MAINE REPORTS

94

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

1900—1901.

CHARLES HAMLIN

REPORTER

PORTLAND, MAINE
WILLIAM W. ROBERTS
1901

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.
HON. HENRY C. PEABODY. †

Justices of the Superior Courts.

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

ATTORNEY GENERAL.

HON. GEORGE M. SEIDERS.

CHARLES HAMLIN, REPORTER OF DECISIONS.

*Resigned January 1, 1900.
‡Died September 24, 1900.
†Appointed November 29, 1900.

ASSIGNMENT OF JUSTICES

FOR THE JUDICIAL YEAR, 1900.

LAW TERMS.

MIDDLE DISTRICT, at Augusta, Fourth Tuesday of May.

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

EASTERN DISTRICT, at Bangor, Third Tuesday of June.

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

WESTERN DISTRICT, at Portland, Third Tuesday of July.

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

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CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE.

ARTHUR J. FRYE, pro ami,

vs.

BATH GAS AND ELECTRIC COMPANY.

Sagadahoc. Opinion February 12, 1900.

Negligence. Fellow-Servant. Assumption of Risk. Contributory Negligence. Verdict.

It is the duty of the master to provide a reasonably suitable and safe place where his servant can perform his work. The neglect of that duty by the master's employees is the neglect of the master himself.

The plaintiff was a fireman employed in the boiler-room of the defendant and while thus at work fell into a hole that had been dug and left open, or in a dangerous state, in front of the boiler, by the defendant's employees who were making a foundation there for an economizer. *Held;* that in leaving the hole uncovered, or the excavation in an unsafe condition, was negligence of the master; and that the doctrine as to negligence of a fellow-servant does not apply.

While it is settled law that a servant assumes the ordinary and apparent risks of his employment, he does not assume the risk from defects in the plant itself which the master is bound to make and keep reasonably safe.

The fact that a person takes voluntarily some risk is not conclusive evidence, under all circumstances, that he is not using due care. Nor is knowledge of a danger, not fully appreciated, conclusive that the risk is his.

While the defendant may well be chargeable with negligence in not sufficiently covering the hole, considering its proximity to the boiler, where the plaintiff was at work and also the method and exigencies of that work, *held;* that

it is peculiarly for the jury to decide whether he acted recklessly, regardless of his safety; or whether he exercised that degree of care to be reasonably expected in that situation and under all the circumstances.

The verdict of a jury is entitled to respect and should not be disturbed unless it is so clearly wrong as to compel the conclusion that it is the result of prejudice, or failure to comprehend the facts and the legitimate inferences therefrom, or is antagonized by some controlling rule of law.

ON MOTION BY DEFENDANT.

This was an action on the case to recover damages for injuries received by the plaintiff, a minor, twenty years of age, while in the employ of the defendant corporation at the city of Bath.

The plaintiff claimed that he had been in the service of the defendant for five months, or more, and for two months previous to March, 1898, he had served in the capacity of fireman in the defendant's power-house in Bath; and that while so employed he was injured through the negligence of the defendant corporation in the following manner.

It appears that in the fire-room where the plaintiff was employed, the defendant had caused four holes to be dug, of varying depths in which to place stone foundations for the support of iron pillars of a massive machine known as an "economizer", and required for the business of the power-house.

One of these holes, about two feet deep, was directly opposite the door of furnace number three, being some eleven feet distant.

The plaintiff had known of the existence of the hole, as he says, for three days.

On March 10, 1898, while "slicing" the fire in furnace number three, the plaintiff stepped backward and either fell into the hole, or across and upon a plank lying across the hole; from which fall he claimed to have received the injuries complained of, and recovered a verdict against the defendant corporation in the sum of $4,166.

Other facts are stated in the opinion.

S. L. Fogg and F. E. Southard, for plaintiff.

The plaintiff was a fireman, employed in the boiler-room, the operating department, as it were. The hole into which he fell was dug and left open, or in a dangerous state, by men in the

construction department. These departments were wholly distinct, and in no way connected with or dependent on each other. The foremen were different, and the men in charge of each department were under no orders, and owed no duty to the other. *Donnelly* v. *Granite Co.*, 90 Maine, 110.

The danger flowing from the existence and non-covering of this hole was not an ordinary danger incident to plaintiff's employment. It is too much to say that it is an ordinary or natural incident for an employer to dig pitfalls under the feet of his firemen into which he might, in the performance of his duties as such, be liable to fall. It nowhere appears that the plaintiff had an appreciating knowledge of the dangerous condition of the hole before he fell. *Campbell* v. *Eveleth*, 83 Maine, 59. Mere knowledge of a danger will not preclude a plaintiff from recovering unless he appreciates it. *Mundle* v. *Hill Mfg. Co.*, 86 Maine, 400, and cases. Momentary forgetfulness of a danger is not necessarily conclusive proof of negligence. *Kelly* v. *Blackstone*, 147 Mass. 448; *McQuillan* v. *Seattle*, 10 Wash. 467, (45 Am. St. Rep. 802). That knowledge and appreciation of the danger, in this class of cases, must co-exist in order to charge a plaintiff with contributory negligence is held by all the cases. *Mundle* v. *Hill Mfg. Co.*, supra.

C. W. Larrabee and Geo. E. Hughes, for defendant.

Plaintiff was perfectly familiar with his service as fireman in that place, and all its requirements and surroundings. As fireman he was required to wheel coal into the furnace room from outside the building, and after a two months acquaintance with this duty no considerable part of that location escaped his knowledge. In fact he says so. He shows full and complete knowledge not only of the holes, but the special condition of each as to its covering.

Such an assumption of the risk of an employment by a servant will bar recovery independently of the principle of contributory negligence. *Conley* v. *Am. Ex. Co.*, 87 Maine, p. 356. If the servant comprehends the nature and degree of danger and voluntarily takes his chances, he must abide the consequences, whether he is fortunate or unfortunate in the result of his venture. *Mundle* v. *Hill Mfg. Co.*, 86 Maine, pp. 405–6. Business is sometimes

carried on in buildings or places obviously unsafe; and if, with a knowledge that a business thus conducted, the workman engages in it, he takes the risks which he must know are incident thereto. *Taylor* v. *Carew Mfg. Co.*, 140 Mass. 152. See case in point, *Carrigan* v. *Washburn & Moen Mfg. Co.*, 170 Mass. p. 79. See also *Leary* v. *B. & A. R. R.*, 139 Mass. p. 580; *Ciriack* v. *Merchants' Woolen Co.*, 146 Mass. 182; *Huddlestone* v. *Lowell Machine Shop*, 106 Mass. p. 286; *Buzzell* v. *Laconia Mfg. Co.*, 48 Maine, p. 113; *Wheeler* v. *Wason Mfg. Co.*, 135 Mass. p. 298; *Shanny* v. *Andros. Mills*, 66 Maine, p. 427; *DeForest* v. *Jewett*, 88 N. Y. p. 264.

The burden was upon the plaintiff to show affirmatively that this casualty occurred from the negligence of the defendant by reason of defects, or dangers, the location of which the plaintiff was ignorant and had no appreciable knowledge. This he failed to do. There is not a scintilla of evidence on his part, or his four witnesses, to show that any change had been made in the covering of the hole, into which he says he fell. So far as the affirmative testimony goes, the hole was then covered in the same way with one plank, as it had been for the three days previous. Therefore, if the plaintiff's evidence is to be believed, there was no question for the jury as to change of covering. There was but one covering and that was the same at the time of the accident as it had been from the first; and in this line for a perfect defense to this action we quote from the judge's charge, to which there is no exception: "And I said if there had been, and if there was a hole for one day, or two or three, in this condition, which he knew, and if it remained in the same condition that it had been up to the time of the accident, and he knew about it, and appreciated it, why he would assume the risk of the danger arising therefrom." And therefore on this point the jury had no evidence on which to base a verdict.

The injury occurred by want of due diligence and proper caution or care on his own part, knowing all the conditions under which he was acting. As was said by EMERY, J., in *Campbell* v. *Eveleth*, 83 Maine, p. 57: "It is also a reasonable and well estab-

lished principle that the employer may assume that his employee is not a senseless, mindless machine, but that he possesses and will use for the benefit of his employer as well as of himself, the ordinary senses, intelligence and understanding of one of his age."

The total want of evidence on the part of the plaintiff that the defendant was guilty of negligence in placing its foundations for the contemplated "economizer" and the absence of evidence that the plaintiff at the time of the accident was in the exercise of due care must be fatal to the plaintiff's action. *Cunningham* v. *Bath Iron Works*, 92 Maine, page 513.

The burden is on the party prosecuting to show that the person killed or injured did not by his own want of care contribute to the accident. *State* v. *Me. Cent. R. R. Co.*, 76 Maine, p. 357.

It is also said that sometimes the plaintiff's own evidence shows that he by his own carelessness did thus contribute, but that it is equally fatal if his evidence fails to show that he did not thus contribute. *McLane* v. *Perkins*, 92 Maine, p. 44; *Gleason* v. *Bremen*, 50 Maine, 252.

The court will not allow to the plaintiff the excuse that his attention was diverted by his duties. *Walker* v. *Lumber Co.*, 86 Maine, p. 191, where HASKELL, J., says: "He carelessly exposed himself to a danger of which he must have previously had notice, and, although his misfortune was great, others cannot be held to share it with him or bear it for him." *Wallace* v. *Cent. Vt. R. R. Co.*, 63 Hun, 632.

We submit that there was no evidence before the jury to prove that the accident resulted from the negligence of the defendant; neither was there any direct evidence that the plaintiff was in the exercise of due care and free from contributory negligence. The undisputed facts prove that he had assumed the risk of all the perils incident to his employment, and the weight and preponderance of the evidence was clear and unanswerable that the accident must have resulted from the plaintiff's heedlessness and want of proper and due vigilance. The verdict has no valid foundation and should be set aside.

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

STROUT, J. Defendant had at its power-house five furnaces in a line, three of them burning coal and two saw-dust. Plaintiff was fireman, whose duty it was to "slice" or rake the fires in these furnaces. This was done with an iron bar ten feet, or more, in length. The furnaces were ten to twelve feet deep. It was necessary to do the slicing or raking rapidly, to prevent steam running down. The raking was begun at the back of the furnace, with the fire-box doors open. It was very hot in front when the doors were open. In raking, plaintiff stood facing the furnace. The raking of one furnace occupied about two minutes.

To obtain foundation for an "economizer", defendant had dug four holes, six feet square, more or less, and intended to be ten or twelve feet deep. Plaintiff, at the time of the accident, was "slicing" the fire in coal furnace number 3.

Directly in front of the fire-box, and eight to eleven feet from it was one of these holes, then dug to the depth of about two feet. It had been there about three days, and was partially covered with plank,—plaintiff says only one plank upon it. Hanson, superintendent of the excavations, says it was nearly all covered—that it had been covered all the time the hole was there. "I tried to keep these places covered all we could when we were working in them", and that it was covered at the time of the accident, when they were not working in it, "with a small opening". Sheldon, a witness for defendant, says that "the hole was partially covered", "a good part of it was covered"—that there was an "opening" or "hole large enough for his (plaintiff's) foot to go down through". Plaintiff says the opening was three feet or more.

In slicing, plaintiff stood facing the furnace and back to this hole. In doing his work it was necessary to step backward from the furnace to slice the fire to its front.

In doing so, he fell into the hole and was seriously and permanently injured. Plaintiff had previous knowledge of the existence of all the holes.

Plaintiff had a verdict, and the defendant asks that it be set aside as against law and evidence.

Digging the holes for foundation to the "economizer," was connected with and a part of the plant itself. As to this, the master had the responsibility that the work should be done with due care, and made reasonably safe, and that responsibility continued so long as the means were used. If any servant of defendant employed upon that work was negligent in leaving the excavation in an unsafe condition—such negligence was that of the master—the the doctrine as to negligence of fellow-servants does not apply. *Shanny* v. *Androscoggin Mills*, 66 Maine, 424; *B. & O. Railroad* v. *Baugh*, 149 U. S. 388.

The distance from furnace 3 to the hole is placed by one witness at eight feet, by another at nine, and by another at eleven—the longest given by any witness. Regarding the furnace as ten to twelve feet deep, and the method of slicing requiring it to begin at the back of the furnace and the bar then to be drawn forward to the mouth, the operator in the meantime standing face to the furnace and his back to the hole, and taking into account that from the heat when the doors were open he could not approach within one or two feet of it, it is obvious that in his backward steps he would probably, almost inevitably, pass upon or over a portion of this hole. Whether at the time it had one or more planks over it, the fact that he fell into it is conclusive that there was an opening in the covering sufficient to permit a fall into it.

Was it negligent in defendant to leave such opening, under the conditions existing? The jury have said it was, and we are not disposed to differ from the jury in that finding.

But, it is said that plaintiff assumed the risk. He knew the hole was there, but it does not appear that he knew before the accident, that it was partially uncovered.

He testified that it had but one plank over it, from examination after the accident, but he does not state that he knew that condition before he fell into it. In the fall or extrication of plaintiff, the planking was likely to be disturbed or partly removed.

It is well settled, that the servant assumes the ordinary and

apparent risks of his employment; but, as is said in *Shanny* v. *Androscoggin Mills*, supra, "under his contract for service he assumes such risks only as are incident to his employment. These risks include the use, not the purchase, of the machinery." Here plaintiff assumed the risk from the operation of the works, under his contract of employment—but not the risk from defects in the plant itself, which defendants were bound to make and keep reasonably safe. *Coolbroth* v. *Maine Central Railroad*, 77 Maine, 165. That duty cannot be escaped by delegating the work to a servant.

If such servant in attempting to discharge the master's duty is negligent it is imputed to the master as his negligence. *Donnelly* v. *Booth Brothers*, 90 Maine, 110.

The plaintiff, under his general employment, did not assume the risk arising from inattention or negligence of the master in regard to these holes. In determining the question of the liability of defendant upon the facts in this case, the familiar doctrine as to negligence of fellow-servants, and assumption of the risks of the employment by the servant are eliminated, as inapplicable.

If the defendant was guilty of negligence in not sufficiently covering this hole, it became liable to compensate the plaintiff for his injury, if he was in the exercise of due care at the time, and no negligence of his contributed to it. It is true, that if a known and appreciated peril exists, though resulting from the fault of the master, and the servant continues in the employment exposed to the danger, and receives an injury therefrom, he cannot recover from the master. In a sense, in such case, he may be said to assume the peril, not as incident to his employment, but as a voluntary undertaking at his own risk, to do the work, subject to such peril. He deliberately takes the chances upon himself to the exoneration of the master.

But, as was said in *Kane* v. *Northern Central Railway*, 128 U. S. 95, "in determining whether an employee has recklessly exposed himself to peril, or failed to exercise the care for his personal safety that might reasonably be expected, regard must always be had to the exigencies of his position, indeed to all the circumstances of the particular occasion." In that case, a brakeman on a freight train

knew that one of the steps of a car was missing, and while it was held that he should not have forgotten this fact, yet, as his duty and the safety of the train required him to pass over the cars "to reach his post at the earliest practicable moment," it was a question for the jury to determine whether, under the particular circumstances, he was in the exercise of due care when injured in consequence of the missing step, notwithstanding his forgetfulness of its absence at the time.

So here, while defendant may well be chargeable with negligence in not sufficiently covering the hole, considering its proximity to the furnace where plaintiff was at work, and the method and exigencies of that work, it was peculiarly a question for the jury, whether he acted recklessly, regardless of his safety, or whether he exercised that degree of care reasonably to be expected in that situation and under all the circumstances.

It must not be forgotten that, if the defendant's witnesses are to be believed, the hole was not only intended to be covered, but that it was in fact nearly covered, and may have presented, and probably did, an appearance of safety to casual observation,—but being in fact unsafe, while it invited the confidence of the servant,—it operated as a trap to his feet. It was really more dangerous if wholly uncovered, as, in that case, the peril would have been obvious and the servant put upon his guard. He relied, as he had a right to rely, upon the presumption that defendant had discharged its duty, until its neglect became obvious, and was not bound to make a critical examination when its general appearance was that of safety. *Fox* v. *Sackett*, 10 Allen, 586.

If the jury found, as the evidence justified, if it did not require them to find, that the hole was covered except a small opening sufficient to allow plaintiff's foot to pass through, they might well find also that the covering presented a general appearance of safety, and was not suggestive of peril; and that plaintiff was justified in relying upon it, and was not wanting in due care. Where the evidence is such that different minds may reach opposite conclusions upon the question of reasonable and proper care, it is always submitted to the jury to determine that question, and their

conclusion ought to control. The fact that a person voluntarily takes some risk is not conclusive evidence, under all circumstances, that he is not using due care. Nor is knowledge of a danger, not fully appreciated, conclusive that the risk is his. *Lawless* v. *Connecticut River Railroad*, 136 Mass. 1; *Taylor* v. *Carew Manufacturing Co.*, 140 Mass. 153; *Lyman* v. *Hampshire*, 140 Mass. 313; *Carey* v. *Arlington Mills*, 148 Mass. 342; *Mundle* v. *Hill Manufacturing Co.*, 86 Maine, 405; *Campbell* v. *Eveleth*, 83 Maine, 55.

The case was submitted to the jury upon a charge, to which no exception is taken, which fully and very clearly presented the relative rights, duties, liabilities and responsibilities which the law imposes upon the relation of master and servant. The questions involved were those of fact, within the province of the jury to determine. The verdict of that tribunal is entitled to respect, and should not be disturbed unless it is so clearly wrong as to compel the conclusion that it was the result of prejudice, or failure to comprehend the facts and the legitimate inferences therefrom, or is antagonized by some controlling rule of law.

It is not for the court to substitute its judgment for that of the jury. The facts have been found by the constitutional tribunal in favor of the plaintiff, and we cannot say that the evidence did not justify the finding. The rules of law applicable are not inconsistent with the verdict. *Campbell* v. *Eveleth*, supra.

Motion overruled.

CHARLES A. GREGORY *vs.* MARY H. PIKE.

Washington. Opinion February 12, 1900.

Submission. Attorney. Judgment. Record. Evidence. Bills and Notes.

A submission, not by rule of court, may be revoked by a party to it before award made; but it is otherwise if the submission is by rule of court.

Held; in this case, that neither the referee, nor the parties, regarded himself as making an award of binding force.

The death of a party to a submission operates a revocation of the submission.

While an attorney may be regarded, under his general employment, as endowed with authority to submit his client's cause to arbitration, it is doubtful whether such authority is sufficient to justify a stipulation in a submission to the effect that in case of death of either party before award is made, the award when made shall bind the legal representative.

Where a court has jurisdiction of the subject matter and of all the parties in interest, the subject matter in controversy becomes res judicata when all the parties have appeared, were heard, and a final decree has been rendered.

The defendant objected to a record of proceedings in the Circuit Court of the United States upon the ground that the record was not complete, and was not properly certified. It appeared that the record was prepared for the Supreme Court in certain appealed cases of the plaintiff against the defendant and a cross-bill filed by another party. This record contained all the pleadings of all the parties claiming an interest in the subject matter in controversy, together with the proceedings of the court thereon up to and including the final decree. *Held;* that nothing further is required or would be of use in this case. *Also;* that the attestation by the clerk of that court, under seal, is a sufficient affirmation of the verity of the matters contained in the record; and therefore this record, as verified, is admissible.

An immediate assignee of a non-negotiable note may afterwards transfer the same to an innocent holder, who will be protected to the extent of his claim.

ON REPORT.

Bill in equity, heard on bill, answer and proofs, alleging that the defendant was not legally entitled to a fund held by the Boston Trust Company and that she had wrongfully obtained said money in violation of an express trust agreement under which it was thus held; also that said fund is charged with a resulting trust in favor of the complainant who is legally entitled to it under and by virtue of an award of an arbitrator made and published December 20,

1886, and which award has never been annulled nor set aside by any court of law, nor waived or reopened by any act of the complainant.

The case is stated in the opinion.

F. A. Brooks and Robert T. Whitehouse, for plaintiff.

T. H. Talbot; J. W. Symonds, D. W. Snow and *C. S. Cook*, for defendant.

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

STROUT, J. Plaintiff alleges that on April 25, 1883, he was the equitable owner of two non-negotiable notes, of that date, signed by William C. N. Swift and payable to Charles F. Jones, one for $15,000 payable in two years from date with interest, and the other for $20,334.60 payable in three years from date with interest. Jones, the payee, without authority from Gregory, as he claims, on or about July 31, 1883, delivered the notes to George W. Butterfield, who on that day delivered them to Frederick A. Pike as collateral security for a payment of $25,000 due from him to Pike, under an agreement of that date by which Pike was to sell and convey certain mining property to Butterfield. The notes bore upon their back the indorsement of Jones, the payee. When Gregory learned of this transaction, he demanded the notes of Pike, who refused to deliver them; and Gregory, in December, 1889, brought a bill in equity in the Supreme Court of Massachusetts against Pike and Swift to recover possession of them.

This suit was removed to the United States Circuit Court, and became number 2170 on the equity docket of that court.

Pending this suit, on January 8, 1886, Pike and Gregory made an agreement, by which Pike was not to deal with either J. C. Kemp, Butterfield, or Jones, each of whom claimed an interest therein, in reference to the notes, except in pursuance of Gregory's rights as they might be determined in this suit—and that the larger note should be lodged with Amos P. Tapley to abide the determination of the suit; and if that note was not paid at maturity, suit should be brought under the joint direction of the attorneys of

Pike and Gregory. January 22, 1886, Kemp and Butterfield were made parties defendant to the bill. November 30, 1886, the attorneys of Pike and Gregory agreed in writing to submit the controversy to Judge Hoar, as referee, but Kemp and Butterfield were not parties to the submission, and it was not made a rule of court, nor any entry in regard to it made upon the docket. By the agreement Hoar was to have possession of the notes and deliver them to the party he found entitled to them. The counsel proceeded to a hearing before Judge Hoar in December, 1886—but before the hearing had concluded Pike died. Notwithstanding this, counsel continued the hearing, but without authority from the defendant, Mary H. Pike, wife of Frederick A. Pike and named as his executrix in his will, but who was not qualified as such till March 1887. Neither Kemp nor Butterfield were represented. December 18, Judge Hoar verbally announced his decision. On the 17th, Mr. Brooks, counsel for Gregory, having drawn a form of award, asked Judge Hoar to sign it, which he did, and offered to make a delivery of it as his award, which Brooks declined till Talbot, Pike's counsel, could see it, as he might desire some change. On the 24th, Brooks and Talbot called on Judge Hoar by previous request from him.

That morning Mrs. Pike had delivered to Hoar a written revocation of his authority as referee. At that interview Judge Hoar asked to be relieved from the further custody of the Swift notes, and hesitated about receiving payment for his services, remarking that he did not know as the parties had derived any benefit from them. He said the award was not to be binding as an award until Pike's counsel should be heard in relation to it. He then delivered to Brooks and Talbot the award and the Swift notes, and they immediately, in pursuance of previous arrangement, delivered them to John G. Stetson, upon his receipt therefor, with the stipulation that they should be held "subject to the joint order and direction of the said Talbot and Brooks, and dealt with as they may jointly direct." Both of the Swift notes were put in suit at their maturity, and their amounts were paid into the Circuit Court, and there held by order of that court to await determination of the rights of the several claimants of the fund.

By order of that court the fund was transferred to the credit of equity suit 2170, "to remain subject to the order of court in that case." By order of court, with the consent of all parties, the fund was deposited upon interest in the Boston Safe Deposit and Trust Company. January 10, 1887, Gregory brought a supplemental bill against Stetson, Swift and Talbot, docketed in the original suit 2170, for the purpose of reaching the proceeds of the $20,000 note of Swift, by virtue of an alleged award of Judge Hoar. August 6, 1887, Gregory brought another bill in equity in the Circuit Court against the Safe Deposit and Trust Company and this defendant Mary H. Pike, docketed as number 2424, claiming under the award of Judge Hoar. To this suit Mrs. Pike appeared and answered as executrix of F. A. Pike. A cross-bill was brought by Kemp in which he claimed an interest in the Swift notes. Butterfield also brought a cross-bill. Both of these were in 2170. April 29, 1887, on motion of Gregory, the court ordered that this defendant, Mary H. Pike, be summoned to appear and answer to the supplemental bill in number 2170. In response to this Mrs. Pike, as executrix, appeared and answered to the supplemental bill and the original bill. The cause then proceeded, testimony was taken, hearing had and decree rendered March 8, 1894. By this decree Kemp took one-half of the amount of the $15,000 note, and Mrs. Pike $25,000 with interest from January 1, 1884, if the fund in court was sufficient therefor—if not, the balance of the fund,—and the cross-bill of Butterfield was dismissed. This decree was in number 2170.

Gregory's bill 2424 having been dismissed by the Circuit Court, that and Kemp's cross-bill in 2170 were carried to the Circuit Court of Appeals, and thence to the Supreme Court of the United States, where the dismissal of Gregory's bill 2424 was sustained, and it was held that all persons interested in the fund were parties to the original bill in 2170, and that their rights could "be effectively determined only in equity cause No. 2170." *Gregory* v. *Boston Safe Deposit and Trust Co.*, 144 U. S. 668.

In pursuance of mandates from that court and the Circuit Court of Appeals, a final decree in number 2170 was entered in the

Circuit Court on June 20, 1896, by which from the fund then in court, amounting to $50,131.85, after payment of certain fees and costs, $9,439.98 being one-half of the amount received on the $15,000 note, was decreed to Kemp, and the remainder of the fund, being less than $25,000 and interest thereon from January 1, 1884, was decreed to this defendant, Mary H. Pike, executrix of F. A. Pike. The cross-bill of Butterfield was dismissed, and the cross-bill of Kemp allowed to stand as a petition pro interesse suo. Payment was made to Mrs. Pike according to this decree.

Plaintiff's bill seeks to recover the amount of this payment from her.

Notwithstanding the attempt of parties to transfer the controversy from suit 2170 to suit 2424, it failed, because the court held that it should be settled in the earlier and original case.

Much stress is laid upon an award by Judge Hoar. The submission to him was signed by counsel, and not by the parties, and it does not appear that Pike's counsel had any other authority to refer than that arising from his general employment as counsel, nor that Pike subsequently ratified or even knew of the submission or hearing under it. It could not be a reference of suit 2170, because Swift, an original defendant, was not a party to it by himself or counsel—nor could an award under it determine anything more than the title to the Swift notes, as between Gregory and Pike. Other parties, subsequently brought in, claimed rights, and Kemp, at least, was ultimately shown to have a substantial interest therein.

