judge."

It is settled law that the jurisdiction of inferior tribunals must affirmatively appear in the papers, and cannot be inferred. This complaint and warrant do distinctly and fully show the authority of the recorder to receive the complaint and issue the warrant. It therefore afforded justification to the defendant for his acts. Such was the ruling below.

Exceptions overruled.

NORTHPORT WESLEYAN GROVE CAMPMEETING ASSOCIATION

vs.

CHESTER PERKINS.

Waldo. Opinion November 25, 1899.

Campmeeting Associations. Tax. License. Regulations. Priv. and Spec. Laws, 1873, c. 319.

A campmeeting association, that has laid out its grounds into cottage lots, streets and squares and has made perpetual leases of the lots without other restriction than that they are "subject to such rules and regulations as the association may from time to time adopt," cannot afterward, for revenue purposes impose a license tax on persons visiting the occupants of cottages on such lots to obtain orders for family supplies.

AGREED STATEMENT OF FACTS.

The case appears in the opinion.

W. P. Thompson, for plaintiff.

Such a license may be verbal or inferred from circumstances. It is an authority given to do some one act or a series of acts on the land of another without passing any interest in the land. *Harmon* v. *Harmon*, 61 Maine, 222; *Cook* v. *Stearns*, 11 Mass. 537.

The condition upon which the defendant was permitted to use the plaintiff's land was reasonable and one which the plaintiff had a legal right to impose. It made legal, acts of the defendant which otherwise would have been illegal, and gave him the right to do certain things which without such license would have been trespass.

If the defendant had paid the plaintiff for the privilege of using its land for such purpose and the plaintiff had revoked the license and refused to allow the use thereof, the defendant could have maintained an action against the plaintiff on the contract; therefore, it must follow that this action is maintainable. It was of great and beneficial importance to the defendant to have the privilege of going upon the plaintiff's land for the purposes of trade;

and the pay therefor important to the plaintiff in the way of revenue necessary to maintain operations upon their grounds.

The plaintiff corporation has expended large sums of money, so beautified and adorned the grounds that it has become quite a famous and a very desirable resort for people during the summer season.

The cottage lots are all leased subject to the rules and regulations adopted by the plaintiff corporation, among which are the rules mentioned. The association has never surrendered its control and management of this camp-ground and has the same right to impose conditions as to the use thereof by strangers, as though no lots had been leased. It is a part of their system of management and one of the sources of obtaining revenue to enable the association to continue. The association owns a store upon said grounds and it is reasonable for outsiders to pay for the privilege of competing with the proprietor of this store.

R. F. and J. R. Dunton, for defendant.

The power to license and regulate corporations is conferred solely for police purposes, and municipal corporations have no power to use it as a means for increasing their revenue. 2 Beach, Pub. Corp. § 255.

If this license were imposed as a police regulation, and not for the principal and avowed purpose of raising revenue, the plaintiff would have no right to exact a license fee from the defendant, who is not a resident of the plaintiff's grounds, notwithstanding that he did business with the residents within said grounds. Under a statute empowering cities to levy license taxes on attorneys residing therein, a city may not levy such taxes on attorneys not residing therein, but having offices and doing business therein. 2 Beach, Pub. Corp. § 1252.

Grants of this kind are to be strictly construed, and if the plaintiff's charter by implication gives it power to levy upon the residents of its grounds, that power cannot be enlarged by any by-law so as to extend to non-residents doing business therein.

"A grant of police power can never be taken to authorize ordi-

nances upon some subject which is partially or imperfectly given to the control of the corporation by an express grant. For this shows that the legislative mind was specially directed to the subject and the grant must be taken as the limit of its intention." Ib. § 1249.

But if this plaintiff corporation had a legal power under its charter to enact license ordinances, it has not legally exercised that power. License ordinances, to be valid, must name and fix a definite license fee which all persons engaged in like business shall pay, and should state the time of duration and validity of the license to be issued. The plaintiff, without right, has delegated all its powers to its trustees, and its trustees have passed a license ordinance in which no definite license fee is named, and no time of duration of license, but has left all this to the discretion of the superintendent, and under said ordinance, he has discretionary power to collect or not collect of any person at his pleasure.

The power to issue a license cannot be delegated by the council, unless there be express authority for such delegation. Ib. § 1254.

The plaintiff, even if it had power to issue license, had no right to delegate this power to the trustees, and much less had the trustees authority to delegate this power to the superintendent to be exercised at his discretion. "The rule may be considered universal that no judicial discretion may be conferred upon an officer issuing the license." Ib. § 1254.

The avowed purpose of imposing this license would render the vote of the trustees under which this suit is brought invalid, for this vote directs the levy of a license tax, the avowed and principal object of which is the raising of revenue. Ib. § 1255.

The plaintiff has exercised a power not given it by law, but contrary to common law, and the constitution of the state, which declares "that no tax or duty shall be imposed without the consent of the people, or their representatives in the legislature."

The defendant in visiting his customers, the plaintiff's lessees, for the purpose of taking orders for goods, and in delivering goods in accordance with their orders, was, by their patronage, invited to visit their houses on said grounds to transact this business with

them, and if any license were needed, they, by their patronage, have given the defendant a license, and they are the only persons competent to license any one to enter their houses or the approaches thereto; and the fact that he was their licensee, gives him full authority to use, in going to and from their said houses, the plaintiff's said streets, which are open to public travel.

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

EMERY, J. The Wesleyan Grove Campmeeting Association was incorporated by special act of the legislature, approved February 19, 1873, to be composed of the presiding elders of the Methodist Episcopal Church of the East Maine Conference with the preachers under their charge, and with the tent masters from Methodist Episcopal Societies. It was empowered to acquire real and personal property and to sell the same, and "to establish such by-laws and regulations as are necessary for the further and proper management of their affairs, consistent with the laws of this State." The principal purpose of the corporators was to acquire and manage real estate for campmeeting purposes. The corporation afterward acquired the fee in that tract of land in Northport known as the "Northport Camp Ground," and which is a well known summer resort. It laid out this land into cottage lots, with streets, squares, etc., and has leased the most of these lots in perpetuum to the owners of cottages thereon. The most of the cottages on the lots thus perpetually leased are occupied by their owners or others during the summer season. The streets leading through and across the grounds are open to public travel, except during campmeeting week when toll is taken at the entrance to the grounds. The only restriction stated in the case as existing in the perpetual leases is that they are "subject to such rules and regulations as the Association may from time to time adopt."

The defendant has a place of business outside of, but near, these grounds of the Association where he sells groceries, fruits and provisions, mainly of course to the summer-residents on the grounds.

He has been wont to go round to the cottages occupied by his customers upon the grounds and take orders for his goods, which orders he filled at his store outside the grounds and then delivered the goods so ordered to his customers at their cottages on the grounds. In doing this he passed over the streets on the grounds open (except during campmeeting week) to public travel. The plaintiff association owned a store on the grounds for the sale of various goods, which it leased for a rental.

In 1898, the trustees of the association voted that "any person or persons taking any order or orders for goods, wares, merchandise, fruit or produce, or peddling groceries upon said grounds shall pay the sum of fifteen dollars for the season." The defendant was duly apprised of this new rule, but continued to visit his customers upon the grounds and take their orders for goods, and refused to pay the fifteen dollars. This action is to recover that sum.

The question raised by the parties in the statement of the case is whether the trustees can lawfully impose this revenue tax on the business of taking orders for fruit, groceries and provisions from cottagers upon the grounds of the association, there being no suggestion of any other purpose of the vote.

It is common knowledge that it is now an almost universal practice in cities, villages and summer resorts, for dealers in such articles to go or send to the residences of the customers for orders for goods to be delivered there. The great convenience and comfort of this practice to families, especially those in summer cottages, are obvious. If the trustees of the plaintiff association can impose a revenue tax on that practice they can make the tax so high as to break it up, and compel the occupants of the cottages on the lots held by them under perpetual leases, to trade exclusively with some favored dealer on the grounds, or to go some distance to find a dealer outside of the grounds. Clearly the cottagers cannot be subjected to such arbitrary power unless it is plainly expressed in the terms of the leases under which they occupy. The only condition or restriction in the leases stated in the case is, that they are "subject to such rules and regulations as the asso-

ciation may from time to time adopt." What the context might show we do not know. We are confined to the particular extract stated.

We think that condition or restriction imports only rules and regulations of a police nature, such as may be adopted for the preservation or improvement of the health, morals, religion, comfort and convenience of all the occupants of the grounds. We do not think it can be extended to include an indefinite power to impose taxes directly or indirectly upon the cottagers at the discretion of the trustees, or even to abridge their comfort or convenience for mere purposes of revenue to the association, when the enjoyment of that comfort or convenience is in no way hurtful to the health, morals, religious sentiment, comfort or convenience of that particular community.

It is argued that the tax is imposed upon the grocer, not on the cottager, and that the association is under no obligation to the grocer and can exclude him from the grounds entirely, or impose upon him any conditions of entrance including the payment of a revenue license fee.

The power of the association is not so absolute as that. It has laid out its grounds into lots, streets and squares, and has invited people to take leases of lots, build cottages thereon, and occupy them as residents. It has thrown open the streets and squares to the the free use of all persons occupying the cottages or having business or social relations with the cottagers, at all times except during camp-meeting week, when a toll is charged at the entrance. This state of things has existed for more than twenty years. While, as before stated, the association has retained full power to make reasonable rules and regulations of a police nature, it has not apparently reserved, if it ever possessed, the power to prevent the use of the streets by the cottagers or by those having business or social relations with them, or to impose a tax for such use in the ordinary intercourse of life, or in other words, to shut off, or impose revenue conditions upon, the intercourse of the cottagers with the rest of the town or state.

It is again argued that the charter gave the association authority

"to establish such by-laws and regulations as are necessary for the further and proper management of their affairs," and that license fees like that imposed in this case are necessary for requisite revenue. Granting, for the purpose of the argument only, that in making its leases and opening its streets, etc., the association might have reserved the power to impose such license fees as conditions or restrictions, it does not appear to have done so. The rights of the cottagers in their cottages and in the streets, and to the use of them for business and social intercourse acquired under the perpetual leases of the lots, cannot now be abridged without their consent to enable the association to raise a revenue. A corporation has no power to adopt rules or regulations injuriously affecting the rights of others under prior contracts, by annexing conditions not embraced in the contracts. *Illinois Conference Female College* v. *Cooper*, 25 Ill. 148.

Plaintiff nonsuit.

ELBRIDGE G. BENNETT, in Equity,

vs.

EDGAR H. BENNETT, Administrator.

Cumberland. Opinion November 25, 1899.

Limitations. Equitable Relief. R. S., c. 87, § 19.

The relief authorized by R. S., chap. 87, § 19, is exceptional, and is to be granted only when the creditor fully proves, not only the justice and equity of his claim, but also that he is not responsible for the delay.

Held; in this case no good lawful reason is shown for the delay.

See *Bennett* v. *Bennett*, 92 Maine, 80.

IN EQUITY. ON EXCEPTIONS AND APPEAL BY DEFENDANT.

The case appears in the opinion.

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

Geo. Libby, for defendant.

SITTING: EMERY, HASKELL, WISWELL, SAVAGE, FOGLER, JJ.

EMERY, J. The plaintiff and the defendant's intestate were business partners. The defendant was appointed administrator of his intestate's estate in February, 1889, and he gave the usual notice of his appointment. In the next month, March, 1889, the plaintiff was qualified and authorized as surviving partner to administer the partnership estate and affairs. He did not close that administration and present his final account for allowance until March, 1896. This account, as finally allowed in November, 1896, showed the partnership to be indebted to him in the sum of $1015.81. He brought an action at law for one-half this sum, or $507.90, against the defendant, but the court held the action was barred by the statute of limitations in favor of executors and administrators. See *Bennett* v. *Bennett*, 92 Maine, 80.

He now brings this bill in equity to obtain the relief authorized by R. S., c. 87, § 19, viz: "If the supreme judicial court, upon a bill in equity filed by a creditor whose claim has not been prosecuted within the time limited by the preceding sections, is of opinion that justice and equity require it, and that such creditor is not chargeable with culpable neglect in not prosecuting his claim within the time so limited, it may give him judgment for the amount of his claim against the estate of the deceased person; but such judgment shall not affect any payment or distribution made before the filing of such bill."

This statute, first enacted in Maine in 1883, is almost a verbatim copy of the Massachusetts statute enacted in 1861, the language of which had several times received a judicial interpretation from the court of that state before it was adopted in this state in 1883. It is to be presumed that, in adopting the language thus interpreted, the legislature used it in the sense already judicially declared to be its true sense and meaning. *Rutland* v. *Mendon*, 1 Pick. 154; *Purrington* v. *Dunning*, 11 Maine, 174.

The Massachusetts court held speed of administration and early discharge of the executor and administrator from liability to suit to be the worthy purpose of the statute of limitations in their favor,

and hence that the relief to be granted in equity was exceptional only. The court also held that both conditions of the statute in question must be complied with,—that it was not enough for the plaintiff to show that he had a valid claim against the estate, a claim good in "justice and equity," but that he must further show that he was not "chargeable with culpable neglect in not prosecuting his claim within the time so limited." "Culpable neglect" was held to be not criminal neglect, but any neglect that was "censurable," "blameworthy," "the neglect which exists when the loss can fairly be ascribed to his (the plaintiff's) own carelessness, improvidence or folly," "failure to make reasonable inquiry." See *Waltham Bank* v. *Wright*, 8 Allen, 121, where it was held that it was culpable neglect in the plaintiff to delay the enforcement of his claim on the oral promise of the administrator to pay it out of a particular fund. *Jenney* v. *Wilcox*, 9 Allen, 245, where it was held to be culpable neglect for the plaintiff to delay at the earnest request of the executor to wait until he could realize from certain property, and upon his earnest assurance that the claim should certainly be paid. It was also held in this case that ignorance of the special limitation in favor of executors and administrators was culpable neglect. In *Wells* v. *Child*, 12 Allen, 333, the creditor was a woman living in another state. She seasonably sent her claim to the executors, who acknowledged its validity and assured her that it would be paid as soon as they could sell some real estate, which would be soon, and that no further proceedings were necessary on her part. Relying upon these assurances she brought no action within the limitation. Afterwards, finding out that the executors had not applied for license to sell real estate, she applied for relief in equity. *Held;* that she had been culpably negligent, and relief was denied. The court said that in administering this statute the court should not exercise an arbitrary or capricious discretion governed only by an opinion as to the hardship of the particular case, but should be guided by the rules and principles of equity jurisdiction as settled by a long series of adjudications. In *Sykes* v. *Meacham*, 103 Mass. 285, the creditor lived in Montreal and was unaware of the death of his debtor,

and of the appointment of the administrators until after the two years limitation. One of the administrators knew of the claim of the Montreal creditor, but sent him no notice of the death or appointment. The creditor applied for relief under the statute, but the court dismissed his bill with costs, saying: "The object of the statute was to protect the estates of deceased persons and insure their speedy settlement without embarrassment from creditors who slumber upon their rights and take no pains to inform themselves of facts as to which information is easily to be obtained. . . . . In this case there is no misrepresentation, and the only mistake is the failure to know a fact about which he made no inquiry."

Recurring now to the evidence in the case before us, we find that the partnership estate was a small one, consisting of real estate valued at $2225, and goods and chattels valued at $117.65. The liabilities of the partnership over its assets turned out to be only $1015.81. Though the plaintiff was qualified as surviving partner in March, 1889, he does not appear to have taken any steps to sell the real estate till May, 1890. He does not appear to have obtained any license until January 20, 1892, and even then he made no sale under it. He presented no account for allowance until July, 1893, and only after two citations therefor at the instance of the administrator. He did not present his final account till March, 1896. Thus he protracted for seven years or more the administration of a partnership estate where the assets were mainly real estate and less than $3000, and the total liabilities not over $4000. While he says he did the best he could and tried to close up the estate by negotiations, etc., he utterly fails to point out any unusual difficulty. No litigation, nor even dispute, is shown between the partnership and its creditors or debtors. No obstacles were put in his way by the administrator or heirs of the deceased partner. On the contrary they were anxious for him to proceed more rapidly. The administrator twice cited him to present accounts for settlement, and with the heirs signed an agreement for the conveyance of the partnership real estate by him.

We are constrained to believe fully, notwithstanding the finding

of the justice of the first instance, that the delay of which the plaintiff complains, and from the consequences of which he asks to be relieved, was the result of his own inattention, want of diligence, and lack of proper effort,—that is, of his own "culpable neglect." To hold otherwise would be to practically nullify the statute of limitations and indefinitely prolong the administration of estates.

Decree below reversed.
Bill dismissed with costs.

JOSEPHINE T. CURTISS, Appellant,

vs.

WILLIAM H. MORRISON, Administrator.

Franklin. Opinion November 27, 1899.

Probate. Guardian. Minor. Bond. Appeal. R. S., c. 63, § 24; c. 67, § 3.

A ward is no longer "under guardianship" after he becomes twenty-one years of age. And if such person, after he becomes of full age, appeals from an allowance of the guardian's account, he is not excused from giving bond, by R. S., chap. 63, § 24.

In this case, the appellant was forty-one years old when she appealed, and she gave no bond. *Held;* that her appeal was, for that reason, rightly dismissed.

ON EXCEPTIONS BY PLAINTIFF.

This was a probate appeal, from the allowance by the judge of probate for Franklin county, of a guardian's account settled by the administrator. No bond was filed by the appellant, and for that reason the appellee, on the second day of the first term, moved to dismiss the appeal. The appellee's intestate was appointed guardian of the appellant, on the first Tuesday of October, 1863, then a minor of the age of six years. The guardian filed an inventory, and during his lifetime and during the minority of his ward, settled two accounts in the probate court, and on the first Tuesday of May, 1873, filed a third, upon which notice was given returnable on the first Tuesday of June, 1873, and which said account was

sworn to prior to the day of settlement, and thereafterwards, without further notice, after said ward had attained her majority, was settled and allowed on the first Tuesday of September, 1879, showing a balance in his hands of $548.79.

The ward became of age on the seventh day of April, 1878, and the guardian, without having settled any further account, died on the fifteenth day of March, 1898. After the lapse of nineteen years from the time the ward became of age, and after the death of the guardian, the ward, being of full age, to wit, of the age of forty-one years, cited the appellee as administrator of the guardian to settle an account in the probate court. Whereupon he did settle his account, which was allowed by the judge of probate, and from which this appeal is taken, without the filing of any bond.

It was considered by the court that the appellant, being of full age and not under guardianship, but of the age of forty-one years, could not maintain her appeal without the prerequisite of a statute bond as required in other cases, and that the appeal should be dismissed.

To this ruling and decision of the presiding justice the appellant took exceptions.

E. O. Greenleaf, for plaintiff.

The guardian ceases to be such only when the ward arrives at full age and has made final settlement.

The consequences and responsibilities of the relation may continue. *Overton* v. *Beavers*, 19 Ark. 623, (70 Am. Dec. 610.)

The jurisdiction of the court still subsists for the special purpose of final settlement and so far the original relation and rights of the ward are preserved. It has been said that the guardian is the agent of the ward, having an authority without an interest. *Manson* v. *Felton*, 13 Pick. 211.

If this be so, how can the relation of principal and agent be dissolved without a settlement? The ward has the right to dispute the account of his guardian after attaining his majority. *Blake* v. *Pegram*, 101 Mass. 592.

The pertinent inquiry arises, how can this be done if the relationship has ceased.

True, the legal status of guardian and ward may cease as to future advances, as is held *in re Kincaid's Case*, 120 Cal. 203, (3 Prob. Rep. Annotated, 260); but the probate court retains jurisdiction to compel an accounting.

The proceeding is "in rem" and the estate the "res." The accounting is for property which came in his possession during the minority of his ward, so that the ward bears the same relation toward his guardian in final settlement as at any prior time, it being his minority property over which the court then has jurisdiction.

Again, there were no laches on the part of the ward, as it was as much the duty of the guardian to call her up for settlement as hers to compel him, and she had several times called the matter up in the family, the guardian being her step-father.

Custody of person yields to age, but guardianship of estate cannot cease till final settlement in probate court, whether during minority or after full age of ward.

E. E. Richards, for defendant.

Counsel cited: R. S., c. 63, § 24; c. 67, § 3, as amended by stat. 1893, c. 275; stat. 1895, c. 41; 2 Kent's Com. 227, and cases cited; *Witham, Applt.*, 85 Maine, 360; *Murray* v. *Wood*, 144 Mass. 195.

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

SAVAGE, J. The appellee's intestate was appointed guardian of the appellant, then a minor, in 1863. The guardian, having settled three accounts, died in 1898. The appellant then cited the appellee, as administrator of the guardian, to settle a further account in probate court. The appellee did so, and his account was allowed by the judge of probate. From that allowance, this appeal was taken. No bond was filed by the appellant upon taking the appeal, and for this reason, the presiding justice, on motion, dismissed the appeal and the appellant excepted.

The case shows that the appellant, at the time of taking the appeal, was forty-one years old.

The statute governing probate appeals provides that "within the time limited for claiming an appeal, the appellant shall file, in the probate office, his bond to the adverse party, or to the judge of probate for the benefit of the adverse party, for such sum and with such sureties, as the judge approves; conditioned to prosecute his appeal with effect, and to pay all intervening costs and damages, and such costs as the supreme court taxes against him." R. S., chap. 63, § 24. The same section also provides that "in case of controversy between a person under guardianship and his guardian, the supreme court may sustain an appeal on the part of the ward without such bond."

It is clear, that the filing of a bond is, in general, made an essential prerequisite to the right to maintain an appeal. It is a condition precedent. But the appellant contends that she was "a person under guardianship," and therefore, by the clause of the statute last cited, was excused from filing a bond. We do not think so. The statute elsewhere provides that a "guardian shall have the care and management of all his ward's estate, and continue in office until the ward is twenty-one years of age, unless sooner lawfully discharged." R. S., chap. 67, § 3. When the ward becomes twenty-one years of age, the authority of the guardian ceases. He can no longer act as guardian. He can no longer manage the estate. His only duty is to settle his account, and deliver the estate remaining in his hands to his ward. Thus it appears that the ward is no longer "under guardianship" after he becomes of age. The statute relied upon by the appellant was evidently intended "to relieve appellants, who were incapable of contracting, from the necessity of filing bonds in cases of appeals where the guardian was a party." *Witham, Applt.*, 85 Maine, 360. But such is not the case of this appellant. She has been a long time of full age, and is included neither within the language nor the reason of the statute which she relies upon.

Exceptions overruled.

FRED TUTTLE, Appellant, *vs.* GEORGE H. FLETCHER and others.

Somerset. Opinion November 28, 1899.

Insolvency. Appeal. Action. R. S., c. 70, §§ 12, 49; c. 82, § 1. Rule of Court, II.

An appeal in insolvency is not an an "action" within R. S., c. 82, § 1, or Rule II of this court.

The supreme judicial court takes jurisdiction of appeals from decrees of judges of insolvency by force of R. S., c. 70, § 12 ; and such appeals are to "be taken to the supreme judicial court next to be held within and for the county where the proceedings are pending."

Held; that such appeals, to be effective, must be taken and prosecuted as provided by the statute.

An insolvent debtor appealed from a decree of the insolvent court, annulling a discharge previously granted to him, to the following term of the supreme judicial court. He did not enter his appeal, nor file a certified copy of the application for annulment on the first day of that term as required by R. S., c. 70, §§ 12 and 49; but on the fourteenth day of the term asked leave to enter his appeal, which was granted. *Held;* that the appellate court did not have authority to allow the appeal to be entered after the first day of the term.

AGREED STATEMENT OF FACTS AND EXCEPTIONS BY DEFENDANTS.

This was an appeal from a decree of the judge of the court of insolvency, for Somerset county, annulling a discharge in insolvency granted to the plaintiff Tuttle.

On July 15, 1891, the plaintiff, Tuttle, filed in the insolvency court, for Somerset county, his voluntary petition in insolvency and on the same day was by the judge of said court duly adjudged and decreed to be an insolvent debtor, and after due proceedings had, was on July 10th, 1895, by said judge, granted a discharge in due form from all his debts provable in insolvency.

At the time of filing the petition in insolvency and granting said discharge, the defendants, Fletcher & Co., were, and ever since have been creditors of said Tuttle, secured in part only by a real estate mortgage worth much less than the amount of his

indebtedness. Said indebtedness, or the balance above the security, was provable against said Tuttle in insolvency.

Fletcher & Co. did not prove their debt, or any part thereof, against Tuttle in insolvency, and took no part whatever in said insolvency proceedings.

Within two years from the granting said discharge, to wit: on May 8th, 1897, Fletcher & Co. filed in said court of insolvency their petition and application to have said discharge in insolvency annulled on the ground that it was fraudulently obtained and for reasons that were unknown to them at the time the discharge was granted.

Notice was ordered and given upon said application and Tuttle duly appeared and answered thereto. The judge of the court of insolvency fully heard the said Fletchers and Tuttle and considered the evidence, and on the 16th day of May, 1898, duly ordered, adjudged and decreed that the said discharge in insolvency be annulled as prayed for; from which decree said Tuttle appealed on May 17th, 1898, to the September term 1898 of the supreme judicial court for said county. Said notice of appeal was seasonably served upon the said petitioners. Tuttle did not enter his appeal, or a copy of the application to have said discharge annulled, on the first day of said September term of the appellate court, but on October 5th, 1898, being the fourteenth day of said September term of said appellate court, filed a motion to then enter his said appeal, which motion the presiding justice granted, and allowed Tuttle to enter his appeal on the fourteenth day of said term, as of the first day of said term.

No further proceedings were had in the court below between the 20th of September, 1898, and the 5th day of October, 1898.

To these rulings of the court the defendants took exceptions.

A. K. Butler, for plaintiff.

Geo. W. Gower, for defendants.

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

STROUT, J. On petition of Fletcher & Co., as creditors of

Tuttle, the court of insolvency, on May 16th, 1898, decreed the annulment of a discharge previously granted to Tuttle. From the decree Tuttle appealed to the following September term of the supreme judicial court. He did not enter his appeal, nor file a certified copy of the application for annulment on the first day of that term, as required by R. S., c. 70, §§ 12, 49. On the fourteenth day of the term he asked leave to enter the appeal, as of the first day, which was granted. Exception was taken to this order. The question is: was the presiding justice authorized to allow the entry after the first day of the term?

An appeal in insolvency is not "an action" within R. S., c. 82, § 1, or Rule II of this court. *Milliken* v. *Morey*, 85 Maine, 340. Nor does it vacate the decree appealed from, as is the usual effect in other cases. This results from the peculiar provisions of section 12 of the insolvency law. That section provides that "no appeal in insolvency lies in any case . . . . unless specially provided for" in the insolvency law. It follows that such appeals, to be effective, must be taken and prosecuted as provided by that act. No latitude or discretion is given to the court by the act. Section 49 of the insolvency law, authorizing the proceeding for annulment of a discharge, provides for an appeal to the supreme judicial court next to be held in the same county, "to be taken, heard and determined as provided in section 12." That section provides that the appeal shall be taken to the next term of the court, and directs the procedure with a view to expedition. It then provides: "But if the appellant in writing waives his appeal before the entry thereof, or fails to enter the same on the first day of the term to which such appeal is taken, proceedings may be had in the insolvency court as if no appeal had been taken."

This provision limits the appellant's right to prosecute his appeal to the condition that he shall enter it on the first day of the term. It is not effectual otherwise. The entry perfects the appeal—is an element in it. Unless so perfected, there is no legal appeal, and the decree of the insolvency court stands.

Expedition in closing insolvency proceedings is a leading feature in the law. To this end, section 12 provides that appeals may be

heard by the court, or a single justice in vacation, and if exceptions are taken, summary proceedings for their disposition are provided. The time for appearance, or for doing certain acts, or claiming certain rights as fixed by statute or order of the judge, becomes material. Thus a creditor is allowed to appear at the time assigned by the judge for hearing a debtor's petition for discharge and oppose it. But if he does not appear at that time he has lost his right to oppose. *In re Butterfield*, 80 Maine, 596.

So here, the statute makes the time of the entry of an appeal (the first day of the term) material. If not so entered the appeal is gone. No power is given the court to extend the time, or relieve against carelessness or accident. Such entry is a condition precedent to the prosecution of the appeal in the appellate court. It cannot be entered at a subsequent day of the term, nor at a subsequent term, for any cause. *Palmer* v. *Dayton*, 4 Cush. 270.

That the legislature intended the provision for entry on the first day of the term to be imperative, is apparent when it is seen that serious complications might arise if the entry was permitted at a later day. Section 25 of the insolvent law, relative to proof of claims against the estate, gives an appeal to the claimant or assignee from the decision of the judge, allowing or rejecting a claim, the appeal to be governed by section 12, which provides for entry on the first day of the term, and if not so entered, the proceedings in the insolvency court to go on as if no appeal had been taken. If the claim is allowed by the judge, and the assignee appeals but fails to enter his appeal on the first day, the insolvency court may order distribution of assets among the creditors, including this contested claim, which may be paid by the assignee—and later the appellate court may reject the claim. Or, if the claim is rejected by the insolvency court, and the creditor appeals and neglects to enter his appeal on the first day, the estate may be distributed in the insolvency court among the creditors exclusive of the rejected claim; and if the appellate court allows the claim, there may be no unexpended assets to apply to it.

These complications are avoided by holding, as we do, that the appeal must be entered on the first day of the term of the appel-

late court, and that there is no power in the court to permit an entry at a later day.

Exceptions sustained.
Entry of appeal disallowed.

WILLIAM M. SMITH *vs.* CHARLES C. SMITH, and another.

Piscataquis. Opinion November 28, 1899.

Partnership. Dissolution. Exceptions.

If parties would obtain any benefit from their exceptions, it is incumbent upon them to set forth enough in their bill of exceptions, so that the court may determine that the points raised are material; and that the instructions are both erroneous and harmful. The court will not travel out of the record to imagine the ills that litigants are heir to.

A requested instruction to the jury that "the employment of a relative by one partner at an exorbitant price, without the knowledge or consent of the other partner, does not bind the firm," was refused by the presiding justice, who instructed the jury that the employment must be in good faith. Nothing appeared in the case to show upon what ground this request for instruction was made, except the fact that by the contract the person employed was to receive seventy-five dollars per month. *Held;* that the instruction was correct.

In an action by the plaintiff to recover pay for services rendered to the defendants as copartners, the defendants claimed that the copartnership was dissolved by the giving of a "trust mortgage" by one partner Smith, without the knowledge or consent of the other, Williams, and that Smith could not thereafter employ the plaintiff on the credit of the firm.

Inasmuch as it did not appear that the "trust mortgage" was a conveyance of all the property of the firm, or that the trustees accepted the trust or acted as trustees, or that the plaintiff, who was then and for a long time had been under contract relations with the defendants as a copartnership, had notice of any dissolution of the firm by any method whatever, *it was held;* that the instructions given or refused touching the dissolution of the copartnership based upon the theory that the trust mortgage became effective and that the plaintiff might be affected thereby, became immaterial.

If the trustees did not accept the trust, the instrument was of no effect; and if the plaintiff had no notice, he was not affected in any event.

ON MOTION AND EXCEPTIONS BY DEFENDANTS.

This was an action of assumpsit upon an account annexed brought by the plaintiff to recover from the defendants as copartners an amount that he claimed to be due to him for his personal labor while in their employ. The account is as follows:

East Brownville Maine Slate Company

To Wm. M. Smith, Dr.

labor from 25 April to October 12th, 1896	$412.50	
" " Oct. 12 1896, to Mch 31st 1897	412.50	
	$825.00	$825.00
Less cash, $100. and $206.		306.00
		$519.00

Some time prior to April 25, 1896, the defendants became copartners in the operating of a slate quarry in the town of Brownville. On the 25th day of April, 1896, the plaintiff went to work for the defendants. At that time no agreement as to the amount of wages was made. The plaintiff claimed that, at some time prior to the 12th day of October, 1896, he made an agreement with his father, one of the copartners, fixing the price of his wages at $75.00 per month. The defendant Williams claimed that the plaintiff had received in full all that was due to him for wages from April 25, 1896, to October 12, 1896; and that from October 12, 1896, to March 31, 1897, the defendants were not liable. Sometime prior to October 12, 1896, the defendant Charles C. Smith went to Dover to consult an attorney in regard to the amount of debts owed by the copartners. As a result of that conference a paper was drawn up, called a trust mortgage, and given by the defendant Charles C. Smith for said copartners to J. B. Peaks and others. It did not appear that the trustees named in said paper accepted the trust or acted as trustees. At the date this trust mortgage was made and given the defendant Williams was in Canada. Upon his return to Brownville he claimed to have repudiated everything that was done by him in giving the trust mortgage and in caring for the property. The defendants' counsel claimed that the copartners were not liable for

any debt incurred after the 12th day of October, 1896. They claimed that the giving of the trust mortgage was a dissolution of the copartnership. Upon this branch of the case the court instructed the jury as follows:

"The construction of all written instruments is for the court and not the jury, because it is not a fact to be passed on by the jury—the writing shows for itself. It, therefore, becomes my duty to give a construction to be placed upon that paper. The contention of the defendants is that this was such an instrument as dissolved the partnership at that time; so that the partnership did not continue after the 12th day of October. They say further, the partnership being dissolved by reason of that paper, or whatever occurred, that Mr. Smith, senior, could not bind the firm by the employment of his son to look after the business at the quarry. It is true that one partner may by certain conveyances dissolve a partnership. If, for instance, he assigns all the property and effects of the partnership for the benefit of the creditors, it dissolves the partnership, because all the property is swallowed up. But a partner may sell property to pay debts. Any one partner may sell the personal property of the firm to pay debts, and he may pledge the property of the firm to pay debts, and by so doing the partnership is not dissolved. So I instruct you, as a matter of law, that this trust mortgage, being a mortgage simply, did not in and of itself, dissolve the partnership, but the partnership continued notwithstanding."

The defendants claimed that the copartnership was dissolved, and being dissolved, Charles C. Smith could not make any contract to bind his copartner. Upon this branch of the case the court instructed the jury as follows:

"But it is claimed that Mr. Smith, the partner, said to Mr. Williams that the partnership was dissolved. When there is a partnership at will, no time being named, one partner may dissolve the partnership, that is, give notice of the dissolution of the partnership and the partnership, except so far as may be necessary to wind up the business, is dissolved. But there must be a distinct notice of dissolution. It must be a notice to the other partner

which is certain, not left to conjecture. Now, my recollection of the testimony is that Mr. Smith, the elder, testified that he said to Mr. Williams that the partnership was dissolved by reason of this trust mortgage. And I instruct you that the trust mortgage did not of itself dissolve the partnership. The question as to whether what was said and done afterwards amounted to a dissolution of the firm, is a question of fact for you to determine, and in determining that you will remember what the testimony is as to what was said between the parties."

The defendant, John J. Williams, claimed that the copartnership was dissolved; that the copartnership being dissolved the defendant, Charles C. Smith, had no authority to hire the plaintiff and bind the defendant Williams as a copartner. Upon this branch of the case the court instructed the jury as follows:

"So I instruct you that if Mr. Smith, the plaintiff, was there in charge of the quarry under his father and with the knowledge and consent of Mr. Williams, that he is entitled to recover compensation for what he did there, and even though the partnership had been dissolved he would recover such compensation, because while after the dissolution of the partnership the authority of partners, as agents for one another, ceases in a general way, so far as the transaction of the business of the firm is concerned, yet it continues so far and so long as may be necessary for the winding up of the affairs of the partnership, and of caring for, preserving and disposing of the property; and for those purposes, the care of the property, the disposition of the property, and the winding up of the partnership affairs, the agency of one partner for all continues. So that if Mr. Smith, senior, the partner, did in fact employ his son to look after the property in the interest of the partnership, and he performed those duties, then the firm would be liable. He would bind his copartner so far. He could not bind him generally as a partner, but to the extent of the preservation of the property."

The defendants' counsel asked the court to give the following instructions to the jury, which requested instructions, the court declined to give: "That the employment of a relative by one partner at an exorbitant price, without the knowledge or consent

of the other partner, does not bind the firm." As to this request the presiding justice said to the jury: "I think I will not instruct you in the terms requested, but I do instruct you that the employment must be in good faith; and I think that covers it."

The defendants' counsel also asked the court to instruct the jury "that if they find that either or all of the trust mortgagees, in the mortgage given by C. C. Smith, entered into possession, either actual or constructive, of the mortgaged property, under said mortgage, then the partnership was dissolved."

The court declined to give the instruction, and said to the jury: "I have covered it fully. This is a question whether they entered into possession, but I think I will decline to give the instruction requested."

To these several instructions of the court to the jury and its refusal to give said requested instructions, the defendants excepted.

The jury returned a verdict in favor of the plaintiff for the full amount claimed by him.

The defendants also filed a motion for a new trial, but did not report the evidence, and did not argue the motion. The charge to the jury was reported in full with the bill of exceptions.

J. B. Peaks and E. C. Smith, for plaintiff.

Whether a conveyance by one partner to the others of all his interest is a dissolution of the partnership, is a question for the jury. *Taft* v. *Buffum*, 14 Pick. 322.

One partner may mortgage for the debts of the copartnership. *Tapley* v. *Butterfield*, 1 Met. 515.

If the partnership was not dissolved by this trust mortgage, then of course the instruction given can harm no one, because the judge submitted the question of fact to the jury to determine whether what was said and done afterwards amounted to a dissolution of the firm, and the jury found that it did not. *Taft* v. *Buffum*, supra.

All persons are entitled to actual notice of the dissolution of a firm, or the retirement of a partner, who have previously given credit to the firm in money, goods or services. George on Partner-

ship, p. 261; *Stimson* v. *Whitney*, 130 Mass. 591; *Roberts* v. *Spencer*, 123 Mass. 397; *Baring* v. *Crafts*, 9 Met. 380.

The instructions could not harm the defendant, because there is no pretense that he had ever given notice to anybody that he claimed the partnership was dissolved.

Notwithstanding dissolution, a partner has ample authority to bind the firm so far as may be necessary to complete transactions begun but unfinished at the time of the dissolution. *Murray* v. *Mumford*, 6 Cow. (N. Y.) 441; *Thursby* v. *Lidgerwood*, 69 N. Y. 198; *Yale* v. *Eames*, 1 Met. 486.

From the manner in which these exceptions are drawn, it does not appear by either of them what the evidence tended to show, and in what way the defendant is injured by them. This criticism applies especially to the last two.

C. W. Hayes and H. Hudson, for defendants.

This plaintiff was the only one in possession for some time, and as he was one of the assignees he must be considered as holding for them under the assignment.

After dissolution a partner can create no new liability, even to the renewal of an existing date or indebtedness. *Perrin* v. *Keene*, 19 Maine, 355; *Simmons* v. *Curtis*, 41 Maine, 373; *Lane* v. *Tyler*, 49 Maine, 252; *Lumberman's Bank* v. *Pratt*, 51 Maine, 563; *Bowman* v. *Blodgett*, 2 Met. 308. If the instrument is construed to be a sale or mortgage, we claim it would have the effect to dissolve the partnership. A sale of the entire property of a copartnership effects a dissolution. *Wells* v. *Ellis*, 68 Cal. 243; *Kennedy* v. *Porter*, 109 N. Y. 526; *Thompson* v. *Bowman*, 6 Wall. 316. A mortgage of all the property of a concern, putting the mortgagees into actual possession, has the same effect. *Smith* v. *Vandenburg*, 46 Ill. 34. He cannot charge the firm for his own time and services in winding up the affairs of the copartnership. *Dunlap* v. *Watson*, 124 Mass. 305.

At common law the surviving partner can not charge for services in winding up the affairs of the firm. *Schenkl* v. *Dana*, 118 Mass. 236.

It has been held that the guardian of an infant partner can not

charge the firm for services in winding up the firm's affairs, but must charge such services to the estate of the infant. *McMichael* v. *Raoul*, 14 La. Ann. 307.

It must follow that this partner, Smith, being bound to care for and preserve the property without charge, and having no power to create new liabilities against the firm, can not bind the firm for services of his son in watching this hole in the ground.

The hiring of an incompetent relative by one partner without the knowledge or consent of the other did not bind the firm. *Beste* v. *His Creditors*, 15 La. Ann. 55. On the same principle, the hiring of a relative at an exorbitant price would not bind the firm. "Indeed" says the author, in Parsons on Partnership, 223, "there seems to be no relation in life calling, either by its own exigencies, or by the rules of law, for a more absolute good faith, than the relation of partnership."

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

SAVAGE, J. This is an action brought to recover an amount which the plaintiff claims to be due to him for his personal labor while in the employment of the defendants as copartners, from April 25, 1896, to March 31, 1897. No price was agreed upon at the time he began to work, but the plaintiff claims that he subsequently, and prior to October 12, 1896, made an agreement with his father, one of the defendants, fixing his wages at $75 a month. It is not denied that the defendants were partners from April 25, 1896, to October 12, 1896, doing business under the name of East Brownville Maine Slate Company. But on this last named day, an instrument, called in the bill of exceptions "a trust mortgage," was given by the defendant Smith, as copartner, to J. B. Peaks and others. It was given without the knowledge of the defendant Williams. It purported to convey certain property of the copartnership, namely, "all the slate manufactured and now at the quarry in said Brownville, and all slate to be hereafter manufactured in said quarry, by said East Brownville Maine Slate Com-

pany, and all tools, machinery and apparatus owned by said East Brownville Maine Slate Company." The conveyance was expressed to be in trust "to pay the workmen in said quarry and other creditors of said East Brownville Maine Slate Company." The names of the creditors and the amount of their claims are all given.

The defendants claim that the giving of the "trust mortgage" was a dissolution of the copartnership; that the copartners were not liable for any debt incurred after it was given; that the defendant Smith could not by contract bind Williams after the dissolution; and hence that the plaintiff cannot recover against them as copartners for any labor performed after October 12, 1896.

It may be conceded, as claimed by the learned counsel for the defendants, that when one partner, without the knowledge or consent of the other, makes a sale or assignment of all the property of the firm, or gives a general assignment for the benefit of creditors, it works a dissolution of the firm. Yet it does not follow that this partnership was thus dissolved, or if it was, that this plaintiff was affected thereby. In the first place, the case does not show, either on the face of the instrument or in the bill of exceptions, that the "trust mortgage" was a conveyance of all the property of the firm. Again, the exceptions expressly state that it did not appear at the trial that the trustees named in the instrument accepted the trust or acted as trustees. Further, it does not appear that the plaintiff had notice of any dissolution of the firm by any method whatever.

Under these conditions, all the instructions given or refused, touching the dissolution of the copartnership, became immaterial. They were based upon the theory that the trust mortgage became effective, and that the plaintiff might be affected thereby. If the trustees did not accept the trust, the instrument had no more effect than any other piece of paper. Or if they did accept the trust, the plaintiff, who was then and for a long time had been under contract relations with the defendants, as a copartnership, would not be affected, without notice. He would still have the right to labor under his contract, and would still be entitled to recover his pay.

So far as appears by anything that the record contains, it has not been shown that the instructions were either wrong or prejudicial. If the defendants would obtain any benefit from their exceptions, it was incumbent upon them to set forth enough in their bill, that the court may determine that the points raised are material, and that the instructions were both erroneous and harmful. It has been so held too many times to require the citation of authorities. The court cannot travel out of the record to imagine the ills that litigants are heir to.

These considerations dispose of all the exceptions save one. The presiding justice was requested by the defendants to instruct the jury that "the employment of a relative by one partner at an exorbitant price, without the knowledge or consent of the other partner, does not bind the firm." The presiding justice declined to instruct in the terms requested, but did instruct the jury that the employment must be "in good faith." Nothing further appears in the case to show upon what ground the request for instruction was made, except the fact that by the contract the plaintiff was to receive $75 a month. The instruction given was, we think, all the defendants were entitled to, from anything that appears in the case.

The defendants do not rely upon their motion.

Motion and exceptions overruled.

LLEWELLYN W. SAVAGE, and others,

vs.

FREDERICK C. ROBINSON, and another.

Franklin. Opinion November 28, 1899.

Guaranty. Stat. Frauds. Agreement. R. S., c. 111.

The delivery of goods under an attachment by an officer is a sufficient consideration for the contract of a receiptor making himself responsible thereby for the amount of debt and damages claimed in the writ.

The defendants were sued for breach of the following agreement in writing:— "Farmington, February 11, 1897. Fred C. Robinson and Clarence M. Eaton hold ourselves responsible for the amount of debt and damage contained in a writ in favor of Savage, Flanders & Co. and served upon Peter Degree by Deputy Sheriff C. E. Dyer on the above date."

In consideration of this agreement, the deputy sheriff released an attachment of goods.

Held; that the agreement is a guaranty, that the terms are made sufficiently certain, either in the writing, or by reference to the writ, to satisfy the statute of frauds, that the consideration was lawful, and that the defendants are holden.

ON REPORT.

The case appears in the opinion.

E. O. Greenleaf, for plaintiffs.

The question raised by defendants is not the promise but the consideration. The consideration having been proven by the officer, as well as properly inferred from the case itself, the whole matter would seem to be settled.

The consideration need not necessarily be a benefit to the promisors, and it may move for the original debtor or for the promisee.

The object of the promise was to release the debtor, and need not be expressed in writing. *King* v. *Upton*, 4 Greenl. 387.

A promise to forbear is a sufficient consideration. *Moore* v. *McKenney*, 83 Maine, 80.

The whole subject matter involved in this case is most exhaus-

tively discussed in note to *Packer* v. *Benton*, 35 Conn. 343, (95 Am. Dec. 246.)

If it be contended that the case falls within the statute of frauds, the answer is, the promise is in writing, and the courts have been very liberal in holding even oral promises. *Furbish* v. *Goodnow*, 98 Mass. 296.

H. L. Whitcomb, for defendants, filed no brief.

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

SAVAGE, J. C. E. Dyer, a deputy sheriff, holding a writ in favor of the plaintiffs and against one Peter Degree, attached certain goods belonging to Degree. While the goods were in the possession of the officer, Degree procured the defendants to sign the following agreement:

"Farmington, February 11, 1897.

Fred C. Robinson and Clarence M. Eaton hold ourselves responsible for the amount of debt and damage contained in a writ in favor of Savage, Flanders & Co. and served upon Peter Degree by Deputy Sheriff C. E. Dyer on the above date.

F. C. Robinson,
C. M. Eaton."

Upon receipt of this agreement, Dyer released the attachment and left the goods in the possession of Degree.

This action is brought upon the agreement. Is it enforceable? We think the agreement should be construed as a guaranty of payment to the plaintiffs of the debt described in their writ against Degree. The agreement was in writing. The names of the parties debtor and creditors, and the amount of the debt, are made certain, either in the writing itself or in the writ to which reference is made by the writing. This is sufficient, and the statute of frauds is satisfied. *Kingsley* v. *Siebrecht*, 92 Maine, 23.

The release of the attachment was a sufficient consideration for the promise of the defendants, and we think it was a legal one. While undoubtedly it is the duty of an officer to attach and retain

goods for the security of the attaching creditor, it has never been questioned but that the officer may take a receipt for the goods. He is primarily responsible. He takes the receipt at his peril. But if the creditor accepts the receipt and ratifies the act of the officer, the latter is relieved of further liability. The delivery of the goods is a good consideration for the contract of the receiptor. So it has been held that a note given to an officer in consideration of the release of property attached is not void by reason of an illegal consideration. *Foster* v. *Clark*, 19 Pick. 329. The contract in suit is analogous. Instead of taking an agreement to be responsible for the goods attached, the officer took an agreement to be responsible for the debt. There is no substantial difference; one is as valid as the other.

The debt sued for in the original writ was $68.53.

Defendants defaulted.

JOHN K. WEARE, and others, *vs.* JOSIAH CHASE, and others.

York. Opinion November 28, 1899.

Waters. Obstruction. Prescription. Damages.

In an action between upper and lower riparian proprietors upon the same stream, the plaintiffs being the lower proprietors and the defendants the upper proprietors, the plaintiffs claimed that the defendants "unlawfully, unnecessarily and wilfully" managed the gates at the foot of Chase's Pond, which empties into the stream in question, in such manner as to obstruct the natural flow of the water in the stream to the injury of the plaintiffs. They also claimed that they themselves had the right by prescription, or contract, to control these gates, and that the defendants unlawfully interfered with the exercise of this right.

Held; that the plaintiffs had no right to control the gates at the foot of Chase's Pond; and that there was no right by prescription, because the prior use of the gates by the defendants' predecessors, from which prescription is claimed, was mutually and equally beneficial to the plaintiffs, as well as the defendants. *Also;* that there was no such right by contract, because an easement or permanent right in a dam or watercourse cannot be acquired by parol agreement.

Also; that the plaintiffs are entitled to the reasonable use and enjoyment of the water in the stream and to the natural flow thereof, without obstruction and without diminution, subject only to the reasonable and proper use or detention by the proprietors above. They are not entitled to an intermittent flow, such as might be created by using Chase's Pond as a reservoir, though such a flow might be more useful.

The defendants did not show that they had any beneficial use for the waters in the pond, and admitted that on several occasions they let the waters out of the pond in order to be able to make repairs upon the dam at its foot, and after completion of the repairs closed the gates and allowed the pond to refill. *Held;* that this was an obstruction of the natural flow, and unless justified, gives the plaintiffs a right to recover the damages sustained thereby.

Held; that the facts shown by the defendants are not a justification; and that, therefore, the verdict, so far as it establishes the liability of the defendants, should not be disturbed. But the damages awarded are manifestly excessive.

The plaintiffs are entitled to recover damages for the obstruction or detention of the natural flow only, the same flow they would have been entitled to, if there had been no pond, no dam and no gates. *Held;* that the comparison, evidently adopted by the jury, between the flow in 1883, and the flow during the years for which damages are claimed, is an unfair test, for in 1883 the plaintiffs were getting the benefit of an intermittent flow, which was more useful and more than they could legally exact.

ON MOTION BY DEFENDANTS.

This was an action to recover damages for obstructing and detaining water from the plaintiffs' mill on Cape Neddick river, in the town of York, from the first day of January, 1891, to the spring of 1896.

The plaintiffs alleged that during the period complained of, the defendants obstructed and impeded the natural flow of water, by raising the gates and draining the pond in the fall, then shutting them down and keeping them closed until the spring rains, then raising them and draining the pond and, when the pond was empty, keeping them closed until the fall.

The jury returned a verdict of $3,486.00, and the case came before the law court on a motion for a new trial as against evidence and because the damages are excessive.

The facts are stated in the opinion.

J. C. Stewart, B. F. Hamilton and B. F. Cleaves, for plaintiffs.

Counsel cited: *Phillips* v. *Sherman*, 64 Maine, p. 173; *Barnard* v. *Shirley*, 151 Ind. Superior Court, 160, (S. C. 41 L. R. A.

737, and note); *Clark* v. *Rockland Water Power Co.*, 52 Maine, p. 78; *Pillsbury* v. *Moore*, 44 Maine, 154; *Lancey* v. *Clifford*, 54 Maine, p. 490; *Lockwood Co.* v. *Lawrence*, 77 Maine, 297, p. 320; *Crosby* v. *Bessey*, 49 Maine, 539; *Donnell* v. *Clark*, 19 Maine, 174; Gould on Waters, § 346; *Lawrence* v. *Fairhaven*, 5 Gray, 110; *Davis* v. *Winslow*, 51 Maine, p. 292, 293.

Geo. F. and Leroy Haley, for defendants.

SITTING: EMERY, HASKELL, WISWELL, STROUT, SAVAGE, FOGLER, JJ.

SAVAGE, J. The plaintiffs allege, in substance, that they are the owners and operators of a mill privilege and saw-mill on Cape Neddick River in York, and as such, during the six years prior to the date of their writ, December 21, 1896, were entitled to the natural flow of the water from Chase's Pond, down the river, to and past their mill and privilege; that the defendants during that period owned and controlled certain dams and gates at the outlet of Chase's Pond; that the defendants, in each of the six years, "unlawfully, unnecessarily and wilfully," raised the gates to the dam at the foot of the pond, and permitted large quantities of water to run out, and afterwards in each year, "unlawfully, unnecessarily and wilfully" closed the gates, and so obstructed the flow of water, or retained it, that none came from the pond, down the river, to their mill, during certain months in each year; and that, by reason of the alleged unlawful acts of the defendants, the plaintiffs were deprived of the use of their mill and privilege. It is also alleged that the plaintiffs, by contract with the defendants' predecessor in title, acquired the right to the exclusive control of the dam and gates at the outlet of Chase's Pond, "in regard to the supply from the pond of the natural flow of the waters thereof down the river to and past plaintiffs' mill and privilege, for the purpose of supplying power therefor." It is not alleged that the defendants' dam and gates at the foot of the pond are of themselves an unlawful obstruction to the flow of the water from the pond. The complaint of the plaintiffs goes rather to the manner in which

the defendants have managed and operated the dam and gates, and to the refusal of the defendants to permit the plaintiffs to manage and operate them, as they claim they have a right to do, by contract. And furthermore, it is not claimed that injury was done by an overflow of water, caused by unlawfully opening the dam or gates, but rather by retaining the water at times and under circumstances when the plaintiffs say they were entitled to it.

The case presents a controversy between upper and lower riparian proprietors upon the same stream, the plaintiffs being the lower proprietors and the defendants the upper proprietors. The following facts may be regarded as established by the evidence: The respective mill privileges of the parties are about a mile and a half apart, on Cape Neddick River. Both parties show title by mesne conveyances from the town of York, the plaintiffs by grant in 1736, the defendants by grant in 1702. It does not appear when dams were first erected or mills first built upon either privilege. In 1841, there was a saw-mill, a grist-mill and a fulling-mill at the plaintiffs' privilege; at the same time there was a grist-mill and a fulling-mill at the defendants' privilege. The plaintiffs' privilege has been used for mill purposes all of the time since 1841 to the present time. At the defendants' privilege, a woolen factory was erected in 1845, in place of the fulling-mill; and in 1866, the grist-mill was abandoned. Up to 1866, the mills on defendants' mill privilege were operated by power created by a dam at the foot of a small pond below Chase's Pond. And during all the time from 1841 to 1866, Chase's Pond was used solely as a storage or reservoir pond. At its outlet there was a dam owned and controlled by the predecessors of the defendants. Over this dam, or through its gates, water fell directly into the small pond which furnished power to the mills on defendants' privilege. In 1866, the dam at the foot of the little pond was abandoned, and power was supplied to the woolen mill there by water conducted through a penstock running from the gate in the dam at the foot of Chase's Pond directly to the mill wheels. So it remained until 1881, when the woolen factory was burned. Since that time there has been no mill of any kind on defendants' privi-

lege or at the foot of Chase's Pond. Nor did the defendants make any beneficial or profitable use of the water stored by the dam, until the spring of 1896, when, in some way not disclosed by the evidence, the York Shore Water Company came into possession of the dam and used the stored waters of Chase's Pond.

Down to 1881, the defendants' predecessors controlled the stored waters in Chase's Pond, by raising and lowering the gates to suit their own convenience. It is in evidence that during most seasons of the year, by opening the gates at the foot of Chase's Pond in the morning and closing them at night, that pond would fill up at night substantially what it had lost during the day. In this way the mills on defendants' privilege were operated a large portion of the time, except in seasons of drought. But it is evident that by the management of the dam and gates in the manner we have described, the mills on plaintiffs' privilege were equally benefited. They got the use of the stored water after it had been used by defendants' mill, and they got it during the same seasons and for the same length of time, and were thereby enabled to make a profitable use of their mill for a longer time during each year than they otherwise could have done.

After defendants' woolen mill was burned in 1881, the plaintiffs were permitted by the defendants, for several years, to control the waters to suit themselves, and thus far no complaint is made. From and after 1885, the defendants resumed exclusive control of the dam and gates, and it is claimed by the plaintiffs that they arbitrarily, capriciously and wantonly, opened the gates and permitted pondfuls of water to escape, and then closed them and permitted no water to run until the pond filled, during which periods of days or even months elapsed.

The defendants admit that they sometimes raised the gates in freshet times, for the sake of safety, but say that they closed them as soon as the danger was over. They also admit that they drained the pond, on several occasions, for the purpose of rebuilding or repairing the dam, and then left the gates shut until the pond filled. Otherwise, they say that they have not meddled with the gates, except when requested by the plaintiffs.

At the outset, we may say that the plaintiffs fail to show any right in themselves to control or manage the dam or gates at Chase's Pond, either by prescription or contract. Such an easement will not arise by prescription in favor of the plaintiffs and against the defendants, in a case like this, where the defendants exercised the sole control and management, and where the use was mutual and equally beneficial to both parties. Nor is there any evidence of a valid contract by which the plaintiffs would be entitled to control and manage the dam and stored waters. The plaintiffs introduced testimony to the effect that after the woolen mill was burned and prior to 1885, the then owner of the dam agreed that the plaintiffs might manage and control the waters if they would make the necessary repairs. This was denied by the defendants. But assuming it to be true, it only tends to prove an oral license, temporary and revocable. No easement or permanent right in a dam or watercourse can be acquired by parol agreement. *Pitman* v. *Poor*, 38 Maine, 237; *Moulton* v. *Faught*, 41 Maine, 298; *Cook* v. *Stearns*, 11 Mass. 533. And not only was there no binding contract or grant in this case, but the conduct of the parties shows that they did not so understand it. The control which the plaintiffs exercised between 1881 and 1885 was, we think, understood to be permissive only.

The plaintiffs, therefore, as lower riparian proprietors, were entitled to the reasonable use and enjoyment of the water in Cape Neddick River, and to the natural flow of the stream, without obstruction and without diminution, subject only to the reasonable and proper use or detention by the proprietors above. *Phillips* v. *Sherman*, 64 Maine, 171. But it should be observed that they were entitled only to the natural flow, not to an intermittent flow. *Hamor* v. *Bar Harbor Water Company*, 92 Maine, 364. It is true, that improvements made by the proprietor above inure to the benefit of those below. If by such improvements the lower proprietor gets a more useful flow than the natural flow would be, he is entitled to it. But he is not entitled to stored waters as such; nor has he the right to let them down intermittently and irregularly, to suit his own convenience. And this is true, whether

there be a dam or not, for the natural flow is presumptively the same with a dam as without a dam; no more, no less. *Hamor* v. *Bar Harbor Water Company*, supra.

The defendants admit that they interrupted the natural flow from the pond; that having drained the pond on several occasions, they closed the gates and thereby stopped the flow, and they claim that such detention was reasonable and necessary. Were they justified? It is undoubtedly the law not only that the upper riparian proprietor has the right to the use of the waters as they pass over his land, but that a mill owner may under some circumstances detain the waters for a reasonable time and to a reasonable extent. Gould on Waters, § 218.

It is unnecessary, however, to discuss this feature further. The defendants were not mill owners at the times complained of, nor had they, so far as appears, any beneficial use for the waters. Nor are we called upon to decide whether the defendants had a right to continue their dam or repair it after their mills were burned when they no longer had any use for the power created by the dam.

As the plaintiffs in their writ make no complaint of the existence or maintenance of the dam, we may assume that the defendants, by grant, prescription or otherwise, had a right to maintain it there, although they have had no mill since 1881. But even as dam owners, and having the right to maintain and repair their dam, the defendants could not wantonly, or capriciously or unnecessarily, detain the waters, without becoming liable to those injured thereby. If they did so, the plaintiffs, if injured, are entitled to recover damages for such detention; for the defendants, so far as they undertook to manage or control the flow of the water, were limited to a reasonable use or detention. So, if the defendants rebuilt or repaired the dam when not reasonably necessary, or at an improper season, or in an improper manner, and thereby the natural flow was detained to the injury of the plaintiffs, the plaintiffs are entitled to a remedy.

And if water was detained by the process of building or repairing, was it necessary or was it reasonable? Now, the defendants admit that when the repairs were completed and the dam made

tight, they closed the gates. Thus, from that time on, at least, they clearly obstructed the natural flow. Was this reasonable? We think not. The defendants had no beneficial use for the waters stored. They had no mill. One of them testifies that the object in keeping up the dam was to have water in the pond in summer time, for personal pleasure, and "to maintain our right to the water," our right "to maintain a dam." Surely such reasons do not justify shutting off the natural flow from the mill owners below. Such rights as the defendants had should have been exercised with reference to the surrounding conditions, to the size and character of the stream, and the uses which the plaintiffs were entitled to make of the water. When the defendants completed their repairs, under such circumstances, they should have allowed the natural flow to proceed from that time on. The pond would easily have filled at freshet periods, had it been necessary that it should be filled. The defendants seemed to assume that they had a right to do with the dam and waters as they pleased. In that they were in error. In fact, their learned counsel now makes no such claim.

The justification offered by the defendants therefore fails. The result is the same in this case, whether the defendants had no right to do the acts complained of, or whether they did them in an unreasonable manner. The latter is what is complained of by the plaintiffs, and their contention is sustained upon the defendants' own showing.

For these reasons, we think the verdict establishing the liability of the defendants should not in so far be disturbed. But the damages are manifestly excessive. The plaintiffs arrive at the amount which they claim by comparing their net profits in 1883 with the net profits since the defendants intermeddled with the natural flow. In 1883, the net profits were $500, says one, $600 says the second, $666 says the third; since 1890, they have been nothing. The jury seem to have adopted substantially the plaintiffs' method of computation. The verdict was for $3486, which averages $581 for each year covered by the plaintiffs' writ. But to compare profits from 1891 to 1896, inclusive, with the profits in 1883 is not

just. It is not a fair test. In 1883, the plaintiffs, by permission of the defendants, were hoisting and lowering the gates at the dam at Chase's Pond as they pleased. They were getting better than the natural flow of the water. They were getting such an intermittent flow as enabled them to operate their mills at times when they could not otherwise have done so. They are entitled to damages only for the unreasonable obstruction to the natural flow. Moreover, the testimony for the plaintiffs shows that, during the first two years after the defendants rebuilt the dam in 1889, they got "nearly the natural flow." This period includes some portion of the six years covered by the writ. The case shows that the York Shore Water Company took possession of the dam in the spring of 1896. This also shortens the six year period.

The case must go back to be heard again in damages only. *McKay, Admr.* v. *New England Dredging Co.*, ante., p. 201.

Motion sustained.

Verdict set aside as to damages only.

GEORGE DEMERS *vs.* FRANK C. DEERING.

York. Opinion November 28, 1899.

Negligence. Risk Assumed. Fellow-Servant.

In an action to recover damages for personal injuries, it appeared that the plaintiff was an employee of the defendant in his saw mill, and was injured by being thrown upon a trimming-saw which he was operating. The plaintiff was standing in such a position that he was struck by one end of a plank lying upon rolls, the other end of which had been accidently caught by a piece of timber on the moving carriage of the circular or main saw. The movement of the carriage forced the plank against the plaintiff, who was standing in its path, and he was thereby pushed over onto the trimming-saw. The defendant gave no instructions to the plaintiff where to stand, and the plaintiff had worked at the saw in question only two hours before the accident.

The plaintiff contended that the defendant was in fault in not providing him with a suitable and safe place in which to do his work, that the appliances by which the trimming-saw was raised and lowered were improperly adjusted

or negligently permitted to be out of order, so that the saw did not drop down as quickly as it should have done, and that the defendant should have warned the plaintiff of the danger.

Held; that the plaintiff was not standing in the place intended for workmen to stand in, while doing that work, and that the position of the various parts of the machinery and appliances was such as to plainly indicate to any person of ordinary intelligence where it was expected that a workman should stand; that if that place was dangerous, as claimed by the plaintiff, he might have refused to work there, but that he could not select another place, not intended by the employer, and if he did, he assumed the risks.

Also, held; that the place selected by the plaintiff was one of obvious danger, and that even if he had been directed by the defendant to stand in that place, and he had assented, he must be held to have assumed the risks, for they were not only naturally incident to the business, but were sufficiently obvious, without special instruction.

Also, held; that the injury was contributed to by the negligence of a fellow-servant whose duty it was to see that the plank was so placed upon the rolls that it could not be caught by the moving carriage; or by the negligence of another fellow-servant, the surveyor, whose duty it was not to run the carriage unless it was clear of the planks on the rolls; or by the negligence of both.

ON MOTION BY DEFENDANT.

This was an action on the case to recover damages for the loss of the plaintiff's leg, etc., while employed in the defendant's saw mill, in Biddeford, on the twenty-seventh day of September, 1897. The jury returned a verdict for the plaintiff, assessing the damages at $1450.

The writ contained two counts; one, in a general way, alleging that the plaintiff was injured through the bad arrangement of the defendant's machinery, whereby there was no suitable place in which the plaintiff could stand and do his work; and in the second count, specifying more definitely and in detail the nature and arrangement of the machinery and the particular parts of it that caused the injury,—alleging that the trimming-saw was not properly weighted, that it was so overweighted that it was too much counter-balanced, and it did not drop back quickly enough; also that the rotary saw and trimming-saw were placed too near each other.

The case is stated in the opinion.

F. W. Hovey, for plaintiff.

Counsel cited, among others, the following cases:

An employer is liable for an injury to an employee resulting in part from its failure to furnish reasonably safe machinery for his use, although the negligence of a fellow-servant contributed to the injury. *Hogue* v. *Sligo Furnace Co.*, 62 Mo. App. 491; *Shields* v. *Robbins*, 73 N. Y. 708.

The negligence of a fellow-servant who concurred with the negligence of the master in causing an injury to a servant, does not prevent him from recovering from the master. *Chicago & N. W. R. Co.* v. *Gillson*, 173 Ill. 264, (64 Am. St. Rep. 117.)

A person whose duty it was to keep the machinery in repair, is not a fellow-servant of the injured employee. *Shanny* v. *Androscoggin Mills*, 66 Maine, 426.

An unsuitableness of ways, works or machinery for the work intended to be done and actually done by means thereof, is a defect within the meaning of the Mass. Stat. 1887, c. 270, § 1, cl. 1, although they are perfect of their kind and in good repair and suitable for other kind of work. *Geloneck* v. *Dean Steam Pump Co.*, 165 Mass. 202.

An employer is liable for an injury to an employee caused by a defective condition of the appliances furnished, if he knew or by the exercise of due care might have known of the defect. *Whitney & S. Co.* v. *O'Rourke*, 172 Ill. 177.

A servant does not assume the unusual and extraordinary risk of which the master knew or which he should have known or foreseen. *Reed* v. *Stoskmeyer*, 74 Fed. Rep. 186.

An employee may rely upon the duty of the master to furnish safe appliances, and is not bound to investigate and test the fitness and safety of an appliance in the absence of notice that it is defective or unsafe. *Chicago & A. R. Co.* v. *Mavoney*, 67 Ill. App. 618.

A master is responsible for the maintenance of a dangerous condition of the place to which the servant is assigned to work where his attention was called to it and a proper inspection would have resulted in its discovery.

An employer is bound to furnish a safe place in which the servant, being himself in the exercise of due care, can perform his duty safely. *Cayzer* v. *Taylor*, 10 Gray, 274.

Whether it was possible for the plaintiff to have met with the accident from inadvertence, or want of acquaintance with the danger of his position, without being chargeable with a want of reasonable care, is a question to be submitted to the jury. *Coombs* v. *New Bedford Cordage Co.*, 102 Mass. 584. A servant knowing the facts, may be utterly ignorant of the risks. The employee must perceive or appreciate the danger in order to preclude the recovery. *Ib.*

Whether a circular saw should have a guard is a question for the jury. *Holmes* v. *Winchester*, 135 Mass. 298.

Where the master employs a servant in the use of machinery which he knows, but the servant does not know, to be attended with peculiar danger, he must be held responsible for an injury which occurs in consequence of his failure to see to it that a proper notice is given. *Holmes* v. *Winchester*, supra.

H. Fairfield and L. R. Moore, for defendant.

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

SAVAGE, J. The plaintiff had been an employee in the defendant's steam saw-mill, for about two and one-half months prior to the time he received the injuries complained of. He had nearly all that time been at work in the same room where the accident occurred, but at a saw other than the one which he was operating when he was hurt, and which did the injury. On the morning of the accident, he was directed by the foreman of the defendant to work at the trimming-saw. His duties there were to receive the slabs and sawed lumber as they came to him over iron rolls from the main rotary saw, and with the trimming-saw cut the slabs into lengths, and butt or trim the lumber. The pieces of slabs were then thrown out of a door at the side of the mill, and the lumber passed on over the trimming-saw box and over other rolls out at the end of the mill. The saw carriage, set of rolls from the rotary to the trimming-saw box, and the trimming-saw box itself are all spoken of in the case with reference to a "right side" and a "left

side," meaning the relative position of the various objects as they would appear to one looking from the rotary saw in the direction the saw carriage would be moving while lumber is being sawed, which would also be towards the trimming-saw box. The situation was such that the outermost timber of the saw carriage on the right hand side, when run down to the box, would touch, but not go by, the nearer left hand corner of the trimming-saw box. The set of iron rolls was on the right hand side of the rotary saw and saw carriage and extended at intervals to the trimming-saw box. The rolls were placed so near to the saw carriage that planks and other lumber after being sawed would naturally drop off onto them from the carriage. There was another servant of the defendant (Loroux, at the time in question,) whose duty it was to "clear" the rotary saw, that is, to see that the lumber fell or was taken from the carriage onto the rolls, and it was then his duty to push it along the rolls towards the trimming-saw box, to be taken there by the plaintiff. The trimming-saw box was about five feet square. Its top was about eighteen inches from the floor, and on a level with the top of the rolls. The upper edge of the trimming-saw when not in use was below the top of the box. But when it was to be used, the operator, by pulling down on a rope which was attached to a combination of levers, rods and pulleys, lifted the saw partly above the level of the box. The rope stretched from lever to lever was about six and one-half feet from the floor, and was placed over the left hand side of the box. The door out of which slabs were thrown was about seven feet to the left of the box. The distance between the iron roll at the box and the next one towards the rotary was about three feet.

The man in charge of the trimming-saw operated it in this way. With his left hand he pulled down the rope and thus lifted the saw and held it up while in use. At the same time, with his right hand, he held or steadied the lumber on the rolls while it was being butted or trimmed. When the saw carriage was run down as far as it could be by the gear and pinion in use, the end of the right hand side timber of the carriage nearest the trimming-saw was about six feet distant from the box. The plaintiff claims that

at times the carriage by its momentum was carried so far, after leaving the pinion, that the end of the timber of the carriage struck the box, and it is admitted that sometimes when very long timber was being sawed, the carriage, after leaving the pinion, was pushed by hand, or by the use of bars, until the end touched the box, in order to allow the saw to cut through to the end of the timber.

So much of a description of the machinery and the method of operating it has been necessary to an understanding of the manner in which the plaintiff was injured, and as well, of the duties which the defendant owed to the plaintiff.

The plaintiff says that the only instruction he received was "to work at the trimming-saw," that he received no instructions as to the manner of operating it, nor where he should stand when at work. Nor was he instructed or cautioned in regard to dangers. He had worked about two hours at the time of the accident. A log had been squared by the rotary saw, and the four planks dropping onto the rolls, one after another, had been pushed down to him by Loroux, the servant whose duty it was to take the lumber from the saw carriage, and push it down to him. The plaintiff sawed the slabs and was making the last cut in the fourth slab. He was standing between the two rolls nearest the trimming-saw and somewhat towards the right side of the box, with his left hand pulling down the rope and sustaining the saw, and with his right hand on the slab. Meanwhile, a plank had been sawed by the rotary, had been taken off onto the rolls by Loroux, and pushed down towards the plaintiff. A second plank was being sawed. In the process of sawing, the end of this latter plank sprung off towards the rolls and caught onto the end of the plank lying on the rolls. Such is the testimony of Loroux, who was a witness for the plaintiff. The effect was that the movement of the saw carriage pushed the plank on the rolls against the legs of the plaintiff and crowded him over onto the box and saw. The saw was still in motion, and cut his leg nearly off.

The claims of the parties are these. The plaintiff alleges and now contends that the defendant was in fault in not providing him

with a suitable and safe place in which to do his work, and also in that the mechanical appliances by which the saw was lifted and allowed to drop down, and the counter balance on the saw frame, were so improperly adjusted or so negligently permitted to be out of order, that the saw did not drop back as quickly as it ought to have done, when the operator let go of the rope. The plaintiff claims that he instantly let go of the rope as soon as he was struck by the plank, and that if the saw had dropped as it should have done, he would not have been hurt by it.

The defendant contends that the plaintiff was working in an improper and dangerous place—a place selected by himself without any good reason; that the proper place for the plaintiff to have stood was outside of the rolls on the left hand side of the box; that though the plaintiff received no special directions where to stand, the position of the box and appliances was such as to make it obvious to any man of ordinary intelligence that he should stand at the left hand side of the box; that the door out of which it was the operator's duty to throw the slabs he cut, or at least the last piece of each slab, was at the left hand side; that the standards and levers and rope were all on the left hand side; that the rope would be directly over the head of a workman standing in that position, while if he stood on the right hand side of the box outside of the rolls, he could reach the rope only with difficulty, and that he could not hold the rope, from the right side, and at the same time hold the lumber he was sawing without much difficulty, unless he stood between the rolls; and that to stand between the rolls was obviously dangerous, as it was the point towards which all lumber from the rotary was pushed and was in the path along which it all had to pass; and that a man there was at any time liable to be struck by lumber pushed by hand, or, as in this case, by the carriage.

The plaintiff does not seriously deny that by the manner in which the trimming-saw box and its appliances were constructed, it would appear that it was intended that the operator should stand at the left hand side of the box. His reply to the defendant is that the left hand side of the box was not a suitable or safe place

for him to work, because of a constant liability to be struck by the timber of the saw carriage when it was propelled down against the box; that timber at such times was exactly in the place where the defendant claims he ought to have stood at his work; that the carriage came down thus far frequently in the ordinary operation of the mill, and did come down several times during the two hours he was at work; that he was not instructed where to stand; and and that, as the left side of the box was a dangerous place, he worked on the other side, it being the only practicable place remaining.

The parties are not much at variance in regard to the facts which we deem to be vital, nor is there any serious contention about the rules of law which govern their rights. The parties do differ in applying those rules to the facts.

It was, indeed, the duty of the defendant to provide the plaintiff with a reasonably safe place in which to do his work; but whatever the place appointed by the defendant, the plaintiff is to be held to have assumed the risk of obvious perils, and of those ordinarily incident to the business, if he consented to work there. *Mundle* v. *Hill Mfg. Co.*, 86 Maine, 400. We think it is clear, for reasons already suggested, which are supported by proof, that the place selected by the defendant for the plaintiff to work was at the left side of the box. The plaintiff, however, did not work in the place appointed by the defendant. He says there was an obvious danger in that position, and for that reason he chose another place to work in. It is unnecessary to inquire whether the movements of the saw carriage made the place dangerous to stand in, or whether it only made it at times more difficult or inconvenient to work there, as the testimony of some of the plaintiff's own witnesses seems to indicate,—for the plaintiff did not work in that place and was not hurt there. If the place was dangerous, he might have refused to work at the trimming-saw. *Buzzell* v. *Laconia Mfg. Co.*, 48 Maine, 113. But he did not. He selected another place, not the place appointed by the defendant; and when he did that, we think he assumed the risks attendant upon working in that place.

The relative rights and duties of master and servant arise from the contract of employment. If plaintiff worked in a place not appointed by defendant, and so not within the purview of the contract, the defendant did not owe him any duty with respect to that place. In such case, the plaintiff took whatever risks there were. And if the occupation there was apparently hazardous, the plaintiff would also be guilty of contributory negligence, and cannot recover if his own negligence contributed to the injury.

And these remarks apply also to the complaint of the plaintiff that the trimming-saw dropped back to its place too slowly. The plaintiff was not standing in the place appointed for him.

But the plaintiff contends that the place where he stood was the usual place that men had stood in before that time, doing the same work, that the defendant knew it was the usual, customary place, and that by setting the plaintiff to work without instructions, the latter had a right to assume that he was expected to work where those before him had worked, that such in effect was the contract of employment. See *Coombs* v. *New Bedford Cordage Co.*, 102 Mass. 572. The defendant denies this. But assume it to be so. The plaintiff even then assumed not only the risks naturally incident to the business, but also the obvious risks of working in that place, *Coolbroth* v. *Maine Central R. R. Co.*, 77 Maine, 165; *Wormell* v. *Maine Central R. R. Co.*, 79 Maine, 397; and it seems to us obvious that a man standing between the rolls along which all the product of the rotary saw must be pushed, as this machinery was situated, was likely to be struck by it. It was therefore a risk which he assumed. *Conley* v. *American Express Co.*, 87 Maine, 352.

The plaintiff was a man of mature years. It is true, that he received no instructions relative to the dangers attending his work. But those dangers, even upon the plaintiff's own showing, were not latent or concealed. They were obvious and apparent. If the defendant had told him that by standing between the rolls where he did stand he was liable to be hit by planks pushed along the rolls, it would be no more than he himself knew or ought to have known. The servant assumes all the risks which he knows, or

which by the exercise of ordinary care he ought to know. *Nason* v. *West*, 78 Maine, 253; *Campbell* v. *Eveleth*, 83 Maine, 50; *Wheeler* v. *Wason Mfg. Co.*, 135 Mass. 294.

But, as we have already said, we think the evidence discloses that the plaintiff was not standing in the proper place, that he was negligent in standing where he did, and that his negligence contributed to the injury.

It may also be said that the plaintiff cannot recover, because the negligence of a fellow-servant caused or contributed to the injury. It is well settled, of course, that the negligence of a fellow-servant is one of the risks assumed by the servant. *Blake* v. *Maine Central R. R. Co.*, 70 Maine, 60.

Nason, the sawyer, testified that it was his duty not to start or run the carriage unless the lumber on the rolls was clear from the path of the carriage, and that such was his duty is self evident. It was the duty of the man at the rolls, Loroux, to take away the lumber from the carriage, and leave it on the rolls, clear of the carriage, and in such a manner that neither the carriage nor the stick upon it could come in contact with it. If the sawyer run the carriage while its path was not clear, or if Loroux failed to clear the plank from the carriage, and keep it clear, (and one or both of these things did happen), such conduct was negligent, and by means of that negligence the plaintiff was crowded over onto the trimming-saw. Nason and Loroux were fellow-servants of the plaintiff, and for injuries received through the negligence of either of them, the plaintiff cannot recover. Even the rule laid down by some courts, and to support which the plaintiff's counsel has cited authorities, that when the master has been negligent, the servant may not be debarred from recovery, even if the negligence of a fellow-servant contributed to the injury, would not avail the plaintiff in this case. That rule is nowhere applied in cases where the plaintiff himself was in fault. It is unnecessary to discuss that rule further.

We are of the opinion, therefore, that the verdict for the plaintiff was clearly wrong. We are led to the conclusion that the jury must have been influenced by bias or sympathy, or acted

under a misapprehension of the facts, or of the legal rules which should have controlled a decision based upon those facts.

Verdict set aside.

Motion for a new trial sustained.

EUGENE J. ALIE *vs.* ONESIME NADEAU.

York. Opinion November 29, 1899.

Judgment. Former Suits. Entire Contract.

Only one action can be maintained for the breach of an entire or indivisible contract; and the judgment obtained by the plaintiff in one suit may be pleaded in bar for a second suit.

A litigant cannot sever an entire or indivisible contract and become entitled to maintain several actions as for several breaches of it, simply by limiting his claim for damages in his earlier actions to less than full damages.

The law presumes, in such case, that the plaintiff alleged and recovered in his first action all the damages which he sustained.

The defendant hired the plaintiff to work for him for the period of six months, beginning November 9, 1897, wages being payable weekly. The plaintiff was unjustifiably discharged by the defendant January 15, 1898, but was paid all wages due him up to that time. March 12, 1898, the plaintiff sued the defendant for breach of the contract and claimed damages to the date of his writ. In that action he recovered judgment in damages for an amount equal to the weekly wages from January 15, 1898, to March 12, 1898.

The plaintiff then brought another action claiming to recover damages from March 12, 1898, to May 9, 1898, the remainder of the period covered by the contract.

Held; that the former judgment is a bar to the second suit, and that the action cannot be maintained.

ON EXCEPTIONS BY DEFENDANT.

This was an action by the plaintiff to recover wages for the last two months of a period of six months, under an agreement entered into November 9th, 1897, wherein defendant agreed to employ plaintiff for six months at wages of ten dollars per week, payable weekly.

After keeping plaintiff in his employ about two months, or to

January 15th, 1898, defendant discharged him without cause. March 12th, 1898, the plaintiff brought suit to recover the wages due him up to that time, and on trial a jury found for the plaintiff on all the issues and rendered judgment for the wages due up to March 12, 1898. This judgment has been satisfied.

The present suit was brought at the expiration of the six months period to recover the balance of wages due after March 12th, 1898. The jury rendered a verdict for the plaintiff, and the defendant took exceptions to the refusal of the court to non-suit the plaintiff; and also upon the court's refusing to make certain rulings requested by defendant, which appear in the opinion.

H. T. Waterhouse and B. F. Cleaves, for plaintiff.

Counsel cited: *Timberlake* v. *Thayer*, (Miss.) 24 L. R. A. 232, and note; *Badger* v. *Titcomb*, 15 Pick. 409, 413; *Veazie* v. *Bangor*, 51 Maine, 509, 510; *Allard* v. *Belfast*, 40 Maine, 369, 377; *McMullan* v. *Dickinson Company*, (Minn.) 27 L. R. A. p. 410.

F. W. Hovey, for defendant.

After a servant is discharged, he cannot recover for services. It is immaterial that the plaintiff may have intended only one suit. In the first action for wages upon the theory of constructive service it must be held to be an action for damages, whether so intended or not. 1 Sutherland, Damages, 175–184; *Toles* v. *Hazen*, 57 How. Pr. 516; *Miller* v. *Covert*, 1 Wend. 487; *Farrington* v. *Payne*, 15 Johns. 432.

The prosecution of subsequent action by a servant after one recovery has been had, may be enjoined in equity, even though wages are payable weekly. The contract is entire and but one action is maintainable. *Tarbox* v. *Hartenstein*, 4 Baxter, 78; *Litchenstein* v. *Brooks*, 75 Tex. 196; *Keedy* v. *Long*, 5 L. R. A. 759, (S. C. 71 Md. 358, and 71 Md. 395.)

The plaintiff in the former action had a right to recover for all the damage sustained, by reason of the alleged wrongful discharge, both present and prospective. *Ennis* v. *Buckeye Pub. Co.*, 44 Minn. 105; *Bowe* v. *Minn. Milk Co.*, 44 Minn. 460; *Sutherland* v. *Wyer*, 67 Maine, 64; Wood, Master and Servant, 2nd Ed. p. 261.

Counsel also cited: *Olmstead* v. *Bach*, 78 Md. 132, (22 L. R. A. 74); *Kahn* v. *Kahn*, 24 Neb. 209; *James* v. *Allen Co.*, 44 Ohio St. 226; *Colburn* v. *Woodworth*, 31 Barb. 381; *Booge* v. *Pacific R. Co.*, 33 Mo. 212, (82 Am. Dec. 160); Note to *Keedy* v. *Long*, (Md.) 5 L. R. A. 759, 767; *Dugan* v. *Anderson*, 36 Md. 567 (11 Am. Rep. 509); *Clossman* v. *Lacoste*, 28 Eng. L. & Eq. 140; Mayne, Damages, 159.

When the first action was brought to recover damages for a breach of the contract, it was necessarily an election by the plaintiff to consider the contract as at an end, so far at least as performance on his part is concerned. The action operated as a rescission by him as to further performance. If the party thus situated brings his action before the entire measure of damages has been filled, or before the damages have become known so as to be susceptible of proof, it is his folly, or misfortune. He cannot sever them, and recover part in one action and the residue when discovered in another. But the question as to what damages the plaintiff ought to recover as his compensation, does not arise here. That question necessarily arose in the other action, and should have been there determined, that action being a bar to the present action. *Booge* v. *Pac. R. R. Co.*, supra.

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

SAVAGE, J. The plaintiff brings this action to recover damages for the breach of a contract of service, whereby the plaintiff alleges that he agreed to enter and remain in the employment of the defendant for the period of six months from the ninth day of November, 1897, and that the defendant agreed to hire the plaintiff for the same period and to pay him for his labor the sum of ten dollars per week. The plaintiff further alleges that he entered upon the performance of the contract upon his part, and continued to work until January 15, 1898, upon which day he was discharged by the defendant, without lawful cause.

The case shows that the plaintiff was paid all wages due him up to the time of his discharge. On March 12, 1898, the plaintiff

commenced an action against the defendant for damages, alleging the same breach of the same contract as is alleged here, and claiming damages to the date of his writ. In that action he ultimately recovered judgment in damages for an amount equal to the weekly wages agreed upon from January 15, 1898, to March 12, 1898.

This action was commenced November 23, 1898, and the plaintiff now claims to recover damages from March 12, 1898, to May 9, 1898, the remainder of the period covered by the contract. At the close of the testimony, the defendant's counsel requested the presiding justice to instruct the jury that the judgment in the former action was a bar to recovery in this suit. To a refusal to give this instruction the defendant excepted.

We think the requested instruction should have been given. Here is a single and indivisible contract, a hiring for the period of six months. When the defendant discharged the plaintiff he broke the contract. He broke it altogether. But there was only one breach. The plaintiff urges that while the contract was entire, the performance was divisible, that each week's work constituted a performance so far, and that the defendant was in default each week he failed to continue plaintiff in his employment. Hence the plaintiff claims that an action will lie for each default. A little examination will show that this position cannot be sustained.

The contract of the defendant may be viewed in a two-fold aspect. In the first place, he agreed to continue the plaintiff in his employment for a period of six months. That contract was entire and indivisible. There was a single breach of that part of the contract. He also agreed, we will assume, to pay the plaintiff weekly. Performance of that part of the contract by the defendant was divisible, and the plaintiff might have maintained an action for wages for services performed on each failure of the defendant to pay as he agreed. To this effect are most of the cases cited by the plaintiff from our own decisions. But such is not this case. After the plaintiff was discharged, he performed no more service, and was entitled no longer to wages as such, for the contract was at an end. The damage was the loss of his contract right to earn wages. He was entitled to recover all the damages he sustained

by the breach, both present and prospective, and for such a breach but one action can be maintained. *Sutherland* v. *Wyer*, 67 Maine, 64. The plaintiff brought an action for breach of contract and recovered judgment for damages. It is to be presumed that he recovered all he was entitled to receive for that breach. We think the principles stated in *Sutherland* v. *Wyer*, supra, are decisive upon this point. See also *Miller* v. *Goddard*, 34 Maine, 102; *Colburn* v. *Woodworth*, 31 Barb. 381; *Olmstead* v. *Bach*, 78 Md. 132; *James* v. *Allen County*, 44 Ohio St. 226, and cases cited; 2 Sedgwick on Damages, 8th Ed. § 366.

But the plaintiff contends that the rule should not apply here, because in his first writ he claimed damages only to May 12, 1898. If this contention is sound, it follows that any litigant may sever an indivisible contract, and become entitled to maintain several actions as for several breaches of it, simply by limiting his claim for damages in his earlier actions, to less than full damages. We think this cannot be done. As we have already suggested, the law presumes that the plaintiff alleged and recovered in his first action all the damages that he sustained.

Exceptions sustained.

THE WEEKS AND POTTER COMPANY, Appellant,

vs.

LUELLA E. ELLIOTT.

Waldo. Opinion December 5, 1899.

Insolvency. Proof of Debt. Husband and Wife.

1. A wife may prove a claim against the insolvent estate of her husband.
2. *Held;* in this case, that the claim of the insolvent's wife was, under the evidence, properly admitted to proof in the court of insolvency.

ON REPORT.

The case is stated in the opinion.

Jos. Williamson, for appellant.

In *Blake* v. *Blake*, 64 Maine, 177, the court did say that husband and wife may not sue each other at law, but quoting 2 Story, Eq. Jur. § 1368, say that a wife may sue her husband in a court of equity and be sued by him. "It may be that while the marriage relation exists, no action of any kind," says WALTON, J. in *Carlton* v. *Carlton*, 72 Maine, 115, "can be maintained by her against her husband."

In *Wyman* v. *Whitehouse*, 80 Maine, 257, (1888) which was on a note given by a wife to her husband in the year 1853, before the passage of the statute of 1863, it was held that it could not be collected against her estate after her death. In that case PETERS, C. J., remarks, "by the implication of later statutes husband and wife may even contract with each other, though a remedy for the enforcement of contracts strictly between themselves is not available while the marriage relation exists."

The statutes concerning married women, being all in derogation of the common law, cannot properly be expanded by construction, so as to embrace cases not fairly within the scope of the language used. *Dwelly* v. *Dwelly*, 46 Maine, 377; *Lord* v. *Parker*, 3 Allen, 129.

Thus in *Knowles* v. *Hull*, 97 Mass. 206, it was held that a married woman could not underlet real estate from her husband who was the legal tenant; and the recent case of *Haggett* v. *Hurley*, 91 Maine, 542, affirming the doctrine in *Lord* v. *Parker*, holds that, as a new statute would not be construed as intending a reversal of long established principles of law and equity unless such intent unmistakably appears that the common law disabilities have not been so far removed by statute as to empower her to form a business partnership with her husband, and thereby subject her separate estate to debts contracted by the partnership. So, in *National Granite Bank* v. *Whicher*, 173 Mass. 517, the court decided that an action could not be maintained against a wife on notes signed by her, and made payable to her husband even in the name of an indorser.

In New York, where the statute expressly enables a married

woman to convey property as if unmarried, it was decided that the disability to convey to her husband was not removed, and that a deed from her to him was void. *White* v. *Wager*, 25 N. Y. 328.

The only case to be found where a wife has been authorized to prove a claim against the estate of her husband in local insolvent proceedings is that of *Oswald* v. *Hoover*, 43 Md. 360. The laws of Maryland, however, authorize a wife to sue in any action.

Under the national bankrupt law of 1867, an equitable debt was within its scope, because that court was vested with the most ample equitable powers to enable it to work out full remedies to all persons. Bump on Bankruptcy, p. 570.

No such equitable powers are given to insolvent courts in Maine, but are reserved for the supreme court. Insolvent Act, § 13.

In Massachusetts this defect existed until 1894, when it was remedied by an enactment allowing proof of equitable liabilities. Stat. Mass. 1894, c. 293. Such powers then as with us now, could only be exercised by the supreme court. *Hall* v. *Marsh*, 11 Allen, 563.

"We are by no means prepared to admit," remarks the court of Massachusetts in *Robb* v. *Mudge*, 14 Gray, 534, "that under our insolvent law equitable claims against a debtor may be proved against his estate in insolvency." The same view is taken in the case of *Blandin*, 1 Lowell, 543, which is the only case cited in the recent edition of our insolvent law that the claim of a wife was provable against her husband.

A debt of this kind, if provable at all, can not be admitted by this court until its legal status has been established by a decree in equity. Under the present liberal and expeditious modes of practice in our state a claimant of this nature could readily obtain such a decree before a final dividend was awarded.

W. P. Thompson, for claimant.

In contemplation of law the husband and wife are no longer one person, and their interests in property are no longer identical, but separate and independent. It never rested on rational or substantial groundwork and was long ago superseded by the more enlightened principles of civilization. *Robinson, Appellant*, 88 Maine, 17.

All the disabilities by which married women were formerly surrounded by the common law have been swept away except her right to bring an action at law against her husband. The reason for precluding husband and wife from bringing such actions against each other, is that it would be against public policy, but whatever the reason, it is of no sort of consequence in the case at bar, for the proof of the wife's claim against the estate of her husband is not an action at law, as proceedings in insolvency do not constitute an action within the provisions of the statutes. *Belfast* v. *Fogler*, 71 Maine, 403.

The insolvent debtor, by the decree of the insolvency court adjudging him to be insolvent, appointing an assignee to settle his affairs and assigning the debtor's estate to him, has been divested of all control over or interest in his estate, and neither his wife nor any other creditor can maintain an action against him.

The proceedings in insolvency are equitable and equity recognizes the separate estate and existence of married women, and with respect to such property treats her as a feme sole and she can enforce her rights in equity against her husband. *Blake* v. *Blake*, 64 Maine, 177.

The insolvent law of this state makes no distinction between married women and others, but provides in § 26, c. 70, R. S., that "any creditor may prove his claim at any time before the final dividend."

It would seem to be a strange doctrine which would allow a part of an insolvent debtor's creditors to absorb the estate at the expense of the wife whose money, which she had loaned the debtor, constituted the debtor's estate which is to be divided.

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

SAVAGE, J. Luella E. Elliott presented claims against the estate of her husband, Tilton A. Elliott, in insolvency. She claimed to be the indorsee and owner of one note for $1000, originally given by her husband to her father, A. E. Houghton, and by him indorsed to her; also the payee of another note, for $500,

given to her by her husband; also the holder and owner of a due-bill for $100. All these obligations were for money lent. These claims were admitted to proof by the judge of the court of insolvency, and the Weeks and Potter Company, a creditor, appealed.

The appellant's objections are, (1) that credit should be given on said claim for the support furnished to A. E. Houghton and wife by the insolvent debtor; and (2) that the claimant, as wife of the debtor, is not entitled to prove against the estate of her husband a claim for money lent by her to him from her separate estate, and used by him in his business.

We do not think that either objection can be sustained. The first fails for want of proof. The case shows that the claimant's father, A. E. Houghton, and his wife, had been living in the family of the debtor for some time prior to his going into insolvency, but it does not show any contract, express or implied, by which Houghton is liable for his support either to the debtor or to the claimant. The inference is rather to the contrary, taking into account the relationship of the parties, and also certain pecuniary gifts or advancements which Houghton had made to the claimant, and of which the insolvent had the use in whole or in part. Nor does the case show facts which we think should be regarded as fraudulent as to creditors within the insolvent law.

The second objection presents the question whether a wife who holds a valid indebtedness against her husband can prove the same against his estate in insolvency. We have no doubt that she can. It is not claimed here that she may not lawfully contract with her husband, or that his note to her is not valid, or that the title to his note to a third person does not pass to her by sale or gift, and indorsement. *Motley* v. *Sawyer*, 34 Maine, 540; *Webster* v. *Webster*, 58 Maine, 139; *Blake* v. *Blake*, 64 Maine, 177. But it is claimed that while the marriage relation continues, she cannot enforce her claim by proving it against his insolvent estate. At common law a wife could not maintain an action at law against her husband. And it has been held that, while the marital relation continues, her rights in this respect have not been enlarged by statute. *Smith* v. *Gorman*, 41 Maine, 405; *Crowther* v. *Crowther*,

55 Maine, 358. Her contract with her husband is not invalid, but the right to enforce it against him is suspended during coverture. But it is suspended no longer, and it is suspended only as against him. *Lane* v. *Lane*, 76 Maine, 521; *Blake* v. *Blake*, supra. The wife's administrator was allowed to recover against the husband's executor, in *Morrison* v. *Brown*, 84 Maine, 82. We see no good reason why the wife may not prove her claim against his insolvent estate. The proceeding is not against the husband, but against his estate, which is in the hands of the court for distribution. None of the reasons which weigh against suits between husband and wife are applicable in such a case. Her interests are not adverse to his. There is no controversy between them. There are no principles of public policy to be contravened by permitting her to prove her claim and share in the distribution. The statute provides that "creditors" may prove their claims. No distinction is made. And we think it is clearly the intent of the statute that all creditors shall share in the assets. See *Re Blandin*, 1 Lowell, 543, a case in point. The insolvent law has been in force for more than twenty years. During that time thousands of wives have proved claims against the estates of their husbands. If the law is as claimed by the appellant, it is certainly remarkable that the right to do so has not been challenged before this time.

The appellant has cited, and relies upon, decisions in Massachusetts to the effect that a note given by a husband to a wife cannot be collected even in the hands of a third party. This is so, because under the statute of Massachusetts, unlike our statute, husbands and wives may not contract with each other.

Appeal dismissed with costs.

Decree of court of insolvency affirmed.

JAMES H. COUSENS, in Equity,

vs.

THE ADVENT CHURCH OF THE CITY OF BIDDEFORD.

York. Opinion December 5, 1899.

Will. Probate. Equity. Jurisdiction. R. S., c. 64, §§ 7, 19.

This court sitting in equity, cannot establish an unprobated will.

If, after probate of a will, a later will, which revokes the first, is found, it should be presented for probate to the probate court. From the decree of that court an appeal lies to the supreme court of probate.

The prior probate of the earlier will does not preclude the probate of the later will. If the later will revokes the former, upon its probate, the court authorized to admit wills to probate has authority to revise or revoke the former decree, so far as to give effect to the last will.

IN EQUITY. ON EXCEPTIONS BY PLAINTIFF.

Bill in equity praying that the defendant corporation be required to pay to the plaintiff a legacy of three thousand dollars, and other sums and bequests, which he claimed were due him under the will of Charles E. Rumery, deceased, made in 1884 and alleged to have been fraudulently suppressed or destroyed by Eliza A. Rumery, his wife, and never probated.

The defendant answered and demurred to the bill, and the presiding justice having sustained the demurrer, the plaintiff took exceptions to this ruling and order of the court.

The case is stated in the opinion.

J. M. Stone and C. S. Hamilton, for plaintiff.

There is in the probate court no plain, adequate and complete remedy at law.

We learned the fact, so as to be able to prove the existence of the will of 1884, and the bequest to Mr. Cousens in it, too late to bring a writ of error, under our statute; and upon a writ of review, if granted us, we cannot reverse the judgment in whole or in part. *Curtis* v. *Curtis*, 47 Maine, 528.

Proceedings in probate court "are not according to the course of the common law, but they are creatures of the statute, having a special and limited jurisdiction only. Hence we must look to the statute for the jurisdiction in a given case. While all their decrees, made within their jurisdiction are conclusive unless appealed from, those without their jurisdiction, may be called in question, even collaterally." *Fowle* v. *Coe*, 63 Maine, 248, and cases there cited. For sixty years it has been settled in Maine, that "one judge of probate has no authority to correct the errors of another, nor can he reverse or alter his own decrees, in regard to a past transaction. If it were so, executors, administrators and others, who act under the supervision of that court, could never trust to its sanctions, or be secure from having their proceeding unravelled at a future day." *Bradbury* v. *Jefferds*, 15 Maine, 215. Valid reasons then and now.

Waters v. *Stickney*, 12 Allen, 1, apparently supports the respondent's position. But when critically examined, it does not support it. For it is expressly said in that case that, "the authority of the probate court to revoke its own decrees is expressly recognized and declared by the statutes of the commonwealth, in some cases." And the statutes conferring upon the probate court that power are cited. And it is further said, that "this accords with the practice in the ecclesiastical courts in England" based upon the peculiarity of their practice and jurisprudence. And this case also is inapplicable to the present one, for the further reason, that it is there said: "The new decree would not necessarily avoid payments made, or acts under the old decree, while it remained unrevoked;" which is the very power now and here invoked.

Neither does *Gale* v. *Nickerson*, 144 Mass. 415, support the respondent's contention. Because the court there says, that the petition for review presented in that case: "Nowhere specifies any fraud practiced upon the court or the parties interested. It nowhere alleges that there is any newly discovered evidence upon the issues which it seeks to rely. All the issues were open and tried in the probate court, before the decree allowing the will, and they are all raised in the reasons for appealing from the decree filed in this case. The very matters now sought to be reopened were

tried and determined there." Neither of these cases, therefore, is applicable to the present one, because fraud and newly discovered evidence are the very gist of the present bill.

J. O. Bradbury, Geo. F. and Leroy Haley, for defendant.

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

STROUT, J. Demurrer to the bill was sustained by the justice hearing the case, and exception taken. The only question is, whether the case made by the bill, if proved, affords ground for the equitable relief sought.

The bill alleges that Charles E. Rumery made his will on the sixteenth day of January, 1870, and died on May fourteenth, 1885. This will was admitted to probate, by decree of the probate court, and on appeal by complainant, by the supreme court of probate; that under this will Eliza A. Rumery, his wife, took all of the estate of Charles—and that by her will she gave it to defendant, who since her death has received and still holds the same.

It alleges that in the summer or fall of 1884, Charles E. Rumery made another and later will, in which he gave complainant three thousand dollars, and he believes other valuable gifts; that Charles exhibited this will to his wife, and told her that he had given complainant three thousand dollars; that thereupon she became very indignant, and said complainant should never receive a cent of it; that this last will was fraudulently concealed or destroyed by Eliza, and has never been found; that at the time of the probate of the will of 1870, complainant was unable to prove the execution and contents of the later will of 1885, but that he has since discovered and is now able to make such proof; that defendant has already received, as legatee of Eliza, a little over $6,000, and will receive $1,000 more on the death of this complainant, which is now held by a trustee. It charges that by law the defendant holds this sum of $6,000 in trust to pay the complainant the three thousand dollar legacy to him, and other sums given him by the will of 1884. The prayer is that defendant be

decreed to pay complainant "three thousand dollars and such other sums and bequests as were therein given to him in the last will and testament of said Charles E. Rumery" and for other relief.

Wills do not become operative until proved and established in some court having jurisdiction for that purpose—in this state, by allowance by the court of probate, or the appellate supreme court of probate. No other tribunal can give effect to a will. Until established in that forum it has no life. This court, sitting in equity, cannot establish and execute an unprobated will. The first step for complainant to take, is to prove his later will in the probate court.

But the complainant says he cannot do this, because an earlier will has been admitted to probate, and the judgment in that case is final, conclusive and cannot be revoked. It may be that what has been done by the executor under that will, and its probate, will protect the executor; but it does not follow, that upon the probate of a later will which revokes the earlier, the estate may not be followed in the hands of the legatees who received it under the earlier will. Our statutes make no provision for a new trial, or review in case of an appeal allowing a will. But if a will, admitted to probate, is afterwards found to be a forgery, or the testator proves to be alive, or a later will is discovered, it would be a reproach to the law to hold that such erroneous decree must stand. If it is to be corrected, it would seem it should be done in the court having jurisdiction of the subject matter—in the probate court in the first instance, and by appeal in the supreme court of probate. This course is more convenient and much more logical than an appeal to a court of equity, to annul or revise the decree of another court of special and exclusive jurisdiction in such matters. It is said in *Gale* v. *Nickerson*, 144 Mass. 415, "there is an inherent power in probate courts, in cases where justice clearly requires it, to revise such a decree. Thus, if, after a will is proved, a later will or codicil is discovered, or if there is newly discovered evidence proving that a will is forged, the court may reopen the case and revise the decree." It is also there said that, "it is more in harmony with our system, and more convenient in practice, that

a motion for a new trial or rehearing of a decree of the probate court, affirmed by the supreme court of probate, should be heard in the first instance in the probate court."

The same question is fully discussed in *Waters* v. *Stickney*, 12 Allen, 1, 12, 13, and the same result reached. In that case it is said: "A court of probate has no more power by a decree establishing one testamentary instrument to preclude the subsequent probate of a later one never before brought to its notice, than by a decree approving one account to discharge an administrator from responsibility for assets not accounted for." . . . "There is no reason why the probate of a will which does not express the last intentions of the testator should be held irrevocable, more than letters of administration issued upon the supposition that the deceased died intestate."

In *Bowers* v. *Johnson*, 5 R. I. 119, the supreme court of Rhode Island held that the power to revoke a probate once granted, though nowhere expressly recognized in the statutes of that state, was a just and necessary power to be implied from the statute granting general authority to "take the probate of wills and grant administration on the estate of deceased persons," and might be exercised incidentally to an application for the probate of a later will. See also *Muir* v. *Trustees of the Orphan House*, 3 Barb. Ch. 481. So it is held that after probate of a will, a later will may be admitted to probate by the court which granted the first probate. *Clogett* v. *Hawkins*, 11 Maryland, 281; *Schultz* v. *Schultz*, 10 Gratt. 358.

The power of the probate court to revoke a decree granting administration is recognized in R. S., c. 64, § 19, which requires an administrator to give a bond, with the condition, among others, "to deliver the letters of administration into the probate court, in case any will of the deceased is thereafter proved and allowed." In the same chapter, § 7, provision is made for admitting to probate lost or suppressed wills, on the testimony of the subscribing witnesses or "by any other evidence competent to prove the execution and contents of a will." For a construction of this statute see opinion of PETERS, C. J., in *Rich* v. *Gilkey*, 73 Maine, 603.

To grant the prayer of the bill would require this court, sitting in equity, to assume the jurisdiction of the probate court, and establish and execute a will, never presented to a court of probate. This is beyond the province of equity. *Wolcott* v. *Wolcott*, 140 Mass. 194.

The complainant must seek relief by proving the later will in the probate court, in the first instance.

Exceptions overruled. Demurrer sustained.
Bill dismissed with costs.

HENRY W. OAKES *vs.* CHARLES J. M. MERRIFIELD.

Androscoggin. Opinion December 6, 1899.

Intox. Liquors. Bills and Notes. Consideration. R. S., c. 27, § 56.

1. By R. S., c. 27, § 56, it is provided that, "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 a valuable consideration and without notice of the illegality of the contract."
2. The law court sitting with jury powers, holds that evidence showing a hotel keeper, in this state, who purchased and received at one time intoxicating liquors to the amount of $537, warrants the conclusion, in the absence of any explanation, that the liquors were intended to be sold by him; and the court has no doubt that such was the fact in this case. Therefore, inasmuch as the purchaser had no lawful authority to sell, if he intended to sell them in this state, he intended to sell them unlawfully.
3. A purchaser gave a promissory note for a portion of the purchase price of such intoxicating liquors, which note came into the possession of a third party. *Held;* under the evidence, that this third party was not a holder for a "valuable consideration," it appearing that he paid nothing for the note, and that he agreed to make payment only in case he succeeded in collecting it. Such a consideration is not "valuable."
4. Where notes are given in renewal of the original invalid note and were afterwards indorsed to the plaintiff who is not a holder for value, *held;* that although there may have been a new and independent consideration for the renewal notes, yet the old consideration remains. The illegality is not purged.

5. The consideration of the notes in suit, in part at least, having been intoxicating liquors purchased with intent that they should be unlawfully sold in this state, and neither the plaintiff nor the person from whom he received the notes, being a holder for a valuable consideration, *held;* that the statute, (R. S., c. 27, § 56,) affords a perfect defense to an action thereon.

ON REPORT.

The facts are stated in the opinion.

H. W. Oakes, J. A. Pulsifer and F. E. Ludden, for plaintiff.

The plaintiff claims that the question of illegality must be held to have been disposed of when the defendant Merrifield settled the other suit and gave the new notes.

There was more involved in this settlement than the question of consideration for the original claim against Merrifield. Montgomery, in bringing his suit, claimed to be a holder for value without notice. A settlement was made by the defendant of this suit against him, in respect to which it is fair to assume that, notwithstanding his claim of a defense, he really believed that he had no defense.

This was sufficient consideration for the new notes. *Castner* v. *Slater*, 50 Maine, 212; Story on Promissory Notes, 6th ed., § 186, and cases cited; *Russell* v. *Cook*, 3 Hill, 504; Clark on Contracts, 176, and cases cited; *York* v. *Pearson*, 63 Maine, 587.

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

In *Paton* v. *Coit*, 5 Mich. 503, in relation to claims of this kind, the learned judge, who drew the opinion says: "Courts should be careful to avoid doing anything to facilitate the indorsement of such contracts, unless it appear that the plaintiff is not in fault, and that he has real equities to be protected."

In *Kidder* v. *Black*, 45 N. H. 530, the court held that the surrender of the note, the consideration for which was the sale of a stock of goods, a part of which were intoxicating liquors, sold contrary to law, is not a good and valuable consideration for the issue of new notes, and they say: "It would seem somewhat strange if the surrender of such notes by one, in whose hands they were void, to the maker or another, in whose hands they would be equally invalid, could furnish a sufficient consideration for a note

by either of the latter to the former. . . . . The surrender of such notes to the maker would not be a sufficient consideration for a new note between the parties." The court in the same case further said: "The abandonment of legal proceedings commenced where there is palpably no cause of action, is not a good consideration for a promise. . . . . The surrender, forbearance or assignment of a claim, having no legal validity, is not a sufficient consideration for a promise." This is directly in point.

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

SAVAGE, J. The plaintiff, as indorsee, seeks to recover against the defendant upon two notes, one for $75 and one for $200, given by the defendant, payable to the order of J. H. Montgomery.

The case shows that on November 18, 1896, the defendant gave to the firm of C. Berry & Co., Boston, a note payable to his own order, for the sum of $437.20. In May, 1897, Berry & Co. indorsed and delivered the note to Mr. Montgomery, and he brought an action upon it, in his own name, by trustee process. October 23, 1897, the action was settled and the trustee released upon the defendant's giving to Mr. Montgomery $50 in money and the two notes in suit, which Mr. Montgomery indorsed upon the original note. The defendant, however, claims that the money and notes were given in full settlement and payment of the original cause of action.

It is admitted that the consideration of the first note was intoxicating liquors purchased in Boston, and the defense claims that those liquors were purchased out of the state with intention to sell the same inviolation of the laws of this state, and that the provisions of R. S., c. 27, § 56, afford a perfect defense. The section referred to provides that "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 a valuable consideration and without notice of the illegality of the contract."

The contention of the plaintiff is (1), that there is no evidence that the liquors were intended for unlawful sale in this state; (2), that Montgomery was a holder of the original note "for a valuable consideration and without notice of the illegality of the contract," and hence that notes given in settlement or renewal of it would be valid, *Field* v. *Tibbetts*, 57 Maine, 358; and (3) that, even if the statutory defense might have been made in an action upon the original note, it is not open upon the notes in suit, which plaintiff claims were given for new, independent and lawful considerations, namely, the discontinuance of the first suit and the releasing of the trustee.

In regard to the plaintiff's first contention, it is sufficient to say that we think that the only reasonable and legitimate inference to be drawn from the evidence is that the liquors were intended for unlawful sale in this state. The defendant was a hotel keeper. The value of the liquors purchased was $537, for which he gave his note for $437 and his check for $100. It does not appear that the defendant was authorized by law to sell liquors in this state, and it is hardly to be supposed that he would purchase liquors to such an amount for his personal use. We think that the facts above stated, in the absence of any explanation, warrant the conclusion that the liquors were intended to be unlawfully sold; and we have no doubt that such was the fact.

As to the plaintiff's second contention, that the prohibition of the statute excepts "negotiable paper in the hands of a holder for a valuable consideration and without notice of the illegality of the contract," it is enough to say that we think that Mr. Montgomery was not a holder of the original note "for a valuable consideration." He says that he bought it, but he does not say that he paid anything for it. Upon this question, the burden is upon the plaintiff. *Cottle* v. *Cleaves*, 70 Maine, 256. Giving full effect to Mr. Montgomery's testimony upon this point, it would seem that he was to make payment only if he succeeded in collecting. The consider-

ation, therefore, of the contract for the purchase of the note was was not "valuable." It follows that the statutory defense of illegality was available as against the original note in the hands of Mr. Montgomery.

Has the illegality been cured by giving the new notes in settlement of the old? We are of the opinion that it has not. The new notes are only the renewal of some part of the old one. *Miller* v. *Hilton*, 88 Maine, 429. The taint is not purged by renewal. It still remains true that the notes were given for intoxicating liquors. Or if, as claimed by the plaintiff, the discontinuance of the original action and the release of the trustee constituted a new consideration, and a legal one, for these notes, nevertheless, the old consideration remained also. That was a part of the consideration of these notes, and that has not ceased to be illegal. The question is not whether there was any legal consideration, but whether there was any illegal consideration. If any portion of the consideration for the note was illegal, the court cannot separate the legal from the illegal. *Hay* v. *Parker*, 55 Maine, 355. The whole transaction is void.

It is not claimed that the present plaintiff is a holder of the notes for a valuable consideration. He has no greater rights than Mr. Montgomery would have had if suit had been brought in his name.

Judgment for the defendant.

W. EDWIN ULMER, In Equity,

vs.

FALMOUTH LOAN AND BUILDING ASSOCIATION.

Cumberland. Opinion December 6, 1899.

Equity. Practice. Loan and Building Associations. Bank Examiner. Stat. 1897, c. 218; c. 319, § 4. R. S., c. 47, § 121.

The power of invoking the interference of the court, when loan and building associations exceed their powers, is invested, under the statutes of this state, in the bank examiner alone, and he only may ask for an injunction and receiver.

A bill in equity will be dismissed when the allegations contained therein are altogether too indefinite and uncertain to apprise the defendants of the particular charges they are called upon to answer.

IN EQUITY. ON APPEAL BY PLAINTIFF.

Bill in equity, heard on bill and demurrer, praying for an injunction, a receiver, and the winding up of the affairs of the defendant corporation. The presiding justice dismissed the bill.

The plaintiff in his bill charged various acts of the officers to be in violation of the by-laws of the corporation, such as follows:— "That your petitioner is informed and has reason to believe and does believe that the board of directors and officers of said association disregarding the rights of your petitioner and the provisions of said constitution and said laws of said state, and in direct violation thereof, have made a loan of a large sum of money from the funds of said association belonging to your petitioner and the other shareholders of said association, and in which your petitioner is interested as said trustee and attorney for said mortgagors, upon a single parcel of real estate and to an amount far in excess of that provided for in said constitution, and upon property of such a nature that it does not come within the provisions of said by-laws and the laws of said state relative to said loan and building association for the purposes for which said funds of said association may be loaned and of such a nature that the value of same is uncertain."

He also charged illegal reloans at lower rates of lower rates of premium, etc., and "that thereby said monthly payments from said mortgagors to said association as provided in said mortgage deeds and the notes thereto have, in divers cases, been reduced, and to that extent the action of said board of directors and said officers has impaired and still is impairing the revenues of said association, and the returns from thence to your petitioner and other shareholders and mortgagors thereof; that as a result the burden of the mortgagors not so favored by a reduction of payment in said monthly dues on said mortgages is thereby increased and made unequal with the other mortgagors so favored."

The concluding charge in the bill alleged:—"That said action of said board of directors and said officers of said association, as aforesaid, has disintegrated, broken and changed the original basis upon which said association was organized and upon which its business was conducted until said fifteenth day of February, A. D. 1897, and has destroyed the mutual relationship between shareholders and borrowers of said associations, then existing, to such an extent that the said mutual obligations thereof cannot now be fulfilled; that the original purposes of said association cannot now be effected; and that the usefulness of said association for the purposes for which it was organized has been destroyed and can no longer be accomplished."

The defendant demurred to the bill and gave the following reasons for its dismissal:—

"Because it appears by said bill that the facts therein claimed are uncertain and not positively alleged.

"Because all the shareholders in said association have not been notified to join and have not joined and become parties to said bill.

"Because it is not alleged in said bill that complainant made any request to the board of directors and officers of said association for them to give him relief in the premises complained of in his said bill of complaint.

"Because said bill does not contain any matter of equity, whereon this court can ground any decree or give the complainant relief against the defendant corporation.

"And for further cause of demurrer said defendant corporation shows that under the laws of the State of Maine, Fremont E. Timberlake, as bank examiner, is the only person in whose name a bill of complaint praying for the relief prayed for in said bill of complaint, and upon the grounds and for the causes therein mentioned can be prosecuted and maintained."

W. Edwin Ulmer, for plaintiff.

Geo. Libby, for defendant.

SITTING: EMERY, HASKELL, WISWELL, SAVAGE, FOGLER, JJ.

SAVAGE, J. Bill in equity by complainant, as shareholder, charging that various acts of the officers of the defendant corporation, which are alleged to be ultra vires, have "disintegrated, broken and changed the original basis upon which said association was organized and upon which its business was conducted, and have destroyed the mutual relationship between the shareholders and borrowers of said association to such an extent that the mutual obligations thereof cannot now be fulfilled; that the original purposes of said association cannot now be effected; and that the usefulness of said association for the purposes for which it was organized has been destroyed and can no longer be accomplished." The bill prays for an injunction, a receiver, and a winding up of the affairs of the Association.

On demurrer, the bill was dismissed by the presiding justice below, and the complainant appealed.

We think the bill was properly dismissed, for, in the first place, the allegations contained therein are altogether too indefinite and uncertain to apprise the defendants of the particular charges they are called upon to answer.

But besides this objection, which goes to the form and structure of the bill, there is another one, which we think is insuperable to the maintenance of such a bill in any form.

Loan and building associations, like savings banks, are creatures of the statutes. Their manner of organization and method of doing business are specifically prescribed by statute. They are

placed under the charge, and to a certain extent, under the control of a public official, the bank examiner. Upon him the statutes impose the power and the duty of an examination and investigation, and to him the associations must make stated reports. The bank examiner has the same powers and duties with respect to such associations that he has with respect to savings banks. Laws of 1897, ch. 319, § 4. He is required to visit each institution once in each year, and as much oftener as he deems expedient. At such visits he has free access to the vaults, books and papers, and is required to thoroughly inspect and examine all the affairs of the institution, and make such inquiries as are necessary to ascertain its condition and ability to fulfil all its engagements, and whether it has complied with the law. When required by the bank examiner, the officers of such an association must furnish him with statements and full information relating to matters pertaining to its business affairs and management. Laws of 1897, chap. 218. If, upon examination, the bank examiner is of the opinion that such an association is insolvent, or that its condition is such as to render its further proceedings hazardous to the public or those having funds in its custody, or if he is of the opinion that the institution has exceeded its powers or failed to comply with the rules, restrictions or conditions provided by law, he may apply to one of the justices of the supreme judicial court for an injunction to restrain the institution from proceeding further with its business. After a hearing, such injunction may be dissolved, modified or made perpetual. R. S., chap. 47, § 121.

The foregoing summary of statute provisions makes it apparent that the legislature has intended to throw around institutions of this character all possible safeguards for the protection, not only of those who are financially interested in them, but of the public itself; and it is made the duty of the bank examiner to see that the safeguards established by law are maintained, and that the associations conduct their business according to law. For failure in either respect, he may apply to the court for the proper remedy.

The statute points out the conditions under which the intervention of the court may be obtained, and the officer by whom the

machinery of litigation may be set in motion. It suggests no other way. And it is the opinion of the court that it was the intention of the legislature, as expressed in the statute, that the power of invoking the interference of the court should be vested in the bank examiner alone, and that he only may pray for an injunction and a receiver. It is to be observed that these institutions possess a public character, and it is for the interest of the public, not only that they shall be subjected to judicial investigation when they ought to be, but also that they shall not be so subjected when they ought not to be. Unusual means are placed in the hands of the bank examiner to ascertain their condition, and it cannot be presumed that he will fail to act in a proper case. If one shareholder may maintain a bill, so may every other. There is no limit. To subject loan and building associations to vexatious, harassing and expensive litigation caused by the suits of possibly multitudinous shareholders who may be dissatisfied, with or without reason, would greatly impair their usefulness, if not imperil their existence.

Bill dismissed with costs.

CHARLES F. JOHNSON, Assignee,

vs.

JOHN H. EVELETH.

Kennebec. Opinion December 7, 1899.

Sales. Stoppage in Transitu. Spec. and Priv. Laws, 1885, c. 402.

The right of stoppage in transitu is merely an extension of the lien for the price which the vendor has, after contract of sale and before delivery of goods sold on credit. The term itself implies that the goods are in transit, and that they have not come into the possession of the vendee. It permits the vendor to resume possession before the goods sold have come into the vendee's possession, if the latter has become insolvent. The transitus is not at an end until the goods have reached the place contemplated by the contract between the buyer and seller as the place of their destination. Property sold on credit may have been delivered so as to effect title, and yet not have come

into the possession of the vendee so as to bar the right of stoppage in transitu. The vital question is, are the goods in transit between the vendor and vendee.

Where logs are bargained and sold, to be delivered "over the dam" at the outlet of Moosehead lake, thence to be driven by the Kennebec Log-Driving Company to the purchaser's booms and mill, *held;* that the right of stoppage in transitu remains in the vendor until the logs come into the actual possession of the vendee; and the vendee having become insolvent in the meantime, the vendor has the right to resume the possession of the logs.

Also, *held;* that the right of stoppage in transitu is not lost, as to the logs still being driven, although some portion of the logs sold have drifted into the possession of the vendee.

ON REPORT.

This was an action of trover brought by the plaintiff as assignee in insolvency of Edward Ware to recover the value of 7936 spruce logs of the value of $7812.54. The action came on for trial at the October term, 1898, of the supreme judicial court in Kennebec county; but after the testimony had been partly taken out it was, by agreement of counsel, reported to the law court to render such judgment, upon so much of the evidence as is admissible, as the rights of the parties require.

The defendant pleaded the general issue with the following brief statement, of special matters of defense, alleging that "the defendant will show that any such alleged purchase was procured by fraud and without consideration; and that said pretended purchase was on credit and that at the time same was made said Ware was insolvent and knew he was insolvent; and that he did not at the time of the alleged purchase intend ever to pay for said logs, and that said defendant, on learning of such insolvency and fraudulent intent, promptly rescinded said pretended sale. And that said logs were sold by the defendant to said Ware, on credit, and were never delivered by said defendant to said Ware, or to the plaintiff, but were delivered by the defendant to the Kennebec Log-Driving Co., a common carrier, from Moosehead lake to the ocean, to be carried from the dam at the outlet of Moosehead lake to said Ware's boom in Winslow; and that as soon as the defendant learned of the failure of said Ware, to wit, on May 25, 1898, he resumed possession of said logs, at a place called Shawmut, in the town of Fairfield, while they were in transit to said Ware and in the possession

of said common carrier, and before they got into the actual possession of said Ware.

Chas. F. Johnson, for plaintiff.

If Ware knew or had reasonable grounds for believing that he was insolvent when these logs were purchased, that would not afford a legal reason for a rescission by the defendant of the contract of sale. *Burrill* v. *Stevens*, 73 Maine, 395.

The second ground of defense is wholly inconsistent with the first, because if the logs were stopped by the defendant by virtue of his right of stoppage in transitu, there was no rescission of the contract of sale. *Newhall* v. *Vargas*, 13 Maine, 93; *Vargas* v. *Newhall*, 15 Maine, 314.

If, therefore, the defendant rescinded the contract because of fraud practiced by Ware, he cannot avail himself of this second ground of defense.

But if the contract were not rescinded by the defendant, the plaintiff contends that the right of stoppage in transitu could not be exercised in this case, because the place of delivery specified in the contract of sale had been reached and the transit was at an end when the logs were turned over the dam at the East Outlet of Moosehead Lake, and they were then in the constructive if not actual possession of Ware. The contract contained no provision for a delivery to the Kennebec Log-Driving Company for transportation to Ware's Mill at Winslow.

In *Muskegon Booming Co.* v. *Underhill*, 43 Mich. 629, the court held in a similar case that when the Muskegon Booming Company took control of the logs for the purpose of driving them, this amounted to a delivery to Eldred & Company and cut off the defendant's right of stoppage in transitu.

The same court has also decided that a company charged with the duty of driving logs is not a common carrier. *Mann* v. *White River Log and Booming Co.*, 46 Mich. 38.

Admitting, however, that the right of stoppage in transitu might apply to logs which were being driven by the Kennebec Log-Driving Company to the same extent as to carriers of goods, the defendant in this case could not avail himself of that right because the

transitus was ended when the logs were delivered over the Moosehead Lake Dam. *Brooke Iron Co.* v. *O'Brien*, 135 Mass. 446; *Mohr* v. *B. & A. R. R.* 106 Mass. 70; *Dixon* v. *Baldwen*, 5 East, 175; *Guilford* v. *Smith*, 30 Vt. 49; *Rowley* v. *Bigelow*, 12 Pick. 307; 23 Am. & Eng. Ency. of Law, p. 913; *Becker* v. *Hallgarten*, 86 N. Y. 167; *Aguirre* v. *Parmelee*, 22 Conn. 473; *Sawyer* v. *Joslin*, 20 Vt. 172.

Where goods are left with the carrier to await a destination to be given to them by the purchaser the transit is at an end. Cases supra. A delivery of part of an entire parcel, or cargo, with an intention on the part of the vendee to take the whole, terminates the transitus and the vendor cannot stop the remainder. 2 Kent's Com. 9th Ed. p. 746.

While all the logs had not been delivered to Ware over the lake dam according to the contract of sale, before he made an assignment to the plaintiff, yet two rafts had been delivered there before that time, and some of the logs which they had contained had reached Ware's boom at Winslow; and a delivery of part would pass the title to the whole. *Boynton* v. *Veazie*, 24 Maine, 286; *Kohl* v. *Lindley*, 39 Ill. 195, (89 Am. Dec. 294); *Jewett* v. *Warren*, 12 Mass. 300.

The title to the logs in the raft, which was not turned over the dam until June 1, 1898, therefore passed to the plaintiff by virtue of the assignment.

W. T. Haines and H. D. Eaton, for defendant.

Counsel argued: 1st. The plaintiff cannot maintain the action in any event. 2nd. The pretended sale of the logs by Eveleth to Ware is not valid, and the same is fraudulent and therefore void. 3rd. Eveleth had the right to stop the logs in transit from Moosehead Lake dam to Ware's mill in Winslow, after the insolvency of Ware.

Where a sale is made or agreed upon, and there is nothing said about payment, the law will assume that payment is to be made on delivery; and upon a failure to comply with the request thereof, the seller may retake possession of his goods, although he has actually delivered them. *Peabody* v. *MaGuire*, 79 Maine, 585; *Hill* v.

Hobart, 16 Maine, 168; *Genin* v. *Tompkins*, 12 Barb. 275. Where delivery and payment are to be concurrent and payment is not made, the title does not pass to the purchaser. *Goslin* v. *Campbell*, 88 Maine, 450; *Ballantyne* v. *Appleton*, 82 Maine, 573; *Furniture Co.* v. *Hill*, 87 Maine, 22.

How can the seller deliver half the goods and not be subject to the conditions of full delivery, and the buyer half the notes he agrees to, and not be subject to the conditions to deliver them all as he agreed to do? The taking of a check—for goods—which is protested and not paid does not ordinarily operate as payment and prevent seller from retaking his goods. *Natl. Bank of Commerce* v. *C. B. & N. Railroad Co.* 44 Minn. 224. So as to buyer's note. *Davidson* v. *Davis*, 125 U. S. 91.

If the condition of payment is not fully complied with, or is waived, the original vendor's right becomes perfect and absolute. *Calcord* v. *McDonald*, 128 Mass. 470; *Brown* v. *Haynes*, 52 Maine, 578; *Carter* v. *Kingman*, 103 Mass. 517.

Purchasing goods with the intention not to pay for them is a fraud, which will render the sale void and entitle the vendor to obtain the goods from vendee or any subsequent purchaser, with notice, or without consideration, although there were no fraudulent misrepresentations or false pretenses. *Wiggin* v. *Day*, 9 Gray, 97; *Dow* v. *Sanborn*, 3 Allen, 181; *Burrill* v. *Stevens*, 73 Maine, 395.

"Where a party, by fraudulently concealing his insolvency and his intent not to pay for goods, induced the owner to sell them to him on credit, the vendor, if no innocent third party has acquired an interest in them, is entitled to disaffirm the contract and recover the goods.

"The defeasible title of the vendee to the goods so acquired vests in his assignee in bankruptcy, and is subject to be determined by the prompt disaffirment of the contract by the vendor." *Donaldson* v. *Farwell*, 93 U. S. 631.

Fraud may be committed by the artful and purposed concealment of facts exclusively within the knowledge of one party and known by him to be material, and where the other party has not equal means of information. *Prentiss* v. *Russ*, 16 Maine, 30.

The defense set up in this case is, that Ware artfully and purposely concealed his purpose, and had it been known would have had a material influence upon the contract.

The court says in *Ingersoll* v. *Barker*, 21 Maine, 474: "Fraud is almost always a matter of inference from circumstances. Direct proof of it can seldom be expected."

Insolvency is the basis of the right of stoppage in transitu; and by reason of the justice and equity, which will not allow one man's goods to be taken and applied to the payment of another man's debt. This right can only be exercised by the seller or some one standing in his place.

Part payment by the buyer only diminishes the claim pro tanto on the goods stopped, and does not affect the seller's right of stoppage for the proportion of the price remaining unpaid, nor is he, in order to exercise this right, bound to refund what he may have received in part payment.

In *State* v. *Peters*, 91 Maine, 31, it is decided, and reaffirming the doctrine of *State* v. *Intoxicating Liquors*, 73 Maine, 278, that "delivery to the carrier designated by the consignee was delivery to the consignee subject to vendor's lien. . . . . The title passes to the vendor, when the bargain is struck, subject to fraud, and loss of property by accident would have been loss to buyer or consignee." But this does not affect the right of stoppage in transit. It is not a question of title; it is a lien effected by taking possession in case of insolvency when goods are passing to the actual possession of vendee, and while in the carrier's hands.

Hence, if the court should decide that the sale was completed, the right to stop the logs remained under this doctrine, upon Ware becoming insolvent, while they were passing to his boom. *Hurd* v. *Bickford*, 85 Maine, 217.

The delivery into the "Kennebec waters" or "over the dam," or "into the corporation"—as this case shows to have been done—was in the same line as a delivery "free on board." It meant that Eveleth was to pay all expenses on logs to this point and nothing more. *Ex parte Rosevear China Clay Co.*, 11 Ch. D. 560, C. A.

Mr. Eaton argued that the plaintiff took no title to the logs because the insolvent court had no jurisdiction to entertain the petition of Ware at the time it was filed, viz: July 8, 1898.

The National Bankruptcy Act was approved and went into effect July 1, 1898. The effect of that act was to supersede all state insolvency laws from and after its passage. In *Parmenter Mfg. Co.* v. *Hamilton*, 172 Mass. 178, the court says: "The only saving clause affecting the jurisdiction of state courts provides for cases commenced in those courts before the passage of the act. The plain implication is that proceedings commenced in the state courts after the passage of the act are unauthorized. This is in accordance with the earlier language giving the statute full force and effect from the time of its passage, except that the filing of petitions is to be postponed for a short time. We are of opinion that the language was chosen to make clear the purpose of congress that the new system of bankruptcy should supersede all state laws in regard to insolvency from the date of the passage of the statute."

And this decision has been approved by the Federal courts *in re Gutwillig*, 90 Fed. Rep. 475, and the same doctrine has been affirmed in the cases *in re Bruss-Ritter Company*, 90 Fed. Rep. 651; *in re Lewis*, 91 Fed. Rep. 632; *in re Curtis*, 91 Fed. Rep. 737; *in re Smith*, 92 Fed. Rep. 135.

In the last case it is held that: "The assignee under the inoperative state law takes no title as against the creditors by the deed of assignment; and all of his acts touching the estate of the bankrupt, as well as all acts by the state court in the administration of the same, are unauthorized and void, and will be treated as nullities wherever drawn in question. . . . . "It follows that the assignee is a mere naked bailee for the creditors, without a shred of title or lawful authority to the possession of the bankrupt's estate; . . . . "but where the possession and only right of possession are under the authority of a state court by virtue of a general assignment for the benefit of creditors, no contestable question is presented."

The proceedings in insolvency did not commence in legal contemplation until the day of the filing of the petition. *Wells* v. *Brackett*, 30 Maine, 61; Stat. 1897, c. 325, § 1.

SITTING: EMERY, HASKELL, WISWELL, STROUT, SAVAGE, FOGLER, JJ.

SAVAGE, J. This case comes up on report. We think the evidence shows the following facts:—On March 22, 1898, one Edward Ware entered into a contract of bargain and sale with the defendant for the purchase of about one million feet of logs, numbering 7663 sticks, then lying in Spencer Pond, above Moosehead lake. It was agreed that the logs should be delivered by the defendant "over the dam," at the East Outlet of Moosehead lake, into Kennebec waters. From that point they were to be driven down the Kennebec river by the Kennebec Log-Driving Company. Ware had booms in Fairfield and Winslow, and a mill at the latter place. The logs were bought by Ware for the purpose of being manufactured into lumber at his mill in Winslow. On May 25, 1898, Ware assigned to the plaintiff for the benefit of his creditors, under the provisions of the insolvent law. Laws of 1897, chap. 325, § 16. He was, and for a long time had been, hopelessly insolvent. In the meantime, the defendant had caused a large portion of the logs to be delivered "over the dam" at the East Outlet, and they were being driven down the Kennebec river towards Ware's booms and mill. Some scattering logs had already reached Ware's mill and had been sawed. They had drifted down the river, without the necessity of being driven. But the drive proper did not reach Fairfield or Winslow until the last of August, 1898. When the drive reached "Shawmut," above the Fairfield boom, August 22, the defendant took from the river all the logs he had sold to Ware which then remained in the drive, numbering 6815 sticks, and surveying 808,032 feet. And it is for this taking and alleged conversion that the plaintiff has brought this action of trover. Ware agreed to give four notes for the price of the logs, maturing at different times. At the time of his assignment he had given one note to the defendant, which was subsequently protested for non-payment, and then tendered back by the defendant to the plaintiff. The other three notes he never gave.

The defendant asserts several grounds of defense, only one of

which do we think it necessary to consider. He says he took the logs from the river in the exercise of the right of stoppage in transitu. He claims that the log-driving company was a carrier. He says he sold the logs on credit, and that while they were in transit to their ultimate destination in Winslow and were in the possession of the log-driving company as a carrier, the purchaser became insolvent. And this fact, he says, gave him the right to resume the possession of the logs at any time before they came into the actual possession of Ware, or came to their destination in Winslow.

In reply, the plaintiff says (1) that the log-driving company was not a carrier, or middle man, in such a sense as gave it possession or control of the logs; that the river was the real carrier; that the company provided no means of conveyance or motive power, but simply facilitated the floating of logs down the river by breaking jams and otherwise, and hence that after the logs passed out of the possession of the defendant by being turned "over the dam," they must have been constructively, at least, in the possession of Ware, while floating upon the river; and furthermore, that in any event, the log-driving company was really only an association of log owners, of whom Ware was one, and that a delivery of the logs to the company was in effect a delivery into the possession of Ware; (2) that by the terms of the contract between Ware and the defendant, the "destination" of the logs was "over the dam" at the East Outlet, and that when they were so delivered, the "transitus" was at an end; and (3) that the facts that some of the logs had floated down the river to Ware's mill and had been received and sawed by him constituted a constructive delivery of the whole mass into his possession.

These contentions make it necessary for us to consider the character and duties and method of operation of the Kennebec Log-Driving Company. Its charter and by-laws are made a part of the case. By the charter, Laws of 1885, Chap. 402, certain persons named, their associates and successors, are constituted "a body politic and corporate" and may sue and be sued, etc. They have power to adopt all necessary regulations and by-laws. "They shall

drive to such place of destination on the Kennebec River as may be designated by the owners, or by the directors of said company, and may secure and form into rafts, under rigging, all logs and other timber belonging to said company, or any member thereof, that may be in the East Branch and Kennebec River, for that purpose, below the outlet of Moosehead Lake at the dam." "They may remove obstructions, and erect booms, piers and dams." Sect. 1. "Any person, persons or corporations, or their agents, owning logs or other timber to be driven on said rivers at the date of the annual meeting in each year, shall be members of the Kennebec Log-Driving Company, and shall so continue for two years at least from that date." Sect. 3. Members owning logs to be driven are required to file a correct statement of all such logs or timber, giving the number of feet, with the marks, and the place from which logs are to be driven and their destination. The expenses of driving, and for damages, and losses, are to be assessed upon the owners of the logs driven, and the payment of assessments is secured by a lien upon the logs. Section 4. The company may collect logs or timber remaining in booms or in any place exposed to loss, and deposit the same in suitable places and properly secure it from loss, and to pay for this service an assessment may be made. Sections 10, 11, 12 and 13. "The private property of each member of said company shall be holden to pay all debts contracted by the company after he became a member thereof, and before his withdrawal from the same, in default of company property whereon execution may be satisfied." Section 16.

By these extracts from its charter, it appears that the Kennebec Log-Driving Company is a corporation. It is more than a mere association of log owners. To be sure, all owners of logs to be driven are, by force of the statute, members, but all combined are only one corporate body. The corporation and its members are different persons. Hence it follows that a possession by the corporation is not a possession by a member, unless the corporation has been made an agent for that purpose. In this case the corporation does not appear to have been the agent of Ware for any

purpose. It was simply performing its corporate duty in receiving and driving the logs. It did that under its charter and not as agent. In this respect this case is unlike *Muskegon Booming Co.* v. *Underhill*, 43 Mich. 629, cited by the plaintiff. There the logs in question had failed to get into the booming company's main drive and had been left in the rear. The vendees engaged the booming company to send back and get the logs, which they did. The vendees having become insolvent before the logs reached their mill, the vendor, Underhill, sought to exercise the right of stoppage in transitu. The court denied this right, but rested its decision on the ground that the vendor, by his contract or acquiescence "virtually offered possession to vendees" . . . . "and that the vendees accepted the offer and virtually took possession by having the logs taken into custody at their expense and on their account as owners, by the booming company." Our conclusion is, therefore, that the possession by the log driving company was not possession by Ware.

The next question in this connection is, may the right of stoppage in transitu attach to logs being driven as these were. We have no doubt that it may. It may be conceded that the log-driving company is not a common carrier, although in some respects its duties are analogous to those of common carriers. See *Mann* v. *White River Log, etc., Co.*, 46 Mich. 38, where the distinction is pointed out. But that is not decisive. When a vendor sends goods sold to the place of destination by private conveyance, the right of stoppage in transitu exists the same as if they are sent by common carrier. The vital question is, are they in transit between the vendor and the vendee. The right of stoppage in transitu is merely an extension of the lien for the price which the vendor has, after contract of sale and before delivery of goods sold on credit. The term itself implies that the goods are in transit, and that they have not come into the possession of the vendee. It permits the vendor to resume possession before the goods sold have come into the vendee's possession, if the latter has become insolvent. Whether they are in the possession of a carrier, strictly so called, while in transit, or whether they are in possession of a "middle-man," is

immaterial. 2 Kent's Com. 702. In this case the logs were certainly in transit between the dam at East Outlet and Ware's mill. They were moving down the river. They were kept moving by the agency of the log-driving company. The company broke the jams, cleared the eddies and the banks of logs, took them wherever they became stranded, and drove in the rear. The company having assumed the duty of driving the logs, no one else had the right to interfere with the driving. So far as a mass of logs in a river is susceptible of possession, to that extent the log-driving company was in possession of these logs for the purpose of transporting them. And we think that was sufficient. It certainly accords with the equitable principles out of which the right of stoppage in transitu has grown. *Newhall* v. *Vargas*, 13 Maine, 93. The character of the possession of the log-driving company is only important as it shows that the logs had not come into the possession of the vendee, and were still in transit.

But the plaintiff next contends that, so far as this case is concerned, the transitus ended when the logs were turned "over the dam" at East Outlet, because, he says, that was the ultimate destination of the logs, within the meaning of the contract of purchase; that the defendant's agreement was to deliver the logs there, and that when the logs were so delivered, the transitus contemplated by the contract was at an end; and that in any further transit, the right of stoppage in transitu would not exist. This might be true, if by any fair construction of the contract, read in the light of surrounding conditions and circumstances, we could understand that the dam was really the contemplated final destination of the logs, or that the logs were to be delivered at the "dam," and there remain subject to further acts or directions of Ware. *Becker* v. *Hallgarten*, 86 N. Y. 167. But we cannot interpret the contract so narrowly. We must view the situation as the parties did. We cannot shut our eyes to the fact that these logs at the time of the contract were above the dam and above a portion of Moosehead Lake; that they were bought to be manufactured in Ware's mill in Winslow; that they must float or be driven down the river all the distance between those points; that it was

expected that they would be driven by the log-driving company; that there was no place of deposit at the "dam," for keeping the logs, but that the transit in the lake above the dam and in the river below was actually continuous, the dam being simply the point where the defendant ceased to drive and the company began. In view of these circumstances, should "over the dam" be regarded as the "destination" of the logs? We think not.

The question here is not whether the turning of the logs "over the dam" was a delivery, such a delivery as would have vested title in the vendee, in case delivery was necessary. It is not a question of title. We assume that Ware had the title to the logs. The defendant bases his right of stoppage in transitu upon that fact in part. The exercise of that particular right presupposes that the title of the goods is in the vendee; and further, the title remains in the vendee even after the exercise of the right. The title is not changed. *Hurd* v. *Bickford*, 85 Maine, 217. The question here is whether by the delivery at the dam, the logs came into the possession of the vendee; and so far only as the delivery at the dam throws light upon this question is it material. The distinction, in a word, is that property sold may have been delivered so as to effect title, and yet not have come into the possession of the vendee so as to bar the right of stoppage in transitu. An illustration of this is found in the common class of contracts where the vendor agrees to deliver to a carrier designated by vendee, for shipment to vendee's place of business. A delivery to a carrier under such circumstances vests title in the vendee and places the goods subject to his risk, but the vendor does not lose his right of stoppage in transitu while the goods are in transit to the vendee. *Grout* v. *Hill*, 4 Gray, 361; *Rowley* v. *Bigelow*, 12 Pick. 307; *Gibson* v. *Carruthers*, 8 M. & W. 321. In a case where goods were delivered to the purchasing agent of the vendees to be transmitted to the vendees' factory in another state, it was held that the right of stoppage in transitu was not barred. The court said that the delivery of the goods was to the agent, not as owner, nor as agent of the owners to dispose of them in any other way than to transmit them to the vendees' place of business, and that to take

away the right of stoppage in transitu there must be an absolute delivery to the agent for the use of the vendees, and it must have been a full and final delivery, as contradistinguished from a delivery to a person acting as a carrier or forwarding agent to the principal. *Aguirre* v. *Parmelee*, 22 Conn. 473. To terminate the transitus by delivery to a middle-man, it must be a delivery not to transport, but to keep. *Guilford* v. *Smith*, 30 Vt. 49. See our own case of *Newhall* v. *Vargas*, supra. It was held in *Mohr* v. *Boston & Albany R. R.* 106 Mass. 67, that the transitus is not at an end until the goods have reached the place contemplated by the contract between the buyer and seller as the place of their destination.

As bearing upon the "destination" of the logs, the plaintiff, in argument, suggests that under the charter of the log-driving company, the owner of the logs was required to file with the company a statement of their destination, which was not done, and also that the company does not itself take logs from the river, but the owners separate them from the general drive and boom them, or take them out, at such points as they please. To these suggestions, it is a sufficient answer to say that it is clear that the intended destination of these logs was at Ware's mill, and that whatever the rights of Ware to stop the logs or take them out of the river may have been, he did not exercise them. He did not take possession of the logs while they were in transit.

Finally, the plaintiff contends, inasmuch as some small portion of the logs had floated down to Ware's mill and had been received by him before his assignment, that this put him in constructive possession of the whole mass, and terminated the transitus. We are unable to come to that conclusion. The surveyor's bill shows that there were 7663 sticks in the lot of logs purchased. The defendant, when he took possession, found 6815 sticks in the drive. It appears that some had gone below Ware's mill to Hallowell, and undoubtedly some sticks had been left behind, upon the banks or in the eddies of the river. But assuming that the whole of the remaining 848 sticks had, during the season, floated down to or by Ware's mill, still we do not think that that fact constituted a con-

structive possession in Ware, or the plaintiff, of the logs which had not come down. It is not like the case where a vendee has taken some portion out of the whole mass, which was then susceptible of possession, and in which case he has thus obtained constructive possession of the whole. Such facts are important sometimes when it is necessary to decide whether a legal delivery has been made. But here, as we have said, it is not a question of technical delivery, but one of actual possession. Here Ware took only such scattering, floating logs as came to him. The remainder were not in his possession. They were still in the possession of the log-driving company. They were still being driven. They were still in actual transit. And we think the vendor had the right to stop them before that transit was ended. Such a conclusion gives effect to the spirit and purpose of the law. *Buckley* v. *Furniss*, 17 Wend. 504; *Mohr* v. *Boston & Albany R. R.* supra.

Plaintiff nonsuit.

CHARLES H. ROBINSON, and others,

vs.

JESSE W. BERRY.

York. Opinion December 7, 1899.

Sales. Infancy. Possession.

In an action of replevin it appeared that the defendant received the goods replevied, under a written agreement which constituted a conditional sale to him, and by which the title to the goods would pass only when the price should have been paid. The defendant was a minor and pleaded infancy. *Held;* that the plaintiffs did not part with the title; and even if the defendant had avoided his conditional contract, as he claimed, the title still remains in the plaintiffs. *Also;* that the plaintiffs have the right of possession, for breach of the conditions of contract.

AGREED STATEMENT OF FACTS.

The case appears in the opinion.

G. W. Hanson, for plaintiffs.

The contract in this case was made in Boston, at a time when Berry, the defendant, was a resident of New Hampshire. The goods were moved to the state of Maine without the knowledge or consent of the plaintiffs. The contract must be governed by the laws of Massachusetts, the place where it was made, and, by that law, amounts to a conditional sale. *Gross* v. *Jordan*, 83 Maine, 383; *Gorham* v. *Holden*, 79 Maine, 317.

Under such a contract the property does not pass until performance of the conditions. *Gorham* v. *Holden*, supra; *Furniture Co.* v. *Hill*, 87 Maine, 17; *Armour* v. *Pecker*, 123 Mass. 143.

On breach of the conditions the seller may retake the property or replevin. *Quimby* v. *Lowell*, 89 Maine, 547; *Williams* v. *Williams*, 23 So. Rep. 291; *Wall* v. *Mitkiewicz*, 9 App. D. C. 109; *Richardson Drug Co.* v. *Teasdall*, 72 N. W. Rep. 1028.

No demand is necessary. *Salomon* v. *Hathaway*, 126 Mass. 482; and a resale to a third person passes title. *Webber* v. *Osgood*, 38 Atl. 730, (N. H.)

If defendant annuls the sale by avoiding the mortgage, he cannot claim the property; both are one transaction. Jones, Chat. Mtges., § 40; *Heath* v. *West*, 28 N. H. 101.

J. S. Derby and J. O. Bradbury, for defendant.

The written instrument is clearly voidable by the infant maker; and is avoided during minority by his plea. *Robinson* v. *Weeks*, 56 Maine, 102, 107; *Towle* v. *Dresser*, 73 Maine, 252. Articles not necessaries. *Bent* v. *Manning*, 10 Vt. 225; *Merriam* v. *Cunningham*, 11 Cush. 40.

The exception,—as to necessaries,—to the voidable contracts of infants extends only to the articles themselves and not to collateral agreements. *Miller* v. *Smith*, 26 Minn. 248; *Chapin* v. *Shafer*, 49 N. Y. 411; *Willis* v. *Twambly*, 13 Mass. 204.

The written instrument executed by the minor, being avoided by him, the transaction constituted "a sale partly on credit, the title to the property passing upon the delivery." *Quimby* v. *Lowell*, 89 Maine, 549.

The statute,—R. S. ch. 111, § 2,—is intended to protect the

infant from improvident contracts and if "the other party to the contract seeks to enforce it against him, the statute is a protection." *Hilton* v. *Shepherd*, 92 Maine, 164.

The action is premature as the written instrument contains alternative times of payment, one of which had not matured when suit was brought. The promisor has the option of the alternatives. 2 *Parson's Cont.* 169; 3 *Addison, Cont.* 789; *Layton* v. *Pierce*, 1 Doug. 16; *Smith* v. *Sanborn*, 11 Johns. 59.

SITTING: EMERY, HASKELL, WISWELL, STROUT, SAVAGE, FOGLER, JJ.

SAVAGE, J. Replevin of certain articles of household furniture which were received by the defendant from the plaintiffs under an agreement in writing, signed by the defendant, dated March 1, 1898. This agreement, after reciting a receipt and "hiring" of the furniture, contains, among others, the following provisions:

"For the use of the above mentioned articles, I agree to pay to the said C. H. Robinson & Co., their representatives and assigns, the following rent, and at the terms stated below, viz: Fifteen Dollars upon the signing of this agreement, and Twelve 50-100 Dollars per month thereafter, entire amount to be paid by October 1, 1898; the above articles to be used by me at Pittsfield, N. H. . . . . But in case of failure to pay said rent as aforesaid, the said C. H. Robinson & Co., or their agents, may without demand or notice, or being deemed guilty of trespass or tort, and without thereby rendering themselves liable to refund any sums received by them as rent aforesaid, enter any house or place where said articles may be, and examine or take possession of and remove said articles therefrom. . . . . I further agree that so long as said rent shall be payable as aforesaid, I will not injure, sell, mortgage, or re-let the said articles, or remove the same from the above mentioned place; and that in case of failure to pay said rent, I will, on demand, return said articles to the said C. H. Robinson & Co., or their legal representatives. It is expressly agreed that the title to each and all of the above goods and articles . . . . . remains

in C. H. Robinson & Co., and they remain absolute owner of the same until the full price for all the goods in all such leases are fully paid. But that upon full payment to the said C. H. Robinson & Co., the prices named in all the leases . . . . they will release their claim in and for the goods leased to me."

The agreement also provides that if the "articles" should be taken possession of by the plaintiffs for non-payment of rent, they might be sold on defendant's account.

It is admitted that at the time of the execution of the agreement, the defendant was a minor, married and living at Pittsfield, N. H., and that he is still under age; that he paid fifteen dollars at the time the contract was made, and never made any further payment; that he afterwards removed the goods from Pittsfield to Springvale, Maine, without the written consent of the plaintiffs; and that, after demand, the goods were taken upon this replevin writ, which is dated June 10, 1898.

The defendant, after the appointment of a guardian ad litem, pleaded the general issue, with a brief statement setting up infancy, and that title was in himself and not in the plaintiffs.

The agreement signed by the defendant, on its face, constitutes a conditional sale, by which the title to the goods would pass only when the price should have been paid. *Gorham* v. *Holden*, 79 Maine, 317; *Gross* v. *Jordan*, 83 Maine, 380. But the defendant, while conceding that the contract was a conditional sale, now contends that the conditional contract has been avoided by him by his plea of infancy, and that the result is that the absolute title is now in him. We do not think it can be so. No doubt such a contract as this is voidable on account of infancy, but in other respects it is to be construed and enforced like other similar contracts. The relation of the plaintiffs to the goods, and their title in them, are the same as if the other contracting party had been of full age. They parted with their possession only conditionally. They never parted with the title. The defendant received possession and held it subject to the conditions, which were lawful ones. Among the conditions was one that title should not pass until full payment, and another was that upon failure to pay rent or instalments as

agreed, the plaintiffs might take possession. These conditions affect the defendant minor the same as if he were an adult. He obtained no greater right to the property than the contract expresses. He was entitled to retain possession only on condition that he paid. He could obtain title only by paying. He did not pay according to contract. The plaintiffs, therefore, were clearly entitled, upon demand, to enforce their right of possession by replevin.

We are entirely unable to see how the avoiding of the contract by plea of infancy entitles the defendant to retain the goods. While the defendant held to the contract, he was a conditional vendee. He certainly could not get a better title by repudiating the contract.

But the defendant further says that this action is prematurely brought, that by the terms of the contract there was no failure on his part, if he paid the whole amount by October 1, 1898. We do not so construe the contract. The defendant agreed to pay $12.50 each month, and to pay the whole by October 1, 1898, which would simply make the last payment larger than the preceding monthly payments. He failed to pay as agreed, and the plaintiffs were entitled to possession.

Judgment for plaintiffs. Damages one dollar.

W. EDWIN ULMER, In Equity,

vs.

MAINE REAL ESTATE COMPANY.

Cumberland. Opinion December 8, 1899.

Corporations. Officers. Stockholder. Election. Dissolution. Equity.

A bill in equity, asking for an injunction and a receiver, is not the proper remedy when it is claimed that the election of the officers of a corporation is illegal.

As a general rule, in the absence of statutory authority, a court in equity will not dissolve a corporation upon the application of a stockholder, nor will it lay hold of the property of a going concern, and by means of a receiver wind up its business and distribute the assets, because that would be tantamount to a dissolution. To this rule the only well recognized exceptions are, when it has become impossible to accomplish the chartered purposes of the corporation, or when its affairs have been so managed that failure or ruin is inevitable.

In a bill in equity by a stockholder against a corporation, charging that the directors have done acts ultra vires and in violation of law, and praying for an injunction, appointment of a receiver and a winding up of the affairs of the corporation, the complainant must allege that the directors in office at the time the bill is brought have been asked to act, or that they have refused to act, or that failing with the officers, the corporation itself has been asked to protect itself, or that it has refused to do so, or that it is incapable of action, or that the necessary delay in securing corporate action would prejudice the complainant.

Held; for want of proper allegations in these respects the bill is demurrable, as it is also demurrable because the charges are in other respects vague, indefinite and uncertain.

IN EQUITY. ON APPEAL BY PLAINTIFF.

The case appears in the opinion.

W. Edwin Ulmer, for plaintiff.

Geo. Libby, for defendant.

SITTING: HASKELL, WHITEHOUSE, WISWELL, SAVAGE, FOGLER, JJ.

SAVAGE, J. Bill in equity by the complainant as a stockholder, alleging upon information and belief, that the directors of the defendant company, without authority, disregarding the rights of complainant and all other stockholders, and in violation of law, have loaned the funds of the corporation upon mortgages of real estate, whereby the interest of the complainant in said funds, as a stockholder, has become jeopardized, and he is liable to be subjected to great loss; also, that the members of the present board of directors caused the annual meeting for 1898 to be held without due notice to stockholders, and without knowledge of the stockholders other than themselves caused themselves to be elected as directors for the year then ensuing; also, that the board so elected

"has caused to be issued shares of the capital stock, without any authority therefor, and with intent to use the proceeds thereof otherwise than for the purposes for which the corporation was organized, and that the proceeds of said shares have been so used."

The defendant demurred, and the plaintiff has appealed from the decree sustaining the demurrer and dismissing the bill.

The allegations in the bill are vague, indefinite and uncertain. They give the defendant no certain notice of the specific charges which they are called upon to answer. For this reason, if for no other, the bill was properly dismissed. But there are other reasons. Two classes of wrongs are charged in the bill: One, that certain acts of the board of directors already done are ultra vires; second, that the election of the directors for the year 1898 was illegal.

It may be said as to the latter complaint, that if the election was illegal, certainly a bill for an injunction and receiver is not the proper remedy. If, however, the election was legal, the complainant has no ground of complaint.

The other acts of which the complainant complains are said to be ultra vires, unlawful, not within the power of the corporation or the scope of its charter. Such wrongs are against the corporation itself, and strictly speaking, not against the stockholders. In law, the injury was done to the corporation, not to the stockholders. 1 Morawetz on Corporations (2nd Ed.,) § 237. No stockholder can assume the right to seek redress for wrongs to the corporation, until the latter is shown to be unwilling or incapable of seeking the remedy for itself. *Hersey* v. *Veazie*, 24 Maine, 9. This is the general rule. Shareholders aggrieved must seek their remedy through corporate channels. They must exhaust all remedies within their reach in the corporation itself. They must apply to the officers in charge. Failing with the officers, they must apply to the corporation itself, or they must show why application would be ineffectual in either case. If they fail with both, then the courts are open for redress. 1 Morawetz on Corporations, § 241; 4 Thompson on Corporations, § 4499; *Memphis City* v. *Dean*, 8 Wall. 73; *Hawes* v. *Oakland*, 104 U. S. 450; *Dimpfel* v. *Ohio &*

Mississippi Ry. Co., 110 U. S. 209; *Dunphy* v. *Traveller Newspaper Association*, 146 Mass. 495.

Even when the officers themselves are at fault, and under such circumstances as will excuse a complainant from applying to them, it does not follow necessarily that the stockholders cannot find and apply a remedy. Stockholders, to be sure, act only in general meetings, and such meetings are ordinarily held only once a year. But usually provision is made for special meetings. And it was held in *Brewer* v. *Proprietors of the Boston Theatre*, 104 Mass. 378, that annual meetings, even if special meetings are impracticable, secure to stockholders ample means of correcting abuses practiced by their officers. And in every case, if for any reason it would be useless to apply to the officers or to the corporation, or if there be reason why a delay until the corporation could act would unduly prejudice the rights of the complainant, the reason should be alleged. 1 Morawetz on Corporations, § 251.

While "courts of equity," as was said in *Dunphy* v. *Traveller Newspaper Association*, 146 Mass. 495, "are swift to protect helpless minorities of stockholders of corporations from the oppression and fraud of majorities," it would be intolerable if a single stockholder, without notice or request to officers or corporation, should be allowed to vex and harass it by citing it into court for every wrong, real or fancied. If one stockholder may, every stockholder can. In no way could it be made more certain that the business of a corporation would be rendered unprofitable, its credit weakened, and the fulfilment of its chartered purposes impossible.