While an attorney may be regarded, under his general employment, as endowed with authority to submit his client's cause to arbitration, *Buckland* v. *Conway*, 16 Mass. 397, *Everett* v. *Charlestown*, 12 Allen, 96, it is doubtful whether that authority is sufficient to justify a stipulation like that in this case, that in case of death of either party before award made, the award when made shall bind the legal representative. The death of Pike previous to conclusion of the hearing before Judge Hoar, terminated the authority of his attorney, Talbot, and he was unauthorized to proceed further for him. He had not then become the attorney of

Mrs. Pike, the executrix, and was not empowered to continue the hearing on her account. So the death of one of the parties to a submission operates a revocation of the submission. *Sutton* v. *Tyrel*, 10 Vt. 94; *Marseilles* v. *Kenton*, 17 Pa. St. 245.

If, therefore, after Pike's death Judge Hoar made an award, it was inoperative, unless saved by the stipulation in the submission as to the legal representatives, within the doctrine of *Tyler* v. *Jones*, 3 Barn. & Cr. 144. But even in that event, Mrs. Pike, executrix and residuary legatee under the will of F. A. Pike, before any award was made, revoked the submission by written notice to that effect to Judge Hoar. It is universally held that any submission, not by rule of court, may be revoked by a party to it, before award made. *Green* v. *Pole*, 6 Bingham, 443; *Dexter* v. *Young*, 40 N. H. 130; *Brown* v. *Leavitt*, 26 Maine, 251. It is otherwise if the submission is by rule of court. *Haskell* v. *Whitney*, 12 Mass. 47. If the stipulation in the submission that the legal representative should be bound by an award after death of one of the parties is sufficient to bind the representative, it follows that upon such representative the power to revoke must devolve.

But we are satisfied from the acts and declarations of Judge Hoar, and the acts of the parties then and subsequently, that Judge Hoar did not regard himself as making an award of binding force, and that both parties so understood. For instead of a delivery of the Swift notes by Judge Hoar to Gregory, in accordance with his finding and in execution of the terms of the submission, he delivered them to the attorneys of the respective parties, who, by a previous arrangement, delivered them to Stetson, to be by him retained subject to the joint order of Brooks and Talbot— and thenceforward the parties proceeded with the equity cause 2170, took testimony, and had a hearing, subsequent bills and answers were filed, and the litigation proceeded from December, 1886, when Judge Hoar surrendered the notes, to June, 1896, when final decree was entered in the original equity suit. Gregory does not appear to have made any claim under the award, except by his supplemental bill filed in Jannary, 1887, in equity cause 2170.

When Butterfield delivered the Swift notes, not then due, to F.

A. Pike as collateral for a payment of $25,000 then due under his contract, the notes bore upon their back the blank indorsement of Jones, the payee, which was a sufficient assignment. The holder was authorized to fill such indorsement with a promise to pay the contents to him. Randolph's Commercial Paper, § 660; *Josselyn* v. *Ames*, 3 Mass. 274; *Sweetser* v. *French*, 13 Met. 262; *Wareham Bank* v. *Lincoln*, 3 Allen, 192. Butterfield had the possession and indicia of ownership of the notes, and Pike received them without notice of any claim by Gregory or any other party, for a valuable consideration, and was entitled to hold them as a bona fide holder to the extent of his claim of $25,000. Pomeroy's Equity, § 710; *McNeil* v. *Tenth Nat. Bank*, 46 N. Y. 325; *Combes* v. *Chandler*, 33 Ohio St. 178; *Farmers' Nat. Bank* v. *Fletcher*, 44 Iowa, 252.

But the rights of these parties have been determined in the litigation in the circuit court. That court had jurisdiction of the subject matter and of all the parties in interest. They all appeared and were heard and a final decree rendered. It is now res judicata. Under that decree the defendant rightfully received the funds which the complainant claims in this suit, and she is entitled to hold them.

It is objected that the record offered by defendant of the proceedings in the Circuit Court is not admissible, because not a complete record, and not properly certified.

The record was prepared for the Supreme Court of the United States in the appealed cases of this complainant against this defendant and Kemp's cross-bill. By agreement of counsel certain depositions were not printed in that record—but they are not material here. The record contains all the pleadings of all the parties claiming an interest in the Swift notes, and the proceedings of the court thereon up to and including the final decree. Nothing further is required or would be of use here. The attestation by the clerk of that court, under its seal, is a sufficient affirmation of the verity of the matters contained in the record. We regard that record, as verified, admissible.

It is also objected that the decree dealt with equity cause 2170, as a proceeding in rem. When that suit was instituted, the Swift notes existed, unpaid. Pending the litigation, the notes were con-

verted into money by their payment, which then stood as a substitute for the notes. The parties claiming an interest in the notes desired through that interest to realize their share of the money the notes called for, that being the only value in them. This end was appropriately accomplished by the decree rendered. In fact, it was the only decree that could be rationally entered after the notes had been converted into money.

Bill dismissed with costs.

ARTHUR C. DUTCH *vs.* BODWELL GRANITE COMPANY.

Knox. Opinion February 16, 1900.

Evidence. Expert. New Trial.

The admission of immaterial evidence is not necessarily error; but it may be, if the evidence is mischievous and calculated to mislead the jury.

The defendant had exceptions to evidence that blacksmiths do not commonly use refined iron in forgings required to withstand a strain. *Held;* that whether they do or not is immaterial, since they may not use it for various reasons, e. g. its weakness, cost, non-malleability and difficulty in working it, or the infrequency of not having a supply at hand, or for other reasons peculiar to them.

The plaintiff obtained a verdict for personal injuries which he contended, among other reasons, was caused by the defendants' negligent construction of a dray used by them for hauling stone. The case was contested upon other points besides the defective dray, and the defendants contended that the injury resulted from the plaintiff's own conduct and not from the defective dray.

Held; that a motion for a new trial should be overruled, it appearing that the trial was a fair one, conducted by eminent counsel and the verdict supported by evidence which the court cannot say is insufficient.

ON MOTION AND EXCEPTIONS BY DEFENDANT.

This was an action on the case for personal injuries, in which the jury returned a verdict of $1623, for the plaintiff.

Second count in plaintiff's declaration.

For that whereas the said defendant was a corporation legally organized and incorporated and was on the twentieth day of Sep-

tember, A. D. 1897, and for a long time prior thereto, had been operating a stone quarry in Jonesboro, in the county of Washington and State of Maine, and in hauling and transporting cut and rough stone from the quarry aforesaid to the wharf in said Jonesboro; that said corporation in the transportation of stone as aforesaid, constructed and used several carts and carriages known as drays, upon which the stones aforesaid were loaded and when so loaded, were hauled to a wharf in said town by horses and oxen belonging to said corporation.

And the plaintiff avers that on said twentieth day of September, 1897, he was and had been for some time prior thereto, employed by said defendant, for hire, as a teamster and driver of one of the teams of horses aforesaid.

And the plaintiff avers that it was the duty of said defendant corporation to furnish and provide him, while so employed, with proper, safe and suitable vehicles for the transportation of the stone aforesaid and for the performance of his labor and duty in his capacity as teamster in the discharge of his duties aforesaid; yet the said defendant unmindful of its obligations, as aforesaid, on said twentieth day of September, 1897, furnished to the plaintiff's use in his capacity aforesaid and for the purposes aforesaid, an unsafe, defective and unsuitable cart or dray for the purpose aforesaid, viz:—that, as constructed, the band which supported the forward part of the body of said dray was not made of suitable iron, and was wholly unfit for use and it would not endure or stand the strain and heavy weight to which the same was subjected or would ordinarily be subjected, all of which was well known to said defendant corporation, but of which the plaintiff had no knowledge and of which defect he was entirely ignorant; that notwithstanding the defect, imperfect and unsuitable iron and other materials of which said dray was constructed, the defendant, by its superintendent, foreman and agent, ordered and directed the plaintiff to go to the quarry aforesaid with the dray aforesaid and load thereon a stone of great weight and haul the same from said quarry to the wharf aforesaid; that in obedience to said order he loaded the stone aforesaid on the dray aforesaid and, while in the exercise of due

care and caution, he attempted to draw the load with his four-horse team, but being unable to do so, another four-horse team was hitched thereunto, by order of defendant, ahead of the team driven by the plaintiff; that the plaintiff in order to drive his team aforesaid sat on the seat provided for teamsters which was situated over the forward axle; that having proceeded a short distance toward the wharf aforesaid, and while the plaintiff was exercising due care, said band which supported the forward part of the body of said dray and which was affixed to the forward axle thereof, by reason of the defect aforesaid, broke or was torn open by the weight of the stone aforesaid, which permitted the body of said dray to fall suddenly to the ground causing the horses attached thereto to suddenly start forward and which, with the shock and fall aforesaid, caused the seat aforesaid to lurch forward, whereby the plaintiff was violently thrown to the ground, ledge and rocks there situated, and by reason thereof, both bones of his right leg above and near the ankle joint were fractured and broken, and by reason thereof, for a long time afterward the plaintiff suffered great pain and anguish, and by reason thereof he has been from thence hitherto unable to perform much, if any, manual labor, and as appears, is permanently injured, thereby and by reason thereof he has been subjected to great expense for surgical and medical attendance and nursing, to the damage of the said plaintiff (as he says) the sum of five thousand dollars.

The defendant's exceptions, which were to the admission of evidence introduced by the plaintiff, are stated in the opinion.

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

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

Counsel cited: *Harley* v. *Buffalo Car Mnfg. Co.*, 65 Hun, 624; *McDonald* v. *State*, 127 N. Y. 18; *Sowers* v. *Dukes*, 8 Minn. 23; *Bills* v. *City of Ottumwa*, 35 Iowa, 109; *McGregor* v. *Brown*, 10 N. Y. 114; *Pulsifer* v. *Berry*, 87 Maine, 405; *Hill* v. *Portland & Rochester R. R. Co.*, 55 Maine, 445; *McCarthy* v. *Boston Duck Co.*, 165 Mass. 165; *Shepard* v. *Creamer*, 160 Mass. 496; *Hill* v. *Winsor*, 118 Mass. 251; *Hinckley* v. *Barnstable*, 109 Mass. 126;

16 Am. & Eng. Ency. of Law, p. 462; *Lake Erie & W. R. Co.* v. *Mugg*, 31 N. E. Rep. (Ind.) 564.

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

HASKELL, J. One issue on trial was whether a band, made of refined iron, around the forward axle of a four-wheeled dray was of suitable material to hang the forward end of the body of the dray upon.

A blacksmith of fifty years' experience was called as a witness for plaintiff, and in substance testified, that refined iron is a cheaper iron than Norway iron, and that the ore in it is not so good; that it is not so strong by nearly half; that some of it is brittle and that some is quite tough.

The following colloquium, in substance, took place in the presence of the jury:

Q. If you were asked to make a strap of iron, such as I have described, for a dray would you consider refined iron suitable material to be used? (Objected to.)

Court: You may get from him all he knows about iron, its tensile strength, perhaps, and the effect of it in certain conditions and places and its wear, and all those things that he knows or can testify to; but in the end whether it is suitable for a particular purpose must be determined by the jury.

Q. Is refined iron, among blacksmiths, commonly used where tensile strength is required? (Objected to and admitted subject to exception.)

A. No, sir.

Q. What is commonly used? (Objected to and admitted subject to exception.)

A. Norway iron.

Q. For what purpose is refined iron, as distinct from Norway iron, generally used?

A. It is used for a good many purposes, wheel tires for one thing, and then it is used on vessels for a good many things, hatch combings and chain plates and all such work as that.

Q. State whether or not upon any of those you have mentioned there is any strain?

A. I should think there was some strain upon chain plates.

The whole trend of this examination is to show that refined iron is not capable of withstanding a heavy strain, and the jury must have so considered it.

The evidence excepted to is, that blacksmiths do not commonly use refined iron in forgings that are to withstand a strain. Whether they do or no is immaterial. They may not use it because of its weakness, or of its cost, or of its non-malleability and hardness and the difficulty in working it, of the infrequency of having it at hand or for other reasons peculiar to them. Forgings are best made from metal that is ductile and tough, and yet a harder, less ductile metal would serve the purpose equally well. Immateriality made the evidence admitted incompetent. Mere immateriality of evidence admitted is not, necessarily, error. *Flint* v. *Rogers*, 15 Maine, 67. It may be, if the evidence be mischievous and calculated to mislead the jury. *Royal* v. *Chandler*, 81 Maine, 118; *Woodroffe* v. *Jones*, 83 Maine, 21; *Pease* v. *Burrowes*, 86 Maine, 170.

Is the evidence admitted mischievous and calculated to mislead the jury? No exception is taken to the charge, and no request was made for instructions as to the proper application of the evidence excepted to, and we cannot say that it was of so mischievous a character, taken with the context, as to naturally mislead the jury. On the other hand, it impresses us simply as an opinion of the witness as to the comparative strength of the two kinds of iron, refined and Norway. There was much other evidence in the case upon the question, and we feel that the verdict should not be disturbed, because this fragment of evidence, buried in the mass, literally understood, was inadmissible. *Braley* v. *Powers*, 92 Maine, 208.

The evidence is voluminous, and the case was stoutly contested upon other points than the sufficiency of the strap. The defense contended that the injury resulted from the plaintiff's own conduct and not from the defective iron. The trial seems to have been a fair one, conducted by eminent counsel, and the verdict is cer-

tainly supported by evidence, and we cannot say by insufficient evidence.

Motion and exceptions overruled.

JOSHUA T. BIGELOW

vs.

GRANITE STATE FIRE INSURANCE COMPANY.

Somerset. Opinion February 19, 1900.

Insurance,—double. Waiver. Stat. 1895, c. 18.

The plaintiff, having an existing valid policy of insurance upon his stock of merchandise in the defendant company, procured of the Imperial Insurance Company, a policy for additional insurance upon the same property. When he procured the insurance last named, he informed the agent of the Imperial Company of the insurance then in force in the defendant company. The Imperial Company issued to him a policy for additional insurance upon the same property in the form known as the "Maine Standard Policy" prescribed by P. L. 1895, Chap. 18, which contained the following stipulation: "This policy shall be void if the insured has now or shall hereafter make any other insurance on said property without the assent in writing or in print of the Company," but did not otherwise assent in writing or in print to the prior existing insurance upon the property insured. Subsequently and during the term named in the Imperial Company's policy, his policy above named in the defendant company having expired, the plaintiff procured from the defendant company, upon the same property, the policy in suit, also in the "Maine Standard" form and containing the stipulation above recited, but did not inform the defendant or its agents that the property was insured in the Imperial Company; and the fact of such insurance was not known to the defendant or its agent until after a loss had occurred, and the defendant company did not therefore assent in writing or in print to such prior insurance. A loss by fire having occurred, the Imperial Company without resistance, paid to the plaintiff its proportion of the loss. The plaintiff brings this suit upon his last named policy in the defendant company to recover its alleged proportional part of the loss.

Held; that the action is not maintainable because of the breach of the stipulation above referred to.

An insurance company may waive, for the benefit of the assured, the stipulation above recited.

Notice of prior existing insurance given to the agent of an insurance company, is notice to the company.

ON REPORT.

This was an action on the case upon a policy against fire. The case appears in the opinion.

Forrest Goodwin, for plaintiff.

The policy in the Imperial Company was rendered absolutely void when the plaintiff took out his policy in suit, because the condition subsequent in the Imperial policy which provides that "that policy shall be void, if the insured shall hereafter make any other insurance on said property without the assent, &c.," was broken the moment that the plaintiff took out his insurance in the Granite State Company. It was essential to the validity of the contract for prior insurance, that the Imperial Company should be notified in writing of the subsequent insurance. The plaintiff did not notify them of the subsequent insurance and never obtained their consent in writing to the subsequent insurance. Therefore the first policy became absolutely void at once upon the obtaining of the last insurance without consent. Nothing could revive it. A contract to be void upon the happening of a contingency becomes void when that contingency happens. Its condition is violated and it is invalid. The plaintiff says, therefore, that his policy of insurance in the Imperial Company was void, and when the policy in suit was put upon the property there was no valid insurance on it; therefore the defendant company is liable.

This precise case has been decided in some of the states. In most of the states the suit has been brought upon the first policy, and the courts have held that the first policy was good because the second was void. The same reasoning by which the courts arrive at the conclusion,—when suit has been brought upon the first policy,—that the policy was good because the second policy was invalid, applies when suit is brought upon the second policy. But in several of the states the direct case in issue here has been decided. In *Emery* v. *Mutual City Ins. Company*, 51 Mich. 469, the facts were these: "A insured his property in a company, whose policy provided that further insurance without the com-

pany's assent in writing, should render it void. A took a policy in another company; a loss occurred; held, in an action on the latter policy, and in view of the claim of avoidance in the former one, that the former became void on getting the second policy, and the second policy therefore was not void." The court says:—"A policy that is to be void on a certain contingency cannot be regarded, where that occurs, as existing for any purpose, and whether ended by agreement or by lapse of time or by breach of condition, is to be regarded as no policy."

In the *New York Central Ins. Co.* v. *Watson*, 23 Mich. 486, under facts nearly similar, the court held that the "first policy became absolutely void at once upon the obtaining of the last insurance without consent. Nothing could revive it short of a new contract or a valid consideration, or such conduct as, by misleading the assured to their prejudice, would operate as an estoppel."

This case was cited with approval in *Continental Ins. Co.* v. *Hulman*, 92 Ill. 156, and *N. A. F. Ins. Co.* v. *Zunger*, 63 Ill. 464. See also 10 Mich. R. 279; 22 Mich. R. 467.

The principle that the later insurer cannot escape liability unless the earlier insurance remains valid is held in, *N. E. Ins. Co.* v. *Schelter*, 38 Ill. 166; *Obermyer* v. *Globe Ins. Co.* 43 Mo. 573; *Mitchell* v. *Lycoming Ins. Co.* 51 Penn. State, 402.

The question of the conflict of authority is ably discussed in *Clark* v. *N. E. Ins. Co.*, 6 Cush. 342, and after reviewing all of the cases bearing upon the subject, the Massachusetts court holds that it is fully satisfied with the correctness of the doctrine held in the case of *Jackson* v. *Mass. Mutual Fire Ins. Co.*, 23 Pick. 418, which decision is fully supported by the decision of the Supreme Court of Pennsylvania in *Stacey* v. *Franklin Fire Ins. Co.*, 2 W. & S. 506-544–545. On the latter case, the court says: "The defendant's defense rests on this, that the plaintiffs are doubly insured; but if the plaintiffs could, at no time, have recourse to the N. A. Ins. Co. it cannot with any propriety be said, that they were doubly insured. If the plaintiffs have failed to perfect their contract with the subsequent underwriters, by omitting to have the prior insurance allowed of and specified on the policy as is required, it is difficult

to imagine in what way the prior insurance can be invalidated or affected. It is a vain, nugatory, void act. An assurance to avoid a policy, must be a valid and legal policy and effectual and binding upon the assurers."

Some of the cases holding this view are *Jersey City Ins. Co.* v. *Nichol*, 35 N. J. Eq. 201, (S. C. 40 Am. Rep. 625); *Jackson* v. *Mass. Mutual Fire Ins. Co.*, 23 Pick. 418, (S. C. 34 Am. Dec. 69); *Hardy* v. *Union Mut. Fire Ins. Co.*, 4 Allen, 217; *Thomas* v. *Builder's Mut. Fire Ins. Co.*, 119 Mass. 121; *Gale* v. *Belknap Ins. Co.*, 41 N. H. 170; *Rising Sun Ins. Co.* v. *Slaughter*, 21 Ind. 520; *Mitchell* v. *Lycoming Ins. Co.*, 51 Penn. State, 402; *Hubbard* v. *Hartford Ins. Co.*, 33 Iowa, 325; *Knight* v. *Eureka Ins. Co.*, 26 Ohio St. 664.

The question has also received a very able and elaborate discussion in our own State, in the case of *Lindley* v. *Union Farmers Mutual Fire Ins. Co.*, 65 Maine, 368.

In that case the plaintiff took out a policy of insurance in the defendant company, subsequently he took out another policy of insurance upon the same property, in the Hartford Ins. Co.; the first policy contained a provision against other insurance without notice in writing, and the Hartford policy contained a provision of forfeiture, "if the assured shall have, or shall hereafter make any other insurance on the property hereby insured, whether such other insurance is valid or invalid, without the consent of the company written hereon."

Neither of the companies gave the consent provided in the policies; the buildings were burned while both of the policies were in force; the plaintiff brought suit upon the Hartford policy, which occupied precisely the same position in that case as the defendant company does in the case at bar; and the Hartford Company settled. The plaintiff then brought suit against the Union Farmers Mut. Fire Ins. Co. The court held that the first policy was not void by reason of the subsequently acquired insurance; they held that the Hartford Company's policy was void, and therefore the first policy was not void.

It makes no difference that the Imperial Co. treated its policy

as a valid and subsisting contract, and paid its proportion of the loss, (if they were not obliged to pay,) if their contract was invalid and void. No matter what they have done since, it has no effect. They could have made the plaintiff a present, if they saw fit; if they were not compelled to pay legally, the fact that they have paid has no bearing upon the defendant company.

This point was decided in the case, *Lindley* v. *Union Farmers Mutual Fire Ins. Co.*, supra; *Philbrook* v. *N. E. Mut. Fire Ins. Co.*, 37 Maine, 137; *Thomas* v. *Builders Mut. Fire Ins. Co.*, supra.

Leslie C. Cornish, for defendant.

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

FOGLER, J. This is an action of assumpsit upon a policy of insurance dated February 13, 1896. The case is submitted to the law court on report. The history of the case is thus:

February 13, 1895, the plaintiff obtained from the Granite State Fire Insurance Company a policy of insurance of that date upon his stock of merchandise and fixtures contained in his store in Norridgewock, in the sum of six hundred dollars, for the term of one year. July 23, 1895, he obtained from the Imperial Insurance Company a policy of insurance upon the same property in the sum of six hundred dollars for one year. February 13, 1896, he obtained from the defendant company the policy in suit upon the same property in the sum of six hundred dollars for one year.

A fire occurred June 25, 1896, which destroyed a large portion of the property insured. In his proof of loss the plaintiff stated that the value of the property insured was $1037.19, and that the value of the portion destroyed was $841.85. The policy in the Imperial Company and the policy in suit were each in the form known as the "Maine Standard Policy" as required by P. L. 1895, Chap. 18. Each of said last named policies contained this stipulation: "This policy shall be void if the insured has now, or shall hereafter make any other insurance on said property, without the assent in writing or in print of the company".

When the plaintiff obtained his policy from the Imperial Company July 23, 1895, he orally notified the agent of that company that he already had six hundred dollars insured on the same property in the Granite State Company under its policy of February 13, 1895. When, however, he obtained the policy in suit, February 13, 1896, he did not inform the defendant company or its agent, that the property was then insured in the Imperial Company, and the defendant company had no knowledge of such prior insurance until after the loss occurred.

The Imperial Insurance Company paid to the plaintiff without resistance, its proportional part of the loss under a stipulation in its policy that in case of other insurance it should pay only its proportion of the loss. The defendant, the Granite State Insurance Company, refused to pay any part of the loss and the plaintiff has brought this suit against it, counting upon its policy of February 13, 1896. The defendant company invokes the stipulation or condition above quoted from its policy as to other insurance, and claims that the plaintiff's failure to give it notice of the existing insurance in the Imperial Company under its policy of July 23, 1895, and to obtain the assent of the defendant company in writing or print to such insurance, enables it to avoid the policy in suit.

The plaintiff meets this position of the defense by alleging that the policy of the Imperial Insurance Company was not, at the time when he took out the policy in suit, a valid contract of insurance, but was invalid and void, because the Imperial Company did not assent in writing or in print to the insurance on the same property under the policy of the Granite State Company of February 13, 1895; and that, therefore, the policy in suit is valid and binding upon the defendant, although he gave no notice to it of the policy of the Imperial Company nor obtained its consent thereto. He asks this court to declare, in order that he may maintain this action, invalid his contract with the Imperial Company, though that company is not a party to this suit and although that company has fully performed such contract on its part, and although the plaintiff has demanded and received and still retains the money paid by that company under such contract on account of the

destruction of the property insured. This we cannot do, for we are of opinion that such contract of insurance in the Imperial Company was existing, valid and binding at the time when the plaintiff obtained the policy in suit from the defendant company.

The agent of the Imperial Insurance Company, when its policy was issued, had knowledge, derived from the plaintiff, that the property insured was also insured by the Granite State Fire Insurance Company by and under its policy of February 13, 1895. The agent's knowledge was, in law, the knowledge of his company. *Hilton* v. *Phoenix Ins. Co.*, 92 Maine, 279. Having such knowledge the Imperial Company issued its policy of July 23, 1895. It is true that the company did not assent to the prior insurance, unless the writing and delivery of its policy was such assent, but the fact that the company issued its policy, and the further fact that it did not deny its liability under the policy, but paid its proportion of the loss, are sufficient evidence that the company waived the stipulation in question. That an insurance company may, for the benefit of the assured, waive express stipulations, or conditions contained in its policy is too thoroughly settled by this court to require citation of authorities.

Although the act of 1895 prescribes the form of a standard policy and the stipulations to be contained therein, it does not restrict or abridge the right of waiver. In the case at bar the Imperial Company had knowledge of the prior contract of insurance. Its failure to assent thereto "in writing or in print", was undoubtedly its own neglect or inattention. It would be a reproach to the law to hold that the company had not the right to waive such omission or failure.

The defendant company when it issued the policy in suit had no knowledge or notice of the Imperial policy and had no knowledge of the fact until after the loss occurred. It could not, and did not assent in writing or in print, to such prior contract of insurance. There is no evidence of waiver on its part. By the express terms of the policy in suit the defendant company is absolved from all liability thereunder.

Judgment for defendant.

Mr. Justice EMERY concurred in the result.

SAMUEL M. GILE *vs.* FRANCIS M. SAWTELLE.

Piscataquis. Opinion March 21, 1900.

Evidence. Burden of Proof.

In an action to recover one hundred dollars which the defendant agreed to pay for the use of a field and pasture, it appeared that the defendant admitted the contract set up by the plaintiff, but said the plaintiff at the same time guaranteed that the field would cut fifteen tons of hay that season.

Held; that the burden of proving the guaranty and the breach thereof was upon the defendant; and that an instruction by the presiding justice as to the guaranty set up by the defendant "while I will not instruct you that the burden lies upon him, I do instruct you, as he sets that up as an independent proposition, that it should fully appear to be a fact" is calculated to give the jury an impression that, with respect to the alleged contract of guaranty, there was some peculiar duty resting upon the defendant, other and less than the ordinary burden, of proving it by a greater weight of evidence.