In this case it is not alleged that the directors in office at the time the bill was brought have been asked to act, or that they have refused to act, or that there is any reason why they may not act if requested, nor is it alleged that the corporation has been asked to protect itself or that it has refused to do so, or that it is incapable of acting, or that the necessary delay in securing corporate action would prejudice the complainant. For want of proper allegations in this respect, the bill is clearly demurrable.

Moreover, as this bill prays for an injunction, a receiver and a winding up of the affairs of the defendant corporation, it may

be useful to say that, as a general rule, in the absence of statutory authority, a court of equity will not dissolve a corporation upon the application of a stockholder, nor will it lay hold of the property of a corporation which is a going concern, and by means of a receiver wind up its business and distribute the assets, because that would be tantamount to a dissolution. 1 Morawetz on Corporations, § 283; 4 Thompson on Corporations, §§ 4539, 4545, and cases cited. To this rule, the only exceptions stated by law writers are, when it has become impossible to accomplish the chartered purposes of the corporation, or when its affairs have been so managed that failure or ruin is inevitable. 1 Morawetz on Corporations, § 284; 4 Thompson on Corporations, § 4547; *Benedict* v. *Construction Co.*, 49 N. J. Eq. 23.

Bill dismissed with costs.

OLIVER KIERSTEAD *vs.* HORACE A. BENNETT.

Washington. Opinion December 8, 1899.

Prom. Note. Association. Pleading.

The defendant gave a note in his "official capacity as treasurer of a voluntary association, of which he was a member," signing it as treasurer, for money lent to and used in the business of the association. In an action on the note the defendant claimed that he was not liable personally because it was the note of the association and not his own personal promise.

Held; that if he gave the note in his official capacity for and in behalf of the association, he thereby bound all of his associates, including himself.

The non-joinder of a co-promisor is available only by plea in abatement.

Held; that whether the note is the defendant's individual note, or that of the voluntary association, he is liable, in either case, in an action upon it.

AGREED STATEMENT OF FACTS.

"It is agreed that on August 26, 1895, the plaintiff delivered to defendant three hundred and fifty dollars and received the note declared on in his writ; that the money was used by the defendant to pay for the pay-roll work on the Danforth Trotting Park,

and that the record title to the land on which the park is situated is in the defendant, D. C. Parker and William J. Kingston, and that so much of the records of the Danforth Trotting Park Association, and of the directors thereof and of the records of the Danforth Trotting Park Company, as either party may desire, shall be made a part of this case. . . . ." Other material facts are stated in the opinion.

C. B. Donworth, for plaintiff.

1. The instrument is shown upon its face to be the individual undertaking of the defendant. It will not be contended that the abbreviation "Treas." following the signature will be allowed to influence the construction, as this court and that of Massachusetts have repeatedly held that such, and similar additions, are merely descriptive of the person who affixes his signature. In *Sturdivant* v. *Hall*, 59 Maine, 172, the note was signed: "John T. Hall, Treas. St. Paul's Parish;" in *Mellin* v. *Moore*, 68 Maine, 390, the signature was: "George Moore, treasurer of Mechanic Falls Dairying Association;" in *Ross* v. *Brown*, 74 Maine, 352, the word "treasurer" was affixed to the signature; in *Rendell* v. *Harriman*, 75 Maine, 497, the signatures were followed by the words: "President, Directors of Prospect and Stockton Cheese Company;" and in *McClure* v. *Livermore*, 78 Maine, 390, the addition was: "Treas'r Hallowell Gas Light Co."; in *Williams* v. *Robbins*, 16 Gray, 97, and in *Bartlett* v. *Hawley*, 120 Mass. 92, the word "agent" was affixed; in *Plimpton* v. *Goodell*, 126 Mass. 119, the word "administrator" was used; and in *Davis* v. *England*, 141 Mass. 587, the contention was over the suffix: "Pres. and Treas. Chelsea Iron Foundry Company." In all these, and many similar cases, the individual was held. Nor will the mere insertion of the alleged principal's name in the body of the instrument make the contract, even prima facie, that of the principal. Am. & Eng. Ency. Law (1st ed.), title Bills and Notes, p. 335. Such is the law of this state. In *Fogg* v. *Virgin*, 19 Maine, 352, the promise was made by: "We, the trustees of the Wayne Scythe Company," and in *Chick* v. *Trevett*, 20 Maine, 462, the issue was over the words: "We, the trustees of the M. E. Society," and in both

these cases the notes were held to be individual undertakings. In order to exclude personal liability, the note must be signed in the name of the supposed principal, or the promise must appear to have been made for and in his behalf. This seems to be the test which the courts invariably apply and the statute goes no farther. R. S., ch. 73, § 15. In *Barker* v. *Mechanic Ins. Co.*, cited approvingly by this court in *Fogg* v. *Virgin*, supra, the court say: "He" (the defendant), "describes himself as president of the company, but to conclude the company by his acts, he should have contracted in their name, or at least in their behalf." The insertion of the word "for" in the suffix: "Treas. for St. Paul's Parish," was held, in *Sheridan* v. *Carpenter*, 61 Maine, 83, to shift the liability from the individual to the corporation. The note in *Simpson* v. *Garland*, 72 Maine, 40, and 76 Maine, 203, was held to be the note of company because the subscribers expressly promised "*for*" their principal. And see *Bradlee* v. *Boston Glass Co.*, 16 Pick. 347.

In the case at bar the note does not disclose a promise "for" or "in behalf of," or "on account of," the Danforth Trotting Park Association, nor does it purport to bind the alleged corporation. It is the defendant's note unless the language expressly negatives any obligation upon him and asserts the obligation of his supposed principal.

2. The note in suit contains a latent ambiguity and a resort to extrinsic evidence will cause the rejection, as surplusage, of the words, "in my official capacity, as Treasurer of the Danforth Trotting Park Association." "Where there is a misdescription of a person or thing in a contract, as when no such person or thing exists, parol evidence to show the person or thing intended is admissible." Am. & Eng. Ency. title, Agency, p. 1043.

It is immaterial that defendant in the case at bar promised in his "official capacity." The promise is his upon its face; the language used charges him with the obligation.

There being no corporation, the defendant could not contract in its behalf; the reference to an official capacity should, therefore, be treated as surplusage and the instrument held to be the individual note of defendant.

B. W. Hewes, for defendant.

If there was not a legally established corporation, still the note purports to be the note of a corporation and not of an individual; and purporting to be the note of a corporation, no action can be maintained upon the note against the defendant who makes it in his official capacity as treasurer of the association. *Simpson* v. *Garland*, 72 Maine, 40; 76 Maine, 203.

And this would be true even though the defendant had no authority to execute any note; and it would be true that this action could not be maintained even though the defendant in this case knew that he had no authority. *Simpson* v. *Garland*, 76 Maine, 203.

Counsel also cited: *Walter* v. *Brewer*, 11 Mass. 97; *Noyes* v. *Lovering*, 55 Maine, 408; *Teele* v. *Otis*, 66 Maine, 329; *Bank* v. *Dix*, 123 Mass. p. 148; *Nobleborough* v. *Clark*, 68 Maine, p. 87; *Jefts* v. *York*, 4 Cushing, p. 371; *Bartlett* v. *Tucker*, 104 Mass. p. 336; *Rendall* v. *Harriman*, 75 Maine, p. 497.

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

SAVAGE, J. Assumpsit upon a promissory note of the following tenor:—

"Danforth, Maine, August 26, 1895.

$350.

Thirty days after date, I, in my official capacity, as Treasurer of the Danforth Trotting Park Association, promise to pay Oliver Kierstead, or order, three hundred and fifty dollars, with interest, value received.

Horace A. Bennett, Treas."

The defendant pleaded the general issue. The plaintiff claims that this note is to be construed as the personal, individual obligation of the defendant, Horace A. Bennett, who signed it. The defendant, on the other hand, contends that the note, on its face, is the note of the Danforth Trotting Park Association, and that he is not personally liable. An examination of the record will, we think,

show that, so far as the proper decision of this case is concerned, it is immaterial which contention is correct.

The case shows that on July 12, 1895, the defendant and others organized a voluntary association. They chose officers. They voted that the name of the association be the "Danforth Trotting Park Association." They adopted by-laws and fixed the amount of the capital stock. On the following day, July 13, 1895, a part of the associates who had organized July 12, including the defendant, and also including others who had not previously been associates, signed articles of agreement, with the intent to organize a corporation under the statute. Due notice was given of a meeting for organization, to be held July 27, 1895. That meeting was not held. Subsequently, in September, 1895, and apparently without further notice, the associates who had signed the articles of agreement, went through the form of organizing a corporation under the name of the "Danforth Trotting Park Association." The proceedings were manifestly irregular, and we express no opinion as to their validity. It is evident that on the date of this note, August 26, 1895, there was no corporation by the name of the "Danforth Trotting Park Association." Nor had those who had associated themselves for the purpose of organizing a corporation adopted any name at that time. But there was a voluntary association of that name when this note was given, and the defendant was one of the associates, as well as treasurer of the association. There was no other Danforth Trotting Park Association than the one of which the defendant was a member. That was the one in existence August 26, 1895, and we must assume that the defendant contracted with reference to it, rather than with reference to something which did not exist.

Now the defendant claims that the note sued must be held to be the note of the Danforth Trotting Park Association, and that when the defendant promised in his "official capacity," he promised for and in behalf of the association. Assume it to be so. Then he promised for and behalf of all the associates, including himself. That being so, all the members, himself included, are liable upon the promise which he made. All are co-promisors. He is sued;

the others are not. But the non-joinder of a co-promisor is available only by plea in abatement.

Hence it follows that whichever view may be taken of the note, the defendant is liable.

Defendant defaulted.

INHABITANTS OF FARMINGDALE

vs.

BERLIN MILLS COMPANY.

Kennebec. Opinion December 11, 1899.

Taxes. Logs. Employed in Trade. R. S., 1857, c. 6, § 10, 11; R. S., 1883, c. 6, § 14.

In action of debt to recover a tax, it appeared that on April 1, 1897, the defendant corporation, an inhabitant of Portland, owned, occupied and used a saw-mill in Farmingdale. It also owned a large quantity of logs, then on landings in Chain of Ponds in Franklin county, which were destined for that mill, and were in fact sawed there during the season of 1897, but did not arrive in Farmingdale till after June 1 of that year. These logs were taxed by Farmingdale, the plaintiff town, under R. S., chapter 6, § 14, which provides that "all personal property employed in trade, in the erection of buildings or vessels, or in the mechanic arts, shall be taxed in the town where so employed on the first day of each April; provided, that the owner, his servant, sub-contractor or agent, so employing it, occupies any store, shop, mill, wharf, landing-place or ship yard therein for the purpose of such employment."

Held; that these logs must be regarded as employed in trade at the Farmingdale mill, within the meaning and purpose of the statute, on April 1, 1897, and were therefore legally taxable there to the defendant.

ON REPORT.

Action of debt to recover a tax. Writ dated February 27, 1899.

(DECLARATION.)

In a plea of debt for that the said defendant corporation on the first day of April, A. D. 1897, was the owner of a saw-mill, wharf and landing-place in said Farmingdale; that it was also on said

date the owner of certain personal property, to wit: four million feet of logs of the value of twenty thousand dollars; that said company was then and there occupying said saw-mill, wharf and landing-place for the purpose of employing said logs in trade, to wit: of manufacturing said four million feet of logs into lumber, and selling the same in the open market; that said defendant company was liable to be taxed in said town of Farmingdale for said logs and the assessors of taxes of said town for the year 1897, duly elected and legally qualified, assessed upon said defendant company on said logs the sum of two hundred and twenty-five dollars, said sum being said defendant's proportion of the town, county and state tax for said year 1897. And the assessors did on the first day of June, 1897, make a perfect list of said taxes under their hands and commit the same to the hands of John H. Burnham, collector of said town for said year, who was duly elected and duly qualified with a warrant in due form of law for said year, under their hands of the date aforesaid; that said John H. Burnham died on the 16th day of January, 1898, without having completed the collection of taxes committed to him for the year 1897, and that Georgie T. Burnham, of said Farmingdale, was duly appointed by the selectmen of said Farmingdale, to perfect the collection of taxes of said John H. Burnham, deceased, and was duly qualified by law therefor on the 31st day of January, 1898; and the plaintiffs aver that the said tax was duly and seasonably demanded of said defendant company by said collector prior to the commencement of this suit. Said plaintiffs further aver that the selectmen of said town did on the 6th day of January, 1899, direct in writing the collector of taxes of said town to commence an action of debt in the name of the inhabitants of said town against said Berlin Mills Company for the collection of said tax and interest due thereon; whereby and by reason of the statute in such case made and provided, the defendant company became liable and an action hath accrued to the plaintiffs, to have and recover of the defendant company the sum of two hundred and twenty-five dollars.

Plea, general issue.

The case appears in the opinion.

A. M. Spear, for plaintiff.

H. M. Heath and C. L. Andrews, C. F. Libby with them, for defendant.

The legislature of 1883 took the suggestion of the court and declared in express terms that the same limitation as to time should extend to exception first. When it changed paragraph 3 from "shall be taxed in such town" to the clause "shall be taxed in the town where so employed on the first day of each April" it introduced the missing element of limitation of time, as did the legislature of Massachusetts, and met the suggestion of Judge BARROWS that with such a limitation, the rule of the Ellsworth case would have been reversed.

Compare the language "all logs in any town in this state other than where the owners reside shall be taxed in such town if, etc." with the present language "All personal property employed in trade, etc., shall be taxed in the town where so employed on the first day of each April, provided etc." And plaintiffs contend that the meaning is identical.

Logs in a distant forest on the first day of April are in no sense "employed in trade." Nor were these logs, although destined on April 1 for the Farmingdale mill, employed in Farmingdale on April first. "Employed" here means "used." The phrase is "taxed in the town where so employed on the first day of each April." In other words, it must appear that on April first the logs were employed or in use in the plaintiff town. An intention on April first to employ the logs at such mill later in the season is not employing them in said town on April first. On April 1, such might be the intention, but logs might be sold on the drive and never reach the mill. To sustain plaintiff's construction the court must find that the legislature meant nothing by the change of statute.

The change of rule was intended to make the basis of assessment more certain and less likely to end in controversy that might deprive towns of expected revenues. Under the old rule, asserting the right to tax in a non-resident town logs in a distant forest if destined for such non-resident town, the validity of the tax depended

on proof of such intended destination, the owner's intention on a given date. Such an issue resting on parol evidence was prolific in trouble and uncertainty. Under the new rule, the actual situs of the logs governs; the non-resident assessors tax the logs seen within their town, the resident assessors with ordinary diligence reach and get at all logs in their own town, on the drive and in the forests, and no issue of jurisdiction is left to credibility on the frailties of testimony. Taxes are levied with a certainty of collection, and evasion of taxation is far more difficult.

In the case at bar, it was as easy for the assessors of Portland to get at our logs on the streams as the assessors of Farmingdale. Let the situs govern, and controversy ends. Such was the reason of the legislature for the reversal of the former rule, to furnish by the rule of actual situs a fixed and certain rule of taxation.

Such seems to be the view of this court as expressed in *Gower* v. *Jonesboro*, 83 Maine, 142, where the court, by way of dictum, said: "It is the policy of the law that all property, with certain exceptions, should bear its just proportions of the public burdens. The statute contemplates that it should be taxed to the owner, either in the town where he resides or the town where it is situated."

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

STROUT, J. The general provision of law is that personal property shall be taxed "to the owner, in the town where he is an inhabitant on the first day of each April." To this general rule the statute makes certain exceptions, one of which is contained in R. S., c. 6, § 14, clause 1.

On the first day of April, 1897, defendant corporation was an inhabitant of Portland, and owned, occupied and used a saw-mill in plaintiff town. It also owned a large quantity of logs, then on landings in Chain of Ponds, in Franklin County, which were destined for that mill, and were in fact sawed and manufactured there during the season of 1897, but did not arrive in plaintiff

town till after June 1st of that year. Sales of the product of the mill were substantially all negotiated at Portland and shipped from the mill on orders from the home office, though small sales for local delivery were made at the mill. These logs were taxed by plaintiff in 1897, and this suit is to recover that tax.

Upon a state of facts substantially the same as here, it was held in *Ellsworth* v. *Brown*, 53 Maine, 519, under the statute then in force, which provided that "all goods, wares and merchandise, all logs, timber, boards and other lumber, and all stock in trade, including stock employed in the business of any of the mechanic arts, in any town within the state other than where the owners reside, shall be taxed in such towns if the owners occupy any store, shop, mill or wharf therein, and shall not be taxable where the owners reside." R. S., 1857, c. 6, § 11.

In construing that statute, the court in that case held that logs thus situated for manufacture in the mill, though not within the limits of the town, must be regarded as "employed in the business" of the mill within the meaning and purpose of the statute, and subject to taxation in the town where the mill was, notwithstanding the language of the statute "all logs," etc., "in any town," etc. It was said in that case that "the localization of the business is intended to draw after it for the purpose of taxation the property used and employed in that business, in like manner as the residence of the owner draws after it other property not there situated, without regard to its particular situs on the first day of April. The occupation of the store, shop, mill or wharf on the first day of April, in the year for which the tax was assessed, is the essential thing."

In 1883 the phraseology of the excepting clause was changed so as to read, "all personal property employed in trade, in the erection of buildings or vessels, or in the mechanic arts shall be taxed in the town where so employed on the first day of each April, provided that the owner, his servant, sub-contractor or agent, so employing it, occupies any store, shop, mill, wharf, landing-place or ship yard therein for the purpose of such employment." In the revision of 1883, the same language is retained. By it this case is to be governed.

Section 10, of R. S. of 1857, provided for taxation of personal property to the owner on April 1st, except as provided in the following section. That section named the place where logs and certain other property, when employed in a business in a town other than that of the residence of the owner, should be taxed, but did not in terms supply the date at which the liability to taxation should attach. But, as under the general provision no personal property could be taxed anywhere, except it was owned on April 1st, it necessarily and logically followed as to the excepted property, that it must be employed in the business on that day. If subsequently acquired it could not be taxed at all for that year.

The decision therefore in *Ellsworth* v. *Brown*, supra, rested upon the fact found by the court that the logs were employed in the business of the mill, and necessarily that they were so employed on April 1st. The amendment of 1883 repeated in the excepting clause the provision of the enacting clause contained in both statutes, making the first day of April as the time when liability attached. But the logical and necessary implication as to time in the earlier statute, was quite as forceful and convincing as the express language of the later one.

It will be noticed that the qualifying words in the earlier statute "in any town," are omitted in the amended act, and a substituted provision that "personal property employed in trade," etc., "shall be taxed in the town where so employed on the first day of April" inserted. While there was admitted force in the argument that under the earlier statute its language required the logs to be within the town on April 1st, the amended act requires only that the property shall be employed in trade in the town on that day. The question then is, were these logs employed in trade in plaintiff town on the first day of April, irrespective of their actual situs on that day? The business of the mill was the manufacture of lumber for sale. This falls within the legitimate definition of trade. *Gower* v. *Jonesboro*, 83 Maine, 145.

The logs were intended for manufacture in that mill, and were in fact manufactured there. They had been cut, hauled to the landing, and were in transit to the mill, and may therefore be fairly

considered as employed in the trade or business of that mill on that day, within the meaning and purpose of the statute.

If the occupant of a store for sale of ordinary merchandise had bought goods for that store, which were in transit to it, it would hardly be questioned that such goods were employed in the trade and business of that store. So these logs procured for use and manufacture in that mill, and actually manufactured there, in due course of business the ensuing season, constituted the necessary material for the mill and its use, and were in fact part and parcel of its business on the first day of April.

The claim of the defendant derives less support from the present statute than from that in force when *Ellsworth* v. *Brown* was decided, and which was not sustained there.

Under the terms of the report there must be,

Judgment for plaintiff.

UNION WATER POWER CO.

vs.

JOSEPH G. CHABOT, Admr., building, and claimant.

Androscoggin. Opinion December 11, 1899.

Lien. Buildings. Land Rent. R. S., c. 91, § 37.

Under R. S., c. 91, § 37, buildings placed upon land of another are subject to a lien for land rent, whether the land is leased or not. It is an absolute statute lien, and treats the thing as the debtor, independent of the ownership. Having once attached, it exists as to subsequently accruing rent, not as a new, but as the original lien.

It takes precedence of a mortgage, whether existing when the building was rightfully placed upon the land and made subject to rent, or subsequently created.

It is enforceable against the building whenever land rent becomes due and payable, regardless of its then ownership.

ON EXCEPTIONS BY DEFENDANT.

This was an action brought to recover six months' rent of land, the plaintiff claiming a lien on the building standing on the land in the city of Lewiston for the amount of the rent, by virtue of the following provisions of R. S., c. 91, § 37:—

"In all cases where land rent accrues and remains unpaid, whether under a lease, or otherwise, all buildings upon the premises while the rent accrues, are subject to a lien and to attachment for the rent due, as provided in the preceding section, although other persons than the lessee may own the whole or a part thereof, and whether or not the land was leased for the purpose of erecting such buildings; provided, however, that if any person except the lessee, is interested in said buildings, the proceedings shall be substantially in the forms directed for enforcing liens against vessels, with such additional notice to supposed or unknown owners, as any justice of the supreme judicial court orders, or the attachment and levy of execution shall not be valid except against the lessee."

The case was submitted to the presiding justice with the right of exception, upon the following agreed statement of facts.

"The building was erected in the spring of 1894, on land of the plaintiff. After the completion of said building, on August 7, 1894, the defendant's intestate mortgaged said building to E. Provost & Sons to secure a loan of $200.00, which said mortgage was duly recorded in the office of the city clerk of Lewiston on said August 7, 1894.

"It is admitted that the building above mentioned constitutes the only assets of said intestate in the hands of said Joseph G. Chabot, administrator, and that said estate is insolvent.

"It is admitted that the rent claimed by the plaintiff accrued in 1898 and subsequent to the delivery and record of the mortgage to E. Provost & Sons.

"The question to be determined is whether the plaintiff's lien on said building for land rent, as set forth in its writ, takes precedence of and is superior to the lien of the mortgagees under the mortgage as above set forth."

The presiding justice ruled that the landlord's lien was superior to the mortgage and ordered judgment against the building for the

lien claimed, and judgment against the estate of Frank X. Cote for $45.34.

To this ruling the defendant and mortgagees excepted.

Wallace H. White, Seth M. Carter and Harry Manser, for plaintiff.

The language of the statute as to a mechanic's lien is qualified, making contract with or consent of the owner necessary, and under the general rules of law, a mortgagor cannot by contract subject the mortgagee to a lien having priority of his mortgage.

The statute relating to the lien for land rent is absolute in terms, has no qualifying language whatever, does not require any contract with or consent of the owner, but instead says that the lien shall attach, although other persons than the lessee may own the whole or a part thereof, provides no way in which the owner may bar the lien by notice, and is therefore strictly analogous to the statute lien on vessels, and furthermore, it provides that in case any person except the lessee is interested in said buildings, the proceedings shall be substantially in the forms directed for enforcing liens against vessels.

If precisely the same method of procedure is to be employed, can there be any question that it is for the purpose of accomplishing the same results? For what reason are we obliged to summon in all persons interested, to serve notice on known or supposed owners, and to prove to any mortgagee who may see fit to appear the amount and validity of our lien, if it be not that we may obtain a judgment which shall bind all parties? If our lien is subject to a mortgage, and if the mortgagee's rights are in no way affected by the judgment, why is it necessary to give him any notice?

The decisions of our court show that, for this very purpose, legislation as to notice has been enacted with regard to liens that take precedence of all other claims. In 1852 there was no such provision on the statute books, and the court in *Perkins* v. *Pike*, 42 Maine, 141 say: "The practical difficulty in cases of lien by statute, arises from the omission on the part of the legislature to make provision for notice to all persons interested, so that the

judgment rendered shall be conclusive upon all. Until provision is made for general notice, the judgment may conclude the parties to the suit, but it cannot bind others."

The reason that we find no decision of our court bearing upon it to be well stated by the Chief Justice in the case of a shipwright's lien before the English Court of Common Pleas, when he said, in deciding that a mortgage was inferior to the lien: "There is, it seems, no authority to be found bearing upon the question. I should rather expect that it had never been made the subject of litigation because the right of lien has always been admitted to attach." See Jones on Chattel Mortgages, § 474, and *Beall* v. *White*, 94 U. S. 382, there cited.

This mortgage, although perhaps prior in time, was created by contract, while the lien of the lessor, later in time, arises out of the statute and no contract is necessary. The rule of law that the mortgagee's authority for the creation of a lien may be implied, is applicable to the case at bar. Thus in the case of *Hammond* v. *Danielson*, 126 Mass. 294, it was held that independently of any provision of statute, the lien of a person making repairs on a hack which remained in the possession and use of the mortgagor, had precedence of a prior mortgage of the hack, on the ground that "it was the manifest intention of the parties that the hack should continue to be driven for hire, and should be kept in a proper state of repair for that purpose, not merely for the benefit of the mortgagee, but for that of the mortgagor also, by preserving the value of the security, and affording a means wherewithal to pay off the mortgage debt."

So here, it was the manifest intention of the parties that the building should remain on the land, subject by law to the lien for rent, so that it might furnish the means of providing an income wherewith to pay said rent and also the mortgage debt.

And this is no hardship on the mortgagee, for in order to make his security income-bearing he must either leave it on land where the law says it shall be subject to a lien for rent, or else invest money in the purchase of a lot for it to stand upon. He has chosen the former alternative and cannot free himself from the obligations incident to such action.

J. G. Chabot, for defendants.

Buildings erected on leased land become personal property, and thereby subject to the same rule of law governing other property of a chattel nature, in the absence of any special statutory enactments regulating or modifying that rule of law. A valid chattel mortgage duly recorded takes precedence of a subsequent lien (no special statute to the contrary), and the mortgagor in possession cannot create a lien upon the mortgaged property that shall take precedence of his duly recorded mortgage. Jones on Chat. Mortg. 4th Ed. § 472.

It is true that a lien given upon property by force of law or statute may, in exceptional cases, have precedence of an existing mortgage, such as the lien for repairs upon a vessel. Such preference is given upon the principle that the mortgagee is as much benefited by the repairs as is the mortgagor, as such repairs are necessary for its preservation. But no such reason exists in the case of a landlord's lien. 1 Jones on Liens, 2 Ed. § 557, and cases cited in notes. Jones Chat. Mortg. § 474.

The same with liens on logs, which take precedence of a prior mortgage. Such being the clear intent of the legislature and the language of the statute, which makes the laborer's lien superior to any other claim except the lien reserved to the state. R. S., chap. 91, § 38. *Oliver* v. *Woodman*, 66 Maine, 54.

Had the legislature intended to make the landlord's lien for rent superior to any other claim it would had so expressed it in the language of the statute.

The statute giving landlord a lien on building for land rent, creating rights in derogation of the common law, is to be construed strictly and is not to be extended beyond the clearly expressed intent of the legislature. *Rogers* v. *Currier*, 13 Gray, 134. It is not to be supposed that a statute was intended to violate the fundamental rights of property by creating a lien as against the mortgagees without their consent, unless such a construction appears from the language of the statute to be unavoidable. Thus agistors' and livery stable-keepers' liens are generally subordinate to the lien

of a mortgagee. Jones Chat. Mortg. §§ 472, 474, and cases cited in notes.

Mortgage being given before rent accrued is superior to the plaintiffs' lien. 1 Jones on Liens, § 557. *Lyons* v. *Deppen*, 90 Ky. 305; *Thorpe* v. *Fowler*, 57 Iowa, 541.

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

STROUT, J. By R. S., c. 91, § 37, buildings placed upon land of another are subject to a lien for land rent, whether the land is leased or not. It is an absolute statute lien, like that upon vessels and logs, and treats the thing as the debtor independent of any question of ownership. *Deering* v. *Lord*, 45 Maine, 295.

It does not arise from contract, like the lien for erecting or repairing buildings. *Morse* v. *Dole*, 73 Maine, 354. It is a continuing lien. It attaches from the time the building is placed upon the land, and continues in full vigor so long as it remains. Having once attached, it exists as to subsequently accruing rent, not as a new, but as the original lien. It takes precedence of a mortgage, whether existing when the building was rightfully placed upon the land and made subject to rent, or subsequently created.

It is enforceable against the building, whenever land rent becomes due and payable, irrespective of its then ownership.

The ruling below was in accordance with the law.

Exceptions overruled.

GERTRUDE E. JAMESON *vs.* G. GILMORE WELD.

Penobscot. Opinion December 14, 1899.

Verdict. New Trial. Malpractice. Evidence. Exceptions. R. S., c. 82, § 83.

Under a motion for a new trial on the ground that the verdict was against evidence, the verdict will not be set aside, unless it is, upon all the evidence, clearly wrong. It is not enough that it may be wrong, or that the court might have come to a different conclusion. *Held*; in this case, that the evidence for the plaintiff does not seem inherently improbable, and, if believed, is sufficient to sustain the verdict.

In a case of malpractice to an arm where it is claimed that the present condition of the arm is due to the want of care or skill on the part of the defendant, it is within the discretion of the presiding justice to permit the arm to be exhibited to the jury, although the defendant may claim that the present condition of the arm is due to some other cause.

It is within the discretion of a presiding justice to admit in evidence an X-ray photograph. Whether it is sufficiently verified, whether it appears to be fairly representative of the object portrayed, and whether it may be useful to the jury, are preliminary questions addressed to him, and his determination thereon is not open to exceptions.

A presiding justice in his charge may call the attention of the jury to the differing contentions of the parties, and the evidence by which they seek to support them; and if in so doing, he misrecites the evidence, his attention must be called to the specific error before the jury retires, in order that it may be corrected at once, and an accidental mistrial prevented. And this is so, even if the presiding justice may not require exceptions to be specifically noted before the jury retires.

The use of the word "pungent," by the presiding justice, in alluding during his charge to the jury to iodine or ointment used upon the plaintiff's arm, though it may be inaccurate, is not deemed to be prejudicial.

Held; that in the remaining instructions to which exceptions are taken, the presiding justice did not invade the province of the jury, or exceed the legitimate province of the court.

ON MOTION AND EXCEPTIONS BY DEFENDANT.

This was an action on the case against the defendant, a physician and surgeon, for malpractice in treating the plaintiff for an injury to the elbow of the right arm. The plea was the general issue. The verdict was for the plaintiff for $500.00. Besides a

general motion for a new trial, exception is taken by the defendant to the following extracts from the charge of the presiding justice:

1. The presiding justice, after having called the attention of the jury to the injury and the treatment by the defendant in reducing the dislocation and fracture, if there was one, then said: "The next morning, if I remember correctly, he called the family physician, took off the bandages, or loosened the bandages and, perhaps, loosened the splints—I don't remember particularly about that, but, at any rate, he so far exposed the arm that the doctor who came in saw it, and you have heard what he said in regard to it. Then the splints and bandages were replaced and the arm remained in that condition. That continued for a period of some two weeks, I think. I may be in error about the time; it is no matter, but for some little period of time, when he says that he undid the bandages and then began to flex the joint."

2. The presiding justice after remarking in substance, that at the end of the fourth week, the defendant discovered that the bones were again out of place, that they had been pushed by the end of the humerus, said:—

"Now, was he at fault in not discovering earlier whether they had been pushed by? That would depend very much when they were again dislocated. He did not discover it until the end of the fourth week. During that time he was flexing the joint, and he testifies that he came there every day. Is there any evidence to satisfy you, by a preponderance, that he was negligent in not securing the parts, supporting the parts, with his fingers or otherwise, so as not to have that result happen? Then, again, according to his statement, at the end of the fourth week he was met with the fact that the joint had again been dislocated. He says that he then at first, for a day or two, considered it, and then administered ether and attempted to replace the bones of the joint, and he contends that this small bone here, which I shall call the crown, must have broken so as to permit, when the joint was flexed, of its slipping by, and that that was one of the reasons why the joint would not remain where he had placed it." . . .

"These are considerations wholly for you in determining what happened, in the light of all the testimony of the case."

3. The presiding justice further charged the jury as follows: "Then, at the end of the fourth week, having discovered that the bones were again out of place, and having taken time to consider, the doctor tells you that he attempted, by administering ether, to reduce the dislocation, but was unable to do it, and that then he continued rubbing, pulling, massage treatment, using lubricating or pungent liniments upon the parts, hoping thereby to bring it back into place, or so nearly so as to be equivalent to that."

The defendant's exception to this clause is to the use of the word "pungent," which was noted before the jury retired.

4. The presiding justice, in calling the attention of the jury to the surrendering of the case by the defendant to Dr. Rowe, at the end of the eleventh week, said:—

"But, gentlemen, you must bear in mind that when Dr. Weld left the patient and substituted Dr. Rowe, Dr. Rowe could not justify himself by following and acting simply upon the skill and knowledge which Dr. Weld had, because, he, again, was required to exercise his best skill and judgment and to act with absolute fidelity, and if he considered it was his duty, under all the circumstances, in order to benefit his patient, to give her the benefit of hospital treatment, it is hard for me to say his conduct can be censured for doing so. But it is said by the defendant that his motive was to involve Dr. Weld in the charge of malpractice, that he did this maliciously. Well, gentlemen, no matter what his motive was, no matter if it was malicious; if he acted prudently and wisely, as his judgment told him it was best for him to act, and best for his patient, he was justified in doing it; and whether he did it for one purpose or another, only bears upon the question as to how far he is a partisan, and how far he is prejudiced and how far he would be led to misstate, to distort or to color the facts of the case. You saw him and you heard him testify; and he frankly, so far as I saw, told you what he did. There is much controversy about his motives. So far as anything that has been said would give you

reason to discredit the truth of what he has said, that, gentlemen, is competent and proper for you to take into consideration."

5. The presiding justice, in commenting upon the testimony of the experts, said:—

"So, gentlemen, so far as their opinions go, you will take them and consider them for what they are worth. But, above all, in this case, take the testimony of the witnesses who were actors in it; take the testimony of the plaintiff, as she has described her condition, her treatment, her feelings, her talk. Take the testimony of the doctor, as he has told you what he did, how he acted, how he felt and what he hoped; and if, on the whole, the plaintiff has satisfied you by a preponderance of evidence, she is suffering an injury from the doctor's want of the requisite skill, that is, want of ordinary skill to treat her case, which the law required him to have, or from the want of proper care, and for negligence after he undertook her treatment, or for the want of good faith in not giving her sufficient knowledge to give her an opportunity to change the treatment if she desired, then, gentlemen, for any of those things which she satisfies you, by a preponderance of the evidence, she is entitled to recover compensation; that is, an equivalent for the injury suffered at the hands of the defendant."

The defendant also took exceptions to the admission of evidence as follows:—

Gertrude E. Jameson, the plaintiff, on direct examination, testified, in part, as follows:

"Q. Now, after you got to the hospital, what took place there? (Objected to. Admitted. Defendant excepts.)

A. The arm was examined by the doctors and then through the X-ray instrument by the doctors.

Q. Did the physicians present examine your arm through the X-ray instrument prior to treating it or giving you ether?

A. Yes.

Q [By the Court]—Go on and tell what was done.

A. They examined the arm, and then examined it through the X-ray instrument, and they consulted. . . . .

Q. Can you take your sleeve up so that the jury can see your arm, please?

(Objected to upon the ground that the arm is not now in the position it was when the defendant left it. Objection overruled. Arm permitted to be exhibited. Defendant excepts. Arm exhibited to the jury.)"

Dr. W. L. Hunt, called for the plaintiff, on direct examination, testified, in part, as follows:

"Q. I ask you if, looking through the fleuroscope, you saw those bones the same as they are represented on that photograph (Exhibit No. 1)?

A. Yes, sir.

(Said photograph Exhibit No. 1 offered in evidence. Objected to.)

Q. Was the instrument properly adjusted to take that photograph of her arm? (Objected to.)

Q. How did you and the artist arrange the instrument?

The Court. So as to produce what effect? I suggest it; I don't put it in.

A. So as to take the arm from above downwards. The plates were put under the arm, in this way (illustrating). The X-ray was placed above the arm. The rays went up and down, with the arm at the level of the shoulder, practically.

Q. What was the result produced?

A. We got a picture of the shadow of the entire portion of the bones.

Q. Whether or not that was a natural picture of them?

A. It was.

Q. And is that photograph a natural picture of them?

A. It is.

(Said photograph, Exhibit No. 1 offered in evidence by counsel for plaintiff. Admitted. Defendant excepts.)" . . . .

"Q. Does that (Exhibit No. 1) show any fracture, Doctor, whatever? (Objected to. Admitted. Defendant excepts.)

A. No. . . . ."

Dr. Arthur W. Rowe, called for the plaintiff, on direct examination, testified in part, as follows:

Q. "You may state to the jury what diagnosis you made, and what you found.

A. Well, I found, to my satisfaction, a backward dislocation of both bones of the joint, the radius and ulna. The means that I used were measuring from the olecranon process, the one here (indicating) which always has the same relation with the elbow in all positions of the arm, or nearly so, no matter how high or how low the shoulder is, and I found, measuring down the condyles on either side that the distance was exactly the same, or practically the same as it was on the well arm, when they were placed in the same position. Then I measured from the same place to the point of the olecranon process, the tip of the elbow, and I found that about an inch and a quarter shorter than it was on the other side, the other arm. Then I noted the relations of the point of the elbow with the two condyles, the internal and the external condyle, and I found that, instead of being on a line with the tip of the olecranon it come by the head of the olecranon process with a line drawn to the other. I further noted that the relation of the two condyles were the same as they were in the other arm; but there was no separation of the condyles and that they were in the same relation so far as measuring from the olecranon down. They were not lifted up or drawn down. The line was somewhat diagonal, the same as the other, the line drawn across from one condyle to the other, and they were, and the condyles were, at that time the same as in the other arm exactly. She stated to me —(objected to.)

The Court. If he is describing her injury, her condition, her injury, which she gave him. [Defendant excepts.]

Witness. Yes. I had to depend somewhat on what she said. She said that it was claimed that the condyles were both broken somewhere. I couldn't tell whether she meant transverse across the base of the condyles, or whether broken through into the joint, but she said they were both broken, that is, it was claimed they were, and that the olecranon process was broken off, gone, and the

radius was broken. My diagnosis was influenced somewhat by what she said, so I said at the time that I wouldn't be positive there had been any fracture there at all, but it was evident there was a downward dislocation of both bones which had never been reduced; but I couldn't find any evidence that there had been any fracture of any bone. So that, while admitting that it is possible there had been, I felt in my own mind that the union must have been perfect, and that the parts were in the same position they were before they were fractured, a thing that was very unusual; so that I was very well satisfied, enough to act upon it at any time, that it was simply a dislocation of both bones backward."

The entire charge of the presiding justice and a full report of the evidence were made a part of the exceptions.

At the close of the charge, the presiding justice inquired of the counsel for both parties if they desired any further instructions to the jury. Counsel for the defendant requested one instruction, which was given, and he then said he had no others. No suggestion was made of any inaccurate statement in the charge of the presiding justice, nor was any request made for the correction of any or any exception therefor noted before the jury retired except as to the use of the word "pungent" as before stated.

P. H. Gillin, C. A. Bailey and T. B. Towle, for plaintiff.

L. T. Carleton and J. F. Gould, for defendant.

SITTING: EMERY, WISWELL, STROUT, SAVAGE, FOGLER, JJ.

SAVAGE, J. This is an action on the case for damages alleged to have been occasioned by the surgical malpractice of the defendant, who is a physician and surgeon. The defendant was called to attend the plaintiff a short time after she received injuries to her right elbow joint, and it appears that he diagnosed them as a fracture and a dislocation. That there was a dislocation of both the ulna and the radius is not questioned. That there also was a fracture of some bone or bones in the elbow joint is in dispute. The defendant insists that the evidence tends strongly to show the affirmative of that proposition. This controversy, however, relates

to the dislocation. The plaintiff in her declaration makes no complaint of malpractice in the defendant's treatment of any fracture. She alleges, rather, a want of proper skill and care on the part of the defendant in reducing the dislocation, which he undertook to do. It is, indeed, the present contention of the plaintiff that there were no fractures, that the defendant's diagnosis was wrong, and that his treatment accordingly was wrong. But if the plaintiff is in error in this respect, it still remains necessary to inquire whether, there being fractures, the dislocation was treated with that reasonable degree of skill and care which the law imposes upon surgeons. The fractures, if any there were, are only important as bearing upon the condition of the elbow joint while being treated by the defendant, and as tending to show, with other things, that the defendant did or did not use reasonable skill and care under all the circumstances.

The defendant says that he reduced the dislocation of the ulna at the time he first treated plaintiff, but did not succeed in reducing the dislocation of the radius. He says that he attempted afterwards, from time to time, to secure a reduction of the latter dislocation, by manipulations and otherwise, but never succeeded. He also says that he discovered about a month after his first treatment that the ulna had come out of place again, in some way, and that he then attempted by all proper and reasonable means to replace it. This he was never able to do. And in this situation, both the radius and the ulna dislocated, the defendant, having occasion to be absent from town, left the plaintiff's arm, after about eleven weeks from the injury. He called another surgeon to take his place, and this was done with the plaintiff's consent. The defendant had nothing further to do with the case.

It would serve no good purpose to enlarge this opinion by any particular analysis of the evidence. No two cases of this sort are alike, and rarely are they so nearly alike that one case is valuable as a precedent for another. There is much evidence of an expert nature that the treatment given by the defendant was the usual and proper treatment. This, of course, was largely based upon the testimony of the defendant as to what he found and what

he did. There is also medical testimony, on the other hand, that it was improper in some respects. The parties themselves, the plaintiff and the defendant, differ in their testimony, not so much in regard to the real condition of the elbow, for of that the plaintiff does not claim to know anything, nor in regard to the actual treatment, but with respect to the statements made by him to her from time to time, concerning the condition of the elbow and his knowledge of it. The defendant claims that he acted in good faith with the plaintiff, and that he fully and correctly explained to her the condition of the elbow, and the want of success he had experienced in trying to reduce the dislocation. On the other hand, the plaintiff claims that the defendant never told her of his failure in that respect, that he did not state to her the true condition of her arm, and the liability she was under of being seriously and permanently crippled in her arm, that he did not, in substance, fully apprise her of her situation, so that she might obtain other surgical treatment; but she says that, being inquired of by her in the ninth week of the treatment, he assured her that the dislocation had been reduced successfully the first time he treated her. Her statement, if true, does not of itself prove want of skill or care on the part of the defendant, but it does show a purpose to conceal from her the true condition, for some reason or other. It tends to show that the defendant himself was conscious, not only of failure, but of a failure for which he was responsible. And if her statement was believed by the jury, they were entitled to give it considerable weight, and undoubtedly did so, especially in view of the conflict of the medical testimony.

In addition to matters already stated, it appears that the defendant so treated the injury that when the elbow joint became stiff, the arm was extended nearly straight, and was useless. The plaintiff claims that the defendant improperly placed and left it in this position. Her contention is that, if the joint must be stiff, the proper way would have been to leave the arm flexed, so that it could be made somewhat useful, and that reasonable care and skill would have suggested this mode of treatment to the defendant. And whether the defendant used reasonable skill in this respect was one of the propositions before the jury.

Upon the whole, we find ourselves unable to say that the verdict of the jury, upon all the evidence, is clearly wrong. It is not enough that it may be wrong, or that the court might have come to a different conclusion. We think the evidence for the plaintiff, if believed, is sufficient to sustain a verdict, and that evidence does not seem to be inherently improbable. The defendant's motion for a new trial must therefore be overruled.

In the course of the trial, the plaintiff was permitted, against the objection of the defendant, to exhibit her injured arm to the jury, and to this permission the defendant excepted. We think the exception cannot be sustained. The present condition of the arm is claimed by the plaintiff to have been the consequence of the defendant's want of skill or care. Such is the effect of her evidence. This is denied by the defendant. Whether it was so or not, or whether some cause for which the defendant is not responsible had intervened and made the arm worse than it otherwise would have been, were questions of fact to be submitted to the jury. In view of the plaintiff's contention and evidence, we think it was clearly within the discretion of the court to permit the arm to be shown to the jury.

Within a week after the defendant had ceased attending her, the plaintiff was taken to a hospital for further treatment, and there, before anything was done to the arm, an X-ray photograph of the elbow was taken. This X-ray photograph was admitted in evidence, against the objection of the defendant, and exceptions were noted. The learned counsel for the defendant say that their objection lies not to the admissibility of X-ray photographs in general, but to the admissibility of this one in particular, which they claim is an exaggeration and a distortion. We think it is within the discretion of the presiding justice to admit an X-ray photograph. Whether it is sufficiently verified, whether it appears to be fairly representative of the object portrayed, and whether it may be useful to the jury, are preliminary questions addressed to him, and his determination thereon is not open to exceptions. *Carey* v. *Hubbardston*, 172 Mass. 106. We may add that an examination of the testimony and of the photograph does not show that this discretion was unwisely exercised in this case.

The defendant also has exceptions to certain portions of the charge of the presiding justice. He claims, in the first place, that certain testimony was inaccurately quoted to the jury. It appears by the report, however, that during the charge and before the case was committed to the jury, (with a single exception, to be noted later), no suggestion was made by counsel of any inaccurate statement in the charge, nor was any request made for a correction of any statement. An inadvertent misstatement of facts is not an "expression of opinion," forbidden by the statute. *Grows* v. *Maine Central R. R. Co.*, 69 Maine, 412.

It is the duty of a presiding justice to present to the jury the issues to be determined, and, in his discretion, to call attention to the differing contentions of the parties, and the evidence by which they seek to support them. If in doing so, he makes a misstatement of the evidence, his attention must be called to the error before the jury retires. *Harvey* v. *Dodge*, 73 Maine, 316; *Smart* v. *White*, 73 Maine, 332; *Bradstreet* v. *Rich*, 74 Maine, 303; *State* v. *Fenlason*, 78 Maine, 495. And attention must be called to the error specifically in order that it may be corrected. The rule is not for the convenience of presiding justices, but to prevent unnecessary and accidental mistrials. A mistake, like the misrecital of evidence, can be, and should be, corrected at once. It is not good legal policy, nor is it justice to parties litigant, to permit one to sit by and hazard the chance of a verdict, all the time reserving an easily correctible error, to be the basis of exceptions, in case of an untoward result with the jury. And for this reason, even if the presiding justice may not require exceptions to be specifically noted before the jury retires, as may have been the case in this instance, it is no less the duty of parties to call attention to errors of this kind before the case is committed to the jury. If counsel fail to ask for the correction of such errors at the time, it is to be presumed that they deemed them too trivial and unimportant for notice. The rule is not unreasonable nor unfamiliar. In fact, in this case, counsel did call seasonable attention to such an alleged error. There was evidence that the defendant in the course of his treatment of the elbow, used iodine or ointment upon it to allay

the inflammation. In alluding to this evidence, the presiding justice made use of the expression "lubricating or pungent liniments," and to the use of the word "pungent" the defendant objected, and called attention to it before the jury retired. It may be that the use of the word "pungent" was inaccurate, but we are unable to see how it could have been prejudicial.

The defendant next urges that a portion of the charge is exceptionable, because it is virtually an "expression of opinion" concerning the credibility of a witness, and so a violation of R. S., c. 82, § 83. Dr. Rowe, the surgeon in whose charge the defendant left the plaintiff, was a witness for the plaintiff. He testified that the defendant did not communicate to him the fact that there had ever been a dislocation, and that he only ascertained that fact by his own examination. This was denied by the defendant, who claimed also that Dr. Rowe, in his professional conduct in this case, and in his testimony at the trial, was actuated by unfriendly and malicious motives. Upon this subject, the presiding justice said:—"Then, at that period, the defendant leaves the patient and calls another physician to take charge of her. The other physician comes, and he says that he was not told of the dislocation. On the other hand, Dr. Weld says that he was, and there are various pieces of testimony tending to substantiate the story of one or the other. Dr. Rowe, the physician called, having found the arm in the condition I have described, declined to follow the treatment which Dr. Weld had been following, and which it was suggested that he should follow, but he considered it his duty to immediately inform the patient of the condition of things and to give her an opportunity to be removed to a medical hospital where she might be treated. Much criticism has been made of Dr. Rowe in this regard, for not following out the treatment which was suggested to him by Dr. Weld. But, gentlemen, you must bear in mind that when Dr. Weld left the patient and substituted Dr. Rowe, Dr. Rowe could not justify himself by following and acting simply upon the skill and knowledge which Dr. Weld had, because he, again, was required to exercise his best skill and judgment and to act with absolute fidelity, and if he considered it was his duty,

under all the circumstances, in order to benefit his patient, to give her the benefit of hospital treatment, it is hard for me to say his conduct can be censured for doing so. But it is said by the defendant that his motive was to involve Dr. Weld in the charge of malpractice, that he did this maliciously. Well, gentlemen, no matter what his motive was, no matter if it was malicious; if he acted prudently and wisely, as his judgment told him it was best for him to act, and best for his patient, he was justified in doing it; and whether he did it for one purpose or another only bears upon the question as to how far he is a partisan, and how far he is prejudiced and how far he could be led to misstate, to distort, or to color, the facts of the case. You saw him and you heard him testify; and he frankly, so far as I saw, told you what he did. There is much controversy about his motives. So far as anything that has been said would give you reason to discredit the truth of what he has said, that, gentlemen, is competent and proper for you to take into consideration."

The first expression claimed to be objectionable is,—"if he considered it was his duty, under all the circumstances, in order to benefit his patient, to give her the benefit of hospital treatment, it is hard for me to say his conduct can be censured for doing so;" and the second is,—"You saw him, you heard him testify; and he frankly, so far as I saw, told you what he did." The general objection is that the credibility of the witness being in issue, the comments of the justice presiding were calculated to impress the jury as an indorsement of the witness, that to some extent, at least, the court vouched for him. It is beyond question that the credibility of a witness is for the consideration of the jury, and not the court. At the same time it is equally clear that it is the duty of the court to see that the testimony of a witness is fairly presented to the jury. Here was the case of a witness whose credibility was put in question, and to do that, his conduct and his motives were assailed. Such a proceeding, so far as it is logical and reasonable and based upon the evidence in the case, is legitimate. But in the heat of argument it frequently happens that positions are taken, or arguments are used, which are not warranted

by the facts. In such a case, we think it is quite within the province of the court to call the attention of the jury so far to the merits of the particular controversy that they may be able to perceive the true issue, and the legitimate bearing of the arguments which have been addressed to them. It is the duty of a court to see that cases are tried upon true issues, and thus to aid in securing true results. We do not think the justice presiding exceeded the discretion confided to him. *State* v. *Day*, 79 Maine, 120; *York* v. *Maine Central R. R. Co.*, 84 Maine, 117. We can only infer what the criticism was to which allusion is made, but we cannot assume, in the absence of knowledge, that the remarks of the presiding justice were unfounded.

Finally, exception is taken to a comment concerning the value of expert testimony as found in the following excerpt from the charge: "Now, there have been a large number of professional gentlemen called here, who, until they were called here, knew nothing more about this case than you or I. They did not see it, and they have never seen it so far as I know. They are called, not in one sense, to testify to facts within their knowledge, but they are called to testify to scientific facts within their knowledge, and to express opinions. And you must bear in mind that, where their opinions are taken, there is given to them an assumed state of facts, an assumed condition, on which their answers are based; and if the assumed condition be untrue or inaccurate, then, of course, their answers were inaccurate, and neither one of these learned gentlemen would wish the jury to take their answers except as based upon the conditions which were presented to them. Now, they have told you what would be good surgery and what would not be good surgery; and they have asserted that if one man's account was correct it was sufficient, that if another man's account is accurate, perhaps it would not be. So, gentlemen, so far as their opinions go, you will take them and consider them for what they are worth. But above all, in this case take the testimony of the witnesses who were actors in it; take the testimony of the plaintiff, as she has described her condition, her treatment, her feelings, her talk. Take the testimony of the doctor, as he has told you what he did, how

he acted, how he felt and what he hoped, and if, on the whole, the plaintiff has satisfied you by a preponderance of evidence, she is suffering an injury from the doctor's want of the requisite skill, that is, want of ordinary skill, to treat her case, which the law required him to have, or from the want of proper care, and for negligence after he undertook her treatment, or for the want of good faith in not giving her sufficient knowledge to give her an opportunity to change the treatment, if she desired;—then, gentlemen, for any of those things of which she satisfies you, by a preponderance of the evidence, she is entitled to recover compensation;—that is, an equivalent for the injury suffered at the hands of the defendant." Objection is made to the sentence: "So far as their opinions go, you will take them and consider them for what they are worth." But we think that this portion of the charge taken as a whole is unexceptionable. The justice had already pointed out that the opinions were necessarily based on "an assumed state of facts, an assumed condition," and that if the assumed condition was untrue or inaccurate, "then, of course, their answers were inaccurate;" that the experts had told the jury what would be good surgery, and that if one man's account was correct, it (the surgery) was sufficient, and that if another man's account was accurate, perhaps it would not be. This was proper, and was, we think, saying in effect, all that was afterwards put into words, that the opinions must be taken "for what they were worth." They must be considered "for what they were worth" in connection with the accuracy or inaccuracy of the assumed conditions upon which they were based, as the jury might find them. We do not think the jury could have understood the expression to mean more than that.

The other exceptions are not pressed.

Motion and exceptions overruled.

MARY G. GURNEY *vs.* INHABITANTS OF ROCKPORT.

Knox. Opinion December 14, 1899.

Way. Defect. Notice. R. S., c. 18, § 80.

1. To render a town liable for injuries received from a defective way, the municipal officers, highway surveyor or road commissioner must have had twenty-four hours actual notice of the particular defect.
2. Knowledge of a cause likely to produce a defect is not actual notice of a defect resulting from that cause.
3. A heavy fall of snow, which drifts the highways of a town generally, but blows off in spots, is not such actual notice of a particular drift from which an injury is received, as the statute requires.
4. If knowledge of such storm could be regarded as notice of the condition of the way at the place of the accident, *held;* that the plaintiff had the same notice of its condition, and under the statute cannot recover because she had not previously notified the municipal officers of the defect.

ON REPORT.

The case appears in the opinion.

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

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

SITTING: EMERY, HASKELL, WISWELL, STROUT, SAVAGE, JJ. FOGLER, J., having been of counsel did not sit.

STROUT, J. This action is to recover for injuries suffered from a defective way. In the great snow storm of January 31 and February 1, 1898, the ways of defendant town were "blocked with snow, rendering them impassable, except in places where the force of the wind blew the snow wholly or partly out of spots in the road." The injury occurred on the fourth day of February, on one of the ways which had been greatly blocked by snow. A portion of the way "on each end had been broken out, leaving an unbroken space at one end of which the plaintiff suffered her injuries." It is admitted that the "selectmen had no actual notice of the alleged defective condition of the road at the place of the

accident, unless the storm and its results" constitute such notice. The town had no highway surveyors, no road commissioner, but had contracted with various persons to break out the roads.

The statute imposing upon towns liability for damages for injuries for defective ways requires, as a condition precedent to recovery, that the municipal officers, highway surveyors, or road commissioner of the town shall have had "twenty-four hours actual notice of the defect or want of repair." R. S., c. 18, § 80—and this court has held that such actual notice must be of the particular defect which caused the injury, and that notice of a cause likely to produce the defect is not sufficient. *Smyth* v. *Bangor*, 72 Maine, 249; *Pendleton* v. *Northport*, 80 Maine, 598; *Hurley* v. *Bowdoinham*, 88 Maine, 293; *Carleton* v. *Caribou*, 88 Maine, 461.

At most, the selectmen of defendant town had notice of a cause, the great fall of snow, likely to produce drifts, the defect complained of. But they had no knowledge of the existence of a drift of snow at this particular place. It might have been a spot where the snow was blown off. They, therefore, did not have actual notice of the identical defect which caused the injury. Such notice being a condition precedent to the right of plaintiff to recover, no liability is shown to attach to the town.

But, if knowledge of the storm could be regarded as notice of the condition of the way at the place of the accident, plaintiff had the same notice of its condition, and under the statute cannot recover, because she had not previously notified the municipal officers of the fact.

Plaintiff nonsuit.

LARKIN D. SNOW, in Equity,

vs.

GEORGE F. RUSSELL, and others.

Cumberland. Opinion December 15, 1899.

Probate. Jurisdiction. Bond. Sales. Equity. R S., c. 64, § 8; c. 71, § 4.

The provisions of R. S., c. 64, § 8, that "sales of real estate may be made under the provisions of a will, without the executor giving bond, when the will so provides" are not applicable in a case where the testatrix in her will requested that "no official bond be required to be filed" by the executor "in his said capacity," but where the will itself makes no provision for the sale of real estate.

Held; that a decree of a judge of probate licensing the sale of real estate in such case by an executor for the purpose of paying debts, and excusing the executor from giving bond, before making the sale, is void; and the sale under such license, no bond in fact having been given, is equally void; and the validity of the decree and the sale may be attacked collaterally, though no appeal was taken from the decree.

Also; that the complainant has a complete and adequate remedy at law; and that the complainant not being in possession of the land, a bill in equity cannot be maintained as a proceeding to remove a cloud from his title.

The complainant charged in his bill that the license was issued to pay a collusive and fraudulent judgment obtained by one of the defendants, who was the purchaser of the land under the license. *Held;* that if the defendant seeks further to collect his judgment, that this and the other questions involved can, and properly should, be determined by the probate court, either upon a new petition for license to sell, if any is made, or upon a settlement of the executor's account.

IN EQUITY. ON APPEAL BY COMPLAINANT.

This was a bill in equity praying that a judgment in favor of the defendant Russell be annulled; and that a sale made by him under a license granted by the probate court be decreed invalid; and that the defendant Russell and Reuben and Henry B. Higgins, the other defendants, named in the bill, be decreed to release all their interest in the premises and to cancel a mortgage held by them thereon.

The cause came up for hearing by the justice, in the first instance, on bill, answer, demurrer and proofs, who dismissed the bill, and made the following finding of facts and decisions:—

Submit C. Russell, wife of John H. Russell, died February 7th, 1896, testate. Her will was admitted to probate on the third Tuesday of March, 1896. At her death she was seized of the real estate described in the bill, which was appraised at $2,250, and personal estate to the amount of $314.56. She nominated her husband, John H. Russell, executor, who was duly appointed and received letters testamentary. In her will she requested, "that no official bond in his said capacity be required to be filed in the probate court by him." The will gave all her property to her husband for life, and then provided that, "at the decease of my said husband, I give and bequeath to my son Lemuel T. Davis—and to my granddaughter Sarah F. Coyle—and to my husband's son George F. Russell—such sums as my husband may think just and right. At the decease of my said husband I give and bequeath to my son William W. Davis ten dollars."

March 24th, 1896, under this power and in execution of the same, John H. Russell made an appointment under seal to Lemuel T. Davis four hundred dollars, to Sarah F. Coyle one thousand dollars, and to George F. Russell sixteen hundred dollars, which was to include all sums owing to George by Mrs. Russell.

The descendants of Mrs. Russell living at her decease were her two sons Lemuel T. Davis and William W. Davis, her grandson Charles D. Merrill, her granddaughter Sarah F. Coyle, daughter of William W., and two great grandchildren Henry Merrill and Frances Merrill. John H. Russell had a son George F. Russell by a former marriage. This son was in feeble health, and has always been unable to do hard or persistent work, but for most of the time was able to do chores and light work for and about the house. He came of age in 1881.

For several years before that he had lived with and been boarded and clothed by Mrs. Russell. While a minor he had received from Tewksbury one thousand dollars, which was in a savings bank, subject to the control of his father, who was his guardian. The in-

terest received from the bank appears to have been paid to Mrs. Russell, by her husband, to compensate for care and support of George, until he became twenty-one years of age in 1881, and prior to September 15th. Mrs. Russell then requested George to lend her this money to discharge an incumbrance upon her real estate. On September 15th, 1881, George drew his one thousand dollars from the bank and let Mrs. Russell have it, taking her note for the amount at that date, payable in five years with interest at six per cent payable semi-annually. It was then agreed between them that while George remained with her she should board and clothe him, and that this should be given and received as payment of the accruing interest upon the note. A fair price for this support would exceed the interest and the value of services rendered by George, and the small amount he paid her when he had employment; but I find that Mrs. Russell made no charge to or claim of George for any excess, but was satisfied to offset the support against the interest and the light services that George might render, and his occasional small payments, and did not claim or intend to claim any additional payment. For a small portion of the time George earned three dollars a week in some outside service, and during that time he paid her two dollars a week toward his support. George remained with and was supported by Mrs. Russell from his majority, in 1881, to the death of Mrs. Russell in February, 1896.

Under the arrangement between the parties, I find that the interest upon the note had been fully paid by Mrs. Russell, in board and clothing, up to her death, and that the principal sum of one thousand dollars was then due and owing George from Mrs. Russell.

Suit was brought upon this note by George, on October 8th, 1897, returnable to the November term of the superior court, which was defaulted, judgment rendered and execution issued for $1,350.50. No indorsements had been made upon the note until a short time before suit was brought, when George indorsed payments of interest in full up to May 15th, 1891, and made an indorsement of $14.00 as of September, 1893, and $18.00 July,

1894, and $11.00 August, 1895. He should have indorsed full payments of interest to date of death of Mrs. Russell, in February, 1896, as interest had been paid to that date, in manner before stated.

On or about February 18th, 1896, Lemuel T. Davis and Charles D. Merrill made an agreement with John H. Russell, in writing, which is to be referred to as a part of my finding, by which Davis and Merrill were to release their interest in Mrs. Russell's estate and make no opposition to probate of her will, and were to receive from John H. Russell $1,500,00.

March 11th, 1896, in execution of this agreement, Davis and Merrill delivered to Russell a quitclaim deed of all interest in the estate, and received from Russell his note for $1,500.00, payable in three years, and his mortgage upon the real estate of Mrs. Russell to secure the same, with one year foreclosure clause. Russell had obtained a quitclain from William W. Davis of his interest, on February 11th, 1896.

This note and mortgage Davis and Merrill sold to John F. Proctor on March 13, 1896. They indorsed the note in blank, and executed and delivered to Proctor on that day an assignment of the mortgage, leaving blank the name of the assignee. Proctor paid Davis and Merrill for the note and mortgage, $1000.00 cash, and was to allow to Mrs. Merrill for a period of time, free rent in his tenement then occupied by her.

Proctor sold the note and mortgage to complainant on or about March 13th, 1896, and filled in complainant's name as assignee in the assignment made by Davis and Merrill, and delivered it to Snow. Snow paid $1,500.00 for the note and mortgage, and had no knowledge of any defense nor of any defect in the title. He was a purchaser for value and in good faith. Interest not being paid, he foreclosed the mortgage, by publication, the first publication being July 14th, 1897. The notice was duly recorded. These proceedings were in due form of law.

On the fifth day of March, 1898, John H. Russell petitioned the probate court for license to sell Mrs. Russell's real estate, described in the bill, for payment of debts, on which legal notice

was given, and on April 13th, 1898, that court decreed that he have license to sell at public or private sale, without giving bond. No appeal from this decree was taken. License in due form issued on April 13th, 1898.

Under this license John H. Russell sold the real estate in controversy, by private sale, to George F. Russell for $2,200.00, the third day of May, 1898, and on the same day executed and delivered to George F. Russell a deed of the same, which was recorded in Cumberland registry on May 4th, 1898. No objection is made to the regularity of the proceedings, after the license was granted.

George obtained from Reuben and Henry B. Higgins three hundred dollars on mortgage of the property, executed May 3d, 1898, which together with his execution were applied towards payment of purchase price.

John H. Russell died in 1898. On February 14th, 1896, he was sick in bed with a bronchial cold and feverish, but improved the next day and was out attending to business on February 18th. The doctor found him with pneumonia on the 20th, and delirious. He was confined to his bed till March 2nd or 3rd, and was not downstairs till the 6th or 7th of March. His physician left him March 7th. For some days before that, his physician testified that his mind was clear, but he was physically weak.

Russell was present at the office of Mr. T. L. Talbot on February 18th, 1896, when the agreement with Davis and Merrill was executed there by all the parties. He then appeared to be in possession of his mental faculties and capable of doing business. On March 9th, his mind was clear, though physically weak. On March 12th, 1896, when the mortgage from Russell to Davis and Merrill, bearing date March 11th, was in fact executed, Russell was in his house, weak in body, but talked intelligently about the business.

The evidence now introduced fails to satisfy me that, either on February 18th or March 12th, Russell was incapable of transacting business understandingly.

Complainant claims that the note to George F. Russell is paid and barred by limitation; that the judgment thereon was collusive;

that John H. Russell should have defended, and was guilty of fraud in not doing so; that the sale under license from the probate court was void because no bond was given; that the mortgage Russell to Davis and Merrill was upon a valuable consideration and operated to convey title to all the real estate which Russell had acquired under the will of his wife, and deeds of release from Lemuel T. Davis and William W. Davis, sons, and Charles D. Merrill, a grandson, of Mrs. Russell. He prays by his bill that the judgment in favor of George F. Russell be annulled; the sale under license decreed invalid; and that George and Reuben and Henry B. Higgins be decreed to release to complainant all their interest in the premises, and to cancel the Higgins mortgage.

The defendants claim that on February 18th, 1896, when the agreement with Davis and Merrill was executed by John H. Russell and on March 12th, 1896, when the note and mortgage were given by Russell, that he was of unsound mind and incapable of doing business, and that the agreement and note and mortgage are, for that reason, void; that the judgment on the thousand dollar note, and the sale under license are valid and defeat complainant's mortgage.

Upon the facts which I have hereinbefore found, I decide as a matter of law, that the agreement of February 18th, 1896, between John H. Russell and Lemuel T. Davis and Charles D. Merrill and the note and mortgage of March 11th, 1896, Russell to them, were valid against John H. Russell:

That Charles D. Merrill, grandson and an heir-at-law not being named in Mrs. Russell's will, and there being no evidence that he was intentionally omitted from the will, was entitled by virtue of the statute, to inherit as if Mrs. Russell had died intestate:

That the two great grandchildren were not entitled to inherit. R. S., c. 75, § 1; *Stetson* v. *Eastman*, 84 Maine, 376:

That Submit C. Russell was indebted to George F. Russell, upon her note to him, in the sum of one thousand dollars and interest from the date of her death:

That the note was not barred by the statute of limitation:

That George F. Russell was entitled to receive the same from

the estate of Mrs. Russell, and that it was the duty of her executor to pay it:

That the personal being insufficient, it was his duty to obtain license and sell the real estate for this purpose:

Suit upon the note was unimportant. The legal duty of the executor was the same, whether suit had been brought or not. George's claim was superior to that of heirs or legatees. As he knew the legal rights of George, it was not his duty to set up a groundless defense to that suit:

That the interest of the heirs in the real estate was subject and subordinate to the rights of creditors of Mrs. Russell:

That to pay the debts and expenses of administration, it was necessary to sell the real estate:

That the probate court, in granting license to the executor after public notice to sell the real estate, adjudged that under the provisions of the will, no bond was required, and granted the license without bond. No appeal from this decree was taken. The matter was within the jurisdiction of that court, and the decree must be upheld. If vacated, it would not avail plaintiff, as the estate would remain liable to be sold under a new license, or subjected to levy for the debt due George.

It follows that the estate was legally sold to George F. Russell, and the absolute title passed to him, and nothing is left to which plaintiff's mortgage can attach.

Bill dismissed with one bill of costs.

W. R. Anthoine and T. L. Talbot, for plaintiff.

The first objection made to the title of the complainant arises from a clause in the will of Submit C. Russell, and an attempted appointment under the will. Had Submit C. Russell died intestate, leaving no debts in excess of the personal property, the mortgage to Merrill and Davis would have given title to the real estate to the complainant, Snow.

Had the will provided that all the estate, real and personal, of the testatrix should go to Davis, Coyle and Russell as her husband might think just and right, a valid power coupled with a trust would have been created in favor of those three individuals. The

will in the case at bar is absolutely indefinite upon this important point. The requirements of the will would have been met had John H. Russell appointed $10 to each of the beneficiaries, and they would have been powerless to prevent the remainder of the estate from passing to the heirs as undevised property. No intention to dispose of her entire estate, or of the real estate is disclosed. The real estate, therefore, descends to heirs. No trust relation can exist between the parties, for no property is made the subject of a trust.

John H. Russell under the so-called deed of appointment, has not even attempted to make a disposition of the real estate. It cannot be claimed that any title to the real estate passed to the three appointees. Something further must have been done to give them a legal interest which they in turn could have conveyed to other persons. The statutes of this state do not allow courts of probate to issue licenses to sell real estate for the purpose of providing funds to pay sums of money appointed under a power like that in the case at bar. Even if such a license could be granted, it never has in fact been granted, and until it is the real estate in question must belong to the complainant under his foreclosed mortgage.

But if it be admitted that the will gave John H. Russell power to appoint the real estate, it is maintained that the agreement of February 18, 1896, was a valid exercise of that power in favor of Lemuel T. Davis. By the quitclaim deeds of Lemuel T. Davis and Charles D. Merrill and William H. Davis, John H. Russell became the absolute owner of the real estate subject only to what, for the purposes of this argument, may be admitted to be a power of appointment in favor of Davis, Coyle and George F. Russell. The purposes of this agreement were, first: to prevent objection to the probate of the will; second: to effect a settlement with Charles D. Merrill, who had been omitted in the will and who, therefore, took as heir of Submit C. Russell; third: to execute the power in favor of Lemuel T. Davis one of the beneficiaries named in the will. By an instrument, sufficient in law to pass the title to real estate, John H. Russell conveyed the India street property

to Davis and Merrill, who subsequently conveyed to the complainant, Snow. The power admitted to be given by the will was not valid because of the entire indefiniteness of the subject matter; that no trust was created that could be carried into effect; that if a power was given, it was a naked power not coupled with a trust, and that if the power was defectively executed by the deed of appointment in favor of Davis, Coyle and George F. Russell, such defective execution cannot now be aided.

Counsel cited: *Richardson* v. *Chapman*, 7 Bro. P. C. 318; *Brown* v. *Higgs*, 8 Vesey, Jr. 574; *Greenough* v. *Welles*, 10 Cush. 571; *Burrough* v. *Philcox*, 5 Mylne & Craig, 92; *Wentworth* v. *Shibles*, 89 Maine, 167; Perry on Trusts, §§ 82, 83, and cases cited.

The failure to file the bond required by law made this conveyance void, and nothing passed to George F. Russell under the deed. R. S., c. 71, § 4; *Lebroke* v. *Damon*, 89 Maine, 113, and cases cited.

It was the duty of the executor in the interest of the estate to defend an action brought on George's note. He should have required plaintiff to prove his case by proper evidence; he should have seen that all proper credits were given on the note to reduce the damages as low as possible, and he should not have sold at private sale to the party who had been enabled to recover a judgment, property worth $2200 for $1650. All the facts of this case show that the executor was eager to benefit his son at the expense of all other parties in interest.

A judgment may be collaterally impeached when it has been obtained by fraud or collusion. *Pierce* v. *Jackson*, 6 Mass. 242; *Caswell* v. *Caswell*, 28 Maine, 232; *Granger* v. *Clark*, 22 Maine, 128; *Sidensparker* v. *Sidensparker*, 52 Maine, 481.

A judgment may be collaterally impeached when erroneously or unlawfully rendered to the prejudice of the rights of the third parties. *Pierce* v. *Strickland*, 26 Maine, 277; *Miller* v. *Miller*, 23 Maine, 22; *Wadleigh* v. *Jordan*, 74 Maine, 483.

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

Complainant's alleged title is by a foreclosed mortgage given by

John H. Russell, who had only a life interest in estate of Submit C. Russell, and who deceased before the bringing of this bill of complaint. He had no other interest at the time of giving said mortgage, unless by quitclaim deeds from Wm. W. Davis and Lemuel T. Davis and Charles D. Merrill, heirs of Submit C. Russell, and who at that time had acquired no beneficial interest under said will.

The findings of facts in equity proceedings are entitled to the same weight as the verdict of a jury, and are not to be set aside or reversed upon appeal unless clearly erroneous or manifestly against the weight of evidence. *Dwinel* v. *Perley*, 38 Maine, 509; *Young* v. *Witham*, 75 Maine, 536; *Paul* v. *Frye*, 80 Maine, 26.

The decision of the judge of probate, if not appealed from, is conclusive upon all matters brought before him provided he has jurisdiction and no element of fraud or mistake enters into the matter. *Pierce* v. *Prescott*, 128 Mass. p. 140–3–5; *McLean* v. *Weeks*, 65 Maine, p. 411–421; *Patten* v. *Tallman*, 27 Maine, p. 17; *Wolcott* v. *Wolcott*, 140 Mass. p. 194; *Waters* v. *Stickney*, 12 Allen, p. 1–3–10–11; *Peters* v. *Peters*, 8 Cush. p. 529–541; *Smith* v. *Rice*, 11 Mass. p. 510–513; *Decker* v. *Decker*, 74 Maine, p. 465–7.

There being no element of fraud or mistake, the judge of probate, having jurisdiction, decided that under the provisions of the will no bond was required, and issued license to sell, and no appeal was taken therefrom. In accordance with the foregoing authorities his decision was conclusive and cannot be revised.

Where a bond was required, and license was issued without bond, and sale made, the court held that sale was valid. *Perkins* v. *Fairfield*, 11 Mass. p. 227–228; *Leverett* v. *Harris*, 7 Mass. p. 292.

See as to decree of judge of probate as to necessity of sale. *Allen* v. *Trustees, etc.*, 102 Mass. p. 262–65.

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

SAVAGE, J. Appeal from decree of presiding justice dismissing the bill of complainant. The complainant claims title to certain real estate described by mesne conveyances from the heirs of

Submit C. Russell. The defendant George F. Russell claims title to the same premises by a conveyance from the executor of the last will and testament of Submit C. Russell. He alleges that the sale to him was made under license from the probate court, after due proceedings had, and was made for the purpose of raising money to pay the debts of the estate of Submit C. Russell. The complainant replies that one of the debts named in the petition for license to sell was a fraudulent and collusive judgment obtained by George F. Russell against his father John H. Russell, as executor, and that the personal estate of Submit C. Russell was sufficient to pay all the valid indebtedness of the estate, together with the expenses of administration. He also alleges that the conveyance from the executor to George F. Russell was without consideration except for the fraudulent and collusive judgment set forth, and that the conveyance was made in execution of a scheme to defraud him, to create a cloud upon the title of his real estate, and deprive him of his right to the same. The complainant replies further that the license under which the sale to George F. Russell was made was void, and that the sale and deed and all proceedings thereunder were void, for the reason that the executor, before making the sale, gave no bond to the judge of probate under the provisions of R. S., chap. 71, § 4.

The answer of the defendants to these contentions of the complainant is that the judgment complained of was neither fraudulent nor collusive, but was in every respect valid; and that he was excused from giving bond upon obtaining the license to sell real estate, by a valid decree of the judge of probate, under one of the provisions of the will of Submit C. Russell, which was, after nominating her husband, John H. Russell, as executor, "that no official bond in his said capacity be required to be filed in the probate court by him," and further, inasmuch as no appeal was taken, that the decree of the probate court, excusing the executor from filing bond, is conclusive in this proceeding.

The defendants, other than George F. Russell, are mortgagees, holding a mortgage from George F. Russell, given after he obtained the deed from the executor.

The complainant prays that the alleged fraudulent judgment may be annulled, that the cloud upon his title be removed by cancelling the executor's deed to George F. Russell, and the mortgage deed of George F. Russell to the other defendants,

The presiding justice found, and we assume it to be true, that Submit C. Russell died February 7, 1896, testate; that her will was admitted to probate on the third Tuesday of March, 1896, and her husband, John H. Russell, was appointed executor, and was not required to give bond as such; and that in the meantime, certain of the heirs and devisees of Submit C. Russell had conveyed their interests in her real estate, which is the land described in this bill, to John H. Russell, and his title afterwards came to the complainant. But, of course, the title or ownership of the complainant in the land was subject to the right of the executor afterwards, if necessary, to cause it to be taken and sold for the payment of the debts of the estate. It further appears that suit was brought by George F. Russell against John H. Russell as executor, and the judgment complained of was obtained in November, 1897. In March, 1898, the executor petitioned the probate court for license to sell the real estate described, for payment of debts, and after due proceedings, on April 13, 1898, that court decreed that he have license to sell at public or private sale, without giving bond. No appeal was taken from this decree. License was issued, and under it, the executor sold the real estate to George F. Russell, and made, executed and delivered to him a deed of the same. It should be said, also, that the testatrix, in the will, requested that "no official bond be required to be filed by" the executor "in his said capacity."

In view of the conclusion we have reached, it is not necessary to state any other facts. The first question which arises concerns the validity of the executor's deed. If that was invalid, then the complainant has a plain and adequate remedy at law, without the aid of the court in equity, and it will not be necessary in this case to consider the questions of fraud and collusion. For if the deed fails, all prior proceedings are, for the present, immaterial.

The presiding justice found that the probate court, in granting

the license, "adjudged, that under the provisions of the will, no bond was required," and ruled that, as no appeal was taken, the decree was conclusive. Was this ruling correct?

The jurisdiction and powers of the probate court, with respect to the settlement of the estates of deceased persons, are defined by statute. That court has no common law jurisdiction. Its jurisdiction is special and limited, and it has no powers save those conferred upon it by statute. So it is likewise true that the proceedings in petitioning for license to sell real estate, when it is necessary for the payment of debts, the granting of the license, and the conditions precedent to the authority to make a valid sale, are all regulated by statute. It is provided in R. S., c. 71, § 4, that persons licensed to sell real estate, "before proceeding to make such sales . . . . shall give bond to the judge for a sum, and with sureties to his satisfaction," conditioned for observing all provisions of law for the sale, for using due diligence, and for applying and accounting for the proceeds of the sale. This is the requirement of the statute, irrespective of the decree of the judge of probate. The giving of such a bond is a prerequisite to the right by the executor to make a valid sale. *Campbell* v. *Knights*, 26 Maine, 224; *Parker* v. *Nichols*, 7 Pick. 111. In these cases, the sales were held invalid, on account of the failure of executors to make the oath then required by statute, but the reasons given are equally applicable here. Such sales are in derogation of the rights of heirs and devisees, and it has always been held that a purchaser under such a statute sale is bound to show strict compliance with statutory requirements, if his title is called into question. It follows then, that unless relieved by other sections of the statutes, the executor acquired by his license no authority to sell; and if he had no authority, he could not make a valid sale. The supposed authority for issuing such a license without bond is found in R. S., c. 64, § 8, where it is provided that "letters testamentary may issue, or *sales of real estate may be made under the provisions of a will*, without the executor giving bond . . . . when the will so provides." But this provision is of no avail here. This sale was not made "under the provisions of a will." This will makes no provisions

for the sale of real estate. It gives no authority to the executor to sell real estate. It is silent in regard to the disposition of the real estate, except by devise. A testator in his will may authorize his executor to sell the real estate, to pay legacies or debts, and he may authorize him to do so without giving bond. A testator may do this, but the court cannot. And this testator did not give such authority.

The defendants strongly contend, however, that it is now too late to question the validity of the license or of the sale made under it. Their position is that the judge of probate had jurisdiction of the subject matter, and that his decree therein, not appealed from, is conclusive. As to this, it may be observed, in the first place, it is the statute, and not the judge of probate, which imposes upon the executor the duty of giving bond. The decree of the judge cannot make it any more or any less his duty to give a bond. The judge has no authority given him by statute to excuse the giving of such a bond. It may be argued that the judge of probate must of necessity decide in each instance whether a bond is required by statute or not. So he must. But if he decide erroneously, as in this case, does it follow that his decree, in violation of the statute, remains in force, until reversed? If so, he may, by mistake, nullify a statute. Is not such a case rather like the many others where judges of probate have assumed jurisdiction, and mistakenly exercised powers not given them by statute, and where their decrees have been held to be void? Suppose, for instance, that a judge of probate should erroneously issue letters of administration to an administrator, or letters of guardianship to a guardian, without taking bond, would such persons be authorized to act? Suppose he should grant administration, in violation of the statute, after the intestate had been dead twenty years, as in *Wales* v. *Willard*, 2 Mass. 124; or suppose he should appoint a guardian to an insane person without inquisition, and without notice, as in *Coolidge* v. *Allen*, 82 Maine, 23; is there any question but that such decrees would be void? We think not. It has been so held in the cases cited, and in many others. See *Hunt* v. *Hapgood*, 4 Mass. 117; *Sumner* v. *Parker*, 7 Mass. 77; *Smith* v. *Rice*, 11 Mass. 507.

In the cases above supposed, the probate court would undoubtedly have jurisdiction to grant administration, or to appoint a guardian, but in so far as it exceeded its statutory powers in the exercise of its jurisdiction, its acts would be void; and being void, we think they would not be validated by the failure to take an appeal.

We think some confusion may have arisen in the use of the word "jurisdiction" in the decisions. It is frequently said that the decrees of probate courts, touching matters *within their jurisdiction*, when not appealed from, are conclusive upon all persons. See *McLean* v. *Weeks*, 65 Maine, at p. 421; *Decker* v. *Decker*, 74 Maine, 465. And hence it may have been concluded that inasmuch as the licensing of sales of real estate is within the jurisdiction of the probate court, therefore all its decrees relative thereto are conclusive. But we think this conclusion is not the correct one. The rule is stated more precisely and accurately in *Waters* v. *Stickney*, 12 Allen, 1, where it is said that "decrees of probate courts in matters of probate, *within the authority conferred upon them by law*, are conclusive." The distinction we note has been discussed in cases in this state and Massachusetts.

In *Smith* v. *Rice*, 11 Mass. 507, (decided in 1814, while we were a part of Massachusetts), the court said: "But if it appear that the judge of probate exceeded his authority, or that he has undertaken to determine the rights of parties over whom he had no jurisdiction, ... or that he has proceeded in a course expressly prohibited by law, in all such cases, the party aggrieved, if without any laches on his part he has had no opportunity to appeal, may consider the act or decree void. . . . . The defect is not confined to what may be considered strictly a want of jurisdiction of the cause; but if the inferior tribunal proceed in a manner prohibited, or not authorized by law, the proceeding is void." This case was cited with approval of this position in *Peters* v. *Peters*, 8 Cush. 529.

In *Wales* v. *Willard*, 2 Mass. 124, the court said: "It (a decree not appealed from) is not therefore an erroneous exercise of his judgment, but it is an assumption of power against law, and the

grant is ipso facto a nullity." There, as here, the point was raised that the decree was conclusive until reversed on appeal, and it was expressly overruled. *Sumner* v. *Parker*, 7 Mass. 79.

The court in *Pierce* v. *Prescott*, 128 Mass. 140, after stating the rule that judgments of probate courts on all matters within their jurisdiction are conclusive, said: "The law is so laid down by this court, although it is sometimes said, as if in qualification of the rule, that, although the probate court has jurisdiction over the subject matter, yet if it clearly exceeds its powers, or does an act prohibited by law, its decree may be avoided in collateral proceedings as well as by appeal; but this is only one way of saying that where the jurisdiction of the court over the subject matter is in any particular limited, then its decree is not binding, if it oversteps the limits fixed. It is not in such case the indiscreet exercise of a power granted, but the doing of an act for which no power is given, or which is expressly prohibited."

Our own court, in *Coolidge* v. *Allen*, supra, said: "It is undoubtedly true that a judgment of the probate court upon matters within its jurisdiction is conclusive until it is reversed. But it is equally true that jurisdiction of the subject matter only is not sufficient. The preliminary requisites, and the course of proceedings prescribed by law, must be complied with or jurisdiction does not attach, and the judgment will be, not voidable merely, but void, and may be avoided by plea and proof."

The distinction noted is well illustrated in this case. The judge of probate adjudged that there was a necessity for the sale of the real estate to pay debts. Such a judgment would be conclusive unless appealed from. It is a question which the law authorizes him to determine. It is within his jurisdiction to decide whether there is a necessity for a sale or not. But the law has not authorized him to decide that an executor, need, or need not, give a bond before he can sell real estate under a license. The statute itself has decided that question.

We are, therefore, of the opinion that the decree of the probate court licensing the sale of the real estate without bond is open to attack collaterally, in an action at law, as well as by appeal, and that therefore the complainant does not require relief in equity.

The complainant is not in possession of the land, and for that reason he cannot seek to have the alleged cloud upon his title arising from the executor's deed removed by proceedings in equity. He has a plain, adequate and complete remedy at law. As was said in *Robinson* v. *Robinson*, 73 Maine, 170, "it is not the purpose of equity to try titles to real estate and put one party out of possession and another in." *Gamage* v. *Harris*, 79 Maine, 531, and cases cited.

The bill must be dismissed, and we think, under the circumstances of the case, it should be dismissed without prejudice and without costs. If the defendant Russell seeks further to collect his judgment, all the questions involved can, and properly should, be determined by the probate court, either upon a new application for license to sell real estate, if any is made, or upon a settlement of the executor's account.

Bill dismissed without prejudice.

SANFORD A. CHAPMAN *vs.* CHARLES H. DECROW.

Knox. Opinion December 20, 1899.

Dog. Found Worrying. License. Nuisance. R. S., c. 30, § 2; Stat. 1893, c. 287.

By the common law, a dog is property, for an injury to which an action will lie.

An unlicensed dog may not be killed as a public nuisance by a private person who does not suffer damages therefrom peculiar to himself and distinct from the injury to the public.

The statute, R. S., c. 30, § 2, which provides for killing unlicensed dogs by a constable only, under a warrant, impliedly forbids killing by any other person.

Revised Statutes, c. 30, § 2, provides that "any person may lawfully kill a dog . . . . found worrying, wounding or killing any domestic animal, outside of the inclosure or immediate care of his owner." *Held;* under this statute, it is not enough that the dog may have worried or killed a domestic animal before, nor that there is a belief or apprehension that he intends

to do so, to justify the killing; but he must be in the act—the worrying and the shooting must be substantially at the same time.

State v. *Harriman*, 75 Maine, 562, distinguished.

ON EXCEPTIONS BY DEFENDANT.

This was an action of trespass to recover the value of a dog killed by the defendant and belonging to the plaintiff. The jury found for the plaintiff.

The defendant, in justification for killing the dog, claimed that the dog was trespassing on his premises and was then, or had been immediately before the shooting, engaged with two other dogs in chasing and worrying his domesticated animals, viz:—tame rabbits, and that the dog was, at the time, outside of the enclosure or immediate care of his owner.

The dog was killed on the 24th day of April, 1897; and, as appeared, had not been registered nor licensed for that year as provided by law, although he had been licensed for the preceding year and was then wearing a collar.

The plaintiff was allowed to state what was the fair market value of the dog at the time, which was objected to by the defendant, on the ground that, unless the plaintiff could show that the dog was licensed and that he had a right to keep him according to law, he had no market value.

The Court.—"I don't think that element comes in here. I shall rule against that."

When the plaintiff rested his case, counsel for defendant moved a nonsuit on the ground that an unlicensed dog outside of the owner's premises, cannot have a property value, citing chap. 287 of the public laws of 1893.

The Court.—"For the purposes of this trial I make the ruling that a dog is property." To this ruling the defendant took an exception.

The presiding justice, in part, instructed the jury as follows:—"The defense takes the position that in this case there was no property in this dog to his owner, that he was a nuisance; that any person could kill and slay him because he was not licensed and

registered according to the statute of this state. I rule against that proposition."

Upon the question of justification, the defendant requested the presiding judge to instruct the jury "that if the jury find that at the time of the shooting of the dog, he had killed or wounded the defendant's domesticated animals on the defendant's premises and was again there apparently for the purpose of destroying others, the defendant would not be liable for killing the dog; but would be justified in so doing, even though the dog was not, at the time, in the act of destroying or worrying the animals aforesaid," which requested instruction was not given except as it may appear in the charge. In respect to such justification the presiding judge instructed the jury as follows:

"It is when he is found in the act. It is not for punishment to the dog; therefore it is not for an act which he has heretofore done. If he had killed ever so many rabbits for the defendant, hours before—on the day before—he had no right to touch the dog."—"It is when he is found in the act."—"Bear in mind it is while the dog is found in the act. What is the act? Well, my estimation is, the worrying and the shooting must be substantially at the same time." To which instructions and refusal to instruct, the defendant had exceptions.

Charge to the jury:—

"Gentlemen of the jury:—This action is to recover damages for the loss of a dog by shooting. That the dog was shot, no question is made. I don't know as any question is really made that the defendant shot the dog, or ordered him to be shot, so as to be responsible therefor, if there is any responsibility on any one. If his hired man, or agent, shot the dog by his direction or order, or by his assent, then he would be liable, and so would the agent be. If it be proved or admitted that the responsibility for shooting the dog attaches to the defendant, and that the dog was at the time even on the premises of the defendant, but doing no injury, nor worrying his domesticated rabbits, he would be liable to pay the value of the dog, in this case, unless there be some other justification for it.

"Now, in the first place, the defendant takes the position that there is no property value in a domesticated dog. I do not concur in that proposition. I rule against it. A dog has value in this state, by our laws, in most respects, the same as any other property, and no man has a right to kill another's dog, unless the dog is violating a statutory provision. The defense takes the position that in this case there was no property in this dog to his owner, that he was a nuisance; that any person could kill and slay him because he was not licensed and registered according to the statute in this state. I rule against that proposition. I think the question of license or no license, registration or no registration, is between the owner of the dog and the state—a question of finance, affecting only the owner of the dog and the state—and the want of registration does not authorize the killing of the dog.

"I make these rulings as matters of law. If I am wrong on either of them, the case can be taken to and settled in the law court above; and if I am in error, that error can be rectified and the case sent back to be tried on the true, admissible grounds, if I have misstated them.

"But the defense does not stop here. There is a very severe statute towards the owner of dogs doing mischief, which embodies one expression or description of the common law of the state which reads, as I will read to you, and which has been stated to you in different forms: 'Towns may pass by-laws to regulate the going at large of dogs therein.' Towns may regulate the going at large of dogs by by-laws. There are none here that have been called to our attention.

'When a dog does damage to a person or his property, his owner or keeper, and also the parent, guardian, master, or mistress of any minor or servant who owns or keeps such dog, forfeits to the person injured double the amount of the damage done, to be recovered in an action of trespass.'

"You see there is a remedy against the owner of a dog for any damage done by the dog to a person or his property, and the remedy is severe. But that is not this case. It is not a case between the owner of property and the owner of a dog for injury done by

the dog; but by the owner of a dog for the unjustifiable shooting of his dog.

'Any person may lawfully kill a dog that suddenly assaults him or another person when peaceably walking or riding'—and here comes a portion applicable here—'May lawfully kill a dog who is found worrying, wounding, or killing any domestic animal outside of the inclosure or immediate care of his owner.'

"So the defense here sets up its justification on this statute, namely, as they contend, that this dog was found, at the time he was killed, worrying the domesticated rabbits of the defendant, or of the person who killed the dog, or person whose agent or servant killed him. Now, if that be made out, it is a perfect justification by this defendant—if the fact is ascertained by the jury that when he killed the dog, the dog was found worrying his domesticated rabbits. It is not alleged the dog killed any at that time, but that he was endeavoring to kill them; that he was worrying them; and, as severe as it may seem, an owner of domesticated rabbits catching the dog—'finding him' (to use the words of the statute) in the act of worrying the rabbits himself—as the circumstances would be here, if at all—had a perfect right to shoot him on the spot. That is the defense on the facts in this case—the other defense being upon legal propositions, more strictly.

"It is when the dog is found in the act. It is not for punishment to the dog. Therefore it is not for an act which he has heretofore done. If he had killed ever so many rabbits of the defendant hours before, days before, on the day before, the defendant had no right to touch the dog. His remedy would be in another form for the damages done by the dog. The object of the statute is for the prevention of injury to property, and he has a right to shoot the dog when found worrying his domestic animals so as to prevent injury and killing of these animals.

"Now, gentlemen, it may be a very nice question to know when the worrying of animals begins and when it ends—to know when a dog had worried them and had ceased to worry them, or whether he continues to worry them,—and I think it is a question of fact for the jury to decide; but I can give a general illustration, a general

statement or proposition which may touch somewhere nearly the different contentions of the parties,—the contention of the plaintiff and the contention of the defendant. Bear in mind it is while the dog is found in the act. What is the act? Well my estimation is, the worrying and shooting must be at, substantially, the same time; because, as I have already intimated, for past worrying there is no right of shooting. For present worrying there is a right, and I can conceive of cases where it would be close and difficult to decide. But the facts in this case are not for me but for you to determine upon the evidence.

"Now, if the dog had been worrying the defendant's rabbits, but had ceased his chase, and had retreated from the immediate premises where the worrying was done, and had gone so far off on his retreat that it should be reasonably apparent to the owner of the rabbits that he had ceased his chase and gone away, that the work had been done, and was not to be continued—I think he had no justification for shooting the dog. As a legal proposition, that would not be during the act, but after the act. But if the black dog, the one in question, the one shot, had been either alone or in consort with the other dogs, worrying the defendant's rabbits, and had been merely momentarily checked, or held at bay by the girls at the door, or the hired man, or anybody else, and the dog had not quit the chase, but was still intent upon it at a little distance out of his tracks from where he had previously begun to worry the animals, and he was still intent upon the act of worrying, either returning or ready to return as soon as the obstructions for getting at the rabbits were removed from him,—I think you would be authorized, if you see fit, to say that the worrying and killing were coexistent acts, concurrent acts, done at the same time; that they were one transaction.

"Now the proposition which I first stated is the one on which the plaintiff more particularly relies. And he goes further and says that the dog was not there at all; and even if he had been and had been engaged in worrying the animals, he had given up the chase, and was retreating, and at such distance that it was apparent to the owner of the animals that the dog had given up the chase.

And if such were proved it would subject the defendant to liability; there is no other ground for justification.

"Now, the defendant contends that the dog had not given up the chase; that, while he might have gone out of his tracks, shied off, he was intending to return, and was only held at bay, and upon these different contentions you are to examine the facts. Now which contention is true? You have heard the counsel elaborate them very carefully, and it is for you to decide whether the shooting was done while the dog was found there—if the dog was found there—whether the shooting was done while the dog was engaged in worrying, or whether it was after he had done the worrying; whether it was one act or different and separate acts as to time. You see a space of time would make them different acts. If the dog was away where he could not act, his worrying was ended; or if it was another time, it could not be held to be the same thing. Therefore, it is that, if the dog was there the night before, that would have nothing to do with this alleged justification; because it would be a past offense on the part of the dog; it would be past misconduct and not present misconduct.

"I don't know as I can state this proposition any more plainly. The dog must be found in the act,—the act of the dog and the act of the shooting must be so closely connected as to be concurrent acts; as to be essentially done at the same time. It must be one offense, and one condign punishment for it, done at the same time.

"The plaintiff contends that the dog was not there at all, and, if this was the dog seen about there, he was not at the defendant's house, and was not at the worrying at all. Some question has been made here as to whether the defendant's witnesses identified this particular dog. I suppose it would not be contended that the dog killed was not the guilty dog, if he was there, and that the dog killed belonged to the plaintiff. But the more particular stress which the plaintiff lays upon the circumstances of the case is that if the dog had been there, if he had done any worrying, he had ceased to do any worrying, he had fled; he had given up his instinctive scent, and was not continuing it; and that anybody could have seen it; that the owner could have seen it; and the

hired man could have seen it; and if the dog was the culprit, it was for something that he *had* done and not for what he *was doing*.

"The proposition of the other side is that, substantially and virtually, the worrying and the killing was done at one time. And as you find whether or not the dog was shot while worrying the little animals of the defendant,—as you find that question,—so you will be authorized to find for the plaintiff or the defendant, so far as this point is concerned. And counsel have been very urgent about it. And dog cases are interesting cases to the owners. Dogs are prized by their owners, and are very annoying to the persons who are troubled by them. This case is to be decided somewhat upon the definitions given you. And (to repeat a little) at the time the dog was shot, was he still engaged in worrying these rabbits (if he had worried them before,) or was that a past act? Was it being repeated and continued along, or had it ceased? There is the distinction you have to draw, fairly, under all circumstances, and as you find it, the verdict must fall on one side or the other, so far as this point is concerned. . . . ."

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

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

True, the statute does not say specifically that unlicensed dogs may be killed by any one, but by implication it says that such dogs are public nuisances, and if so killed the owner can have no redress or remedy against the killer; because as Chief Justice Shaw says in case of *Tower* v. *Tower*, 18 Pick. 263, in the opinion upon a similar statute to ours: "We think it was the intention of the legislature not to give to the owner of the dog a right to maintain an action for destroying him unless he had in fact given that security to the public which the act required, by causing him at the time to wear a collar with the name and residence of the owner thereon." *Blair* v. *Forehand*, 102 Mass. 145.

The question there determined was not whether the defendant had a right to kill the dog, but it was as to whether or not the owner of an unlicensed or uncollared dog could recover for his destruction, no matter how or by whom he might be killed.

This statute relating to dogs, is penal and prohibitory in its provisions. No dog under its provisions, can be kept legally, except that it be registered, numbered and licensed annually. The violator of the law is liable to a fine of ten dollars. The plaintiff here was a violator of a prohibitory and penal statute. Being, therefore, a violator of a prohibitory law, he cannot invoke the law to protect him in its violation, any more than a violator of the law relating to the Lord's Day can invoke the law to protect him. Section 11 shows the intention of the legislature to make the licensed dog legal property, and a subject of litigation by providing that if any person shall steal, secrete or kill any registered dog, he shall be liable to the owner in a civil action; and that no action could be maintained to recover for the value of any other dog if he had any. This affirmative statute negatives the idea that a person who kills a dog, not so registered, shall be liable; and also the idea that the owner of an unlicensed dog may recover. This affirmative statute relating to recovery implies a negative. "If a thing is limited to be done in a particular form or manner, it excludes every other mode, and affirmative expressions introducing a new rule, imply a negative." Sedgwick on Construction of Statutory and Com. Law, p. 31, note A; *New Haven* v. *Whitney*, 36 Conn. 373.

"When a statute assumes to specify the effects of a certain provision, it is to be taken that no others were intended." *Perkins* v. *Thornburgh*, 10 Cal. 189.

It would be strange for the court to hold that any one may recover for, or be allowed to set a value even, upon a dog which the law forbids him to keep, and where too, a penalty is imposed by law for so doing, especially if when killed the dog is at large, and out of the control of his master or keeper.

The statute nowhere says a dog may be killed while in the act of so doing, but it does say if a dog "suddenly assaults," or is "found worrying," etc., its life may be taken. These two are the offenses mentioned in this statute, if the life is so taken while the dog is "outside of the inclosure or immediate care of its owner." We contend, therefore, that if this dog had been licensed and at liberty to rove as he pleased, the defendant would, under the facts

disclosed here, have been justified in shooting him. But this dog was not licensed; but was at large trespassing on defendant's premises and worrying and destroying his domesticated animals. *Hodge* v. *State*, 11 Lea, (Tenn.) 528.

Under the statute and by the common law, the defendant had the right to kill the dog when found trespassing on his premises, worrying his animals and destroying his property. In this case the act of worrying and shooting were the same, and at the same time. The shooting was done by the defendant for the purpose of protecting his property. 1 Hilliard on Torts, 645, and cases there cited.

It has been held that the owner of sheep is justified in killing a dog, which has destroyed some of his sheep, and returned upon his premises apparently for the purpose of destroying others, although the dog at the time he is killed was not in the very act of destroying his property. 1 Hilliard on Torts, 155.

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

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

STROUT, J. Trespass for killing plaintiff's dog. Defendant claimed that the dog was trespassing on his premises, and was, "then, or had been immediately before the shooting, engaged with two other dogs in chasing and worrying his domesticated animals, to wit, tame rabbits;" and that the killing was therefore justified.

The dog had not been licensed for that year, as provided by c. 287 of the laws of 1893, though it had been the previous year. The defendant claimed that because he was not licensed, that there was no property in him, and that anybody had the right to kill him, and therefore the owner had no redress.

The first exception is to the ruling of the presiding justice, "that a dog is property," and to the instruction "the defense takes the position that in this case there was no property in this dog to his owner, that he was a nuisance; that any person could kill and slay him because he was not licensed and registered according to the statute of this state. I rule against that proposition,"

By the common law, a dog is property, for an injury to which an action will lie. *Wright* v. *Ramscot*, 1 Saunders, 84; *Athill* v. *Corbet*, Cro. Jac. 463. But larceny could not be committed of a dog. But by statute 7 and 8 Geo. 4, it is made a misdemeanor to steal one.

In *State* v. *McDuffie*, 34 N. H. 526, it is said, "dogs are domesticated or tame animals, and as much the subject of property or ownership as horses, cattle or sheep. Trespass or trover will lie for them." In *State* v. *Harriman*, 75 Maine, 562, where it was held by a divided court that a dog was not a domestic animal within the statute making it a criminal offense to kill or wound a domestic animal, it was said, "the dog is recognized as property so far as to afford a civil remedy for an injury, but seldom, if ever, any other."

If, as claimed by defendant, the fact that this dog was not licensed for that year, rendered him a nuisance, which is not admitted, he would be a public nuisance, and no individual was authorized to abate it, unless he was suffering damages therefrom peculiar to himself and distinct from the injury to the public. *Corthell* v. *Holmes*, 87 Maine, 27.

But the defendant claims that the statute of 1893 has by implication outlawed all dogs not registered as therein provided. That act provides for an annual registration of dogs before the first day of April, and imposes a penalty upon the owner if he fails to so register. Section 10 requires the selectmen "within ten days from the first day of May to issue a warrant" for killing unlicensed and uncollared dogs.

No authority to kill them is given under this statute except to a constable acting under such warrant—which cannot issue before the first day of May nor after the lapse of ten days thereafter. The legislature evidently contemplated, notwithstanding the requirement for registration before April 1, that dogs might be registered and licensed at a later date; for in the same section which requires registration before April 1, it is provided that "a person becoming the owner or keeper of a dog after the first day of April, not duly licensed, shall cause it to be registered, etc., as provided above."

It may be that the owner who fails to register his dog before April 1, may be liable to the penalty prescribed, but if he sells the dog at any time after that date, the then owner may register him and protect him against the warrant in the constable's hand; and as revenue appears to be one object of the act, it would seem that the owner who neglected to register on April 1, might do so later. This dog was shot April 24, before the municipal officers were authorized to issue a warrant.

It will be noticed that this act provides only for killing unlicensed dogs, by a constable under a warrant, and impliedly forbids killing by any other person.

The postponement to May 1, of the authority to the municipal officers to issue a warrant, indicates an intention to allow the negligent owner opportunity to repair his forgetfulness.

But, it is said that section 11, which provides a civil liability for stealing or killing a registered dog, by implication outlaws all that are not registered, and authorizes anybody to steal or kill them. If this provision adds any remedy not known to the common law, it certainly does not take away rights previously existing by it.

The defendant justified the killing upon the ground that the dog was worrying his rabbits. He asked the court to instruct the jury, "that if the jury find that, at the time of the shooting of the dog, he had killed or wounded the defendant's domesticated animals on the defendant's premises, and was again there apparently for the purpose of destroying others, the defendant would not be liable for killing the dog, but would be justified in so doing, even though the dog was not at the time in the act of destroying or worrying the animals.

This instruction was refused and rightly so. It was too broad. Revised Statutes, c. 30, § 2, provides that "any person may lawfully kill a dog that suddenly assaults him or another person, when peaceably walking or riding, or is found worrying, wounding or killing any domestic animal, outside of the inclosure or immediate care of his owner." Under this statute it is not enough that the dog may have worried or killed a domestic animal before, nor that there is a belief or apprehension that he intends to do so, to justify

the killing, but he must be in the act—or, in the language of the charge in this case, "the worrying and the shooting must be substantially at the same time." "If he had been worrying the defendant's rabbits, and had been merely momentarily checked or held at bay by the girls at the door, or the hired man or anybody else, and the dog had not quit the chase but was still intent at a little distance from out his tracks where he had previously begun to worry the animals, and he was still intent upon the act of worrying, either returning or ready to return as soon as the obstructions for getting at the rabbits were removed from him, I think you would be authorized, if you see fit to say that his worrying and killing were co-existent acts, concurrent acts, done at the same time, that they were one transaction."

The defendant has no reason to complain of this instruction. In *Morris* v. *Nugent*, 7 Car. & P. 572, it was held that to justify shooting a dog, he must be actually attacking the party at the time. In that case the dog run out and bit the defendant's garter, and the defendant turned round and raised his gun and the dog ran away, and he shot the dog as he was running away, and it was held he was not justified. So, to justify shooting a dog because he was worrying fowl, and could not otherwise be prevented, the party must show that the dog was in the act of worrying at the time. *Janson* v. *Brown*, 1 Camp. 41. See also *Wells* v. *Head*, 4 Car. & P. 568. It is not sufficient that the party had reasonable cause to believe that the dog was proceeding to worry the animals, but he should also have reasonable cause to believe that it was necessary to kill the dog to prevent him from killing the animals. So held in *Livermore* v. *Batchelder*, 141 Mass. 179.

The refusal to instruct and the instructions given were in accordance with law, and fully protected defendant's rights.

Exceptions overruled.

In Re Petition of Penobscot Lumbering Association.

Penobscot. Opinion December 26, 1899.

Lumbering Association. Safety Fund. Debts. Priv. and Spec. Laws, 1854, c. 298; 1869, c. 34; R. S., 1857, c. 47, § 73.

The obvious intention of a statute, and not its literal import, is to govern.

Held; that the legislature intended by the use of the word "debt," in the charter of the Penobscot Lumbering Association, to include not only sums of money due under simple contract, or by specialty, but also unliquidated claims for damages arising from negligence.

Section seven of the amended charter of the Penobscot Lumbering Association, (Private & Special Laws of 1869, chap. 34) provides for the gradual accumulation of a "safety fund" by the association, and further provides that the safety fund, at the end of a specified period, shall be used, among other things, "to pay any other debt of the association," and that any part of the fund not needed for the purposes designated by the Act, shall be paid back to those who paid it, under the direction of a justice of the Supreme Judicial Court. Upon a petition of the association to a justice of the court for such a distribution of the fund, objection to a present distribution was made by parties who have in suit claims against the association for damages alleged to have been sustained by them through the negligence of the association in booming and rafting their logs, within the period during which the safety fund was accumulated.

Held; that the "safety fund" was intended to stand as security for the payment of all the debts and liabilities of the association, which remain unpaid, and including unliquidated claims for damages arising from the negligence of the association.

It is held, therefore, by the court that this safety fund should be held for the security and payment of the contingent liabilities named in the petition. The justice before whom the proceedings are pending may fix some reasonable time within which these liabilities are to be reduced to judgment, and may extend such time, if it becomes necessary. After which, upon payment of such judgments, by the association, or out of the safety fund, the balance of the fund shall be paid back to those who paid it, or to their heirs or assigns, under the direction of said justice.

See *Sibley* v. *Penob. Lumbering Assoc.* post, p. 399.

On Report.

Petition by the Penobscot Lumbering Association for distribution of a safety fund accumulated under its charter. The case is stated in the opinion.

C. P. Stetson and M. Laughlin, for petitioner.

C. F. Woodard; C. J. Hutchings; J. D. Rice; P. H. Gillin and T. B. Towle, for intervening parties in opposition.

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

SAVAGE, J. The Penobscot Lumbering Association is the lessee of certain booms, piers and other property belonging to the Penobscot Boom Corporation, in Penobscot river, and carries on the business of booming and rafting logs in that river under the provisions of a charter granted to it by the legislature in 1854. Private and Special Laws of 1854, chap. 298. Any owner of lumber in the Penobscot river, or designed to come into the Penobscot boom, may become a member of the corporation in the manner specified in the charter and by-laws. Section 3. A certain toll or boomage on logs passing through the booms is paid by the association to the Penobscot Boom Corporation as a rental for the leased property, and the boom corporation has a lien on any and all such lumber to secure the payment of such tolls. Section 9. Provision is made for the enforcement of the claim of any member who has suffered loss or damage through the neglect or carelessness of the association or its officers. Section 11. In order to meet all payments and expenses of every character, due from the association, it is made the duty of the association to make and enforce assessments therefor, either after the payments or expenses or in anticipation of the same. The assessments are to be pro rata upon every thousand feet of lumber passing through the booms, and a lien is given on the logs to secure the payment of the assessments. In addition, the association may recover the assessments by action of assumpsit. Section 18. If the assessment collected exceeds the amount paid for the use and repair of the boom and all other expenses, the surplus is to be refunded pro rata to those from whom it was received. Section 19. So much of the general financial system of the association should be taken into consideration, when we attempt to construe the provisions of the "safety fund," concerning which this controversy has arisen.

In the original charter, § 19, we find the following language relating to a safety fund: "In order to ensure the safety of debts due from the association, it shall be its duty before taking control of the lumber in the boom, to establish and constantly to maintain a substantial fund amounting to at least fifty thousand dollars, lodged in the hands of a trustee." Section 20 provided that "so often as any judgment or other liquidated claims against the association shall be made, it shall be the duty of the trustee to pay the same out of the safety fund." It was also provided that the safety fund might consist of good and well secured notes, and that the notes might be given by members of the association as individuals, or by other persons.

In 1869, the foregoing provisions relating to a safety fund were repealed. Private and Special Laws of 1869, chap. 34, § 4. And in this latter act the following new provision for a safety fund was made: "The association shall every year assess and collect one-half cent for every thousand feet on all logs that come into the boom, and shall deposit the same in the Bangor Savings Bank, ... as a safety fund, to remain there on interest till the end of fifteen years and then to be used, first, for the payment of any and all sums due to the Penobscot Boom Corporation from the association for not restoring the boom in good condition, or other cause; and, second, to pay any other debt of the association; and any part of said fund not needed for said purpose shall be paid back to those who paid it, or to their heirs or assigns . . . .

"The application or distribution of this fund shall be made under direction of one of the justices of the supreme judicial court to be designated by the chief justice." Section 7.

The charter, with this provision in it, was granted in 1869, for the term of fifteen years, and in 1883 was renewed for another fifteen years. At the expiration of this latter period, the pending petition was made to a justice of the supreme judicial court for a distribution of the safety fund collected during the period, and then amounting to $13,854.98. The petition sets forth that "there are not any sums due from said association to the Penobscot Boom Corporation under the provisions of said section seven"

(of the amended charter, Private and Special Laws of 1869, chap. 34,) "and said association does not owe any other debts whatsoever, unless the following contingent liabilities shall he construed to be 'debts' within the meaning of the language of said section seven, namely:—There are now pending in the supreme judicial court for the county of Penobscot, six actions against said association for alleged negligence of said association during the rafting season of 1893 (within said period of fifteen years,) in sorting, rafting, delivering and caring for the logs of various owners; that is to say, one in favor of G. C. & G. H. Sibley, against said association, which was tried at the April term, 1899, of said court, and a verdict obtained for the plaintiffs in the sum of about $300, and in reference to the same there is pending a motion and exceptions to be argued at the June law term at said Bangor," and five other similar actions not yet tried, in all of which damages to the amount of $21,000 are claimed.

After notice to all parties interested, the several plaintiffs in the foregoing actions appeared to object to the distribution as prayed for, and by consent, the justice before whom the petition was pending reported the whole matter for the determination of the law court. The stipulation is that, if this court determines that the safety fund should be distributed as prayed for in the petition, then it shall forthwith be distributed under the direction of the justice below; but if this court determines otherwise, then "it shall give such directions regarding the premises, as it may deem legal and proper."

The facts stated in the petition are admitted to be true. It appears by the report that the booms of the Penobscot Boom Corporation are in good condition as contemplated by the provisions of section seven of the Act of 1869, the section under which these proceedings were instituted. It also appears that the association owns personal property of the value of about $2600, and possesses cash to the amount of about $1800.

The parties objecting to a present distribution of the safety fund among the members of the association who contributed to it contend that, under the charter, it should not be distributed until all

sums due the Penobscot Boom Corporation are paid, *nor until all other debts of the association are paid;* and they say that their unliquidated claims for damages growing out of the alleged negligence of the association in the performance of its duties to them, as log owners, are "debts" within the meaning of the petitioner's charter, and so are entitled to be paid out of this fund, at least, after being reduced to judgment, and meanwhile are entitled to have it held as a "safety fund." And, since nothing is due to the Penobscot Boom Corporation, it only remains to inquire whether the contention of these claimants should be sustained.

The legal construction of the word "debt," as found in statutes, has been the subject of much discussion in the decisions, but a review of them would be of little service here. The construction of this statute must fall within the general rules for the construction of all statutes, and the chief of these rules is to give effect to the legislative intent, as it may be ascertained from all the language used. And within that rule, it will be our duty to give the word "debt" such a construction in this case as will carry out what we think is the evident design of petitioner's charter. The obvious intention of a statute, and not its literal import, is to govern. *Seiders* v. *Creamer*, 22 Maine, 558; *Holmes* v. *Paris*, 75 Maine, 559; *Allen* v. *Young*, 76 Maine, 80. The meaning of the statute is to be ascertained though it seems to conflict with the words. *Landers* v. *Smith*, 78 Maine, 212; *Gray* v. *County Commissioners*, 83 Maine, 429. This is only saying that a statute must be construed according to the obvious legislative intent shown by all of its provisions taken together, and that the special meanings of some words may be enlarged or modified by the general meaning of all the words as a whole. The meaning of the word as used in the charter may be extended beyond the technical and limited significance of the word itself. *Smith* v. *Chase*, 71 Maine, 164.

What did the legislature intend by the use of the word "debt" in this section nineteen of the original charter? Was it only to include sums of money due under simple contract or by specialty, or was it to include any claim for money, even an unliquidated

claim for damages arising from negligence? We think the answer is to be found in the charter. Looking into that instrument, the substance of which so far as it is important we have already given, we find that the petitioner is a business corporation, carrying on the business of booming and rafting logs. It owns property and employs men. It is liable to incur the expenses and to sustain the losses and damage which are incident to that kind of business. The charter anticipates that the association may become liable to log owners for damages occasioned by its negligence, and in addition to the common law right of action, gives the log owner a remedy by summary process for the enforcement of his claim for damages. Section 11. It is made the duty of the association to make and enforce assessments of money "in order to meet *all payments and expenses of every character* due from the association." Section 18. This language is broad enough to cover every conceivable payment which the association might legally make, and includes claims for damages like those in question. The association may make such assessments in anticipation of the necessary payments, or after the payments have been made. Which course was pursued in 1893, the year these claims for damages arose, does not appear. But it may be inferred that if any more money was assessed and collected in that year than was equal to the amounts paid for current expenses, it has been refunded to those who paid it, for such a course is authorized by section 19, and seems to be contemplated as the proper course. The petitioner's statement of the amount of cash on hand does not convey the impression that any has been reserved or set aside to satisfy judgments in these cases.

It may seem that these provisions of the charter would be sufficient, if effective, to provide money for all payments required to be made in any contingency. But it appears that in the very same section which authorizes the return of the surplus of the assessments to the contributors, provision is made for a safety fund, "in order to ensure the safety of debts due from the association." Assessments might be made to cover all kinds of necessary expenditures. Was the safety fund intended to apply to anything less?

Sections 18 and 19 are very closely associated in purpose, and they should be construed together. We think that the word "debts" in section 19 was intended to be synonymous with "payments and expenses of every character" in section 18. It was the duty of the corporation to assess for payments and expenses. But it might fail to do so, or it might fail to collect, or contingencies might arise by which it might lose the security of its lien upon the logs or be unable to enforce payment by action at law, or claims might first be made known after the surplus of the assessment had been redistributed under section 19. And foreseeing such contingencies, the legislature said that the association must provide a "safety fund," before it assumed control of the logs, and out of this safety fund should be paid "judgments and other liquidated claims." Section 20.

Now it is evident that section seven of the amendatory act of 1869 was intended to be a substitute for the safety fund provisions in the act of 1854, which were repealed; and we think that the safety fund provided for in the act of 1869 was intended for the security of the same classes of payments, expenses and liabilities as were secured by the original safety fund. The essential difference lies in the different manner in which the fund is made up. The later statute uses the word "debt" just as the former does, and we think with the same significance. One or two authorities are cited by way of illustration. In *Hewett* v. *Adams*, 50 Maine, 271, where a claim was made upon the stockholders of a bank, arising out of alleged official mismanagement of the directors, it was held that the word "debts" used in R. S., 1857, chapter 47, § 73, was synonymous with the word "claims" used in the same section, and that the provisions making stockholders liable for "debts" of the bank would make them liable for a "claim" of that nature. See also *Mill Dam Foundery* v. *Hovey*, 21 Pick. 417.

The amount of available assets left in hand at the end of each year's operations is naturally expected to be small. The boom company owns the booms and piers, and the surplus of cash of the association is redistributed. But, surely, it must be understood that the charter contemplates that all legal liabilities of the petitioner must in the end be satisfied in some way, unliquidated

claims for damages, as well as simple debts. If a claim for damages arises, or if one is contested and goes to judgment, only after the assessment for the year in question has been made, or after the surplus for that year has been redistributed, how is it expected that it shall be paid? Shall it be provided for by a new assessment on the log owners of the year when the damage occurred? Such an assessment may be uncollectible. The log owners may have become insolvent or their estates beyond the reach of legal process. Or, shall the assessment be made on the log owners for the year after the claim is reduced to judgment, in this case, many years after the damage complained of occurred? Such a course may be unfair and inequitable. These considerations also lead us to the conclusion that the safety fund was intended to stand for the security and payment of all such claims and liabilities which remain unpaid. The fund is the annual contribution of log owners for just this purpose. To the objection that by this means the contributions of the log owners for one year may be used to pay liabilities of another year when the contributors were not owners, it may be replied that such may be the inevitable consequence whenever persons associate themselves together in a corporate body. The corporate fund at the time of payment pays the liability, regardless of who contributed it, or who were stockholders at the time the liability arose.

We are, therefore, of opinion that this safety fund should be held for the security and payment of the contingent liabilities named in the petition.

The justice before whom the proceedings are pending may fix some reasonable time within which these liabilities are to be reduced to judgment, and may extend such time, if it becomes necessary; after which, upon payment of such judgments, by the association, or out of the safety fund, the balance of the fund shall be paid back to those who paid it, or to their heirs or assigns, under the direction of said justice.

Case remanded for further proceedings in accordance with this opinion.

GREENLEAF C. SIBLEY, and another,

vs.

PENOBSCOT LUMBERING ASSOCIATION.

Penobscot. Opinion December 26, 1899.

Corporation. Actions. Log Owners. Priv. and Spec. Laws, 1854, c. 236, § 3; c. 298, § 6; c. 299, § 10; 1869, c. 34.

A corporation aggregate is a collection of individuals united in one body under such a grant of privileges as secures the succession of members without changing the identity of the body, and constitutes the members for the time being one artificial person, or legal being, capable of transacting some kind of business like a natural person.

Held; that the Penobscot Lumbering Association is a corporation, and liable to its members in actions at law for damages sustained by them through its negligence in booming and rafting their logs.

No duty is imposed upon such injured parties, either by the defendant's charter or by the common law, of presenting their claims to the defendant within any particular time; nor are they obliged to present their claims before bringing suit.

See *In re Penob. Lumb. Assoc.*, ante. p. 391.

ON MOTION AND EXCEPTIONS BY DEFENDANT.

This was an action on the case, in which the jury rendered a verdict of $309.08 for the plaintiffs, who claimed that the defendant corporation had been guilty of carelessly and negligently rafting out and delivering to them their logs in the spring and summer of 1893.

At the close of the charge, the defendant association, by its counsel, requested the court to rule and instruct the jury that the action could not be maintained for the following reasons:

Because the plaintiffs failed seasonably to present their claim for damages to the defendant association that it might be included in the assessment, or a supplementary assessment of that year 1893, covering the expenses of that year.

Because it was the duty of the plaintiffs to present their claim for damages to the defendant association within a reasonable time,

and there is no evidence in the case that they ever presented their claim to the association, except by bringing this action, November 6, 1897.

Because the plaintiffs were members of the defendant association during the rafting season in question.

The presiding justice refused to give the requested instructions and after verdict for the plaintiff, the defendant took exceptions.

The case is stated in the opinion.

P. H. Gillin and C. J. Hutchings, for plaintiffs.

C. P. Stetson and M. Laughlin, for defendant.

Counsel cited: *Plummer* v. *Penob. Lumbering Assoc.*, 67 Maine, 363; *Ocean Castle* v. *Smith*, 58 N. J. L. 545; *Russell* v. *Men of Devon*, 2 T. R. 667; *Hill* v. *Boston*, 122 Mass. 344; *Lavalle* v. *St. Jean Baptiste Society*, 17 R. I. 680; *Glavin* v. *R. I. Hospital*, 12 R. I. 411, (34 Am. Rep. 675); 18 Am. & Eng. Corp. Cases, p. 428; Dillon, Mun. Corp. § 948, et seq., (4th Ed.); 7 A. & E. Ency. L. 839, 2nd Ed.; *McDonald* v. *Mass. Gen. Hospital*, 120 Mass. 432; *Perry* v. *House of Refuge*, 63 Md. 20, (52 Am. Rep. 495); *Elmore* v. *Drainage Com'r*, 34 A. & E. Cor. Cases, 491; *Mersey Docks* v. *Gibbs*, 11 H. L. Cases, 688; *Newcomb* v. *Boston Protective Department*, 151 Mass. 215; *Fire Ins. Patrol* v. *Boyd*, 120 Pa. St. 624; *Grindle* v. *York Mutual Aid Association*, 87 Maine, 177; *Weymouth* v. *Penob. Log-Driving Co.*, 71 Maine, 29.

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

SAVAGE, J. After a verdict for the plaintiffs, this case comes up on a motion for a new trial, and exceptions by the defendant. The plaintiffs claim that by reason of the negligence of the defendant, in booming and rafting their logs in Penobscot river, during the season of 1893, they suffered damage. We do not think the defendant can take anything by its motion, on the grounds that the verdict is against the evidence, and that the damages are excessive. There is sufficient evidence to sustain the verdict, and the damages are not clearly excessive.

But the defendant urges that the plaintiffs are not entitled to retain their verdict as a matter of law, and this point requires careful consideration.

The contention of the defendant is, in the first place, that it is not a corporation in such sense as to be a separate, legal entity, distinct from the members who compose it; that it is in effect a "corporate partnership," and that the plaintiff, being a member, being one of the partnership, cannot maintain an action at law against the partnership.

We do not think this position can be sustained. The defendant's charter, Private and Special Laws of 1854, chap. 298, is entitled an act to *incorporate* the Penobscot Lumber Association. By section 1, the association is vested with the usual "powers of corporations." It is declared that the "corporate power" is vested in a board of trustees. This last provision was amended in 1869, (Private and Special Laws of 1869, chap. 34, § 2,) so that the "corporate powers" are now vested in the members of the association. The members named in the charter are called "corporators." Section 2. The charter provides that the association shall "remain a corporate body" after the time named in the first section of the act, for the purpose of settling up its business. Section 36. These expressions from the charter leave no doubt of the intention of the legislature to create a corporation. The character of the body created, as drawn from the general provisions of the charter, is clearly corporate. It does not possess every attribute of a corporation, but it possesses sufficient. It answers well an approved definition of a corporation. "A corporation aggregate is a collection of individuals united in one body under such a grant of privileges as secures the succession of members without changing the identity of the body, and constitutes the members for the time being one artificial person, or legal being, capable of transacting some kind of business like a natural person." *People* v. *Assessors of Watertown*, 1 Hill, 620.

The members of this association are the log owners on Penobscot river and its tributaries. They carry on the business of booming and rafting logs in the Penobscot boom. The members may

change from year to year, but the association remains, and the business goes on. The association is a legal entity, entirely distinct from its members. It is a corporation.

But the defendant contends further that if it is a corporation, it was not the intention of the legislature that it should be made liable to its members in actions at law, for damages such as are claimed in this case. And in support of this position, the learned counsel for the defendant liken this corporation to quasi-corporations, like municipalities organized for public purposes, and whose constituent membership are such nolens volens. They also say that by statute this association has succeeded to all the duties and liabilities of the Penobscot Boom Corporation, and that by a fair construction of its charter, remedies of members are limited to such remedies as existed against the Penobscot Boom Corporation; and hence that persons suffering damage are limited, in the first instance at least, to the special remedy provided in the charter of the latter corporation. Private and Special Laws of 1854, chap. 236, § 3; 1854, chaps. 298, § 6, and 299, § 10. It is argued further that it was not intended that actions of tort should lie against this particular corporation, not only because of the general character and scope of the corporation, but also, among other things, because the charter does not give the right to sue and impose the liabilty of being sued, and because there is no corporate fund provided out of which judgments for damages can be satisfied. We shall not review the authorities cited by counsel, nor discuss the positions taken by them, further than to point out that they are not applicable to the facts in this case.

This association is not a quasi-corporation. It is not like a municipal corporation. Only in a limited sense is it a public corporation. It is rather a corporation organized solely for the convenience and profit of its members, not a profit earned and distributed as a dividend, but a profit saved in the increased convenience and the lessened expense of booming and rafting their logs, by a single instrumentality, under one management. A municipality even is liable for acts of negligence in the transaction of such business as it may lawfully do for profit, as distinguished from the

exercise of its governmental or public functions. *Moulton* v. *Scarborough*, 71 Maine, 267. But, beyond any considerations arising from the statutory character of the defendant corporation, we think it clearly appears from the charter itself that this corporation has the power to sue, and is subject to being sued, like other business corporations, and that it is specifically made liable to suit for damages to log owners occurring through the negligence of the corporation. In the first place, the corporation is vested with the usual powers of corporations. That includes the power of suing, and we think, incidentally, the liability of being sued. Then, if that is not enough, sections 10 and 11 provide for suits by members against the corporation, and section 11 impliedly, but clearly, recognizes the right of a log owner to maintain an action at law to recover damages caused by negligence. That section provides a remedy by summary process for any owner of lumber who may suffer loss or damage through the negligence of the association, but the summary process is given "in addition to his common law rights." This last phrase has no significance except upon the assumption that such injured party has a remedy also at common law.

As to the suggestion that no fund is provided for the payment of damages such as these, we think it is well answered by the provisions of section 18, by which the corporation is given the power, to which is added the duty, of raising a fund by assessment, "in order to meet all payments and expenses of every character." If it has no fund, it has the power to create one, and it is its duty to do so, if the necessity for it arises. But it has a fund. It is compelled to accumulate a safety fund. Private and Special Laws of 1869, chap. 34, § 7. And we hold elsewhere, (*In re Petition of Penobscot Lumbering Association*, ante, p. 391) that this safety fund is for the security and payment of all debts, including claims like the one in this case.

We need to examine only one other ground of defense under the motion. The charter of the defendant provides for the appointment of Boom Commissioners. Section 25. "Whenever five or more persons interested in lumber shall apply to said commis-

sioner in writing, to visit said boom and structures for the purpose of examining the manner and mode said logs, lumber, masts and spars are being rafted and secured, and see that the trips and passage-ways are properly guarded, and also to examine into and determine whether said boom is safe and secure, and being managed in the best possible manner for the lumbering interest, and the safety and security of the logs and lumber in their care and custody, said commissioners shall forthwith proceed to examine into and determine upon all matters relating to the boom as contemplated in this section . . . . and if the said association shall fully and faithfully do and perform all the requirements and directions of said commissioners, then and in that case said association shall not be responsible for any loss or damage which may arise and accrue to any owners of lumber." Section 26. Two such applications were made in the summer of 1893, and the reports of the boom commissioners thereon are in the case. The defendant claims that it complied with the directions of the boom commissioners, and that it is thereby relieved from liability in this suit. There is no presumption that the defendant complied with these directions, and we think the evidence fails to show that it did in all respects. Further, the testimony tends to show that the defendant's liability arises largely, if not entirely, out of alleged acts of negligence prior to the examinations made by the boom commissioners, namely, the failure to employ seasonably a sufficient number of men to boom and raft the logs. And as to expressions of satisfaction found in their reports, in relation to the manner in which the work was being done, we can only say that we cannot substitute the opinion of the commissioners for the verdict of the jury. This defense cannot avail.

At the close of the charge of the presiding justice, the defendant requested the court to instruct the jury that the action could not be maintained, (1) "because the plaintiffs failed seasonably to present their claim for damages to the defendant, that it might be included in the assessment or a supplementary assessment of that year, 1893, covering the expenses of that year"; and (2) "because it was the duty of the plaintiffs to present their claim for damages

to the defendant within a reasonable time, and there is no evidence in the case that they ever presented their claim to the defendant, except by bringing this action, November 6, 1897." The presiding justice declined so to rule, and the defendant excepted.

We perceive no merit in the exceptions. The statute which made these plaintiffs members of the defendant association and subjected their logs to the defendant's booming and rafting, nowhere imposes upon the plaintiffs the duty of presenting their claim to the defendant, within any particular time, and certainly they were under no common law obligation to do so. Nor were the plaintiffs obliged to present their claim before bringing suit, and they may bring suit at any time within six years.

The remaining exception has been considered already in the discussion concerning the corporate character of the defendant association.

Motion and exceptions overruled.

HARRIET E. FROST, and others, in Equity,

vs.

FREDERICK S. WALLS, and another.

Knox. Opinion December 26, 1899.

Equity. Law. Laches. Fraud.

Fraud is never to be presumed. Where many years have elapsed, and parties and witnesses are dead, and important papers are lost, the proof of fraud should be full, clear and convincing. *Held;* that the complainants have failed to furnish such proof in this case.

Complainants in equity may fairly be barred by laches.

Where a complainant in equity is not in possession he cannot test defects or flaws in a defendant's title. It is not the business of equity to try titles, and put one party out and another in.

Held; that so far as the validity of the defendant's title in this case is affected by illegality in the appointment of a guardian, from whom the defendants' title is deraigned, such question should be tried in an action at law.

ON REPORT.

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

The case is stated in the opinion.

J. H. Montgomery, for plaintiffs.

J. E. Moore, for defendants.

SITTING: EMERY, HASKELL, WISWELL, STROUT, SAVAGE, JJ. FOGLER, J., having been of counsel, did not sit.

SAVAGE, J. This case is reported to the law court on bill, answer and proof.

The complainants are the children and heirs at law of James McComiskey, a resident of Nova Scotia, who died intestate in 1874, leaving real estate in Vinal Haven in this state. In October, 1875, upon a petition which purported to be signed by the mother of the complainants, Moses Webster was appointed their guardian. It was alleged in the petition that they were residents of Nova Scotia, but that they were seized of real estate in the county of Knox. In the same year, 1875, the guardian obtained from the probate court license to sell the real estate for an alleged advantageous offer of four hundred dollars. Under this license, the guardian conveyed the interest of the wards in the estate to one John S. Ingerson, June 26, 1876. Ingerson conveyed a portion of the land to Lucy A. Miller, a daughter of Moses Webster, July 12, 1876. Subsequently, at different times in 1876, 1877 and 1878, Ingerson conveyed three separate parcels of the land to Moses Webster. In January, 1880, he conveyed the remainder to one Wharff; and in August of the same year, Wharff conveyed to Webster. Webster died in 1887, and the defendants are his executors, and one of them, Walls, is his residuary devisee. All the real estate in question, except the portion conveyed to Lucy A. Miller, is now in the possession of Walls, and claimed by him as residuary devisee. The complainants have never been in possession. The present owner of the portion conveyed to Lucy A. Miller in 1876 has not been made a party to the bill, so that if the bill is maintainable against these defendants, it must be sent

back for amendment, to diminish the description of the land claimed by so much as was conveyed to Mrs. Miller. But we think the bill is not maintainable.

The gravamen of the complainants' charges is found in paragraph four of the bill, which is as follows: "And the plaintiffs say that the said Moses Webster was never their legally appointed guardian; that he never invested the proceeds of said sale as aforesaid for them, so far as they know, except in the repurchase of said real estate; that said conveyance of said premises by said Webster to said Ingerson, and the reconveyance of the same from said Ingerson to him were each in fraud of the plaintiffs; that said Webster had no right to act as their guardian in the sale and conveyance of said real estate to the said Ingerson, which was well known to the said Ingerson; that the plaintiffs never knew that the said Webster was their guardian, or that he claimed to be such, or that said premises had been conveyed by him, and to him as aforesaid, until within the year last past; that it is within the year last past that they knew of the estate of their father, the late James McComiskey, in said premises; that said Webster never settled any account of his said guardianship in his lifetime, nor have his said executors since his decease."

The charges are vague and indefinite,—too much so; but under the circumstances of the case, we think it proper to consider them in the light of the evidence. The complainants claim that the signature of their mother to the petition for the appointment of a guardian for them is a forgery, and that the appointment was therefore illegal and void. They also claim that it was a fraud upon them. They say that the appointment of Mr. Webster as guardian was a part of a fraudulent scheme on his part to obtain title to at least a part of these premises which they say he desired; that he was thereby enabled to convey title to Ingerson, who, in pursuance of his scheme, conveyed back to him such portions as he wished. And for further claim, they urge that even if the appointment of Mr. Webster as guardian was valid and unimpeachable, still the conveyance to Ingerson and the reconveyance to Webster were intended to be, and were, really but one transaction,

and that the guardian virtually sold the property to himself, through the medium of a third person, and so that it was contrary to the policy of the law. They ask us to find that these conveyances were collusive and fraudulent; or, if they are not fraudulent, that it be determined that Webster, and after him, his devisee has, by reason of such a conveyance, held the property in trust for the complainants.

It has been held, and is no doubt true, that when one who stands in a trust relation to property, directly or indirectly purchases it for his own benefit, equity, in the absence of laches, will afford a remedy. *Boynton* v. *Brastow*, 53 Maine, 362; *Decker* v. *Decker*, 74 Maine, 465. But in this bill there are no allegations upon which to base such relief. The allegations go only to the legality of the appointment of the guardian, and the question of fraud in the procuring the appointment, or in the subsequent conveyances. They are no broader than that, even by a liberal construction.

We think the allegations of fraud are not satisfactorily proved. And in deciding this, we do not mean, even by inference, to say that if fraud in procuring the appointment of a guardian, which was not appealed from, had been proved, it could have been relieved against in this proceeding. That question has not been argued and is not decided.

The four principal facts which the complainants claim are proved, and are the indicia of fraud, are the forgery of the petition for guardianship, the failure of Webster to account in any way for the proceeds of the sale to Ingerson, a certain false representation made by Webster to the mother of the complainants in 1876, after he was appointed guardian, but before the sale, namely, that he had paid to the decedent all of the price of the property except fifty dollars, and the further fact already stated as claimed that Webster was unlawfully but really the purchaser; and from these facts, as claimed, it is argued that the whole transaction was a fraudulent contrivance on the part of Webster to obtain title to so much of the land as he desired, without payment.

The widow of James McComiskey, and mother of the complainants, is their principal witness. Her testimony upon the forego-

ing points, summarized, is that she never signed the petition for guardianship, nor authorized the signing, nor knew of the appointment until many years afterwards; that Webster did not pay to her any of the proceeds of the sale for herself or the children, or, so far as she knows, account for the proceeds; that she was in Vinal Haven in April, 1876, which was after the appointment and prior to the sale, and was told by Webster that he owed her fifty dollars, and that he had paid her husband for the property all except fifty dollars; and that he offered to give her the fifty dollars remaining unpaid, if she would sign a paper which he had. She did sign the paper, and it appears that it was a quitclaim deed of the property, though she insists that she never sold her interest to him. She testifies, also, that he never paid her the fifty dollars, then or afterwards. It does not appear that she had any further knowledge about the property until, at least, 1885, but it does appear that never after April, 1876, did she make any inquiry about the property, nor ask Webster for the payment of the fifty dollars. Moses Webster is not living and cannot give his version of what he said to Mrs. McComiskey. This witness also states that she knew from her husband that he had agreed with Ingerson, whose wife was his sister, that he, Ingerson, might have the premises upon the payment of five hundred dollars when he was able to pay, and that until he could afford to pay he could live upon them free of rent. It appears that Ingerson and his wife were living upon the premises when McComiskey died, in 1874, and when Mrs. McComiskey visited them in 1876.

Mrs. McComiskey, the witness, had been informed, then, prior to her visit, that her husband owned land in Vinal Haven, in which she, by her dower right, and her children as heirs, were interested, and that they were entitled either to five hundred dollars, in case the arrangement with Ingerson was enforceable and was carried out, or to the land itself. As a woman of ordinary intelligence, she must have known so much as that. Armed with this information as she was, it is singular indeed that she should have acquiesced without inquiry in a statement by Webster that he had paid for the property all except fifty dollars. The title was a matter of

public record and easily ascertainable. The Ingersons were there, with whom the arrangement with her husband had been made, and might be able to affirm or deny Webster's statement. But it does not appear that she asked any questions of anybody. If it be true that Webster agreed to pay her fifty dollars and did not, it is singular that she never asked him for it. If it be true that she did not knowingly give Webster a deed of her interest, she must have supposed that she still owned it, and it is singular that for more than twenty years she made no effort to ascertain the situation of her estate.

Again,—and this bears also directly upon the question of fraudulent purpose,—it appears to us to be beyond question that Mr. Webster, in November, 1876, mailed to Mrs. McComiskey, at her admitted postoffice address in Nova Scotia, a bank draft, payable to her order, for one hundred and fifty dollars, and the draft was subsequently paid by the drawee in due course of business. This draft was accompanied by a letter to Mrs. McComiskey, stating that it was "in payment of balance due you for land sold as guardian for your children." Mrs. McComiskey denies the receipt of either the draft or the letter. The draft itself has become lost or destroyed, and it cannot be made certain that she did or did not indorse it.

Now it is not claimed that the payment of the money to the mother would be a good payment to the children, nor that they would thereby be barred necessarily of a recovery from their guardian, by the proper form of action. But if Moses Webster did mail a draft for the one hundred and fifty dollars to the mother and natural guardian of the children, and did then by letter intended for her perusal state that the draft was for a *balance* due her for lands sold *as guardian* for her children, and the letter and check were sent in the usual course of business, we think it is entitled to much weight, especially after the lapse of so many years, as showing an absence of fraudulent purpose on his part. And in this respect, it makes no difference whether Mrs. McComiskey received the draft and letter or not. But the probabilities of her having received them, do, in view of her testimony, bear upon her credibility.

If Mrs. McComiskey knew of the arrangement between her husband and Ingerson, whereby the latter expected to have the property on payment of five hundred dollars, as she says she did, and if she knew in 1876, as the evidence leads us to believe that she did, that the money had not then been paid, and that either the land or the five hundred dollars belonged to her and her children, (for in addition to considerations already noticed, she testifies that Ingerson told her then, in 1876, that "he wished he could sell it [the land] and give me the money") and if, as she testifies, she knew in 1885, that the Ingersons had never paid anything on the place, why did she not make some inquiry about it? Her children were living at home with her, and naturally she was interested for them as well as for herself. That she did not bestir herself seems almost incredible, upon these assumptions. Her conduct seems to be consistent only with the theory that she had been content to have her husband's arrangements carried out, and that the five hundred dollars had been paid by Webster to her, which accords with the statement of Mr. Webster in his letter to her.

The only other testimony which throws light upon the transaction is that of Mrs. Ingerson, the sister of McComiskey, and widow of John S. Ingerson. Her statements tend to show that Mr. Webster desired a part of the land, and for that part was willing to pay the whole five hundred dollars, and that it was arranged between Webster and Ingerson that the former should pay the widow and children of McComiskey the five hundred dollars, for the part he desired, and that Ingerson should have the remainder of the land, which would be in effect carrying out the arrangement with McComiskey. If this was so, it falls far short of proving fraud, whatever else may have been the nature of the transaction.

There seems to be a probability against the fraud theory. Mr. Webster was dealing with real estate which was known by McComiskey's wife to belong to his heirs. Webster must act under the publicity of proceedings in court. The records of that court and the records of the various transfers of title are public and subject to inspection. He gave a bond, and could be held responsible for his acts. He could hardly expect that a fraud would remain undetected, under the circumstances.

Twenty-three years have elapsed since the transactions complained of. Webster died ten years before this bill was brought. Ingerson is dead. Some of the attesting witnesses to the deeds, who might have knowledge, are dead. The bank draft which, as we have seen, would be important to corroborate or impeach the testimony of Mrs. McComiskey, is lost.

Fraud is never to be presumed, but must always be proved. *Grant* v. *Ward*, 64 Maine, 239. And we think in a case where a long time has elapsed, and parties and witnesses are dead, and important papers are lost, the proof of fraud should be clear, full and convincing. Such proof the complainants have failed to furnish.

We think, too, that the complainants may fairly be barred by laches. If we assume that the testimony offered by them is to be fully credited, and that the transactions were fraudulent, and no payment had been made by Webster to any one for them, we think the statements which Mrs. McComiskey says she made to them as far back as 1885, were sufficient reasonably to put them upon inquiry. Webster was alive then, and could have answered them in or out of court. Two of the complainants were of age, one was twenty years old, and one sixteen. The younger ones were not old enough to act for themselves, but they were old enough to listen, to understand and to remember. They were old enough to appreciate that they had, or might have, property interests at stake, if the statements made to them were true. But they waited before they brought their bill eleven years after the next to the youngest, and seven years after the youngest, became of full age. Parties should not sleep upon their rights, while others interested are dying and evidence of the facts is fading out. *Spaulding* v. *Farwell*, 70 Maine, 17; *Godden* v. *Kimmell*, 99 U. S. 201; 2 Pomeroy Eq. Jur. §§ 917, 965.

The point of illegality in the appointment of guardian, aside from the alleged fraud, we think it is not necessary to discuss at length. So far as the validity of the defendants' title may be affected by a question of that kind, the issue must be tried in an action at law, where the remedy is full and complete. It is not the

business of equity to try titles, and put one party out and another in. *Robinson* v. *Robinson*, 73 Maine, 170. The complainants are not in possession, and they cannot by bill in equity test defects or flaws in defendants' title. *Gamage* v. *Harris*, 79 Maine, 531.

Bill dismissed, with costs.

RAOUL MARTEL, and another, by Guardian,

vs.

ETTIENNE DESJARDIN.

Androscoggin. Opinion December 27, 1899.

Action. Guardian. Ward. Mortgage.

A cestui que trust of a mortgage of real estate cannot maintain a writ of entry for possession of the mortgaged premises.

A testamentary guardian of infant wards loaned money of his wards and took as security a mortgage of real estate in favor of himself as such guardian.

Held; that the wards cannot maintain a writ of entry for possession of the mortgaged property.

ON EXCEPTIONS BY DEFENDANT.

The case appears in the opinion.

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

The only question is whether this guardian can maintain this action to foreclose a mortgage, or should it be done by the administrator of the deceased guardian in Canada.

The case shows that Lambert Sarazin, of St. Hyacinthe, Canada, was appointed guardian in Canada, of Raoul and Mary Louise Martel, both of Lewiston, Maine. Previous to the execution of this mortgage, Sarazin, the guardian, took certain money of the Martel children and invested it in the property in Lewiston covered by this mortgage and took the mortgage as security therefor, in his capacity of guardian. He afterwards died in Canada; administrator of his estate was appointed in Canada, and this administrator

also died in Canada. The above guardian and his deceased administrator were foreign guardian and foreign administrator, not subject to the jurisdiction of the courts of this state, or even of the United States.

It is well settled law that the authority of a guardian over both persons and estates of the ward is strictly territorial, not extending beyond the state or country of his appointment. *Leanord* v. *Putman*, 51 N. H. 247; *Rogers* v. *McLean*, 31 Barb. 304; *Weller* v. *Suggett*, 3 Redf. (N. Y.) 249.

In this case, the wards being residents of Androscoggin county would have no power to compel the foreign guardian or his administrator, even if they were living, to come to this state and prosecute the action to foreclose their mortgage, and thus they would be left without power to foreclose their mortgage. Even if the foreign guardian or administrator were living and volunteered to come, they would have no power in this state, being a foreign guardian and a foreign administrator.

Consequently a new guardian was appointed, Pierre E. Provost, a resident of Androscoggin county, and has given bond to the judge of probate, and has full authority to prosecute this action in behalf of said wards.

The administrator of the deceased guardian cannot maintain an action upon the bond of third party to recover a fund alleged to be due the ward. *Davis* v. *Fox*, 69 N. C. 435.

A guardian's administrator has no authority to invest the ward's funds nor to discharge the ward's general indebtedness by setting apart a portion of the guardian's estate for that purpose. *Morhead* v. *Orr*, 1 S. C. 304; *Clark* v. *Tompkins*, 1 S. C. 119.

The executor of a deceased guardian has no right to draw from the bank to pay over to him, money deposited by the deceased as guardian. *Garry* v. *Bank*, 20 S. C. 538.

W. H. White, *S. M. Carter*; *J. G. Chabot*, for defendant.

Sarazin was at most a testamentary guardian, appointed and qualified in a foreign jurisdiction. He took possession of the bequest for the benefit of the minor children, and came into this jurisdiction, made a loan and took the mortgage above described

for security. It is true he was described in the mortgage deed as guardian. While this was notice that he held the title as a trustee for the benefit of the children, it did not in any way prevent the legal title to the land vesting in him by the terms of the deed.

So far as his relations to the property in this jurisdiction were concerned, and his rights and remedies, he is to be treated by our court simply as a trustee. *Everett* v. *Drew*, 129 Mass. 150.

A writ of entry to foreclose a mortgage must be brought by the owner of the legal estate, whether he be trustee or otherwise. 2 Jones on Mortgages, § 1280; *Carey* v. *Brown*, 92 U. S. 171; Loring's Trustee's Handbook, p. 22.

Under our statutes a guardian may bring suit in the name of his ward in relation to property of the estate of which the ward holds the legal title.

Provost is such a guardian, but these wards have no legal title to the demanded premises nor to the mortgage deed. Their estate consists in the right to an accounting of the guardian in Canada, and the enforcement of whatever claims they have against him under the terms of the trust by which he holds this property. But even in case of a guardian seeking to enforce a claim in the jurisdiction of his appointment, where the suit is upon a debt or contract which is the result of the guardian's own management of the estate, such suit would be in the name of the guardian. 9 Am. & Eng. Ency. of Law, (1st Ed.) p. 111.

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

FOGLER, J. On exceptions. Writ of entry. Plea, the general issue. The demanded premises are situate in the city of Lewiston. The defendant is summoned to answer unto Raoul Martel and Marie Louise Martel both of said Lewiston, infants under the age of twenty-one years, who sue this action by Pierre E. Provost, their duly and legally appointed guardian. The question in controversy is whether the plaintiffs have such an estate in the demanded premises as will enable them to maintain the action.

The case is thus: Lambert Sarazin of St. Hyacinthe in the Province of Quebec was appointed in said Province, under the last will and testament of Jean Bte. Germain, deceased, testamentary guardian of the plaintiffs, Raoul Martel and Marie Louise Martel, minor children of L. J. Martel and of all other children which may be born of said L. J. Martel's marriage, May 4, 1893. Said Sarazin loaned to said L. J. Martel five thousand dollars of the funds in his hands as such testamentary guardian, and received from said Martel a mortgage of that date of the demanded premises, under which the plaintiffs claim title. The mortgage ran to "Lambert Sarazin of St. Hyacinthe of the Province of Quebec in the Dominion of Canada, guardian of Marie Louise and Raoul, minor children of L. J. Martel under the last will and testament of the late Jean Bte. Germain, made at St. Hyacinthe aforesaid, and of all other children which may be born of said L. J. Martel's marriage." Sarazin died about two years before the commencement of this action and an administrator of his estate was appointed in Canada, who died about a year before this suit was commenced. In February, 1899, Pierre E. Provost was appointed guardian of the plaintiffs by the judge of probate for the county of Androscoggin. L. J. Martel conveyed the demanded premises to the defendant by deed which was executed and delivered subsequently to the execution, delivery and record of the mortgage. The plaintiffs claim no title to the demanded premises other than the mortgage above referred to. The presiding justice ruled that the plaintiffs were entitled to judgment and the defendant excepts.

We are of opinion that the plaintiffs cannot maintain their action and that the defendant's exceptions must be sustained.

A legal interest in the realty is essential to maintain a writ of entry to foreclose a mortgage or to reduce the mortgaged property to possession. The plaintiff must hold the legal estate at the time he brings the action, and it is immaterial that he holds the estate for the benefit of another. A cestui que trust of a mortgage of real estate cannot maintain a suit of entry for possession of the mortgaged premises. 2 Jones on Mortgages, § 1280; *Somes by Guardian* v. *Skinner*, 16 Mass. 348; *Young* v. *Miller*, 6 Gray, 152.

Even in equity, where a suit brought to recover trust property or to reduce it to possession, in no wise affects his relations with his cestuis que trustent, it is unnecessary to make them parties. *Carey* v. *Brown*, 92 U. S. 171.

In the case at bar, the mortgage under which the demandants claim was in favor of Lambert Sarazin. The legal title was in him although the mortgage was to him as guardian of the demandants. The demandants took no legal estate in the mortgaged premises and cannot maintain this action to foreclose. This was so held in the similar case of *Somes* v. *Skinner*, supra. There a mortgage was taken by one Somes as guardian and for the benefit of his ward who brought the action to foreclose the mortgage. It was held that he could not maintain the action. The court says: "It is true, that the mortgage was taken by N. Somes, guardian of the demandant, and for his benefit; but the legal estate in the mortgage was never in the demandant, and he could not maintain a suit to foreclose the mortgage." This decision is supported by numerous authorities, among which we cite: *Young* v. *Miller*, supra; *Pond* v. *Curtis*, 7 Wend. 45; *McKinney* v. *Jones*, 55 Wis. 39; *Gard* v. *Neff*, 39 Ohio St. 607.

The fact that Sarazin, the testamentary guardian, died before the commencement of the suit, gave the demandants no other or better estate than the equitable estate which they had in the life-time of the guardian. The mortgage debt and the mortgage by which it was secured, at his death, passed to his personal representatives who must account therefor to the court from which the deceased guardian received his appointment.

Exceptions sustained.

STATE *vs.* JAMES LUBEE.

Cumberland. Opinion December 27, 1899.

Constitutional Law. Excessive Penalties. Lobsters. Art. I, § 9, Maine Constitution. Stat. 1897, c. 285, § 39.

Every presumption and intendment is in favor of the constitutionality of an act of the legislature; and courts are not justified in pronouncing a legislative enactment invalid unless satisfied beyond a reasonable doubt of its repugnance to the constitution.

The statute of 1897, c. 285, relating to short lobsters, is not repugnant to Section 9 of Article 1 of the Constitution of this State, which prohibits the imposition of excessive fines.

ON EXCEPTIONS BY DEFENDANT.

This was an appeal to the Superior Court, Cumberland county, from the Portland municipal court upon a complaint against the defendant under the provisions of section 39 of chapter 285, of the public laws of 1897, for having in his possession 36 lobsters less than 10 1-2 inches in length.

The government introduced evidence that the defendant on the 14th day of July, 1898, had in his possession 36 lobsters, each of which lobsters was less than 10 1-2 inches in length, measured as provided by said law; said lobsters being at said time in a lobster trap owned and controlled by the defendant, the ends of which were tied up in such a manner that said lobsters could not escape; and also that the defendant then stated that the lobsters were intended to be used by him for bait.

The evidence also showed that the value of the lobsters was from one to two cents apiece.

The defendant did not take the stand, and did not offer any evidence whatever.

The defendant's counsel requested the court to rule that the law under which said complaint was instituted, was unconstitutional, as it imposed an excessive fine. The court declined so to rule, and instructed the jury that the law was constitutional. The jury returned a verdict of guilty.

To this ruling and refusal to rule the defendant excepted.

Geo. Libby, County Attorney, for the State.

Counsel cited: *State* v. *Craig*, 80 Maine, 85; *Com.* v. *Savage*, 155 Mass. p. 278.

Benj. Thompson, for defendant.

To say when a fine, penalty, or punishment is "not proportioned to the offense," or is "excessive" or "cruel" is to answer a question of much importance and attended with difficulty.

This question of an excessive penalty for the violation of the statutes of this state, relating to short lobsters, was considered by this court in the case of *State* v. *Craig*, 80 Maine, 85, in which it was held that a penalty of one dollar was not an excessive penalty. By § 39 of chapter 285 of the public laws of 1897, this penalty was increased to five dollars for each lobster. The evidence here shows that the lobsters which were in the defendant's possession were worth from one to two cents apiece, so that the value of the whole thirty-six lobsters did not exceed seventy-four cents, and probably very much less than that sum, yet a fine is imposed by the statute in question which would aggregate $185.00.

While it is true, as stated by HASKELL, J., in the case of *State* v. *Craig*, that "the object and purpose of the act is to prevent the destruction of lobsters, ... and that the unlawful destruction of many lobsters has created penalties aggregating a large sum signifies no more than a purpose to violate the statute regardless of the penalties affixed," and "rather shows that the present forfeitures are insufficient to work obedience to the statute, than that they are too severe" and that "it can hardly be said that penalties which fail to prevent a violation of law by wholesale are disproportionate to the act prohibited," yet the statute in question increased the penalty five-fold; and still it will be safe to say that it has accomplished but little, if anything, in the direction intended.

It is doubtful if a penalty of $1,000.00 would accomplish the result, yet no one will hesitate to say that such a fine would be disproportionate and excessive.

The only way by which the constitutionality of the statute can

be determined is by a consideration of the nature of the offense, which imposes the fine.

While, in a certain sense, the circumstances under which the possession of the lobsters is obtained, and the reasons for which they are retained, do not mitigate the offense, yet these considerations as well as the purposes for which he holds them, do in a certain measure determine whether the fine is disproportionate to the offense or not.

The legislature must have regarded the penalty as excessive, because at its last session the fine was reduced to one dollar for each lobster, the same as it had been prior to the Act of 1897.

SITTING: EMERY, HASKELL, WISWELL, STROUT, SAVAGE, FOGLER, JJ.

FOGLER, J. The respondent was tried in the Superior court for Cumberland county, on appeal from the Municipal court of the City of Portland, upon a complaint charging him with having in his possession thirty-six lobsters, each less than ten and one-half inches in length. The statute upon which the complaint is based, section 39 of chapter 285, Public Laws of 1897, provides that it is unlawful to possess for any purpose, any lobsters less than ten and one-half inches in length, under a penalty of five dollars for each lobster so possessed. The respondent's counsel requested the court to rule that the law under which the complaint was instituted, was unconstitutional and void as it imposed an excessive fine. The court declined to so rule and instructed the jury that the law was constitutional, and, the jury having returned a verdict of guilty, the respondent excepts to such ruling and refusal to rule.

The question presented by the exceptions is whether or not the fine provided by the act above referred to is "excessive" and repugnant to Section 9 of Article 1 of the constitution of this state, which prohibits the imposition of "excessive fines".

It is contended by the respondent's counsel that, as the value of the lobsters less than the required length, found in the respondent's possession was, as appears by the testimony, only one or two cents

each, a penalty of five dollars for each lobster is not proportional to the offense, but is excessive and therefore repugnant to the constitutional provision above referred to.

Every presumption and intendment is in favor of the constitutionality of an act of legislature. Courts are not justified in pronouncing a legislative enactment invalid unless satisfied beyond a reasonable doubt of its repugnance to the constitution, and nothing but a clear violation of the constitution — a clear usurpation of power prohibited — will warrant the judiciary in declaring an act of the legislature unconstitutional and void. Cooley's Const. Lim. 181; *Fletcher* v. *Peck*, 6 Cranch, 128; *Ogden* v. *Saunders*, 12 Wheat. 270; *Foster* v. *Essex Bank*, 16 Mass. 245; *Rich* v. *Flanders*, 39 N. H. 304; *Hartford Bridge Co.* v. *Union Ferry Co.*, 29 Conn. 210; *Kerrigan* v. *Force*, 68 N. Y. 381; *Tyler* v. *The People* 8 Mich. 320; *Inkster* v. *Carver*, 16 Mich. 484. "It is but a decent respect", says Mr. Justice Washington in *Ogden* v. *Saunders*, supra, "due to the wisdom, the integrity and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity, until its violation is proved beyond all reasonable doubt."

It is also to be presumed that the legislature in enacting a statute, has acted with integrity, and with a just desire to keep within the restrictions laid down by the constitution upon its action, and has deliberately solved all doubts of the constitutionality of its action in its favor. Cooley's Const. Lim. 183.