ON EXCEPTIONS BY PLAINTIFF.

The case is stated in the opinion.

Henry Hudson, for plaintiff.

J. S. Williams, for defendant.

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

WHITEHOUSE, J. This is an action of assumpsit brought by the plaintiff to recover the sum of one hundred dollars under an express contract for the use of the defendant's field and pasture. The defendant admitted the contract set up by the plaintiff, but averred that the plaintiff at the same time guaranteed that the field would cut fifteen tons of hay that season, and claimed that he had sustained damage by reason of a breach of that guaranty.

Upon this branch of the case the presiding justice instructed the jury, inter alia, as follows: "The defendant sets up this contract of guaranty, and while I will not instruct you that the burden of proof lies upon him, I do instruct you, as he sets that up as an independent proposition, that it should fully appear to be a fact,

because while it is connected with the trade, yet it was an independent proposition set up by Mr. Sawtelle, and if you find there was no guaranty, that goes out of the case. If you find there was a guaranty, then what amount would make Mr. Sawtelle whole under the guaranty; supposing, for instance, that Mr. Sawtelle had sued Mr. Gile for a breach of warranty, how much ought he to recover?" The verdict was for the defendant, and the case comes to this court on the plaintiff's exceptions to this instruction respecting the burden of proving the contract of guaranty.

It is an elementary principle that whenever in a court of justice one party undertakes to establish a proposition of fact as the foundation of a suit against another, or to set up a new proposition to obtain a release from another's claim against him, he is deemed the moving party or actor in the suit, and must produce a greater weight of evidence in support of his contention. "It makes no difference," says Mr. Wharton, "whether the actor is plaintiff or defendant, so far as concerns the burden of proof. If he undertakes to make out a case, whether affirmative or negative, this case must be made out by him, or judgment must go against him. Hence it may be stated as a test admitting of universal application, that whether the proposition be affirmative or negative, the party against whom judgment would be given, as to a particular issue, supposing no proof to be offered on either side, has on him, whether he be plaintiff or defendant, the burden of proof which he must satisfactorily sustain." 1 Whar. Ev. § 357, and cases cited. Indeed, this doctrine is too familiar and well-settled to admit of discussion or require the citation of authorities.

In *Dorr* v. *Fisher*, 1 Cush. 271, the action was for the recovery of the contract price of a quantity of butter. The defendant admitted the contract, but set up in defense a breach of warranty respecting the quality of the butter. It was held that the burden of proof was on the defendant to show that it was not equal to the warranty.

In *Lothrop* v. *Otis*, 7 Allen 435, the action was to recover for a set of scales. The defense admitted the contract price, but claimed that the scales were warranted to be "six-ton scales" and that they

did not correspond to the warranty, and it was held that "the burden of proof was on the defendant to prove the contract which he had alleged and also the breach of it." So in *McGregory* v. *Prescott*, 5 Cush. 67, the court say: "On an affirmative contract being proved to pay money or perform some duty, it is incumbent on the defendant to prove payment, performance or tender, or an excuse therefrom." See also *Windle* v. *Jordan*, 75 Maine, 154, and cases cited.

"There is much ambiguity," says Prof. Thayer, "in what is said of the 'shifting' of the burden of proof. As to this it is vital to keep quite apart the considerations applicable to pleading and those belonging to evidence. We see that the burden of going forward with evidence may shift often from side to side; while the duty of establishing his proposition is always with the actor and never shifts." Prelim. Treat. on Ev. p. 378. See also the like discrimination made in *Buswell* v. *Fuller*, 89 Maine, 602, and *Willett* v. *Rich*, 142 Mass. 360.

But as already seen, the solution of the question presented in the case at bar does not involve a special inquiry into this distinction between the burden of proof and the burden of evidence. The plaintiff undertook to prove that the defendant agreed to pay him one hundred dollars for the use of his field and pasture. It was incumbent upon the plaintiff to establish this proposition as the foundation of his action. Upon this proposition the plaintiff was the actor. The duty of establishing it was imposed upon him and never shifted. His evidence upon this point, however, was not controverted. The defense admitted the contract of hiring, and made no question in regard to the price named by the plaintiff. But it was contended that the plaintiff guaranteed that the field would cut a certain quantity of hay that season, and that it failed to do so. The defendant undertook to prove this contract of guaranty, and claimed damages for the breach of it by way of recoupment. He set up an independent proposition to obtain a release from the plaintiff's claim against him for the contract price. This procedure was a substitute for a cross-action on the plaintiff's guaranty. But if the defendant had brought such an action, it is entirely clear

that the burden of proof would have been upon him to prove the alleged guaranty and also the breach of it. The proposition to be established is the same whether advanced as the basis of a separate action or in defense of a pending suit to meet the plaintiff's claim. He who sets it up is as clearly and distinctly the actor in the one case as in the other. It is immaterial whether he sets up the proposition as defendant in this suit or as plaintiff in a cross-action. In either case the burden of proof is upon him to make good his contention by a preponderance of evidence, and that burden never shifts.

The instruction excepted to was doubtless inadvertently given, under the impression of the moment, that as the burden of proof never shifts it could not properly be said to rest on the defendant at any stage of the proceedings; and it is by no means certain that the plaintiff is aggrieved by the instructions actually given. But the explicit refusal of the presiding justice to instruct the jury that the burden was on the defendant to establish the proposition set up by him, though followed by the statement that it must "fully appear to be a fact," was calculated, it is feared, to give the jury an impression that with respect to the alleged contract of guaranty there was some peculiar duty resting upon the defendant, other and less than the ordinary burden of proving it by a greater weight of evidence. It is accordingly the opinion of the court that the entry must be,

Exceptions sustained.

STEPHEN C. PERRY, Admr., *vs.* AUGUSTUS BAILEY, and others.

Cumberland. Opinion March 21, 1900.

Trespass. Landlord and Tenant.

The owner of realty cannot maintain trespass quare clausum unless he is in possession at the time of the alleged trespass, for the gist of the action is the injury to the possessory right. Therefore, a landlord out of possession cannot maintain trespass if the tenant is in possession.

A qualification of this rule permits a landlord, while the tenant is in possession, to maintain trespass for permanent injuries to the freehold affecting its value.

Held; in this case, that the entry by the defendant was by lawful authority of the tenant, and hence there was no trespass on the part of the defendant.

Trespass ab initio does not lie for an abuse of authority to enter upon land given by a party. It will only lie for the abuse of authority given by the law.

ON EXCEPTIONS BY DEFENDANTS.

This was an action of trespass quare clausum tried by the justice of the Superior Court, for Cumberland county, without the intervention of a jury, at the December Term, 1898, subject to exceptions in matters of law, who signed a bill of exceptions substantially as follows.

The plaintiff is the administrator, with the will annexed, of the estate not already administered of one Charles Deake, late of Portland, deceased; and in his representative capacity, was on the fifth day of August, 1895, and has been since, the owner of what is known as Deake's wharf in the city of Portland.

This wharf extends from Commercial street into the harbor, and lies between Sturdivant's wharf and Dyer's wharf; the three wharves being separated by two docks. Deake's wharf was built prior to the fire of 1866. Soon after that date it was extended, and was constructed upon each side with walls of shore stone, filled in between with earth, and remained in that condition until August 19, 1895, when the injury complained of occurred. It had a railroad track, running from the main line on Commercial street down on the wharf to a shed or bonded warehouse, near the outer end of the

wharf, over which track railroad cars were run, in order to deliver lumber in the shed or warehouse.

At this time, there was upon the lower end of the wharf the shed or warehouse referred to; and at the upper end, near Commercial street, was a retail ice house, an office occupied by S. C. Dyer & Co., and another building occupied by a yacht club. For several years prior to this date, the greater part of the wharf, including the place of the alleged injury, had been leased to S. C. Dyer & Co., of which firm one James E. Marrett was one of the partners. With the exception of the ice business, and the yacht club office, the wharf had been used by the firm of S. C. Dyer & Co., almost exclusively in the shipping and storing of lumber. For twenty-five years before that time, neither the owners nor the lessees had offered to the general public the use of this wharf; nor had the wharf been used, as matter of fact, by the general public for that length of time, but had been used exclusively, with the single exception named, for the storage and shipment of lumber by the lessees, S. C. Dyer & Co.

The lease of S. C. Dyer & Co., which had been in existence for many years, expired during the first part of the year 1895, at which time the lessees notified the plaintiff, that they did not wish to renew the lease on the terms contained in the same, and from that time on, until the 19th of August, when the injury complained of occurred, S. C. Dyer & Co. were occupying the wharf under no arrangement as to the amount of rent. There was some talk about the making of a new lease, but the parties had not agreed upon any terms as to the length of occupancy, or rate of compensation for use and occupation. As matter of fact, when settlement was finally made, the lessees paid ten cents a thousand per month for the storage of such lumber as was put upon the wharf during the period of occupancy subsequent to the expiration of the lease. After the expiration of the lease, and up to the time when the alleged injury occurred, they were tenants at will of the plaintiff.

At the time of the injury complained of, the defendants were owners of the three-masted schooner, called the Julia S. Bailey of which Calvin W. Sprague was captain. She reached Portland on

the fifth of August, 1895, having been towed to this port from Sullivan Falls, Me. While coming out of Sullivan harbor, the schooner met with some mishap, the exact nature of which the testimony does not disclose, and hence was towed from that port to Portland, to be repaired in the dry dock. The vessel was loaded with paving stone; and before she could go into the dry dock it was necessary to discharge her cargo. At first, an arrangement was made with Mr. Fred I. Sturdivant, who had charge of Sturdivant's wharf. The vessel hauled into the dock, and discharged, upon the second day of August, about one hundred tons of paving stone upon that wharf. After having landed so much of his cargo, he moved his vessel to Dyer's wharf, and there discharged about one hundred and fifty tons of stone. He then, owing to the bad berth of the Julia S. Bailey, as he testifies, moved from that wharf to Deake's wharf, where he discharged some two hundred tons or more of stone; and the occupancy of this wharf, for the purpose of discharging a part of his cargo, is the subject of the present litigation.

From the testimony, it appears that Captain Sprague employed one A. K. P. Leighton, a repairer of vessels, to secure permission to discharge a part of his cargo upon Deake's wharf. And Mr. Leighton had an interview with James E. Marrett, one of the partners of S. C. Dyer & Co. Mr. Leighton stated to Mr. Marrett, that the captain of the Julia S. Bailey would like to pile about fifty tons of paving stone on the wharf, indicating the place where he wanted to pile it. He stated to Mr. Marrett that the vessel was in distress; that the cargo must be removed from her in order to have her repaired; that part of the cargo had been discharged on Sturdivant's wharf, and part on Dyer's wharf; and that the remaining fifty tons must be gotten out so that she could be placed on the railway for repairs. Mr. Marrett informed Mr. Leighton, that he had no authority to allow the cargo to be piled on the wharf; and he told him that it would not do to put the vessel in there, because the firm of S. C. Dyer & Co. had a vessel coming, that she was chartered, and was expected in about a week or ten days, and the dock must be clear for her. Mr. Leighton then said

that he only wanted the privilege of leaving the stone there for three or four days, just long enough to repair the vessel on the railway. The result of the interview was, that Mr. Marrett finally told Mr. Leighton, that if he would get the stone away, so that they would not interfere with S. C. Dyer & Co. in any way, and would be sure not to have the vessel there to block their vessel when it arrived,—so far as the firm of S. C. Dyer & Co. were concerñed, he might pile them there. After the expiration of the lease, no authority was given at any time to the firm of S. C. Dyer & Co., by the owner of the wharf, to allow the using of the wharf for any purpose.

At this time, the vessel was at Dyer's wharf, across the dock. No arrangement was made between them as to what should be paid for wharfage; nor has anything been paid, or offered to be paid, either to Dyer & Co., or to the plaintiffs. The Julia S. Bailey thereupon moved across the dock to Deake's wharf, and discharged upon said wharf, near the edge of the same, extending some thirty or forty feet more or less up and down said wharf, some two hundred tons of paving blocks. The discharging began on the 7th of August, 1895, and was completed on the 9th. Mr. Marrett left the city on the 9th, and did not return until after the alleged injury to the wharf. The paving stone remained there until the 19th day of August, when, owing to the heavy weight of the same, the side of the wharf where the stone were piled, for some thirty feet, gave way; and the shore stone, of which the wharf was laid up, as well as the paving stones, were thrown into the dock.

The defendants requested the presiding justice to find, as matter of fact, that the wharf in question was a public wharf. He did not find this as a fact one way or the other, but ruled as matter of law, (1) that so far as the facts in this case are concerned, it is immaterial whether Deake's wharf was a public or private wharf.

Upon these facts he further ruled, as matter of law, (2) that, so far as the plaintiff in the case is concerned, the defendants were trespassers, when they discharged the cargo of paving stone on plaintiff's wharf, and must respond in damages for the injury which the plaintiff sustained.

Also, as matter of law, (3) that the measure of damages, is the difference between the value of the wharf before the injury and its value afterwards. And under this rule he assessed damages at the sum of fourteen hundred dollars.

Henry W. Swasey, for plaintiff.

At the time of the injury sued for, S. C. Dyer & Co. were tenants at will of the plaintiff. *Franklin Land Co.* v. *Card*, 84 Maine, 532.

Trespass q. c. may be maintained by the owner of land for a permanent injury done to the freehold though the land be in occupation of a tenant at will. *Davis* v. *Nash*, 32 Maine, 411; *Lawry* v. *Lawry*, 88 Maine, 482.

Tenant at will has no interest which he can transfer to another or over which he can exercise any control. *Cooper* v. *Adams*, 6 Cush. 90; *Cunningham* v. *Holton*, 55 Maine, 33.

From the nature of the relation, no agency is implied by law in a tenant at will.

The evidence shows that S. C. Dyer & Co. expressly and unequivocally stated to Mr. Leighton that they had no such agency in fact.

The court made no special findings as to the wharf being a public one, but did rule it to be immaterial, under the facts, whether the wharf was a public or a private wharf. This did not aggrieve the defendants and can do them no injustice. *Braley* v. *Powers*, 92 Maine, 208.

The case shows plainly that whatever was done by defendants on this wharf was done, not under an implied license to use same as a public wharf to which they had made fast in stress of weather, or to which they had gone to take on freight therefrom; and was not under a claim of right to use same as a public wharf on payment of a reasonable wharfage; but was done under and only under a special and limited permission by them obtained at their own solicitation from Mr. Marrett, who had already told them he had no authority to allow them to pile stone on the wharf.

The case finds that "after the expiration of the lease no authority was given at any time to the firm of S. C. Dyer & Co. by the

owner of the wharf, to allow the using of the wharf for any purpose."

Counsel cited: *Deering* v. *Proprietors Long Wharf*, 25 Maine, 51; *State* v. *Wilson*, 42 Maine, 26; *Montgomery* v. *Reed*, 69 Maine, 515; Laws of 1856, c. 215; Charter of city of Portland, 22; *Commonwealth* v. *Alger*, 7 Cush. 53; *Boston* v. *Richardson*, 105 Mass. 351; *Yates* v. *Milwaukee*, 10 Wall. 497; *Transportation Co.* v. *Parkersburg*, 107 U. S. 691; *Hanford* v. *St. Paul, & Duluth R. R. Co.*, 43 Minn. 110; *Shively* v. *Bowlby*, 152 U. S. 1, 19, 20, 37; *St. Anthony Falls W. P. Co.* v. *Water Commrs.*, 168 U. S. 368.

The wharf owner may exclude the public from his wharf. Gould on Waters, 119; *Dutton* v. *Strong*, 1 Black, 23.

Benjamin Thompson, for defendant.

Deake's wharf was a public wharf. *Whitman* v. *Brooklyn Gas Light Co.*, 42 N. Y. 384, 390; *Dutton* v. *Strong*, 1 Black, 23; *Compton* v. *Hawkins*, 90 Ala. 411, 414.

The tests: The purposes for which it was built; the use to which it has been applied; the place where built; and nature and character of the structure. *Heaney* v. *Heeney*, 2 Denio, 625; *Swords* v. *Edgar*, 59 N. Y. 28, 31; *Commissioners of Pilots* v. *Clark*, 33 N. Y. 251, 264; *Bolt* v. *Stennett*, 12 East, 531; *Eastman* v. *The Mayor*, 152 N. Y. 468, 474; *Langdon* v. *The Mayor of N. Y.*, 133 N. Y. 628, 634; *Kingsland* v. *Mayor of N. Y.*, 110 N. Y. 569, 575; Private Laws 1879, c. 175; *Deering* v. *Prop. of Long Wharf*, 25 Maine, 51, 65.

If, therefore, Deake's wharf was a public wharf, within the meaning of that term, the schooner Julia S. Bailey had the right at the time, and under the circumstances as they existed here, (that is, when the wharf was unoccupied, and there were no notices prohibiting its use) to haul in and make fast thereto, and to discharge her cargo thereon, without direct permission or the implied consent of the plaintiff or his tenants, S. C. Dyer & Co. The question whether this wharf was a public or a private wharf is not only material to the correct determination of this case, but is

absolutely necessary thus to distinguish between these two classes of wharves in order to settle the rights of the parties before the court. *Kelley* v. *Tilton*, 2 Abbott, N. Y. Appeals, 495.

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

SAVAGE, J. The plaintiff sues in trespass quare clausum for an injury to his wharf. He alleges that the defendants by their agent unloaded two hundred tons of paving stone upon the wharf without any license, permission or authority therefor, and that the wharf was broken down by the weight of the stone. For many years the wharf had been leased to S. C. Dyer & Co. Their lease expired during the first part of the year 1895, "at which time the lessees notified the plaintiff that they did not wish to renew the lease on the terms contained in the same, and from that time on, until the nineteenth day of August when the injury complained of occurred, S. C. Dyer & Co. were occupying the wharf under no arrangement as to the amount of rent." The captain of the vessel containing the paving stone, through one Leighton, applied to Mr. Marrett, one of the firm of Dyer & Co., for permission to pile fifty tons of stone on the wharf in question, and said that he wanted the privilege of leaving the stone there for three or four days. Mr. Marrett told Leighton that he had no authority to allow the cargo to be piled on the wharf, and also that the firm of S. C. Dyer & Co. had a vessel coming in a week or ten days, and the dock must be clear for her. The result of the interview was that Mr. Marrett told Leighton that "if he would get the stone away so that they would not interfere with S. C. Dyer & Co. in any way, and would be sure not to have the vessel there to block their vessel when it arrived, so far as the firm of S. C. Dyer & Co. were concerned, he might pile them there." No arrangement was made as to the amount of wharfage, and none has been paid or offered to be paid. The case shows that "after the expiration of the lease, no authority was given at any time to the firm of S. C. Dyer & Co. by the plaintiff to allow the using of the wharf for any purpose."

Two hundred tons of stone were unloaded from defendants' vessel onto the wharf, August 7, 8 and 9, 1895, and on the nineteenth day of the same month, owing to the heavy weight of the stone, the side of the wharf, where the stone were piled, gave way and the stone of which the wharf was laid up were thrown into the dock.

For this injury, can the plaintiff maintain trespass quare clausum? We think not. Much of the argument of counsel has been directed to the question whether the wharf was public or private, but this question we do not deem it necessary to consider. For the purposes of this decision, we shall assume, as the plaintiff claims, that the wharf was a private one.

The wharf had been leased to Dyer & Co. After the expiration of the term of the lease, they held over. They continued in possession. Under our statute, and under the circumstances of this case, so far as developed, we think they held as tenants at will, unless by the peculiar stipulations in the lease they had acquired superior rights. *Kendall* v. *Moore*, 30 Maine, 327; *Franklin Land, etc., Co.* v. *Card*, 84 Maine, 528. The lease is not made a part of the case, and we know nothing of its contents. Therefore, it is to be presumed that they held simply as tenants at will, and with the usual rights of tenants at will. Dyer & Co. not only were in lawful possession, but inasmuch as no restrictions are shown, it must be presumed that they had a right to make such use of the wharf as is ordinarily incident to a wharf. Though they may have used it as a private wharf, they were not debarred from permitting vessels other than their own to unload there, for such is the purpose for which wharves are usually built. As tenants, they could use it for any lawful purpose. Their permission to unload stone from defendants' vessel was lawful, and the defendants were thereby authorized to unload stone on the wharf. They committed no acts of trespass so far as S. C. Dyer & Co. were concerned. But for all the purposes of the action of trespass, Dyer & Co., the tenants in possession, are to be considered as the owners, and a license so far as they "were concerned" was sufficient authority for unloading the vessel. Taylor on Landlord & Tenant, § 766.

Now, the well known rule is that the owner himself cannot main-

tain trespass quare clausum unless he was in possession at the time of the alleged trespass, for the gist of the action is the injury to the possessory right. *Chadbourne* v. *Straw*, 22 Maine, 450; *Jones* v. *Leeman*, 69 Maine, 489; *Kimball* v. *Hilton*, 92 Maine, 214. Therefore, the landlord out of possession cannot maintain trespass, if the tenant is in possession. *Bartlett* v. *Perkins*, 13 Maine, 87. A qualification of this rule permits a landlord, while a tenant is in possession, to maintain trespass for injuries to the freehold. *Davis* v. *Nash*, 32 Maine, 411; *Lawry* v. *Lawry*, 88 Maine, 482. But this remedy extends only to acts of trespass. We have said that the entry in this case was by lawful authority. It follows that there was no trespass. *Dingley* v. *Buffum*, 57 Maine, 379. If it be said that the defendants in any event were authorized to pile only fifty tons of stone upon the wharf, and that they occasioned the damage by exceeding their authority, the answer is that an abuse of authority to enter upon land, given by a party, does not render a man a trespasser. *Hunnewell* v. *Hobart*, 42 Maine, 565; *Dingley* v. *Buffum*, supra.

The court is, therefore, of the opinion that the ruling of the presiding judge below, that, upon the facts in the case, the defendants were trespassers, was erroneous.

Exceptions sustained.

STATE *vs.* WILLIAM N. HATCH.

SAME *vs.* HENRY N. BARTLEY.

SAME *vs.* WILLIAM BARRETT.

SAME *vs.* LOUIS GILL.

Piscataquis. Opinion March 26, 1900.

Pleading. Indictment. Surplusage. Intox. Liquors. R. S., c. 27, §§ 35, 37.

A count in an indictment for the offense of being a common seller of intoxicating liquors, in all respects correctly drawn otherwise than that it contains the unnecessarily added words that the offense was committed "under the laws for the suppression of drinking-houses and tippling shops," is not

vitiated by the averment thus uselessly added. Such averment is merely an incorrect and unnecessary over-statement that may be rejected as surplusage. *Held;* that the offense aimed at in the indictment, in this case, is described in the same chapter of the statutes as is the offense of maintaining a tippling shop, but the two offenses are described in different sections of the same chapter.

ON EXCEPTIONS BY DEFENDANTS.

The defendant in each case was indicted as a common seller of intoxicating liquors and was also charged in the same indictment with having been previously convicted as a common seller "under the law for the suppression of drinking-houses and tippling shops."

The defendants demurred to the indictments which were in the following form:

STATE OF MAINE.

PISCATAQUIS SS.

At the Supreme Judicial Court, begun and holden at Dover within and for the county of Piscataquis, in said State on the last Tuesday of February in the year of our Lord, one thousand eight hundred and ninety-nine.

The jurors for said State upon their oath present that William Barrett of Brownville in said County of Piscataquis, at Brownville aforesaid, in said county of Piscataquis on the first day of March in the year of our Lord, one thousand eight hundred and ninety-eight and on divers other days and times between said first day of March aforesaid and the day of the finding of this indictment, without lawful authority, license or permission therefor, was a common seller of intoxicating liquors.

And the jurors aforesaid upon their oath aforesaid do further present that said William Barrett has been before, to wit, at the February term A. D. 1898 of the Supreme Judicial Court, Piscataquis county, Maine, convicted as a common seller of intoxicating liquors under the law for the suppression of drinking-houses and tippling shops in said county of Piscataquis, against the peace of the said State and contrary to the form of the statute in such case made and provided.

A true bill. GEO. L. BARROWS, Foreman.

CHARLES W. HAYES, County Attorney.

The demurrers were overruled by the presiding justice and the defendants were allowed their exceptions.

J. B. Peaks and E. C. Smith; Henry Hudson; Geo. W. Howe, for defendants.

The words "under the law for the suppression of drinking houses and tippling shops" cannot be rejected as surplusage. These words are a part of the charge and cannot be struck out. *State* v. *Mayberry*, 48 Maine, 218.

C. W. Hayes, County Attorney, for State.

Counsel cited: *State* v. *Noble*, 15 Maine, 476; *State* v. *Mayberry*, 48 Maine, 218; *State* v. *Skolfield*, 86 Maine, 149; *State* v. *Corrigan*, 24 Conn. 286; *Com.* v. *Randall*, 4 Gray, 36; *Com.* v. *Hunt*, 4 Pick. 252.

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

PETERS, C. J. These exceptions may be briefly dealt with.

It is first averred in the indictment that the respondent was a common seller, and this part of the indictment is not objected to. Then a former conviction is averred in these words: "And the jurors aforesaid upon their oath aforesaid do further present that the said William N. Hatch has been before, to wit, at the February Term A. D. 1898, of the Supreme Judicial Court, Piscataquis County, Maine, convicted as a common seller of intoxicating liquors, under the laws for the suppression of drinking houses and tippling shops, in said County of Piscataquis, against the peace of the state, and contrary to the form of the statute in such case made and provided."

It is contended, on general demurrer to the indictment, that the former conviction is not well alleged because of the averment that the offense was committed under the laws for the suppression of drinking houses and tippling shops. We think the questionable words may properly be regarded as immaterial and rejected as such. The indictment avers generally that the offense was com-

mitted against the statute, but does not accurately identify the particular statute which the pleader had in mind. It is merely an incorrect and unnecessary over-statement. All the essential features of the offense are found in the count without such statement. The count is perfect without it, and not vitiated with it. The superadded words do not mislead any one. The offense aimed at is described in the same chapter as the offense of keeping a tippling-house is, but in another section, one class of offense being covered by section 35 and the other by section 37 of chapter 27 of the revised statutes. No case in this state has gone so far as to support the respondent's contention.

Exceptions and demurrer overruled.

HOWARD BESSEY, pro ami, *vs.* NEWICHAWANICK COMPANY.

York. Opinion March 27, 1900.

Negligence.