In determining the question whether the punishment imposed by a statute is proportional to the offense, or whether or not a fine imposed is excessive, regard must be had to the purpose of the enactment, and to the importance and magnitude of the public interest sought by it to be protected. It has long been the policy of our state to protect and preserve its sea-shore fisheries. Those fisheries are of great importance to the state, furnishing, when properly protected and preserved, employment to many people and supplying great quantities of wholesome and nutritious food. The statute under consideration is one of a series of enactments passed by the legislature for the protection of one branch of those fish-

eries. As stated by Mr. Justice HASKELL, in *State* v. *Craig*, 80 Maine, 85: "The object and purpose of the act is to prevent the destruction of lobsters to such a degree as to materially diminish the supply and to preserve a necessary and valuable source of food."

Whether or not the fine imposed by the act is excessive does not depend upon the value of the lobsters found in the unlawful possession of a party. Were it otherwise and the lobsters so found were so small as to be of no value, there should be no penalty. If the law, as urged by the respondent's counsel, be onerous to those who, like the respondent, have large numbers of small lobsters in their possession, it is the fault, not of the law, but of the infractors.

The legislature, with full knowledge of the evil to be remedied and of the public interests involved, has fixed the penalty for violation of the statute. We are not satisfied that its action is in violation of the constitutional restrictions, and we therefore adjudge that the act is constitutional.

Exceptions overruled.

BELFAST SAVINGS BANK *vs.* WILLIAM K. LANCEY.

Waldo. Opinion January 2, 1900.

Attachment. Bankruptcy. Insolvent Estate. R. S., c. 81, § 68; Stat. 1875, c. 39; 1876, c. 143.

In an action upon the defendant's promissory notes, it appeared that the suit was commenced November 11, 1876, and the defendant's real estate was attached upon the writ. More than four months after the attachment of real estate, the defendant filed his petition in bankruptcy,—he was duly adjudged a bankrupt, and subsequently received his discharge. An assignee was appointed, who, in pursuance of a license granted by the U. S. District Court, sold the real estate attached upon the writ in this action, subject to such attachment. The action was continued from term to term until the January term, 1899, when the plaintiff filed a motion setting out the facts and asking that it might have a special judgment for the amount found due upon the notes in suit and execution against the property attached upon the writ

But prior to this the defendant had died, letters of administration had been duly granted upon his estate, and his estate had been duly adjudged and decreed insolvent, and commissioners in insolvency appointed.

Held; that notwithstanding the fact that the real estate attached upon the writ had passed to the defendant's assignee in bankruptcy, and had been sold by him, subject to the attachment, the plaintiff's attachment had been dissolved, according to the provisions of R. S., c. 81, § 68, by the decree of insolvency on the estate of the defendant before a levy or sale on execution; and that consequently the plaintiff is not entitled to a special judgment against the property attached upon the writ.

ON REPORT.

This was an action of assumpsit on two promissory notes of $2000 each, dated February 15, 1875, given to the plaintiff by W. K. Lancey, and which, with other notes amounting in all to $10,000 were secured by mortgage of real estate in the city of Augusta, Kennebec county. The action was defended by the administrators of said Lancey's estate, who pleaded several defenses: (1) that the notes have been paid; (2) that the discharge of said Lancey in bankruptcy under the act of March 2, 1867, was a bar; (3) that said Lancey's death and the representing of his estate insolvent in the probate court, followed by the issuing of a commission in insolvency, had dissolved an attachment of all of said Lancey's real estate in Somerset county, made by the plaintiff more than four months prior to the proceedings in bankruptcy, and which attachment the plaintiff sought to enforce by a judgment in rem.

The facts are stated in the opinion.

R. F. and J. R. Dunton, for plaintiff.

If the mortgage was not foreclosed there can be no question but that, so far as this branch of the case is concerned, there should be judgment for the full amount of the notes in suit and interest.

If the mortgage was legally foreclosed there would be a little more than eight hundred dollars due on the mortgage debt, after deducting the value of the real estate, as found by the jury, at the time when the right of redemption expired; and in that case special judgment against the property attached should be rendered for this balance.

It has been held in three cases under the statute, as it existed at the date of the attempted foreclosure in this case, that a certificate of the register that the notice was published in a newspaper "published" in the county where the premises are situated does not show a compliance with the statute which required public notice be given in a newspaper "printed" in the county where the premises are situated, and that a record of such notice and certificate does not foreclose the mortgage. *Blake* v. *Dennett*, 49 Maine, 102; *Bragdon* v. *Hatch*, 77 Maine, 433; *Hollis* v. *Hollis*, 84 Maine, 96.

There is also another fatal defect in this attempted foreclosure. The statute (c. 90, § 5) requires the mortgagee to "cause a copy of such printed notice, and the name and date of the newspaper in which it was last published to be recorded in each registry of deeds in which the mortgage deed is, or by law ought to be, recorded, within thirty days after such last publication." It appears by the certificate that the third publication of said notice was in the paper bearing date December 1, 1876, while the certificate states that the notice was received and copied November 30, 1876, or the day before the last publication of the notice. Parol evidence is not admissible to show that in fact the paper issued two days before its date. The validity of the foreclosure must stand or fall by the record alone, otherwise there can be no certainty as to the title under a mortgage and its foreclosure. *Morris* v. *Day*, 37 Maine, 386; *Chase* v. *Savage*, 55 Maine, 543.

The plaintiff is entitled to a special judgment, to be enforced against the property attached, and not against the person or other property of the defendant. *Bosworth* v. *Pomeroy*, 112 Mass. 293; *Davenport* v. *Tilton*, 10 Met. 320; *Bates* v. *Tappan*, 99 Mass. 376; *Stockwell* v. *Silloway*, 113 Mass. 382; *Johnson* v. *Collins*, 116 Mass. 392; *Leighton* v. *Kelsey*, 57 Maine, 85; *Bowman* v. *Harding*, 56 Maine, 559.

When the defendant died the property attached was not a part of his estate, and his estate was in no way liable for the debt in suit. Judgment could not be rendered against his estate if solvent, and this claim cannot be proved against his insolvent estate. The property attached cannot be held by the administrator as assets of

the estate, and it is wholly immaterial to creditors, heirs, or anybody else interested in his estate, whether this attachment is dissolved or not. If dissolved, the purchaser or purchasers of the property at the assignee's sale, and those claiming under them, reap the benefit. It gives to these purchasers and those holding under them, something which they never bought or paid for, and which was expressly excepted from their purchases, as the sale by the assignee to them was subject to this attachment.

If the attachment is dissolved, the estate gets no benefit, and this plaintiff can prove no claim against the estate; neither can it share in the assets, even though they prove to be more than sufficient to pay every debt in full. Can it be possible that the legislature intended by this act to place it in the power of the administrator of an estate, by filing a representation of insolvency, arbitrarily to transfer large property interests, where his estate is in nowise interested?

The facts in *Bullard* v. *Dame*, 7 Pick. 239, and *Ridlon* v. *Cressey*, 65 Maine, 128, differ materially from those in the case at bar.

No bankruptcy intervened in those cases.

J. Williamson, S. S. Hackett and J. W. Manson, for defendants.

Foreclosure valid: The paper is proved to have been "printed" in Kennebec county. The statute requires no more. The three Maine cases cited by plaintiff show there was an entire lack of evidence that the newspaper was printed in the county, the parties setting up that foreclosure depended upon the certificate alone. We have introduced other evidence sufficient to prove the only fact lacking from another source.

The certificate is evidence and fixes the first date of publication Nov. 17, 1876; the certificate says that this is the third publication, that the paper is published weekly, and that the third publication is in a paper dated Dec. 1, which we have shown by affidavit admitted by agreement was published one or two days earlier. The court will take judicial notice of days of the week and month; so it is plain to be seen that Nov. 17 to Nov. 29 or 30th is "three weeks successively." Twenty-one days is not required. *Wilson* v.

Page, 76 Maine, 279; *Stowe* v. *Merrill*, 77 Maine, 550; *Chase* v. *Savage*, 55 Maine, 543.

We say that the notes sued upon have been paid in full. At the time the bank began foreclosure proceedings, Nov. 17, 1876, the first three notes and one year's interest on all the notes was all that was due. The value of the property foreclosed upon in Nov. 1877 should be applied to pay this interest due on all the notes and the three notes due Nov. 17, 1876; the value of the property $11,000 was a great deal more than enough for this purpose, and we feel that this question of so applying that payment is not now an open one, either in this state or N. H. but has been decided. *Hunt* v. *Stiles*, 10 N. H. 466; *Larrabee* v. *Lumbert*, 32 Maine, 97.

Under the rules of appropriation of payment, the creditor has applied the payment made by foreclosure by his own act to the notes and interest due when foreclosure was begun. And more than that, if he had not so applied it, the law does. Cases, supra.

Attachment is dissolved: The statute has been construed to mean what it said and dissolved the attachment, whatever changes to title had been since the attachment had taken place. *Bullard* v. *Dame*, 7 Pick. 238; *Coverdale* v. *Aldrich*, 19 Pick. 391; *Day* v. *Lamb*, 6 Gray, 523; *Wilmarth* v. *Richmond*, 11 Cush. 463; *Parsons* v. *Merrill*, 5 Met. 356; *Ridlon* v. *Cressey*, 65 Maine, 128.

And that our legislature knew what they were doing in 1876, when they repealed the construction of 1875, cannot be doubted.

The enactment of the act of 1875 and its repeal in 1876 showed that the very question we are discussing was considered by the legislature of 1876; so that the plaintiff cannot now say that the case was within the letter but not the spirit of the law.

For a history of this law of dissolving attachment, see Laws of Maine, vol. 1, c. 60, § 32; *Martin* v. *Abbot*, 1 Greenl. 333. R. S., 1857, does not appear to have this provision but it is added in 1869, Laws of 1869, c. 37; R. S., 1871, c. 81, § 65; R. S., 1883, c. 81, § 68; *McNally* v. *Kerswell*, 37 Maine, 552; *Bowley* v. *Bowley*, 41 Maine, 545.

Furthermore, if the plaintiff ever could have made an attach-

ment that would survive the death and insolvency of defendant, the legislature had a right by repealing it to change this, the attachment being a remedy provided for enforcing the contract and not a part of the contract. *Bigelow* v. *Pritchard*, 21 Pick. 169; *Geer* v. *Horton*, 159 Mass. 259; *Owen* v. *Roberts*, 81 Maine, 439.

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

WISWELL, J. On February 15, 1875, the Belfast Savings Bank loaned to William K. Lancey the sum of ten thousand dollars, for which Lancey gave to the bank his five promissory notes for two thousand dollars each, the first payable in six months time and the others respectively at intervals of six months thereafter, with interest payable semi-annually, secured by a mortgage upon real eatate situated in Augusta.

After three of these notes had become due, on November 11, 1876, this action was commenced upon the first two notes that matured, and an attachment made thereon, November 13, 1876, of all of the real estate and interest therein which Lancey had in Somerset county. On November 17, 1876, the plaintiff commenced, or attempted to commence, a foreclosure of the mortgage given to secure these five notes, by publishing on that day a notice of foreclosure in a newspaper.

On April 13, 1878, considerably more than four months subsequent to the attachment of his real estate in Somerset county, above referred to, Lancey filed his voluntary petition in bankruptcy in the U. S. District Court for this district; he was subsequently adjudged a bankrupt and an assignee was duly appointed who, on May 21, 1885, in pursuance of a license granted by the District court, sold the real estate attached upon the writ in this suit, subject to the attachment. On June 2, 1879, Lancey was duly granted a discharge by the District court from all debts provable against him in bankruptcy.

William K. Lancey died,—the exact date is not stated,—within one year prior to the April term, 1899, of this court in Waldo

county. Letters of administration were duly granted by the probate court in Somerset county, which court had jurisdiction of his estate; and at the January term 1899, of the probate court in that county, the estate of Lancey was duly adjudged and decreed insolvent and commissioners in insolvency appointed.

At the January term 1899, in Waldo county, the plaintiff's counsel filed a motion setting out the fact of the attachment of real estate upon the writ, specifically describing the different parcels of real estate that were thereby attached, the bankruptcy proceedings above referred to, and asking to have the amount due upon the notes in suit determined and that it might have special judgment therefor and execution against the property attached. By agreement of the parties, the question of what was the fair market value of the real estate described in the plaintiff's mortgage, on November 17, 1877, was submitted to the jury, who found that such value on that day was eleven thousand dollars. The case was then reported to this court to determine the rights of the parties.

The counsel for the defense assigns several reasons why the plaintiff should not have the judgment he asks for. He claims that a foreclosure of the mortgage by publication was commenced on November 17, 1876; that by operation of law and in pursuance of an agreement to that effect contained in the mortgage, the mortgage became fully foreclosed in one year therefrom; and that the value of the mortgaged premises, as ascertained by the jury, although not sufficient to satisfy the entire mortgage debt at that time, should be applied in payment of the three notes that were due at the time the foreclosure was commenced and in payment of the interest due at that time upon all of the notes: such an application would much more than pay the two notes sued in this action.

This involves the question as to whether the proceedings commenced by the bank on November 17, 1876, for the purpose of foreclosing the mortgage, was sufficient for that purpose. The notice of foreclosure was published in a newspaper that was both printed and published in the county where the mortgaged premises were situated, but the certificate of the register of deeds reads:

"Received Nov. 30, 1876, and copied from the Maine Standard, a public newspaper, *published* weekly at Augusta, Maine;" etc. The statute in force at that time required a mortgagee who desired to foreclose his mortgage by publication, to give public notice in a newspaper *printed* in the county where the premises are situated, if any. This certificate does not state that the newspaper referred to was printed in that county.

This court has in several instances decided that such a certificate was fatally defective. *Blake* v. *Dennett*, 49 Maine, 102; *Bragdon* v. *Hatch*, 77 Maine, 433; *Hollis* v. *Hollis*, 84 Maine, 96. But it is urged in behalf of the defense that these cases are not conclusive because this case differs from those cited in this respect; that here the newspaper was in fact printed in the county; and it is claimed that this fact may be shown, by parol evidence, that the statute does not require any certificate from the register of deeds, but only makes it prima facie evidence of the facts stated.

We do not think it necessary to determine this question, in which others, not parties to this action, and not bound by the decision of the case, are especially interested, the bank having conveyed the mortgaged premises a number of years ago, because, in our opinion, there is another reason why the plaintiff is not entitled to the special judgment he asks for against the property attached.

The plaintiff does not claim that it is entitled to a general judgment against the estate of Lancey. The bankruptcy proceedings already referred to are a bar thereto, but it desires a special judgment and execution thereon against the property attached more than four months prior to the time of the filing of the petition in bankruptcy. This he would have been entitled to, *Bowman* v. *Harding*, 56 Maine, 559, *Leighton* v. *Kelsey*, 57 Maine, 85, except for the death of Lancey and the decree of insolvency upon his estate.

The only reason why the plaintiff should have a special judgment against the property attached upon the writ is, that it has at the time of such judgment a valid and subsisting attachment of the property, unaffected by any subsequent proceeding. Does the attachment made upon the writ in this case still exist so as to create

a valid lien upon the property attached? We think not. By R. S., c. 81, § 68, "all attachments of real or personal estate are dissolved by final judgment for the defendant; by a decree of insolvency on his estate before a levy or sale on execution;" . . . . etc.

In this case, as we have seen, there has been a decree of insolvency upon the estate of the original defendant, made before judgment; such decree, by the express terms of the statute, dissolves "all attachments" previously made of his real or personal estate.

The plaintiff's counsel argues with much force that the object of this statute is that in the case of the insolvency of the estate of the deceased person, his whole estate may be used as assets for ratable distribution among all of his creditors, but that under the circumstances of this case, the property attached does not belong to the estate and cannot in any event be taken by the administrator for a proportional distribution among creditors; and that consequently there is no reason why the attachment should be dissolved; and that the legislature could not have intended that the terms of the enactment should apply to the circumstances of this case.

The very plausible and strong reasons given by the counsel why the statute should not apply to a case, like this under consideration, might be considered by the legislature as sufficient to require its modification in some respects by legislative enactment; but the matter is wholly within the province of the law making department of the government. We can not disregard the plain and unequivocal terms of the section referred to. This is especially true when we consider the judicial construction which the statute has already received, and the history of legislative action relative to the subject matter.

A similar statute was in force in Massachusetts when the case of *Bullard* v. *Dame*, 7 Pick. 239, was decided in 1828. In that case the real estate attached had been conveyed by the defendant subsequent to the attachment. Pending the action the defendant died and his estate was adjudged insolvent and commissioners in insolvency appointed. The property attached could not be taken by the administrator for general distribution among creditors, and the

reasons why the statute should not be regarded as applicable were as strong in that case as in this; but the court held that according to the terms of the statute the attachment was dissolved by the decree of insolvency.

In *Ridlon* v. *Cressey*, 65 Maine, 128, the real estate of the defendant was attached on the writ and was subsequently conveyed by the defendant; before judgment for the plaintiff the defendant died and his estate was later decreed insolvent. The plaintiff, as in this case, sought a special judgment against the real estate attached because of the attachment, because the defendant had no title or interest therein at the time of his death, and the property would not become assets of the estate for distribution among his creditors; but the court decided that, "the decree of insolvency dissolved the attachment."

In *Grant* v. *Lynam*, 4 Metc. 471, a different but somewhat similar, statute was under consideration, and the court came to a similar conclusion as to its effect. A debtor whose goods were attached, mortgaged them to another creditor, he then applied for the benefit of the insolvent act, and all his estate was thereupon assigned under the statute It was urged in behalf of the existence of the attachment, that the only purpose of dissolving the attachment must have been to let in the general creditors to the proceeds of the attached property; and that, unless the property was so situated that the assignee could obtain it, the reason for dissolving the attachment would not exist. The court, in its opinion, expressed the belief that it could not have been the purpose of the legislature to dissolve the prior attachment of one creditor in order to let in the subsequent mortgage of another creditor, and that it was probably a case that was overlooked by the legislature; but the court held that the attachment was dissolved, saying: "But yet the words of the statute are positive and explicit, that it shall dissolve the attachment without condition or qualification."

We have already spoken of the history of legislation upon this subject. It must be considered as throwing considerable light upon the purpose of the legislature.

The legislature of 1875, public laws 1875, c. 39, modified this

statute so as to make it precisely as the plaintiff's counsel thinks it ought to be. The first section of that chapter provided that the portion of the statute, which we have been considering, should be understood and construed to apply to such property as the debtor owned, or in which he had an interest at the time of his death, and which, by the dissolution of such attachments, become assets belonging to his estate, to be distributed among his creditors. The second section of this chapter was as follows: "When property has been legally attached on a just debt or claim, and the debtor subsequently sells or conveys the same, subject to such attachment, such attachment shall not be dissolved or affected by his death or by a decree of insolvency in the probate court, but judgment may be entered and execution issue in the same form as if the estate was solvent, and may be levied upon the property attached in the same manner as if the debtor were alive."

The terms of this chapter were so full as to disclose, not only the intention of the legislature, but the reasons, as well, which actuated the passage of the amendment: the first section contained almost an argument in its favor. But the succeeding legislature, by an act c. 143, approved February 23, 1876, some months before the commencement of this suit, repealed c. 39 of the public laws of 1875 without qualification.

We are, therefore, forced to the conclusion that the plaintiff's attachment was dissolved by the decree of insolvency upon the estate of the original defendant, and that consequently it is not entitled to a special judgment against the property attached.

Case remanded to the court at nisi prius for disposal in accordance with this opinion.

EMILY PERRY *vs.* JUSTIN L. KEITH, and another.

Penobscot. Opinion January 2, 1900.

Deed. Description. Boundary. R. R. Location.

Where the description in a deed makes the land thereby conveyed commence at "the west line of the Bangor and Piscataquis Railroad," the true westerly line of the strip of land taken by the railroad for its right of way is made the boundary.

The actual location of a railroad company's track furnishes no evidence as to the location of either the centre or side lines of the land taken by the railroad company for its purposes.

The only question presented in this case is whether or not any portion of the land described in the defendant's deed had been previously conveyed to the plaintiff. *Held;* that the case does not show any such previous conveyance.

AGREED STATEMENT.

The case appears in the opinion.

W. H. Powell and G. T. Sewall, for plaintiff.

Peregrine White, for defendants.

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

WISWELL, J. This is a real action in which the question at issue is as to the location of the dividing line between the plaintiff's and the defendants' contiguous lots of land.

The line in dispute is the plaintiff's western and the defendants' eastern line. Both of these lots belonging to the parties to the suit, together with considerable other land, out of which they were taken, were at one time owned by the same grantors. The defendants' lot was conveyed out of the tract by a deed, dated May 31, 1883. In that deed the easterly line of the lot is described as, "beginning at a point on the north line of Brown street, eighty feet westerly from the west line of the Bangor and Piscataquis Railroad; the west line of said railroad being taken thirteen feet from the centre of the track as now laid." The lot is further

described as extending westerly on Brown street twenty-two feet and extending back from the street seventy feet, of the same width.

This deed unquestionably conveyed to the defendants' predecessor in title the lot therein described, unless some portion of it had been previously conveyed. Prior to the date of the deed under which the defendants claim, two lots had been conveyed by the then owners of the whole tract between the defendants' lot and the railroad, the plaintiff's lot, the one next easterly of that of the defendants, by deed dated January 3, 1871, and the one next easterly of that, by deed dated November 22, 1870, to one James Weymouth. The Weymouth lot is described as beginning on the north line of Brown street and on the west line of the Bangor and Piscataquis Railroad;—it is sixty feet wide on Brown street,—and the Perry lot, commencing at the western line of the Weymouth lot, is twenty feet wide on the street.

So far, there would seem to be no inconsistencies in the descriptions in the deeds of the three lots. The easterly corner of the defendants' lot on Brown street is eighty feet distant from the Bangor and Piscataquis Railroad, sixty feet of that intervening distance had been conveyed to Weymouth and twenty feet to the plaintiff's predecessor; so that the description in all of the three deeds would agree. But in the deed of the defendants' lot it is said, "the west line of said railroad being taken thirteen feet from the centre of the track as now laid;" and it is claimed upon the part of the plaintiff that, as a matter of fact, the width of the right of way of the Railroad Company, west of its centre line, is fifteen feet,—so that the defendants' lot was made to commence two feet further to the east than it should have.

In other words, the position of the plaintiff is, that the Weymouth lot, the first of the three conveyed, commences on Brown street at a point fifteen feet from a line midway between the rails of the railroad track; that the lot extends westerly upon Brown street sixty feet and that the next lot conveyed, the plaintiff's commences at the western corner of the Weymouth lot on the street and extends westerly thereon twenty feet further, making the western corner on the street of the plaintiff's lot ninety-five feet

west of the line midway of the rails of the railroad track, while the easterly line of the defendants' lot is made by the deed to commence on Brown street at a point only ninety-three feet distant from this centre line of the track; and that consequently two feet in width off the easterly side of this lot had been previously included in the plaintiff's lot.

This would, of course, be true if the line midway of the rails of the railroad track as laid was coincident with the centre line of the railroad company's right of way. But the difficulty with the contention of the plaintiff's counsel is that he assumes this to be a fact while there is no evidence in the case that it is so. It does not by any means follow that a railroad company's track is located in the centre of its right of way. One of the very reasons why so much width of land is necessary for and is taken by railroads, upon which to construct their road beds and tracks, is that they may have sufficient room for double tracks, side tracks and other structures. The actual location, therefore, of the track furnishes no evidence as to the location of the centre or side lines of the land taken by the railroad company for its purposes.

Moreover, in this case, the plans and the brief of the plaintiff's counsel show that the actual centre line of the right of way is several feet east of the track.

Nor can it be said, as urged by plaintiff's counsel, that the grantors in the deed to Weymouth supposed that the location of the track was indicative of the centre line of the right of way and consequently of the western line thereof, and intended that the lot should commence fifteen feet from a point midway of the rails. That deed made the Weymouth lot commence at the westerly line of the right of way. It made the true westerly line a boundary, wherever that westerly line is. The Weymouth lot commences at the Bangor and Piscataquis Railroad and, so far as the evidence in the case shows, there is ample distance upon the street between the right of way and the defendants' lot for the two lots conveyed prior to the conveyance of the defendants' lot.

This conclusion prevents the maintenance of the action and does away with the necessity of the examination of other questions. In

accordance with the stipulation of the report judgment should be rendered for the defendants.

Judgment for defendants.

LEWIS SOLOMAN *vs.* AMERICAN MERCANTILE EXCHANGE.

Penobscot. Opinion January 2, 1900.

Libel. Evidence.

In an action of libel, wherein the alleged libel consisted of a printed advertisement of judgments for sale, posted by the defendant in a public place, it is not competent for a witness called by the plaintiff to give his opinion, in reply to a question by plaintiff's counsel calling for it, as to the purpose of the defendant in posting the advertisement.

ON MOTION AND EXCEPTIONS BY DEFENDANT.

This was an action on the case for libel. The alleged libel consisted in the publication of a statement in the form of a poster advertising for sale certain judgments against various individuals therein named, among others the plaintiff.

The defendant contended that the language complained of was not libelous; that it was true; that the judgment against the plaintiff was in force at the time of the alleged publication; that the defendant had no knowledge of any payment upon said judgment at the time of the publication; and that said judgment was advertised for sale by authority of the owner, and was in good faith for sale. The fact of the publication was not controverted.

The jury rendered a verdict of $491.63 in favor of the plaintiff. The defendant had exceptions to the admission of certain testimony; to the certain portions of the charge to the jury; and also to the refusal of the presiding justice to give certain requested instructions to the jury.

A full report of the exceptions becomes unnecessary, as the law court granted a new trial for a single cause.

H. J. Chapman, G. H. Worster and L. C. Stearns, for plaintiff.

J. R. Mason and H. W. Oakes, for defendant.

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

WISWELL, J. Action of libel. The defendant, against whom a verdict was rendered, alleges various exceptions. It will be necessary to consider only one of these, because we are forced to the conclusion that the ruling therein complained of was erroneous.

The alleged libel consisted of a printed advertisement, published by the defendant, of judgments for sale, as follows:—

"Established 1894. Incorporated.

AMERICAN MERCANTILE EXCHANGE.

16 Broad street, Bangor, Maine.

Accounts for Sale.

"The following judgments on accounts are for sale at our office. A liberal reduction made off face value. Full information cheerfully given. Correspondence solicited. Apply or write to above address." Then follows a list of the judgments advertised, included in which is the following item relative to the plaintiff: "Soloman, Lewis, pedler, 23 Boyd St., Bangor, judgment on account dry goods merchants, $32.27." The judgment against the plaintiff had been satisfied prior to the publication of the alleged libel.

Two witnesses, called by the plaintiff, were each asked this question: "What is it (the alleged libel) posted for?" One answered: "It is posted for to spoil the character of men that do not pay their bills." The answer of the other was: "To notify creditors for to be careful for those people."

In the opinion of the court this question was improper and should have been excluded. It called for the opinion of witnesses upon a subject matter as to which opinions are not competent. It was not within any of the many exceptions to the general rule, that a witness must confine himself to a statement of facts and can not give his opinion upon questions involved.

There has been considerable conflict of authorities as to whether an exception to this general rule should or should not be made to the extent of allowing witnesses in actions of libel and slander to

give their opinion as to whom the libelous or slanderous language was intended to apply to, and although quite a number of cases have held that this kind of evidence is admissible, our court in *White* v. *Sayward*, 33 Maine, 322, following the authority of *Van Vechten* v. *Hopkins*, 5 Johns. 211, and, *Gibson* v. *Williams*, 4 Wend. 320, decided that even this was not permissible.

There has also been considerable difference of opinion as to whether or not a witness should be allowed to give his understanding of what the defendant meant by the language used, either written or spoken. But, we think, that the better rule is, that where the whole language is capable of being fully stated to the jury, and where the speaker's or writer's meaning is conveyed in direct terms and not by incomplete expressions, nor by signs, gestures, pictures or the like, it is not competent for a witness to give his opinion or understanding of the meaning intended by the one who used the language. Under such circumstances the words speak for themselves. This was so decided in *Snell* v. *Snow*, 13 Met. 278. In *Leonard* v. *Allen*, 11 Cush. 241, although evidence of this character was decided to be competent, it was for the reason that the slanderous charge was made in part by gestures and signs, and the court called attention to the distinction between that case and the case of *Snell* v. *Snow*, supra. In *Stacy* v. *Portland Publishing Company*, 68 Maine, 279, this court held that a witness may not, ordinarily, be allowed to state what he understood the speaker to mean by the words spoken by him.

While this is not the exact question presented by the exceptions, we think that there is less reason why a witness should be allowed to state his opinion of the purpose of such a publication, than that he should be permitted to give his opinion or understanding of the meaning of the language used, and that there is more danger in the former than in the latter testimony. We cannot, of course, tell to what extent this testimony may have affected the judgment of the jurors upon a question for their determination. It is sufficient that it may have been harmful and may have had an improper effect.

Exceptions sustained.

FRANK S. BIGELOW, and another,

vs.

LEVI R. BIGELOW, and others.

Somerset. Opinion January 2, 1900.

Mortgage. Conditional Judgment. Consideration. Evidence. Parol Gift of Land. R. S., c. 90.

1. In an action to foreclose a mortgage of land between the original parties, or those having no superior rights, the mortgagor is not estopped from denying the consideration. The reason is that the debt is the principal thing, the mortgage is only an incident.
2. In such case, when the note is shown to be without consideration, a mortgage given to secure it cannot be enforced.
3. In a real action to foreclose a mortgage, the plaintiff, as assignee of the original mortgagee, put in evidence the defendant's note of $1000 and the mortgage securing the same, containing a clause,—"this mortgage is given to secure part of the purchase money of said premises." He also put in evidence, as part of the same transaction, a warranty deed from his assignor to the defendant of the same premises, a farm valued at $2500, and dated two days prior to the mortgage. The defendant offered evidence, without its being objected to, tending to show that the grantor in the warranty deed, who was the defendant's uncle, had agreed to give the farm to the defendant on condition that he would move there. Thereupon the defendant claimed that the giving the deed was the consummation of the gift or contract; and that therefore the mortgage given afterwards was without consideration and void. The jury adopted the defendant's contention and rendered a verdict accordingly in his favor. *Held;* that such promise to give the defendant the farm, if made, must be regarded, under the evidence disclosed by the defendant, merely as a voluntary executory promise to make a gift in the future, and is not a valid contract on the part of the promisor; *also*, that the verdict must be set aside and new trial granted.
4. A mortgagee to foreclose a mortgage of land by an action at law must first obtain, under our statute, a conditional judgment; and before such a judgment can be rendered, the amount of the indebtedness secured by the mortgage must be determined and adjudged by the court. If there is no indebtedness, he cannot have such a judgment any more than if it had once existed but had since been paid.

It is, therefore, competent in such an action between the original parties, or those having no superior rights for a defendant, to show by parol evidence, or otherwise, that the mortgage was originally without consideration.

5. Upon the question as to whether the mortgage in this suit was with or without consideration, evidence was introduced on the part of the defense to the effect that sometime before the conveyance and mortgage back were made, the mortgagee sent word to the mortgagor, his nephew, that if he would leave the mill, in which he was then employed and go upon a farm, the premises subsequently mortgaged, he, the mortgagee, would make the mortgagor a present of it; that this message was delivered to the mortgagor, who accepted the proposition and acted upon it by leaving his former residence and employment and moving upon the farm. Subsequently the mortgagee made and delivered to the mortgagor a deed of the premises and requested the latter to call at a designated place and execute the mortgage back. This was done by the mortgagor a few days later, but as a part of the same transaction. This was the mortgage in suit.

The defendant claimed that, under these circumstances, the mortgagor was the equitable owner of the mortgaged premises before the delivery of the deed to him and that he could have compelled a conveyance to him of the farm; and that consequently, the mortgage given back at the time of the conveyance, or as a part of the same transaction, was without consideration.

Held; that these facts do not constitute a valid contract upon the part of the mortgagee. It lacks the essential element of a consideration. The condition that the mortgagor should leave his employment and move upon the farm, was neither a benefit to the promisor nor an injury to the promisee, and could not have been understood as such by the parties. The promise upon the mortgagee's part must, therefore, be regarded merely as a voluntary executory promise to make a gift in the future.

6. A parol gift of land, accompanied by possession by the donee, will be enforced in equity, when the donee has been induced by the promise of the gift to make valuable improvements to the land of a permanent nature, and to such an extent as to render a revocation of the gift unjust, inequitable and a fraud upon the donee.

But it must clearly appear that the acts relied upon as part performance were done with a view to the performance of the contract; but slight and temporary erections for the tenant's own convenience give no equity.

Held; that the circumstances of this case do not bring it within the principle as above stated. The expenditures made by the promisee were not provided for by any stipulation in the alleged promise. It does not clearly appear that these expenditures were induced by or made in consequence of the promise; but however this may be, they were of such a trivial character, in comparison with the value of the property, and the repairs were of such a temporary nature, that they do not raise an equity in behalf of the donee.

The mortgagor, therefore, prior to the delivery to him of the deed was not the equitable owner of the property and could not have compelled a conveyance of it; consequently the note and mortgage given back shortly after the delivery of the deed, and as a part of the same transaction, were not without consideration.

These questions might perhaps have been more concisely raised upon proper exceptions; but still they are open to the plaintiffs upon their motion, because, the facts testified to by the witnesses for the defense, and the inferences properly deducible therefrom, did not warrant the verdict rendered by the jury.

ON MOTION BY DEFENDANTS.

This was a real action to foreclose a mortgage given by Levi R. Bigelow to John Harlow Bigelow for $1000 and annual interest, dated April 29, 1889, acknowledged May 8, and recorded October 5, 1889.

The mortgaged property is a farm in Smithfield, Somerset county, containing two hundred and forty acres of land with buildings, and was purchased by John Harlow Bigelow of R. H. and J. Palmer Merrill, by deed dated June 7, 1888, for $2500, and conveyed by him to the defendant Levi R. Bigelow by deed dated April 27, 1889.

May 27, 1891, the defendant Levi conveyed one undivided-half of the farm, subject to the mortgage given by him, as before stated, for $1000, to George M. and Harlow Bigelow, two of his sons, and the other defendants in this action.

March 18, 1896, John Harlow Bigelow assigned the mortgage to Frank S. and James S. Bigelow, the plaintiffs of record in this suit.

The case was tried at the March term 1897, of this court, sitting at nisi prius, in Skowhegan, and a verdict rendered for the defendants; whereupon the plaintiffs filed a motion to set the verdict aside as against the law and the evidence.

The case was submitted to this court and argued in writing. The briefs of counsel were received by the law court in May, 1898.

The plaintiffs contended that the case shows the following facts: John Harlow Bigelow, ninety years old, had spent the greater part of his active business life in the employ of the late Governor Coburn, as manager of his farm and household affairs in Skowhegan, and by prudence and economy had accumulated something more than was required for the wants of his declining years. He was also possessed of numerous relatives, who were not without some knowledge of his pecuniary situation; among whom were Levi R. his nephew, one of the defendants in this suit.

It is agreed by both sides that some time in the month of June, 1888, two of these sons came to the old gentleman, in Skowhegan, and had an interview with him in relation to money matters.

He had never seen them before and only knew them as they introduced themselves, and had not seen their father for fourteen years. As to what took place at this interview, the parties differ, but Harlow says that they came to borrow $5000, representing to him that they wished to purchase a boarding-house in Augusta, called the Hotel Bigelow, then kept by one of the boys; that their father, who for many years had been an employee in the Lockwood mill, at Waterville, was getting old and out of health; that they intended to run a grocery store in connection with the boarding-house; and if they could raise the money to do this, their father would come out of the mill and drive the delivery wagon, believing that the outdoor work would benefit his health.

To this proposition Harlow told them that he had no such sum of money to lend, and if he had he wouldn't loan it to them to be used for any such purpose; that they knew nothing about the business and would make a failure if they undertook it; that their father, Levi R., was no business man, was unused to such work and wholly unfitted to enter into such an enterprise. He told them, however, that he knew of a farm for sale which he believed could be bought at a good trade, and, if Levi wanted to get out of the mill, he didn't know but he would buy it and let him move onto it.

Either on the day of this conversation or one subsequent Harlow called upon the Merrills, owners of the farm, and went with J. Palmer Merrill to Smithfield, to see the property. On their way back from Smithfield, they met two of Levi's boys, and while there in the road, Harlow and Mr. Merrill struck the trade for the farm, and Harlow told the boys that their father might move onto the farm.

About the first of July, 1888, Levi moved to the farm in Smithfield and lived there till April 27th, 1889, before he received a deed from his uncle or gave the mortgage back.

On April 27th, 1889, Harlow went to the office of Merrill and Coffin in Skowhegan, and had a deed of the farm made to Levi R.

and at the same time had a mortgage and note drawn running back to himself, for $1000, payable in five years with interest annually.

On the same day he carried the deed to Smithfield to Levi and at the same time told him that he had had the mortgage and note made, and that he, Levi, would have to come to Skowhegan to sign them before a justice of the peace.

On the 8th day of May, 1889, Levi R. came to Skowhegan, called upon his uncle Harlow and told him that he had come down to sign the mortgage, and together they went to Mr. Coffin's office and then and there Levi R. executed the mortgage.

The formal execution and delivery of the mortgage in question, and the non-payment under it, was not denied, but the defendant claimed that the mortgage was of no effect, that it is, at least, equitably void; and that by virtue of the statute, making all equitable defenses available, in an action at common law, the mortgage deed could not be supported because without consideration; that a mortgage deed is necessarily and always collateral merely to supposed indebtedness; and that where there is no debt there never can be any valid or enforceable mortgage.

To show that the mortgage is without consideration, and has no debt to support it, the defendants relied upon the following legal rules and the facts as adduced from the testimony introduced by them:—

That in June, 1888, nearly a year before the mortgage deed (the premises in question being then owned by a third party) the plaintiffs' assignor, John Harlow Bigelow, through the defendant's sons, proposed to the defendant a contract by which the defendant on his part was to abandon his existing business as employee in the Lockwood cotton mill, and his existing residence which was Waterville, and was to move his home and family to Smithfield; that he was to equip the farm at his own expense with suitable farming tools and machinery, and was thereafter to carry on the farm in question in Smithfield; that, provided he did these several things and in consideration thereof, the old gentleman (who was the defendant's uncle, and well to do,) would buy him this particular farm and would make him a present of it in toto; that the de-

fendant on his part agreed to do all these things, and, in fact, did abandon his previous business and home, and move on to this farm with his family about the twelfth day of July, 1888, providing himself with suitable equipment therefor at the cost of over four hundred dollars, and thereafter carrying on the place; that, as matter of law, this constituted a valid and enforceable contract between the parties by virtue of which at common law the defendant, having fully performed his part of the contract, could have compelled at any time the plaintiff to procure and deed to him this farm according to the agreement, except for the statute of frauds; that these mutual agreements and their actual performance by the defendant would make the deed of the farm, when executed and delivered, no longer in the eye of the law a gift without consideration, but an executory contract with full and executed legal consideration to support it; that being thus a contract, and not a gift, the mere delivery of possession to the defendant, even uncoupled with the various expenditures and improvements made by the defendant at his own cost on the strength of the contract, would take the case out of the statute of frauds and support a bill brought by the defendant against the old gentleman for specific performance, in accordance with a well settled line of authorities which may be found fully summed up in White & Tudor's Leading Cases in Equity, 4th Am. Ed. Vol. 1, Part 2, pp. 1045–8; that even if the agreement by the old gentleman had had no consideration to support it, and had been a mere naked promise to execute a gift of the land, even in such case the transfer of possession, followed by actual expenditures, as here, on the strength of such promise, would then convert the promise from a mere nudum pactum into an agreement enforceable in equity, and full right to specific performance by the defendant against the promisor would still lie; that, therefore, on the twelfth day of July, 1888, and at all times thereafter (the old gentleman having meanwhile purchased the farm in question in his own name) the defendant was equitably entitled at every instant to a full and absolute deed of the whole farm, and that when the old gentleman, nearly a year afterwards, on the 27th day of April, 1889, (the defendant still being in possession) actually

delivered to the defendant the deed which he had promised, he was only doing what equity would have obliged him to do, and what the defendant himself was legally entitled to receive; that neither then nor at any moment after the twelfth day of July, 1888, could any debt arise from the defendant to the old gentleman by virtue of the delivery of this deed, or the so-called gift of this land; that the doing by the old gentleman of what he was legally or equitably obliged to do, or the receiving by the defendant of the deed or gift to which he was legally entitled could in no case constitute a debt or consideration by which this mortgage would be supported or enforced; that the evidence showed no pretense of any subsequent, new or fresh consideration to support the mortgage, and that the mortgage, therefore, was void.

E. F. Danforth and S. W. Gould, for plaintiffs.

The seal imports a consideration, and the grantor is estopped to deny it. (English cases.) *Lainson* v. *Tremere*, 1 A. & E. 792; *Harding* v. *Hambler*, 3 M. & W. 279; *Leming* v. *Skirrow*, 7 A. & E. 157; *Bowman* v. *Taylor*, 2 A. & E. 278. (American cases.) *Myrick* v. *Dame*, 9 Cush. 254; *Western Railroad Corp.* v. *Babcock*, 6 Met. 353; *Hayes* v. *Kyle*, 8 Allen, 300; *Billerica* v. *Carlisle*, 2 Mass. 159; *Sumner* v. *Williams*, 8 Mass. 200; *Mather* v. *Corliss*, 103 Mass. 568; *The United States* v. *Linn*, 15 Peters, 290; *Curtis* v. *Clark*, 133 Mass. 510.

Levi R. voluntarily acknowledged the mortgage and thereby gave authority to spread it upon the records of Somerset county as notice to all the world that he had received the consideration, and that the land was holden for the debt, and by this act he is estopped to deny it.

Weld v. *Farmington*, 68 Maine, 307; *Eames* v. *Gray*, 61 Maine, 405; *Van Valkenburgh* v. *Smith*, 60 Maine, 98; *Chapman* v. *Searle*, 3 Pick. 38; *Jewett* v. *Torrey*, 11 Mass. 219; *Foster* v. *Clark*, 19 Pick. 329; *Wheelock* v. *Henshaw*, Id. 341; *Wing* v. *Chase*, 35 Maine, 260; *Commonwealth* v. *Griffith*, 2 Pick. 18; *Pierce* v. *Indseth*, 106 U. S. 548; *Comstock* v. *Smith*, 13 Pick. 116; *Nash* v. *Spofford*, 10 Met. 192; *Dyer* v. *Rich*, 1 Met. 180; *Baxter* v. *Bradbury*, 20 Maine, 260; *Tyler* v. *Hall*, 106 Mo. 313, (27 Am.

St. Rep. 337); *DeFrieze* v. *Quint*, 94 Cal. 653, (28 Am. St. Rep. 151); *Reinhard* v. *Virginia Lead Mining Co.*, 107 Mo. 616, (28 Am. St. Rep. 441.)

The court will reject evidence in itself illegal, notwithstanding the admissions or omissions of the litigants. *Shaw* v. *Roberts*, 2 Starkie, 455.

Parol evidence is inadmissible to vary a written agreement, which is clear in its terms, and expresses the result of the conversation of the parties to it. *Pike* v. *McIntosh*, 167 Mass. 309; *Batchelder* v. *Queen Insurance Co.*, 135 Mass. 449; *Flynn* v. *Bourneuf*, 143 Mass. 277; *Stevens* v. *Haskell*, 70 Maine, 202; *Shaw* v. *Shaw*, 50 Maine, 94; *Stoyell* v. *Stoyell*, 82 Maine, 332; *Knowlton* v. *Keenan*, 146 Mass. 86; *Durkin* v. *Cobleigh*, 156 Mass. 108.

When from the nature of the instrument, the whole contract is presumed to be reduced to writing, parol evidence of any contemporaneous agreement is inadmissible if it contradicts, adds to, or varies the written contract. *Buchtel* v. *Mason Lumber Co.*, 1 Flippin (Mich.) 640.

Although a failure of consideration is a sufficient answer to a suit brought on a sealed instrument on the principles of equity, as now adopted by the statutes or common law in most of the states of the Union, yet a want of consideration is not because the seal imports a consideration, or more properly speaking renders a consideration superfluous,—and binds the parties by force of the natural presumption, that an instrument executed with so much deliberation and solemnity is founded upon some sufficient cause. 1 Smith's Leading Cases, Part 2, p. 749, 8th Am. Ed. *Walker* v. *Walker*, 13 Ired. (N. C.) 335; *Wing* v. *Chase*, 35 Maine, 260.

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

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

WISWELL, J. This is a real action, brought, it is said in the plaintiffs' brief, to foreclose a mortgage. The plaintiffs made out a prima facie case by introducing in evidence a mortgage given by

Levi R. Bigelow, one of the defendants, and under whom the other two defendants claim, to J. Harlow Bigelow, dated April 27, 1889, acknowledged and recorded, to secure a note for one thousand dollars, together with the note, both of which had been duly assigned and transferred to the plaintiffs.

The defense was that the mortgage was not enforceable because it was without consideration;—that, in fact, there was no indebtedness owed by the mortgagor to the mortgagee at the time of the execution of the mortgage.

The verdict was for the defendants, and the case comes here upon the plaintiffs' motion for a new trial for the reason that the verdict was contrary to the weight of the evidence and the law. There are no exceptions.

The first contention, upon the part of the plaintiffs, is that parol evidence was inadmissible to show a want of consideration, or the existence of an indebtedness, which the mortgage under seal acknowledged and purported to secure; and that, although it was admitted without exception, it should be regarded as ineffectual for the purpose for which such evidence was offered; and that consequently the verdict was erroneous even upon the defendants' theory.

The defense was not fraud or duress, nor that the consideration was illegal or against the policy of the law, nor that the note had been paid, but that there never was any indebtedness from mortgagor to mortgagee, or consideration for the note or mortgage: the question is, therefore, can a mortgage under seal which acknowledges an indebtedness and which purports to secure such indebtedness, be contradicted by parol evidence to the extent of showing a want of original consideration so that the mortgage cannot be enforced.

The plaintiffs' counsel have cited many cases to the effect that a seal upon an instrument conclusively imports a consideration, or, that, at least, it estops the covenantor from denying the consideration. But we do not think that this principle applies to a mortgage in an action brought to foreclose the mortgage, so as to prevent inquiry into the existence or non-existence of a debt which

the mortgage purports to secure. We mean, of course, between the original parties or those having no superior right. The reason is, that the indebtedness is regarded as the principal thing, the mortgage only as an incident. In order for a mortgagee to commence a foreclosure of a mortgage in an action at law he must first obtain, under our statutes, a conditional judgment; before such a judgment can be rendered, the amount of the indebtedness must be determined and adjudged by the court. If, as a matter of fact, there is no indebtedness, we do not see how a plaintiff can have such a judgment any more than if the obligation, once valid and real, had since been paid. The question as to the consideration of the principal thing, the note, may be inquired into between the original parties, or between those having no superior right; and when, under these circumstances, the note is shown to have been without consideration, the mortgage purporting to secure such a note must become unenforceable. This has long been the settled law in Massachusetts. *Wearse* v. *Peirce*, 24 Pick. 141; *Hannan* v. *Hannan*, 123 Mass. 441.

"Want of consideration is, of course, a good defense; for in such case there is nothing on which to found a conditional judgment, and parol evidence is admissible to show that no debt ever existed between the parties to the mortgage." 2 Jones on Mortgages, § 1297.

The next question is, whether upon all the evidence in the case the jury was authorized in its finding, upon which the verdict must have been based, that the mortgage, which the plaintiffs were seeking to foreclose, was without consideration.

The defendants' contention was substantially this: In June, 1888, Levi R. Bigelow, the mortgagor, and a nephew of John Harlow Bigelow, the mortgagee, was living in Augusta and working in a cotton mill in Waterville. During the latter part of that month two of his sons were temporarily at Skowhegan where they met and had a conversation with their great uncle, John Harlow Bigelow, during the course of which he inquired concerning the health of his nephew, Levi; and upon being informed by the young men that their father was not in very good health, made a suggestion

relative to his leaving the mill and moving upon a farm in a neighboring town that he had in mind.

The testimony of Frank Bigelow, one of the mortgagors' sons with whom the conversation was had relative thereto, is as follows: "We drove up in a team, found him (Harlow) at the end of the stable in a flower garden. I got out and introduced myself and he asked me about my lameness. I was on canes at that time; inquired how my father was and asked if he was in the mill at work. I told him he was and he says to me, do you suppose that your father would come out of the mill and go onto a farm. I know where there is a farm that can be bought cheap. A good farm but run out some; it is the Marston place in Smithfield, owned here in Skowhegan by Mr. Merrill; he got it through a mortgage. Wanted to know when I was going down home. Told him sometime during the week; wanted that I should stop at Waterville and tell father what he said. Q. What, if anything, did your uncle say about deeding the farm to your father? A. He said that, if he would come out of the mill and go onto the farm, he would make him a present of it."

This message was carried by Frank to his father, who expressed himself as pleased with the suggestion, but who said that, before he made any move and gave up his employment in the cotton mill, he wanted to be sure that the arrangement was to be made; and thereupon he sent Frank and another son to Skowhegan again to see the uncle and obtain further information upon the subject. The two sons went to Skowhegan, saw their father's uncle, and explained to him their father's attitude; thereupon the uncle at once went to see the owner of the farm in question, bargained with him for it and informed the young men of what had been done, and requested them to tell their father that he had bought the farm, and that he had better move onto it at once so as to cut the hay. Frank, testifying as to this conversation, says: "Uncle Harlow said tell your father that he had bought the farm and would make him a present of it."

This word was carried to Levi, who shortly afterwards left his employment in the cotton mill and, on July 12th, 1888, moved

onto the farm and went into possession of it. He brought to the farm certain farming tools and some horses and stock, and made some rather slight repairs upon the building at a cost, he says, of about fifty dollars. Harlow Bigelow on the day following his second interview with Frank concluded his purchase of the farm by taking a deed thereof to himself. In the spring following, on the 27th of April, Harlow went to Levi's house with a deed of the farm running to Levi, duly signed, executed and acknowledged, which he then and there delivered to him and told him that he wanted him as soon as convenient to call at a certain office and there sign a note and mortgage for one thousand dollars. Levi admits upon cross-examination that he was told by Harlow Bigelow at the time of the delivery of the deed that, as a part of that transaction, he was to go to Merrill & Coffin's office and sign a mortgage and note for one thousand dollars. A few days later he, Levi, did go to the office and executed the note and mortgage in question;—the latter contains this clause: "This mortgage is given to secure part of the purchase money of said premises."

Assuming this to be a true statement of the facts, and although it is stoutly denied by the plaintiffs, we think that a jury might have been authorized in finding that the facts were substantially as above narrated,—was Levi R. Bigelow, prior to April 27th, 1898, when the deed to him was delivered, the equitable owner of the farm and entitled as of right to a conveyance thereof so that he could have successfully maintained a bill in equity for a specific performance? If so, the defendants' theory that the mortgage was without consideration is correct.

The defendant's contention is, that these facts disclose a valid and binding contract upon the part of Harlow Bigelow, for a valuable consideration, to convey the farm to Levi; and that the partial performance by Levi was of such a character as to take the parol contract out of the statute of frauds.

There is no question that a parol agreement for the conveyance of land may be enforced in equity in behalf of a vendee whose partial performance had been such that fraud would result to him unless the vendor be compelled to perform on his part. It was so decided by this court in *Woodbury* v. *Gardiner*, 77 Maine, 68.

But even upon the plaintiffs' testimony we cannot regard the alleged promise of Harlow Bigelow to make Levi a present of the farm as a valid contract upon the former's part. It lacks the essential element of a consideration. True, the testimony of Frank Bigelow was that Harlow said, if his father would come out of the mill and go upon the farm, he would make him a present of it. But we do not think that this comes within the broadest definition of a consideration. It was neither a benefit to the promisor nor an injury to the promisee. The case shows no circumstances from which it can be inferred that Harlow would be benefited by Levi's moving onto the farm. It could not have been understood to be such by the parties. Nor was this an injury to Levi;—it could not have been understood as such. Levi's health was rather poor, so one of his sons informed Harlow at the first interview, and the suggestion as to his moving upon the farm was made, intended and acted upon, we are forced to believe, as a benefit to Levi. The subsequent conduct of the parties, when the deed was made and the mortgage taken back as a part of the same transaction, confirms us in this belief that they did not suppose that a binding contract had been made.

The promise upon Harlow's part, therefore, must be regarded merely as a voluntary executory promise to make a gift in the future. Such a promise, so long as it remains unexecuted, can not ordinarily be enforced.

But, it is also undoubtedly true, as urged in behalf of the defense that, under some circumstances, even a parol promise to make a gift of land will be enforced in equity. The principle is thus stated in the case of *Neale* v. *Neale*, 9 Wallace, 1: "And equity protects a parol gift of land, equally with a parol agreement to sell it, if accompanied by possession, and the donee, induced by the promise to give it, has made valuable improvements on the property. And this is particularly true where the donor stipulates that the expenditure shall be made and by doing this makes it the consideration or condition of the gift." In that case the promise to give the real estate was made to a person who was about to marry the promisor's son, and it was upon the condition that she

should erect with her own means a suitable dwelling-house upon the property. This condition was expressly made the consideration of the promise to give, and upon its performance by the promisee she was certainly entitled to performance on the part of the promisor.

No such state of facts exist in this case;—there was no stipulation that any expenditure should be made for repairs. But we do not hold that this is necessary in order to make such a promise enforceable. We think that the following is a correct statement of the rule as deduced from the great weight of authority. A parol gift of land, accompanied by possession by the donee, will be enforced in equity, when the donee has been induced by the promise of the gift to make valuable improvements to the land of a permanent nature and to such an extent as to render a revocation of the gift unjust, inequitable and a fraud upon the donee. *Green* v. *Jones*, 76 Maine, 563. See the cases collected in the note to *Lester* v. *Foxcroft*, White & Tudor's Leading Cases in Equity, Vol. 1, p. 1047; and the note to *Anderson* v. *Green*, 23 Am. Dec. 417, (7 J. J. Marshall, 448.)

But it must clearly appear that the acts relied upon as part performance were done with a view to the performance of the contract. *Tilton* v. *Tilton*, 9 N. H. 385. And slight and temporary erections for the tenant's own convenience give no equity. *Young* v. *Glendenning*, 6 Watts, 509.

In the case under consideration, as we have already seen, the expenditures made by the promisee were not provided for by any stipulation in the alleged promise. Nor do we think that it clearly appears that these expenditures were induced by or made in consequence of the promise. It seems to us from the nature and extent of these expenditures for repairs upon the buildings that they were made for the convenience of the mortgagor, who was expecting to occupy them, at least, for an indefinite period of time, and that the expenditures would have been just as likely to have been made under the facts claimed by the plaintiffs as under those relied upon by the defendants.

But even if it were otherwise, and it could be said that the ex-

penditures for repairs were induced by and made in consequence of the alleged promise, they were in the opinion of the court, of such a trivial character, in comparison with the value of the property, which cost the alleged donor some twenty-three hundred dollars, and the repairs were of such a temporary nature, that they do not in the opinion of the court raise an equity in behalf of the donee. The revocation of the promise to make a gift would not, under all of the circumstances of the case work such a hardship or impose a fraud upon the promisee, as to entitle him to a decree in equity compelling a conveyance.

In our view of the case, therefore, the mortgagor, prior to the delivery to him of the deed, was not the equitable owner of the property and could not have compelled a conveyance of it to himself; consequently the note and mortgage given back shortly after the delivery of the deed, and as a part of the same transaction, was not without consideration.

These questions might perhaps have been more concisely raised upon proper exceptions; but still they are open to the plaintiffs upon their motion, because, in our view of the case the facts testified to by the witnesses for the defense, and the inferences properly deducible therefrom, did not warrant the verdict rendered by the jury.

Motion sustained. New trial granted.

ANDREW J. WEYMOUTH, and others,

vs.

ISAAC BEATHAM.

Piscataquis. Opinion January 2, 1900.

Pleading. Special Assumpsit.

Assumpsit in the common counts to recover for labor can only be maintained when the labor has been performed and when nothing remains to be done by the defendant but the payment of the price in money.

Where the plaintiff seeks to recover damages for the defendant's breach of a contract for the performance of labor by the plaintiff, which contract has not been performed upon the part of the plaintiff, he must declare specially.

ON EXCEPTIONS BY PLAINTIFFS.

The case appears in the opinion.

G. W. Howe, for plaintiffs.

W. H. Powell, for defendant.

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

WISWELL, J. The declaration, in this action, is in the form of indebitatus assumpsit to recover for the labor of sixteen men furnished by the plaintiffs, in driving logs for the defendant out of one of the tributaries of the Piscataquis river.

From the plaintiffs' evidence it appeared that an arrangement had been made between the plaintiffs and the defendant,—both of whom had drives of logs upon the river,—that if the plaintiffs' logs should first arrive in the main river at the mouth of this tributary, they should furnish men to assist the defendant in driving his logs into the main river; that, this contingency happening, the plaintiffs, in pursuance of the arrangement, sent their men to work for the defendant upon his drive, but that the defendant did not accept their services, or set them to work; and that the plaintiffs' men performed no labor whatever for the defendant.

Thereupon, the presiding justice ordered a nonsuit upon defendant's motion, to which exception is taken by the plaintiffs. The ruling was clearly right. Assumpsit in the common counts to recover for labor can only be maintained when the labor has been performed and when nothing remains to be done by the defendant but the payment of the price in money. 1 Chitty on Pleadings, 360; Encyl. of Pleading and Practice, Vol. 2, page 1009 and note.

Where, as in this case, a plaintiff seeks damages for the breach of such a contract, which has not yet been performed upon his part, he must declare specially.

Exceptions overruled.

EUSEBE PROVOST, and others,

vs.

MELINA PICHE, and Trustee.

Androscoggin. Opinion January 3, 1900.

Trustee Process. Appeal. Necessaries. R. S., c. 86, §§ 30, 76.

Under the statutes of this state relative to trustee process, a principal defendant is estopped, in a subsequent suit brought by him against the trustee, by the previous judgment against the trustee followed by a delivery or payment by him of the goods, effects and credits for which he was charged. Such a defendant, therefore, has a legal interest in the adjudication of the trustee's liability, and may appeal from such an adjudication in a lower court to the appellate court. *Held;* that the defendant's appeal carries the whole case to the appellate court.

What is included under the term "necessaries" in the statute relative to exemption from trustee process can not be determined by any arbitrary and inflexible rule; it depends upon the circumstances of each case. The term is a relative one, and what would be classed among necessaries under the circumstances of one case, would not be in another.

A sewing machine is not a necessary article under any and all circumstances; it might be such under some circumstances. The statement in a bill of exceptions, that the machine was bought by the defendant "for her own personal use in the manufacture of her own clothing," is not sufficient to show that the machine was necessary for her.

ON EXCEPTIONS BY PLAINTIFF.

This was an action of assumpsit, brought before the Auburn municipal court, to recover one installment of ten dollars upon a non-negotiable note given by the defendant to the plaintiffs for the purchase of a sewing machine; and was there tried and appealed to this court, sitting at nisi prius, by the principal defendant, and a default was there entered for $10 damages, with interest from date of the writ.

In the court below the trustee filed a disclosure that, at the service of the writ upon it, the sum of $13.37 was due the principal defendant for her personal labor performed within thirty days of such service, and upon that disclosure the court below charged the trustee for that sum. In this court the defendant insisted upon the right to have the question of the trustee's liability decided anew; and the plaintiff contended that the defendant has no such right, inasmuch as his appeal of the action does not affect the judgment of the court below charging the trustee; but the court ruled otherwise, and allowed the defendant to have a hearing anew upon the liability of the trustee to be charged.

It appeared that the suit was brought for an installment due upon a note for a sewing machine, sold by the plaintiffs to the defendant for her own personal use in the manufacture of her own clothing. The court ruled that the trustee was not liable to be charged, unless such claim be considered for necessaries; and the court ruled that it is not, and so ordered the trustee discharged with costs. To both of these rulings, as to re-hearing upon the trustee disclosure, and as to whether the plaintiff's claim be for necessaries, the plaintiffs excepted.

H. W. Oakes, J. A. Pulsifer, and F. E. Ludden, for plaintiffs.

The statute provides that any party aggrieved by the judgment of a lower court may appeal, and that before such appeal is allowed, the appellant shall recognize, etc. R. S., c. 83, §§ 18 & 19.

The trustee is a party, and his rights are separate and distinct from those of the principal defendant. *Dennison* v. *Benner*, 36 Maine, 227; *Jacobs* v. *Copeland*, 54 Maine, 503.

Either plaintiff, defendant, or trustee may allege and prove any facts material, in deciding the question how far the trustee is chargeable. R. S., c. 86, § 30.

The judgment of a lower court charging the trustee is not vacated by a defendant's appeal. *Kellogg* v. *Waite*, 99 Mass. 501; *Jarvis* v. *Mitchell*, 99 Mass. 530; *Wasson* v. *Bowman*, 117 Mass. 91; *Butler* v. *Butler*, 162 Mass. 524; *Webster* v. *Lowell*, 2 Allen, 123.

Defendant cannot appeal for the trustee, nor trustee for defendant; each must appeal for himself. *Cowan* v. *Lowry*, 7 Lea, (Tenn.) 620; *Chandler* v. *FonDuLac*, 56 How. Pr. (N. Y.) 449; *Hanna's Syndics* v. *Lauring*, 10 Martin, (La.,) 568, (13 Am. Dec. 339); *Scoffedhast* v. *Bollman*, 21 Ind. 280; *Bryant* v. *Bigelow*, 9 Lea, (Tenn.) 135.

If the note declared upon, being non-negotiable, was for a necessary, the trustee should properly have been charged. R. S., c. 86, § 55, par. 6; *Trustees, etc.*, v. *Kendrick*, 12 Maine, 381; *Fairbanks* v. *Stanley*, 18 Maine, 296; *Bartlett* v. *Mayo*, 33 Maine, 518; *Richmond* v. *Toothaker*, 69 Maine, 451.

Necessaries are things proper and useful for the sustenance of human life. The term is a relative one, dependent upon the circumstances of the particular case. Black's Law Dictionary; Bouvier's Law Dictionary; *Davis* v. *Caldwell*, 12 Cush. 512; *Kilgore* v. *Rich*, 83 Maine, 305; *McAuley* v. *Tracy*, 61 Maine, 523; *Peters* v. *Fleming*, 6 M. & W. 42; *Clyde Cycle Co.* v. *Hargreaves*, (Q. B.) 78 Law T. Rep. 296; *Leonard* v. *Stott*, 108 Mass. 46; *Trainer* v. *Trumbull*, 141 Mass. 527; *Merriam* v. *Cunningham*, 11 Cush. 40; *Pyne* v. *Wood*, 145 Mass. 558. For extended note, see 18 Am. State Rep. 650.

Our statute has gone far to determine that a sewing machine is a necessary, in placing it among the personal property exempt from attachment. R. S., c. 81, § 62, par. 6.

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

The defendant is an interested party in the charging of the trustee. It is her money that is taken away and put in the plaintiffs' hands; the trustee can have no interest being simply a stake-holder.

All questions urged in the court below were thus opened up anew. Additional evidence might be introduced. *Moody* v. *Hutchinson*, 44 Maine, 57.

Suppose there had been judgment in the supreme court, in favor of the defendant, would the plaintiffs contend that the judgment of the municipal court charging the trustee should there stand?

Necessaries defined: *Shelton* v. *Pendleton*, 8 Conn. 423; *Whitingham* v. *Hill*, Cro. Jac. 490; Clancy on Husband and Wife, 23; 2 Kent's Com. 146; Finch, 103; *Baker* v. *Lovett*, 6 Mass. 30; *Munson* v. *Washband*, 31 Conn. 303.

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

WISWELL, J. This is an action of assumpsit to recover one installment due upon a non-negotiable note given by the defendant to the plaintiffs for the purchase of a sewing machine. The suit was commenced in the Auburn municipal court, and the exceptions state, "was there tried and appealed to this court by the principal defendant."

In the lower court the alleged trustee filed a disclosure showing that, at the time of the service of the writ upon him, there was due from him to the principal defendant the sum of $13.37 as wages for her personal labor performed within thirty days next before such service. In that court the trustee was adjudged trustee and charged for the above amount.

In this court at nisi prius, where the case was taken by the defendant on appeal, she was defaulted by consent for the sum of $10, and the alleged trustee was discharged for the reason that the amount due from the trustee to the principal defendant was due her as wages for her personal labor for a time not exceeding one month next preceding the service of the process, and because the suit was not to recover for necessaries furnished her. Two questions are raised by the plaintiffs' exceptions relative to the liability of the trustee.

I. It is claimed, on the part of the plaintiffs, that the adjudication of the lower court charging the trustee was not vacated by the defendant's appeal; that therefore the question was not opened for a rehearing and decision in the appellate court; and that, in fact, a principal defendant has no such legal interest in the adjudication of the question whether the alleged trustee should be charged or not as to give him a right of appeal; that he can not be aggrieved by any adjudication of this question.

In support of this position various cases are cited by the plaintiffs' counsel, some of which go fully to the extent claimed by him. For instance, in *Kellogg* v. *Waite and trustee*, 99 Mass. 501, this is said in the opinion of the court: "The defendant in a trustee process has no legal interest in the question whether the trustee shall be charged or discharged. It does not bind him in any subsequent suit as an adjudication either of the fact or the amount of the indebtedness of the trustee to him. Nor is the pendency of the trustee process any defense to a suit by the defendant therein against the trustee."

This is not the law in this state under our statutes relating to trustee process. Under our statutes a principal defendant has a legal interest in the adjudication of the alleged trustee's liability to be charged, and in a subsequent suit brought by such defendant he is estopped by the previous judgment, followed by a delivery or payment by the trustee of the goods, effects and credits for which he was charged.

By R. S., c. 86, § 30, it is provided, that the answers and statements sworn to by a trustee, shall be deemed true, in deciding how far he is chargeable, until the contrary is proved, "but the plaintiff, defendant and trustee may allege and prove any facts material in deciding that question."

Various sections of the chapter of the revised statutes, relating to trustee process, provide for the proceedings when two cases are pending at the same time, one against a defendant and trustee, and the other where the defendant therein is plaintiff in a suit directly against the trustee, which need not be here particularly referred to. But, that a principal defendant has a legal interest in

the adjudication upon the question of liability of a person summoned as his trustee, is conclusively shown by section 76, of that chapter, which is as follows: "The judgment against any person as trustee discharges him from all demands by the principal defendant, or his executors or administrators, for all goods, effects and credits, paid, delivered or accounted for by the trustee thereon; and if he is afterwards sued for the same by the defendant, or his executors or administrators, such judgments, and disposal of the goods, effects and credits as above stated, being proved, shall be a bar to the action for the amount so paid or delivered by him."

In a case of this kind, where there is no claimant for the funds in the trustee's possession, and no controversy as to the amount due, and where the only question is whether or not the funds in the trustee's hands are exempted from attachment by this process, because of the provision of the statute that an amount due the principal defendant as wages for his personal labor performed within one month next before the service of the process, except where the suit is for necessaries, can not be thus attached,—the principal defendant is the only one, except the plaintiff, who has any real interest in the determination of the question.

It would be an anomaly if a person thus interested could not appeal from an adjudication charging the trustee, because he is not aggrieved by such adjudication, when, by force of the statute above referred to, he is estopped by such judgment to claim the funds in the trustee's hands.

We have no doubt that, under the circumstances of this case, the principal defendant had the right of appeal, and that her appeal carried the whole case to the appellate court.

II. The ruling of the court at nisi prius, discharging the trustee, was unquestionably right, unless the suit was for necessaries furnished her. The exceptions say, "that the suit is brought for an installment due upon a note for a sewing machine, sold by the plaintiffs to the defendant for her own personal use in the manufacture of her own clothing." What are necessaries under this statute can not be determined by any arbitrary and inflexible rule,

—it depends upon the circumstances of each case. The term is a relative one and what would be classed among necessaries under the circumstances of one case, would not be in another.

It certainly can not be said that a sewing machine is a necessary article under any and all circumstances,—at most, it might be necessary under some circumstances. Here we only know that the machine was bought by the defendant, "for her own personal use in the manufacture of her own clothing." We do not regard this as sufficient to show that the machine was necessary for her. So far as we can tell, it may have been entirely unnecessary, and the contract of purchase a most improvident one for the defendant to make. The trustee therefore was properly discharged.

Exceptions overruled.

HENRY J. CONLEY, Admr.,

vs.

WASHINGTON CASUALTY INSURANCE COMPANY.

Cumberland. Opinion January 4, 1900.

Accident and Sickness. Insurance. Waiver. Payment. Notice.

In an action by the administrator of the insured against an accident insurance company, upon a certificate which provided for the payment to the insured, subject to many conditions and qualifications, of the sum of $10 a week for each week's disability caused by accident or disease, and seeking to recover the stipulated sum per week from the beginning of the disability to the death, *held;* that the objections made by the defendant to the maintenance of the action based in part upon non-payment of dues, cannot be sustained, it appearing among other things that there was a waiver; but that the plaintiff has proved only a total disability of the insured, within the terms of the certificate, for a period of three weeks prior to his death.

ON REPORT.

This was an action on a policy of insurance against accident and disease, issued June 24, 1895, by the defendant company to John H. Flaherty, of Portland, to recover a balance of $170, for sick

benefits claimed by his administrator to be due from June 13, 1895, to and including November 28, 1895, the date of said Flaherty's death; ten dollars per week for twenty-three weeks, less sixty dollars which have been paid.

It appeared that in April 1894, said Flaherty took out a policy in defendant company, and June 24, 1895, the policy was exchanged for the policy upon which the suit was brought.

June 10, 1895, before the change of policies, said Flaherty paid his premiums, being then in arrears, up to May 27th, preceding, which was the last payment made on the policy; June 13, 1895, said Flaherty was taken sick.

Before the payment of June 10th the premiums were paid up only to May 13th, being more than two weeks and nearly four weeks in arrears, but by the payment of June 10th, being for two weeks, the premiums were paid up to May 27th, leaving two weeks then in arrears and unpaid, from May 27th to June 10th. On June 13th while said premiums were more than two weeks in arrears, not having been paid up in full on June 10th, and within one week after any payment of premiums was made, said Flaherty was taken sick.

The old policy was in force and he was sick on the twenty-fourth of June when this new policy was issued, and died on the twenty-eighth of November, 1895, from the sickness that he then had. There was no money paid for sick benefits until after the tenth of November, 1895, viz: ten dollars November 12, ten dollars November 19, ten dollars November 26, twenty dollars in December and again ten dollars in December, 1895.

The following terms and conditions are on the back of the policy:

Sec. 2. "All dues are payable on Monday of each week, in advance, and no benefit will be paid for death or disability occurring while said dues remain more than two weeks in arrears, or for death or disability occurring within one week after said arrears shall be paid up in full; and if the dues are not paid within thirty days after due, this certificate shall be null and void."

Sec. 8. "The member agrees that if disabled by sickness or accident he must fill out, or cause to be filled out, the blanks furnished by said company, and immediately forward the same to said company, and he further agrees that he or his representatives must give proper notice to said company of any disability, and if not given within ten days from date of disablement he will forfeit any benefit until said notice is given, and unless said notice is given within sixty days from date of said disablement, he will not be entitled to any benefit for such disability."

The various contentions of the parties are stated in the opinion.

D. A. Meaher, for plaintiff.

If there had been no dues paid from June 10 up to November 28, a period of twenty-two and three-sevenths weeks, there would have been simply six dollars and fifty-one cents owing to the company. At no time after the sickness of Flaherty, and up to his death, did the company owe him less than thirty dollars. There was nobody authorized to receive these weekly benefits except the administrator and none of this money was paid to him by the company. It held the money without paying it over until after Flaherty died and claimed that he was behind on his dues with this large amount to his credit on the company's books. From this condition of things it would seem that the company now owes the estate, on their own admissions, the sum of thirty dollars, while from their own evidence and the testimony furnished by the plaintiff, there remains $170 claimed in this action. The premium receipt book shows that the last payment was June 10, 1895, when the deceased was first taken sick, and from which date he was entitled to weekly benefits up to the time of his decease, the company being all the time in his debt. The company seems to lay stress on the fact that they received only two doctor's certificates, but that should not relieve the company from its liability of performing what it assumed. Mrs. Flaherty kept the company informed of the sickness of her husband and of his death, and if they had required any further certificates, they would have been furnished at any time. The sole object of the company seems to be to get some excuse for delay in the payment of the dues and

some excuse for not paying a death benefit. Such would seem from the evidence throughout, to be the aim of this company and its agents.

Mrs. Flaherty testifies that there was another policy on the life of Mr. Flaherty in this company and the day he was taken sick he went to the office and exchanged it for the one on which we sue. She went three or four times to the company asking them to pay the weekly dues while her husband was sick before she received anything. She told the company she was in need of money and the company kept putting her off from time to time until at last it gave her ten dollars. Her claims for money were to the treasurer of the company. No reason was given why the balance was not paid, and the company promised to pay the rest.

It was ten dollars a week for every week he was sick. It is quite evident from the testimony of Mrs. Flaherty that at no time during her repeated visits was she notified that any further information was required except what the company had received and there was no claim made to her that there was anything for her to pay to the company. She understood and the company knew that there was a large amount to the credit of Mr. Flaherty in the hands of the company and Mrs. Flaherty must have felt she had done everything that the company asked. No agent of the company said to her that the premiums were paid up only to July 31st, or that the policy would be of no value after that date; and probably she never heard any claim of that nature from the company until she heard the testimony of the company's treasurer in court.

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

At the time of the occurrence of the disability June 13th, the policy was out of benefit or non-beneficial for the following reasons:

1st. Before the payment of June 10th the dues were certainly more than two weeks in arrears, and by the payment of June 10th the dues were not paid up in full, but were on June 13th more than two weeks in arrears.

2nd. The disability occurred within a week after the payment on June 10th, even if by that payment the dues had been paid up

in full to that time, which they were not, but were still then two weeks in arrears. So that by the non-payment of dues and non-compliance with the conditions contained in Sec. 2, said policy was non-beneficial at the time of the disability occurring June 13th.

On June 24th, being within thirty days from May 27th, the policy not having then lapsed, although being non-beneficial for reasons above stated, the policy in suit was issued, upon which policy no premiums were ever paid, and which lapsed for non-payment thereof at the expiration of thirty days from issue, or on July 24th. Now, notwithstanding the first policy was non-beneficial on June 13th, the date of the occurrence of the disability, and was never beneficial afterwards, the defendant company upon proof having been received Nov. 4th of disability up to July 31st, paid $60, the full amount of disability covered by said proof from June 13th to July 31st, being one week more than the life of the second policy, provided the same had ever been in force.

There is nothing in the case that shows the plaintiff or Flaherty in his lifetime, in any way complied with the provisions of Sec. 8, in regard to any disability arising after July 31st, if any existed. The company has had no notice as required by said section of any disability since said date, or any physician's certificate of the duration or character of the same; and said section expressly provides that unless notice is given within a certain time and the proper blanks filled out and forwarded to the company, the insured will not be entitled to any benefits.

No notice of any disability occurring after July 31st, under the second policy, was given within sixty days; and no certificate of physician or proof of any kind was given within thirty days of termination of disability or at any time thereafter. Those requirements are plain, and there is no evidence whatever of any waiver on the part of the company, and without such proofs or certificate of attending physician, the company has no sufficient knowledge upon which to base any action either of allowance or disallowance of any claim. *Kimball* v. *Accident Assoc.* 90 Maine, 183.

There is nothing to show from that time up to within three or

four weeks previous to his decease that he was under the care of a physician or confined to the house, or in such a condition that he might not expect to fully recover, until about the first of November, when he consulted Dr. McDonough, and died on the 28th.

That Flaherty did not consider himself entitled to benefits after July 31st is shown by the fact, that after he was repeatedly reminded that no benefit could be allowed until a physician's certificate was filed,—and that requirement was clearly brought to the attention of himself and wife, so that there could be no misunderstanding about it,—on November 4, he procured a physician's certificate of disability only from July 6th to July 31st, which with another certificate made still later, for previous disability, covered the whole time from June 13th to July 31st, for which benefits have been paid. Now, if, on November 4, and still later, when he sent in certificate of previous disability, he knew or thought he was entitled to benefits after July 31st, why did he not have sent in a certificate of the whole or some part of the time between July 31st and November 4th? There were over three months time, for which if the company was liable, or if he even thought it was liable, provided he had an attending physician during that time, for which he might have procured a certificate to be filed; but instead of that he procured two certificates covering previous disability only. Certainly he was not ignorant of the requirement, and the only conclusion that can be drawn is, that he either knew that the policy was lapsed or non-beneficial for non-payment of dues or the non-fulfillment of some requirement on his part or that he was not in that physical condition whereby he was entitled to benefits.

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

WISWELL, J. The plaintiff's intestate was the holder of a certificate issued by the defendant corporation under date of June 24, 1895, which provided for the payment to him, subject to many conditions and qualifications, of the sum of $10 a week for each week's disability caused by accident or disease.

He had been the holder of another certificate, since April, 1894, issued by the same company, which upon June 24, 1895, was surrendered and the new one of that date taken in exchange. The later certificate was in some respects more beneficial to the company than the first one.

On June 13, 1895, the deceased suffered a hemorrhage of the lungs and shortly after gave notice of his disability and its cause to the company, upon one of its blanks furnished for the purpose. This notice was received by the company on June 26.

He seems to have furnished evidence, satisfactory to the company, of a disability which continued until July 31, 1895, because for that period of time, the company has since paid the weekly benefit.

The deceased died on November 28, 1895. In this action his administrator seeks to recover the stipulated sum per week from July 31, 1895, to the time of his death. The case comes to the law court upon report. Various objections are urged by the defendant to the maintenance of the suit.

According to the strict terms of the certificate, upon which the suit is brought, the plaintiff's intestate was not entitled to the weekly benefit provided therein, because disability caused by accident or disease within thirty days of the date of the certificate was excluded from its provision. But we do not regard the certificate issued June 24, as a new contract, but rather as evidence of a modification of the contract which had been in force since April, 1894.

The deceased had not strictly complied with a condition of the contract to pay dues weekly in advance. The dues that were payable May 27, 1895, on the first certificate, were paid June 10, and none were afterwards paid. One of the provisions of the certificate provided that: "No benefit will be paid for death or disability accruing while said dues remain more than two weeks overdue." But we think that the failure of the deceased to comply with this condition may fairly be inferred to have been waived by the company by the issuance of the new certificate of June 24, especially in view of the fact that the company must have consid-

ered the condition waived, when it paid the stipulated sum up to July 31, 1895.

We do not think that the contract contemplated the payment of dues during a period of disability, but even if it were otherwise, the company had in its hands money due the deceased from which it might have deducted the amount of his weekly dues

It is further urged that there was a failure upon the part of the deceased to comply with the condition relative to giving notice of disability; but between the 13th and 26th days of June, he gave notice to the company of his disability, upon one of the blanks furnished by the company. So long as that disability continued, from the same cause, we do not understand that the contract required further notice.

As to the remaining objection, there is more difficulty. The certificate contains the following provision: "Benefits shall be paid only for such time as the insured is confined to the house, or totally disabled and under the care of a physician and incapacitated thereby from following some legitimate business or occupation." The evidence in the case does not show that after July 31, and up to within a short time before his death, the deceased was confined to the house, or totally disabled, or under the care of a physician, or incapacitated thereby from following business or occupation.

We think that the evidence does show that the deceased, from the time of his first sickness until his death, suffered from the same disease, although the extent of his disability is not shown; and that from the time that he called upon a physician, who testified in the case he was totally disabled within the meaning of the contract. This length of time is somewhat indefinite; the physician says in his testimony, that it was three or four weeks before his death. For that time he was entitled to receive the sum mentioned and his administrator may recover it in this action.

Judgment for plaintiff for $30.

CHARLES MATSON *vs.* TRAVELLERS' INSURANCE COMPANY.

Knox. Opinion January 4, 1900.

Accident Insurance. Intentional Injuries.

Where an accident insurance policy contains a provision that the insurance should not cover "intentional injuries, inflicted by the insured or by any other person, except burglars or robbers," the insured can not recover of the insurer for injuries intentionally inflicted upon him by another, not a robber or burglar, who made an assault upon him,—even if the injury sustained was not precisely that intended, provided the act was intentional, was directed against the insured and some injury to him was intended.

AGREED STATEMENT.

This was an action of assumpsit brought upon an accident insurance policy, issued by the defendant company to the plaintiff. The plaintiff sustained a double fracture of his right arm by reason of an alleged accident to him at the time and place mentioned in the declaration, which he claimed was occasioned by an accident within the meaning of law and the policy by which he was insured. The defendant company claimed that the facts did not disclose any cause of action against the defendant. The parties stipulated that if under the agreed statement the defendant was liable, the action should stand for the assessment of damages; otherwise the plaintiff was to become nonsuit. The following is the agreed statement of facts:—"The policy makes a part of the case. At the time and place of the injury the plaintiff was at work 'in a motion' by himself, in a hole or excavation in the ledge about two feet below the surface of the ledge about him, when Daniel Story, who was working at another place in another 'motion' came along on the ledge above, where the plaintiff was standing, and began to talk to the plaintiff in an angry manner, accusing the plaintiff of blasting too heavily near his house (Story's,) claiming that the rocks flew from Matson's blast into his 'motion,' and also struck Story's house, and Story told Matson to stop it; that he would kill his wife (Story's) children or him-

self. Matson's reply was 'get out of here. You have no business here.' This maddened Story, who then picked up a stick, or club of wood which was lying near by, drew off and struck at Matson's head with it; and Matson to ward off the coming blow and save his head, threw up his right arm and received the blow on the right side thereof, breaking it as described in the declaration. Matson had made no attempt to strike or assault Story, or to use any violence whatever. The assault by Story upon Matson was intentional."

The case involved the construction and application of one clause in the policy, which provides that the insurance does not cover "intentional injuries inflicted by the insured, or any other person, except burglars or robbers," the only question being whether the injury which caused the accident, for which recovery is sought, was intentionally inflicted by "any other person."

W. R. Prescott, for plaintiff.

The policy issued by the defendant company to Matson contained a very great number of provisions or conditions to its becoming liable, printed in small type, and, including this one in question should be strictly construed. The company holds out by its policy that it will insure against accident and then it prints in its policy in small print many conditions limiting liability. In reason it would seem only fair to the insured to construe these conditions strictly and not to extend the meaning of words used beyond their ordinary meaning.

The general rule in these cases is that, in the absence of special provisions in the policy, injuries intentionally inflicted on the insured by other parties, not being the result of mis-conduct or the participation of the injured party, have been held to be accidental, and to render the insurer liable. Am. & Eng. Ency. of Law, 294, 322. The injuries received by the plaintiff were not the injuries intentionally inflicted by Story within the meaning of the language used in the policy.

In a Kentucky case, where the policy contains a clause practically the same as the one here discussed the court says that "the clause is evidently intended to apply to such injuries by other per-

sons as are intentionally directed against the insured, and not to such injuries as the insured may receive at the hands of the third person who are doing mischief generally." *Hutchcraft, Exr.*, v. *Travellers' Ins. Co.*, 87 Kentucky, 300, (12 Am. St. R. 484.)

When the plaintiff saw the danger he did an act, received an injury in the breaking of an arm, that was not intended either by Story or the plaintiff. Story intended to hit the head but he did not do it but inflicted an injury by reason of an act of the plaintiff in trying to avert the danger.

Construing the policy strictly where it provides that the company is not responsible for intentional injuries, it cannot be held to release the company from responsibility for injuries received by the insured as the result of a movement on his part made by him with the intention of escaping the injuries that Story intended to inflict upon him, the movement being necessary in preventing the injuries that Story intended to inflict; and in this sense the breaking of the plaintiff's arm was an accident for which the company is responsible.

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

"A sane man, a voluntary agent, acting upon motives, must be presumed to contemplate and intend the necessary, natural and probable consequences of his own acts." *Com.* v. *York*, 9 Met. 103.

If the situation is to be logically analyzed, Story, then, must have been held to have contemplated that Matson would so ward off the blow with his arm, and thus actually, by reason of this, have intended to hit his arm, as that, under such circumstances, was the natural and probable consequence of his assault. The assailant must assume that the assailed would use all necessary and available means for his protection, and he must assume further the probability of the infliction of a variety of injuries as the result of such attempt at protection upon the part of the assailed. These facts are the necessary results of the assault, and the assailant is conclusively presumed to have contemplated them, and to have intended these as the necessary, natural and probable consequences of his own acts.

Counsel also cited: *Butero* v *Travellers' Ins. Co.*, 96 Wis. 536;

Phelan v. *Travellers' Ins. Co.*, 38 Mo. App. 640; *Fischer* v. *Travellers' Ins. Co.*, 77 Cal. 246; *McCarthy* v. *Travellers' Ins. Co.*, 15 Col. 351; *Degraw* v. *National Acc. Soc'y*, 51 Hun, (N. Y.) 142; *Scherek* v. *Travellers' Ins. Co.*, 38 Albany Law Journal, 466.

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

WISWELL, J. The plaintiff was the holder of an accident insurance policy issued by the defendant corporation, which entitled him to receive, if disabled by bodily injuries sustained through "external, violent and accidental means," a certain sum of money each week while the disability continued. The policy contained a clause which provided that the insurance should not cover, among other things, "intentional injuries, inflicted by the insured, or by any other person, except burglars or robbers."

During the life of the policy, the plaintiff was violently assaulted by another person, not a robber or burglar, who attempted to strike him upon the head with a stick, but the plaintiff, to protect himself, put up his arm and received the blow thereon, and thereby sustained the injury which he claims entitles him to recover of the company. The plaintiff was without fault in the affair, and the assault upon him is admitted to have been intentional. These facts appear in the agreed statement of facts upon which the case comes to this court.

Under these circumstances is the plaintiff entitled to recover? We think not. Were it not for the provision that the insurance should not cover injuries intentionally inflicted by another, it might perhaps be said, as some courts have held, that as to the insured, the injury, for which he was in no way responsible, was an accident, an unforeseen event, a casualty.

But here the injury was sustained in one of the very ways which the policy provided should not be covered by the insurance,—intentional injuries inflicted by another. An act may be intentional while its result may be unforeseen and unintentional and therefore accidental within the meaning of the contract of insurance. But

that is not so in this case; here the act was intentional, it was directed against the insured and direct injury to the insured was intended.

All the cases that have been called to our attention, in which a similar provision of an accident insurance policy has been considered, hold that where the injuries sustained by the insured were intentionally inflicted by another, and where the intentional acts of another that caused the injury were aimed at the insured, there could be no recovery. *Travellers' Insurance Company* v. *McConkey*, 127 U. S. 661; *Hutchcraft* v. *Travellers' Insurance Company*, 87 Ky. 300, (12 Am. St. R. 484); *Utter* v. *Travellers' Insurance Company*, 65 Mich. 545, (8 Am. St. R. 913.)

The suggestion made by counsel for plaintiff, that the injury sustained by the plaintiff was not the precise one intended by the person making the assault, is rather too much of a refinement. The plaintiff sustained an injury inflicted by another,—that other intended to inflict injury upon the plaintiff and accomplished his purpose. The case is clearly within the exception made by the contract of insurance. In accordance with the stipulation of the report, the entry will be,

Plaintiff nonsuit.

INHABITANTS OF DEXTER *vs.* OWEN E. BLACKDEN.

SAME *vs.* SAME.

SAME *vs.* SAME.

SAME *vs.* J. MORRILL JORDAN.

Penobscot. Opinion January 9, 1900.

Constitutional Law. License. Innholder. Actions. R. S., c. 27, §§ 1, 2, 14. Col. Laws. Mass. 1660-1686. Stat. 1891, c. 132. Mass. Stat. 1875, c. 99, § 5.

Section 2, c. 27, R. S., which provides that no person shall receive a license as an innholder unless he first gives a bond with one or more sureties, contain-

ing a condition that he "shall not violate any law of the state in relation to intoxicating liquors," is not an unconstitutional enactment.

While the general rule is that any person is at liberty to pursue any ordinary calling without restraint, not encroaching on the rights of others, the business of innholding has always been regarded as a privilege rather than as a right, and as a public or quasi-public occupation to be regulated by the legislature for the public convenience and good. It is not a natural right.

Nor is § 1, of c. 132, of the Statutes of 1891, amenable to the objection of unconstitutionality, which (section) provides that any citizen of the state may prosecute any person, for carrying on the business of innholding without a license, in the same manner as the licensing board may prosecute for such offense; there being an existing enactment that the licensing board shall prosecute innholders for any such violations that come to their knowledge, the prosecution to be by complaint, indictment, or action of debt, and all penalties to inure to the town where the offense is committed.

This action being in the name of the Inhabitants of Dexter, which is a proper remedy if the action be not brought in the name of the state, the latter also being a proper, if not the better form of prosecution, it is averred in the writ that the town prosecutes the action by Carrie H. Foster of Dexter, a citizen of this state. *Held;* that the town has full control of the action, and may prosecute it or abandon it as it pleases; that it is not strictly a qui tam action, none of the penalty sued for inuring to any person or party other than the town itself; and that Carrie H. Foster has no control of the action except by the assent of the town, she standing merely in the position of an informer or complainant and aiding and promoting the prosecution in that capacity.

Whether the town shall or not espouse the cause instituted in its name is not a question upon which the defendant can be heard. The presumption is that the town assents to the action, nothing appearing to the contrary.

AGREED STATEMENT.

The first of the above named actions was brought in the name of the "Inhabitants of Dexter who prosecute this action by Carrie H. Foster of said Dexter, a citizen of said State of Maine."

The defendant on the first day of the return term filed the following plea in abatement: (omitting formal parts.)

And now the said Owen E. Blackden comes and defends, etc., when, etc., and prays judgment of the writ aforesaid, because he says that the Inhabitants of the town of Dexter never authorized this action to be brought; and this he is ready to verify; wherefore he prays judgment of said writ; that the same may be quashed and for his costs.

To this plea on the sixth day of the return term the plaintiff demurred as not sufficient in law. The demurrer was duly joined.

Plea was overruled and defendant required to answer over. To this ruling the defendant duly filed exceptions which were allowed.

Thereupon the defendant plead the general issue which was duly joined. The defendant also filed with the general issue the following brief statement of further defense:—

(1) That said Carrie H. Foster had no authority to bring this action.

(2) That the action was never authorized by the Inhabitants of Dexter or by the Licensing Board of Dexter.

(3) That neither the Inhabitants of Dexter nor the Licensing Board had any official knowledge of the commencement of this action, were not in any way consulted or notified about it, nor up to this time have had any such official knowledge or consultation; that it was instituted by the said Carrie H. Foster of her own motion.

(4) That the statute requiring innholders to give bond with sureties, R. S., c. 27, § 2, is unconstitutional, invalid and against public policy.

(5) That the statute of 1891, c. 132, amending c. 27, § 14, of R. S., is unconstitutional, invalid and against public policy, so far as regard is had to the following provision:

"Any citizen of the State may prosecute for any violation of any of the preceding sections of this act in the same manner as the Licensing Board may prosecute."

(6) That if defendant is liable for anything by the way of forfeiture or penalty it is not fifty dollars, but any sum not more than fifty dollars.

"It is admitted that the authority of said Carrie H. Foster to bring said action in the name of the Inhabitants of Dexter is derived solely from § 14 of chapter 27 of the revised statutes as amended by § 1 of chapter 132, laws of 1891, she being a citizen of the State. Also, it is admitted that the defendant was a common inholder in said Dexter as declared in plaintiff's writ, during the time set forth therein, and that he was not licensed therefor as required by statute. Also, it is admitted that the Licensing Board

of said Dexter had knowledge of such violation of the statute by defendant and neglected or refused to prosecute therefor as required by law.

"It is agreed that the only questions to be determined by the court shall be, (so far as the defendant has the right to raise the questions in this case) the constitutionality or validity of the statute requiring innholders to give the bond with sureties, (mentioned as the fourth item of defendant's brief statement,)—and the constitutionality or validity of the statute of 1891, (referred to in defendant's fifth item in his brief statement,) conferring authority upon any citizen of the State to prosecute in same manner as Licensing Board. All other matters are admitted on both sides as regular and sufficient. If either statute is held to be unconstitutional or invalid, judgment is to be for defendant. Otherwise judgment is to be for plaintiffs. The amount of penalty to be fixed by the court. This case is submitted to the law court on this agreed statement of facts."

The other cases named in this agreement were to abide the judgment in the case set out; said judgment to be entered in each of the others as by consent of parties. Full costs to be taxed in favor of the prevailing party, and to the same amount in each case as in the present case.

T. H. B. Pierce, for plaintiff.

Courts will not take cognizance of constitutional questions by consent of parties. They must be absolutely necessary to the disposal of the case. *Fish* v. *Baker*, 74 Maine, 107; Black, Const. Law, p. 57. The license board must find the person is of "good moral character." *Randall* v. *Tuell*, 89 Maine, 443. It is apparent, therefore, that the bond clause is remote from anything that concerns the defendant's liability, and he is not entitled to set it up in defense of this suit. *Saco* v. *Wentworth*, 37 Maine, 165, and *Saco* v. *Woodsum*, 39 Maine, 258, were cases in which bonds were required as a condition of appeal or right to trial by jury, where the constitutional question came up properly, and bonds were actually given.

In *Randall* v. *Tuell*, supra, this court grounded its opinion upon

the fact that "a license is required of innkeepers for the protection of the public and to prevent improper persons from engaging in (the) . . . . business." . . . . "The statute is explicitly prohibitory." When I travel and of necessity depend upon the public inns, as we all have to, what protection may I expect at the hands of the municipal corporations within whose limits I trust myself? (1) That they see to it that only such persons are allowed by them to be innkeepers as are "persons of good moral character:" (2) That such innkeepers are suitably equipped and prepared for their business and may safely be intrusted with the health, comfort, welfare and property of their guests: (3) That those so appointed have given a special guarantee or security for the conduct of the places they are allowed to maintain, so they may be relied on as respectable places to which confiding travelers may safely bring their wives, children and friends without risk of introducing them to places of drunkenness, rumselling, debauchery, gambling or prostitution. Wandell on Law of Inns, p. 33; Black. Com. Book IV, c. 18, pp. 251–4; 256–7; R. S., c. 130, § 1; c. 135, § 8; *State* v. *Folsom*, 26 Maine, 209.

Act of 1891: Our laws from 1821 to the present time have provided in a peremptory manner for the prosecution of all persons who impose on a community or an unsuspecting traveling public by keeping a common inn without a license. For many years before 1891, the duty and obligation of prosecuting offenders was imposed on the licensing board of each town. The language of the statute was and is, "shall prosecute all violations that come to their knowledge." This is mandatory and requires no consent of town that the duty shall be performed. They could prosecute by complaint, indictment, or action of debt in name of the town. This court has declared that the members of the board are liable to indictment if they fail to perform their duty. *Wiscasset* v. *Trundy*, 12 Maine, 204. They are now liable to a penalty of $20 in an action of debt. R. S., c. 3, § 69. The act of 1891 provides that "any citizen of the state may prosecute in same manner as the licensing board," and also by necessary implication, with the same effect.

Where can be found the constitutional right of a person prosecuted in an action of debt for a penalty, to dictate who shall or may bring the action? It is contrary to all human experience to allow the accused such a right, reaching as it does to the very vitals of government. So the wrong doer may be eliminated from the problem; and this leaves to be considered only the constitutional rights of the municipal corporation in whose name the suit is brought. If its consent was necessary to the bringing of a suit like this to enforce a penalty, it could nullify the statute within its own limits. That result could never have been the intention of the founders of the state or of its lawmakers.

"Where an action is brought to recover a penalty for violation of a statute, and any person is authorized to prosecute therefor in the name of a certain officer in case the proper persons refuse to bring such action, the officer in whose name the action is brought has no power to consent to its discontinuance without the consent of the person by whom it was commenced." 18 Am. & Eng. Ency. p. 281.

J. and J. W. Crosby, for defendant.

Defendant not liable, because, R. S., c. 27, § 2, is unconstitutional in three respects; (1) It requires a bond with sureties that he will not violate sundry laws of the State.

(2) It violates the bill of rights in several respects—especially the provision that "no man shall be twice put in jeopardy of life or limb." (3) The statute is in violation of XIVth Amendment to the U. S. Constitution.

Act of 1891: The law under which this action is commenced is in violation of every principal of liberty—in conflict with various provisions in the bill of rights—is without precedent—a perfect monstrosity—an unheard of infringement of rights retained by the people referred to in Art. 24 of Bill of Rights.

This case is a novelty. No precedent can be cited for it. None can be found in any digest.

This court understands as well and better than any others the extravagant length to which the temperance fanaticism has gone in this State. It has attempted repeatedly to trample on the con-

stitution and several of the statutes have been found to be unconstitutional by this court, and some other unconstitutional provisions which once existed have disappeared without getting to this tribunal.

It assumes that the act of selling any liquor which drunk to excess may intoxicate, even the sale of a pint of cider as a beverage, is a crime of such exceptional atrocity that it is not and cannot be protected by our bill of rights—that the limitations upon the powers delegated to the legislature however much they may and do apply to the administration of the law in every other case—cannot apply to the case of the sale of intoxicating liquors.

The statute is an unjustifiable, unconstitutional interference with a man's natural and unalienable rights. It requires a peaceable man—a man never known to have committed any crime and never threatened to commit any, to get some one to be responsible for him that he will not commit a crime in the pursuit of a well known, ancient, common-law calling—a calling recognized as such for thousands of years previous to Magna Charta and still so recognized.

There are many rights and privileges retained by the people in our Democratic form of government, as is positively assured in § 24, of the Bill of Rights, with which the legislature can have no right to interfere under any circumstances, except under their police power.

The occupation of a hotel keeper is a well understood occupation recognized as customary for thousands of years—certainly ever since the time when St. Paul in the Appian Way met his friends at the three taverns and took courage; allusion to which occupation might be read in cuneiform characters on the bricks of Babylon and Nineveh. Now and long before the existence of Magna Charta, its prohibition, except upon the condition of his giving a bond with surety, would deprive many a poor man of his means of livelihood, be the means of starving his wife and children perhaps. Why? Because he has not the ability to procure a bond with sureties. If the penal sum may be $300 it may as well be $3000. Whatever it might be would depend upon the freak of the legisla-

ture. Impossible for many a poor man to procure it, especially as such bond as has been intimated by the court is not subject to chancery. And Judge Cooley, (Const. Lim. 355) says: "While every man has a right to require that his own controversies shall be judged by the same rules which are applied in the controversies of his neighbors, the whole community is also entitled, at all times, to demand the protection of the ancient principles which shield private rights against arbitrary interference, even though such interference may be under a rule impartial in its operation. It is not the partial nature of the rule, so much as its arbitrary and unusual character, which condemns it as unknown to the law of the land."

"The general law undoubtedly is that any person is at liberty to pursue any lawful calling and to do so in his own way, not encroaching upon the rights of others. This general right cannot be taken away." It is inconsistent with our bill of rights, § 6, which says that a man shall not be deprived of his life, liberty, property or privileges but by the judgment of his peers or by the law of the land. It is inconsistent with § 19, Bill of Rights, which enacts that every person for an injury done to him, his person, reputation, property or immunities shall have a remedy by due course of law. He is, in fact, deprived of his property, his privileges, his immunities in a common, ancient, innocent and well-known occupation, for the reason that he cannot procure the bond, whereas a wealthy man finds no difficulty. Section 1—The words "his natural and unalienable rights, the right of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness,"—are an assurance to the poor man that he may pursue any lawful calling, only subject to such penalties as the legislature may enact under their police power. These phrases—"reputation, property and immunities," "rights and immunities," "due process of law," "law of the land"—are words of great significance, and their meaning is well understood.

A man's calling is a man's property. *Slaughter-House Cases*, 83 U. S. p. 420, et seq. Dissenting opinion by Judge Bradley. Fundamental principles retained by the citizens are very extensively discussed by Judge Bradley and strongly in favor of the doctrine advocated here.

The calling of an attorney is property. Cooley, Con. Lim., note, p. 438. But a victualer has to buy his right. What does he pay for it? He pays the trouble and inconvenience of getting other men to become his sureties that he will not transgress some law of the state. "A vested right of action is property in the same sense in which tangible things are property and is equally protected against arbitrary interference. Where it springs from contract or from the principles of common law, it is not competent for the legislature to take it away. And every man is entitled to a certain remedy in the law for all wrongs against his person or his property and cannot be compelled to buy justice or to submit to conditions not imposed upon his fellows, as a means of obtaining it." *Ib.* p. 445–6.

That there are "rights which did not come from the constitution, but from principles antecedent to and recognized by it" is emphatically recognized in *Benson* v. *Mayor*, 10 Barb. 223–244, and in *Goshen* v. *Stonington*, 4 Conn. 209–225. These cases are cited with approbation by Cooley, Lim. 199–200 with quotations.

This statute requiring the bond is also unconstitutional for another reason. It is in violation of § 8, Bill of Rights: "No person for the same offense shall be twice put in jeopardy of life or limb." The words "jeopardy of life or limb" have a very extensive significance. This point has already been decided by the court. It is no longer an open question. It was settled in *Saco* v. *Wentworth*, 27 Maine, 175–6. This very same chapter 27 requires the hotel keeper or victualer to do two things. 1st. To give the bond and forfeit $300 if he breaks it in an action on the bond. 2d. It requires also that he shall be tried in divers other cases on complaint or by indictment if charged with a commission of any of the offenses embraced by the bond. This is a clear violation of § 8 of the Bill of Rights.

It may be granted that a statute which simply required a license and imposed a penalty for keeping a hotel without a license might be valid. But this statute imposes a penalty for the sole reason that the innholder kept an inn without giving a bond imposed by an unconstitutional law. It was an unconstitutional condition;

therefore no condition. Therefore there is no law against keeping a hotel with or without a license. Under this statute, "any citizen" of the State,—man or woman,—may commence an action in the name of the town in any county where defendant may reside and perhaps in any county where the "citizen" may reside. Consider the principle involved in such practice. If the legislature can authorize such an act, it may confer a similar power upon any other citizen in any other case. The number of crimes, which it has made the duty of the licensing board to prosecute, are very numerous. For all the crimes referred to in sections 1 to 13 of chapter 27, R. S.,—which in fact cover every offense embraced in the whole chapter relating in any way to intoxicating liquors,—for every such offense this action may be commenced in the name of the town by some remote citizen, not known perhaps to any individual in the town.

The prosecutor,—"any citizen,"—is authorized to prosecute "in the same manner as the licensing board may prosecute." Of course, it would be legitimate for the licensing board to use the funds of the town for all necessary incidental expenses—for witnesses—copies—counsel fees, etc. "Any citizen" may do the same "in the same manner;" so that, in the four cases now before the court, the town of Dexter may be liable for hundreds of dollars, not included in any bill of costs, and for expenditures incurred, whether successful or defeated.

The statute is in conflict with the XIVth Amendment: (1) A man is deprived of his rights without due process of law. (2) He is deprived of the equal protection of the laws.

"No statement of the general meaning of the phrases "due process of law" and "the law of the land" is more often quoted than that given by Mr. Webster in the Dartmouth College case. It defines the term in its relation to procedure as well as to substantive rights. Mr. Webster said: "By the law of the land is most clearly intended the general law; a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property and immunities, under the protection of the

general rules which govern society. Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land." Judge Story's definition is succinct and accurate: "Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one being dealt with belongs." Guthrie's Lect. XIVth Amendment, pp. 69–70.

No one questions the police power, but no one will consent to have it so monstrously extended as to be the ruin of liberty.

See *King* v. *Hayes*, 80 Maine, 206. Destruction of a horse by the agent of society to prevent cruelty to animals held to be illegal without notice. The law of R. S., c. 124, § 42, held to be unconstitutional. Many other cases cited. *Portland* v. *Bangor*, 65 Maine, 120, in which it was held that the commitment of a pauper to the workhouse by the overseers without a judicial investigation and notice to the pauper is not in accordance "with due process of law," and is a violation of XIVth Amendment.

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

PETERS, C. J. These cases, in all respects alike, present by agreement of parties the single question whether certain clauses of the liquor-statutes, taken singly or combined, are, so far as applicable to the facts stated, constitutional or not.

Section 2 chapter 27, R. S., provides that no person shall receive a license as an innholder or victualler until he has given bond with one or more sureties with the condition annexed that the licensee shall conform to the provisions of law relating to the business for which he is licensed. . . . . "and shall not violate any law of the state in relation to intoxicating liquors." Section 14 of the same chapter reads as follows: "The licensing board shall prosecute for the violation of the foregoing sections (of ch. 27) that come to their knowledge by complaint, indictment, or action of

debt: and all penalties recovered shall inure to the town where the offense is committed. Section 1, chapter 132, Laws of 1891, enacts that "any citizen of the state may prosecute for a violation of any of the preceding sections (of ch. 27) in the same manner as the licensing board may prosecute."

The counsel for the defendant in an exhaustive argument strongly urges the reasons why in his view these statutes are unconstitutional, while to our minds his objections are in effect merely an argument as to the expediency of the statutes rather than as to their want of constitutionality.

It is virtually admitted in behalf of the defendant that all the statutory requirements contained in chapter 27 of the revised statutes relating to innkeepers, however extreme and severe they may be, might not be regarded as tainted with unconstitutionality, were it not for the one imposing on the innholder the necessity of giving a bond with sureties for his observance of the liquor enactments as a condition of his being granted an innholder's license. We apprehend that the fallacy of this position is, in what we believe to be, an erroneous assumption by the defendant that the business of keeping a hotel is a private and natural right of which a person cannot be directly or indirectly deprived. If this foundation proposition be wrong, then all the superstructure built upon it falls to the ground.

Of course, we must admit that the position thus assumed would be a sound one as to very many private employments, and perhaps as to all the usual employments in ordinary business life. But innholding has always been regarded in this country as a public or quasi-public business over which the legislature may rightfully exercise an unusual control.

Judge Cooley strikes the true key in stating the general rule and its exceptions. "The general rule," he says, "undoubtedly is that any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching on the rights of others. This general right cannot be taken away. But here, as elsewhere, it is proper to recognize distinctions that exist in the nature of things, and proper under some circumstances to inhibit employ-

ments to some one class while leaving them open to others. And some employments in which integrity is of vital importance it may be proper to treat as privilege merely, and to refuse a license to follow them to any who are not reputable." Cooley Con. Lim. 5th ed. 745. The author places stress upon the reasonableness of restraining rules and regulations, where the occupations, though proper in themselves, may be subject to special evils, and affording peculiar opportunities for imposition and fraud. The business of marketmen, draymen, pilots, brokers, auctioneers and others, comes within this category. The persons engaged in such employments are often required by law to take out licenses and submit to such rules and regulations in their business as may seem to be important for the public convenience and protection.

We are not, however, forgetting that the great point of objection to the validity of the statute, as urged by the defense, is the feature of requiring the bond with sureties. But we must at the same time remember, as before declared, that the innholder has no natural right to pursue the business of innholding, and that it is an exceptional privilege which may or may not be conferred upon him by the public authority, and that his chance for obtaining a license is dependent upon whether the licensing board decides his appointment to be necessary and that he sustains a good moral character. By section 1, chapter 27, R. S., the licensing board may license "as many persons of good moral character . . . . as they deem necessary to be innholders." This authority involves questions to be determined by the board and not by the applicant. This idea of limiting the number of innholders in a place has always prevailed in most if not all of the states. In Colonial days the General Court of Massachusetts annually prescribed how many each town in the colony should be entitled to, especially naming the towns that should be entitled to more than one, and the business of innholding was regulated with exacting restraints and impositions which would perhaps be regarded as oppressive at the present day. It is, therefore, not easy to see that this question of constitutionality in its present aspect is a practical one between these parties. Colonial Laws, Mass. 1660–1686. (Whitmore, Boston, 1889,

1890.) As a merely academical question we cannot indulge in its discussion.

The penal sum of the bond ($300) cannot be regarded as extreme at all when it is considered that the accompanying license would confer a right and privilege where none existed before. The statute requirement certainly cannot be regarded as prohibitory in its nature or effect. There is nothing indicating that the defendant could not have easily furnished the bond had he been disposed to do so. There are many instances in the statutes where bonds are required of officials and quasi-officials for the faithful discharge of their duties, even where no money is necessarily to pass through their hands as officers, but where honest conduct is to be ensured.

In *Lunt's case*, 6 Maine, 412, it was held not unconstitutional to require a common seller of liquors to purchase a license and pay certain duties before entering on his business. There cannot be very much difference in principle between requiring pre-payment of money and requiring security for the payment of money for damages if afterwards incurred. In *Day* v. *Frank*, 127 Mass. 497, a licensee was required to give a bond with sureties to pay all costs, fines and damages recoverable against him under the Massachusetts statute of 1875, ch. 99, § 9, and while the main question here arose in another form there, it was not noticed by counsel or court, while other questions were discussed and considered.

Upon another ground is the constitutionality of the statutes in question attacked by the defense. It is contended that an action cannot be lawfully instituted "by any citizen of the state" in the name of a town, and the burden of an expensive litigation be imposed on the town without its consent; and that any statute authorizing such a thing is null and void. The first obvious answer to this proposition is that the counsel for the defense cannot represent the plaintiffs in order to raise such a question. He is defending against the plaintiffs and not acting in their behalf. The only legitimate controversy on the record of the case is whether the town can maintain this particular action while it is apparently at least striving to do so, and all else in this connection is illusory and theoretical merely. But there is much more answer

than this. The position of the defense misappreciates the true position of the plaintiffs. The town has the entire control of the action and can repudiate it if it pleases, although the presumption is that it acquiesces in the proceedings, nothing appearing to the contrary. This is not technically a qui tam action. The town sues for a penalty because the penalty belongs to the town; it sues to recover its own. Carrie H. Foster, who claims to prosecute the suit as a citizen of Maine, can only do so by the plaintiffs' consent. She is not plaintiff, but stands rather in the position of an informer for the state or town, somewhat in the position of a complainant who obtains an indictment,—an aid and promoter of the prosecution. She informs the town of the penalty due them, and they sue for it. Section 14 of the chapter, 27, says the licensing board shall prosecute for any violations by complaint, indictment, or action of debt, implying the institution of proceedings in the name of the state which perhaps is the better and more satisfactory kind of remedy. But the town can sue directly for the penalty because it owns all of it. So held in *Wiscasset* v. *Trundy*, 12 Maine, 204, an action where the facts and pleadings were essentially the same as in the present case. The writ here is in all essential respects, as far as form goes, like the writ there.

Even were this a qui tam action, the principle would be the same. The action would be under the control and direction of the town as the actual plaintiff. In a qui tam action at common law, a plaintiff may abandon or continue his action at his pleasure. If, however, he becomes nonsuited without the consent of the court, any other person interested in the penalty may sue again as if no action had been brought before. *Wheeler* v. *Goulding*, 15 Gray, 539; *Colburn* v. *Swett*, 1 Metc. 232; *Smith* v. *Look*, 108 Mass. 139; *State* v. *Johnson*, 65 Maine, 262; *Dunn* v. *Framingham*, 132 Mass. 430. Where only a moiety of a penalty goes to an informer he cannot sue for it in his own name, although it is otherwise, as before seen, if he is entitled to all of the penalty. As part owner of the penalty the informer does not control the action, but receives his share when recovered. Same authorities as before.

What would have been the position and legal rights of the parties had the informer or prosecutor instituted the proceedings in her own name as plaintiff we need not directly inquire. She has not done so.

We think the penalty to be assessed against the defendant should not be large as there are several actions and full costs are to be recovered in each case.

Judgment for plaintiffs in each action for ten dollars and full costs.

ALFRED COOKSON *vs.* JOHN PARKER, and Logs.

Somerset. Opinion January 9, 1900.

Attachment. Logs. Return. De Facto Town. R. S., c. 3, § 73, c. 81, § 26.

A lien on logs acquired by attachment will be lost if the attaching officer fails to file a copy of his return thereof in the office of the clerk of the proper town as required by the statute.

The requirement of § 26, c. 81, R. S., that an officer who cannot immediately remove bulky personal property attached by him, may keep his attachment good by filing a copy of his return on the writ in the office of the town or incorporated place where the property is attached, is complied with by filing such copy in the office of the clerk of an acting de facto plantation in which the property is situated; and the officer is neither required nor allowed to enter upon an investigation to ascertain whether or not some technical irregularity may be found in the proceedings taken for organizing such plantation affecting its corporate existence. The apparent existence of the plantation, should be regarded by the officer as the real.

ON REPORT.

This was an action of assumpsit brought to enforce the plaintiff's lien claim for his personal labor upon logs and amounting to twenty-eight dollars. The defendant, Parker, was defaulted and the owner of the logs, the Southard Manufacturing Company, after notice by publication had been proved, appeared and made defense as follows:

"The Southard Manufacturing Company, a corporation organized

under the laws of the State of Maine, comes and defends when etc. where etc. and for plea says, that said corporation is the sole owner of the logs and lumber described in the said plaintiff's writ, and that said plaintiff has not now, and never had, any lien on said logs and lumber; and further says that if said plaintiff ever had any lien on said logs and lumber, that he has lost said lien by attaching on said writ other logs and lumber than that upon which said plaintiff labored and not intermingled with the same; and that said plaintiff has lost said lien, (if any he had) because the officer who made said attachment did not take and retain possession of said logs and lumber nor legally record said attachment."

The officer's return on the writ shows that he filed a copy of it in the office of the clerk of the town of Athens; and the defendant log owner, under the last clause of its brief statement, claimed upon the evidence in the case that the officer's return should have been filed in the office of the clerk of the plantation of Brighton, where the logs were found. The defendant also interposed various other defenses.

H. Hudson, for plaintiff.

As the act incorporating the town of Brighton was repealed, it became an unorganized place. Athens is the oldest adjoining town to Brighton, as the evidence in the case shows. Unless Brighton has been legally organized as a plantation, then Athens is the place in which to file the certificate. Brighton has never been legally organized as a plantation. The record evidence introduced shows that an attempt was made to organize a plantation under sections 72, 73 and 74 of chapter 3 of the Revised Statutes. The organization of the plantation is fatally defective. First, because the clerk and assessors did not transmit to the secretary of state, to be by him recorded, a certified copy of all proceedings had in effecting the organization, including the petition, if any, the warrant issued therefor and the return thereof, and the record of the meeting held in pursuance thereof, and a written description of the limits of the plantation. Section 74 prescribes that such return shall be made. If it is not made, then there is no legally organized plantation. There is nothing in the records in this case to show

that the clerk and assessors transmitted to the secretary of state any copy at all of the proceedings. In *Plantation No.* 9 v. *Bean* 40 Maine, 218, the court have said: "Without such a return to the office of the secretary of state the organization is defective and of no validity." The court have in effect said the same thing in *State* v. *Woodbury*, 76 Maine, 458. Second, section 73 provides that a moderator shall be chosen by ballot by the voters present, to preside at such meeting, and the person to whom the warrant was directed shall preside until such moderator is chosen and by such person sworn. The record introduced in this case shows that the warrant was directed to H. L. Wyman. The record of the meeting upon page 41 shows that G. C. Davenport was chosen moderator and that he was sworn by the clerk. The record further shows that L. H. Hayden was elected plantation clerk. The record shows that the moderator was sworn by L. H. Hayden and not by H. L. Wyman, as required by the statute. As the moderator was not sworn by the person required by statute to swear him, it is the same as though no oath had ever been administered. The administering of the oath by the person not authorized to administer the same, is the same as though no oath had been administered. The statute requires that the moderator must be sworn. He was not sworn, and he was therefore acting in violation of the statute authorizing the organization of a plantation. In the organization of plantations the court have held that the statute requirements must be complied with.

Jos. F. Holman; S. J. and L. L. Walton, for log owner.

We say the plaintiff should have no judgment against logs, for four distinct reasons:—1st. The writ is defective. It does not fix the value of the logs which the officer is required to attach. "To the value of one hundred dollars," should have been inserted after the logs and lumber had been specified, instead of simply after the defendant's name. The command in the writ was to attach all the poplar, spruce, pine, hemlock and cedar logs piled on the bank or in the stream. The officer was not limited as to amount. No value or amount is specified.

2nd. The lien proved is not that set out in the writ. The lien declared upon is for cutting. The plaintiff testified that the labor performed was partly cutting and partly loading and shoveling snow.

3rd. There is no evidence that any of the logs are those upon which plaintiff labored. It clearly appears that some of the logs attached were those upon which he had no lien. They were from other lots and piled in distinct and separate piles from the Parker logs.

4th. The attachment was lost, if any there had been, by the failure to file the certificate in the proper place. The return should have been made to the clerk of Brighton, not to that of Athens, the oldest adjoining town, as Brighton is not an unorganized plantation.

The officer's return of his attachment should have been made to the clerk's office in Brighton. *Parker* v. *Williams*, 77 Maine, 418.

Does plaintiff claim that Brighton is not an organized plantation: that there were defects or omissions in the proceedings for its organization? Does not the court take judicial cognizance of the organization of plantations as well as towns?

In any event, it has the right to examine the papers on file in the office of the Secretary of State, in the same manner as the U. S. Supreme Court resorted to the archives and public record-books of the United States to inform themselves of the particular facts material to be known, to the proper understanding of a cause before it, (*Romero* v. *United States*, 1 Wall. 721,) Nelson, J., in *United States* v. *Teschmaker*, 22 How. 405, cited with approval in 1 Greenl. Ev. p. 11, (Redfield's Edition.)

But it is not necessary for us, in this proceeding, to show that all the requirements of law were complied with in the organization of the defunct town of Brighton into a plantation.

It had a clerk de facto, which was sufficient to have justified the officer in making his return to him; it would justify any person in regarding his acts as those of the clerk of a duly organized plantation, and to look to his records for those matters there to be recorded. *Woodside* v. *Wagg*, 71 Maine, 207; *Brown* v. *Lunt*, 37

Maine, 423; *Johnson* v. *McGinly*, 76 Maine, 432; *Petersilia* v. *Stone*, 119 Mass. 465; *Attorney General* v. *Crocker*, 138 Mass. 214; *State* v. *Carroll*, 38 Conn. 449–467.

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

PETERS, C. J. Several objections are urged by the defense against the maintenance of this action, only one of which need be considered.

The action seeks to obtain a lien judgment against certain logs in favor of a laborer who worked upon them. The logs when attached were on a township which for many years until recently comprised the town of Brighton, in Somerset county, but which, as the plaintiff contends, was at the date of the attachment merely an unincorporated place, while the defense contends it was at that time an incorporated plantation. The officer did not retain possession of the logs, but made a return of his attachment to the clerk of the town of Athens as the oldest adjoining town in the county. And such was the statute requirement if Brighton was at the time merely an unincorporated place and not a plantation. R. S., ch. 81, § 26.

It seems that in March, 1895, the legislature, on the petition of its inhabitants, allowed the town to surrender its town charter and organize themselves as a plantation. This the inhabitants immediately undertook to do, the vote showing that the voters were a unit on the question. In April, 1895, a meeting was duly called at which the new organization was effected, in pursuance of which a full board of plantation officers was chosen, and appropriations made for all plantation purposes. Since then the plantation has held its regular annual meeting in the spring of the year, and in the fall, as public returns show, has voted in all federal, state, congressional and county elections. The plantation appears to have been recognized as such in all affairs incident to such an incorporation. The plaintiff contends, however, that the proceedings attendant upon the formation of the plantation are defective in two

particulars. One defect is that no return of the proceedings of incorporation was ever made to the Secretary of State as by statute required. It seems that such a return was in fact made on April 18, 1895, and an official certificate of the fact was produced before us at the argument but was not in evidence at the trial when the case was reported. This objection could easily be obviated, if necessary, by allowing the certified proceedings to be made a part of the case by amendment. The other alleged defect is that the moderator of the first meeting of the inhabitants, called together to organize the plantation, was sworn by a justice of the peace instead of by the person who presided at the meeting when the moderator was chosen, the latter course being prescribed by R. S., ch. 3, § 73.

But the substance of the statute requirement was preserved if the form was not, the result being only an irregularity perhaps. In proving the organization of municipal corporations the presumption of regularity and completeness is not without much weight. *Prentiss* v. *Davis*, 83 Maine, 364. Mr. Dillon says the existence of a municipality may sometimes be presumed. Dill. Mun. Corp. § 39. At all events, this plantation was surely a municipality in fact, a de facto corporation, and this rendered it unnecessary and even improper for the officer to question the apparent fact, and to take upon himself the responsibility of investigating and deciding the question. It could not possibly be pretended that an officer would be under obligation to do so. He would be justified in regarding the appearances of the thing as the thing itself. "So things seem right, no matter what they are," is a sentiment applicable here.

The plaintiff may have judgment against the person, but not against the property.

Judgment accordingly.

SAMUEL KNIGHT, and others, Petrs. for Mandamus,

vs.

EUGENE THOMAS, and others.

Sagadahoc. Opinion January 11, 1900.

Mandamus. Taxes. R. S., c. 77, § 6.

While it is settled law in this state that a writ of mandamus can issue only at the instance of public officers to subserve a public right, yet an individual may move for the writ when his personal rights have been invaded beyond those rights which he enjoys as a part of the public and that are common to every one.

By omitting property in his own town from taxation, the personal interest of a tax-paying citizen is invaded beyond that enjoyed in common with the public, and he may be allowed to move for a writ of mandamus to the assessors in protection of it.

An individual taxpayer may have the writ to compel the assessors to act,—that is, to assess all the property in their town; but the valuation thereof must be fixed by them according to their own honest judgment, which cannot be revised by mandamus.

The writ of mandamus is a prerogative, to be granted or withheld at the discretion of the court. It is not a writ of right. *Held;* that it will not be granted when to issue it would be but idle ceremony, when, as in this case, the assessments complained of have been long since completed.

ON EXCEPTIONS BY PLAINTIFF.

This was a petition of Samuel Knight, and fourteen other taxpayers and residents of Topsham, for a writ of mandamus against the assessors of taxes in that town. The petition was filed April 21, 1899, and alleged as follows:

"That the Pejepscot Paper Company is a corporation duly organized by law, having a place of business at said Topsham, and on said first day of said April was the owner and possessor of property situated in said Topsham subject to taxation as aforesaid.

"That the inhabitants of said town of Topsham at a meeting called for that purpose, and held on the twenty-ninth day of October, 1892, passed the following vote:

"Voted; that the selectmen and assessors be and are hereby instructed not to place a valuation for taxation exceeding thirty thousand dollars during the ten years next ensuing on the lands and erections that may be made thereon during the same ten years, and water power and rights on Androscoggin River, being the privilege which Eliphalet M. Dennison, deceased, owned, but this shall not apply to dwellings or tenement houses or the lots on which they may be.

"That the assessors of said town of Topsham in each year since said 1892 have made the assessment of said taxes upon the property of said company situated in said Topsham and described in said vote, in accordance therewith, although the just value of said property has been in each of said years, and especially on the first day of April aforesaid, was far in excess of the sum of thirty thousand dollars, namely the sum of four hundred thousand dollars, as your petitioners are informed and believe.

"That the Sagadahoc Agricultural and Horticultural Society is a corporation duly established by law, having a place of business in said Topsham, and on said first day of April was the owner and possessor of certain property situated in said Topsham subject to taxation for the purposes aforesaid, and that said town of Topsham has voted to exempt said property from taxation.

"That the assessors for said town of Topsham for the current municipal year are Eugene Thomas, Joseph P. Whitney, Alden Q. Goud.

"That your petitioners are informed and believe that said assessors do not intend to value the property of said corporations as aforesaid for purposes of taxation for state, county, and town taxes for the current year at its just value on said first day of April, but have avowed their intention to be governed as to the valuation and exemption thereof by the votes aforesaid.

"Wherefore, your petitioners pray that a writ of mandamus may be issued to said assessors, commanding them to apportion and assess said state, county and town taxes for the current municipal year upon said property according to the just value thereof on said first day of April, 1899."

The petition was duly signed and sworn to by the subscribers. A summons to the respondents was ordered on May 3 to issue and made returnable at judges chambers in Auburn May 10, where a hearing took place Thomas and the other assessors filed a motion to discharge the rule to show cause, as also did the Pejepscot Paper Company. These motions were sustained and, exceptions having been allowed, the cause was by agreement of the parties entered at the May law term, Middle District.

The principal grounds set forth in the motion to dismiss were as follows: . . . .

6. "That said petitioners are all private and unofficial persons, having no interest in the subject matter of the petition other than their interests therein in common with the public at large, and that a writ of mandamus issued on said petition would subserve public rights only.

7. "That said petition contains no averment of any default or intended default on the part of the respondents therein named as assessors of said town of Topsham, in the performance of their official duty, and shows no reason for proceeding by mandamus against any respondent named in said petition.

8. "That for these and other reasons apparent upon the face of the petition, no ground whatever for interference by this court by writ of mandamus is shown."

F. E. Southard, for plaintiffs.

Objection 6: "There is much authority that a private person may move for the writ to enforce a public duty, not due the government as such, without the intervention of the Government law officer." *Union Pacific R. R.* v. *Hall*, 91 U. S. 355, and cases cited.

The Massachusetts courts are showing symptoms of coming around to this most reasonable doctrine. The petitioners in *Richards* v. *Co. Com. of Bristol*, 120 Mass. 401, do not appear to have any interest in the completion of the way asked for, except as a part of the general public, and in *Atty. Gen'l* v. *Boston*, 123 Mass. 479, the rule in *R. R.* v. *Hall*, supra, is quoted with evident friendliness. In *Larcom* v. *Olin*, 160 Mass. 102, the writ was

issued upon the petition of inhabitants, tax payers and voters of Beverly, but the question of the right of the petitioners to move for the writ was not passed upon. It is but a step, and a short and easy one, too, for the Massachusetts court to take, to adopt the United States rule. There are many reasons why they should take this step, and none against it.

But upon the rule as adopted by this court in *Sanger* v. *Co. Com.* 25 Maine, 291, and *Weeks* v. *Smith*, 81 Maine, 538, these petitioners are proper parties to ask for this writ. Private persons may move, when they have a special interest beyond that of the public at large. *Wellington's Case*, 16 Pick. 87; *Sanger* v. *Co. Com.* 25 Maine, 291; *Weeks* v. *Smith*, 81 Maine, 538; *Brunswick* v. *Bath*, 90 Maine, 479; *Adams* v. *Ulmer*, 91 Maine, 47.

By the public is meant all the citizens, and every member of the state. 1 Gr. Ev. § 128. The whole body politic or all the citizens of the state. Bouv. Law Dict.; Standard Dict. "Public."

Every tax payer in the state has the right to have taxes assessed therein according to law;—that is the public right. Beyond and in addition to this, every tax payer has a special right to have the taxes in his own town assessed in the same manner, for though it does not affect tax payers of other municipalities if half the taxable property therein is exempted from taxation by the assessors, it is of vital moment to the tax paying residents of that town. Every dollar of tax which taxable property therein escapes, must be borne by the rest of the taxable property therein, and by actual computation in this case of every seven dollars paid by the tax payers of Topsham other than the Pejepscot Paper Company, one dollar is on account of the inadequate valuation of its property. And the tax payers of the other towns of the state are not affected. Can anything be clearer than the proposition that these petitioners have an interest in the valuation of property and assessment of taxes thereon in their own town beyond that of the public at large? This brings the petitioners within the rule as laid down by this court, and entitles them to move for this writ. 13 Ency. Pleading and Practice, 642.

Objection 7: It is unfair and unworthy of men charged on their oaths with a public duty. The petition alleges that the assessors

have avowed their intention to be governed in the valuation of the Paper Company's plant by the vote of the town,—a grossly inadequate valuation. They have filed no answer denying it. If they had intended to exercise their judgment in fixing this value, they could and should have said so. Instead of a frank avowal of their intention they file this motion. A formal demand and refusal to perform a public duty have been held not a necessary preliminary to the filing of a petition for mandamus. 127 Ill. 613.

Weston Thompson, for defendant assessors.

J. W. Symonds, *D. W. Snow*, *C. S. Cook and C. L. Hutchinson*, for Pejepscot Paper Company.

"Questions of much nicety have frequently arisen" in determining how far the writ of mandamus may be employed in cases of this class "without encroaching upon the element of sovereignty which is a necessary incident to the exercise of the taxing power." High, Extr. Legal Rem. § 368.

These petitioners seek to enforce performance of "a general duty of providing for the payment of all indebtedness against the municipality" and not a special duty to levy a tax for a particular purpose. It has been held that in cases of this class, mandamus will not lie. High, Extr. Legal Rem. § 369, citing *State* v. *City of Davenport*, 12 Iowa, 335.

In a case of the other class, where a "special duty" was involved, it was said that "where no private rights have as yet been affected by the proceedings, a mere individual tax-payer, who has no other interest than the public generally, is not entitled to the writ." High, Extr. Legal Rem. § 371, citing *People* v. *Supervisors of Vermilion*, 47 Ill. 259.

The assessors are not servants of the town. They are public officers—servants of the law. Petitioners seek to compel their performance of a purely public duty which their official oath requires and which they have not yet neglected or refused to execute. The petition does not allege such neglect or refusal. It merely alleges that the petitioners are informed and believe.

Mandamus will not issue in a case of this kind at the instance of these petitioners, who are all private and unofficial persons. Such

person is competent to call for the writ "in those cases only where he has some private or particular interest to be subserved, or some particular right to be pursued or protected by the aid of this process, independent of that which he holds in common with the public at large. It is for the public officers, exclusively, to apply for such writ when the public rights are to be subserved." *Sanger* v. *Co. Com.* 25 Maine, 291.

This doctrine is not acknowledged in all jurisdictions, but "it has for a very long time been well settled law in this state." *Mitchell* v. *Boardman*, 79 Maine, 469; *Weeks* v. *Smith*, 81 Maine, 538. And it is law elsewhere. *Wellington's case*, 16 Pick. 187; *Heffner* v. *Commonwealth*, 28 Pa. St. 108; *Delbridge* v. *Green*, 29 Mich. 121; *People* v. *Regents of University*, 4 Mich. 98; *People* v. *Inspectors of State Prison*, 4 Mich. 187; Wood, Mandamus, 96; *State* v. *Hollingshead*, 47 N. J. L. 437. See also *Emery* v. *Sanford*, 92 Maine, 525.

This case falls within the reason of the rule which is supported by our citations. The duty is purely public. Whether the petitioners are damnified depends on the fairness of the valuations of their own estates as well as of the property here called in question. It cannot be seen that there is a private grievance without going into questions that cannot be investigated on this application. Public officers should be trusted to protect public interests. It will keep the writ of mandamus busy, if it must respond to the call of every jealous tax-payer who claims that undervaluation is exemption. The appraisal is for the discretion of the assessors, not to be controlled by mandamus. It is not pretended that the assessors have neglected or refused to act or that they do not intend to act. Petitioners do not even allege that they have been so informed or that they so believe.

In the assessment of state, county and town taxes, the titles and values are regarded as they stand April 1; but the statute does not require that an impossible assessment be made on that day. Time is allowed for the assessment afterwards. R. S., c. 6, §§ 106–110. Mandamus does not lie for anticipated delinquency, even though it be threatened.

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

HASKELL, J. Petition for mandamus by several taxpayers of a town to compel the assessors to assess certain real estate in the town at a just and fair valuation, that had previously been undervalued, and to assess certain other real estate that had theretofore been omitted from taxation.

I. It is objected that the writ cannot issue at the instance of the petitioners, who are individuals.

It is settled law, in this state, that the writ can only issue at the instance of public officers, to subserve a public right. *Sanger* v. *County Commissioners*, 25 Maine, 291; *Mitchell* v. *Boardman*, 79 Maine, 469; *Weeks* v. *Smith*, 81 Maine, 538. But, as stated in the last named case, an individual may move for the writ "when his personal rights have been invaded beyond those rights that he enjoys as a part of the public and that are common to every one."

The public consists of the entire community, persons who pay taxes and persons who do not. Their interest is the raising of revenue by taxation or otherwise to provide for the expenses of government, public works, public institutions and public charges. The individual taxpayer's interest is in common with all these, but he has another interest peculiar to himself, that taxes shall be assessed equally, so that his burden shall not be greater than equality of taxation shall impose. His personal interest, therefore, by the omitting of property from taxation in his own town would be invaded thereby beyond that enjoyed in common with the public, and he may well be allowed to move for the writ in protection of it.

II. It is objected that the writ will not lie to command assessors, who intend to assess a certain parcel of land, to assess the same at its just and fair value. Their oath requires them to do that, and mandamus could not require more. It may require them to assess, but the assessment is matter of judgment, and it must be their own judgment, honestly given of course. Any other assess-

ment would be corrupt, and the remedy for that must be elsewhere. Otherwise, mandamus would simply work an appeal from the appraisal of property made by the assessors, which is not at all the proper function of the writ. To have all the property assessed is a private right; to have the assessment according to law is a public right. The assessors are public officers, sworn to a faithful discharge of their duty. The individual has a right to have them act. The public has the right to their official action, honestly performed under their oath, and with this the individual must be content, unless the legislature shall provide a remedy. The legislature has already provided such remedy as it thought wise by R. S., c. 77, § 6, where jurisdiction is conferred upon this court to hear and determine all complaints relating to any unauthorized votes to raise money by taxation, or to exempt property therefrom.

III. As to the land not assessed, the petitioner might have had the writ if the court below, in its discretion, had seen fit to award it, for the writ is a prerogative to be withheld or granted in the exercise of discretion. It is not a writ of right. *Morsell* v. *First Natl. Bank of Washington*, 91 U. S. 357. Nor can it now be issued to any effective purpose. The assessment must have long since been made. To issue it would be an idle ceremony. *Mitchell* v. *Boardman*, 79 Maine, 471. The petitioner is not aggrieved by the ruling below.

Exceptions overruled. Petition dismissed.

H. H. NEVENS & COMPANY, (Corporation),

vs.

WILLIAM H. BULGER AND ALFRED G. BULGER.

Hancock. Opinion January 11, 1900.

Partnership. Notice of Dissolution. Evidence.

All the partners of a firm, which has had continuous dealing with another, are liable to him for goods purchased of him upon the credit of the firm after dissolution of it, if he have no notice thereof.

In a suit to recover merchandise sold to a partnership, from which one partner had retired unknown to the plaintiff, the publication of notice of dissolution, not known to the plaintiff, is inadmissible in evidence.

Postal cards, signed by the defendant firm, ordering goods of the plaintiff are competent evidence to show the sale of the goods, and for this purpose are admissible, even though they were not written by authority of the retiring partner.

ON EXCEPTIONS BY DEFENDANT.

This was an action of assumpsit on account annexed by plaintiff, a corporation located at Portland, against defendants, alleged to be partners in trade at Bar Harbor as Bulger Brothers, for goods sold and shipped to Bulger Brothers, Bar Harbor, between June 1 and June 25, 1897, amounting to four hundred and eighty-four dollars, which goods were received by the defendant Alfred G. Bulger, who was doing business at Bar Harbor under the name of Bulger Brothers at that time.

The defendants, who were brothers, formed a partnership in 1893, by written articles of agreement, to carry on the business of a store at Bar Harbor under the name of Bulger Brothers, and carried on such business until April 30, 1896, when the partnership was dissolved by mutual agreement, evidenced by written articles of dissolution; the purchasing partner, Alfred G. Bulger, continuing to carry on the business under the name of Bulger Brothers until his bankruptcy in October, 1898.

The plaintiff dealt with and sold goods on credit to the defend-

ants during their partnership, knew of the partnership and relied upon it.

Plaintiff claimed to have received no notice of the dissolution. The defendants claimed otherwise. The question at issue was whether the plaintiff, prior to June 1, 1897, had received notice or knew of the dissolution.

The defendants offered in evidence a notice of dissolution of partnership published in the Bar Harbor Record newspaper November 11, 1896. On the objection of the plaintiff this notice was excluded.

The defendants also offered to show the number of times that said notice had been published, but this testimony was excluded upon the objection of the plaintiff. It had previously appeared, without objection, on direct examination of defendants' witnesses that a notice was published. Upon the offering of the notice, the court inquired of counsel for defendants whether he proposed to show that the notice as published had been brought to the attention of the plaintiff or its agent prior to June 1, 1897, and counsel for defendant said that he was not willing that the notice should be admitted on the understanding that he should so prove.

It appeared in evidence that an agent of the plaintiff visited Bar Harbor and the store of the defendants and remained over night at Bar Harbor once a week, on the average, from May to October, less frequently from October to May. This agent was the one who sold a considerable part of the goods sued for to the defendant, and a part of whose duty it was also to obtain knowledge of the credit and standing of the defendants. The defendants claimed both that express notice of the dissolution of partnership was given to the plaintiff by them, and also that the circumstances would authorize the jury to find that the plaintiff or its agent must have had actual knowledge of the dissolution prior to June 1, 1897. The agent referred to was a witness for the plaintiff and was not asked whether he had seen the notice in the Record newspaper, but he denied that he had, prior to June 25, 1897, received any notice or had any knowledge of the dissolution of partnership.

No question as to the liability of Alfred G. Bulger was raised, and William H. Bulger defended on the ground that he was not liable as a partner.

The plaintiff offered in evidence, during its direct testimony, twenty-one postal cards, all dated at Bar Harbor, from October, 1896, to June, 1897, inclusive, signed Bulger Brothers, and directed to H. H. Nevens & Co., Portland, Maine, ordering various goods, of which cards the following are examples:

Send us 5 lbs. white whole pepper.
100 lbs. best rice. Bulger Brothers.
Bar Harbor, June 16, 1897.

Send us one bbl. Y. E. beans.
Bar Harbor, Nov. 27, 1896. Bulger Brothers.

To the admission of all these cards, the defendant, William H. Bulger, seasonably objected on the ground that they were not admissible to bind him, as they had not been written or authorized by him. The cards were admitted in evidence on the ground that no evidence had been presented by the defendants of a dissolution of partnership. Evidence had been presented by the plaintiff showing a partnership of the defendants commencing in 1893. No evidence of a dissolution of partnership nor any other evidence had been presented by the defendants up to that point of the trial. The defendant, William H. Bulger, had filed an affidavit denying partnership, said affidavit having been filed at the previous October term, and prior to the trial had filed his pleadings denying partnership and his liability as a partner.

To the exclusion of the evidence offered by him, and to the admission of the evidence against his objection, the defendant, William H. Bulger, was allowed his exceptions.

The bill of exceptions contained a copy of the articles of the co-partnership and its dissolution. And it was also stipulated that either party might present to the law court a report of all the evidence in the case to be considered as a part of the exceptions; but no report of the evidence was presented.

L. B. Deasy, for plaintiff.

It seems to be clearly established by authorities that when a partnership is dissolved, a notice of dissolution must be given, otherwise either partner may bind the other by continuing to buy goods and make contracts under the firm name with persons who have no knowledge of the dissolution. It seems also clearly established that as to strangers, i. e. persons with whom the firm has had no previous dealings, a public notice, a notice published in a newspaper, is sufficient. But it is as firmly settled that persons with whom the partnership has had previous dealings, must have actual notice.

Pitcher v. *Barrows*, 17 Pick. 365; *Goddard* v. *Pratt*, 16 Pick. 432; *Marlett* v. *Jackman*, 3 Allen 292; *Central National Bank* v. *Frye*, 148 Mass. 500; *Munroe* v. *Conner*, 15 Maine, 180; *Almira Rolling Mill Co.* v. *Harris*, 124 N. Y. 280; *Austin* v. *Holland*, 69 N. Y. 575; *Lyon* v. *Johnson*, 28 Conn. 1; *Lovejoy* v. *Spafford*, 93 U. S. 430; *Prentiss* v. *Sinclair*, 5 Vt. 149; *Amidown* v. *Osgood*, 24 Vt. 278.

If there had been an issue between the parties as to whether there had been previous dealings between the parties, then in such case the notice should have been admitted. The court would not be justified in assuming that there had been such previous dealings. Neither could the court determine such fact. That issue (an issue of fact) would have been one for the jury, and in such case the notice should have been admitted, and the jury instructed that such notice might be sufficient if there had been no previous dealings between the parties. Thus in *Watkinson* v. *Bank of Pennsylvania*, 4 Wharton, 484, (34 Am. Dec. 521) the court say: "The newspaper notice should have been admitted, because if the plaintiff were not a customer it would be admissible, and it is for the jury and not the court to decide whether there had been previous dealings between the parties."

If defendant has introduced some evidence tending to show that the notice as published came to the attention of the creditors, then in connection with such evidence the notice itself might be admissible. Sometimes such newspaper notice is offered in evidence

accompanied with proof that the party sought to be charged with actual notice was subscriber to or regular purchaser or reader of the paper; this is not sufficient however to prove actual notice. In the case of *Lincoln* v. *Wright*, 23 Pa. 76, (62 Am. Dec. 318), the court say: "The statement of a fact in a public paper is either actual notice or else no notice at all. There is no rule of law which gives it the effect of constructive notice. It must therefore be proved that he read it, otherwise it is no stronger than proof that the fact was orally and publicly uttered at a place where he was not present. To show that he was in the habit of reading the paper which contained it does not help the matter. If he must be presumed to know every fact which happens to be published in a daily paper merely because he is a subscriber or habitual purchaser of it, he can make himself safe only by ceasing to take it or else by reading every word in it. To do one would be a heavy burden upon a man of business, and the other would be a serious privation. The law puts no citizen to a choice of such evils." The defendants' counsel disclaimed any intention of showing that the notice was brought to plaintiff's attention; whereupon the notice was objected to and properly ruled out.

In the case of *Pitcher* v. *Barrows*, supra, a dissolution of partnership was claimed and the plaintiffs denied notice of it. The defendants offered in evidence the record in the registry of deeds of an instrument relied upon as a dissolution of partnership. They also offered evidence of the notoriety of the fact of dissolution. No public notice had been given and no notice to the plaintiffs. It was held that the above evidence was inadmissible.

The case of *Central National Bank* v. *Frye*, 148 Mass. 500, was an action by a bank against a partnership, one of the members of which claimed to have withdrawn before the debt was contracted. The court say: "On the question whether if he had left, due notice was given, evidence was admitted that it was known in the trade and generally among business men. If the plaintiff had been a previous trader with the firm and entitled to actual notice, this evidence would not be sufficient or indeed admissible under our decisions to show that it received notice." In the case of *Scheiffelin*

v. *Stevens*, N. C. 1 Winston's Law, 106 (84 Am. Dec. 355), the question at issue was exactly the same question here. The defendant and one Boyd were partners in business in Asheville, North Carolina. The firm was dissolved and notice of dissolution was published in the Asheville Spectator. Boyd continued to buy goods in the name of Boyd & Stevens. Two or three years after the dissolution he bought the goods sued for of the plaintiffs in the firm name, but without the knowledge or consent of Stevens. The verdict was for the defendant, but upon the appeal the judgment was reversed. The court say: "We think it was the duty of the partners in Asheville to give notice of the dissolution of their co-partnership to their correspondents in New York, and that a publication of it in the Asheville Spectator was not actual notice, nor did it furnish any evidence from which such notice could be inferred."

No case can be cited where a newspaper notice has been held admissible when offered alone, not only unsupported by other circumstances, but bearing the burden of a disclaimer of intention to bring it home to the plaintiff, and this against a party with whom the defendants were admitted to have had previous dealings.

The defendant was not injured by the exclusion of the testimony; nor does he show to the court what the evidence is. *Holbrook* v. *Knight*, 67 Maine, 246; *Noyes* v. *Gilman*, 71 Maine, 399; *Soule* v. *Winslow*, 66 Maine, 451; *Bryant* v. *R. R. Co.*, 61 Maine, 303; *Toole* v. *Bearce*, 91 Maine, 214.

Where written evidence is excluded, the bill of exceptions should set out the instrument with the grounds on which it was excluded. *Crowley* v. *Appleton*, 148 Mass. 101; *Warren* v. *Spencer Water Co.*, 143 Mass. 164; *Morville* v. *American Tract Soc.*, 123 Mass. 139; *Noyes* v. *Gilman*, 71 Maine, 398; *Howes* v. *Tolman*, 63 Maine, 258; *Com.* v. *Smith*, 163 Mass. 429; *Small* v. *Sacramento Co.*, 40 Maine, 274; 3 A. & E. Ency. Pl. & Pr. 427, 428, note.

At the time these postal cards were offered, the agreement of partnership had been offered and admitted,—the defendant William H. Bulger had denied the partnership by affidavit and

also by his pleadings. But no evidence of dissolution had been introduced. It is a well-settled principle that a relation or condition once shown to exist is presumed to continue until the contrary appears in evidence. This is true of, Title, *Porter* v *Bullard*, 26 Maine, 448; Seizin, *Brown* v King, 5 Met. 173; Ownership of stock, *Barron* v *Paine*, 83 Maine, 324; Residence, *Greenfield* v *Camden*, 74 Maine, 56; Domicile, *Chicopee* v *Whately*, 6 Allen, 508; Coverture, *Erskine* v. *Davis*, 25 Ill. 251; Solvency, *Wallace* v. *Hull*, 28 Ga. 251; Insolvency, *Mullen* v *Pryor*, 12 Mo. 307.

The same principle is true of partnership: *Eames* v *Eames*, 41 N. H. 177; *Cooper* v *Dedrick*, 22 Barb. 516; *Clark* v *Alexander*, 8 Scott, N. R. 147; *Anderson* v *Clay*, 1 Starkey, 121; 19 A. & E. Ency. p. 76.

J. A. Peters, Jr., for defendant Wm. H. Bulger.

Wm. H. Bulger was not actually a member of the defendant firm at the time of the contracting of the bill sued for, and had not been a member for over a year. Plaintiff claims that Wm. H. Bulger failed to give them notice of his withdrawal and so is liable to them for this bill. The question is thus one of estoppel and should be regarded as such. The defendant is entitled to have the proof clear, if he is to be precluded from alleging the actual facts, —especially where the result of the estoppel is to deprive him of his property to such a considerable extent.

Liability of partner who has withdrawn liability is by estoppel only. *Scarf* v. *Jardine*, 7 App. Cas. 345, referred to in *Elkinton* v. *Booth*, 143 Mass. 482; *Bloch* v. *Price*, 32 Fed. Rep. 562.

Defendant claimed to be able to show facts and circumstances which would authorize the jury to believe that the plaintiff through its agents had actual knowledge of the dissolution of partnership before this bill was contracted. If the defendant could bring actual knowledge home to the plaintiff, it would not be necessary to go further and show a notice from the defendant to the plaintiff.

Knowledge of dissolution may be established by parol or inferred from circumstances. 17 Am. & Eng. Encl. Law, p. 1121, (1st Ed.) When traced to its source, this rule of holding a partner,

who has actually and in good faith withdrawn from a firm, liable for a new debt contracted by his successors with an old dealer, rests upon the principle that where one of two innocent persons must suffer a loss it shall fall upon him whose carelessness or mistake is more nearly the cause of the loss. On this theory the defendant should be permitted to introduce testimony having a direct bearing upon the performance of his whole duty in respect of the plaintiff.

"A notice of dissolution of a partnership published in a newspaper though not per se sufficient to show either that the dissolution took place on a certain day prior to the publication or that the parties dealing with the firm and others had notice of the dissolution on that day, is, however, admissible in evidence as a circumstance tending to show those facts, and if followed up with other evidence may sufficiently charge the parties with notice." *Boyd* v. *McCann*, 10 Md. 122; *Vernon* v. *Manhattan Co.*, 22 Wend. 183. Both cited in support of above quotation in *Lincoln* v. *Wright*, 23 Pa. St. 76, (62 Am. Dec. (note) 322.)

"The fact is, that as to those who have had dealings with the firm, the publication of a notice of dissolution will be received in evidence and left to the jury, who must determine from all the circumstances of the case whether the parties had notice." Note in 62 Am. Dec. 322. The bill of exceptions show that the defendant had two contentions, one, that direct notice had been given plaintiff by word of mouth; and two, that a certain notice, published in a certain way, together with other circumstances, authorized the conclusion that the plaintiff had actual knowledge. It was as a part of this second contention that the evidence was offered. The fact that the agent of the plaintiff denied that he either received notice, or had knowledge, cannot affect the question of admissibility of this evidence, as the fact of his having knowledge was the question at issue.

Postal cards: They were statements of admissions of a former partner not in any way relating to the former partnership business and were no better than the admissions of a third party. In *Nichols* v. *White*, 85 Maine, 531, two men were partners as Law-

rence Brewing Co., and dissolved. The point was, as in this case, whether the plaintiff had notice of the dissolution. A written statement by a former partner was offered and admitted in the court below. The court says: "It does not distinctly appear when the statement admitted in evidence was written; but it was written after the dissolution of the firm, and after the commencement of this suit. The paper was not relevant to any fact to be established in the action against William H. Nichols. He did not defend the action. The only issue was as to the liability of the defendant White, and he alone defended. The statement, as against him, was mere hearsay. The declarations of one partner after the dissolution of a firm, not made in the business of winding up, and not connected with any transaction or dealing connected with the dissolution of the partnership, are inadmissible against his copartner. He may bind himself by his admissions, but as to his former partners, his agency, except for special purposes, is terminated by the dissolution, and his admissions are like those of a stranger, and they are not bound by them." See also cases cited there. When these cards were offered and admitted no evidence of a dissolution, or any other evidence, had been presented by the defendant. But this did not make these cards any more admissible. The whole and only issue was the fact of knowledge by the plaintiff of dissolution. All the evidence presented was on this one point.

If there had not been a dissolution of partnership prior to the date of the first postal card there would have been no object or reason in introducing them. If they were introduced on the theory that there had been no dissolution, or no evidence of dissolution, then they were immaterial and inadmissible as in no way connected with the account sued upon.

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

HASKELL, J. Plaintiff was a corporation dealing in merchandise in Portland. Defendants were copartners trading at Bar Harbor under name of Bulger Brothers. They dissolved copartnership

and one of the brothers, continuing the business under the firm name, ordered the goods sued for in the firm name of Bulger Brothers. The plaintiff gave credit to the firm, as it had previously been in the habit of doing before the dissolution, and denied knowledge of it.

I. The defendant, who had retired from the firm, seasonably denied the partnership and insisted that plaintiff knew of the dissolution, and in support of that contention offered in evidence a notice of the dissolution published in the Bar Harbor Record before the merchandise sued for had been ordered. Upon objection by the plaintiff the court inquired of defendants' counsel whether he proposed to show that the notice had been brought to the attention of the plaintiff or its agent before the goods were ordered. He replied "that he was not willing that the notice should be admitted on the understanding that he should so prove;" thereupon the notice was excluded and defendant has exception. If the plaintiff had no knowledge of the notice, of course, its admission could serve no good purpose. It became entirely immaterial to the issue, whether in or out, and its exclusion was not error.

II. The plaintiff was allowed to read in evidence twenty-one postal cards, dated after the dissolution, ordering goods under the name of Bulger Brothers. To the admission of these cards defendant has exception.

The pleadings are not made a part of these exceptions, but the exceptions state that the retiring partner filed "pleadings denying partnership and his liability as a partner." It was incumbent upon the plaintiff to prove a sale and delivery of the goods as well as the liability of the defendant as a partner. To show the sale it was clearly competent to produce a written order for the goods that were delivered; and for this purpose the cards were admissible. The retiring partner may not have authorized the writing of these orders, but he did suffer the continuance of the business by his brother, under the old name of Bulger Brothers, and to the old

customers of the firm, continuing to deal with it without knowledge of his retirement, he remained liable.

Exceptions overruled.

FRED W. BROWN, JR., in Equity, *vs.* ISAAC F. GOULD.

Waldo. Opinion January 11, 1900.

Insolvency. Preference. R. S., c. 70, § 52.

A preference becomes a protected transaction under the insolvent law after the lapse of four months.

The insolvent, of whom the plaintiff is assignee, gave a mortgage to secure a pre-existing debt, the mortgagor being insolvent, as the mortgagee well knew, but the mortgage had been recorded more than four months before the mortgagor filed his petition to be adjudged an insolvent debtor. *Held;* that the mortgage is not in fraud of the statute against preferences.

Neither was it a fraud under the six months clause of the insolvent law, for it was given to secure a bona fide indebtedness and had no elements of fraud.

ON REPORT.

Bill in equity, heard on bill, answer and proofs, to vacate a mortgage given by an insolvent debtor.

The mortgage was made to the defendant, May 16, 1895, by one William Gould, his brother, who filed a petition in insolvency, October 31, 1895. The plaintiff claimed that the second inhibition in R. S., c. 70, § 52, as amended, applied to the case; that the conveyance was in contemplation of insolvency, and with a view to put the property beyond the reach of creditors, and the defendant had reasonable cause to so believe.

Jos. Williamson, for plaintiff.

The knowledge by one to whom an insolvent has transferred property, of the business affairs of the latter of his indebtedness, and the like, are facts competent to charge the former with a fraudulent purpose, in a case of this nature. *Strout* v *Redman*, 89 Maine, 435.

The defendant and the insolvent were brothers. Residing fifteen miles apart, they were "back and forth some from each other's houses." Business relations had existed between them. It appears that the mortgage in question was in part for a note for $375, given ten years before, and barred by the statute of limitations. Although giving vitality to a debt of this nature is perfectly right, it seems a little singular that it was done just at that time, when the defendant knew of a large judgment which just before had been recovered against the mortgagor, and that it should have been coupled with a lease of the mortgaged premises, for the alleged reason that the defendant "considered the mortgage as scant security for his claim, and that he was induced to take the lease of said premises to prevent said security from being impaired by the accumulation of interest and taxes". According to the insolvency schedules, his brother then owed $1600, mostly for borrowed money, and except two doubtful accounts of $600, he had no property save what was exempt from attachment; yet the defendant testifies that no suspicion of insolvency occurred to him until he "saw it in the newspaper, in November, 1895", and not even in August, when the insolvent was in jail for debt.

But little reliance can be placed upon the statements of William Gould that he had no reason to believe himself insolvent, his schedules contradict his evidence in that respect.

The evidence of the defendant that he did not believe the debtor insolvent, is clearly inadmissible. If allowed before a jury, it would have been cause for a new trial. *Coburn* v. *Proctor*, 15 Gray, 38.

Testimony of the parties as to their intention is inexpressibly weak, and can rarely avail against the stronger proof which the transaction affords. *Oxford Iron Works* v. *Shafter*, 13 Blackford, 455.

If it appears that the debtor was actually insolvent, and that the means of knowledge upon the subject were at hand, and that such facts and circumstances were known to the creditor as clearly put him on inquiry, he had reasonable cause to believe that the debtor was insolvent.

Knowledge of a trader's inability to pay his debts in the ordin-

ary course of business, derived from his failure to pay the debt due to the creditor himself, is at least sufficient to put him on inquiry as to the debtor's solvency. *Scammon* v. *Cole*, 3 B. R. 100.

R. W. Rogers, for defendant.

The identical question which the complainant here presents, was tried and decided adversely to him in the unreported case between these same parties.—Fred W. Brown, Jr., Assignee, vs. Isaac F. Gould. That case was an action at law, but, like this, it turned on the question of fraud in the transaction of May 16, 1895.

The rescript in that case, received May 30, 1898, is: "The evidence does not satisfy the court that the transaction between the plaintiff's assignor in insolvency and the defendant was in contemplation of insolvency, or in fraud of the insolvent law."

William Gould, the insolvent, testifies that he did not contemplate insolvency on May 16, 1895, that he had no intention or thought of going into insolvency until a few days before he filed his petition; that he did not make the conveyance with a view to keeping his property out of the reach of his creditors, or to prevent its going to his assignee in insolvency, or to prevent its being distributed under the insolvent law, or with a view to defeat the object of said law. This testimony is not only uncontradicted, but is corroborated by his conduct just before and after the transaction. In March, 1895, he procured one of his brothers to sign with him as surety on a note for $150—to renew a note for a like amount on which there was no surety, or security of any kind; June 8, 1895, he paid twenty-five dollars to another person, thereby renewing a note that had been barred by the statute of limitations for nearly a year; and August 12, 1895, he got his brothers Isaiah and this respondent to sign a note with him, on which he hired $425 to pay a judgment against himself. These, the respondent claims, are not the acts of a man contemplating insolvency.

The respondent himself testifies, in substance, that he had no suspicion that William was acting in contemplation of insolvency, or was making the mortgage and lease for the purpose set forth in

complainant's bill; and in corroboration of his testimony, points to the fact that on August 12 following, he signed the note for $425.00 as surety for William instead of advising him to get rid of the judgment by proceedings in insolvency. There is no evidence tending to show that he had any knowledge whatever of William's financial condition, or that he had reasonable cause to believe that he was acting in contemplation of insolvency.