The plaintiff, seventeen years and two months old and of ordinary intelligence, had been employed in defendant's mill off and on for two years, first in the card-room, then as a spinner, and lastly for four weeks in the dye-room where he was, while at work, accidentally injured. Before this he had noticed how the work in the dye-room had been carried on by other employees.

The dye-room contained four vats, each six feet long by five wide and two feet seven inches in height above a planking that circled the vat at the floor. The planks were eight to ten inches wide, lying flatly on the floor and beveled off from the vat. There was an open frame fitted with slats in the vat and a hoisting gear connected with it by which the frame loaded with wool was lowered into and raised out of the hot dye.

To raise the frame up from the vat two men, plaintiff and another, were required to connect certain hooks and rings together in the gearing above the vat, and while they were leaning over the vat, on opposite sides of it, in an attempt to effect the coupling the plaintiff fell into the vat and was badly scalded.

His own evidence was that the floor was wet about the vat, and was usually so, and that he slipped and went into the vat; and neither from him or from any witness is there any other evidence as to how the accident happened. *Held;*

on these facts that the plaintiff cannot recover, either upon the ground that the defendant did not furnish safe and sufficient machinery, or that the plaintiff was not sufficiently instructed in the hazards of the employment. The presumption is that the plaintiff was guilty of some carelessness that caused the injury.

ON REPORT.

This was an action on the case to recover damages received by the plaintiff, a boy of seventeen years, while working in the dye-room of a woolen mill of the defendant in South Berwick. The plaintiff claimed that the defendant was negligent in two particulars: first, in the construction of its vat; and, second, in failing to notify the plaintiff of the dangers of such construction, the plaintiff being of such immature age that he did not appreciate the danger of the work he was set to perform.

The facts are stated in the opinion.

C. Dean Varney, Edward F. Gowell and Geo. F. Haley, for plaintiff.

In *Buzzell* v. *Laconia Manfg. Co.*, 48 Maine, 113, 116, the court say: "It is the duty of every employer to use all reasonable precautions for the safety of those in his service. He should provide them with suitable machinery, and see that it is kept in a condition which shall not endanger the safety of the employed. If the employer knowingly makes use of defective and unsafe machinery, when an injury is done to a servant ignorant of its condition, and in the exercise of ordinary care, he should compensate the person thus injured through his neglect. The capital of the master furnishes the means of his employment. His will determines the place. His sagacity directs, controls and supervises not merely the labor, but the machinery and other instruments and appliances by which the labor is performed. The superior intelligence and determining will of the master demand vigilance on his part, that his servants shall neither wantonly or negligently be exposed to needless and unnecessary peril."

To require a workman while leaning some three feet over a vat filled with scalding hot liquid dye with both hands occupied with doing his work with nothing to keep him from falling in but his

foothold, to oblige him to rely for his foothold on a plank which need not have been there at all, is a flagrant case of "wantonly and negligently exposing a servant to needless and unnecessary peril."

Ordinary care in every situation is proportionate to the injury that may arise to others. *Morgan* v. *Cox*, 22 Mo. 373; *Toledo R. R. Co.* v. *Goddard*, 25 Ind. 185. Wood on Master & Servant (1st ed.) p. 730, § 359, says: "The term 'ordinary care' is a flexible one and has no fixed meaning. What might be considered to be 'ordinary care' in reference to one matter, might as applied to another be gross negligence, therefore the measure of the term 'ordinary care' and of the master's duty is to be estimated from the nature of the implement, the use to which it is devoted and the consequences to the servant in case it should prove defective." Certainly the consequences to the servant in the case of this defect would seem to be serious enough to bring it within the rule laid down by Mr. Wood on the part of the master.

The master having decided to use dangerous machinery was negligent in not informing plaintiff of the dangers.

"The employer may undoubtedly exercise his own judgment as to the kind of machinery he shall use, as well as to the condition in which it shall be kept, having due regard to the rights of others he may do that which in his own view his interest may dictate or he may be careless of that interest. But if he elects to use machinery unsuitable, or permits it intentionally or carelessly to get out of repair so that in its use the employee incurs more danger other than fairly and naturally belongs or is incidental to the business or employment, another and somewhat different duty devolves upon him. The master is required to give such information to the servant as will enable him to enter into his contract intelligently and with a full understanding of the unusual dangers he has to encounter.

"To relieve the master from liability upon this ground, it must appear not only that the servant had knowledge of the insufficiency of the machinery, but that his age and experience or the instructions given by his master, or some one in his behalf, were such as to

enable him to fully understand and appreciate the dangers attending his employment. That he assumed the ordinary risks, the law will infer from the contract of service. If the master would impose upon him the extraordinary risks, the burden is upon the master to show, as matter of fact, that such was the contract." *Shanny* v. *Androscoggin Mills*, 66 Maine, 420, 427, 428.

The burden then rests upon the defendant to show either that the plaintiff's age, or the instructions given him, were such as to fully enable him to understand and appreciate the dangers attending the employment. 14 Am. & Eng. Ency. of Law, p. 844.

George C. Yeaton and John Kivel, for defendant.

Counsel cited: 2 Bailey on Mas. Lia. Inj. to Serv. c. 14, par. 2664; *Ciriack* v. *Merchants' Woolen Co.*, 146 Mass. 182; *S. C.*, 151 Mass. 152; *Probert* v. *Phipps*, 149 Mass. 258; *Coullard* v. *Tecumseh Mills*, 151 Mass. 85; *Pratt* v. *Prouty*, 153 Mass. 333; *Rooney* v. *Sewall & Day Cordage Co.*, 161 Mass. 153, 160; *Ladd* v. *New Bedford R. R. Co.*, 119 Mass. 412; *Fifield* v. *Northern R. R.*, 42 N. H. 239, 240; *Foss* v. *Baker*, 62 N. H. 251; *Hanley* v. *Railway Co.*, 62 N. H. 282; *Williamson* v. *Sheldon Marble Works*, 66 Vt. 427; *Wormell* v. *M. C. R. R. Co.*, 79 Maine, 397; *Campbell* v. *Eveleth*, 83 Maine, 50; 14 Am. & Eng. Ency. Law, par. 842, and cases; *Casey* v. *C. St. Paul, Minn. & O. Ry. Co.*, 90 Wisc. 113, 117; *Hayden* v. *Smithville Manfg. Co.*, 29 Conn. 548; *Sullivan* v. *Ind. Manfg. Co.*, 113 Mass. 396; *Gilbert* v. *Guild*, 144 Mass. 605; *Hatt* v. *Nay*, 144 Mass. 187; *Murphy* v. *Am. Rubber Co.*, 159 Mass. 267; *Carey* v. *B. & M. R. R.* 158 Mass. 228; *Kleinest* v. *Kunhardt*, 160 Mass. 231; *Disano* v. *N. E. Steam Brick Co.*, 40 Atl. 7; *McIntire* v. *White*, 171 Mass. 171; *Yeaton* v. *B. & L. R. R. Corp.* 135 Mass. 418; *Coombs* v. *New Bedford Cordage Co.*, 102 Mass. 572, 583; *Truntle* v. *North Star Woolen Mill*, 57 Minn. 52; *Hickey* v. *Taaffe*, 105 N. Y. 26; *Buckley* v. *G. P. & R. M. Co.*, 113 N. Y. 544; *Murphy* v. *Deane*, 101 Mass. 455; *Dowd* v. *Chicopee*, 116 Mass. 93; *Dyer* v. *Fitchburg R. R.* 170 Mass. 148; *Walsh* v. *B. & M. R. R.* 171 Mass. 52; *Mayo* v. *B. & M. R. R.* 104 Mass. 137; *Crafts* v. *Boston*, 109 Mass. 519; *Hinckley* v. *Cape Cod R. R. Co.*, 120 Mass. 257, 262; *Gerety* v.

Phila., etc., R. R., 81 Pa. St. 274, 277; *Gaynor* v. *R. R. Co.*, 100 Mass. 208; *Gahagan* v. *R. R. Co.*, 1 Allen, 190; *Gavett* v. *R. R. Co.*, 16 Gray, 506; *Barton* v. *Kirk*, 157 Mass. 303; *Moore* v. *B. & A. R. R. Co.*, 159 Mass. 399; *Lesan* v. *M. C. R. R.*, 77 Maine, 85; *Merrill* v. *No. Yarmouth*, 78 Maine, 200; *Pitts. Conn. & St. L. Ry. Co.* v. *Adams*, 105 Ind. 151, 166; *Klochinski* v. *Shaw Lumber Co.*, 93 Wisc. 417; *McLane* v. *Perkins*, 92 Maine, 39; *Cunningham* v. *Iron Works*, 92 Maine, 501, 512; *Jones* v. *Mnfg. Co.*, 92 Maine, 565.

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

PETERS, C. J. The essential facts in this case are not really in dispute, but only the inferences to be fairly deduced therefrom. To the court, by agreement of the parties, is left the decision of the case upon both the law and the fact.

The plaintiff at the time his injury was received was seventeen years and two months old, and, as far as appears, possessed of such degree of intelligence as ordinarily belongs to one of his years. He had been in the employment of the defendant company in their mill off and on in different ways for about two years, attending "breakers and hoppers" in the card-room, then becoming a spinner in the mill, and lastly working in the dye-house where he had been employed at work jointly with another hand about four weeks before the accident happened; thus becoming a good deal familiarized, no doubt, with different phases of employment in the mill. Before his being personally employed in the dye-house, he had been in and out of the room where the dyeing was carried on, noticing the men at their work, and assisting them occasionally to some extent.

The dye-house contained four kettles or vats, each six feet long and five wide, and two feet and seven inches in height above a planking which circled each vat at the floor. The plank, eight or ten inches wide, were laid flatly on the floor and were "beveled off" from the vat. Each vat, having clamps upon it, required the hole in the floor where it was to be set to be a little larger than the

vat would be without such attachments, leaving an open space around the vat, and the plank were used to stop up the opening.

There was an open frame, a structure fitted with slats, designed to be sunk into the vat, upon which wool and blankets were loaded, sometimes the one and sometimes the other, and then lowered into the vat to be dyed. The frame was fitted with a hoisting gear so that it could be swung over and then lowered into the vat containing boiling hot dye, and raised up out of the vat when the process of dyeing became completed.

In order to raise the frame out of the vat the two men in attendance had to do some coupling of hooks with rings connected with the gearing, which necessitated their leaning over the sides of the vat, while facing each other, to a point near the centre of the vat; and the plaintiff while performing his part of such an act, somehow fell into the vat, and before he could be rescued by his co-worker and another person at work in the same room, was severely scalded and injured thereby.

The plaintiff alleges that he was injured through the fault of the defendant, either in not furnishing reasonably safe and proper machinery and appliances, or by its failure to instruct him in the art of using the machinery and explaining the dangers incident to its use.

Experience shows us that there is an instinctive proneness in a person who has received an injury to seek for some culpable cause for it other than his own remissness. He can see carelessness in others but is likely to be blind as to his own. Is not that a fair characterization of the contentions in the present case? The plaintiff's counsel asserts that the floors about the vats were wet, exposing them to some slipperiness. Did not the plaintiff see that himself? Of course he did as it was a normal and necessary state of things there. But he is reluctant to admit that he did.

Counsel for plaintiff contends that the planking about the vat was an improper appliance, rendering the structure defective and dangerous. Is it not true that, had there been no planking about the vat its absence could have been just as reasonably criticised as its existence now is? Really, the planking must be an assistance to safety

if used cautiously, and as any person's wits would naturally lead him to use it. But, to avoid any imputation of his own fault on this ground the plaintiff endeavors to deny, although he really fails to deny, that he ever noticed that the planks were there, and that leads him to the necessity, to preserve consistency, of saying that he does not know whether he put either foot on the planking or not on the day of the injury or whether he ever did so or not. He says, "I know now there was a plank because I have heard so many people talk about it." But he feels compelled to say, "I might have noticed it, sweeping around it, sweeping the wool." It appears that he habitually swept the floor three or four times a day, clearing up the waste wool collected around all the four vats. On cross-examination he tries to deny knowledge of the planking but really confesses knowledge. We can have no doubt that he many times noticed the planks and their shape and situation.

But it is urged that he was not instructed in the use of the machinery or informed of its dangers while being used. That should have been as obvious to him on the day of the accident as to the defendant or its employees. There was an overseer and several other employees habitually in the same room with him. If the plaintiff was in any respect uninformed of his duties on the day he began his work, but such does not seem to have been the case, he must have become fully acquainted with them by his constant service in the work for four weeks afterwards; especially as he had been working all of that time in cooperation and face to face with another employee of greatly larger experience in the same employment, whose example and aid were of themselves a sufficient and the most satisfactory instruction to the new-comer. Their labors were indissoluble, not separate.

The counsel for the plaintiff asserts, arguendo, that the plaintiff was standing on the plank, not making it clear whether he means with two feet on the plank or only one, leaning over the vat when his foot slipped off the plank and from under him and he toppled over into the boiling dye. But the plaintiff himself gives no such account of the accident, but merely says he slipped and went into the vat, without stating any further circumstance about the accident,

saying repeatedly that he has no knowledge that he ever stepped on the plank at all in any manner. He says he never thought anything about the danger, that he did not remember how he did stand while pushing over the hook to his co-operator, but that his habit was to "walk up to it (the hook) and push it the best way he could and get back." We feel forced above all else to the conclusion that, whether the defendant was or not in any fault, actual or theoretical merely, the case fails to show that the plaintiff's own heedlessness was not the great cause of the accident. There must therefore be an entry of,

Judgment for defendant.

LEONARD ANDREWS, Petitioner,

vs.

POLICE BOARD, City of Biddeford.

FRANK IRISH *vs.* SAME.

York. Opinion February 17, 1900.

Certiorari. Biddeford Police Board. Removal of Police. Spec. Laws, 1893, c. 625.

The manifest purpose of the act of 1893, c. 625, establishing a Board of Police in the City of Biddeford "with authority to appoint, establish and organize the police force of said city, including the marshal and deputy marshal, and to remove the same for cause and make all needful rules and regulations for its government, control and efficiency", was to create a police force, not subject to change from the result of recurring elections, but with a tenure to be cut short only for cause and after due notice and hearing.

Held; that a rule of said board to the effect that "whenever the board of police consider the police force ineffective on account of its number, police officers,—regular, reserved or special,—may be removed for the following cause, viz: to make more effective the police force as the board consider proper therefor, no offense being charged against such police officers; and the same may be done whenever said board of police consider the above named cause exists with no personal discredit of officers removed upon order of said board" is in violation of the statute creating the board of police.

Also, that the action of said police board, in this case, was an attempted exercise of power under said rule not conferred by the statute and therefore void.

ON REPORT.

This was a petition for a writ of certiorari, praying that the board of Police Commissioners of the city of Biddeford be ordered to certify their records relating to the attempted removal of the petitioner from the office of police officer of the city of Biddeford, to the end that so much thereof as is illegal may be quashed.

PETITION:

STATE OF MAINE.

YORK, SS.

To the Honorable Justice of the Supreme Judicial Court:

Respectfully represents Leonard Andrews of Biddeford, in the County of York and State of Maine, that on the third day of July, A. D. 1893, he was duly appointed Police Officer of the City of Biddeford, and was duly qualified as such officer, by the Board of Police, duly constituted and acting, under and by virtue of chapter 625 of the laws of the State of Maine, for the year A. D. 1893.

That at a meeting of said Board of Police, held on the fourteenth day of November, A. D. 1898, said Board of Police undertook to remove your petitioner from the office of Police of the City of Biddeford, and served notice on your petitioner that he was so removed.

That said appointment and qualification of your petitioner and said attempt to remove him fully appears upon the records to be produced and exhibited herein.

And your petitioner represents and shows that said Police Board have no jurisdiction in the matter of said removal, and that their acts in making said removal were erroneous and unlawful, and the records thereof are erroneous and illegal, in the several causes which your petitioner relies on for his support.

Wherefore, your petitioner prays that this court will issue a writ of certiorari ordering the said Board of Police to certify their records relating to said attempted removal of your petitioner that they may be presented in court to the end that the same or so much thereof

as may be illegal may be quashed, for the several causes which are recited and annexed to this petition and made a part thereof, upon which your petitioner relies for its support.

1st. Because it does not appear, nor is it true in fact, that any charges or complaints were ever filed with said Board of Police against your petitioner.

2nd. Because it also does not appear, nor is it true in fact, that any notice was ever given to your petitioner that said Board of Police was to act upon the question of the removal of your petitioner.

3rd. Because it does not appear, nor is it true in fact, that said attempted removal was for cause and with notice to your petitioner.

4th. Because attempted removal was made without cause and without notice to your petitioner of any cause, and without any opportunity to your petitioner to be heard upon the question of his removal.

All in violation of chapter 625 of the private and special laws of the State of Maine of 1893.

Leonard Andrews.

STATE OF MAINE.

YORK, SS. April 21, A. D. 1899.

Personally appeared Leonard Andrews, and subscribed and made oath to the above.

Before me,

Charles S. Hamilton, Justice of the Peace.

ANSWER.

STATE OF MAINE.

YORK SS. SUPREME JUDICIAL COURT.

May Term, 1899.

LEONARD ANDREWS, Petitioner,

vs.

BOARD OF POLICE OF THE CITY OF BIDDEFORD.

ANSWER.

In the matter of Leonard Andrews petitioner for the writ of Certiorari ordering the Board of Police of the City of Biddeford to

certify their records now pending in the Supreme Judicial Court in session in Alfred for the County of York.

Your respondent, the Board of Police of the City of Biddeford aforesaid, hereby respectfully certify and answer as follows:

First. That if said Andrews was a duly appointed and qualified police officer in said city on July 3, 1893, or after, which your respondent denies, that on the fourteenth day of September, 1898, he became divested of all official or de facto rights, powers and liabilities as a police officer through the action of said board of police by its doings, findings and judgments; and that said doings, findings and judgments were, in all respects, just and without error and within their jurisdiction, under chapter 625, private and special laws of Maine, of 1893, and acts amendatory thereof and additional thereto. That no charge or complaint for an offense under rule 38 of the board aforesaid was ever preferred against said petitioner, consequently, no notice was ever given said petitioner of any charge or complaint as alleged in his bill of particulars. That said Andrews' removal from the position of policeman, if he ever held that position, was for cause other than for offenses as set forth in said rule 38, and by virtue of the terms of rule 56 of said board and for no other reason.

Your respondent further, and with respect, certifies that the following is rule 38 aforesaid: "Any member of the police force may be punished by the board of police, in its discretion, whether by reprimand, forfeiture of pay for not exceeding thirty days, for any one offense, by being reduced in rank, or by dismissal from the force, on conviction of any one of the following offenses, to wit: Intoxication. . . . .

Any other act contrary to good order and discipline or constituting neglect of duty, or the violation of the rules of the department."

And that the rule 56 of said board is as follows: "Whenever the board of police consider the police force ineffective on account of its number,—police officers, regular, reserved or special,—may be removed for the following cause viz.: to make more effective the police force as the board of police consider proper therefor—no

offense being charged against such police officers, and the same may be done whenever said board of police consider the above named cause exists with no personal discredit of officers removed upon order of said board." That said rule 56 was adopted September 14th, 1898, and that thereafter, upon the same day, certain actions and doings of said board were had concerning which the following is a true copy of the record thereof. "Upon due consideration and investigation the board of police consider that to make the police force of Biddeford more effective, which said board hereby consider necessary and proper that the following named men, whose names appear upon the records of said board as officers be and hereby are removed by virtue of Rule 56 of this board, and this is the order of the board thereof viz: Leonard Andrews, . "

That the writ as prayed for should not issue; that the doings, findings and judgments and records of your respondent are not illegal and in error; but legal and correct; that no part of said record should be quashed. Respondent further answering says that said petition is not sufficient in its terms and allegations in law for your petitioner to have his prayer granted by this court, and so says not for the purpose of frivolous delay but believing said ground well taken.

Wherefore, respondent prays such judgment as is usual and proper.

And with due respect said respondent makes the above its answer.

June 7, 1899.

BOARD OF POLICE OF THE CITY OF BIDDEFORD, Respondent,
By its Attorney, JAMES O. BRADBURY.

It was admitted at the hearing on the petition, in the case of Andrews, that Ezra H. Banks, James F. Tarr and Levi W. Stone were the board of police commissioners duly qualified at the time of the removal of Leonard Andrews the petitioner; that Andrews was duly appointed and duly qualified as a police officer, July 3, 1893; that Andrews was removed by said board of police, September 14th, 1898; that no charge or complaint was made against the

said Andrews, and that no notice was given to him of any proceeding in the premises until after he was removed.

B. F. Hamilton and C. S. Hamilton, for petitioners.

The power that appoints, the board of police, has the power to remove for cause. The statute is silent as to what the cause shall be that would justify the removal of a police officer. The board of police is the tribunal that is to hear and determine, and the act of hearing and determining is a judicial act always. *Andrews* v. *King*, 77 Maine, 224. There were no charges preferred against the petitioners. Chief Justice Parker says, in *Murdock, Petitioner*, 7 Pick. 303, 330, "we hold that by analogy to trials on criminal accusations in courts of justice, and the principles of the constitution, no man can be deprived of his office, which is a valuable property, without having the offense with which he is charged, 'fully and plainly, substantially and formally described to him.' This enters so essentially into the justice of the case, and into the character of a fair trial, that it ought not to be dispensed with. Without it, the party charged does not know what to defend against; nor can another body, to which there may be an appeal, ascertain the effect or admissibility of the evidence against him."

There was no specification of the charges made against the petitioner in the administration of his office, and no notice was given him of a hearing, and in fact no hearing was had. The whole proceeding was ex-parte, a Star Chamber performance. Was the removal of the petitioner a judicial act?

A cause for the removal of an officer must embrace some act of the officer in the administration of his office. In this case the petitioner is charged with no act of misfeasance or nonfeasance in his office.

It is true, that in the statute creating the board of police it is not stated in detail what the causes are that will justify a removal, but it must be such a cause as seems to the board sufficient, after the party has notice and an opportunity to be heard in defense or explanation of whatever may be alleged, as a cause of removal.

The statute creating the Biddeford board of police is an exact

copy of the Mass. statute and the proceedings of the Biddeford board of police were the same as those of the Boston board in *Ham* v. *Boston Board of Police*, 142 Mass. 90. The court held that the board could not remove an officer or member of the police, without assigning a cause for such removal and giving to such officer or member an opportunity to be heard thereon. *State* v. *Donovan*, 89 Maine, 448.

J. O. Bradbury and F. W. Hovey, for defendants.

The question of the efficiency of the force, so far as its number is concerned, cannot be made an issue between the creating power and the officers created. That proposition is one for trial, but rests entirely upon the good judgment and integrity of the police commission under the force of the oath of its members; and that being so, it takes this case out of the general rule of cases in which the officer is discharged and his position vacated on account of the commission of any offense or misdemeanor punishable under the rules of the board other than Rule 56 by suspension or removal.

The petitioners have not alleged in either case that they were qualified officers at the time of the removal. They cannot now prove they were, but are bound by their pleadings.

By the terms of c. 625, of the special laws of 1893, the Police Board have authority to appoint, and also authority to remove for cause, and to make all needful rules and regulations for its government, control and efficiency. It is to be borne in mind that the police board have all authority and power, formerly vested in the board of aldermen and common council.

The police officers of Biddeford are not appointed for any limited term, nor during good behavior, but their appointment is without limitation of time. Hence, in the appointment of regulars and specials for special business, in a few years the city becomes burdened, and the efficiency of the force greatly lessened, by the accumulation of the appointments of years.

That condition of things is the actual experience of the police board of the city of Biddeford. The rules cited indicate how members of the police force may be punished by suspension, or by

removal, for various misdemeanors and offenses, and in those cases the charges must be preferred, and a hearing must be had. But with the statutory power to make any rules and regulations for the efficiency of its force, the respondent must have the inherent right, when the board and its force have become unwieldy through the lapse of years, to reduce it to efficiency by the removal of the unneeded accumulation of years and for that purpose Rule 56, of the board, was established. And under that rule, action of the board has been taken, relating to the efficiency of the board of men whose names appeared on the police force records.

The rule requiring charges to be preferred, and a hearing had, relates solely to the cases where policemen are to be tried and punished by suspension or removal, by violation of law or of the rules of the board. The matter of regulating the efficiency of the force, so far as number is concerned, must rest in the good judgment, discretion and integrity of the board itself.

Ham v. *The Boston Board of Police*, 142 Mass. 90, was for the removal of a regular policeman and not a special officer, and under the Massachusetts statute it was specially stated, that the officer could not be removed without preferring charges against him.

In the case of *Andrews* v. *King*, 77 Maine, 224, the contention was relative to the office of city marshal and not in relation to the appointment or removal of policemen either regular or special; the office of city marshal is held not to be a corporate or even a municipal office, but a position affecting the entire state, while the appointment and management of the police force of the city of Biddeford is certainly a purely local and municipal affair.

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

HASKELL, J. Petition for certiorari to quash the order of the Board of Police in the city of Biddeford, dismissing the plaintiff and twenty-six others from the police force.

The act of 1893, c. 625, established a board of police in Biddeford, with "authority to appoint, establish and organize the police

force of said city, including the marshal and deputy marshal, and to remove the same for cause and make all needful rules and regulations for its government, control and efficiency." It gave the board the same power for governing the police then vested in the city government, except as provided by the act. It continued in service the existing police force until removed by the board of police. It prohibited the appointment of more than the city government might then appoint, except thereafterwards authorized by the "city".

In short, the existing police force was continued in service under the control of the board of police, which might remove for cause, and appoint not exceeding the number authorized by the city government. The manifest purpose of the act was to create a police force, not subject to change from the result of recurring elections, but with a tenure to be cut short only for cause. That means cause affecting the individual to be removed. It does not mean cause applicable to the force in gross or collectively. It does not mean that the force may be discharged by wholesale because they may not be agreeable to the board of commissioners.

Indeed, this view was taken by the board when it organized, for it ordained rule 41: "Trials of police officers shall be held at such times as may be ordered by the board of police. Notice of the time and place of the trial, together with a copy of the charges and specifications, shall be served on the accused party at least two days before the time of trial, including the day of service," etc.

Again, by rule 38, any member of the force might be disciplined or dismissed for any one of twenty-three offenses specifically named.

It is agreed that the petitioner was duly appointed and qualified as a police officer July 3, 1893. That on September 14, 1898, the board adopted rule 56: "Whenever the board of police consider the police ineffective on account of its number, police officers,—regular, reserved or special,—may be removed for the following cause, viz. to make more effective the police force as the board of police consider proper therefor—no offense being charged against such police officers, and the same may be done whenever said board

of police consider the above named cause exists with no personal discredit of officers removed upon order of said board."