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

HASKELL, J. One William Gould, on October 1, 1895, filed his petition in insolvency. He had been possessed of a farm, subject to a mortgage given by him in 1876 upon which there was due about $800 on May 16, 1895, when he gave a second mortgage to the defendant to secure a pre-existing debt of $575, and also a lease of the farm for one year at a rental of interest on $1400 "that is on the place and pays the taxes of 1895," reserving the house to live in and the right of keeping two cows and two horses.

This bill is brought by the assignee in insolvency of William against the mortgagee to vacate the $575 mortgage as taken with a view to prevent the property from coming to the plaintiff as assignee in insolvency.

The mortgage was given to secure a pre-existing debt, the mortgagor being insolvent as the mortgagee well knew, but the mortgage had been recorded more than four months before the mortgagor filed his petition to be adjudged an insolvent debtor, and therefore was not in fraud of the statute against preferences.

It is contended, however, that the mortgage was given in fraud of the six months clause of the insolvent law. The mortgage was a preference. For more than four months the creditors slept on their rights and allowed it to become valid as such under the law. To bring it within the six months clause it must be something more than a preference. It must be a fraud. If it merely works a preference it is not a fraud. Had it secured a fictitious debt, it would have appeared to have been a preference, but have been a

fraud. It secures an actual debt and therefore has no element of dishonesty. To be sure, it prevents the property from coming to the assignee, but in a legal way. The defendant was a creditor. He knew of the debtor's embarrassment, but wanted security and took it. The creditors allowed him to keep it for more than four months and now charge him with fraud in doing so. The evidence does not sustain the charge. When he took the mortgage, he also took a lease of the farm for a year, agreeing to pay interest and taxes, but allowing the mortgagor to live there and keep two cows and two horses. The purpose doubtless was to secure his interest and taxes and leave the debtor meantime a home. The assignee might have redeemed and got the benefit of any value in the farm above the mortgages, but cannot avoid them as fraudulent, for they are not.

Bill dismissed with costs.

CHARLES F. JOHNSON, Assignee,

vs.

SKOWHEGAN SAVINGS BANK.

Somerset. Opinion January 11, 1900.

Mortgage. Payment. Discharge.

A mortgagee does not relinquish his lien on the mortgaged property by taking notes of a third party, when he does not apply the notes in payment of the mortgage debt, and neither cancels nor surrenders the mortgage, and does not surrender or intend to surrender his security.

A vendee, the plaintiff's assignor, bought certain logs, knowing them to be mortgaged to the defendant bank. He sent his notes, payable to the order of his vendor, on three, six and nine months, for more than was due on the mortgage to the bank, so that the vendor could not appropriate them and leave the mortgage outstanding, and failed. The bank did not apply the notes to the payment of its mortgage debt or cancel or surrender the mortgage.

Held; that it never surrendered its security, and never intended to.

ON REPORT.

This was an action of trover in which the plaintiff, as assignee of Edward Ware, an insolvent debtor, sought to recover of the defendant $8,930.55, the value of certain pine, spruce and cedar logs and which he claimed had been sold to said Ware, by one W. H. Clark, prior to the proceedings in insolvency, and by him mortgaged to the defendant bank. The plaintiff claimed (1) that this mortgage was paid by the receipt of three notes given by Ware to Clark for the logs and indorsed by Clark to the bank; and (2) that the bank consented to the sale of the logs by the mortgagor, Clark; and having received the proceeds of the sale is estopped to set up any claim to them under its mortgage; and that the title to them passed to Edward Ware and was assigned by him to the plaintiff free from the lien of said mortgage.

The defendant, the Skowhegan Savings Bank, claimed title to the logs by virtue of a mortgage given to it by said Clark on the first day of December, 1897, which mortgage was made to secure advances to be made to the said Clark by the defendant to enable him to carry on his lumbering operations during the winter of 1897 and 1898, and which covered not only the mark of logs in dispute but also another mark. Under this mortgage the sum of $13,100.00 was advanced by the bank to Clark from December 1, 1897, to May 19, 1898, and it has not been discharged or given up.

An assignment was made by Ware to the plaintiff May 25, 1898, of all his real estate and personal property for the benefit of his creditors under chapter 325, § 16, of the statutes of 1897. No question was raised as to the validity of the assignment, or that the same was not ratified by the requisite number of creditors and approved by the judge of the insolvency court of Kennebec county, in which the petition of Ware, with his assignment and ratification by the creditors, was filed. It was also admitted that the logs in dispute were sold to Ware by Clark.

The plaintiff introduced testimony, to show the course of dealing at the bank, that for a period of eight years from 1890 to 1898, with the exception of one year, the defendant had furnished money to Clark with which to conduct his lumbering operations during the winter, and in the spring Ware had made his notes payable to

Clark for part if not the whole of each winter's cut and had sent or carried them to the Skowhegan Savings Bank; and after he had done so, Ware testified that the bank had never asserted any claim to the logs bought of Clark. The plaintiff also offered other testimony to show that the treasurer of the bank did not claim that the bank ever interfered with Ware's possession or manufacture of the logs into lumber at his mill; and notes to the amount of about sixteen thousand dollars given by Ware to Clark for logs upon which the bank had held mortgages previous to the year in which the logs in question had been cut, had been discounted at the First National Bank which occupies the same banking rooms as the savings bank and in which the treasurer was also a director, and were held by that bank at the time Ware made his assignment, and Clark's notes and mortgages had been returned to him. During all these years, as the treasurer testified, he considered Ware's notes good; and that about the first of May, 1898, only about three weeks prior to the assignment, he, as the director of the bank, consented to a renewal of some of these notes. It also appeared that such had been the course of dealing between the parties every year with the exception of one, from 1890 down to the spring of 1898. Clark had carried on lumbering operations, obtaining money from the defendant bank by giving mortgages upon the logs to be cut by him and then had sold the logs to Ware, taking his notes for the same and these notes had been sent or carried by Ware to the bank. The plaintiff then introduced testimony which relates to the transaction in question as follows:

In the spring of 1898, Ware again bought of Clark a large part of his cut of logs for the previous winter and arranged to give his notes for the same, for $15,777.44, on three, six and nine months, from May 1, the usual time on which logs are bought by the millmen, thus giving them an opportunity to pay for the logs out of the manufactured lumber. Ware testified that he went to Skowhegan, previous to the time when these notes were sent to the bank, to see Page in regard to renewing some of the notes given by him to Clark in previous years and then held by the First National Bank and which fell due about the first of May, 1898; that he

had a conversation with Page in regard to renewing the notes which were about to fall due, and that Page told him he might make the renewals, but that he wanted him to make the time as short as possible as he had got to take the Clark notes again. But the treasurer testified that the conversation took place at a later day. Ware also testified that he understood that the savings bank held a mortgage on the logs purchased by him of Clark in the spring of 1898; and that by an agreement with Clark, he sent his notes to the bank to take up the notes and mortgage which Clark had given it.

April 15, 1898, Ware sent the three notes to the Savings Bank. On the following day he received the letter from Page, acknowledging the receipt of notes for the Clark logs, and stating that the writer thought them to be correct.

The defendant bank introduced evidence that the treasurer had no information from any person that he was expected to receive these notes in payment of the Clark notes and mortgage; that he intended to receive them as collateral; that he did not accept them in payment of the mortgage, but designed to credit upon the Clark notes and mortgage the amounts paid by Ware, as they were received from him upon his notes. These notes were not entered upon the books of the bank as its property.

It also appeared that not only the treasurer of the bank was ignorant of any such substitution, understanding that, by law, he had no right to do this; but that Clark did not understand his notes and mortgage were paid, as he made no claim to the balance of the two to three thousand dollars in excess of the Ware notes over and above his own notes, to which he would have been entitled if the Ware notes had paid his own, but left the Ware notes in the bank as collateral to his own, and subsequently took them into his hands when it was found necessary to do something in relation to the same after his own insolvency; and that Ware well understood what was the bank's arrangement, year after year, to take the notes given for logs mortgaged and hold them as collateral.

On the day of Ware's assignment, the treasurer requested Ware to take back the notes in question; but Ware refused.

C. F. Johnson, for plaintiff.

If the savings bank's consent to the sale of the logs by Clark was actually given, then it is estopped from claiming any title to the logs against the purchaser; and if its consent to a sale to Ware was actually given or can be implied from the course of dealing in previous years, there would be certainly a stronger reason for the application of this principle of law and also of sound common sense, than if the consent to the sale had been general.

A sale of the mortgaged property with the consent of the mortgagee estops him from afterward setting up any claim to the mortgaged property. Jones, Chat. Mort. 4th. Ed. §§ 456, 457, 458; *Gage* v. *Whittier*, 17 N. H. 312; *Roberts* v. *Crawford*, 54 N. H. 532; *Carter* v. *Fately*, 67 Ind. 427; *Stafford* v. *Whitcomb*, 8 Allen, 518; *Bangs* v. *Friezen*, 36 Minn. 423; *Benedict* v. *Farlow*, 1 Ind. App. 160; *Littlejohn* v. *Pearson*, 23 Neb. 192; *First Nat'l Bank* v. *Weed*, 89 Mich. 357; *Brooks* v. *Record*, 47 Ill. 30; *Patrick* v. *Meserve*, 18 N. H. 300; *Brandt* v. *Daniels*, 45 Ill. 453; *Thompson* v. *Blanchard*, 4 N. Y. 303; *Bank* v. *Raymond*, 57 N. H. 144; *Chase* v. *Willard*, 67 N. H. 369; *Shearer* v. *Babson*, 1 Allen, 486.

Consent of the mortgagee may be implied from the fact that he has knowledge that the mortgagor has sold property covered by mortgages held by it in the past, and has received the proceeds of such sales. And it also may be implied from the general course of dealing of the parties. *Pratt* v. *Maynard*, 116 Mass. 388: *Riley* v. *Conner*, 79 Mich. 497; *Jenckes* v. *Goffe*, 1 R. I. 511; *Thompson* v. *Blanchard*, 4 N. Y. 303; *Walker* v. *Clay*, 49 L. J. R. 660.

In such cases the mortgagor is held to be the agent of the mortgagee. *Jenckes, Admr.*, v. *Goffe*, 1 R. I. 511 *Ogden* v. *Stuart*, 29 Ill. 122; *Barnet* v. *Fergus*, (99 Am. Dec. 547) 51 Ill. 352 and 355; *National Mercantile Bank* v. *Hampson*, 5 Q. B. D. 177; *Abbott* v. *Goodwin*, 20 Maine, 408; *Melody* v. *Chandler*, 12 Maine, 282; *Foster* v. *Perkins*, 42 Maine, 168.

A mortgagee who accepts the proceeds or benefits of sales made by the mortgagor cannot question their validity. *Etheridge* v. *Hilliard*, 100 N. C. 250.

Ware believed, and he had a right to believe, from this letter and from the manner in which business had been conducted in the past, that he was obtaining a good title to the logs; and the bank is estopped from claiming title in itself. *Chapman* v. *Pingree*, 67 Maine, 198; *Hatch* v. *Kimball*, 16 Maine, 146.

Clark was as much the agent of the savings bank in making this sale as he would have been had the bank acquired an absolute title to the logs by a foreclosure of its mortgage and engaged Clark to sell them for it, and if there had been no previous consent to their sale by Clark, the bank's receipt of the proceeds of the sale would have been a ratification of it. *Jenckes, Admr.*, v. *Goffe*, 1 R. I. 511.

The mortgage itself repudiates the claim that it was intended as security for any notes that might be taken in the sale of the logs. It is dated December 1, 1897, and all sums advanced by the bank were by its terms to be paid in six months from that date. Mr. Page testifies that the usual practice is to pay for logs in notes on three, six and nine months, and if it had been the intention of the Savings Bank to have taken the notes received from the sales of logs as collateral for Clark's notes, the sums advanced under the mortgage would not have been made to fall due until the notes given for the logs should fall due. All these sums would become due June 1, 1898, at a time when all the logs would have been driven to the main river and could be sold, and it is evident that the bank intended that Mr. Clark should then sell them and turn over to it enough of the proceeds of the sale in notes to pay the mortgage. The fact that the Savings Bank is prohibited by statute from loaning money to parties except corporations, without security, does not prevent the doctrine of estoppel applying to it under the circumstances, for it has been held by this court that such a statute is directory. *Farmington Sav. Bank* v. *Fall*, 71 Maine, 49; *Roberts* v. *Lane*, 64 Maine, 108.

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

There is no question as to the validity of this mortgage, (*Claflin* v. *Carpenter*, 4 Met. 580; *Douglas* v. *Shumway*, 13 Gray, 498; *Banton* v. *Shorey*, 77 Maine, 48) and that the bank advanced some

$12,500 to Clark, who then owned the logs and gave the mortgage. This mortgage has never been discharged or the notes given up. The plaintiff's claim, in its strongest presentation, is that Ware, whom he represents, bought the logs upon which the mortgage rested, of the mortgagor (Clark) with full knowledge of the mortgage, and sent his own notes for their value to the treasurer of the savings bank as he supposed to take the place of the mortgage without any definite arrangement with the officers of the bank that such should be the effect.

The treasurer did not intend or suppose that, by receiving the Ware notes, he took them in place of the Clark notes and mortgage. It is true, there was no express arrangement with Ware that his notes should be given and held as collateral to Clark's. No agreement whatever about it. No agreement that the amount of the Ware notes should be credited until paid.

A man who purchases property upon which he knows there is an existing mortgage, should make definite arrangements about the payment and discharge of the claim. The mortgage is not to be set aside upon the expectation or belief of the purchaser, or any one else, that the mortgagee is willing to accept or has accepted his notes or other security for the lien. There is no reason why, if the mortgage is paid and the purchaser so understands it, that he should not call for its discharge upon the record. Not to ask this is such indifference and negligence on his part that he ought to be debarred from resisting the mortgage claim, unless the acts of the mortgagee have been of that decisive character that it amounts to an express waiver, or of so deceptive a nature, so misleading to the purchaser, that the mortgagee is thereby clearly estopped from enforcing his mortgage. The burden is, therefore, upon the plaintiff to show that something was done by the bank which amounted to a waiver of its claim or of that character that it is now estopped from relying upon and enforcing the same.

The treasurer understood he had no right to take a note of an individual in payment of such a secured debt. He intended to keep within the provisions of R. S., c. 47, § 100. There can be no question, therefore, that the mortgagee did not intend to discharge or waive his mortgage.

Waiver: Waiver is a voluntary relinquishment or renunciation of some right, a foregoing or giving up of some benefit or advantage, which, but for such waiver, he would have enjoyed. It may be proved by express declaration; or by acts and declarations manifesting an intent and purpose not to claim the supposed advantage; or by a course of acts and conduct, or by so neglecting and failing to act, as to induce a belief that it was his intention and purpose to waive. Still, voluntary choice not to claim is of the essence of waiver, and not mere negligence; though from such negligence, unexplained, such intention may be inferred. The question of waiver, therefore, is a question of fact for a jury; it may be proved by various species of proofs and evidence, by declarations, by acts, and by nonfeasance or forbearing to claim or act; but however proved, the question is, "Has he willingly given up and forborne to claim the benefit of the condition?" *Farlow* v. *Ellis*, 15 Gray, 231–232.

Estoppel: "It is the general rule of estoppel in pais that a party will be concluded from denying his own acts or admissions, which were expressly designed to influence the conduct of another, and did so influence it, and when such denial will operate to the injury of another." *Cummings* v. *Webster*, 43 Maine, 194.

"The declarations or acts relied upon must have induced the party seeking to enforce an estoppel to do what resulted to his detriment, and what he would not otherwise have done. If his action was not changed by what was said he has no cause of complaint." *Allum* v. *Perry*, 68 Maine, 234.

"It seems to us that in all cases when a party is to be deprived of his property or his right to maintain an action by estoppel, the equity ought to be strong and the proof clear." Per WALTON, J., in *Stubbs* v. *Pratt*, 85 Maine, 432.

"To make out a case of abandonment or waiver of a legal right there must be a clear, unequivocal, and decisive act of the party showing such a purpose, or acts amounting to estoppel on his part. *Ross* v. *Swan*, 7 Lea, (Tenn.) 467; *Dicht* v. *Insurance Co.*, 58 Pa. St. 452.

He knew there was a mortgage. He did not ask that it be dis-

charged. Suppose, that instead of his notes being larger than the amount due upon the mortgage by some two or three thousand dollars they had been less, what then? "He should have looked for something more that equivocal acts merely admitting a possible inference that it had been discharged." *Copeland* v. *Copeland*, 28 Maine, 541.

The acts of the treasurer could not bind the bank. R. S., chap. 47, § 114. *Holden* v. *Upton*, 134 Mass. 177; *Dedham Institution for Saving* v. *Slack*, 6 Cushing, 408.

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

HASKELL, J. One W. H. Clark, being about to engage in a lumbering operation, and in need of funds to carry it on until he could sell his logs, arranged with the defendant bank to make the necessary advances, and secured the bank by mortgage upon the product of the operation to secure the same made within six months. The advances amounted to $12,500, for which the bank took Clark's notes.

Clark sold the logs to Edward Ware, plaintiff's assignor. Ware made notes to the order of Clark and sent them by mail to the bank, receiving in reply, "Yours of the 15th inst. enclosing notes for Clark logs received. I think they are correct." In about a month, Clark went to the bank, within the six months named in the mortgage, and gave his note for a further advance of $600 and indorsed the Ware notes, amounting to $15,687.54, in blank and left them with the bank. Soon afterwards Ware failed, and the defendant bank enforced its mortgage upon the logs. Ware's assignee sues to recover their value, asserting that the mortgage debt had been paid by the Ware notes.

The transaction does not sustain this contention. Ware bought the logs knowing them to be mortgaged. He sent his notes for more than was due on the mortgage to the bank, payable to the order of Clark, so that Clark could not appropriate them and leave the mortgage outstanding. Ware's purpose was to have the pro-

ceeds of the notes applied to the mortgage debt. He failed, and voluntarily assigned in less than forty days after he sent the notes. He must have known his own condition, and, if an honest man, could not have intended that notes due in three, six and nine months, respectively, should have operated to discharge the mortgage and turn the mortgage security from the bank to his own creditors. That would have been a fraud. Nor could Clark so have understood the transaction, for the notes amounted to more than his loan, and he neither received the balance in his favor nor took up his own notes and procured a discharge of the mortgage. The substance of the transaction was a sale of mortgaged logs, the vendee to pay the mortgage in three, six and nine months, when his notes for the purchase money should fall due, until which time it was hoped there would be no necessity for enforcing the mortgage. The bank never intended to surrender its security, and never did.

Judgment for defendant.

ANDREW J. WEYMOUTH, and others, *vs.* ISAAC BEATHAM.

Piscataquis. Opinion January 11, 1900.

Logs. Driving. R. S., c. 42, § 6.

He who undertakes to drive logs intermixed with his own, at the expense of the owner of them, must drive them reasonably clean to their destination before he can recover compensation therefor. *Held;* that the plaintiff did not do this, and therefore he cannot recover.

ON EXCEPTIONS BY PLAINTIFFS.

This was an action on the case, to recover a reasonable compensation from the owner for driving his timber, which became so intermixed with that of the plaintiffs that it could not be conveniently separated, for the purpose of being floated to the place of market or manufacture. The evidence tended to show that defendant's logs were so intermixed with those of the plaintiffs' in Piscataquis River at the mouth of Sebois stream; and that plaintiff

drove said intermixed timber of defendant out of the Piscataquis River into the Penobscot towards the place of market or manufacture. Evidence was introduced, by the defendant, to show that after said timber was driven out of Piscataquis into the Penobscot, a part of both plaintiffs' and defendant's timber became intermixed with timber of the East Branch drive, which was at that time being driven in the Penobscot River at and below the mouth of the Piscataquis, and was driven to the place of market or manfacture by the persons or company so driving said East Branch drive, who were paid for such driving by the plaintiffs and defendant severally.

Evidence was also introduced, by defendant and it was admitted by the plaintiff and his witnesses, that a portion of both plaintiffs' and defendant's logs was left by plaintiff along the shores of Penobscot River, and in two large jams in said river between the mouth of the Piscataquis River and the boom or destination of said logs or timber. Upon the plaintiffs' right to recover a reasonable compensation for so driving the defendant's logs towards the place of market or manufacture the court instructed the jury as follows: "He exercises his option either to take them along or leave them where he pleases. But, if he decides to take them along, the intermixed logs with his to the place of destination, then he assumes the control and the duty to take them all along with his drive just as much as if he had undertaken by contract to drive them. He assumes the duty of taking to market or destination all the so intermixed logs. Something has been said in the argument that the statute does not require that the plaintiff in this case shall have driven the logs to the place of destination, that if he left the logs elsewhere, short of their destination he might recover. Now these logs, as I understand it, were all destined to the same market or some place or home—those of the plaintiffs' and those of the defendant's. Now the court has said in a case, which has been before it: "When a log becomes intermixed they may drive that log all the way even though it afterwards clears itself from the mass intermixed. The plaintiffs have the custody of it and if they drive it at all they must drive it home. When he

undertakes to drive intermixed logs—having in view the holding liable the owner of those logs, he must make a clean drive and drive home to the place of destination." To which ruling and instructions of the court, after a verdict for the defendant had been returned, the plaintiffs excepted.

G. W. Howe, for plaintiffs.

The statute does not require that the plaintiff drive the logs "to" their destination as a pre-requisite to receiving compensation. The statute simply requires that the plaintiff drive them with his "toward" their destination. This the plaintiff did. He drove them also as far as he did his own, into the Penobscot. There the logs of both were to be taken and driven down the Penobscot by another party.

There is nothing in the statute requiring the plaintiff to complete the driving,—to sort out the defendant's logs at the end. The statute is satisfied when the defendant's logs (having become intermixed) are driven any distance "toward" their destination. For such distance the defendant should pay.

When the logs were out of the Piscataquis into the Penobscot, they were no more on the plaintiffs' hands than on the defendant's. He had completed his part of the driving.

W. H. Powell, for defendant.

The legislature never intended that a man having a drive of logs in Penobscot river, the destination of which logs was Howland, should drive the logs of other owners that become intermixed with his own, but the destination of which was Penobscot boom, only so far as the destination of his own logs and hold the owners liable. But the intention must have been that if he undertook to drive the logs and hold the owner liable that he should drive them to their destination, and also that he should make a clean drive of the intermixed logs. By section 6 of chapter 42 of the R. S., this is his plain duty, the language of the statute being that he must drive all the timber of the defendant which had become intermixed with his own towards the market or place of manufacture. It would be unnatural and unreasonable to interpret this to mean toward the market or place of manufacture of the plaintiff's logs.

It is the logs of the defendant that the statute refers to when it says that the plaintiff "may drive all timber with which his own is so intermixed to said market or place of manufacture," and the legislature must have meant a market or place of manufacture of the defendant's logs. The plaintiff's contention is that they started all the logs towards their destination and are not obliged to drive them home.

In construing this statute the court has held the clause "towards the market or place of manufacture," as used in the statute, to mean that all the intermixed logs must be driven home. *Bearce* v. *Dudley*, 88 Maine, p. 419.

It was admitted by the plaintiff and his witnesses that a portion of both the plaintiffs' and defendant's logs was left by the plaintiff along the shores of the Penobscot river and in two jams in Penobscot river between the mouth of Piscataquis river and the boom or destination of said logs and timber.

This is not a case where the plaintiffs inadvertently left a few of their own and a few of the defendant's logs because they were hidden away in the grass or bushes. The logs were in large jams and consequently in plain sight. It could not have been an oversight, but it must have been the intention of the plaintiffs to take only such logs as they could conveniently drive. It is hard, serious work breaking big jams of logs and the plaintiffs preferred to let some one else do it, and it appears from the bill of exceptions that the East Branch Driving Company did afterward drive the intermixed logs of the plaintiffs and the defendant to the market, or place of manufacture, and was paid for the same by the plaintiff and defendant severally.

The jury could not have been misled by the statement of the presiding justice as to making a clean drive. He was talking about intermixed logs and his language is "where he undertakes to drive intermixed logs having in view the holding liable the owner of those logs, he must make a clean drive." Make a clean drive of what? There is but one answer to the question: Of intermixed logs, and it is the law as laid down in *Bearce* v. *Dudley*, above cited, that intermixed logs must be driven clean, reasonably

clean. In that case the court say "they could not drive a part of the intermixed logs and scatter the rest along the river, driving only such part as was convenient."

This opinion was concurred in by Chief Justice PETERS and Justices WALTON, FOSTER, WISWELL and STROUT; and in *McGuire* v. *Gilpatrick*, *Ib.*, page 423, in an opinion by Chief Justice PETERS it is said "the law of this case is stated in *Bearce* v. *Dudley*, ante, page 410, and need not be repeated here."

In *French* v. *Stanley*, 21 Maine, 512 the court say: "If an instruction of a District judge be not perfectly correct, but the finding of the jury upon a view of the whole case as then presented to them was correct, the party against whom such finding was cannot be considered in the language of the statute authorizing exceptions, as a party aggrieved and exceptions in such case would not be sustainable." To the same effect are the following cases: *Bryant* v. *K. & L. Railroad Co.*, 61 Maine, 300; *Lord* v. *Kennebunkport*, 61 Maine, 462; *Copeland* v. *Copeland*, 28 Maine, 525.

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

HASKELL, J. This is an action to recover compensation for driving defendant's logs that had become intermixed with plaintiffs' logs so that they could not be conveniently separated therefrom. The case comes up on exceptions by plaintiffs. The verdict was for the defendant. The evidence is not reported, and the facts must be taken as stated in the bill of exceptions.

The plaintiffs and defendant were owners of logs in the Piscataquis river, destined for the boom above Bangor in the Penobscot. Their respective logs became intermixed in the Piscataquis at the mouth of the Sebois stream, and were driven by the plaintiffs out of the Piscataquis into the Penobscot. There a part of the intermixed logs became again intermixed with the East Branch drive, and was driven to the boom by those in charge of that drive, to whom the plaintiffs and defendant paid compensation respectively. A part of the remainder of plaintiffs' drive of intermixed logs

was driven to the boom above Bangor, and part of them was left along the shores and in jams in the Penobscot above the boom, and were not driven in by the plaintiffs.

Had the destination of the plaintiffs' logs been the mouth of the Piscataquis, and had they there separated the defendant's logs from their own and turned them into the Penobscot, they would have been entitled to compensation for driving defendant's with their own, for they would have then driven them home, that is, to the destination of their own drive. That is the doctrine of *Bearce* v. *Dudley*, 88 Maine, 410. In that case the plaintiff drove the defendant's logs in a mass with his own down the Androscoggin to Lewiston, the place of destination of plaintiffs' logs, and there separated defendant's logs and turned them adrift down river towards Topsham, the place of their destination, and the plaintiff was allowed pro rata compensation for driving the mass.

In the case at bar, plaintiffs turned the intermixed mass into the Penobscot, where a part became intermixed with the East Branch drive, and with it were driven to the boom. Had the plaintiffs driven the remainder clean to the boom, then all defendant's logs would have been delivered at their destination, and no good reason can be given why defendant should not have contributed to the expense of driving his logs to market by whomsoever incurred it. But this plaintiffs did not do. They left the intermixed mass along the shores and on the rocks of the Penobscot, as suited their own convenience, over a distance of forty miles. The defendant must then either lose his stranded logs or bear the expense of collecting them from shores, coves, rocks and shoals, at a much larger expense, perhaps, than the cost of driving them in the first instance. He who undertakes to drive logs intermixed with his own, at the expense of the owner of them, must drive them clean, reasonably clean. He cannot scatter a part by the way and only drive those logs that may be conveniently driven, perhaps without much expense, and leave the owner to gather those stranded or lose them. It must be remembered that the whole mass of intermixed logs was driven by plaintiffs out of the Piscataquis. They had taken control of the mass, and should have seen to it that they were driven home as a

pre-requisite of compensation therefor. If a part became intermixed with another drive, and so were driven in, the defendant could not have been prejudiced thereby. His logs would have been all delivered at their destination, and it would be just to require him to pay for the benefit of the service received.

The whole charge is neither reported nor made a part of the exceptions. It is presumed that appropriate instructions were given relative to the particular facts of the case, except so far as the extract therefrom excepted to show the contrary.

The extract excepted to is this:

"He [a plaintiff] exercises his option either to take them along [the intermixed] logs, or leave them where he pleases. But if he decides to take them along, the intermixed logs, with his to the place of destination, then he assumes the control and the duty of taking them all along with his drive, just as much as if he had undertaken by contract to drive them."

That instruction is correct as a rule of law. Conditions might call for more explicit explanation in its application to the facts of a case, as, for instance, that the intermixing with the East Branch drive, if the intermixed logs were driven in, would not preclude recovery. Such an instruction is presumed to have been given. If not given, it should have been requested. But whether given or not, upon the facts stated in the exceptions the plaintiffs should not recover, for they admit that they neither did, nor did they try to drive the remaining logs reasonably clean, which fact ought to bar their recovery. This would have been so if no logs had become intermixed with the East Branch drive, for the plaintiffs then would have been required to make a reasonably clean drive of the whole mass of logs before recovery.

The remaining extract excepted to is a quotation from *Bearce* v. *Dudley*, and is applicable to the facts, as the destination of both plaintiffs' and defendant's logs was the same boom, and had reference to the scattering of defendant's logs all the way from the Piscataquis to the boom.

Exceptions overruled.

EDWARD S. MARSHALL, Petitioner, *vs.* WILSON M. WALKER.

York. Opinion January 12, 1900.

Quieting Title. Flats. Possession. R S., c. 104, § 47.

Revised Statutes, c. 104, § 47, provide as follows: Sec. 47. "A person in possession of real property, claiming an estate of freehold therein or an unexpired term of not less than ten years, may file a petition in the supreme judicial court, setting forth his estate, whether of inheritance, for life, or for years, describing the premises, averring that he is credibly informed and believes that persons named in the petition make some claim adverse to his estate, and praying that such persons may be summoned to show cause why they should not bring an action to try their alleged title. A person in the enjoyment of an easement is in possession of real property within the meaning and for the purposes of this section."

The plaintiff alleged in his petition, under this statute, that he is in possession of certain upland and flats, claiming an estate of freehold therein, to wit, a fee simple, and that he is credibly informed and believes that defendant claims title in fee to a part thereof, describing it, wherefore he prays that defendant may show cause why he should not bring an action to try his title thereto. Defendant did so by interposing a general demurrer at the first term, which was overruled and he has exception.

Held; that the plaintiff, to maintain his petition, must aver and prove that he is in possession of land, claiming a freehold therein. He does so aver, and the defendant admits it by demurrer, insisting that flats are not subject to possession, and therefore the averment of possession of them is the averment of an impossibility and self-destructive. If this were so, the petition might still be maintained as to the upland and the demurrer for that reason should fail. But it is not so. Flats are subject to possession. They may not have been reduced to possession or they may have been. The plaintiff's averment is that they have been, and that is admitted by demurrer.

Held; that the petition should be allowed as to so much of the upland and flats as are shown to be wholly in possession of the plaintiff and to none other.

ON EXCEPTIONS BY DEFENDANT.

This was a petition inserted in a writ, brought under R. S., c. 104, §§ 47 and 48, to compel the respondent to bring an action to try the title, which it is alleged he claims, to certain real estate described in the petition. At the return term the respondent filed a general demurrer, which the presiding justice overruled, and or-

dered the defendant to answer, to which the defendant duly excepted.

The case appears in the opinion.

G. C. Yeaton, J. C. Stewart, and F. D. Marshall, for plaintiff.

H. M. Heath, C. L. Andrews; H. W. Gage and C. A. Strout, for defendant.

The owner of land in possession, who finds some party entering upon his premises and interfering with his use thereof, in what he considers an unlawful manner, no matter what his claim may be, may bring an action at law at once, and fully protect his rights; and now if a claim is made which constitutes a cloud upon his title, equity affords a complete and full remedy, and as said by VIRGIN J., "in such cases equity gives the fullest power to remove the cloud, which under the present rules is a much more prompt and complete remedy than that of compelling the holder to bring his action at law." *Poor* v. *Lord*, 84 Maine, 98; *Loring* v. *Hildreth*, 170 Mass. 332.

And the remedy under the statute is not so adequate and complete as to supersede a remedy in equity. *Hinchley* v. *Greany*, 118 Mass. 598; *Loring* v. *Hildreth*, 170 Mass. 328.

The statute was never intended to furnish a petitioner having a defective title, and which it might be difficult to establish, with a means of shifting the burden of proof upon another claimant to the same land, and as Holmes, J., says in a case upon a similar petition "in a case like this the burden of proof may determine the substantive right, and there is no reason why this court should shut its eyes to the possibility." *Slater* v. *Manchester*, 160 Mass. 473.

In a similar course the court dismissed the petition, and said he might maintain a bill in equity, and "it is true that the burden of proof will be upon him to show the extent of his ownership; but this is no objection to leaving him to pursue a remedy in his own name, instead of seeking to compel the respondent to go forward." *Clouston* v. *Shearer*, 99 Mass. 213.

If the mere swearing that he claimed the title was not enough, and he must show some ownership, prima facie at least, that if it

is necessary to prove ownership, or in fact anything more than a mere claim, it must be necessary to allege it.

It is not sufficient that the petition follows the precise language of the statute. *Com.* v. *Bean*, 11 Cush. 414; S. P. 14 Gray, 52; *State* v. *Lashus*, 79 Maine, 541; *State* v. *Learned*, 47 Maine, 426; *State* v. *Mace*, 76 Maine, 64; *Barter* v. *Martin*, 5 Maine, 76; *State* v. *R. R. Co.*, 76 Maine, 412.

Actual exclusive possession necessary. *Boston Mfg. Co.* v. *Burgin*, 114 Mass. 340; *Munroe* v. *Ward*, 4 Allen, 152; *Dewey* v. *Bulkley*, 1 Gray, 416; *Tompkins* v. *Wyman*, 116 Mass. 561.

If the possession appears to be mixed or doubtful, the petitioner has not made out a case that the respondent rather than himself should institute an action to try the title. *India Wharf* v. *Central Wharf*, 117 Mass. 504. The statute contemplates an exclusive and adverse possession; unless so, there is no reason why the respondent rather than the petitioner should be ousted, and compelled to bring an action at law to try the title. *Orthodox Society* v. *Greenwich*, 145 Mass. 112.

The petition does not show such exclusive and adverse possession. Title merely as in this case of flats, over which the tide ebbs and flows, is not sufficient to maintain a petition. *Boston Mfg. Co.* v. *Burgin*, supra.

The premises also include a town way. The extent of the town's right in the land covered by the way does not appear. It may be the fee itself, or perhaps a less estate by location; but these rights are adverse to an absolute, exclusive right in the petitioner. His allegations are inconsistent. Nor could respondent's rights be any greater, and as he could not be required to bring an action to try his title, therefore the petition cannot lie. *Tisdale* v. *Brabrook*, 102 Mass. 374; *May* v. *N. E. R. R.*, 171 Mass. 369.

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

HASKELL, J. This is a petition under R. S., c. 104, § 47, to quiet title to land. The plaintiff alleges that he is in possession of

certain upland and flats, describing them, claiming an estate of freehold therein, to wit, a fee simple, and that he is credibly informed and believes that defendant claims title in fee to a part thereof, describing it; wherefore he prays that defendant show cause why he should not bring an action to try his title thereto. Defendant does so by interposing a general demurrer at the first term, which was overruled and he has exception.

The plaintiff, to maintain his petition, must aver and prove that he is in possession of land, claiming a freehold therein. He does so aver, and the defendant admits it by demurrer, insisting that flats are not subject to possession, and therefore the averment of possession of them is the averment of an impossibility and self-destructive. If this were so the petition might still be maintained as to the upland, and the demurrer for that reason should fail; but it is not so, flats are subject to possession. They may not have been reduced to possession, or they may have been. Plaintiff's averment is that they have been, and that is admitted by demurrer. A wharf or other structure built upon flats certainly reduces them to possession. So inclosing them by a weir seems to do the same. *Treat* v. *Chipman*, 35 Maine, 34. Other acts of dominion over them may count for possession. But after all, the question is one of fact, to be decided by plea and proof, and not ordinarily one of pleading. Upon answer below, denying the plaintiff's possession, he must prove his allegation of possession in order to maintain his petition; and he can only maintain it as to so much of the locus described therein as he shows to have been in his possession with claim of title thereto. He cannot maintain his petition, as he could a writ of entry, on proof of title and right of entry, but he must go further and show not only the entry, but the actual retention of the possession. The statute is to quiet possession, and not to cast the burden of proof upon one of two claimants to land, neither of whom have possession or perhaps title. He who begins the litigation must and ought to carry the burden of proving title.

The remedy here sought is given to a person having possession, meaning actual possession, exclusive possession and not a mixed possession enjoyed in common with others who may rightly use the

premises. The owner of the upland is presumed to own the adjacent flats. The presumption, however, may be disproved, for the owner of the upland may convey it without the flats, or the flats without the upland.

The seashore primarily belonged to the Crown as a jus publicum in trust for the people. It may be held by the subject, but his jus privatum is charged, nevertheless, with the jus publicum. This is so, whether title thereto be set up under the grant from Charles I to Sir Ferdinando Gorges, or by virtue of the Colonial ordinance of 1641 as modified in 1647. That ordinance has become a part of our common law, and by it, the proprietor of the main holds the shore to low water not exceeding one hundred rods. He holds it in fee, like other lands, subject, however, to the jus publicum, the right of the public to use it for the purposes of navigation and of fishery, not, however, to interfere with his right of exclusive appropriation that shall not unreasonably impede navigation by filling and turning it into upland, or by building wharves or other structures upon it, so that necessarily the public would be excluded thereby. Their right remains so long as it be left in a natural state, covered by the flow of the tide and left bare by its ebb. *Moulton* v. *Libbey*, 37 Maine, 472; *Deering* v. *Prop. of Long Wharf*, 25 Maine, 51; *Moore* v. *Griffin*, 22 Maine, 350; *King* v. *Young*, 76 Maine, 76; *Babson* v. *Tainter*, 79 Maine, 368; *Snow* v. *Mt. Desert Co.*, 84 Maine, 14; *Abbott* v. *Treat*, 78 Maine, 121; *Barrows* v. *McDermott*, 73 Maine, 441; *Partridge* v. *Luce*, 36 Maine, 16; *McFadden* v. *Haynes & Dewitt Ice Co.*, 86 Maine, 319; *Gerrish* v. *Prop. of Union Wharf*, 26 Maine, 384.

As we have seen, flats may be owned by an individual in fee. He may appropriate them, within the limits of law, to his exclusive use and possession. When not so appropriated his possession is constructive rather than actual. He has the right of entry and the right of actual possession, if he choose to exercise it. Until he does the jus publicum remains. Others may sail over them, may moor their craft upon them, may allow their vessels to rest upon the soil when bare, may land and walk upon them, may ride or skate over them when covered with water bearing ice, may fish in

the water over them, may dig shell fish in them, may take sea manure from them, but may not take shells or mussel manure or deposit scrapings of snow upon the ice over them. And while the public may enjoy all these rights in common with the owner, it cannot be said that he alone retains the actual possession. True, he may maintain trespass for unlawful entry thereon, or trespass on the case for obstructing his rights of fishery, or a writ of entry against a disseizor, upon the strength of adverse possession held by entry under color of title to both upland and flats, even if he does not actually occupy all the flats. *Clancey* v. *Houdlette*, 39 Maine, 451; *Treat* v. *Chipman*, 35 Maine, 34; *Duncan* v. *Sylvester*, 24 Maine, 482; *Brackett* v. *Persons Unknown*, 53 Maine, 228–238.

But where the actual occupation has not been gained and kept, and the owner and the public enjoy rights in common, it cannot be said that the owner's possession is actual, although in law it may be so considered for the purpose of creating a seizin or disseizin sufficient to ground actions upon. Thus in *Prescott* v. *Nevers*, 4 Mason, 326, the court says: "I take the principle of law to be clear that where a person enters upon land under a claim of title thereto by a recorded deed, his entry and possession are referred to such title; and that he is deemed to have seizin of the land co-extensive with the boundaries stated in his deed, when there is no open adverse possession of any part of the land so described in any other person."

Again in *Little* v. *Megquier*, 2 Maine, 176, the court says: "Though the deed may not convey the legal title, still the possession of a part of the land described in it under a claim of the whole and as a disseizin of the true owner is equivalent to an actual and exclusive possession of the whole tract unless controlled by other possessions."

Again in *Putnam Free School* v. *Fisher*, 34 Maine, 177, the court says: "If he (the tenant) entered under a deed recorded, claiming title to the land and had a visible possession of a part of it, such entry and possession would be a disseizin of the true owner of the whole tract described in the deed. *Prop. of Kennebec Purchase* v. *Laboree*, 2 Greenl. 275. And in contemplation of law he

would have possession of the whole parcel, and it would be as effectual as actual possession." In *Bailey* v. *Carleton*, 12 N. H. 15, it is held that entry under color of title works constructive possession of the whole premises.

Again in *Treat* v. *Strickland*, 23 Maine, 243, the court says: "The grantees have been in possession of lands under deeds recorded. This would have the effect to disseize others, and to give them a seizin of the flats according to the bounds named in the deed whether they actually occupied the flats or not."

Again in *Brackett* v. *Persons Unknown*, 53 Maine, 231, the court says: "As a general rule, the title acquired by an entry under a defective deed and a continued disseizin for more than twenty years is the same in extent as if the conveyance had been valid." In that case the entry was upon upland and flats adjoining by maintaining a wharf upon a portion of the flats.

In all these cases relating to flats, it will be seen that actual occupancy, or actual possession, which is the same thing, is not a necessary element to seizin or disseizin as the foundation for an action at law arising therefrom. A constructive possession will answer. Otherwise the true owner might be remediless at common law to assert his title, for there are various kinds of real property that may not conveniently be reduced to actual possession or occupation.

The statute under which this proceeding is had was borrowed from Massachusetts, where it was made to relieve against a supposed defect in the common law that did not allow one in possession of land to sue for its recovery from a person claiming title to it, without first surrendering the possession, because a mere right of entry would not work a disseizin of the one in possession.

The statute, by proper application, may serve a useful purpose in quieting titles for those in actual possession, who may be threatened with vexatious claims never meant to be enforced but held as a menace and threat, thereby working much annoyance and perhaps injuring the value of the estate.

The statute should only apply to those actually in possession of land, taking the emblements thereof. Of course, the occupation

of a part of a tract, under claim to the whole, would suffice, if the possession of the residue be not mixed, or in common with others. There should be no other possession of any part of the tract. The petitioner's possession should be all the possession there is, whether actual or constructive.

According to this view, the petition should be allowed as to so much of the upland and flats as are shown to be wholly in the possession of the plaintiff, and to none other.

The statute received construction from Massachusetts prior to its enactment here. It was enacted here in 1883, but in 1862 a petition was sought to be maintained in Massachusetts upon a paper title to flats without any continuous possession, which was dismissed, the court saying: "But it is only where there is an actual possession and taking of profits that the provisions of the statute are necessary, and the construction heretofore given to it has limited it to cases of such possession. *Hill* v. *Andrews*, 12 Cush. 185; *Dewey* v. *Bulkley*, 1 Gray, 416;" *Munroe* v. *Ward*, 4 Allen, 150.

In *Boston Mfg. Co.* v. *Burgin*, 114 Mass. 340, the court says: "One rule is that the petitioner must show an actual possession and taking of the profits. Title merely, as in the case of flats over which the tide ebbs and flows, is not sufficient. Another rule is that a respondent will not be required to bring a suit unless it is made to appear that the right which he claims can be fairly and conclusively tried by such a suit as may be directed.

"Where the petitioner is not in exclusive possession it has always been held that this proceeding cannot be maintained." *Leary* v. *Duff*, 137 Mass. 149. If between the parties the possession appears mixed or doubtful, the petition cannot be maintained. The petitioner's possession should be practically exclusive. *Tompkins* v. *Wyman*, 116 Mass. 558; *Bowditch* v. *Gardner*, 113 Mass. 315; *Orthodox Society* v. *Greenwich*, 145 Mass. 112.

As before noticed, the possession of flats may become practically exclusive by the building of wharves or other structures, by inclosing flats within a permanent weir, or by any reasonable exclusion of the public from the exercise of their right of jus publicum. *Brackett* v. *Persons Unknown*, 53 Maine, 228; *Treat* v. *Chipman*,

35 Maine, 36; *Thornton* v. *Foss*, 26 Maine, 402; *Clancey* v. *Houdlette*, 39 Maine, 451. See *Deering* v. *Prop. of Long Wharf*, 25 Maine, 51; *State* v. *Wilson*, 42 Maine, 9.

Controversies over flats are frequently between the exercise of jus publicum and jus privatum. The one is an easement, the other a fee. They are not inconsistent interests. Judgment at law as to the title would not exclude the exercise of the easement or destroy it. *Stetson* v. *Veazie*, 11 Maine, 408. In such cases the proceeding here sought would not settle the controversy, and should not therefore be granted. *Boston Mfg. Co.* v. *Burgin*, 114 Mass. 340.

True, the statute says, "a person in the enjoyment of an easement is in possession of real property within the meaning and for the purposes of this section."

The law considers the owner of an easement to be always possessed of it. He cannot be dispossessed. It is incorporeal, intangible, and cannot be recovered by action at law. The enjoyment of an easement may be disturbed, and the legal remedy is case for damages. The statute must mean, therefore, that one in the actual enjoyment of an easement may have the statute remedy, to compel the owner of the fee to sue for the supposed trespass, who would not then have the exclusive possession of the land himself. *Duncan* v. *Sylvester*, 24 Maine, 482.

Our own cases construing this statute, though not much in point, are *Oliver* v. *Look*, 77 Maine, 585; *Webster* v. *Tuttle*, 83 Maine, 271; *Poor* v. *Lord*, 84 Maine, 98. Possession is requisite to maintain this petition. *Pierce* v. *Rollins*, 83 Maine, 178.

Exceptions overruled. Defendant to answer.

INHABITANTS OF LISBON *vs.* INHABITANTS OF WINTHROP.

Androscoggin. Opinion January 12, 1900.

Pauper. Notice. Evidence.

The plaintiff sued for pauper supplies furnished one Hall and his family. It was then allowed to amend its writ by adding a new count for supplies furnished Hall alone and recovered a verdict. *Held;* that it was not error to admit evidence of supplies furnished both, although the jury should render a verdict for supplies furnished Hall alone. *Also;* that the notice to the overseers of defendant town is sufficient for supplies furnished Hall alone, and the verdict cannot be said to include more.

On motion for a new trial, *held;* that the evidence as to the pauper settlement of Hall cannot be said to so clearly weigh in favor of the defendant town as to overcome the verdict. The evidence does not show the verdict is clearly wrong.

ON MOTION AND EXCEPTIONS BY DEFENDANT.

This was an action of assumpsit, to recover for pauper supplies furnished to one Joseph W. Hall. The plaintiff town claimed to recover by reason of having fulfilled all the necessary requirements of the statutes; and to support its claim offered testimony tending to show that it had furnished Joseph W. Hall and family, consisting of himself, wife and nine children, (the wife and children, nor their names appearing in the notice,) house rent, milk and groceries, to the amount of $236.13, to which the defendant seasonably objected. The court overruled the objections and admitted the evidence.

To the rulings of the court the defendants excepted.

Verdict for plaintiff for $38.50.

Plea, general issue with brief statement as follows, to wit:

That they have never received any such notice touching the persons, alleged in the plaintiffs' writ to be paupers, as required by c. 24, § 37, of the R. S., and they specifically deny that any such notice was ever sent.

H. W. Oakes, for plaintiff.

G. C. Wing, for defendant.

When the plaintiffs began their suit, it was to recover compensation for articles and supplies furnished to Joseph W. Hall, his wife and his nine minor children, with the allegation in the writ that the overseers of the poor of the plaintiff town had sent a written notice as required by law, stating the facts respecting said paupers, and requesting their removal, etc.

The defendants pleaded the general issue, and denied notice; whereupon, in the exercise of its discretion, the court allowed the plaintiffs to amend their writ, and to declare that the articles were for the necessary relief of Joseph W. Hall, and the plaintiffs were permitted to go to trial on that theory. Objection was seasonably made and exception taken to the admissibility of evidence as to supplies which it was conceded were used for the entire eleven members of Hall's family.

To state the proposition more accurately, on a notice to the defendant town that a certain man had fallen into distress, the court allowed proof as to a gross amount of supplies that were furnished him and ten others, leaving the jury to calculate and estimate, or rather to guess the amount which Joseph W. Hall had out of that list of supplies. We submit that the amendment does not change the law applicable to the case, and defendants had a right under the law to have accurate information as to whom supplies were being furnished at their expense; that the acts of the plaintiffs rendered it impossible for them to show the amount of supplies furnished for which recovery could be had under the notice. *Carver* v. *Taunton*, 152 Mass. 484; *Bangor* v. *Deer Isle*, 1 Maine, 329.

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

HASKELL, J. Lisbon brings this action against Winthrop to recover for pauper supplies furnished one Hall, his wife and nine children, who had fallen into distress in Lisbon and who had their pauper settlement in Winthrop.

The plaintiff amended its writ by adding a new count for the same pauper supplies but furnished to Hall alone. The plaintiff recovered a verdict of $38.50.

Defendant has exception to the admission of evidence tending to show the whole amount of supplies furnished Hall and his family. No reason appears why the evidence was not admissible under the pleadings. It was certainly admissible under the counts for supplies furnished both Hall and the family, even if the whole evidence, when in, only authorized a verdict upon the last count for supplies furnished Hall alone. The exceptions must be overruled.

Defendant moves to set the verdict aside as against law and evidence, but the motion is without merit. The notice to the overseers of Winthrop, a necessary prerequisite to charge that town, seems amply sufficient for the supplies furnished Hall, and the verdict cannot be said to include more. Proper instructions to the jury upon the question must be presumed. The notice called for a much larger amount of supplies furnished than the jury allowed, but that does not work error. The evidence failed to warrant a recovery of the whole claim. Nor does it matter that the evidence was in proof of supplies furnished both Hall and his family, since the jury might estimate what part thereof might properly apply to the relief of Hall alone.

The evidence, as to the pauper settlement of Hall, cannot be said to so clearly weigh in favor of the contention of Winthrop as to overcome the verdict. It does not show the verdict to be clearly wrong.

Motion and exceptions overruled.

WILLIAM A. GLEASON

vs.

SANITARY MILK SUPPLY COMPANY & THOMAS A. HUSTON.

Kennebec. Opinion January 12, 1900.

Corporation Note. Pleading. Practice. R. S., c. 82, § 84.

A promissory note, beginning, "We promise to pay," and signed, "The Sanitary Milk Co., T. A. Huston, Trs." is the several note of the milk company and not the joint note of the company and its treasurer.

Held; that the note is not admissible under a declaration declaring upon it as a joint note of the corporation and its treasurer.

In actions of contract against more than one defendant, the jury may return a separate verdict as to each defendant, or as to two or more defendants jointly, and judgments shall be entered accordingly.

ON MOTION AND EXCEPTIONS BY DEFENDANTS.

Exceptions by defendants. This was an action of assumpsit, brought against the defendants jointly, upon two counts; one count setting out that the said defendants, at Auburn, on the nineteenth day of September, 1898, by their promisory note of that date, by them signed, for value received, promised W. A. Gleason, the plaintiff, to pay him, or order, the sum of ninety dollars and no cents, at First National Bank of Auburn, Me. The second count was the money count, with no specifications.

In the trial of the case in the Superior Court, for Kennebec county, no claim was made to recover upon any contract other than that contained in the note described in the first count.

It was admitted that the Sanitary Milk Supply Company was a corporation duly organized by law; and there was testimony introduced tending to show that the defendant, Thomas A. Huston, was treasurer of the corporation at the time the note in question was given.

1. Counsel for plaintiff offered in evidence the following note:

"$90.00 Auburn, Me., Sept. 19th, 1898.

Four months after date we promise to pay to the order of W. A. Gleason, ninety dollars at First National Bank of Auburn, Me. Value received.

The Sanitary Milk Supply Co.

T. A. Huston, Treas."

Objection was taken by defendants, on the ground that the note offered did not conform to the note declared upon. But the note was admitted subject to exception.

2. The plaintiff was called, and having been shown the note, the following question was put: "State as fully and accurately as you can recollect it, the conversation which you had with Huston."

Objection was thereupon made to any part of the testimony that would tend to contradict or vary the note. Subject to such objection, the plaintiff further testified, in answer to questions, as follows:

"Ques. Did he (Huston), or not, state anything about giving you a company note?

"Ans. I didn't hear him say anything about a company note; no, sir.

"Ques. And your understanding was that you were to receive whose note?

"Ans. Mr. Huston's; that is what I supposed."

3. The defendants requested the following instructions:

(1.) The omission to write the word "by" before the name of T. A. Huston, making the signature read "The Sanitary Milk Supply Co., By T. A. Huston, Trs." does not change the apparent character of the instrument.

(2.) The whole instrument construed together in all its parts shows it to be the signature of the Sanitary Milk Supply Co., and not T. A. Huston.

(3.) A joint promise having been alleged, the action must fail if the evidence proves a promise by one only, and not by both.

In regard to the above requested instructions the court said:

"I think I have given sufficient instructions upon the point. The note itself, upon its face, would not hold Huston if nothing more was shown. I think I will rule, for the purposes of this case, that the form of action is sufficient to sustain a judgment against the Milk Supply Co."

The defendants also took exceptions to the charge to the jury as follows:—

(1.) The defendants claimed that the note in the case must speak for itself, and must be interpreted by the court, and that the jury would not be authorized to consider conversations tending to contradict or vary the note.

Upon this point the court instructed the jury as follows:

"Ordinarily, a promissory note put into a case by the plaintiff is sufficient to make out a prima facie case against the defendant, if the signature is not disputed and the only question is what is called the general issue of never promised. It is not so in case there are any ambiguities, any indications upon the note itself which show that the party attempted to be holden did not sign the note in the capacity of a maker. In this case the plaintiff was permitted to go further and introduce evidence having a tendency to show that T. A. Huston, who adds the letters Tr or Trs after his name, signed as maker, and with the intention of being held as maker.

"Now there is no denial in this case so far as the Sanitary Milk Supply Co. is concerned that that company is holden; I do not understand that there is any pretense that that company is not a maker of the note. But it is claimed that the Milk Supply Co. is the only maker of the note, and that the name of T. A. Huston placed after it on this note was the name of the agent who wrote the name of the corporation, the Sanitary Milk Supply Co. Now if you shall find that T. A. Huston simply acted as the agent of the company in signing the corporation name, why then he can not be holden as maker. But if you shall find that T. A. Huston signed that note as a maker, intending to be held as a joint promisor on the note, why then your verdict would be against him also.

"Now it has been held in this state that a note signed in this way and written substantially in this way, we promise to pay to the order of A. B., the payee, and signed with a corporate name with a name following, and the added letters 'Pres' or 'Prest,' is the note of the corporation only, and does not hold the individual. But I have permitted evidence to be introduced here to show in what capacity Huston signed this note, and if you shall be satisfied from the evidence that he did sign as maker, you would be authorized to find a verdict against him as well as against the company."

(2.) The defendants claimed that the action being against them as joint promisors, could not be maintained in its present form, upon a contract made by one of the defendants alone.

Upon this point the court instructed the jury as follows:

"If you find that the Sanitary Milk Supply Co. alone promised, and that the name of the corporation was written in there by Mr. Huston as the agent, then your verdict would be that the defendant Sanitary Milk Co. did promise, and assess damages."

To all the foregoing rulings and instructions and refusals to instruct, and to the admission of so much of the above stated evidence, as was admitted against the defendants' objection and exception, the defendants excepted.

Verdict was for plaintiff for $92.35.

W. C. Philbrook and C. W. Hussey, for plaintiff.

No brief of plaintiff's counsel was received by the Reporter.

H. W. Oakes, J. A. Pulsifer and F. E. Ludden, for defendants.

Variance: *Cates* v. *Campbell*, 3 Cal. 192; *Morrison* v. *Bradley*, 5 Cal. 503; *Farum* v. *Cram*, 7 Cal. 136; *Faulkner* v. *Faulkner*, 73 Mo. 327; *Whittemore* v. *Merrill*, 87 Maine, 456; *Perkins* v. *Cushman*, 44 Maine, 484; *Gragg* v. *Frye*, 32 Maine, 283; *Kidder* v. *Flagg*, 28 Maine, 477.

Parol Evidence: *Barlow* v. *Cong. Soc.*, 8 Allen, 460; *Sturdivant* v. *Hull*, 59 Maine, 172.

The liability of the defendant as maker of a negotiable promissory note must be determined by the instrument alone. Affirmed in *Rendell* v. *Harriman*, 75 Maine, 497.

Parol evidence is inadmissible: *Hancock* v. *Fairfield*, 30 Maine, 299; *S. C.* 34 Maine, 93; *Shaw* v. *Shaw*, 50 Maine, 94.

Instructions and refusal to instruct jury as requested, erroneous in two respects. (1.) The jury were permitted to interpret a written instrument, complete in itself, which it was the sole province of the court to interpret. *Brown* v. *Orland*, 36 Maine, 376; *Guptill* v. *Damon*, 42 Maine, 271; *Randall* v. *Thornton*, 43 Maine, 226; *Nash* v. *Drisco*, 51 Maine, 417; *Simpson* v. *Norton*, 45 Maine, 281; *State* v. *Patterson*, 68 Maine, 473; *Herbert* v. *Ford*, 33 Maine, 90.

(2.) The jury were allowed to consider parol evidence, and by so doing to vary the express written contract of the parties. Cases supra. *Sturdivant* v. *Hull*, 59 Maine, 172; *Mellen* v. *Moore*, 68 Maine, 390; *Ross* v. *Brown*, 74 Maine, 352; *Rendell* v. *Harriman*, 75 Maine, 497; *Chadwick* v. *Perkins*, 3 Maine, 399; *Sylvester* v. *Staples*, 44 Maine, 496; *Osgood* v. *Davis*, 18 Maine, 146; *Jarvis* v. *Palmer*, 11 Paige Ch. 650; 2 Kent Com. 556; *Mariner's Bank* v. *Abbott*, 28 Maine, 280; *Palmer* v. *Fogg*, 35 Maine, 368; *Williams* v. *Smith*, 48 Maine, 135; *Waterville Bank* v. *Reddington*, 52 Maine, 466; *Bell* v. *Woodman*, 60 Maine, 465; *Ames* v. *Hilton*, 70 Maine, 36.

Counsel also cited: *Draper* v. *Mass. Steam Heating Co.*, 5 Allen, 338, *Atkins* v. *Brown*, 59 Maine, 90; *Castle* v. *Belfast Foundry Co.*, 72 Maine, 167.

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

HASKELL, J. Assumpsit against two defendants upon their joint promissory note. Plaintiff read in evidence, subject to exception, a promissory note beginning: "We promise to pay," and signed, "The Sanitary Milk Co. T. A. Huston, Trs." This was the several note of the Milk Company, and not the joint note of the company and its treasurer. *Draper* v. *Mass. Steam Heating Co.*, 5 Allen, 338; *Miller* v. *Roach*, 150 Mass. 140. The note was there-

fore inadmissible under the count that misdescribed it, for that describes a joint note, while the note admitted was a several note. *Atkins* v. *Brown*, 59 Maine, 90.

Under the money count the plaintiff might recover of the Milk Company, as he seems to have taken its several note in payment of his debt. This he may do by force of R. S., c. 82, § 84. "In actions of contract against more than one defendant, the jury may return a separate verdict as to each defendant, or as to two or more defendants jointly, and judgments shall be entered accordingly." *Smith* v. *Loomis*, 72 Maine, 51; *Castle* v. *Belfast Foundry Co.*, 72 Maine, 167.

The judge allowed the jury to determine in what capacity the defendant Huston signed the note. This was error. The note speaks for itself. The verdict was against both defendants. It should have been against the Milk Company only.

Motion and exceptions sustained.

LEVI GREENLEAF *vs.* SAMUEL J. GALLAGHER.

Cumberland. Opinion January 12, 1900.

Sales. Delivery. Pleading.

1. An action for the price of goods sold and delivered cannot be maintained until delivery be proved. Proof of tender and refusal is not sufficient.
2. If delivery is unconditional, the plaintiff should receive the contract price and a verdict in his favor should stand.
3. If the delivery is conditional, then the price named in the condition only can be recovered; and a verdict otherwise for the plaintiff must be set aside as against law.
4. Actual delivery to, and acceptance by, the purchaser of the goods sued for is essential. The title to the goods may have passed subject only to the vendor's lien for the price, yet so long as that attaches this form of action does not apply.
5. The remedy in such case is breach of the contract of bargain and sale, where the rule of damages in favor of the vendor is not the contract price, but the difference between it and the value of the goods retained, for he should not keep the goods and have their price too.

Held; in this case, that an unconditional delivery of the goods, the price of which is sued for, is not proved; and the verdict for the same is therefore erroneous and must be set aside.

ON MOTION BY DEFENDANT.

The facts are stated in the opinion.

L. Greenleaf, for plaintiff.

E. W. Whitehouse, for defendant.

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

HASKELL, J. Assumpsit for goods sold and delivered. The writ contains two counts. The first is for a book sold and delivered under special contract. The second is account annexed for the same. The verdict was for plaintiff for $36.92, and the defendant moves for a new trial.

The special contract is in writing of the following tenor:

"$35.00 Dec. 9th, 1895.

New England Magazine, Boston, Mass.:

Please send me one copy of your complete work entitled "Men of Progress," to be issued in one large royal octavo volume, with portraits and biographical sketches of representative men of the state of Maine, for which I agree to pay you or order the sum of Thirty-five Dollars upon issue of the part containing my sketch and portrait, and delivery of the photo-engraved plate of the portrait of myself. My photograph and data for sketch I promise to furnish within thirty days or pay the above-mentioned sum upon delivery of the work.

Name, S. J. Gallagher.
Address, Togus, Me."

That contract is to deliver one volume of "Men of Progress," containing defendant's sketch and portrait, he to furnish sketch and portrait within thirty days and pay thirty-five dollars upon issue of part containing the sketch and portrait, or the same upon delivery of the book.

The upshot of it is, that defendant, if he elects to furnish sketch and portrait, agrees to pay the thirty-five dollars when the "part" containing the same shall be issued; but if he does not furnish the sketch and portrait, then his payment is deferred until delivery of the book; but he is to pay anyhow.

The evidence shows that the defendant did not furnish the sketch and portrait, and that the book was left at his office, in his presence, without them. The only competent evidence of delivery is the defendant's own testimony, which is uncontradicted. He says that, when the book was tendered to him at his office, he at first refused to receive it, but a friend dropping in said to the agent: "Why don't you let him have it on the same conditions that he left mine, that he would take it at the publisher's prices. I said 'No,' at first, ... finally I consented that he should leave it on the same conditions. He says, 'I will leave it on those conditions, will I?' and I said, 'Yes, sir,' and nothing more was said about it really of any consequence. He left the book and went off, and the book is on the top of my desk and has never been opened."

This action cannot be maintained until delivery be proved. If unconditional, the plaintiff should receive the contract price, and the verdict must stand. If conditional, then the price named in the condition can only be recovered, and the verdict must be set aside as against law.

In actions for goods sold and delivered, "actual delivery to and acceptance by the purchaser of the goods sued for is essential." *Atwood* v. *Lucas*, 53 Maine, 508. The title to the goods may have passed, subject only to the vendor's lien for the price, yet so long as that attaches, this form of action does not apply. The remedy in such case is for breach of the contract of bargain and sale, where the rule of damages in favor of the vendor is not the contract price, but the difference between it and the value of the goods retained, for he should not keep the goods and have their price too. A vendor's lien presupposes that the title has passed, for the lien cannot attach to one's own goods. The delivery may have been sufficient to pass the title, but the possession is retained

to uphold the lien. *Merrill* v. *Parker*, 24 Maine, 89, is sometimes cited as against this doctrine, but on reference to the errata at the end of the volume it will be seen that the apparent dissenting opinion of SHEPLEY, J., is really the opinion of the court and upon which judgment was rendered, and which supports the doctrine of this opinion. Nor are we aware of any opinion of this court against it. Where the vendee may not maintain trover against the vendor for the goods, he should not have an action for the price, as goods sold and delivered, but damages only for the breach of the contract of bargain and sale. *Edwards* v. *Grand Trunk R. R.*, 54 Maine, 111. In *State* v. *Intoxicating Liquors*, 73 Maine, 278, *Merrill* v. *Parker* is cited to uphold the doctrine that the title to merchandise forwarded C. O. D. passed when the bargain was struck, and that case is again cited in *State* v. *Peters*, 91 Maine, 37, to the same doctrine, which is perfectly sound, but, by chance, the further apparent doctrine of *Merrill* v. *Parker*, is given in dictum not strictly accurate, that "the vendor could sue for the price." The two cases, *Wing* v. *Clark*, 24 Maine, 366, and *Chase* v. *Willard*, cited with *Merrill* v. *Parker*, sustain the doctrine of *State* v. *Liquors*, but not the dictum. They hold that, as the title passed when the bargain was struck, loss of the goods by fire and by theft, before actual delivery, fell upon the vendee.

To maintain this form of action, actual delivery and acceptance must appear. Tender and refusal will not do. *Moody* v. *Brown*, 34 Maine, 107; *Atwood* v. *Lucas*, 53 Maine, 508. In the latter case it is said: "It is laid down by Mr. Saunders that to support an action for goods sold and delivered, the plaintiff must prove not only such a delivery as will vest the property in the goods in the defendant, but such a delivery as will divest himself of all lien upon the goods and enable the defendant to maintain trover for them without paying or offering to pay for them. Saunders Pl. & Ev. 536." The same doctrine is indorsed in *Edwards* v. *Grand Trunk R. R.*, 54 Maine, 105; *Means* v. *Williamson*, 37 Maine, 556; *Pettengill* v. *Merrill*, 47 Maine, 109; *Gooch* v. *Holmes*, 41 Maine, 523.

In *Tufts* v. *Grewer*, 83 Maine, 412, the court says: "A tender

does not in our law transfer the title to the vendee. The facts show that the plaintiff was to retain title to the fountain until the price should be paid. But the defendant refused to make the partial cash payment called for by the terms of the sale, or to accept any possession or control of the property so that even an equitable title to the property did not pass to him."

Actual acceptance of delivery may sometimes be inferred from the conduct of the parties. "Silence and delay for an unreasonable time are conclusive evidence of acceptance. The burden of action is upon the buyer, and he must seasonably notify the seller of his refusal to accept the goods." *White* v. *Harvey*, 85 Maine, 212. See *Merrill Furniture Co.* v. *Hill*, 87 Maine, 18; *Goslen* v. *Campbell*, 88 Maine, 450.

In the case at bar, the book ordered was tendered to the defendant, who refused acceptance. It thereby did not become the property of defendant, and this action for goods sold and delivered cannot be maintained, except on the general count for goods sold and delivered, by virtue of defendant's acceptance of the book upon new terms then made him by plaintiff's traveling man, who tendered the book. Those terms were payment at the publisher's price. The evidence fails to disclose what that price was, and therefore the verdict cannot be said to rest upon the new contract. Indeed, the fair inference is that it does not, for the publisher's price for a single volume is not likely to be $36.92, including interest. If it be said that the new terms were unauthorized by the publishers and not binding upon them, although made by their agent, then defendant is not bound thereby, as no title to the book passed to him, because his acceptance under a void contract would be no acceptance. *Wood* v. *Finson*, 89 Maine, 459.

Motion sustained. Verdict set aside.

OLIVER COPELAND *vs.* JAMES H. H. HEWETT, and others.

Knox. Opinion January 12, 1900.

Pleading. Plea in Abatement. Demurrer. R. S., c. 77, §§ 52, 76; c, 82, § 23.

Exceptions to the sustaining of a demurrer to a plea in abatement cannot be brought to the law court until a disposal of the action upon the merits.

It is otherwise with exceptions to rulings on demurrers to declarations or pleas in bar.

Semble; that a plea in abatement for the non-joinder of co-defendants should aver the residence of the supposed co-defendants.

ON EXCEPTIONS BY DEFENDANTS.

Action of assumpsit, on a contract for repairs on the Methodist Episcopal church in Thomaston. Within the time provided by law, the defendants filed a plea in abatement alleging non-joinder of other defendants. To this plea the defendants filed a general demurrer, which was duly joined. Upon hearing, the demurrer was sustained, and defendants took exceptions. The plea, demurrer, and joinder were made part of the case. In case the demurrer was sustained the defendants were to have the right to plead over.

(Plea in abatement.) And now the said defendants come and defend, etc., when etc. and pray judgment of the writ and declaration aforesaid because they say that the several supposed promises in said writ declared upon, if any such were made, were made jointly with R. B. Copeland, Levi Seavey, W. J. Swift, L. C. Lermond, J. S. Young and Sylvanus Hyler, and as a committee lawfully appointed by the trustees of the Methodist Episcopal church of Thomaston, in said county of Knox, who are still living and residing at Thomaston in said county, except W. J. Swift, who resides in Warren in said county, and not by the said defendants alone, and this they are ready to verify. Wherefore because said trustees are not named in said writ and declaration together with the said defendants, they, the said defendants, pray judgment of the said writ and that the same may be quashed and for costs.

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

Counsel argued, besides other points, that the plea in abatement is defective because it does not allege that the defendants, as to whom complaint of non-joinder is made, were living within the jurisdiction of the court at the date of the writ. The only allegation in this plea upon that point is, "who are still living and residing at Thomaston in said county, except W. J. Swift, who resides in Warren in said county." There is no allegation that they were living and residing in Thomaston at the date of the writ.

All the precedents except the one found in the Maine Civil Officer, require this. Stephen on Pleading, p. 48; Chitty, p. 270; Story, p, 87; *Furbish* v. *Robertson*, 67 Maine, 35; *Goodhue* v. *Luce* 82 Maine, 222.

It is almost impossible to tell to what or whom the relative pronoun "who," as used in the plea refers. No one can tell by reading the plea whether it applies to Copeland, Levi Seavey, W. J. Swift, L. C. Lermond, J. S. Young, Sylvanus Hyler, or to somebody alleged to be a committee appointed by certain trustees.

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

The plea in abatement need not allege that said Copeland, and others named in the plea, were living within the jurisdiction of the court at the date of the writ, etc. No court has ever held that it was, provided the plea contains all other necessary averments. In *Furbish* v. *Robertson*, 67 Maine, 35, there was no averment that Plummer was alive or that he resided at any time within the jurisdiction of the court. The court said nothing, in that case, about the date of the writ.

If only the defendants named in the writ are to be held to answer alone on the promise alleged in the writ to have been made by them, and not the trustees for whom they acted, and cannot at the trial on the merits show that they were merely agents, it will be so by reason of a mere technicality invoked by the plaintiff "foreign to and regardless of the real merits of the case," and not by the defendants. The object of a plea in abatement is to early inform the plaintiffs of mistakes or errors of fact alleged, and give him "a better writ." *Brown* v. *Gordon*, 1 Maine, 165.

"The object sought by a dilatory plea," was not "the defeat of the particular action upon some technical ground foreign to, and regardless of the real merits of the case" as stated by the court in *Furbish* v. *Robertson*, supra, but was in this case filed for the very purpose of presenting at the trial the real issue on its merits, and for no other purpose. *McGreary* v. *Chandler*, 58 Maine, 537; *White* v. *Cushing*, 30 Maine, 267.

If the plea does not state specifically that these joint promisors named, were all alive and residents of the county on the date of writ, it does state that they were all alive and residents of the county when the plea was filed, and if they all were alive when the plea was filed, it is probable to say the least, that they were not dead a few days before that time. Averment not necessary. 3 Chitty, p. 900; Maine Civil Officer, 6th Ed. p. 242; *Goodhue* v. *Luce*, 82 Maine, p. 223; Stephen on Pleading, 87; 3 Story, 99.

The demurrer was filed, not because the plea did not give the necessary information to enable the plaintiff to amend or make a better writ, but for the purpose, by this technical objection, of preventing the defendants from showing at the trial of the cause, that the real defendants were not sued.

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

HASKELL, J. The defendants pleaded in abatement the non-joinder of co-defendants. The plaintiff demurred, and to the sustaining of the demurrer the defendants had exception, and, before availing themselves of their right to plead over to the merits, have brought their exception here with the agreement that if their exception be overruled they may plead anew below.

The exception is prematurely brought up. R. S., c. 77, § 52. It is to an interlocutory order, and must await the final determination of the suit. *Smith* v. *Hunt*, 91 Maine, 572; *State* v. *Brown*, 75 Maine, 456; *Cameron* v. *Tyler*, 71 Maine, 27; *Abbott* v. *Knowlton*, 31 Maine, 77; *Daggett* v. *Chase*, 29 Maine, 356.

Pleas in abatement are collateral to the merits of the case, and

the sustaining of a demurrer to them never ends the case, but rather orders a plea to the merits. If, however, the demurrer be overruled and the plea sustained the action abates and exceptions may be brought up, for the case is ended.

On demurrers to declarations and pleadings to the merits, the decision is a final disposition of the suit, unless amendments or repleaders be allowed by the court or by provisions of statute, in the furtherance of justice; and therefore such demurrers stay the cause, and exceptions may be entered here at once. If such exceptions be adjudged frivolous and intended for delay, no repleader will be allowed, but final judgment will be ordered. R. S., c. 82, § 23.

In the superior courts the rule is otherwise by reason of R. S., c. 77, § 76.

Semble, that the plea in abatement is fatally defective, because it fails to aver the residence of the supposed co-defendants to be in the state when the action was brought. *Furbish* v. *Robertson*, 67 Maine, 35; *Biddeford Savings Bank* v. *Mosher*, 79 Maine, 242; *Bellamy* v. *Oliver*, 65 Maine, 108.

Exceptions dismissed.

JOHN E. BRIDGES *vs.* ALBERT BRIDGES.

York. Opinion January 12, 1900.

AMELIA D. KNIGHTS *vs.* RICHARD W. BROWN, and another.

Somerset. Opinion January 12, 1900.

Sunday Law. Action. Pleading. Stat. 1821, c. 9, § 2. R. S., c. 82, § 116; c. 124, § 20. Stat. 1895, c. 129.

1. It is now provided by statute (R. S., c. 82, § 116,) that persons receiving a valuable consideration for a contract made on Sunday shall not defend against it, on that ground, until they first shall have restored the consideration.

The defendant sold a horse on Sunday with warranty to the plaintiff who tendered a return of it, which was refused. *Held;* that the tender rescinded the contract and the purchase money became the plaintiff's.

Also; that the same result would follow in an action upon the contract for breach of warranty.

2. By statute of 1895, c. 129, it is enacted that the act of 1821, c. 9, (R. S., c. 124, § 20,) shall not bar any action for tort or injury suffered on Sunday.

Where the plaintiff suffered an injury on Sunday through the defendant's negligently letting him an unsafe carriage, *held;* that the defendant may have assumpsit for breach of an implied warranty to furnish a suitable carriage, or case for negligence in not doing so.

ON EXCEPTIONS BY PLAINTIFF.

II. The first case was an action of assumpsit, the declaration containing counts for money had and received, account annexed, and an omnibus count, to recover seventy-five dollars paid by the plaintiff to the defendant for a horse on Sunday.

The plaintiff introduced evidence tending to show the purchase and a warranty that the horse was sound and safe for plaintiff's wife and son to drive; that he relied on the warranty; that the horse proved to be unsound and unsafe; and that after two weeks he returned the horse to the defendant who refused to refund the money.

The presiding justice ruled that an action for a breach of the contract of warranty, it being a Sunday contract, could not be maintained, and ordered a nonsuit.

The plaintiff was allowed exceptions to the ruling and order of the court.

J. C. Stewart, for plaintiff.

The object of this statute was "undoubtedly to make a party defendant to a Sunday contract do equity." *Berry* v. *Clary*, 77 Maine, 482, 485; *Wentworth* v. *Woodside*, 79 Maine, 156; *Bank* v. *Kingsley*, 84 Maine, 111; *Wheelden* v. *Lyford*, 84 Maine, 114.

See also:—*Batsford* v. *Every*, 44 Barb. (N. Y.), 618; *Eberle* v. *Mehrback*, 55 N. Y., 683; *Miller* v. *Roessler*, 4 E. D. Smith, (N. Y.), 234.

In this last case the court held that an action for breach of warranty in the sale of horses made Sunday could be maintained. So

also in *Maurer* v. *Wolf*, 21 N. Y. Supp. 202. The same was the case in *Adams* v. *Gay*, 19 Vt. 358. Is the contract void? Then nothing passes and plaintiff is entitled to recover. *Tucker* v. *Mowrey*, 12 Mich. 378; *Brazee* v. *Bryant*, 50 Mich. 140.

G. F. and Leroy Haley, for defendant.

The defendant never having consented to, nor actually, received the horse back, this action is therefore for the purpose of recovering back the purchase price after rescinding the contract of sale made on Sunday.

Before the passage of c. 82, § 116, of R. S., the law would lend its aid, neither in enforcing nor in rescinding a contract made on the Lord's day. This statute enables one party to such a contract to enforce his remedy and oblige the other party to fulfil his promise. This is where one party has not performed his part of the contract. Both parties did fulfil their promise and the contract was fully completed.

The law will not lend its aid to rescind a contract made on the Lord's day. The law stands as it did before the passage of c. 82, § 116, R. S.

In *Plaisted* v. *Palmer*, 63 Maine, 576, the court held that an action of assumpsit to recover back the price paid for the horse on account of a deceit practiced in the sale, would not lie, because based upon a contract tainted with illegality (Sunday trade). The law as laid down in *Plaisted* v. *Palmer* exists today, and was not changed by the section of the statute referred to.

I. As appears by the bill of exceptions, the second case was an action of the case brought to recover damages on an implied warranty by a livery stable keeper that the carriage was safe and suitable in kind, for the purpose for which it was let, to wit:—to ride about town. There was evidence introduced by the plaintiff tending to prove that the purpose of the ride was to take the air. There was also evidence in the case tending to prove that the hind seat of the carriage, for want of sufficient fastening, tipped over and allowed the plaintiff to fall out backwards, in consequence of which she received injuries. The hiring of the carriage was on Sunday, and

the accident occurred on Sunday afternoon before sunset. After the evidence for the plaintiff was all taken out, the defendant moved a nonsuit, on the ground that the contract of hiring was an illegal contract and fell within the provisions of R. S., c. 124, § 20, and was void. The presiding justice upon the foregoing evidence ordered a nonsuit.

The declaration was a part of the case.

(DECLARATION.)

"In a plea of the case:—for that on the 14th day of August, A. D. 1898, at Skowhegan aforesaid, the defendants owned, controlled and managed a livery stable, and were engaged in letting teams to the public for hire; that on the said 14th day of August, 1898, at said Skowhegan, the said plaintiff procured one Charles H. Folsom to hire of said defendants, a team for her use, for the purpose of riding. The said team consisted of a horse and a two-seated wagon; and the plaintiff avers that it was the duty of the said defendants to furnish for her use a safe, suitable and sufficient wagon, but that the defendants, wholly unmindful of their duty, carelessly and negligently, without due care and without notifying her or the said Charles H. Folsom, furnished for her use, an unsafe, insufficient and unsuitable wagon, that the back seat of said wagon was dangerous and defective, and unsecurely and improperly fastened to the body of the wagon; all of which was known to said defendants but unknown to the plaintiff; that while in the exercise of due care the plaintiff was riding upon the public streets of said Skowhegan, to wit, up the hill on Summer street, the horse traveling at a walk, when the back seat of said wagon tipped over by reason of its insecure, unsafe and dangerous fastening, and the plaintiff was thrown violently upon the ground, etc. . . . "

Plea, general issue, not guilty.

Forrest Goodwin, for plaintiff.

Counsel cited: Stat. 1895, c. 129. The declaration is in tort, the plea is in tort and the evidence tended to prove the tort, and therefore we claim that the plaintiff should not have been nonsuited. If it is contended that the plaintiff is bound by the recital

in the exceptions, we say no. If the declaration, plea and evidence show that the case could have been maintained, then we should not have been thrown out of court. The decision of the presiding justice was not made upon the recital as it appears in the exceptions, but upon the evidence and pleadings.

E. N. Merrill, for defendants.

The only question in the case is: was the hiring of the team on Sunday an illegal contract and therefore void?

The contract between the parties was one of bailment and it was under such a contract that the plaintiff was in possession of the team. It was by virtue of that contract alone that the liability of the defendants, if any, arose; and if in consequence of the negligence of the defendants the plaintiff received an injury, under ordinary circumstances they would be liable. But that is not this case. The hiring by the plaintiff was illegal and the contract void. Both parties were engaged in an illegal and void contract. Such being the case the plaintiff cannot recover. *Parker* v. *Latner*, 60 Maine, 528; *Bank* v. *Kingsley*, 84 Maine, 111; *Wheelden* v. *Lyford*, 84 Maine, 114; *Morton* v. *Gloster*, 46 Maine, 520.

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

HASKELL, J. These two cases turn upon the construction of the same statute, and are therefore considered in one opinion.

The first is an action of assumpsit to recover the purchase money paid for a horse bought on Sunday. The plaintiff tendered a return of the horse for breach of warranty of soundness, which was refused, and sues for the price paid for it. The sale was on Sunday. The plaintiff was nonsuit and has exception.

The second is an action on the case to recover damages sustained for negligently letting a carriage that was unsafe and unsuitable for the uses for which it had been hired. The hiring was on Sunday, and the damage suffered was on Sunday. The plaintiff was nonsuit and has exception.

To both cases § 20, of c. 124, of R. S., is interposed as a defense. In reply § 116, of c. 82, of R. S., is invoked in the first case, and the act of 1895, c. 129, in the second case. The former statute, inherited from Massachusetts, was upon the erection of our state enacted in 1821, c. 9, § 2. Among other things it prohibits business, except works of charity or necessity, upon the Lord's Day. By a long line of decisions this court has held that, by reason of that statute, a contract made on Sunday is void between the parties, and that the consideration therefor cannot be recovered back, and that a tort arising from such contract will not support an action for damages. *Towle* v. *Larrabee*, 26 Maine, 464; *Hilton* v. *Houghton*, 35 Maine, 143; *Morton* v. *Gloster*, 46 Maine, 520; *Bank of Cumberland* v. *Mayberry*, 48 Maine, 198; *Pope* v. *Linn*, 50 Maine, 83; *Tillock* v. *Webb*, 56 Maine, 100; *Parker* v. *Latner*, 60 Maine, 528; *Plaisted* v. *Palmer*, 63 Maine, 576; *Meader* v. *White*, 66 Maine, 90; *Mace* v. *Putnam*, 71 Maine, 238; *First Natl. Bank of Bar Harbor* v. *Kingsley*, 84 Maine, 111.

This act of 1821 was found, in practice, to work a fraud, by allowing one party to a Sunday contract to retain his fruit of the transaction and to give the other party none, so the legislature, in 1880, (R. S., c. 82, § 116,) enacted that he who receives a valuable consideration for a contract made on Sunday shall not defend against it on that ground until he restores the consideration. That is, if he will repudiate the contract he must first restore his gains from it. A wholesome doctrine, that will not allow a desecration of the Lord's Day to become a cheat.

In the first case at bar, the defendant sold a diseased horse for sound, took the purchase money as the price of a sound horse and tries to keep it because he cheated on Sunday, or warranted the horse sound on Sunday, both of which he might do under the statute of 1821 and not be accountable therefor. The plaintiff tendered a return of the horse, which was refused. The tender operated to rescind the contract. It restored the parties to the same condition they were in before the sale, and the purchase money became the plaintiff's. The defendant cannot resist its return because of the old Sunday law. The same result would

have followed had the plaintiff sued upon the contract for a breach of warranty. The defendant could not then have defended until he had returned the consideration that he had received for making the warranty. Such return would have precluded a recovery, for the damages might have been more than the price paid, had not the contract been void, for the plaintiff would have been entitled to the benefit of his bargain, that is, the horse, if sound, might have been worth more than the purchase price above what he was worth in the condition sold, unsound. A return of the horse, followed by a suit for the price paid, amounts to substantially the same thing as a suit for breach of the warranty. In either case the statute of 1880 bars the defense of Sunday contract until the price paid shall have been returned. *Wentworth* v. *Woodside*, 79 Maine, 156; *Berry* v. *Clary*, 77 Maine, 482; *Bank* v. *Kingsley*, supra.

In the second case at bar, the plaintiff procured another to hire for her, on Sunday, a horse and carriage for driving. The carriage let was unsafe, whereby the plaintiff was injured. She sues for damages received from the defective carriage while driving on Sunday. The act of 1821, as before seen, would bar recovery, *Wheelden* v. *Lyford*, 84 Maine, 114; but the legislature enacted in 1895, c. 129, that the act of 1821, R. S., c. 124, § 20, shall not bar "any action for a tort or injury suffered on Sunday." The plaintiff's injury was suffered on Sunday by defendants' tort, that is, their negligence in letting an unsafe carriage. It matters not whether the plaintiff's action be assumpsit for breach of an implied warranty to furnish a suitable carriage, or case for negligence in not so doing. In either case, the action would be for an "injury suffered" on Sunday, and this the act of 1895 expressly excepts from the operation of the statute of 1821.

Exceptions sustained.
Both actions to stand for trial.

JOSEPH E. SOPER, and another,

vs.

JAMES E. CREIGHTON, and others.

Knox. Opinion January 12, 1900.

Sales. Delivery. Prompt Shipment.

Plaintiffs are merchants in Boston; defendants, traders in Thomaston. A salesman of the plaintiffs sold defendants goods "to be shipped prompt." *Held;* that this means shipped from Boston so that the goods would arrive in Thomaston by reasonable dispatch; and, unless so shipped, the title to the goods would not pass to the defendants, and when not so received by them they are not liable for damages upon their contract of purchase.

ON REPORT.

This was an action for damages for the non-acceptance by the defendants of a car of feed which the plaintiffs allege they sold the defendants through their agent, Raymond O'Brien, and which the defendants refused to accept on account of the long and unreasonable delay in the delivery. No claim of delivery, or acceptance of any part, or any payment by the defendants was made on account of the feed. The declaration was framed not for goods sold and delivered, but for damages for non-acceptance of goods bargained and sold.

The material facts are as follows:—

The plaintiffs carry on business in Boston under the name, "J. E. Soper & Co. Cotton Seed Meal, Grain and Feed, 207 Chamber of Commerce." They are not brokers but dealers. The defendants carry on a lime manufacturing business in Thomaston, Maine, and a general store in connection with it, and sell grain and feed among other articles.

Raymond O'Brien, a native and resident of Warren, near Thomaston, and whose postoffice address was Thomaston, represented the plaintiffs as their agent or salesman. He was well acquainted with the defendants and was often in Thomaston, but had not pre-

viously made sales to the defendants, they buying their grain and feed in Portland.

The last of April, 1898, the defendants were out of a necessary supply of feed, and could not get any in Portland, where they usually dealt, without delay of ten days or two weeks, which they could not grant for they wanted it at once. Charles A. Creighton, one of the defendants, met O'Brien in the postoffice, at Thomaston, and inquired if he could furnish them a car of feed, and whether they had any at Yarmouth or not;—Creighton placing his stress on an immediate delivery, and whether O'Brien could give it. O'Brien said he could not, and Creighton said, then that ends it, for we don't want it unless we can have it "spot" "at once," etc.

Both agree that Creighton said he would try Littlehale of Rockland, which he says he did and could not get it; and then O'Brien came along and hailed him, and told Creighton he "could supply him with that feed," and the time of delivery was repeated, but not so emphatically as before, as O'Brien knew his wishes and testified: "He said to hurry it; he asked me to have them hurry it, or rush it, as he was in a hurry for it." Under O'Brien's assurance that his house could furnish it, Creighton ordered the car of feed with the understanding it should be delivered in a few days.

O'Brien, carrying out the direction to "rush it" and haste, at once wired his house in Boston and followed it by a letter. The telegram is not produced but the letter directs if they are not "able to fill the order, please advise" defendants. The defendants got no notice of shipment and assumed the order was filled and expected it daily and went to the railroad station for it.

The plaintiffs, however, it seems, were not able to fill the order and instead of notifying the defendants went to the broker's board, and bought it of Chapin & Co. for shipment from some point. One of the plaintiffs testifies: "We immediately sent the instructions west to be filled promptly upon the date it was taken," but he afterwards says, "the party of whom they bought sent the order west; they really had nothing further to do with it." It was

bought on the broker's board in Boston May 5, and the plaintiffs claim, was shipped from Seymour, Indiana, May 10, but ordered out before the plaintiffs bought it. So it was not shipped on this order, but was bought in some indefinite place not known to either of these parties, or Chapin & Co., and may have been stalled somewhere when bought. The plaintiffs claim by bill of lading that it left Seymour, Indiana, May 10, 1898, but it does not appear by that document that it was for defendants, and they claimed that the order could not have reached there; it also shows that the car was subject to the order of Chapin & Co. and with directions to hold at Norwood, N. Y., for orders. By indorsement on the back of bill of lading Chapin & Co.'s order was made June 1, 1898. By the way-bill it appears that the car was at Detroit May 27, and at Norwood June 2. It was a month before it arrived at Norwood, the point where its destination was determined.

The plaintiffs sent to the defendants on May 5, a printed blank filled up, which they call a confirmation, containing words, "shipment prompt." Charles A. Creighton, who had the talk with O'Brien, went away a few days after and did not see the confirmation. John M. Creighton another defendant did see it, and construing it to insure the immediate receipt of the feed, made no reply to it. On June 20, long after the feed had arrived and acceptance refused, a copy was also sent to the defendants..

The defendants went daily to the station for the feed. It did not arrive and on May 26th, in the absence of C. A. Creighton, J. M. Creighton wrote the plaintiffs, "we bought cargo of feed to come right along" and on June 4, C. A. Creighton having returned, wrote, "we bought cargo of feed to be delivered at once" and getting no feed, on June 7th, he wired: "O'Brien sold prompt delivery, will not accept feed."

The confirmation sent by the plaintiffs was never acknowledged or referred to by defendants. It was a printed blank circular with only a few written words, and would not attract the attention of a party unless, perhaps, the word "prompt" which would be in accordance with the defendants' wish.

The defendants claimed that there was no car shipped, from Sey-

mour, Indiana, for Thomaston, or for these plaintiffs, and so could not have been shipped prompt, or within ten days; and refused acceptance. Thereupon the plaintiffs, after notice to the defendants, resold the feed at a loss of $54.00.

R. I. Thompson, for plaintiffs.

Statute of frauds: *Bauman* v. *James*, 3 Ch. 503; *Cave* v. *Hastings*, 7, Q. B. D. 125, (42 Am. Rep. 347, note); *Kingsley* v. *Siebrecht*, 92 Maine, 23; *Long* v. *Millar*, 41 L. T. Rep. (N. S.) 306; Browne Stat. Frauds, § 348; Benj. Sales, §§ 222, a, 252, (Bennett's 4th Am. Ed); *Ryan* v. *U. S.* 136, U. S. 68; *Freeland* v. *Ritz*, 154 Mass. 259; *Beckwith* v. *Talbot*, 95 U. S. 289; *Williams* v. *Robinson*, 73 Maine, 186; *Townsend* v. *Hargraves*, 118 Mass. 325, and cases.

Whether the contract was that the feed was "to be shipped prompt," as plaintiffs contend, or whether it was to be prompt delivery as defendants contend, the defendants are estopped by their three weeks silence after reading the terms of the contract as written by the plaintiffs; and whatever doubt there might be or may have been, had there been no written evidence in the case as to whether it was shipment or delivery that was meant, must, under all circumstances, be resolved in favor of the plaintiffs.

The defendants must have understood the word "shipment" in its ordinary sense. They are manufacturers of lime and are accustomed to shipments of large quantities of it; and as intelligent men know the meaning of the word "shipment" and knew when they bought this car of feed the full meaning of the words as written. Defendant John Creighton, as a dealer in lime, well knows the difference between "shipment" and "delivery".

The words "to be shipped prompt" have no technical legal meaning like the word "delivery", and the ordinary meaning of "shipped" all business men must be presumed to understand in its ordinary sense.

This car of feed was shipped within the contract time and was delivered to the B. & O. R. R. Co. as per bill of lading, which in contemplation of law is a delivery to these defendants. Benj. on Sales (Bennett's 4th. Am. Ed.) §§ 181, 693, and cases; *Tyler* v.

Augusta, 88 Maine, 504. But delivery is not always essential to the validity of a sale. *Cummings* v. *Gilman*, 90 Maine, 524.

J. E. Moore, for defendants.

(1.) Stat. of frauds: *Riley* v. *Farnsworth*, 116 Mass. 223, 225–6, cited in *Williams* v. *Robinson*, 73 Maine, 195; *O'Donnell* v. *Leeman*, 43 Maine, 159; *Washington Ice Co.* v. *Webster*, 62 Maine, 341.

But suppose the confirmation could be connected by implication, still there would not be a completed contract or memorandum of one, for the letters of the defendants state the time of delivery differently from what the blank does. Defendants say "delivery" and the confirmation says "shipment."

The confirmation sent may have been a quiet attempt to change the oral agreement made by O'Brien, for he says, that defendants "said to hurry it; he asked me to have the house hurry it, or rush it, as he was in a hurry for it." This certainly confirms the defendants' statement of what delivery was to be and throws light upon the whole matter. There is a conflict between the "confirmation" and the letter of defendants on question of delivery, and so there could not have been any contract according to the requirements as stated in the authorities cited, supra.

There is no price or terms of payment stated in either of defendants letters or telegram. These three (two letters and a telegram) are all the memoranda in writing, signed by the defendants, and which plaintiffs claim do not correctly state the contract and these do not contain all the essential elements of a bargain.

Plaintiffs say prompt shipment means ten days from the date of the contract (though not meaning this to defendants) and claim that the way-bill shows this was shipped on May 10, within five days. The facts do not bear this out. The bill of lading was to Chapin & Co. Its destination was determined when it arrived at Norwood, N. Y., and Creighton & Co. and Thomaston, did not appear on it till then, if it did even at that time. So the first that appears to show when this car of feed was shipped to defendants was June 1, 1898. Up to this time no car had been assigned to

defendants, and the testimony all through shows that the plaintiffs knew nothing about it; so in fact and law the shipment on this contract was from Norwood, N. Y., which was June 1.

(2) The shipment was not prompt and the delay was unreasonable. It may be said that the contract was not reduced to writing in its entirety. So far as time of delivery was concerned it was expressed in the letters. In *Neal* v. *Flint*, 88 Maine, 72, it is held that the situation of the parties and circumstances under which the contract was made, etc., are admissible in certain cases. Counsel also cited *Rhoades* v. *Cotton*, 90 Maine, 453; *Fisher* v. *Boynton*, 87 Maine, 395.

The plaintiffs, in this case, as they testify, didn't even attend to the shipping, but simply left an order with a broker, and he did all that was done.

SITTING: EMERY, HASKELL, WISWELL, STROUT, SAVAGE, FOGLER, JJ.

HASKELL, J. Plaintiffs are merchants in Boston; defendants traders in Thomaston. May 4th O'Brien, a salesman of plaintiffs, sold defendants a car of feed, to be shipped at once. May 5th plaintiffs wrote defendants, "We have this day sold you one car Blish Milling Co. at $17.75 mixed feed 100 lbs. B. Pts. To be shipped prompt." May 26th defendants wrote plaintiffs, "We bought a car of feed to come right along. That was some four weeks ago, but it is not here yet. We have been looking for it all this time and its not coming has hurt our business very much. If it is not near here shall have to give it up and order elsewhere." Again June 4th defendants wrote plaintiffs, "We bought a car of feed of you, through your Mr. O'Brien, May 5th, to be delivered at once. Now it has not arrived yet, and we have lost the sale of a car of feed, and it is so late in the season that we shall not want it. You will please cancel the order as we will not be able to receive it."

The contract contemplated the prompt delivery by plaintiffs on board carrier, at Boston or vicinity, merchandise consigned to

defendants. Upon such delivery the title to the goods would have passed to defendants. Without such delivery the title would not pass, except by defendants' consent. Such delivery was never made. Plaintiffs never shipped the merchandise from Boston or vicinity, where prompt delivery would insure prompt receipt of the goods by the purchasers, as contemplated by the contract of sale. The delay was unreasonable. The defendants might well cancel their order, or, which is the same thing, refuse to receive the goods not shipped for a month after they should have been. Plaintiffs had no right to sell defendants goods to be shipped promptly, presumably from their warehouse or store in Boston, and compel defendants to await their arrival from the west, with delay of perhaps a month in transit.

Had plaintiffs sold the goods to be delivered in Thomaston, they might have shipped them from the four corners of the universe, had they seasonably delivered them, and they would have become the defendants' goods.

The title to the goods did not pass to defendants, nor were the goods seasonably shipped under the contract of sale so as to enable plaintiffs to have damages. They did not mind the contract themselves and defendants need not. *Rhoades* v. *Cotton*, 90 Maine, 453.

Judgment for defendants.

MARY S. DOWNING *vs.* THOMAS J. WHEELER.

Franklin. Opinion January 12, 1900.

Prom. Note. Indorsement. Action.

One may retain title to a negotiable note and order its contents to be paid to another, who may sue upon it.

The maker cannot raise the question of ownership, because he promised to pay, not necessarily to the owner, but to the order of the payee.

A payee may order the contents of a note remaining due at a future day to be paid after his death to a third person.

Held; in an action by such person that, when the day of payment came, the

note became negotiated to the plaintiff for the benefit of whomsoever it might concern.

Also; that the defendant maker cannot dispute the plaintiff's title to the note in defense of the suit.

AGREED STATEMENT.

The parties agreed upon the following statement of facts:

"Writ, service, note and indorsements thereon to be made part of case. Plaintiff with her husband, George A. Downing, moved to Worcester, Mass., in October, 1887, and he died there May 6, 1894.

"Defendant wrote plaintiff's husband under date of January 12, 1891, and also to the plaintiff under date of January 1, 1895. Defendant also wrote plaintiff by postal card which bears post mark date March 18, 1895. [These letters and postal card are printed below:]

"Defendant filed his petition in insolvency in the county of Franklin, November 5, 1894, and was discharged January 6, 1897.

"The note in suit was not listed in defendant's list of liabilities in the insolvency court; and was not proved in his estate.

"No administration has ever been taken out in the estate of George A. Downing.

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

[NOTE.]

"For value received I promise to pay Geo. A. Downing or order on demand five hundred dollars, with interest at 5 per cent, interest annually.

Chesterville, March 2nd, 1885. Thomas J. Wheeler.

Mr. Wheeler:

It is the wish of Geo. A. Downing for you to pay Mary S. Downing the amount due on this note at his death.

Geo. A. Downing."

[INDORSEMENTS ON NOTE.]

"Oct. 14, 1887. Paid fifty dollars as interest on the within note. Dec. 6, 1888. Received twenty-five dollars. Feb. 7, 1889. Rec. twenty-five dollars. Nov. 5, 1890. Rec. twenty dollars. Dec.

26, 1890. Rec. one hundred dollars. March 25, 1891. Rec. twenty dollars. Oct. 10, 1891. Rec. ten dollars. March 24, 1892. Rec. twenty-five dollars. March 4, 1893. Rec. twenty-four dollars. March 6, 1894. Rec. twenty-four dollars, $24.00. Oct. 11, 1894. Rec. twenty dollars, $20.00."

[POSTAL CARD, BEARING POST MARK DATE.]

"March 18, 1895.

I cannot do anything just now, but the first that I get be it more or less you shall have.

Resp't, T. J. Wheeler."

[LETTERS.]

"Chesterville, Jan. 12, 1891.

Friend Downing:

You may be surprised for me at this late day to ask you such a question as I am going to. I can pay you three or four times over what I owe you, but I cannot without my wife knowing of it and she has forgotten all about it and I dislike to tell her, she is so poorly. The doctor says that she can never be any better than she is now, and liable to grow worse any day. The money that I intended to pay you I cannot get now. I have a bank book at the Peoples Trust at Farmington and one at Augusta. I will make you this offer. I will pay you the interest that is due this spring right away and give you six per cent. for the rest as long as I keep it. Please let me know by return mail just how you feel about it and if you say so, I will draw out the money and send to you the first day I can get some one to stay with my wife.

Truly yours, T. J. Wheeler."

"Chesterville, Me., Jan. 1, 1895.

Mrs. M. J. Downing:

I have had to stop business, in other words I have failed up. The estate will pay but a small per cent. on a dollar. The Portland folks got the whole of it. You hold onto the note and in time you will get all of it, two are doing that way and just as soon as I can I will begin to help you out. If I had thought it was coming this way I would have sent you some soon after I did the

other, but then I thought I could pull through all right, but I got into a trap and they got the whole. I am very sorry, but what can I do? Respt.,

T. J. Wheeler."

E. O. Greenleaf, for plaintiff.

The defendant always recognized his bounden indebtedness to plaintiff and promised twice in writing to pay her after the death of her husband, and made her one payment. He is therefore estopped to deny his obligation at this late day. The note was properly indorsed; and if not, there is a subsequent promise in writing to pay her the debt, which makes him a promisor to the plaintiff and for a valuable consideration, as shown by letter of January 1, 1895, and by postal card of March 18, 1895.

The indorsement is definite and intelligible and not against public policy. Counsel cited: *Abbott* v. *Holway*, 72 Maine, 298; *Wyman* v. *Brown*, 50 Maine, 139.

E. E. Richards, for defendant.

Indorsement takes effect only on delivery. *Dana* v. *Morris*, 24 Conn. 333.

Though delivery may be presumed from possession, such presumption is overcome by the evidence in the case. The form of the alleged indorsement makes it evident that the note was not to pass until death of payee. The letters from debtor relative to payment prior to death of payee were to him, and after death to the plaintiff.

There is no evidence to show that plaintiff exercised any acts of ownership prior to death of the payee. The indorsement must import a present intent to transfer note. Story's Prom. Notes, § 121, and cases cited; *Adams* v. *Blethen*, 66 Maine, 19.

A delivery for a particular purpose, without intention to transfer property, insufficient. *Nutter* v. *Stover*, 48 Maine, 163.

Delivery cannot be made after death to payee. *Clark* v. *Sigourney*, 17 Conn. 511; *Foglesang* v. *Wichaud*, 75 Ind. 258.

The indorsement is the best evidence that it was the intention of the indorser to pass property in it only after his death. This could legally be done only by will executed as provided by statute.

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

HASKELL, J. Plaintiff produced a promissory note of the defendant, payable on demand to the order of her husband. Upon it was written, "Mr Wheeler [maker of the note], it is the wish of George A. Downing [payee] for you to pay Mary S. Downing [plaintiff] the amount due on this note at his death. (Signed) George A. Downing."

The production of the note with the indorsement upon it raises a fair inference that it had been delivered to the plaintiff during the lifetime of her husband, the payee. The question at issue is not that of title to the note, but whether it had become payable to the plaintiff. One may retain title to a negotiable note and order its contents paid to another who may sue upon it, and the maker cannot raise that defense, because he had promised to pay, not necessarily to the owner, but to the order of the payee.

The payee ordered the contents of the note remaining due at a future day, sure to come, paid to the plaintiff. The defendant had promised to pay to whomsoever the payee might order. The order had been written and signed and delivered before the day when it called for payment. The defendant had promised to so pay when he gave the note. When the day of payment came, why had not the note become negotiated to the plaintiff? Suppose it had been a non-negotiable note, and the payee had ordered the maker to pay another at a future day any amount then due, and the maker had accepted the order, could not the acceptance be enforced? If the order were to pay at the death of the maker of it, and before that time, had been accepted, would it not have become an enforceable contract? And yet, not more so than the acceptance beforehand of the order upon the note in suit. When the contingency of the payee's death happened, the note had become payable to the plaintiff, for the benefit of whomsoever it might concern. It had then become payable to her, and she may sue upon it.

Defendant defaulted.

HARRY D. PINKHAM *vs.* ALPHONZO J. LIBBEY, and another.

Kennebec. Opinion February 3, 1900.

Contract. Performance.

Where under a contract for the service of a stallion "with a privilege of return for the season," the plaintiff voluntarily pays the agreed price after the first service, and is prevented from exercising the privilege of return by the death of the stallion, and the service proves fruitless, the plaintiff cannot recover the money so paid.

AGREED STATEMENT.

The case appears in the opinion.

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

The negotiation of the note, and the receiving and retaining the money thereon, by the defendants, before the time expired, for the fulfillment of the contract on their part, was an absolute guaranty of performance.

Absolute undertakings: The general rule is, that when a party has undertaken absolutely to do a thing, he is not excused from liability by the occurrence of events which render the performance of his promise impossible. 3 A. & E. Ency. Law, p. 900, § 77, and cases cited.

The sickness and death of the horse Arrival was not such an act of God, as would excuse the defendants from the performance of their contract. While it might have prevented them from fulfilling it literally, it could have been substantially performed by procuring or tendering the service of some other horse than Arrival. There is no pretense that this was done.

A contract is not to be treated as having become impossible of performance if by any reasonable construction it is still capable in substance of being performed. *White* v. *Mann*, 26 Maine, 361, and cases there cited; *Knight* v. *Bean*, 22 Maine, 531; *Williams* v. *Vanderbilt*, 28 N. Y. 217.

O. B. Clason and A. M. Spear, for defendants.

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

WHITEHOUSE, J. The plaintiff agreed to pay the defendants seventy-five dollars for the service of their stallion to a valuable mare owned by him, "with the privilege of return for the season." At the time of the service, the plaintiff gave to the defendants his negotiable promissory note for the sum of seventy-five dollars in full payment of the contract price. But the service proved fruitless, and the exercise of the "privilege of return" was prevented by the sickness and death of the stallion. In the meantime the plaintiff's note had been discounted at a bank in the regular course of business, and after it had been merged in a judgment of the court was duly paid.

The plaintiff now brings this action to recover the amount paid by him under this contract on the ground of a want or failure of consideration.

It is the opinion of the court that upon the facts presented in the agreed statement the action is not maintainable.

It should be observed in the first place that this is not a contract of warranty, but for a service "with the privilege of return" for which he was to pay seventy-five dollars. This sum was not to be divided and made payable in two instalments, one for the service and another for the "privilege of return;" or in a specified instalment for each service. The consideration was entire, and the plaintiff unhesitatingly gave his negotiable note for the full amount of the contract price at the time of the service. This note was presumptively payment. It was equivalent to cash; and the fact that the plaintiff was willing to give it has much significance upon the precise understanding of the parties in relation to this contract. By reason of his knowledge of the breeding qualities of the mare, the plaintiff apparently decided that it was not for his interest to pay the price of a contract of warranty, but preferred to pay the price of a service with the privilege of return; and from his readiness to pay the entire sum at the time the contract was made, it is evident that the service actually obtained at that time was deemed by him

the most important and substantial feature of the contract. In the event that this service proved fruitless he had the "privilege of return" for further service. But it would seem that the plaintiff did not consider it probable that he would have occasion to exercise the privilege. It is obvious that that part of the contract, by which one service of the stallion was actually obtained, was considered positive and absolute. It depended upon no contingency. But the "privilege of return for the season" was not absolute and unconditional. It necessarily contemplated the continued existence of the stallion; and it is a settled rule of law that "in contracts from the nature of which it is apparent that the parties contracted on the basis of the continued existence of a given person or thing, a condition is implied that, if the performance become impossible from the perishing of the person or thing, that shall excuse such performance." 2 Chitty on Cont. (11 Am. Ed.) 1076; *Knight* v. *Bean*, 22 Maine, 531; *Marvel* v. *Phillips*, 162 Mass. 399, and cases cited; *Spalding* v. *Rose*, 71 N. Y. 40; *Yerrington* v. *Greene*, 7 R. I. 589; *Taylor* v. *Caldwell*, 3 B. & S. 826. The plaintiff was absolutely assured of one service before the payment of the contract price, but the right to further service was contingent upon the life of the stallion. There was no guaranty that the horse would live through the season.

The plaintiff does not controvert this familiar principle. He does not deny "that in this case the death of the stallion excused exact or full performance" of the contract. He does not claim that the plaintiff would be entitled to recover damages for the nonfulfillment of it. But he insists that the death of the stallion did not relieve the defendants from the obligation either to return the money to the plaintiff or give him a substantial performance of the contract by furnishing the service of some other stallion.

The agreement between these parties was analogous to a contract for personal services involving the exercise of individual skill and judgment, which can be performed only by the person named. Such contracts are not deemed to be of absolute obligation, but are subject to an implied condition that the person shall be alive and able to perform the services at the time required. *Dickey* v. *Linscott*,

20 Maine, 453; *Greenleaf* v. *Grounder*, 86 Maine, 298; *Spalding* v. *Rose*, 71 N. Y. supra; *Marvel* v. *Phillips*, 162 Mass. supra. In the last named case the court say: "A contract to render such services and perform such duties is subject to the implied condition that the party shall be alive and well enough in health to perform it. Death or a disability which renders performance impossible discharges the contract. Neither Phillips nor his estate is bound to furnish a substitute, nor is the plaintiff bound to accept one."

The plaintiff doubtless preferred the defendants' stallion because his pedigree, record and peculiar merits seemed best calculated to accomplish the purpose in breeding contemplated by him. He contracted for the service of a particular stallion, and could not be compelled to accept the services of any other. The defendants contracted to furnish the services of their stallion and not the services of any other. Nor does it anywhere appear in the statement of facts that there was ever any suggestion or intimation from the plaintiff that he desired or would accept the service of any other stallion in lieu of that one selected by him.

There is a class of cases represented by *Butterfield* v. *Byron*, 153 Mass. 517, in which it is held that if one contracts to furnish labor and material in the construction of a building, and his contract becomes impossible of performance on account of the destruction of the building, he may recover pro rata for what he has done or furnished; and on the other hand that the owner of the building who has made payments in advance in such a case may recover back so much of his money as was an over-payment. But this doctrine is clearly inapplicable to the case at bar. As before stated, the contract price was indivisible and incapable of apportionment. The payment made by the plaintiff cannot, upon the facts of this case, be fairly deemed an over-payment. If therefore the plaintiff is entitled to recover anything, it must be the full amount of the contract price. But this would be unjust to the defendants. It is true the service actually had was ineffectual and of no value to the plaintiff. But non constat that the privilege of return would have been of any value. The defendants made no engagement of warranty that any service would be successful.

The absolute part of the contract was executed by the voluntary act of the plaintiff in giving his negotiable note for the contract price, and the contingent part became impossible of performance. The entry must therefore be,

Judgment for defendants.

LUCY A. BATCHELDER *vs.* CHESTER W. ROBBINS, and others.

Penobscot. Opinion February 6, 1900.

Adverse Possession. Interruption. Notice.

Where the plaintiff in a writ of entry claims title by adverse possession, and the acts of occupation alleged by the defendant to work an interruption of such possession emanate from the record owner in assertion of his title, and are of such a character as to afford reasonable notice of such claims of ownership, it is not essential that the plaintiff should have actual knowledge at the time that the acts of occupation were authorized by the record owner. It is sufficient if in such a case it appears that by the exercise of reasonable diligence such actual knowledge might have been obtained.

Held; that an explicit statement, in a charge to the jury, that the plaintiff must be shown to have had such knowledge, imposed upon the defendant too heavy a burden of proof, and must be deemed error.

ON MOTION AND EXCEPTIONS BY DEFENDANTS.

This was a real action, brought to establish the title to a certain tract of land in the city of Old Town. The defendants pleaded the general issue. Plaintiff claimed title by adverse possession, under color of title, by virtue of quitclaim deeds to Samuel Pratt, under whom the plaintiff claimed as heir. The defendants also claimed title by adverse possession, under color of title, by virtue of warranty deed or deeds from one Jeremiah Swan. The only question submitted to the jury was whether either the plaintiff or defendants had acquired title to the land in question by adverse possession. The defendants claimed that the acts of possession testified to by the plaintiff were not sufficient in kind and character to give title by adverse possession, and that even those acts

were not continued uninterruptedly by the plaintiffs, and those under whom she claimed, for any period of twenty consecutive years. The jury returned a verdict for the plaintiff.

The case appears in the opinion.

P. H. Gillin, E. C. Ryder, and Clarence Scott, for plaintiff.

J. F. Gould; F. J. Martin and H. M. Cook, for defendants.

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

WHITEHOUSE, J. This was a writ of entry brought by the plaintiff to establish her title to a certain tract of land on "Treat & Webster Island" in Old Town, designated on a plan made by A. S. Howard in 1835, as "lots 43, 44, 45, 46, 47, 48, 49, 50 and 51." The plaintiff sought in the first place to derive title under a deed from Treat and Webster of July 30, 1823, through various mesne conveyances to her father, Samuel Pratt, and under a quit-claim deed from Newell Blake to Samuel Pratt, dated April 14, 1860, founded on a tax title.

The defendants claimed title by virtue of a deed from Jeremiah A. Swan, dated October 4, 1894.

But the plaintiff furthermore claimed that, immediately upon the delivery of the deed from Newell Blake, in 1860, Samuel Pratt, the grantee therein named, entered into actual occupation of the land described in the writ, under color of right and claiming title thereto; that such occupancy was continued to the time of his death in 1863, and subsequently by his heirs, the plaintiff and her sister, until 1867; that the plaintiff then acquired by purchase the interests of her sister and mother in the property and thereafter continued in the uninterrupted occupation of the premises until 1894. It was accordingly contended that prior to the date of the defendants' deed in 1894, the plaintiff had acquired a perfect title to the premises by adverse possession.

The plaintiff's claim of adverse possession was contested by the defendants upon two grounds: first, that the plaintiff's occupancy and acts of ownership were not of such kind and character as

would ripen into a title by adverse possession; and secondly, that her possession had not been continuous and uninterrupted for a period of twenty years. There was evidence tending to show that during the period of the plaintiff's occupancy, several other parties cultivated and occupied some parts of the demanded premises, and the defendants relied especially upon the occupancy of John B. Beaulieu, who was alleged to have been a lessee of Jeremiah A. Swan from whom they derived their title in 1894.

The only question submitted to the jury was whether the plaintiff had acquired a title to the land by adverse possession. The jury returned a general verdict for the plaintiff and found specially that the plaintiff, and her predecessors under color of title, had been in the possession and occupation of the premises for twenty consecutive years; and also that the plaintiff herself had "been in open, notorious, adverse, exclusive and uninterrupted possession and occupancy of the lots 43 to 51 both inclusive claiming title thereto, for a period of twenty consecutive years."

The case now comes to this court on exceptions to the rulings and instructions of the presiding justice and also upon a motion to set aside the verdict as against the evidence.

The exceptions: With respect to the continuity of the plaintiff's possession, and the character of the occupancy on the part of the defendants' grantor, or those claiming under him, which would amount to an interruption of the plaintiff's possession, the presiding judge instructed the jury, inter alia, as follows:

"And it must be uninterrupted by the owner for this period of twenty years. An interruption which would prevent the running of the limitation and the acquiring of title by possession might be by suit of the owner, and it might be by some decided, visible open acts of the owner, inconsistent with the claim of the party setting up adverse possession within twenty years, and brought home to the knowledge of the party asserting it either by words or by acts in the open, so that the party would know that the owner was asserting his right; it would not be an interruption of adverse possession, occurring within twenty years, for the true owner to go upon the lot in the night time and do something there which was

not apparent, or, if it was a wood lot, to go in and cut a tree or some trees of which the party, seeking to gain title by adverse possession had no knowledge. It would need to be something which was brought home in some way to the senses, the eyes or ears of the party who was in possession, claiming adversely, which would indicate to him that the owner was intending to assert his rights as against him. . . . .

"An interruption to interfere with and make a break in the twenty years of the party acquiring title by adverse possession, must be by the owner or by his authority. It is not a legal interruption for a trespasser to go onto the land, for a man to go upon there without any authority or consent of anybody and build a house and squat there; he is a mere trespasser. It must be an interference by the owner himself or by somebody having authority to act for him or occupy under him; and in such a case as that, if the true owner went and built a house upon it or let it to somebody to build a house, and that house was occupied by the true owner or his tenant, that would be an interruption to possession being acquired adversely by the other party. But these acts by a man not acting by the authority of the owner, a mere trespasser, squatters, would have no such effect as to interrupt the acquiring of title by adverse possession. . . . .

"It is said that some men went on there and planted little gardens, and that they went there, in one case I think and perhaps more, but I remember one where the party says that they went on there under an arrangement with Swan, and Swan at one time seems to have had some conveyance of the property which perhaps gave him color of title; and if they did go on by his permission, that would be practically going on with the authority of Swan, and would, if in other respects sufficient, operate as an interruption at that time of the running of the twenty years; but as I said to you before, in order to affect the Pratt heirs and this plaintiff, it should have been known that that act was done by the authority of Swan, and that the parties were not mere squatters."

Exceptions are taken to these instructions because it is said in the first place, that in effect they required the jury to find that no

entry upon the land or occupation of it by the defendants or their grantor, would operate to defeat the plaintiff's disseizin, unless he had actual knowledge of such entry, and that it was made by authority of the defendants or their grantor.

In the earlier parts of the charge the presiding judge had explained to the jury the character of the occupancy and the nature of the acts of ownership on the part of the plaintiff which would enable her to acquire title by adverse possession. Among other things he said to the jury: "The rule upon that is very succinctly stated and I will read it: . . . . 'The essential use and occupation by one claiming adversely must be of such unequivocal a character as to reasonably indicate to the true owner, visiting the premises during the statutory period, that instead of suggesting the probable invasion of a mere occasional trespasser, they unmistakably show asserted and exclusive appropriation and ownership.'" . . . . "It must be open, that is to say not clandestine, going upon the land in the night or stealing in at times when the true owner may have no knowledge of it, but it must be broad daylight as a man ordinarily manages his own property, so that anybody looking on, or the true owner looking on, would see and would understand that the man thus occupying was asserting some claim; there need not be any words necessarily, but enough to put the true owner upon the inquiry what are you here for? Are you claiming something, to induce him to assert his rights if he had any?" He then told the jury in substance, in the instructions excepted to, that the same rule should be applied in determining whether the acts of ownership and occupancy on the part of the defendants or their grantor, were sufficient to interrupt the plaintiff's possession.

It is contended by the plaintiff that the instructions of which the defendants complain should be construed in connection with the prior explanations thus expressly adopted, and also with reference to all other parts of the charge relating to the same question; and that when so construed they will be found in substantial accord with the prevailing rule upon this subject and not fairly amenable to the criticism of the defendants.

In Wood on Lim. of Actions, § 270, the principle is thus stated: "An entry by the legal owner upon the land breaks the continuity of an adverse possession when it is made openly with the intention of asserting his claim thereto, and is accompanied with acts upon the land which characterize the assertion of title or ownership; and a mere naked entry which is made for the purpose of ascertaining whether or not there is any adverse occupancy, is not sufficient to break or interrupt the possession. The entry must be made openly with the purpose of ascertaining his claim thereto, and must be accompanied by acts of ownership which characterize and effectuate the claim." See also Buswell on Lims. & Ad. Poss. § 274.

In *Robinson* v. *Swett*, 3 Maine, 310, it is said: "An entry into land to purge a dissezin should be made with that intention; and such intention should be sufficiently indicated either by the act itself or by words accompanying the act." In *Peabody* v. *Hewett*, 52 Maine, 33, the instruction to the jury was as follows:

"If within twenty years after Gregory first disseized Peabody, the heirs of the latter or their agent duly authorized, went upon the premises with the intent of making the entry, and they then and there disclosed to Gregory that they came for such purpose, it would be a legal entry."

In *Burrows* v. *Gallup*, 32 Conn. 493, the court said: "When a party is once dispossessed, it is not every entry upon the premises without permission that would disturb the adverse possession. He may tread upon his own soil and still be as much out of the possession of it there as elsewhere. He must assert his claim to the land, perform some act which would reinstate him in possession, before he can regain what he has lost. It is evident therefore that an entry by stealth, under circumstances that go to show that the party claimed no right to enter, would not be sufficient to break the continuity of exclusive possession in another."

In *Wing* v. *Hall*, 47 Vt. 182, the rule is thus stated: "An entry upon land in the posssession of another, in order to work a legal interruption of such possession, must be made under such circumstances as to enable the party in possession, by the use of rea-

sonable diligence, to ascertain the right and claim of the party making the entry."

So in *Altemas* v. *Campbell*, 9 Watts, 28, Gibson, C. J., said: "The effect of an entry, it is agreed, depends upon the intent of it, expressed by words or intimated by an act equally significant. I would say in a few words that there must be an explicit declaration or an act of notorious dominion by which the claimant challenges the right of the occupant, or it cannot perhaps be better defined than by saying that the entry must bear on the face of it an unequivocal intent to resume the actual possession." See also Am. & Eng. Encyl. of Law (2 Ed) Vol. 1, p. 836, under "Nature of re-entry required."

It has been seen, however, in the case at bar that after reading to the jury the correct rule that the occupancy should be so open and notorious and of such an unequivocal character as to "reasonably indicate" to the true owner an assertion of dominion and ownership, the learned judge thereafter, inadvertently stated the rule more strongly against the defendants, as follows:

"It would need to be something which was brought home in some way to the senses, the eyes or ears, of the party who was in possession claiming adversely, which would indicate to him that the owner was intending to assert his rights as against him."

"As I said to you before, in order to affect the Pratt heirs and this plaintiff, it should have been known that the act was done by the authority of Swan, and that the parties were not mere squatters."

This statement must have been received by the jury as a final interpretation of the rule which had been read to them. Under this instruction the jury could hardly have failed to understand that they were required to find that the acts of occupation by the agents or tenants of Swan, were not only of such a character as to "reasonably indicate" an assertion of title, but that the plaintiff had actual knowledge that they "were done by the authority of Swan."

This requirement of actual knowledge on the part of the plaintiff that such occupants were acting under the authority of Swan,

imposed upon the defendants too heavy a burden of proof. No authority has been brought to the attention of the court which goes to the extent of that requirement. If the acts of occupation emanate from the record owner in assertion of his title, and are of such a character as to afford reasonable notice of such claim of ownership, it is not essential that the party claiming by adverse possession should have actual knowledge at the time that the acts of occupation were authorized by the record owner. It would be a task of great difficulty and in most cases practically impossible for a land-owner to prove such actual knowledge. It is sufficient if in such a case it appears that by the exercise of reasonable diligence such actual knowledge might have been obtained. The explicit statement that the plaintiff must be shown to have had such actual knowledge must, therefore, be deemed error.

Exceptions sustained.

MAINE WATER COMPANY *vs.* CITY OF WATERVILLE.

Kennebec. Opinion February 9, 1900.

Municipal Corporations. Water Company. Contracts. Taxation. Exemptions. Priv. & Spec. Acts, c. 141, 1881; c. 59, 1887.

A city or town may make a valid contract with a water company wherein, in consideration of the agreement of the company to furnish a supply of water for municipal purposes, it agrees to pay therefor, in addition to a specified sum of money, another sum each year equal to the amount of tax that may be assessed for that year upon the company's property, provided that the consideration for this agreement upon the part of the municipality is reasonably adequate and that the contract in other respects is reasonable and fair.

Although such a contract may be made for the purpose of exempting from taxation the property of the contracting corporation, and the form adopted may be merely intended to cover with the semblance of legality an illegal attempt to exempt property from taxation without a fair return therefor, this is not necessarily so; and the validity of the contract will depend upon the circumstances of each case.

The term "exemption" implies a release from some burden, duty or obligation. It can not be properly said that a corporation, which for a valuable and ade-

quate consideration obtains the agreement of the municipality in which it is located to reimburse it for the amount of taxes that it will be obliged to pay, is thereby exempted or released from the burden of paying its just proportion of taxes.

Held; that the contract involved in this case was fair and reasonable when made; that the city thereby received an amply adequate consideration for its agreement, and has since received a fair equivalent for its payments; and that the contract was not intended as the cover of an illegal attempt to exempt the company's property from taxation.

Nor is such a contract, when made in good faith, and when its terms are reasonable and fair, contrary to public policy. In many cases it may be absolutely necessary for a city or town to make a water contract for a term of years, in order to obtain the great benefit of a sufficient water supply for the protection of the property of its inhabitants against fire, to provide for the health of its citizens by a proper sewer system and for other municipal purposes. Such a contract must contain some elements of uncertainty as to compensation because of the uncertainty of the extent of water service that may be required in the future by reason of the growth of a municipality in population and the increase of its needs.

ON REPORT.

This was an action of debt, to recover the sum of $924.00, which the plaintiff claimed was due to it on September 23, 1897, for water service rendered by it to the City of Waterville under its contract of January 21, 1890. Plea, general issue and brief statement:

"And for a brief statement of special matter of defense to be used under the general issue pleaded, the said defendants further say, that the alleged contract of January 21, 1890, referred to and set up in plaintiff's declaration, was not made for and upon the consideration therein expressed, but that the expression of consideration therein was fraudulently inserted for the purpose of concealing the true character of said contract and making it appear to be legal and proper, when in truth and in fact the real agreement and understanding between the parties, who subscribed and executed said pretended contract, was illegal and improper.

"And defendants further say, that the real meaning and intention of the parties to said alleged contract, and the real purpose and object thereof, was to exempt plaintiff's property from taxation in contravention of the principles of the constitution pertaining to such subjects.

"And defendants further say, that it was also the real meaning and intention of the parties to said alleged contract, and one of the real purposes and objects thereof, to illegally limit and control the action of the assessors of said city in the performance of the duties imposed upon them by law.

"And defendants further say, that said pretended written contract is utterly illegal and void for want of power or authority on the part of defendants' agent who pretended to execute the same."

The facts are stated in the opinion.

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

H. D. Eaton, city solicitor, for defendants.

Such contracts are void. *Brewer Brick Co.* v. *Brewer*, 62 Maine 62, and cases cited. *Dill* v. *Wareham*, 7 Met. 477, holding that officers having a statutory duty to perform can not be controlled by vote of the town. And see also *People ex rel. Eckerson* v. *Zundel*, 1 Mun. Corp. Cases, 104, citing *Lorillard* v. *Town of Monroe*, 11 N. Y. 392; *Thorndike* v. *Camden*, 82 Maine, 39.

And it is well to note that no part of the powers and duties of the assessors are prescribed by the city charter, nor are they in any way subject to the control or direction of the city government. But on the contrary, all their powers and duties are prescribed by the general statutes, and are to be exercised wholly independent of the city government.

Such a contract is contrary to public policy, and therefore void for a city to contract to pay annually for many years a sum of money, the gross and annual amounts of which are both uncertain; and more especially so when the return to be received is also uncertain.

Under the express terms of this contract the net cash result to each party is not only uncertain but utterly indeterminate for three reasons: (1) The contract applies not only to the property then owned by the company, but also to "all pipe lines with hydrants and fixtures hereafter laid by said Water Company in said City." (2) The rate of taxation for future years was of necessity unknown to both parties. (3) The service to be ren-

dered by the Water Company extended not only to all sewers and school-houses then existing in the city, but to all future additions thereto. And it was attempted to make this contract binding upon both parties for twenty years.

In *Garrison* v. *Chicago*, 7 Biss. 480, (1877) the court held a contract for a supply of gas for ten years invalid, and also held that the power to make such contract was legislative, and that the council could not, without any reasonable necessity appearing, bind their successors for ten years. Drummond, J., added, "In all cases of contracts to run for years, the authority to make them should be clear. It is better that all parties should understand there is a limit to the powers of municipal bodies in such cases."

In Dillon on Mun. Corporations, 4th Ed. § 97, the learned author says: "Powers are conferred upon municipal corporations for public purposes; and as their legislative powers cannot, as we have just seen, be delegated, so they cannot without legislative authority express or implied, be bargained or bartered away. Such corporations may make authorized contracts, but they have no power, as a party, to make contracts, or pass by-laws, which shall cede away, control or embarass their legislative or governmental powers, or which shall disable them from performing their public duties. The cases cited mark the scope and illustrate the application of this salutary principle in a great variety of circumstances, and, for the protection of the citizen, it is of the first importance that it shall be maintained by the courts in its full extent and vigor." Vide also *Richmond Gaslight Co.* v. *Middletown*, 59 N. Y. p. 228; *Milhau* v. *Sharp*, 27 N. Y. p. 628; *Davis* v. *Mayor of N. Y.* 14 N. Y. 533. In *Gale* v. *Kalamazoo*, 23 Mich. 344, (9 Am. Rep. 80), Judge Cooley says: "Indeed, it is impossible to predicate reasonablesness of any contract by which the governing authority abdicates any of its legislative powers, and precludes itself from meeting in the proper way the emergencies that may arise.

"These powers are conferred in order to be exercised again and again, as may be found needful or politic, and those who hold them in trust to-day are vested with no discretion to circumscribe

their limits or diminish their efficiency, but must transmit them unimpaired to their successors. This is one of the fundamental maxims of government, and it is impossible that free government, with restrictions for the protection of individual or municipal rights, could long exist without its recognition." Vide also *Brick Presbyterian Church* v. *Mayor of New York*, 5 Cowen, 538; *Goszler* v. *Georgetown*, 6 Wheat. 597.

The power of taxation is a legislative power of the utmost importance. By the terms of this contract the city has bargained it away for a period of twenty years as respects a large and constantly increasing amount of property.

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

WISWELL, J. On May 5, 1887, the Waterville Water Company, the predecessor of the plaintiff corporation, entered into a written contract with the inhabitants of the then town of Waterville, by the terms of which, the Water Company contracted among other things, to construct a safe and suitable reservoir in the town with a capacity of at least two million gallons of water, the bottom of which reservoir should be at least one hundred and seventy-five feet above the level of the street at the postoffice; to force water to such reservoir from either the Messalonskee stream, or the Kennebec river, and keep therein at all times water sufficient to supply the hydrants to be established in the town of Waterville for extinguishing fires and also sufficient to supply the inhabitants of the town with water for domestic and other uses; to convey the water from the reservoir through cast iron pipes of adequate size and strength to be laid by it in certain named streets of the town, and to connect such pipes with fifty hydrants of the most improved pattern to be furnished and placed in position by the company wherever located by the town, and to furnish water for such hydrants.

The Water Company therein further contracted to furnish, free of charge, except for the consideration hereinafter referred to, water for three watering troughs and a limited supply of water for

the seven school-houses in the village, the town-hall, selectmen's office, engine-houses, a fountain, and to supply one street sprinkler. The town upon its part, in consideration of the agreements made by the Water Company, agreed to pay forty dollars per annum for each of the fifty hydrants referred to and thirty dollars per annum for each additional hydrant that the town might need and require to be set. It was further provided that the contract should continue in force for a period of twenty years "from the time said works are completed, and said hydrants are supplied with water sufficient to render a reasonably efficient fire service.

At a meeting of the board of aldermen of the city of Waterville, held April 2, 1889, the town having in the intervening time become a city by act of the Legislature, this communication from the Water Company was presented and read:

"To the City Council of Waterville:

The Waterville Water Company respectfully represents that the valuation put upon its property and plant for the purposes of taxation for the year 1888 was excessive and pray that a reasonable abatement of its tax for that year may be ordered. Said Company also pray that a reasonable fixed valuation may be decided upon by the City Council for a definite term, upon which said Company's tax shall be based."

This communication was signed in the name of the Waterville Water Company, by its Treasurer.

Thereupon, at the same meeting, the following order was presented in the board of aldermen, and, upon the same day, passed in concurrence by both branches of the city council:

"Ordered: That the Mayor be and hereby is authorized and instructed to propose to the Waterville Water Company, that if said company will furnish to the city water for flushing the public sewers whenever necessary, the city will fix a valuation of not exceeding $25,000, upon which to tax said company's property. Said valuation to continue so long as the Water Company shall furnish water for flushing the sewers, not exceeding the remainder of the term of the contract now subsisting between the city and said Water Company, and if said proposition is agreed to by said com-

pany, to contract in writing in behalf of the city with said company in accordance with this order."

On April 12th, 1889, a supplemental contract was entered into between the city and the Water Company, substantially in accordance with the order above quoted, except that the terms of the contract in relation to the supply of water to be furnished for school-houses and public buildings were considerably more liberal for the city than the terms of the original contract. It contained a provision in relation to the furnishing of water for flushing sewers, as stipulated in the order passed by the City Council, and a further agreement to supply water for a proposed new city building.

The language of the contract relative to the obligation of the city was as follows: "The City of Waterville, the party of the second part, for and in consideration of the use of water furnished (free of charge) by the party of the first part as hereinbefore mentioned, hereby contracts and agrees with said party of the first part, through Nathaniel Meader, Mayor of said city, its Agent, hereunto duly appointed and authorized, that the annual valuation of said Company's works and the property now owned by said Company in said Waterville, for the purpose of taxation shall not exceed the sum of twenty-five thousand dollars for and during the continuance of the original contract for a supply of water made between said Company and the town of Waterville, and dated May 5, 1887." This contract was subsequently ratified by a resolution passed in concurrence by both branches of the city council.

At a meeting of the board of aldermen, held November 5, 1889, the following order was presented and laid upon the table:

"Whereas, the Waterville Water Company on the twelfth day of April, A. D. 1899, made a contract with the City of Waterville to furnish certain water service for said City, as expressed therein, and whereas, doubt has been expressed as to the validity of said contract on account of the terms in which the same is expressed, therefore, be it ordered:

"That in consideration that said Waterville Water Company has furnished said water service to the present time and shall furnish

the same for the term expressed in said contract, said city will pay therefor a sum of money annually which shall be equal to the tax annually assessed against said company by said city on such a portion of said Company's valuation as shall be in excess of twenty-five thousand dollars. This agreement shall take effect and become operative when said company shall express its assent thereto and shall include the present year, and the mayor is hereby authorized to make a formal contract with said Water Company in accordance with the spirit and terms of this order." This order received a passage by both branches of the city council on November 11, 1889.

Upon January 21, 1890, a new contract was entered into between the city and the Water Company as authorized by the foregoing order, wherein the agreements of the Water Company were substantially identical with those contained in the contract of April 12, 1889. The contract, upon the part of the city, was as follows: "The City of Waterville, the party of the second part, for and in consideration of the use of water furnished by the party of the first part, as hereinbefore mentioned, hereby contracts and agrees with said party of the first part, through Nathaniel Meader, Mayor of said City, its agent, hereunto duly appointed and authorized, to pay said Water Company each year a sum of money equal to all taxes assessed for that year upon the property now owned by said Company in said city, and all pipe lines with hydrants and fixtures hereafter laid by said Water Company in said city, in excess of the tax assessed upon a valuation of twenty-five thousand dollars ($25,000) for and during the remainder of the term of the original contract for a supply of water made between said Company and the town of Waterville, and dated May 5th, 1887." It was further provided therein, "that this contract is substituted for the contract entered into by and between said city and said Water Company April 12, 1889."

The Waterville Water Company was incorporated by an act of the Legislature approved March 16, 1881. By act of the Legislature approved February 8, 1887, its charter was amended by the addition of the following section: "Said towns of Waterville, Wins-

low and Fairfield Village corporation, or either of them, are hereby authorized to contract with said Waterville Water Company for such supply of water as is contemplated by said act of incorporation, and as herein amended, and to pay to such company such compensation therefor as may be agreed upon by said company and said town or towns."

For a number of years succeeding the execution of the contract last referred to, the city yearly paid to the company an amount equal to all taxes assessed upon the company's property in excess of the tax assessed upon a valuation of twenty-five thousand dollars and exclusive of the tax upon new property acquired by the company subsequent to the time of the execution of this contract. But in the year 1897, the tax upon the company's property having been paid by the company, the city refused to pay the company the amount provided by the contract, and this suit was brought to recover the same.

It is urged, upon the part of the defense, that the contract of January 21, 1890, the one upon which this suit is based, was illegal and void because its purpose and effect was to exempt from taxation a considerable portion of the water company's property, or to limit and restrain the assessors of taxes from placing a true valuation upon its property.

If this were true, that is, if the terms of the last contract were merely intended as a cover, and if the real intent and purpose of the contracting parties was to grant an exemption from taxation, in whole or in part, we should have no question of the correctness of the defendant's position.

By the constitution of this state, "all taxes upon real estate, assessed by authority of this State, shall be apportioned and assessed equally, according to the just value thereof." Although this section applies specially to real estate, yet the very idea of taxation implies an equal apportionment and assessment upon all property, real and personal, according to the just value thereof. *Brewer Brick Company* v. *Inhabitants of Brewer*, 62 Maine, 62. All property which is the subject of taxation under the authority of the State must bear its just and due proportion of the burden thereof.

Nor, perhaps, is there any doubt that the contract of April 12, 1889, was invalid, whatever may have been its purpose or the consideration therefor, because therein the City of Waterville, attempted to limit the official action of the assessors of that city, an entirely independent tribunal created by authority at law, and over which the city council of Waterville had no control whatever.

But the question here is, whether or not a municipality may make a valid contract with a water company, wherein, in consideration of the contract of the company to furnish a supply of water for municipal purposes, it agrees to pay therefor, in addition to a specified sum of money, another sum each year equal to the amount of tax for that year assessed against the company, provided that the consideration for this agreement upon the part of the municipality is reasonably adequate. We think that such a contract, if reasonable and fair, and for a reasonable length of time, may be made.

It was decided by this court, in *City of Portland* v. *Portland Water Company*, 67 Maine, 135, that, in pursuance of legislative authority, the City of Portland might exempt from taxation for a term of years the property of the Water Company, in consideration of an undertaking and agreement by the company to furnish, free of cost to the city, a supply of water for its public and municipal purposes. The court pointed out that the legislative action, followed by the vote of the city council in pursuance of it, partook of the nature of a contract with the defendant corporation, and distinguished the case from that of *Brewer Brick Company* v. *Brewer*, supra, which was much relied upon by the plaintiff.

The great distinction between these two cases, *Brewer Brick Company* v. *Brewer*, and *Portland* v. *Portland Water Company*, is obvious. In the former case the municipality attempted, undoubtedly because it was believed that thereby benefits would ultimately but indirectly accrue to the people of the town, to exempt the defendant from its just share of the burden of taxation, while in the latter case the city only paid for benefits received by the municipality as such by the so-called exemption.

But in the case under consideration the contract neither provides

for nor means exemption from taxation, if the consideration for the agreement upon the part of the city is reasonably adequate. The term "exemption" implies a release from some burden, duty or obligation. "It is a grace, a favor, an immunity; taken out from under the general rule, not to be like others who are not exempt; to receive, and not make a return." *Bartholomew* v. *City of Austin*, 85 Fed. Rep. 359. But it cannot be said that a corporation that, for a valuable and adequate consideration, obtains the agreement of another to reimburse it for the amount of taxes that it is obliged to pay, is thereby exempted or released from the burden of paying its just proportion of taxes.

A lessor provides in his lease that, as a partial payment for the use of the demised premises, the lessee shall reimburse him for the amount that he shall be obliged to pay as a tax upon such premises. Is the lessor or his property exempted or released from any burden of taxation? Certainly not; the payment of a tax by the lessee is only the payment of a partial consideration for the use of the premises. No more, we think, can it be said that this contract under consideration has the effect of exempting the property of the plaintiff corporation from taxation provided that there was an adequate consideration for the contract.

If, as was decided in *Portland* v. *Portland Water Company*, supra, a city may make full compensation for a water supply needed and received by it, by offseting the tax against the service rendered, why may not a valid contract be made to pay in part for such service by the payment of a sum equal to the tax assessed upon the company's property, in addition to the payment of a definite sum?—when by reason of the extent of the water service rendered a sum equal to the tax assessed would not be a fair equivalent therefor.

We can see no distinction in principle. True, in *Portland* v. *Portland Water Company*, the Legislature specifically authorized such a contract; but no objection is made to this contract because of a lack of authority given by the Legislature as, we have already seen, the town of Waterville was authorized by an amendment to the charter of the original company to contract with that company for a supply of water.

Our conclusion that such a contract is valid, when made for an adequate consideration, is abundantly sustained by numerous decided cases.

In *Cartersville Gas & Water Company* v. *Cartersville*, 89 Ga. 683, the city agreed that it would exempt or cause to be exempted from municipal taxation all the property of the Gas & Water Company for a term of years, and that: "If the city should at any time during the five years find itself obliged by a decree of any court or by operation of law to assess and collect a tax against the property mentioned, then the city agreed that, in consideration of the reduced prices at which the gaslight was to be furnished it and its citizens, it would pay or return to the Illuminating Gas Company all sums of money which it or they might have been obliged to pay, and which might have been levied or assessed against the property by the city in violation of the spirit of this contract." In an action brought by the company to recover from the city the amount which it had been obliged to pay as taxes assessed upon its property, it was held by the court as follows: "While a city can not exempt a gas company from municipal taxation, it can contract to pay for gas a stipulated sum per lamp, and in addition thereto, a sum for all the lamps supplied equivalent to the amount of taxes imposed upon the company; provided this additional sum is a fair and just allowance to compensate for the actual value of the light service, and the stipulation is bona fide and not in the nature of an evasion of the law prohibiting an exemption from taxes." The court further held: "The present action is not brought to recover money voluntarily paid as taxes, but for a balance due under the contract for lighting the city, this balance being measured in part by the amount of taxes assessed and collected by the municipal government from the gas company."

In *Grant* v. *Davenport*, 36 Ia. 396, an ordinance of the city of Davenport provided that the water company should, during the life of the grant, furnish water free of charge to all public schools and to all city buildings and for certain fountains and watering troughs: "And in consideration of the foregoing provisions the said company, during the term of twenty-five years shall be exempt from

all municipal taxation on the franchise hereby granted, and all property owned by said company and actually required for the economical management of the works aforesaid."

The court held that this ordinance was a valid one, saying in its opinion: "But it seems to us that when the whole ordinance is construed together, it does not amount to exemption from taxation. It in effect applies the taxes as they would otherwise become due in part payment of, or in part consideration for, the water rent. The city pays the amount specified and the taxes upon the franchise and the property required for the management of the works, as water rent. It might have required the payment of the taxes, and then returned the amount as part pay for water rent. The manner of doing it can not defeat the power to do it."

In *Bartholomew* v. *City of Austin*, supra, a case decided by the Circuit Court of Appeals for the Fifth Circuit, the contract between the water company and the city provided that the city should have the right to use water, free of charge, from the hydrants for the purpose of flushing sewers, for the fire department buildings, city hall and all public schools and for watering places and fountains; "in consideration of all of which the property of the City Water Company shall be and the same is hereby exempted from municipal taxation during the full term for which the contract is executed." The courts sustained the contract and held that the meaning of the provision above referred to was not to grant an exemption from taxation. *Grant* v. *City of Davenport*, supra, and *Portland* v. *Portland Water Company*, supra, were both cited by the court in its opinion with approval.

In *Utica Water Works Company* v. *Utica*, 31 Hun, 431, the contract between the Water Company and the city provided that for the water service furnished by the company for municipal services, the company was to receive a definite sum each year and in addition thereto a sum equal to one-half of its taxes paid in excess of one thousand dollars. The court sustained the contract. In the opinion of the court it is said: "The contract furnished a mode of computation by which the sum to be paid annually by the city could be ascertained. The effect of the contract is not to relieve

the company from the payment of taxes in whole or in part at the expense of the tax-payer, but it is to adopt the amount of taxes paid by the company as a partial measure of compensation for the water supplied by it. . . . . It is not a remission of taxes, but simply a resort to the amount of taxes as a measure of compensation."

In *New Orleans* v. *Water Works Company*, 36 La. 432, the act of the legislature incorporating the Water Works Company provided that the city should be allowed water free of charge for fires and other public purposes, "and in consideration thereof the franchises and property of said New Orleans Water Company used in accordance with the act shall be exempted from taxation, state municipal and parochial." A contract was made between the company and the city in accordance with the legislative enactment, but the city subsequently assessed and brought suit against the company for the taxes. The court held that the city was entitled to judgment, since by express provision of the constitution property could not be exempted from taxation unless it was "actually used for church, school or charitable purposes," but that the Water Company could compel the city to pay for water used a sum equal to the amount of the taxes thus recovered, as the latter amount was made by the act of the legislature and by the parties the exact consideration for the free supply of water.

In *Ludington Water Supply Company* v. *City of Ludington*, reported in 78 N. W. Reporter, 558, a case decided by the Supreme Court of Michigan, and announced March 6, 1899, the question considered was identical in principle with the one here presented. The court decided that a contract whereby a city, as part consideration for a water supply, agrees to pay all taxes levied against the property of the Water Company in excess of a certain amount, during the continuance of the contract, is not invalid as an attempt to exempt a company's property from taxation, in excess of the amount named. The court says in its opinion: "It is contended that the provisions relating to taxes are invalid, for the reason that the city has no power, under its charter, to exempt property from taxation, and that this contract is an attempt to exempt the

property of the plaintiff in excess of a certain amount from its share of the public burden. The contract does not purport to provide that the property of the plaintiff shall not be assessed. Its terms indicate that it was intended by both parties that it should be assessed, and that the plaintiff would pay the taxes on the property up to a certain amount, and the defendant all in excess, as a part of the consideration for the supply of water. The city no more exempts the property of the plaintiff from taxation by such an agreement than does the mortgagor who agrees to pay the taxes levied against the mortgaged property, exempt the mortgaged property from taxation."

It is true, that the courts of some states, where the question has arisen, have come to a different conclusion, and have regarded a contract, similar to this in substance, as an attempt to exempt the property of the corporation contracting with the city from taxation. That such may be true in any given case, and that such a contract may be merely intended to cover with the semblance of legality an illegal attempt to exempt property from taxation without a fair return therefor, we do not question.

But what we hold is, that a municipality may, for a reasonably adequate consideration, in the way of service rendered to it for municipal purposes, agree to make compensation therefor, for a term of years not unreasonably long, either in whole or in part, by reimbursing the company, in whole or in part, the amount that the company performing the service may be obliged to pay as taxes assessed upon its property. We think that this conclusion is sustained both by reason and the weight of authority.

This view leads us to an examination of the question of fact as to the adequacy of the consideration for the city's agreement in this case; but about this there is apparently no controversy. It is sufficient to say, upon this branch of the case, that the undisputed testimony of witnesses produced by the plaintiff shows that a fair compensation, according to the prevailing rates, for the water supplied by the company during the year 1897, under the contract of January 21, 1890, in addition to that which was provided for in the original contract of May 5, 1887, would be far in excess of the

amount that the company can recover in this action under the terms of the latter contract. According to this testimony, this compensation would amount to over three thousand dollars, while the amount that can be recovered in this action is less than one thousand dollars.

As to the years preceding 1897, it is admitted that the value of the water service rendered by the company was equal each year to the amount that the city under the last contract reimbursed the company for taxes paid. In view of this evidence and admission, and the further fact that the counsel for the city raises no question of adequacy of consideration, either by evidence or argument, we may safely assume that during the remaining years of the contract the city will receive at least an equal equivalent for the amount that it will be obliged to pay.

We are, therefore, forced to the conclusion, from the value of the water service that has been actually furnished, than which no better evidence could be produced, that the contract when made was fair and reasonable; that the city thereby received an amply adequate consideration for its agreement, and has since received a fair equivalent for its payments; and that the contract was not intended as the cover of an illegal attempt to exempt the company's property from taxation.

It is further urged that this contract was void because "it is contrary to public policy for a city to contract to pay annually for many years a sum of money the gross and annual amounts of which are both uncertain, and more especially so when the return to be received is also uncertain."

We do not think that the contract involved in this case is contrary to public policy. It is not for an unreasonably long period of time. In many cases it is absolutely necessary for a city or town to make a water contract for a term of years, in order to obtain the great benefits of a sufficient water supply for the protection of the property of its inhabitants against fire, to provide for the health of its citizens by a proper sewer system and for other municipal purposes. Without a contract extending over a period of years, it would, we believe, frequently be the case that

no individuals or corporation could be found who would go to the expense of constructing a suitable and sufficient water plant that would answer the requirements for public purposes as well as for domestic uses.

Such a contract must contain some elements of uncertainty as to compensation, because of the uncertainty of the extent of water service that may be required in the future by reason of the growth of the municipality in population and the increase of its needs. There is no very great uncertainty under this contract as to the amount that will have to be paid each year by the city according to its terms. The provision of the contract relative to the repayment of a portion of this company's taxes only applied to "the property now owned by said company in said city, and all pipe lines with hydrants and fixtures hereafter laid by said water company in said city." It does not affect the considerable amount of property that has been acquired by the company since the execution of the contract; and while the pipe lines and hydrants of the company may have increased and very likely will increase in length and number, it is reasonable to believe that there will be a corresponding increase of service rendered to the city. There is undoubtedly some uncertainty in the contract both as to the extent of service that may be required and rendered and the amount of compensation that will have to be paid therefor, but this uncertainty is inevitable in such a contract and is certainly not of such a character as to make the contract contrary to public policy. As was said in several of the cited cases, the amount of taxes is only adopted as a measure by which to determine the amount of compensation.

It is unnecessary in this case to inquire whether a city council in making such a contract as this is exercising its governmental powers or its business powers, or whether a city council may, without legislative authority, enter into a contract with a water company for a term of years, because in this case, as we have already seen, legislative authority was given for the then town of Waterville to make a contract with the water company for a supply of water. Two contracts were made, one, providing for the pay-

ment of a specified sum for each hydrant, the other for the payment of a sum to be measured each year by the amount of taxes for such year in excess of a certain amount. Both contracts were fair and reasonable and entered into without fraud.

There is no controversy as to the amount to be recovered in this action if the action is maintainable. That amount is $924.00 and interest thereon from September 23, 1897, upon which day it is admitted demand was made.

Judgment for plaintiff for $924.00 and interest as above.

PETERS, C. J. I have concurred in the opinion in this case, but not without some hesitation.

I think the principle is so likely to be abused in practice that it would be wise in the legislature to interfere to prevent such contracts in the future. To my mind there is much in the argument, that such contracts are not in accordance with good public policy. As many of our cities and towns have already incurred an indebtedness up to the constitutional limit, they are tempted to purchase the privileges of light and water at extravagant rates in this way. I appreciate a difference between a lessee paying a part of his agreed rent by assuming taxes assessed on the rented property by a third party, and taxes assessed by the lessee himself or by agents and officers in his behalf. Here the taxes to be paid are not merely such as pertain to the property leased, but are the taxes assessed on all the property of the lessors.

MEMORANDUM.

MR. CHIEF JUSTICE PETERS retired from the bench of this court on the first day of January, 1900, on which day his resignation previously tendered to the Governor took effect.

In his letter of resignation, dated December 11, 1899, he says: "When I received at your hands in 1897 a reappointment as Chief Justice, I entertained the opinion that I should probably make January 1, 1900, the date for a termination of my official career. My increasing years, and a certain instability of bodily condition, have for sometime past been an admonition that it would be doubtful if my physical strength would permit me to bear the burdens of judicial service much beyond the first of the next year with adequate advantage to either the state or to myself.

"I am, therefore, convinced that it would be a just act toward the State, and not an unwise one for myself, to resign my office of Chief Justice in pursuance of my first intention, which I now do, my resignation to take effect on January 1, 1900."

Governor Powers in accepting the resignation, said: "You will have, on retiring, the consolation of knowing that you have ably and faithfully performed every duty of the office, and that you have earned and will carry with you the sincere love and gratitude of the whole State."

Thus closes a public career of great eminence and exceptional usefulness, twenty-seven years of which were given to the State as a Justice of the Supreme Judicial Court, of which he was its honored head for more than sixteen years.

His retirement is an event long to be remembered, not only on account of the ending of an eminent public service, so clear in its great office, but also for the spontaneous and wonderful outpouring of love and affection,—coming from all parts of the country,—that greeted him on the occasion.

Whether as an advocate, legislator or jurist, it is given to but few to enjoy such an enviable character and distinction as belongs to Judge Peters. All these places he has filled with great honor and usefulness; yet it is as a jurist that he will be remembered, and for which the State will ever hold him in grateful memory. For it is in this station that his best qualities of head and heart have wrought an enduring monument—The Good Judge. And to make him such, Judge Peters is endowed with alertness of intellect, grasp of mind, firmness, moral rectitude, perfect poise of judgment, and integrity of decision. That he never respects persons in judgment, that he is honest in his opinions, is the universal knowledge of him; but it is of equal importance that he should be believed to be such,—and herein, too, he is equally fortunate. Add to these a sunny nature that, with its large, warm and generous impulses, "pours itself out into the social world around him like a flood of cheering sunlight,"—loving justice tempered with mercy, —spreading the mantle of charity far and wide,—and as a kindly, great-hearted, noble man,—it is such that Judge Peters will ever be respected by the State he has served so long and so well in his exalted office.

The habits of gravity, poise and dignity fostered by the judicial office, and its cold intellectual requirements naturally tend to discourage the social side of life. But the retiring Chief Justice has shown the people how seemingly easy a thing it is "to exercise the fruitful and beneficent gifts of his heart and mind" and in return win from the world a happy meed of honor, affection and admiration, and the large, warm and generous tribute of regard which the world pays to those "whose sympathies and feelings reach out into the social life of the community around them," and who become an intimate sharer in that life; how high honors and great success have not destroyed his plain, unaffected and simple habits;—"who without a touch of vanity, selfishness or arrogance has lived up to the highest standard of intellectual greatness, yet, deriving his chief enjoyment and satisfaction in life not from homage to his position but from what he gave out and received in the exercise of

a happy gift of perceiving what the world affords in the way of beauty, hopefulness and sunshine."

Under the learned, impartial and trusted administration of the law by such a judge, the people will rest secure in liberty and all that makes life desirable. It will be a free government.

C. H.

On the second day of January, 1900, the Honorable ANDREW PETERS WISWELL was appointed Chief Justice of the Court.

On the second day of January, 1900, the Honorable FREDERICK ALTON POWERS was appointed a Justice of the Court, and took his seat upon the bench at Machias, Washington County, on the following Tuesday, being the ninth day of the month.

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Six months', on colt, *held;* expired, *Gile* v. *Atkins*, 223.
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Word "debt" in charter of, includes unliquidated claims for damages, *In re Lumb. Assoc.*, 391.
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Will lie to enforce payment of damages for land taken by water companies, *Furbish* v. *Co. Com.*, 117.
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Tax-payer may move for, *Knight* v. *Thomas*, 494,
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Implied promise of purchaser to pay, *Bank* v. *St. Clair*, 35.
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a, may be absolute deed with bond back, *Ib.*
here, deed was recorded, but bond was not, *Ib.*
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parties to a, cannot stipulate against subsequent parties in interest by unrecorded agreement for terms not part of original agreement, *Ib.*
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Absolute statute lien for land rent on buildings precedes all, *Water Power Co.* v. *Chabot*, 339.
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Lien under, *held;* not lost, *Johnson* v. *Bank*, 516.
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Railroad frogs and guard rails not blocked, *Gillin* v. *R. R. Co.*, 80.
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A requested instruction that a partner may not employ a relative at an exorbitant price was refused, *Smith* v. *Smith*, 253.
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All members of, liable after dissolution, to those with whom they deal continuously without notice of dissolution, *Nevens* v. *Bulger*, 502.
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held; notice of dissolution by publication not admissible in evidence, *Ib.*
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Delivery and acceptance must be proved in actions for goods sold and delivered, *Greenleaf* v. *Gallagher*, 549.
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Semble; plea in abatement for non-joinder of defendants should aver their supposed residence, *Copeland* v. *Hewett*, 554.
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Questions not raised on exceptions are presumed to be correctly decided, *Hill* v. *Reynolds*, 25.

Judgment entered upon nonsuit, *Priest* v. *Axon*, 34.
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Rule of amending pleadings, *Willoughby* v. *Atkinson Co.*, 185.
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Verdict set aside as to damages only, *McKay* v. *Dredging Co.*, 201.
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Misrecited evidence in charge to jury to be corrected at once, *Jameson* v. *Weld*, 345.

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Appeal in, may be had by legatees in prior will not probated, *Smith* v. *Chaney*, 214.
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Executor's real estate sale in, held void, *Snow* v. *Russell*, 362.
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Statute liability of, for fires, *Excelsior Co.* v. *R. R. Co.*, 52.
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Filling and blocking frogs and guard rails, *Gillin* v. *R. R. Co.*, 80.
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Lien of laborers in building, *George* v. *R. R. Co.*, 134.
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Obvious intent of, will govern, and not its literal import, *In re Lumb. Assoc.* 391.
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Page 558, in 9th line of head-note, for "*defendant*" read "*plaintiff*."