Thereafterwards, on the same day that rule 56 was adopted, the board of police ordered, "Upon due consideration and investigation the board of police consider that to make the police force of Biddeford more effective, which said board consider necessary and proper that the following named men, whose names appear upon the records of said board as officers, be and hereby are removed by virtue of rule 56 of this board, and this is the order of said board, viz. Leonard Andrews" and twenty-six others whose names appear in the record of the board of police. The proceeding was without charge against any member of the police force or notice to any one of the policemen removed.

Rule 56 was in violation of the statute creating the board of police, and their action under it was an attempted exercise of power not conferred by the statute and therefore void. The board was only authorized to remove for cause, and such removal is a judicial act, to be made only upon notice and hearing. *State* v. *Donovan*, 89 Maine, 448; *Andrews* v. *King*, 77 Maine, 224.

Writ to issue.

LUDGER J. RENOUF, Assignee in Insolvency,

vs.

FREDERICK YATES.

York. Opinion April 16, 1900.

Insolvency. Preference. Chattel Mortgage. R. S., c. 70, § 33.

In an action of trover by the assignee of an insolvent debtor to recover the value of a stock of goods, the defendant relied upon a chattel mortgage given by the insolvent to him under date of April 8, 1897, but not recorded until May 17, 1898, eleven days before the commencement of insolvency proceedings against the mortgagor.

Held; that, although the transactions between the mortgagor and mortgagee were intended to give the mortgage the appearance of being for a present

consideration, the undisputed facts of the case clearly show that it was in fact given to secure a debt to a prior existing creditor.

Also; that consequently, by R. S., c. 70, § 33, the assignment from the judge of the court of insolvency to the assignee in insolvency vested in him the title to the stock of goods, claimed by the defendant under this mortgage, which had not been recorded three months prior to the commencement of insolvency proceedings.

ON REPORT.

This was an action of trover brought by the plaintiff as assignee of Cyprien A. Lacroix, an insolvent debtor, against the defendant, Frederick Yates, for the conversion of a stock of goods that were in the possession of Lacroix and, as his property at the time when insolvency proceedings were instituted, and claiming that by virtue of the assignment to the plaintiff by the court of insolvency, the title became vested in him. The insolvency proceedings were commenced on the 31st day of May, 1898, the assignment was made to the plaintiff July 6th, 1898, and the action brought September 3rd, 1898.

The defendant claimed under a mortgage given to him by Lacroix to secure a note for $6,500, the note and mortgage bearing date of April 8th, 1897. This mortgage was not recorded till May 17th, 1898, eleven days before the commencement of insolvency proceedings, begun May 31, 1898.

On the 31st day of May the defendant claimed to have begun foreclosure proceedings which resulted, at the expiration of sixty days, in vesting the title in him, and under this claim proceeded to sell the stock, receiving, less expenses and the cost of new goods purchased by him, $4,421.58. The plaintiff after he was appointed assignee of Lacroix made a demand on the defendant for the goods. The defendant refused to deliver the goods to him.

The plaintiff based his claim upon three grounds. 1st. That under the provisions of the statutes the mortgage, being given for a prior existing debt, and not having been recorded at least three months preceding the commencement of insolvency proceedings, was invalid, and the title vested in the assignee. 2nd. On the evidence of the defendant, Yates,—(if the mortgage was not to secure a prior existing debt,)—the alleged title in him was fictitious

and a nullity, in that the note for $6500, for which the mortgage was given as a security, was without consideration. 3rd. The agreement between the defendant Yates and Lacroix that Yates would keep the mortgage from record, so as not to injure Lacroix's credit and so that nobody should know of its existence, rendered the mortgage void at common law.

The defendant claimed that the mortgage was not given to secure a pre-existing debt; that he owned the stock of goods and had the lawful right to sell them as the mortgage was not paid; and that Lacroix agreed in consideration of the transfer to him of the goods to pay $10,500 as set forth in the bill of sale; that Lacroix made the trade and his assignee had no right to insist upon a different one; that the bill of sale from the bank to Yates made Yates the legal owner of the goods; and that the bill of sale from Yates to Lacroix and mortgage from Lacroix to Yates were one transaction, and if void in part, was void in all, and the title would remain in himself, the defendant.

Other facts are stated in the opinion.

J. O. Bradbury and N. B. Walker, for plaintiff.

Trover by the assignee is the proper remedy for goods conveyed in fraud of the insolvency laws and converted. *Wyman* v. *Gay*, 90 Maine, 36.

The measure of damages is the value of the property at the time of the conversion, with interest from the time when the cause of action accrues. *Wing* v. *Milliken*, 91 Maine, 387.

It is apparent from the evidence that the defendant between the time when he was examined before the commissioner, when he admitted the mortgage to be to secure a prior existing debt, and the time of this trial, changed his position.

The defendant now claims title under a mortgage which he alleges was to secure the balance of the purchase price of the stock which he says he sold to Lacroix.

But we say, this purchase by Yates was fictitious, that the money was furnished by Lacroix, and that the title really vested in Lacroix.

The person who takes the title of personal property is the nominal,—he who pays the consideration the real purchaser. *Godding* v. *Brackett*, 34 Maine, 27.

As the title actually vested in Lacroix rather than Yates, the so-called note for the balance of the purchase price which Lacroix was to pay Yates was without consideration, and consequently the mortgage must be invalid for want of consideration. 15 Am. & Eng. Enc. of Law, p. 761, § 7; *West* v. *Hendrick*, 28 Ala. 226; *Wilmerding* v. *Mitchell*, 42 N. J. L. 476; *Culver* v. *Sisson*, 3 N. Y. 264; Jones on Chattel Mortgages, 4th. Ed. § 80.

Where there is no consideration for a mortgage it is "from the beginning inoperative." *Jewett* v. *Preston*, 27 Maine, 400.

The defendant knew that Lacroix was insolvent. The bank had just foreclosed its mortgage, when he took the mortgage in question. He knew of demands in his bank amounting to $4000 against Lacroix. He knew that he himself held a claim of $6500 against Lacroix, and that he (Lacroix) was "scheming or laying plans to pay Peter and take from Paul."

Under these circumstances, the agreement to conceal and keep the mortgage from record, so that Lacroix could have a fictitious credit, and the fact, that not until the creditors became very urgent, was the mortgage recorded, establish such a fraud as renders the mortgage void as against the assignee of Lacroix in insolvency. Cases cited in Waite on Fraudulent Conveyances, (3rd Ed.) p. 53, note 1.

Geo. F. and Leroy Haley, for defendant.

No brief of counsel for defendant was received by the reporter.

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

WISWELL, J. Action of trover brought by the assignee in insolvency of one Lacroix, who was duly adjudged an insolvent upon the petition of his creditors filed May 31, 1898.

From the report of the testimony, upon which the case comes to the law court, these facts appear: On April 8, 1897, Lacroix was indebted to the Biddeford National Bank in the sum of $4000, as

security for which amount the bank held a chattel mortgage upon his stock of goods, which mortgage had been fully foreclosed prior to that day. The value of this stock of goods at that time is somewhat in doubt, but it was unquestionably worth considerably more than the amount of the indebtedness. The defendant testified that the stock was worth at the time between $6000 and $7000. There had been some understanding, more or less definite, between Lacroix and the officers of the bank that he might redeem from the mortgage, notwithstanding its foreclosure, upon paying the amount due to the bank, and upon that day he went to the bank for the purpose of carrying this arrangement into effect.

Upon the same day, but whether before or after Lacroix's arrival is in doubt, the bank transferred by a bill of sale all of its right and interest in the stock of goods to the defendant, who is the father-in-law of Lacroix and the president of the bank. In payment to the bank for this transfer of its interest in the stock of goods, the defendant gave the bank a check, drawn upon it, for the amount of the indebtedness, $4000, although in fact he had no considerable balance to his credit at the time and relied upon the sum that he was to receive from Lacroix to meet his check. The check was not charged to his account until after the check from Lacroix for a like amount had been placed to his credit.

Upon the same day the defendant gave a bill of sale of the stock of goods to Lacroix, which purported to be for a consideration of $10,500, of which amount $4000 was actually paid in cash at the time and a mortgage given back by Lacroix to the defendant to secure the sum of $6500. Prior to this transaction Lacroix was indebted to the defendant for two sums of money, sometime before loaned by the latter to him, of $5000 and $1500, respectively, the aggregate of which is the precise amount for which the mortgage to defendant was given.

So that by this transaction the defendant, without expending, or even using temporarily a dollar of his own money, obtained an apparent title to a stock of goods worth, as he says, between $6000 and $7000, sold it on the same day to his son-in-law for a cash payment exactly equal to the amount that he had paid in the man-

ner above described, and received in addition thereto a mortgage of the stock to secure the sum of $6500, a sum exactly equal to the amount of the two former loans made by him to his son-in-law.

The mere statement of the foregoing facts, about which there is no controversy, shows conclusively that the sole object of the entire transaction was that the defendant might obtain some security for the amount previously loaned by him to his son-in-law, and that the transaction might have the effect of showing a then present consideration for the mortgage.

It can not be believed that the bank, after making an arrangement more or less definite with Lacroix that he might redeem from the mortgage by paying the amount due, would have transferred its interest in the stock of goods, worth several thousand dollars more than the indebtedness, for the amount of the indebtedness, to its president, the father-in-law of the mortgagor; or that the president would have taken the same, except for the benefit of the mortgagor and for the further purpose of giving to the defendant an opportunity to obtain security for his former loans in this way. In fact, the defendant admits this to have been the purpose and effect of the transaction when he says in his testimony: "That (the $6500 note and mortgage) wiped out all of his indebtedness to me."

This mortgage is relied upon by the defendant for the purpose of proving his title to the stock of goods which he subsequently, but before the commencement of this action, took possession of, and after foreclosing the mortgage, sold. The mortgage, and its foreclosure, would have undoubtedly given him title to the chattels covered thereby, except for the further fact that it was not recorded until May 17th, 1898, only eleven days before the commencement of the insolvency proceedings.

But the mortgage was given, as we have seen, and as the case clearly shows, "to secure a debt to a prior existing creditor." It had not been recorded three months prior to the commencement of the insolvency proceedings. Consequently, by R. S., c. 70, § 33, the assignment from the judge of the court of insolvency to the assignee in insolvency vested in him the title to the stock of goods

covered by this mortgage, and claimed by the defendant under this mortgage, given by the insolvent to him to secure a prior existing indebtedness.

The only remaining question is as to the amount of damages. The measure of damages is the value of the property at the time of the conversion, with interest thereon from the time when the cause of action accrued. There is more or less controversy as to the value of the stock of goods at the time of the defendant's conversion. But we think that the best and most satisfactory evidence upon this question of value comes from the actual sale of the goods, as the defendant evidently endeavored to obtain as much as possible therefrom. The amount actually received by him from the sale was $6579.58, from which should be deducted the expenses of the sale and the expenditures made by him for new goods bought for the purpose of continuing the sale at retail. These amounts aggregate $2158.97, and leave $4420.61 as the net value of the stock at the time of the conversion, to which should be added interest from the date of the demand and refusal, August 1, 1898.

Judgment for plaintiff for $4420.61 and interest from August 1, 1898.

CARLOS B. MOSELEY, and another, Appellants,

vs.

YORK SHORE WATER COMPANY.

York. Opinion April 16, 1900.

Water Company. Eminent Domain. Constitutional Law. Description. Stat. 1889, c. 284. Priv. & Spec. Laws, 1895, c. 125.

The York Shore Water Company was authorized by its charter, "to take, hold, protect and use the water of Chase's Pond" for its water supply, and to "take and hold, by purchase or otherwise, any lands, or other real estate necessary for any of the purposes aforesaid, and for the protection of the watershed of said Chase's Pond." Adequate provision was made by the charter for the liability of the corporation to pay all damages sustained by any person by the taking of property, and for the assessment of such damages.

Held; that this grant of the power to exercise the right of eminent domain is not unconstitutional, either because it does not define the limits of the property that may be taken, or because it gives to the company the unrestricted right to determine to what extent and within what limits it would exercise the right of eminent domain.

The directors of the water company voted to take the two lots of land in question as necessary for its purposes in the protection of the watershed of Chase's Pond, and in the vote directed the president of the company "to file in the office of the county commissioners for said county of York such plans, descriptions, certificate or other document as may be necessary for the purpose above mentioned."

The president accordingly did file in the office of the county commissioners a sufficient statement, signed in the name of the company by himself as president, to the effect that the company had found it necessary to take, and that it thereby did take these two lots of land for the purpose of the protection of the watershed of the pond. Attached to which, and filed therewith by the president at the same time, was a separate description and plan of each lot taken, both of which appear to be full and accurate, and as to which no objection is made.

Held; that the proceedings were in strict compliance with the statute, Chap. 284, Statutes of 1889, which was applicable, as the charter did not prescribe the method of condemning lands; that no discretion was delegated to the president by the directors, his only authority being to obtain an accurate description and plan of each of the lots which the directors had voted to take, and to file the same together with a statement that the lots had been taken; and that a corporation must necessarily act by its officers or agents duly authorized.

AGREED STATEMENT.

The case is stated in the opinion.

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

The York Shore Water Co. has never legally taken any land of these appellants. The taking of land by the right of eminent domain must be evidenced by some writing, in which the land is described by metes and bounds. *Hamor* v. *Bar Harbor Water Co.*, 78 Maine, 134; *Lancaster* v. *Kennebec Co.*, 62 Maine, 274.

The only writing the York Shore Water Co. ever filed as evidence of any taking was a copy of the vote of the corporation passed Oct. 14, 1895. In that vote there was no description at all. The people who "said it belonged" to Worthing may have been mistaken, and the company may have thus had in mind a lot which did not belong to Worthing at all. These appellants are

entitled to be apprised of just how much and what land the company claimed to take.

The vote to take is only a preliminary step in the taking. It is not complete so as to justify temporary occupancy pending agreement upon, or assessment of damages, until plans and specifications have been filed. Laws of 1889, ch. 284, (Supplement p. 270); *Cushman* v. *Smith*, 34 Maine, 247, (260); *Lancaster* v. *Kennebec Co.*, 62 Maine, 274; *Riche* v. *Water Co.*, 75 Maine, 91.

It is necessary that the company itself shall file plans and description of the land taken. Laws of 1889, ch. 284. Directors have no authority to leave it to the determination of any one officer or member of the corporation what plans, descriptions, certificates and other documents are necessary, and authorize him to file them himself. A corporation, upon which the law imposes the duty of doing some act, cannot delegate authority to another to do that act, on the principle that delegated authority cannot be delegated. *York & C. R. R.* v. *Ritchie*, 40 Maine, 425; *Orphan Asylum* v. *Johnson*, 43 Maine, 180, (185); *Mutual Ins. Co.* v. *Lowell*, 59 Maine, 504.

Where private property is sought to be taken against the will of the owner, under statute authority, all the statute requirements must be fully and strictly complied with. In the procedure no step, however unimportant, seemingly, must be omitted, nor will the substitution of other steps in the place of those named in the statute be sufficient. *Spofford* v. *B. & B. R. R.*, 66 Maine, 26, (39); *Leavitt* v. *Eastman*, 77 Maine, 117, (120); *Hamor* v. *Water Co.*, 78 Maine, 127, (133).

Statute makes it necessary for the York Shore Water Co. to file plans and descriptions. They voted to allow the president to determine what were necessary, and then file them himself.

The county commissioners had no jurisdiction to assess damages, because there had been no land legally taken for which damages could be assessed. They, upon hearing in damages, could look only to the petition presented to them in ascertaining what land was claimed to be taken, and for which they were to assess damages. To give them jurisdiction the petition must contain a

sufficient description of the land claimed to be taken, by metes and bounds. *Spofford* v. *B. & B. R. R.*, supra.

Geo. F. and Leroy Haley, for defendant.

It is no longer an open question in this country that the mode of exercising the right of eminent domain, in the absence of any provision of the organic law prescribing a contrary course, is within the discretion of the legislature. There is no limitation upon the power of the legislature in this respect, if the purpose be a public one, and just compensation be paid or tendered. *Secombe* v. *Milwaukee & St. Paul R. R. Co.*, 23 Wall. 108.

No question can be raised but that a water company to supply pure water for domestic purposes is a public necessity. The right of eminent domain does not rest upon a statute nor on a constitutional enactment. It is an attribute of sovereignty, possessed by the general government as sovereign, to enable it to perform its proper functions. It is an authority essential to its independent existence and perpetuity. The right of eminent domain being thus possessed by the United States the mode of exercising it, in the absence of any express provision in the constitution to the contrary, is within the discretion of the legislature. *In Re Rugheimer*, 36 Fed. Rep. 369; *Kohl* v. *U. S.*, 91 U. S. 367; *U. S.* v. *Jones*, 109 U. S. 513; *Miss. & Rum River Boom Co.* v. *Patterson*, 98 U. S. 403.

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

WISWELL, J. The York Shore Water Company, a corporation incorporated by an act of the legislature (c. 125 Private and Special Laws of 1895) for the purpose of supplying the towns of York and Wells, and their inhabitants, with pure water for domestic and municipal purposes, was authorized by its charter, "to take, hold, protect and use the water of Chase's Pond in said town of York" for its water supply, and to "take and hold, by purchase or otherwise, any lands, or other real estate necessary for any of the purposes aforesaid, and for the protection of the watershed of said Chase's pond."

Adequate provision was made by the charter for the liability of the corporation to pay all damages sustained by any person by the taking of lands or other property, for the necessary purposes of the corporation, or by flowage or excavation, and for the assessment of such damages in case the owner of the property taken and the corporation should not mutually agree upon the sum to be paid therefor, in which case "such person or said corporation may cause the damage to be ascertained in the manner prescribed by law in case of damage by laying out highways."

On October 14, 1895, the directors of the Water Company passed the following vote to take the two lots of land belonging to these appellants: "That this corporation finds it necessary for its purposes and uses in the protection of the watershed of Chase's Pond in the town of York to take land adjoining said pond in said town of York, and being duly authorized by law to take such land whenever it is necessary for its purposes and uses, hereby takes two certain lots of land within the limits of the watershed of Chase's Pond, one of which lots is said to belong to Charles L. Worthing of said York and the other of said lots is said to belong to Carlos B. Moseley, now commorant at said York, and hereby directs the president of this company to file in the office of the county commissioners for said county of York such plans, descriptions, certificate or other document as may be necessary for the purpose above mentioned."

In accordance with this vote, on October 16, 1895, the president of the Water Company filed in the office of the county commissioners for York county, where the land taken is situated, a declaration signed in the name of the company by himself as president, to the effect that the Water Company "finds it necessary for its purposes and uses in the protection of the watershed of Chase's Pond in said town of York to take land adjoining said Pond," and that it thereby did "take two certain lots of land within the limits of the watershed of said Chase's Pond, one of which lots is said to belong to Charles L. Worthing of York Beach, Maine, and the other of said lots is said to belong to Carlos B. Moseley now commorant at York Beach in the town of York, descriptions and plans of which lots are hereto attached and made a part of this document,

and the property hereby taken being all situated in said town and county of York." Attached to this declaration and filed therewith by the president, at the same time, was a separate description and plan of each lot taken, both of which appear to be full and accurate, and as to which no objection is made.

Subsequently, on August 29, 1896, application was made by the Water Company to the county commissioners to have the damages for the taking of each of these two lots of land determined by them. Thereupon the commissioners, after giving due notice, proceeded in the manner provided by law to determine the damages, and later they made their report. From this assessment of damages these appellants appealed to this court, but certain questions having been raised by them as to the right of the Water Company to take these lands for the purpose named, and as to the sufficiency of the company's proceedings in attempting to take them, the parties have by an agreed statement of facts submitted such questions to the law court.

It is urged that this charter, in so far as it gives to the Water Company the power to exercise the right of eminent domain, is unconstitutional, because "it does not define the limits to which said company may take land and other property for its purposes," and because the charter "gives to said company the unrestricted right to fully determine to what extent and within what limits it will take and hold private property of individuals," without submitting to any tribunal the question of the necessity for such taking.

No question is raised by the appellants as to the necessity of taking these two particular lots for the purpose named, so that it is unnecessary for the court to determine that question, or the question, about which the authorities differ to some extent, as to whether the land owner may have the necessity or expediency of the taking, in any particular instance, submitted to a court, jury or other tribunal. See *Lynch* v. *Forbes*, 161 Mass. 302, and the extended note thereto in 42 Am. St. R. 402. But the objection here is that this portion of the charter itself is unconstitutional.

We do not think that there is any merit in the contention. The

authority given was to take such lands and other property as might be necessary for the legitimate purposes of the Water Company in carrying into effect its general purpose of supplying pure water to the municipalities named and their inhabitants. In many cases it would be impracticable, if not impossible, to define more exactly the limits and extent of the property that might be taken under the exercise of the right of eminent domain, for the purpose of carrying out the public use for which the corporation is authorized to take private property. The grant of the authority in this case was in language similar to that which has been ordinarily used in the charters of water companies in this and other states. In *Riche* v. *Bar Harbor Water Co.*, 75 Maine, 91, the language of the charter was identical in effect: "And said corporation may take and hold any lands necessary therefor, and may excavate through any lands where necessary for the purposes of this incorporation." The court held that the charter gave to the company the right to condemn lands necessary for its purposes. And the examination of a great many cases, which need not here be cited, will show that this has been the usual form adopted by legislatures in incorporating water companies, and in granting to them the power to condemn and take lands and other property for their purposes.

It must be remembered that the question, whether the necessity exists for the granting of this right to take private property for a public use, is a legislative and not a judicial one. The use being public, the determination of the legislature that the necessity exists which requires private property to be taken, is conclusive. Whether a particular use for which land is taken, under the exercise of the right of eminent domain is public or not, is a judicial question; but as to whether the necessity exists for taking lands for a public use by the exercise of the right of eminent domain is a legislative question. *Riche* v. *Bar Harbor Water Company*, supra; *Lynch* v. *Forbes*, supra; *Wisconsin Water Company* v. *Winans*, 85 Wis. 26.

The other question raised is as to whether or not the proceedings of the company in attempting to take these lands were sufficient for that purpose. The company's charter contained no pro-

vision as to the manner of proceeding in condemning land necessary for its purposes, consequently c. 284, Public Laws of 1889, is applicable and prescribes the method of proceeding. By that statute, when a water company duly authorized therefor, finds it necessary for its purposes and uses to take any land or other property, "it shall file in the office of the county commissioners of the county where the land or other property taken is situated, plans and descriptions of all the land, and description of all other property taken."

In this case the Water Company proceeded in strict compliance with the requirements of the statute above quoted. The directors voted to take the two lots of land in question as necessary for its purposes. They instructed the president of the corporation to file in the office of the county commissioners, "such plans, descriptions, certificate or other document as may be necessary for the purpose above mentioned." The president accordingly did file a statement that these lots had been taken, and at the same time a full and particular description and a sufficient plan of each of the lots.

It is urged that it was necessary for the company itself to file the plans and descriptions of the land taken, and that the directors could not delegate to the president the authority to determine what plans and descriptions were necessary. But no discretion was delegated to the president. The directors voted to take the whole of each of these lots. The authority of the president was only to obtain an accurate description and plan of the whole of each of the lots and to file the same, together with a statement that the lots had been taken, as required by law. A corporation must necessarily act by its officers or agents duly authorized. We think that in all respects, the proceedings of this company in taking these lots of land for its necessary purposes, were in accordance with the requirements of the statute.

As stipulated in the report, the case is remanded to nisi prius for a trial upon the question of damages.

Case remanded.

LEVI GREENLEAF *vs.* AMOS F. GERALD.

Cumberland. Opinion April 16, 1900.

False Representations. Contracts. Law and Fact.

The question whether or not a false representation is material, whether it be relied upon by a plaintiff to support an action for deceit, or by a defendant to avoid a contract because of deceit, is one of law for the court, not of fact for the jury.

The defendant entered into a contract relating to a work to be published, entitled "Men of Progress," providing for the publication of his portrait and biographical sketch therein, the delivery to him of one copy of the work, and for his payment therefor, upon the issue of the part containing his portrait and sketch.

In an action by the assignee of the publisher to recover the amount which the defendant had agreed to pay, the latter contended that the contract was void because he was induced to execute it by means of false and material representations as to the character of the work which was to be published, made by the agent of the publisher at the time of the execution of the contract, and that such false and material representations were relied upon by him.

The defendant introduced evidence tending to prove, that the agent of the publisher, who obtained his subscription for this work, represented to him at the time that only three other residents of the town in which the defendant lived would be solicited to be subscribers to this work, and to have their biographical sketches and portraits published therein. And also that the portraits and sketches of only three hundred persons in all would be published.

Held; that these representations respecting a book of this character to be published were material; that if all of the other necessary elements were proved to exist, a contract induced thereby could not be enforced; and that it was error not to instruct the jury, as requested, that these representations were material.

ON EXCEPTIONS BY DEFENDANT.

This was an action of assumpsit tried to a jury in the Cumberland Superior Court against the defendant to recover the sum of thirty-five dollars, for a certain book entitled "Men of Progress of the State of Maine". The jury gave a verdict for the plaintiff. As evidence of that liability, the plaintiff offered in evidence a certain order signed by the defendant and dated the twenty-first day of February, 1896, as follows:—

"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, A. F. Gerald. Address, Fairfield, Maine."

The plaintiff sued as assignee of the proprietor of the N. E. Magazine and offered evidence to show that sometime, in 1897, the book was delivered to the defendant, or was left at his house, and that its presence there came to his knowledge; and that he declined to receive it, as stated in the letter of September 17th, 1897, written by him to the agent of the publisher.

It appeared that the defendant did not comply with the latter part of the contract,—that is, he did not send his photograph or the sketch of his life; and the publisher was unable to publish a sketch of the defendant in the book, or to print a portrait of him in connection with that sketch, or to furnish a plate of the portrait as provided in the order.

The defendant admitted that the publisher sent him, soon after the order was signed, a letter requesting the portrait and sketch, which he declined to furnish; and that he signed the order which constitutes the basis of the action.

He also admitted that the agent of the assignor of the plaintiff came to him and solicited this order, and that he signed it. He rested his defense upon the grounds that he was induced to sign the order by certain representations which were made by the agent, which representations he claimed were false. He also claimed that these representations were of such a character that they were material to the quality of the book, and that he relied upon these representations, and attached his signature to the order in consequence of those representations.

Upon this branch of the case the presiding justice instructed the jury as follows:—

"So there is a question of fact for you to determine. In the first place, did the agent make the representations which the defendant claims he made? If he did not, if no representations of that character were made, why that practically ends the case. Under those circumstances I do not understand that the defendant would claim that he had any defense to this action. After you have determined what the representations were, the next question is, were they material? Did they relate to the character and quality of the book to be published?

"If they were made, did they have any relation whatever to the character of the book? Because it is not every statement, every representation, that a man makes when he is about to make a trade, that is material to the issue. A man, in making a trade, may come to you and say to you that he came from Portland the day before, or that he was going along the street, and called in for the purpose of selling a horse or a carriage; and it turns out that he did not come along the street, and did not come from Portland. Now those are matters not material to the issue. But if he should make any representation as to the character of the horse, that might be material, as you see. So that, if the representations were made, the next question is, were they material?

"Did they relate to the quality and character of the article to be sold? Or, in this case, did those representations relate to the character and quality of the book which was to be published by the plaintiff's assignor? If they did not, if they had no bearing upon the quality of the book, if they were not material, then the defendant was not injured by them, and they would not avail him in the defense of this action. But if they were material, if they did relate to the character and quality of the book to be published, the next question is, were those representations false or true? Because, if true, the defendant of course was not misled, was not prejudiced thereby; and as he declined to furnish Mr. Kellogg with the data and the photographs, he has no cause of complaint, and must pay, as he agreed to pay. But if they were false, as the

defendant claims, then the question arises was the defendant misled, or did he rely upon those false representations in signing the contract?

"Whether or not they were false is a question of fact for you. The testimony offered here is that the solicitor approached Mr. Weeks, the attorney for the defendant in this action, outside of the four named in the list which the defendant says the agent referred to in his conversation with him. Now, if they were false, the next question, as I have said, is, was the defendant misled by them? That is, did he rely upon these representations in signing the contract? That he signed the contract, there is no question. Did he, relying upon these representations, which you must first find to have been false and material, sign that paper?"

The plaintiff recovered a verdict for the full amount claimed by him. The defendant requested certain instructions to the jury which the presiding justice declined to give except as contained in his charge; they are sufficiently stated in the opinion of the court.

The defendant took exceptions to the refusal to instruct the jury as he requested; he also had exceptions to the admission of certain evidence, but they were not considered by the court.

Levi Greenleaf, for plaintiff.

Subscriptions and contributions: "If a subscription is voluntary and independently made, even for the purpose of influencing others to subscribe and has that effect, it would be binding on the ground of the mutuality of the promises". 2 Field's Lawyers' Brief, 105; *Fisher* v. *Ellis*, 3 Pick. 323; *Trustees of Amherst Academy* v. *Cowls*, 6 Pick. 427.

Fraudulent representations: "To take advantage of fraud in a contract, it must be shown that the other party intended a deception and was successful therein to the damage of the party defrauded." *Pratt* v. *Philbrook*, 33 Maine, 22.

"A misrepresentation, moreover, to enable a purchaser to avoid a sale or contract on the ground of deceit and fraud, must be made concerning some matter very material to the value of the contract, so that there may be fair ground for thinking that the contract

would never have been entered into if the false statements had not been made." 2 Ad. on Con. 637.

To all trifling and unimportant representations not seriously affecting the value of the contract, and to all affirmations of matters of opinion and judgment, not amounting to positive assertions of fact with knowledge of their falsehood, the maxim of caveat emptor must apply.

It is presumed that all the elements material to the contract were written out and signed by the parties to the contract.

If this matter is material it should have been mentioned in the contract if it was to stand. Why was not this "material matter" reduced to writing and made a part of the contract if it was to be relied upon and if it was a part of the contract?

There are no stipulations in the contract that no Fairfield people should be represented in the work except this small coterie of gentlemen. In fact, neither they nor any one else are represented from that town.

See in the contract the following: "All conditions of this contract must be expressed in and made a part of the same. None others will be recognized."

The evidence shows that neither the defendant, nor "the three friends" are represented in the work. Is this fraud?

The conversations of parties which ripen into a written contract are not to be received to affect or control that contract.

"The rights of the parties are to be determined by the contract; nor is the contract to be avoided because one party or the other may err in his construction of its legal meaning and effect." *Insurance Co.* v. *Hodgkins*, 66 Maine, 113.

Contracts may be set aside on the ground of fraud, but in an action upon a contract that is expressed in writing in plain, consistent and unambiguous language, it must be taken to express the intention of the parties, and it can not be contradicted or varied by parol evidence. *Warren* v. *Jones*, 51 Maine, 146.

Even though the soliciting agent had told the defendant that none except the four mentioned from Fairfield would be represented in the work, he cannot be guilty of fraudulent representa-

tion of material matter, because none others are represented there, not even they themselves.

"Though a party may have been deceived by fraudulent representation, it is not usual for courts to interfere in his behalf, if he has full means of ascertaining the truth and detecting the fraud, and yet neglected to do so." *Pratt* v. *Philbrook*, 33 Maine, 17.

The defendant could not have known how many or what names were to go into the work, the style of binding, or the other things when he refused and neglected to furnish his photograph and biographical sketch, for the written work was not complete, nor had it gone to the binder.

Is it fraudulent to publish a large and complete work containing six hundred of the most distinguished men of our State, with their photographs and biographical sketches, instead of a smaller and inferior one?

"Where the question of fact for the jury to decide is a question of fraud, and they have decided against the 'fraud', the court will not, except in very glaring cases, grant a new trial." *Googins* v. *Gilmore*, 47 Maine, 16.

Geo. G. Weeks, for defendant.

Materiality of the false representation is a question of law.

Counsel cited: *Hammatt* v. *Emerson*, 27 Maine, 316; *Coburn* v. *Haley*, 57 Maine, 346; *Long* v. *Woodman*, 58 Maine, 49; *Martin* v. *Jordan*, 60 Maine, 531; *Roberts* v. *Plaisted*, 63 Maine, 335; *Thompson* v. *Hinds*, 67 Maine, 177; *Buck* v. *Leach*, 69 Maine, 484; *Coolidge* v. *Goddard*, 77 Maine, 578; *Palmer* v. *Bell*, 85 Maine, 352; *Hoxie* v. *Small*, 86 Maine, 23; *Caswell* v. *Hunton*, 87 Maine, 277; *Braley* v. *Powers*, 92 Maine, 203; *Penn Mut. Life Ins. Co.* v. *Crane*, 134 Mass. 56.

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

WISWELL, J. The defendant signed an order and contract directed to the New England Magazine, Boston, Mass., in which he requested that one copy of a work entitled "Men of Progress," consisting of one volume of portraits and biographical sketches of

representative men of the State of Maine, be sent him, and in which he agreed to pay therefor the sum of $35, "upon issue of the part containing my sketch and portrait, and delivery of the photo-engraved plate of the portrait of myself."

In an action by the assignee under a written assignment of a claim growing out of this contract, the defendant contended that the contract was void and imposed no liability upon him because he was induced to execute it by means of false and material representations, relied upon by him, as to the character of the work which was to be published, made by the agent of the publisher who solicited his subscription, and at the time of the execution of the contract.

The defendant introduced evidence tending to show that certain representations were made to him, before he signed the contract, relative to the number of persons in the town in which he lived who were to be solicited to have their biographical sketches and portraits published in this work, and also as to the whole number of persons whose sketches and portraits were to be published; that these representations were false, that they were relied upon by him and that he was thereby induced to execute the contract.

The defendant's counsel requested the court to instruct the jury, in effect, that if these representations were made, and were false, and were relied upon by the defendant who was thereby induced to make the contract, the action could not be maintained; the object of these requests evidently being to obtain an instruction that the alleged false representations were material. The presiding judge did not give the requested instructions, nor did he in his charge instruct the jury as to whether or not the alleged false representations, if made as claimed by the defendant, were material. But he submitted this question as one of fact to the jury for determination.

This was erroneous. The question whether or not a false representation, whether it is relied upon by the plaintiff to support an action for deceit, or by a defendant to avoid a contract, because of deceit is material, is one of law for the court, not of fact for the jury. This was fully settled in this state in the case of *Caswell* v. *Hunton*, 87 Maine, 277.

This failure, however, to instruct the jury as to the materiality of the representations relied upon by the defendant would not be prejudicial to the defendant, unless the representations were as a matter of law material, so that this question must be considered.

The contention of the defendant was, and he introduced evidence tending to prove, that the agent of the publisher, who obtained his subscription for this work, represented to him at the time that only three other residents of the town, in which the defendant lived, would be solicited to become subscribers to this work and to have their biographical sketches and portraits published therein. And also that the portraits and sketches of only three hundred persons in all would be published therein.

We think that these were material representations, and that if all of the other necessary elements were proved to exist, a contract induced thereby could not be enforced. They were representations relative to the character and contents of a book that was to be subsequently published; and while ordinarily it would be no defense to a subscriber to a book to be published that it contained more than it was represented it would contain, this is not true with reference to a work of this particular character. The inducement held out to a person, in order to obtain from him such a contract as this, is not simply that the subscriber may obtain a copy of the book, but that he may have the pleasure of seeing, and of knowing that others will see, his own sketch and portrait published therein. Under these circumstances the greater the number of persons whose sketches and portraits are published, the less distinction to each. This defendant was to have his sketch published as one of the "representative men of the State of Maine." It very likely was not nearly as satisfactory to him to be included among some six hundred representative men in the state, as it would have been to have been one of only half that number. We think, therefore, that the failure to instruct the jury that these representations were material was prejudicial to the defendant as well as erroneous.

This disposes of the case and makes it unnecessary to consider the other exception.

Exceptions sustained.

STATE *vs.* ELMER SNOWMAN.

Franklin. Opinion May 8, 1900.

Fish and Game. Guides. License. Constitutional Law. Pleading. Law and Fact. Stat. 1897, c. 262.

The fish in the waters of the state and the game in its forests are the property of the people in their collective, sovereign capacity, who may permit or prohibit the taking thereof. When such taking is permitted, the legislature may impose such limitations, restrictions and regulations as it may deem necessary for the public welfare.

Chapter 262 of the statute of 1897 requiring the registration and certification of guides by the commissioners of inland fisheries and game, and imposing a penalty upon any person who engages in the business of guiding without such registration and certificate, is constitutional.

When the legislature may require a license for carrying on any business, or engaging in any vocation, it may exact the payment of a reasonable fee therefor.

An indictment charging the defendant with "having been unlawfully engaged in the business of guiding, in inland fishing and forest hunting, as the term is commonly understood, said defendant not having caused his name, age and residence to be recorded in a book kept for that purpose by the commissioners of inland fisheries and game of the State of Maine, and had not then and there procured from said commissioners a certificate setting forth in substance that he is deemed suitable to act as a guide either for inland fishing or forest hunting, against the peace, etc., "is not bad for duplicity."

The defendant was charged in an indictment with having been unlawfully engaged in the business of guiding. *Held;* whether he was so engaged as a business is a question for the jury. An instruction that "if he acts as guide one or more times, not being licensed, he falls within the provisions of the statute as being engaged in the business of guiding,—the statute intending to prohibit all guiding unless by licensed guides,"—is erroneous.

A single act of guiding with proof of other circumstances may justify the jury of such a charge; while, on the contrary, proof of two or more acts of guiding, with other circumstances proved, may fail to so satisfy them

ON MOTION AND EXCEPTIONS.

The defendant was indicted and found guilty of guiding at Rangeley without a license under c. 262 of the statute of 1897, and after verdict moved for an arrest of judgment upon the following grounds:—

(1) The indictment is bad for duplicity; (2) The indictment does not fully set forth the offense intended to be charged; (3) Everything set forth in the indictment may be true, and still the respondent may be innocent; (4) The law is unconstitutional.

The defendant also took exceptions to certain instructions in the charge of the presiding justice which was reported in full in the bill of exceptions. These exceptions were to the closing part of the charge which appears below.

Charge to the jury.

"Now, Mr. Snowman is charged with pursuing since the first of July in this year the business of guiding upon Rangeley Lake and in that vicinity without having the license which this statute requires. It is admitted that he did not have a license, and the only question of fact, really, for you to determine is whether since the first day of July, his license for 1897 having expired the day before, he has been engaged in the business of guiding contrary to the provisions of the statute. If he has, why then he should be found guilty by you, and if he has not, then he is entitled to a verdict of acquittal.

"The business of guiding defined in the statute is as 'commonly understood.' You have heard the evidence. That question is partly one of law and partly of fact. I understand the term, 'engaged in the business of guiding as commonly understood,' to mean that the party undertakes, not necessarily in words but by acts, to act as a guide by the common sense of the term; that he makes a business of it, not necessarily all the time but it may be for a portion of the time, and he may have some other business for another portion of the time; and the test is not the volume of business he may do. A man may be engaged in the business of guiding although he may not actually discharge the duties of a guide but a few times in a season, and it may be that he may act as a mere servant for a party, hired to row a boat for a sportsman who knows the fishing-ground and does not care for any knowledge on the part of the guide, and he may be a mere boatman and not be in the business of guiding.

"It is a question of fact for you in which capacity this man

acted. I say that it may be a man's business guiding, and yet he may do but little guiding in a season. It is conceivable that a party might advertise himself, by postals if you please, or any way, as a guide, and he might be employed two or three times early in the season, and it is possible that he might remain at the lake the whole of the fishing season and he might not be employed by anybody, or by but a few, and yet it is possible that he may be engaged in that business so far as he can get it to do. So that the volume of the business is not the test. . . . .

"Taking his past experience, the fact that he was licensed the year before and applied for a license this year and what he did and compare it with what other guides do, and perhaps you may have some knowledge about that. And then it is for you to say whether he was then or sometime this year since the first of July engaged in that business to a greater or less extent, and holding himself out directly or indirectly by words, it may be, or simply by acts as a guide and ready to be employed as a guide and to discharge the offices and duties of a guide. It is all a question of fact for you to determine. I say a man may let himself as a boatman and not as a guide; he may let himself for a servant; he may do boating and nothing else and not be engaged in the business of guiding. Your practical common sense will tell you the distinction. . . . . .

"I am requested, gentlemen, to instruct you that it is incumbent upon the State to show that Snowman has held himself out directly or indirectly to the public as a guide, and that separate acts of guiding for pay or otherwise are not necessarily proofs of Snowman having been engaged in the business of guiding in violation of law.

"I give you that with a qualification.

"I have explained to you what is meant by holding himself out directly or indirectly; that it need not be by words, but if he is there by employment under circumstances which imply to the person employing him, and who pays him, that he has a right to act as a guide, and is employed as a guide, that would be an indirect holding out.

"Now, I have said to you that the volume of business he may

do as guide is not the test, but the question is whether he has engaged in the business of guiding to a greater or less extent.

"And I think I will say to you for the purposes of this case, as it will undoubtedly go forward to the law court, that if he acts as guide one or more times, not being licensed, he falls within the provision of the statute as being engaged in the business of guiding. I think the statute intended to prohibit all guiding unless by licensed guides."

E. E. Richards, County Attorney, *L. T. Carleton*, with him, for State.

But one offense is embraced in the indictment, viz.: "engaging in the business of guiding." It may be committed by guiding in inland fishing or forest hunting, the two general branches of the occupation, without a license. The words "in inland fishing and forest hunting," following the word "guiding" in the eleventh line, can be considered simply as two independent causes set out as constituting one offense. *State* v. *Lang*, 63 Maine, 217; *State* v. *Robbins*, 66 Maine, 327; *State* v. *Woodward*, 25 Vt. 616.

The charge is engaging in the business of guiding. The words of the indictment deny the possession by the defendant of any certificate qualifying him to engage in either branch of that business, and is in effect a denial of his qualification to engage in both. *State* v. *Keen*, 34 Maine, 500; *Sherban* v. *Com.* 8 Watts, 212, (34 Am. Dec. 460.)

The enactment of the statute is clearly within the power of the legislature. *People* v. *Naglee*, 1 Cal. 232, (52 Am. Dec. 331); *Com.* v. *Ober*, 12 Cush. 493; *Hewitt* v. *Charier*, 16 Pick. 353; *Com.* v. *Crowell*, 156 Mass. 215; Cooley's Const. Lim. 4th Ed. 594-596; *State* v. *Montgomery*, 92 Maine, 433; *Morrill* v. *State*, 38 Wis. 428, (20 Am. Rep. 12); *State* v. *Express Co.*, 60 N. H., 219, (p. 260); *Geer* v. *State of Conn.*, 161 U. S., 519.

Exceptions: The charge should be construed as a whole, in the same connective way in which it was given.

If, when so given it presents the law fairly and correctly to the jury in a manner not calculated to mislead them, it will afford no ground for reversing the judgment, although some of its expres-

sions, if standing alone, might be regarded as erroneous. 2 Thompson on Trials, § 2407; *Searsmont* v. *Lincolnville*, 83 Maine, 75; *Adams* v. *Nantucket*, 11 Allen, 203; *Jackman* v. *Bowker*, 4 Met. 235.

Enoch Foster and O. H. Hersey, for defendant.

Business of guiding is entirely different, as a matter of law, from the act of guiding. To be engaged in the business of guiding, one act is not sufficient to constitute the offense. *Goodwin* v. *Clark*, 65 Maine, 284; *State* v. *Stanley*, 84 Maine, 561; *State* v. *Garing*, 74 Maine, 153, 154; *Com.* v. *Lambert*, 12 Allen, 178, 179; *State* v. *O'Connor*, 49 Maine, 597, 599.

Act unconstitutional: The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must be free in this country to all alike upon the same conditions. The right to pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright. This act is made in the interest of the few against the rights of the great majority of the citizens of this state. It prohibits a citizen from using his faculties in a lawful way, and from living and working where he will, and earning his livelihood in a lawful calling, or in pursuing any lawful trade or vocation; and a regulation, or enactment, framed to exclude persons or classes from those pursuits that are given them by right and by nature, must be held void by the constitution. It bears no analogy to the police power which may rightfully be exercised in relation to law, medicine, or any of the learned professions, nor belongs to those callings which the state has the right to regulate or even prohibit in the protection of the health and morals of its citizens, or for the purpose of raising revenues.

The act is not in relation to the protection of fish and game. It is simply a prohibition against citizens of our state pursuing an ordinary, common calling in the community in which they reside.

Guiding is not a calling or profession that is dangerous in itself. It is but an "ordinary calling" and requires no skill other than what is possessed by persons residing in the community where they may be located. If the act is to be sustained at all, it must be sustained on the ground that it falls within the police power of the state either as affecting the health or morals of the people, or as dangerous to the public. How can it be said to fall within either class? This law was not enacted, nor does it purport so on its face, for the purpose of protecting fish and game. It was enacted as a prohibition against an ordinary business, or calling of life. It was not enacted, for the purpose of obtaining revenue, because the amount to be paid for the license is merely nominal. It is unlike the cases where the state has a right to even prohibit as well as tax for the purpose of not only obtaining revenue, but for the purpose of prohibiting such business, where it would be injurious to the health or the morals of the state. Nobody can contend that the business of guiding is contrary to the health or to the morals of the people of the state. No proposition is now more firmly settled than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful pursuits not injurious to the community, as he may see fit. Cooley on Torts, p. 277, and cases cited.

When the police power is attempted to be applied to such occupations as guiding, and the state undertakes to prohibit them altogether, or to regulate them by fines or licenses outside of what may be proper as a means of revenue, it may be said that the person so pursuing the calling or business is deprived of his liberty without due process of law.

In respect to the great majority of employments, as ordinary callings of life, and aside from skilled professions, the principles of police power have no application. They not only do not threaten any evil to the public, but their prosecution to the fullest measure of success is a public blessing. They are callings which the Almighty has given to mankind and which are protected by the Constitution, which recognizes a man may have certain "natural, inherent and inalienable rights, among which are those of enjoying

and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness."

The state may impose licenses in respect to any kinds of occupations for the purpose of defraying expenses of government. But these licenses are not, as a rule, within the police regulation for the purpose of prohibiting persons from entering into the practice of professions or callings. For, it is the right of every citizen to pursue the ordinary callings of life independently of government, and the pursuing of such callings can only be restrained and regulated by the state in the exercise of police power so far as may be required to prevent the doing of damage to the public, or in the conservation of public health and public morals. Where the calling or ordinary business of life is not dangerous to the public, and where it does not endanger public health or morals, it can be subject to no police regulation whatever, except that it falls within the power of taxation for the purpose of defraying the expenses of government.

The legislature has the choice of means to prevent evil to the public, but the means chosen must not go beyond the prevention of the evil, and prohibit what does not cause the evil. A regulation framed to exclude persons or classes must be held forbidden by constitutional provisions.

The prosecution of a particular calling which threatens damage to the public, either in regard to health or morals, is a legislative subject for police regulations, to the extent of preventing the evil. But this question is not one that lies wholly within the judgment or discretion of the legislative department. It is strictly a judicial question whether a trade or calling is of such a nature as to require or justify police regulation. The legislature cannot declare a certain employment to be injurious to the public good, and prohibit it, when, as a matter of fact, it is a harmless occupation. The general principle of constitutional liberty, liberty guaranteed by the bill of rights under our constitution, is that there must be no exclusion from lawful employments. Nevertheless, the law may make exceptions in some cases where the reasons therefor are sufficient on grounds of public policy, embracing cases falling within

the two principal grounds which police power rests on, viz:—conservation of public health and public morals.

The test of what is a reasonable regulation must be found in the legislative judgment, unless the bill of rights and the constitution have provisions which conflict upon the subject. What legislation ordains and the constitution does not prohibit will be lawful. But if the constitution does no more than provide that no person shall be deprived of life, liberty, or property, except by due process of law, it makes an important provision on this subject, because it is an important part of liberty to have the right to follow all lawful employments.

Under the mere guise of police regulations personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final or conclusive.

This police power, however broad and extensive, is not above the constitution. The unwritten law of this country is in the main against the exercise of police power, and the restrictions and burdens, imposed upon persons and private property by police regulations, are jealously watched and scrutinized. The main guaranty of private rights against unjust legislation is found in the bill of rights.

Whether the act is a valid exercise of legislative power is to be determined solely by reference to constitutional restraints and prohibitions. The legislative power has no other limitation.

Whenever an act of the legislature contravenes a constitutional provision, it is void, and it is the duty of the courts so to declare it, and refuse to enforce it.

Counsel cited: *People* v. *Otis*, 90 N. Y. 48; *Butchers Union Co.* v. *Crescent City Co.*, 111 U. S. 746; *Live Stock, etc., Assoc.* v. *Crescent City Co.*, 1 Abb. (U. S.) 398; *Bertholf* v. *O'Reilly*, 74 N. Y. 509, 515; Potter's Dwarris on Stat. 458; *Austin* v. *Murray*, 16 Pick. 121, 126; *Watertown* v. *Mayo*, 109 Mass. 315, 319; *Slaughter-House Cases*, 16 Wall. 36, 87; *Coe* v. *Schultz*, 47 Barb. 64; *Matter of Cheeseborough*, 78 N. Y. 232; *Corfield* v. *Coryell*, 4 Wash. (C. C.) 380; *Matter of Jacobs*, 98 N. Y. 98; *Beebe* v. *State*, 16 Ind. 501, (S. C. 63 Am. Dec. 391); Tiedeman, Lim. Police

Power; Cooley, Torts, 277; Smith, Wealth of Nations, Book 1, c. 10.

Mr. Carleton, in reply.

This law provides that whoever engages in the business of guiding shall cause his name, age, and residence to be recorded, and pay $1.00 license fee. The state thus derives a revenue of over $1700.00 annually from this source, which by law goes into the fund for the propagation of fish and the protection of game. It will be nearly $1900.00 this year,—a very substantial revenue, more by hundreds of dollars than was yearly appropriated when the state first commenced on this policy.

There are more than 1700 men living in this state and in New Hampshire and the provinces who are engaged in the business of guiding in Maine. They guided last year, according to their reports made to the Commissioners, and it is so published in their report, 63,501 days, and earned while so doing for this work nearly $350,000.00.

They guided 5820 residents of this state and 7366 residents of other states. These men are skilled in woodcraft, they know the haunts and habitat of fish and game, and how best to take it; and these skilled, trained hunters and fishermen are hired at high wages to show and aid their employers how to take the property of all the people, viz., their fish and game; and the state has said, through this guide law, to these men, if you engage in this business your name, age and postoffice address shall be known to the state authorities; you shall be registered and make a report of the extent of your business in this direction to the state authorities, so that the people of the state, who pay the taxes to provide this business for you, may the better understand the magnitude of this industry they are yearly called upon to pay their money to support by way of taxation.

There are vast interests in our wild lands, over which this vast number of people fish and hunt; our lumbermen, who own the timberlands, insist that they shall have that degree of protection against forest fires which a licensed guide can give if he will, and that no unsuitable person be allowed to guide strangers over their

property, who knows little or nothing of the fire danger, or the necessity of extinguishing camp fires.

Again, there is no so effectual method of protecting game as through this law, as will be readily seen. The guides can protect the game as it can be protected in no other way, and they can only be brought up to this by such a law as this registration law.

One of the chief objects of this law is the better protection of game.

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

FOGLER, J. The respondent was indicted and tried for an alleged violation of the provisions of Section 1 of Chapter 262, Public Laws of 1897, which reads as follows:

Sect. 1. "No person shall engage in the business of guiding, as the term is commonly understood, before he has caused his name, age, and residence to be recorded in a book kept for that purpose by the commissioners of inland fisheries and game, and procured a certificate from said commissioners, setting forth in substance that he is deemed suitable to act as a guide, either for inland fishing or forest hunting, or both, as the case may be. Whoever engages in the business of guiding without having complied with the provisions of this section forfeits fifty dollars and costs of prosecution."

Section 2 of the same chapter is as follows:—

Sect. 2. "Each registered guide shall from time to time, as often as requested by the commissioners, on blanks furnished him by the commissioners, forward a statement to them of the number of persons he has guided in inland fishing and forest hunting during the time called for in said statement, the number of days he has been employed as a guide, and such other useful information relative to the inland fish and game, forest fires and the preservation of the forests in the localities where he has guided, as the commissioners may deem of importance to the state."

Other sections of the chapter require that the registration provided for by the act, shall take place annually on or before the first day of July; that when any registered guide shall be convicted

of any violation of the inland fish and game laws he shall forfeit his certificate; that a fee of one dollar shall be paid by each person registered and that the money thus received shall be and become a part of the fund for the preservation of inland fish and game; and that the act shall not be construed to apply to any person who has not, directly or indirectly, held himself out to the public as a guide, or solicited employment as such.

The indictment alleges that the respondent, Elmer Snowman, at Rangeley in the county of Franklin, "On the second day of July in the year of our Lord one thousand eight hundred and ninety-eight and on divers other days between said second day of July, A. D. 1898, and the day of the finding of this indictment, was then and there engaged in the business of guiding in inland fishing and forest hunting, as the term is commonly understood, said Elmer Snowman not having caused his name, age and residence to be recorded in a book kept for that purpose by the commissioners of inland fisheries and game of the state of Maine, and had not then and there procured from said commissioners a certificate setting forth in substance that he is deemed suitable to act as a guide either for inland fishing or forest hunting, against the peace," etc.

The jury returned a verdict of guilty, whereupon the respondent filed a motion in arrest of judgment which was overruled by the presiding justice, and to such overruling of the motion the respondent excepts.

The respondent also excepts to an instruction given by the presiding justice to the jury.

The motion in arrest of judgment alleges that the indictment is bad for duplicity and is otherwise insufficient in law; and that the statute under which the respondent is indicted is unconstitutional.

We are of opinion that the indictment is sufficient in law. But one offense is charged, namely, that of having been unlawfully engaged in the business of guiding, and the indictment is not therefore, bad for duplicity. The indictment follows closely the language of the statute, so that the offense charged and the statute under which the indictment is found can be clearly identified and understood.

The counsel for the respondent contends that the statute under which the respondent is indicted is repugnant to that clause of the Declaration of Rights, Section 1, Article 1, of the Constitution of Maine, which declares that, "All men are born equally free and independent, and have certain natural, inherent and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness."

It is argued in support of this contention, that the statute in question deprives the respondent and others from engaging in a lawful vocation, and is therefore in contravention of the provisions of the Bill of Rights, guaranteeing the liberty of all citizens.

It is unquestioned that every person has the natural right to pursue any lawful vocation, but such natural right is subject to the legal maxim, sic utere tuo ut alienum non laedas. So when a vocation, naturally lawful, or the mode of exercising it, inflicts injury to the rights of others, or is inconsistent with the public welfare, it may be regulated and restrained by the State by the exercise of its police power; by which persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health and prosperity of the state. *Dexter* v. *Blackden*, 93 Maine, 473; Tiedeman's Lim. of Police Powers, § 1.

The question here is whether the enactment of the statute under consideration by the legislature was a legal and constitutional exercise of such power, or falls within constitutional limitation.

The rule to be observed by the judiciary in determining the constitutionality of a legislative enactment is thus stated in *State* v. *Lubee*, 93 Maine, 418: "Every presumption and intendment is in favor of the constitutionality of an act of the 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."

The manifest purpose of the statute in this case is the preserva-

tion of the fish in inland waters of the state, and the game in its forests. By the terms of the act a person, to be authorized to act as a guide in inland fisheries and forest hunting, must be registered and certified by the commissioners of inland fisheries and game, whose certificate must set forth in substance that the person to whom it is issued is suitable to act in such capacity. Each person so registered and certified, is required, as requested by the commissioners to furnish certain statistics as to his employment as guide, and also such other useful information relative to inland fish and game, forest fires and the preservation of the forests, as the commissioners may deem important to the state.

The fish in the waters of the state and the game in its forests belong to the people of the state in their sovereign capacity who, through their representatives, the legislature, have sole control thereof and may permit or prohibit their taking. *Martin* v. *Waddell*, 16 Pet. 410; *Geer* v. *State of Conn.*, 161 U. S. 519, and cases there cited; *Ex parte Maier*, 103 Cal. 476; *State* v. *Redman*, 58 Minn. 393.

In the case last cited the court says: "We take it to be the correct doctrine in this country that the ownership of wild animals, so far as they are capable of ownership, is in the state, not as a proprietor, but in its sovereign capacity, as the representative and for the benefit of all its people in common."

In *Ex parte Maier*, supra, it is said: "The wild game within a state belongs to the people in their collective sovereign capacity. It is not the subject of private ownership except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or traffic and commerce in it, if it is deemed necessary for the protection or preservation of the public good."

When the state permits the taking of fish and game, it has full power and authority to regulate such taking. It may impose such conditions, restrictions and limitations as it deems needful or

proper. *Geer* v. *State of Conn.*, supra, in which Mr. Justice White, who delivered the opinion of the court, exhaustively examined and discussed the question here involved, citing an array of authorities, says, p. 528: "In most of the states laws have been passed for the preservation and protection of game. We have been referred to no case where the power to so regulate has been questioned although the books contain cases involving controversies as to the meaning of some of the statutes." See also *Manchester* v. *Massachusetts*, 139 U. S. 240; *Roth* v. *State*, 51 Ohio St. 209; *Allen* v. *Wyckoff*, 48 N. J. L. 90; *Phelps* v. *Racy*, 60 N. Y. 10; *Moulton* v. *Libbey*, 37 Maine, 494; *State* v. *Whitten*, 90 Maine, 55.

It has been for many years the policy of this state to protect and preserve its fish and game, and to that end the legislature has annually appropriated and caused to be expended large sums of money, and has enacted numerous statutes. Under this wise policy the fish and game within its borders have become of great importance and value to the state. The statute here in question is a further enactment in pursuance of such policy.

It is well known that most sportsmen who frequent remote streams and lakes, and traverse the trackless forests which cover large portions of the state, do so under the guidance and direction of guides. Guides may be regarded as instrumentalities in fishing and hunting. Guides should possess such skill, experience, sagacity and probity that not only the safety of the sportsman but the welfare of the state can be properly intrusted to them. They should be under such restrictions that it shall be for their interest to discountenance violation of the fish and game laws. The legislature has deemed it wise to create such a body of men who shall pursue such vocation under the supervision of the commissioners of inland fisheries and game, and shall assist the commissioners in protecting and preserving the property of the state. The privilege of hunting and fishing is granted by the state freely and without price; and it is reasonable and proper that all who avail themselves of such privilege, whether they be fishermen, hunters or guides, should conform and be amenable to such regulations as the state may impose. We are of opinion that the legislature has the

constitutional power to regulate the employment of guides in fishing and hunting as provided in the statute here in question.

The learned counsel for the respondent further contends that, assuming the statute to be otherwise constitutional, the requirement that each person registered and certified under the provisions of the act, shall pay a fee of one dollar, is repugnant to the constitution, and that the statute is for that reason unconstitutional and void. We do not sustain that contention. It is well settled that when the state issues a license to any person to carry on any business or to engage in any vocation, it may exact a reasonable fee therefor. Tiedeman on Lim. of Police Powers, § 101, p. 274, et seq., where the authorities upon this point are collated and examined. The fee required by this statute is certainly reasonable, being no more than is sufficient to defray the expense of registering and certifying and maintaining necessary supervision.

We, therefore, hold that the statute under which the respondent is indicted is not repugnant to the constitution of the State, but is constitutional and valid.

The defendant excepts to the following instructions given to the jury by the presiding justice, viz: "And I think I will say to you, for the purposes of this case, as it will undoubtedly go forward to the law court, if he acts as guide one or more times, not being licensed, he falls within the provisions of the statute as being engaged in the business of guiding. I think the statute intended to prohibit all guiding unless by licensed guides."

This instruction was erroneous and the exception thereto must be sustained.

The respondent is charged in the indictment with having been unlawfully engaged in the business of guiding. Whether he was so engaged, as a business, was a question exclusively for the jury. A single act of guiding with proof of other circumstances might satisfy them of the truth of the charge; while, on the contrary, proof of two or more acts of guiding, with other circumstances proved, might fail to so satisfy them. Moreover, the statute, chapter 262, § 5, P. L. 1897, provides that, "This act shall not be construed to apply to any person who does not directly or indi-

rectly, hold himself out to the public as a guide or directly or indirectly solicit employment as such."

Exceptions as to sufficiency of indictment and as to constitutionality of statute overruled.

Exceptions to instructions of presiding justice sustained. New trial granted.

ELBANO L. GOWEN, and another, *vs.* CHARLES F. BESSEY.

Waldo. Opinion May 10, 1900.

Burial. License. Evidence. Trespass.

The holder of a lot in a cemetery belonging to a town, has a license, exclusive of any or every other person, to bury the dead thereon, and such license once acquired cannot be revoked so long as the cemetery is used as a place of sepulture.

The writing of the name of a person to whom a lot in such a cemetery has been assigned in the space designated as such lot upon a plan of the cemetery, is sufficient evidence of license, when such method of perpetuating title has been adopted by the town, or by its selectmen to whom the town has committed the assignment of lots.

When an inhabitant of a town has acquired a license to use a lot in a public cemetery for burial purposes, his removal from the town does not constitute a revocation of his license or an abandonment of his lot.

Trespass quare clausum is a proper action against one who enters upon and uses for burial purposes a lot in a cemetery which another has the exclusive right to use for such purpose.

ON REPORT.

The case is stated in the opinion.

W. P. Thompson, for plaintiffs.

W. H. McLellan, for defendant.

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

FOGLER, J. This is an action of trespass quare clausum. The locus is described as lot No. 165 in the New Cemetery, so called, in the town of Brooks.

In 1887, the town of Brooks, under a vote of the town, purchased a parcel of land as an addition to its cemetery, and had the land so purchased surveyed and divided into lots, the bounds of which were permanently marked, and caused a plan to be made upon which the lots were designated and numbered. By vote of the town non-residents were charged twenty dollars per lot. Lots were furnished to inhabitants of the town free of charge, though the town never so voted. Under a proper article in the warrant, the town voted that "the matter in regard to the new burying yard be left with the selectmen."

In the spring of 1888, the then selectmen, all being present, instructed the sexton, "to adopt that plan, residents to select the lots without pay and put it on the plan."

No person, resident or non-resident selecting a lot in the burying ground, has ever received a deed of the lot, or any certificate or writing in relation thereto, the only record thereof being the writing of the name of the person taking or selecting a lot, in the space upon the plan upon which the lot was designated by number.

In 1891 the plaintiffs, husband and wife, both then being inhabitants of the town, went into the burying ground and in the presence of the sexton, selected Lot No. 165, and inquired of the sexton as to the price, and were informed by him that residents could take up lots without pay. In answer to an inquiry about a deed, the sexton told the plaintiff that he could not give a deed but he would put it on his book and then have it put on the plan in ink, and that would be legal and would hold the lot, and that was the way they did with everyone.

The sexton inquired whose name should be put down as selecting the lot and Mrs. Gowen replied "E. L. Gowen," her husband, and the sexton wrote that name in his book and soon after had the name written on the space upon the plan designated as Lot 165.

In January, 1898, the defendant went to the burying ground in company with the sexton to procure a lot for the burial of his wife who had recently died, and selected Lot No. 165. The sexton informed him that the lot had been selected by Mrs. Gowen, and he could not give the defendant consent to take the lot unless the

selectmen gave permission. The defendant, who was one of the selectmen, obtained verbal permission from the other selectmen to occupy the lot, and caused the remains of his deceased wife to be buried therein. At the time of the decease and burial of the defendant's wife, the plaintiffs were not inhabitants of the town of Brooks.

The plaintiffs bring this suit against the defendant for entering said lot and burying the remains of his deceased wife therein.

Is the action maintainable? We think it is.

The parcel of land of which Lot No. 165 was a subdivision, was dedicated by the town as a place of burial for the dead. It subdivided the land so dedicated into lots to be assigned to its inhabitants and others for burial purposes.

The holder of a lot in a cemetery belonging to a municipality or religious society for burial purposes, whether his evidence of title be by deed, or certificate, or other means, does not acquire an absolute title to the land, but has the right, or license, exclusively of any and every other person to bury the dead upon the sub-divided plot assigned to him, and a license once acquired cannot be revoked so long as the ground continues to be used as a place of sepulture. 1 Kerr on Real Property, § 44; *Kincaid's Appeal*, 66 Penn. St. 411; *Windt* v. *German Reformed Church*, 4 Sandf. Ch. 471; *Sohier* v. *Trinity Church*, 109 Mass. 1–22; *Price* v. *Methodist Episcopal Church*, 4 Ohio, 515–539; *Craig* v. *First Presbyterian Church of Pittsburg*, 88 Penn. St. 42–51; *Smith* v. *Thompson*, 55 Md. 5; *Beatty* v. *Kurtz*, 2 Peters, 566.

In the present case the town did not provide for the execution and delivery of any deed or other writing to any person to whom a lot should be assigned, but the selectmen, to whom the matter was unreservedly submitted, by vote of the town, prescribed the manner or method which should be pursued in the assignment of lots. The method so prescribed was followed in the assignment of the lot selected by the plaintiffs, and the prescribed record was made to evidence or perpetuate the assignment. We think the proceedings gave the plaintiffs a license to use the lot in question for burial purposes. No lot holder in the cemetery has a different or better

title to his lot. The town by its long acquiescence in the methods adopted by the selectmen may be deemed to have ratified their form of procedure. Ordinarily no deed or writing is necessary to give a license to use land for a given purpose. A license may be implied by the acts of the parties.

The fact that the plaintiffs at the time when the cause of action accrued, were not inhabitants of the town of Brooks does not, in our opinion, affect their rights in the lot in question. The cemetery was not dedicated by the town to the exclusive use of the inhabitants, for by its vote non-residents could acquire the right to use lots for burial purposes. The plaintiffs' removal from the town is not sufficient evidence to prove an abandonment of the lot. They had on several occasions removed from the town as the employment of the husband made it necessary, and had, on each occasion, except in the case of their last removal, returned to the town. The town of Brooks was the early home of the wife and her father was still a resident of that town. In *Smith* v. *Thompson*, supra, the plaintiff was a member of an association having for its purpose the purchase and maintenance of a burying ground. A lot was assigned to him as such member. He subsequently withdrew from and ceased to be a member of the association. The court held that his withdrawal from the association was not an abandonment of the lot, and that he still had the exclusive right to use the lot as a place of sepulture.

The plaintiffs in the present case acquired and held an exclusive license, irrevocable, from the town, to occupy the lot in question for burial purposes so long as the cemetery should be used for a place of sepulture. The selectmen had no power to revoke the license so acquired and held, or to grant a similar license to the defendant. The defendant's entry upon the lot was unauthorized and constituted a wrong for which the plaintiffs have a remedy. An action of trespass quare clausum is a proper remedy. *Meagher* v. *Driscoll*, 99 Mass. 281; *Smith* v. *Thompson*, supra.

Defendant defaulted.

LEVI GREENLEAF *vs.* BENJAMIN F. HAMILTON.

York. Opinion May 10, 1900.

Sales. Delivery. Action.

To maintain an action for goods sold and delivered, proof of an actual delivery to and acceptance by the purchaser of the goods is essential.

Delivery and acceptance are questions of fact and are to be proved as other facts may be proved. They may be established by direct testimony or may be proved by circumstances.

The acts of the purchaser, or his failure to act, may be properly considered upon the question of delivery and acceptance.

The defendant agreed in writing to take and pay for at a certain price one copy of a book to be thereafter published. The agent of the publishers took a copy of the book to the defendant's law office for delivery. Being informed by the person in charge of the office that the defendant was out of town, he left the copy of the book at the defendant's office, informing the person in charge of the office that the defendant had subscribed for it. At the trial of an action for the agreed price by the assignee of the publisher against the defendant, the foregoing facts having been shown in evidence, the defendant introduced no testimony in defense.

Held; that the question of delivery and acceptance should have been submitted to the jury, and that it was error for the presiding justice to order a verdict for the defendant.

ON EXCEPTIONS BY PLAINTIFF.

The case is stated in the opinion.

L. Greenleaf, for plaintiff.

Where there may be uncertainty and difficulty in determining the true intent of the parties respecting the delivery and acceptance from the facts proved, the question of acceptance is to be decided by the jury. (14 Me. 403; 14 Me. 303.)

When delivered and placed in his own office with his clerk, as this was, the property was so situated that the defendant was entitled to, and could rightfully take possession of it at his pleasure, he then should be considered as having actually received it—"accepted" it. (37 Me. 556.)

The circumstances fairly give rise to a presumption that the

property was received by the defendant; at least, it is a fair question that a jury should pass on.

There is no evidence that the property was ever returned to the plaintiff or to the publisher, and therefore it should be presumed that it was "accepted" by the defendant. There can be no question as to the delivery by the agent of the publisher, and the circumstances most certainly show that an acceptance was made by the defendant. To complete a delivery, acceptance must take place, which may be presumed from the grantee's possession and all the surrounding circumstances of the individual case. (4 Pick. 518.)

Delivery may be made by an agent as well as by the grantor himself. (9 Mass. 307; 3 Metc. (Mass.) 412.)

It is not necessary to be a delivery, that the property should pass into the hands of the vendee; if it is so situated that he is entitled to and can rightfully take possession of it at his pleasure, the sale is perfected. (37 Me. 556.)

Where plaintiff tendered delivery at proper time and place, and left the goods at such place, it was no defense to an action for the price that no one was there to receive them.

What constitutes an acceptance must of course depend in each case upon the particular circumstances arising.

An acceptance may be by express language, or, as is most invariably the case, by a mere inference from the conduct of the buyer, as for example, his detention of the property sold, or his exercising acts of ownership over it.

The duty of acceptance is one imposed by the contract, and if the buyer refuses compliance with it, the law presumes an acceptance and allows the seller to maintain an action for "goods sold and delivered" without any proof of actual acceptance. *Nichols* v. *Morse*, 100 Mass. 523.

Geo. F. and Leroy Haley, for defendant.

There is no act of the defendant in evidence, there is no word of his, that shows that he ever accepted it, or knew where the book was.

In *Gowen* v. *Knowles*, 118 Mass. 282, the receipt of goods by a

boy at plaintiff's place of business was held insufficient to prove an acceptance although the defendants' examiner examined two cases and defendants would not testify that the goods were not included in a proof of loss made by them for damage by fire. In that case, there was no contract agreed upon as regard to time, but the goods were sent to the defendants and received as above. And if they had accepted them they would have been liable for goods sold and delivered, but the court held they were not liable in that form of action.

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

FOGLER, J. This is an action of assumpsit to recover the price of a certain book entitled, "Men of Progress."

The case comes to us upon exceptions by the plaintiff to a ruling of the judge of the Superior Court for the county of Cumberland, in which court the case was entered and tried, directing the jury to return a verdict for the defendant.

April 8, 1896, the defendant, by his written order of that date directed to the New England Magazine, a publishing concern of Boston, Mass., requested said publishers to send him one copy of the book above named, and therein agreed to pay therefor the sum of thirty-five dollars.

August 14, 1897, the publishers' delivering agent called at the defendant's office and was informed by some persons there present that the defendant was out of the city at that time. Thereupon the agent left a copy of the book at the defendant's office and informed those present that the defendant had subscribed for the work.

The defendant did not testify at the trial nor did he offer any testimony in defense.

The publishers assigned the claim to the plaintiff who brings this suit, as such assignee, to recover the contract price of thirty-five dollars.

The presiding justice ordered the jury to return a verdict for the

defendant "because the plaintiff had failed to show a delivery of the property to the defendant," to which order the plaintiff excepts.

To maintain an action for goods sold and delivered, proof of an actual delivery to and acceptance by the purchaser of the goods sued for is essential. *Atwood* v. *Lucas*, 53 Maine, 508; *Edmunds* v. *Wiggin*, 24 Maine, 505; *Moody* v. *Brown*, 34 Maine, 107; *Greenleaf* v. *Gallagher*, 93 Maine, 549.

Delivery and acceptance are questions of fact and are to be proved as other facts may be proved. They may be established by direct testimony or may be inferred from circumstances proved in the case.

As stated in *Moody* v. *Brown*, supra, "there must be proof of an acceptance or of acts or words respecting it from which an acceptance may be inferred."

The acts of the purchaser, or his failure to act, may be properly considered upon the question of delivery and acceptance. "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, 214.

The questions of delivery and acceptance, being of fact, must be determined by the jury.

It is true that when the testimony is clear and uncontradicted, and the inferences to be drawn therefrom are not doubtful or uncertain, the court may decide the question as one of law; but where there may be uncertainty or difficulty in determining the true intent of the parties respecting the delivery and acceptance from the facts proved, the question is to be decided by the jury. *Houdlette* v. *Tallman*, 14 Maine, 400.

In the case at bar neither time or place of delivery of the book subscribed for was stipulated. The publisher had the right to deliver it at a reasonable place and within a reasonable time. Whether, under the circumstances of the case, the defendant's office was a reasonable place for such delivery, and whether from the defendant's subsequent conduct and silence an acceptance could

be properly inferred, were questions which should have been submitted to the jury, and should not have been decided by the presiding justice as a matter of law.

Exceptions sustained.

BENJAMIN F. WOODBURY, in Equity,

vs.

THE PORTLAND MARINE SOCIETY, and others.

Cumberland. Opinion May 10, 1900.

Equity. Former Suit. Laches. De Minimis.

In a former suit in equity where the facts were substantially the same as in this case, except dates and amounts, praying the court to restrain the defendant society from contracting for a dinner or enjoin payment therefor from the funds of the society, the court dismissed the bill.

Upon a second bill praying that the treasurer of the society may be ordered to pay to the defendant company the money paid out by him from its funds for such dinner, *held;* that the decision and judgment of the court in the former suit between the parties is a bar to this case.

Also; that there is no error in the conclusions of law by the justice in the first instance who heard this case, which are as follows:

"Without deciding that such expenditures come within the scope and purpose for which said society was incorporated, in view of the decision of a similar question in a bill in equity between the same parties in relation to a dinner held by the society in the year 1895, and in view of the lapse of time between such expenditures and the commencement of this proceeding, and the comparatively small amount of the expenditure involved, it is considered by the court that this particular bill, under the circumstances, should not be sustained; and I therefore decide that the bill be dismissed with costs."

See *Woodbury* v. *Portland Marine Soc.*, 90 Maine, 17.

IN EQUITY. ON APPEAL BY PLAINTIFF.

The case is stated in the opinion.

Eben Winthrop Freeman, for plaintiff.

Equity jurisdiction: 2 Morawetz Priv. Corp. § 1042; Clark Corp. § 62; *Brinckerhoff* v. *Bostwick*, 88 N. Y. 52; *Russell* v.

Wakefield, L. R. 20 Eq. 479; Kerr on Injunctions, 567, § 11; 1 Lewin on Trusts, 530, § 9, and cases: 2 High, Injunctions, §§ 1224, 1226, 1229; 2 Mass. Spec. Laws, p. 72, of February, 1796; *Converse* v. *Transportation Co.*, 33 Conn. 180; *Franklin Company* v. *Lewiston Savings Bank*, 68 Maine, 44; Brightley's Federal Digest, citing *Humphreville Copper Co.* v. *Sterling*, 1 West L. Mo. 126; *Beaty* v. *Knowler*, 4 Pet. 152; (S. C. 1 McL. 41); *Perrine* v. *Chesapeake & Del. Canal Co.*, 9 How. 172; *Farnum* v. *Blackstone Canal Co.*, 1 Sum. 46; *Bank of Augusta* v. *Earle*, 13 Pet. 519; *Tombigbee R. R. Co.* v. *Kneeland*, 4 How. 16; *Runyan* v. *Coster's Lessee*, 14 Pet. 122; *Dartmouth College* v. *Woodward*, 4 Wheat. 518; *Byrne* v. *Schuyler's Electric Manfg. Co.*, 65 Conn. 336; *Farrell* v. *Railroad Co.*, 61 Conn. 127, (21 Atl. Rep. 757); *Inhab. of Berlin* v. *Inhab. of New Britain*, 9 Conn. 175; 2 Kent. Com. 298; *Ins. Co.* v. *Ely*, 5 Conn. 560; *Mechanics, etc., Ass'n* v. *Meriden Agency Co.*, 24 Conn. 159; *Sumner* v. *Marcey*, 3 Woodb. & M. 112, (Fed. Cases No. 13,609); Endl. Interp. Stat. § 354; Suth. St. Const. § 325; Angell & Ames Corp. § 343; Clark on Corp. § 62, p. 163, 164; Am. & Eng. Ency. (2nd Ed.) 695; *Hood* v. *N. Y. & N. H. R. R.* 22 Conn. 1; *People* v. *Chicago Gas Trust Co.*, 130 Ill. 283, (17 Am. St. Rep. 319); *Buffitt* v. *Troy, etc., R. Co.*, 40 N. Y. 176; Am. & Eng. Ency. Law, 700, and notes; 1 Mor. Priv. Corp. § 494; R. S., c. 46, § 1; Ang. & Ames Corp. § 325; *Railroad Co.* v. *Kendall*, 31 Maine, 470; *Frame-Work Knitters* v. *Greene*, 1 L. Raym. 113; *Carter* v. *Sanderson*, 5 Bing. 79; *Master, etc., of Scriveners* v. *Brooking*, 3 Q. B. 95; *Fullam* v. *Stearns*, 30 Vt. 454.

Judicial discretion in equity as distinguished from vested rights in a plaintiff: 9 Am. & Eng. Ency. Law, 473, and cases; *Woodbury* v. *Gardner*, 77 Maine, 68; *Rockland* v. *Water Co.*, 86 Maine, 57; *Neves* v. *Scott*, 13 How. 268; *Savings Inst.* v. *Makin*, 23 Maine, 360; *Tripp* v. *Cook*, 26 Wend. 152; *Platt* v. *Munroe*, 34 Barb. 293; 2 Minor's Inst. 784; *Faber* v. *Bunner*, 13 Mo. 543; 11 Cent. L. J. 506; 17 Am. Law Rev. 569.

Scope of equity under prayer for general relief: Story's Equity Pleadings (10th ed.) 41, § 42; *Winslow* v. *Nayson*, 113 Mass. 411;

Franklin v. *Greene*, 2 Allen, 519; *Creely* v. *Bay State Brick Co.* 103 Mass. 514; *Milkman* v. *Ordway*, 106 Mass. 232; *Brown* v. *Gardner*, Harring. Ch. 291; *Carroll* v. *Rice*, Walk. Ch. (Mich.) 373; *Folkerts* v. *Power*, 42 Mich. 283; *Miller* v. *Stepper*, 32 Mich. 194; *McKim* v. *Odom*, 12 Maine, 106; *Scudder* v. *Young*, 25 Maine, 153; *Hiern* v. *Mill*, 13 Ves. 119; *Hobson* v. *McArthur*, 16 Pet. 195; *Burleigh* v. *White*, 70 Maine, 135; *Snowman* v. *Harford*, 55 Maine, 197; *Denton* v. *Stuart*, 1 Cox Ch. 258; *Blore* v. *Sutton*, 3 Mer. 243; *Woodman* v. *Freeman*, 25 Maine, 544; *Phillips* v. *Thompson*, 1 Johns. Ch. 131; *Parkhurst* v. *Van Courtlandt*, Ib. 273; *Durant* v. *Durant*, 1 Cox's Eq. 58; *Bailey* v. *Burton*, 8 Wend. 339; *Allen* v. *Woodruff*, 96 Ill. 19; *English* v. *Foxall*, 2 Pet. 596; *Lee* v. *Patten*, 34 Fla. 149; *Pennoch* v. *Ela*, 41 N. H. 192; 3 Ency. Pdg. & Pr. 348; *Grimes* v. *French*, 2 Atk. 141; *Hill* v. *G. N. R. R.* 5 DeG. M. & G. 56; 1 Dan. Ch. Pldg. & Pr. 384; *Atty. Genl.* v. *Jeanes*, 1 Atk. 355.

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

Plaintiff has not sufficient interest to support the suit. *Female Assoc.* v. *Beekman*, 21 Barb. 565.

Plaintiff is not properly in court; having neither a legal nor equitable interest in the subject matter of the suit, cannot maintain the bill. Objection may be taken by demurrer or at the hearing. *Haskell* v. *Hilton*, 30 Maine, 419; *Crocker* v. *Rogers*, 58 Maine, 342.

Trustees must be allowed reasonable discretion in the management of their trust, and are only required to conduct themselves faithfully and exercise sound discretion. *Lovell* v. *Minot*, 20 Pick. 119; *Harvard College* v. *Amory*, 9 Pick. 446.

A suit for improper appropriation of the funds held in trust by the association by its treasurer, being a public fund, must be brought in behalf of the public by the proper prosecuting officer or by the association. Plaintiff cannot bring bill in his own name and have judgment in favor of another. The judgment of the court cannot be substituted for the discretion of the trustee reasonably and fairly exercised. *Proctor* v. *Heyer*, 122 Mass. 525; *Amory* v. *Green*, 13 Allen, 413; *Walker* v. *Shore*, 19 Ves. 332.

There is no rule in law or equity whereby damage could be computed in case of judgment for the plaintiff.

Appellant must show decree appealed from clearly wrong, otherwise it will be affirmed. The burden to show error falls upon appellant. *Berry* v. *Berry*, 84 Maine, 541, and cases; *Hartley* v. *Richardson*, 91 Maine, 424.

Co-trustees or executors, even though numerous, are regarded in law as but one person. Perry on Trusts, 411.

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

FOGLER, J. This is a bill in equity and comes to this court upon appeal by the complainant from the decree of the sitting justice who heard the case, dismissing the bill. The complainant, as a member of the Portland Marine Society, brings the bill against that corporation and its treasurer. The prayer of the bill is that the treasurer of that society, William Leavitt, one of the defendants, be ordered by the court to pay to said Portland Marine Society certain sums of money paid by him out of the funds of the society, on or about the sixth day of January, 1894, for a dinner provided by vote of the society to its members and others, January 5, 1894. The bill also contains a prayer for general equitable relief.

The history of the society and its purposes are fully stated in the case of *Woodbury* v. *Portland Marine Society*, 90 Maine, 17, and it is unnecessary to repeat them here. The justice who heard this case and from whose decree, dismissing the bill, this appeal is taken, found the facts to be substantially as follows: On the fifth day of January, A. D. 1894, the society held a dinner at the Falmouth Hotel in the city of Portland, the expense thereof amounting to $136.95, which was paid by the respondent, Leavitt, in his capacity as treasurer of the society and out of money of the society in his possession as such treasurer.

At a meeting of the society held on the 19th day of December, A. D. 1893, the proposition was made to have such a dinner in the January then following, which resulted, after discussion, in a vote of 12 in favor of the proposition and 4 against it, as shown by the

records of the society, a copy of which appears in the plaintiff's evidence.

At a meeting of the society held on the 20th of March, A. D. 1894, the complainant presented the following motion: "I move that the treasurer of the society be instructed to refund to the society the amounts paid from the treasury for the expenses of the banquet of the members of the society held on the fifth day of January, A. D. 1894, at Falmouth Hotel." This motion was defeated by a vote of two in favor to eight against. And at a meeting of the society held on September 18, 1894, the complainant moved that proper steps be taken by the society to recover for its use certain funds taken from its treasury for the expenses of the dinner held at the Falmouth Hotel in Portland, January 5, A. D. 1894, which motion was indefinitely postponed by a vote of eight in favor of such indefinite postponement to two against.

The pamphlet containing the act of incorporation of the society and its by-laws is made a part of this finding for the purpose of showing the purposes for which said society was incorporated and its by-laws.

This bill in equity, asking that the funds used by the treasurer to pay the expenses of such dinner be restored to the treasurer, is dated November 4, A. D. 1897.

The sitting justice filed the following conclusions of law, viz: "Without deciding that such expenditures come within the scope and purpose for which said society was incorporated, in view of the decision of a similar question in a bill in equity between the same parties in relation to a dinner held by the society in the year 1895, and in view of the lapse of time between such expenditures and the commencement of this proceeding, and the comparatively small amount of the expenditure involved, it is considered by the court that this particular bill, under the circumstances, should not be sustained and I therefore decide that the bill be dismissed with costs, a decree to which effect will be signed by me upon presentation thereof."

The case of *Woodbury* v. *Portland Marine Society*, supra, is decisive of the case at bar. The parties to this suit are the same

as in the case above cited, except that in the former suit, the president of the society is made a party defendant. The facts found in the two cases, except as to dates and amounts, are substantially identical.

In the former case, the complainant, a member of the society, prayed the court to restrain the society from contracting for a dinner for its members upon a certain occasion in February, 1895, or to enjoin payment for the same from the funds of the society, if already contracted for. The court dismissed the bill. In the case at bar the same complainant, a member of the society, prays that the treasurer of the society be ordered to pay the society money paid by him out of the funds of the society for a like dinner furnished in January, 1894, by vote of the society.

In view of the opinion and decision of this court in *Woodbury* v. *Portland Marine Society*, supra, we perceive no error in the conclusions of law filed by the justice who heard this case, nor any reason why the decision and judgment of this court, in said former suit between the parties, should not be followed in the case at bar.

Appeal dismissed.

Decree affirmed with additional costs.

LEONARD R. CAMPBELL, County Treasurer,

vs.

JAMES R. BURNS.

Knox. Opinion May 11, 1900.

Constitutional Law. Lobsters. Measurement. Evidence. Burden of Proof. Stat. 1897, c. 285.

Section 39 of Chapter 285 of the Public Laws of 1897, imposing a penalty of five dollars for each lobster less than ten and one-half inches in length found in the possession of any person, is not repugnant to section 9, Article 1 of the Constitution of this State which prohibits the imposition of excessive fines and penalties.

In an action to recover the penalty provided by this statute, it is no ground of defense that the officer who searched for and seized lobsters less than legal length did so without warrant or authority; nor is it any ground of defense to such action that the officer making a seizure of such lobsters, omitted to cause the lobsters, which he is not required in law to liberate, to be appraised and sold and to file a libel for a forfeiture both of the property so seized and sold, and the proceeds of the sale thereof, as authorized by section 47 of said act.

The plaintiff alleged that the defendant had in his possession one hundred and three lobsters, each less than ten and one-half inches in length, and introduced testimony to the effect that this number of lobsters, all plugged with wood, and each less than ten and one-half inches in length, were found in the defendant's car, and that they were seized by a fish warden, and a portion of them, if not all, were liberated alive by him in George's River between Gay's Island and Caldwell's Island, the distance between said islands being about half a mile. The defense contended that the lobsters were not properly and fairly measured, and introduced a witness who testified that, within a day or two after the lobsters were liberated, he caught a number of lobsters "out around the point of Gay's Island," and offered to prove by him that the lobsters so caught by him were of legal length. *Held;* that this testimony was properly excluded by the presiding justice.

The lobsters for which the penalty is sued were all found in the upper compartment of the defendant's car, which car contained five compartments, one above the other. The defense offered to prove that the lobsters remaining in the defendant's car were, within a few days after the seizure, sold in Portland and examined by a fish warden and all found to be at least ten and one-half inches in length. *Held;* that such testimony was properly excluded.

The presiding justice instructed the jury as to the degree of proof as follows: "I instruct you that in order to hold the defendant responsible you must be fully satisfied that he had in his possession at the time and place referred to some lobsters, at least less than ten and one-half inches in length. You must be fully satisfied as reasonable men. Not unreasonable in your judgment, not frivolous in your judgment, not partial or biased, but as reasonable men, looking at the matter and the evidence in a reasonable manner, you must be fully satisfied of the fact." *Held;* that the instruction was sufficiently favorable to the defendant.

The presiding justice instructed the jury, as to the method of measuring lobsters, as follows: "I instruct you that in contemplation of that statute (Sec. 39, Ch. 285, P. L. 1897) the lobster should be laid upon its back and extended upon the measure to the end of the tail, ... that any other way, as by lifting the end of the flipper, is not in contemplation of the law."

Held; that the instruction thus given is in accord with the terms of the statute.

In a civil suit to recover a penalty the guilt of the defendant need not be proved beyond a reasonable doubt.

State v. *Lubee*, 93 Maine, 418, affirmed.

ON EXCEPTIONS BY DEFENDANT.

Action of debt brought under chapter 285, statute of 1897, to recover the penalty of five dollars for each and every lobster less than ten and one-half inches in length, alleged to have been found in the possession of the defendant, to the number of 103, amounting in all to $515. The verdict was for the plaintiff for the sum of $250.

The evidence at the trial showed that the one hundred and three lobsters seized were all plugged with wood and were afterwards liberated alive in George's river, a portion of them at least, if not all, between Gay's Island and Caldwell's Island, the distance between said islands being about a half mile.

At the trial the defense claimed that the lobsters seized were of sufficient length, but were unfairly and illegally measured.

The defendant took exceptions to the ruling of the court upon matters of evidence, to the failure to give requested instructions and several instructions given to the jury, which with the facts of the case, are found in the opinion.

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

Constitutional law: *Thorpe* v. *Rutland R. R. Co.*, 27 Vt. 150; *Beer Company Case*, 97 U. S. 33; *Boston & Maine R. R.* v. *Co. Com.* 79 Maine, 394; *Haverty* v. *Bass*, 66 Maine, 71; *State* v. *McCann*, 59 Maine, 383; *Cole* v. *Co. Com.* 78 Maine, 538; *State* v. *Miller*, 48 Maine, 581; *State* v. *Plunkett*, 64 Maine, 537.

The requested instruction is a speculative question of law not relating to the case on trial. *Gilbert* v. *Woodbury*, 22 Maine, 246. The exceptions do not state the facts upon which the requests were based.

Penalties not excessive: *State* v. *Craig*, 80 Maine, 88.

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

Testimony having a tendency to prove the issue is admissible for the consideration of the jury. *State* v. *McAllister*, 24 Maine, 139; *Trull* v. *True*, 33 Maine, 367; *State* v. *Witham*, 72 Maine, 531. The evidence of the fraud of the commissioner in measuring lobsters that he threw away, if any existed, had been destroyed; and no direct evidence could be produced, except the surrounding cir-

cumstances connected with the whole transaction. The evidence of the plaintiff does not show other lobsters had been plugged in that vicinity.

The constitutionality of this law affects the proceedings in this case, because the state has no authority to use unlawful means to accomplish lawful ends.

The officer is given, by the statute, discretionary powers to pursue one method or the other. He may simply seize the illegal lobster and stop there, and prosecute or sue for the penalty; or he may under the provisions of section 47, seize the car and all the lobsters in it; but he must pursue one method or the other, not both or a part of each. There can be but one penalty for the same offense, unless as in the liquor law, the same fact may by statute amount to another offense. But it is not so here. The offender may be prosecuted by either of the methods provided by law, either by seizure and libel or by prosecution direct for the offense, but not by both, or part of each, as above said. 1 Bishop, Crim. Proc. pp. 89 and 92. The state having selected one method and entered upon it, that one and no other can be resorted to, and that one must be pursued to the end.

Excessive fines shall not be imposed. There must be a limit somewhere. It is excessive to impose a fine of five dollars on a person having in his possession a lobster worth three or four cents, which he believed to be of lawful length; or even if he did know it was not.

Burden of proof: In a civil action where a criminal act is so set out in the pleadings as to raise that distinct issue before the jury, the crime charged must be proved beyond a reasonable doubt before the plaintiff is entitled to a verdict. *Sinclair* v. *Jackson*, 47 Maine, 103; *Hobbs* v. *Monmouth Ins. Co.*, 35 Maine, 227; *Thayer* v. *Boyle*, 30 Maine, 475.

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

FOGLER, J. This is an action of debt brought in the name of the treasurer of Knox County, as plaintiff, against the defendant

for an alleged violation of section 39 of chapter 285, Public Laws of 1897, which is as follows:

Sec. 39. "It is unlawful to catch, buy or sell, or expose for sale, or possess for any purpose, any lobster less than ten and one-half inches in length, alive or dead, cooked or uncooked, measured in manner as follows: Taking the length of the back of the lobster, measured from the bone of the nose to the end of the bone of the middle flipper of the tail, the length to be taken with the lobster extended on the back its natural length; and any lobster shorter than the prescribed length when caught, shall be liberated alive at the risk and cost of the parties taking them, under a penalty of five dollars for each lobster so caught, bought, sold, exposed for sale, or in the possession not so liberated. The possession of mutilated, uncooked lobsters shall be prima facie evidence that they are not of the required length."

The declaration avers that on the 7th day of July, A. D. 1898, at Cushing in the county of Knox, the defendant possessed, and was then and there in possession of, one hundred and three lobsters each less than ten and one-half inches in length. The one hundred and three lobsters which the plaintiff claimed were less than ten and one-half inches in length were found in the defendant's car which was divided into five compartments, one above the other. There were in the car about thirty-five hundred lobsters, all of which were plugged with wood. The one hundred and three lobsters in question were all taken by a fish warden from the two upper compartments of the car and were liberated alive in George's River,—a portion of them, if not all,—between Gay's Island, and Caldwell's Island, the distance between said islands being about half a mile. The defense contended that the lobsters so taken and liberated were all of lawful length and that they were unfairly and illegally measured by the warden. The verdict was for the plaintiff for the sum of two hundred and fifty dollars. The case comes here upon exceptions by the defendant to the exclusion by the presiding justice of testimony offered by him, to the refusal of the presiding justice to give certain instructions requested by the defendant, and to several instructions given to the jury by the presiding justice.

I. The defendant's counsel requested the presiding justice to instruct the jury that the penalty imposed by statute under which this action is brought is not proportional to the offense charged, but is excessive, and for that reason is repugnant to Section 9 of Article I of the Constitution of this state, and void, and that this action is not, therefore, maintainable. The presiding justice refused to so instruct the jury, and gave the instruction that the statute is constitutional and valid. This instruction is fully sustained by this court in the recent case of *State* v. *Lubee*, 93 Maine, 418, in which it is held that this statute is not in contravention of the constitutional provision above referred to.

II. Section 27 of the statute above referred to (Ch. 285, P. L. 1897) provides that, "the commissioner of sea and shore fisheries and fish wardens may, with or without warrant, enter upon any vessel, boat, receptacle for fish, or any place or places used therefor, and seize and carry away all fish liable to seizure found therein, and may, with or without warrant, search any car or pound used for the keeping of fish, and seize and carry away all fish liable to seizure found therein, the fish in each case to be disposed of according to law".

The defendant's counsel requested the presiding justice to instruct the jury, in substance, that the provisions of such section are void because repugnant to Section 5 of Article I of the Constitution of this State, which is as follows: "The people shall be secure in their persons, houses, papers and possessions from all unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without a special designation of the place to be searched, and the person or thing to be seized, nor without probable cause—supported by oath or affirmation;" and that the search of the defendant's car and the seizure of his lobsters were illegal, and that this action to recover the penalty imposed by § 39 of the statute cannot, for that reason, be maintained. The presiding justice properly declined to give such requested instruction. The issue was whether the defendant, at the time and place named in the declaration, had in his possession lobsters less than ten and one-half inches in length. The

solution of that question depended, in no degree, upon the legality or illegality of the acts of the officers. The two sections of the statute, sections 27 and 39, have no connection with or dependence upon each other. One imposes a duty upon the officers, the other imposes a penalty upon the infractor. No search or seizure was required to render the defendant liable for the penalty imposed by the statute. If there had been no search or seizure he would be liable upon proof of his violation of the statute. If the officers acted unlawfully, and the defendant is injured by their unlawful acts, he has a remedy against them as he would have against any other wrong doer.

III. Section 47 of Chapter 285, P. L. 1897, provides that when any lobsters are seized by virtue of the provisions of that act, it shall be the duty of the officer making such seizure, to cause the lobsters so seized, as he is not required by law to liberate, together with the cars, traps, etc., in which they are contained, to be appraised and sold, and to file a libel in behalf of the state before some trial justice or police or municipal judge of the county for the forfeiture of the property so seized and sold and the proceeds of the sale thereof.

The counsel for the defendant requested the presiding justice to give the jury the following instruction: "If you find, as matter of fact, that the officer in this case actually seized the car and all that was in it and carried it ashore, he was bound in law to pursue the provisions of that statute to the end unless prevented from doing so from causes not under his control. And if you find that the officer seized the car and all that was in it and carried it away, and abandoned it and did not pursue the provisions of law by having it appraised and sold, this action cannot be maintained." The presiding justice refused such instruction, and to such refusal the defendant excepts.

The exception cannot be sustained. As stated above with reference to sections 27 and 39 of the statute, sections 39 and 47 are separate and distinct enactments, neither having any connection with or dependence upon the other. The one provides for proceedings in rem against the property, the other imposes a penalty upon the

person. If the officer had proceeded to procure a forfeiture of the car and its contents, it would have constituted no defense to this action. Certainly, his failure to proceed in rem can be no defense. The case is similar in principle to that of intoxicating liquors kept for illegal sale. The statute provides for the forfeiture of liquors so kept and also for the punishment of the keeper of the liquors. As stated by APPLETON, C. J., in *State* v. *McCann*, 61 Maine, 116, in which the respondent was charged with keeping intoxicating liquors intended for illegal sale which were seized without a warrant: "The objection that the proceedings should have been solely in rem is not available. The proceedings were originally against the person and the thing. A severance is made by law and in the proceedings against the person, it is immaterial what has been done with the things."

IV. The defense introduced a witness who testified that, a day or two after the lobsters here in question were liberated, he caught at different times fifteen,—possibly a few more,—plugged lobsters, "out around the point of Gay's island as you go towards Caldwell's". The defendant's counsel then asked the witness whether he measured the lobsters so caught, and also whether he was aware of any other plugged lobsters that had been seized in that vicinity at that time. Upon objection by the plaintiff the presiding justice excluded both questions and the defendant excepts.

It is obvious that unless the lobsters caught by the witness were a portion of the identical lobsters taken from the defendant's car and liberated by the warden, the testimony excluded was irrelevant and inadmissible. Were the lobsters caught by the witness sufficiently identified to render the testimony admissible? We think not. Neither the place where the lobsters were liberated, nor the place where those caught by the witness were taken, definitely appeared. That the lobsters caught by the witness were plugged affords no identification in view of the common practice of fishermen to plug their lobsters. We are of opinion that the testimony did not so connect the lobsters caught by the witness with those seized and liberated, as to render the excluded testimony admissible.

V. The defendant offered testimony to prove that within a day

or two after the seizure the remaining lobsters in the car were sold and examined by a fish warden in Portland and all found to be at least ten and one-half inches in length. To the exclusion of such testimony by the presiding justice the defendant excepts. The testimony offered was clearly inadmissible. That the lobsters remaining in the two upper compartments of the car from which the officers had removed the lobsters, which he found to be of less than the required length, were of legal length, could certainly have no tendency to prove that the lobsters seized therefrom were of legal length. If the lobsters in the remaining compartments were all of legal length, non constat that the lobsters seized by the officer were of that length.

VI. The defendant excepted to the following instruction given to the jury by the presiding justice: "Suggestion has been made that the fish commissioner, who has been a witness, has an interest and, therefore, is biased and worthy of less credibility as a witness upon the stand than he would if he had no interest; but I want to say to you that I know of no reason under the statute as it now reads why a fish commissioner may not settle or collect penalties for the violation of this law without suit, if the parties can agree upon the number." No facts appeared in the exceptions tending to show the pertinency or want of pertinency of this instruction. We perceive no error in the instruction, especially as the presiding justice further instructed the jury, as appears by the charge which is printed as part of the case, "I have this to say, that, so far as you discover anything in the testimony of the fish commissioner, in his appearance, or in what he said or what he has written which tends to throw discredit upon him as a witness, you will give it such weight as it is entitled to."

VII. The defendant excepts to the following instruction: "In this case, so far as the result of the legal premises is concerned, there is no fine and no imprisonment. There would be an execution issue as upon a judgment arising in any other civil suit. But, at the same time, it is a process to enforce a penalty for a violation of criminal law, and I instruct you that in order to hold the defendant responsible you must be fully satisfied that he had in his posses-

sion at the time and place referred to . . . . some lobsters, at least less than ten and one-half inches in length." In this connection the presiding justice further instructed the jury: "You must be fully satisfied as reasonable men. Not unreasonable in your judgment, not frivolous in your judgment, not partial or biased, but as reasonable men, looking at the matter and the evidence in a reasonable manner, you must be fully satisfied of the fact."

We think the full instruction is as favorable to the defendant as he is entitled to and in accord with the law as settled in this state. The instruction to which the exception is taken was substantially that the jury must be satisfied beyond a reasonable doubt that the defendant had violated the statute. "By satisfactory evidence, which is sometimes called sufficient evidence, is intended that amount of proof which ordinarily satisfies the unprejudiced mind beyond a reasonable doubt." 1 Greenl. Ev. § 2. In *Abbey* v. *Rapalye*, 1 Hill, 9, the plaintiff charged the defendant with usury, a criminal offense. The plaintiff requested the court to instruct the jury that usury must be proved beyond a reasonable doubt. The presiding judge refused such request and instructed the jury that the proof must be such as to satisfy the jury of the fact. It was held that the instruction given was identical with that requested.

It was formerly the rule in England, for reasons stated by BARROWS, J., in *Ellis* v. *Buzzell*, 60 Maine, 213, that when, in a civil suit, a party was charged with a criminal act, his guilt must be proved beyond a reasonable doubt; and this rule was naturally followed in the early cases in this country although the reason for the rule did not exist here. Such rule was held to apply in *Hobbs* v. *Monmouth Ins. Co.*, 35 Maine, 227, and in *Thayer* v. *Boyle*, 30 Maine, 475. That rule is not now in accord with the weight of modern decisions in this country which hold that in a civil suit it is sufficient to prove a criminal offense, like any other fact in issue, by a preponderance of evidence, discarding the doctrine of reasonable doubt in civil actions.

In *Ellis* v. *Buzzell*, supra, this court adopted the rule above laid down. The court says in that case: "We think it time to limit

the application of a rule, which was originally adopted in favorem vitæ in the days of a sanguinary penal code, to cases arising on the criminal docket, and no longer to suffer it to obstruct or incumber the action of juries in civil suits sounding only in damages." The court, in the same case, after laying down the rule that the party charging the opposite party with a criminal act must furnish evidence enough to overcome in the minds of the jury the presumption of innocence and the opposing evidence, continues as follows: "But to go further and say that this shall be done by such a degree and quantity of proof as shall suffice to remove from their minds every reasonable doubt that might be suggested, is to import into the trial of civil cases, between party and party, a rule which is appropriate only in the trial of an issue between the state and a party charged with crime and exposed to penal consequences if the verdict is against him."

The rule thus stated in *Ellis* v. *Buzzell*, is followed in *Decker* v. *Somerset Mut. Fire Ins. Co.*, 66 Maine, 408. The case of *Sinclair* v. *Jackson*, 47 Maine, 103, and *Knowles* v. *Scribner*, 57 Maine, 495, tend towards the same rule.

The case of *Roberge* v. *Burnham*, 124 Mass. 277, is identical in principle with that at bar. That was an action to recover a forfeiture, provided by statute for the sale of intoxicating liquors to a minor. It was held that, though the action, like all penal actions, partakes somewhat of the nature of punishment, nevertheless, being a civil suit, the guilt of the defendant need not be proved beyond a reasonable doubt.

Among other numerous authorities sustaining the rule we have herein laid down are, *Schmidt* v. *N. Y. Mut. Fire Ins. Co.*, 1 Gray, 529; *Gordon* v. *Parmalee*, 15 Gray, 413; *Matthews* v. *Huntley*, 9 N. H. 150; *Folsom* v. *Brown*, 25 N. H. (5 Foster) 114; *Bradish* v. *Bliss*, 35 Vt. 326; *Weston* v. *Gravlin*, 49 Vt. 507; *People* v. *Briggs*, 114 N. Y. 64; *Allen* v. *Allen*, 101 Id. 658; *Jones* v. *Greaves*, 26 Ohio, 2; *Watkins* v. *Wallace*, 19 Mich. 57; *Elliott* v. *Van Buren*, 33 Mich. 49; *Peoples* v. *Evening Star*, 51 Mich. 11; *Poertner* v. *Poertner*, 66 Wis. 644.

VIII. The defendant further excepts to the following instruction

to the jury by the presiding justice as to the rule to be observed in the measurement of lobsters: "I instruct you that in contemplation of that statute the lobster should be laid upon its back and extended upon the measure to the end of the tail, the back all being made of joints so that it can naturally and readily lie down, or be laid down upon the board; that any other way, as by lifting the end of the flipper, which I believe it is said has the tendency or effect of lengthening the lobster, is not in contemplation of the law".

The rule was correctly stated. The statute under which this action is brought prescribes the following rule as to measurement, viz: "Taking the length of the lobster measured from the bone of the nose to the end of the bone of the middle flipper of the tail, the length to be taken with the lobster extended on the back its natural length."

This can have no other meaning than the lobster is to be extended on the back from the bone of the nose to the end of the bone of the middle flipper of the tail.

Exceptions overruled.

FRANK W. WHITE *vs.* LLEWELLYN W. SAVAGE, and another.

Androscoggin. Opinion May 11, 1900.

Judgment. Former Action. Estoppel. Pleading.

The defendants recovered judgment against the plaintiff in the Bangor Municipal Court upon a writ containing an account annexed for items of merchandise, and also a count for money had and received. The plaintiff brings this suit against the defendants for an alleged breach of a contract of bailment, claiming that the merchandise, the price of which was sued for and recovered in the former action, was left with him on sale by the defendants, he agreeing to account for such portions of the merchandise as should be sold by him and to return to the defendants such portion thereof as he should not sell.

Held; that the judgment in the former suit is a bar to this and that, therefore, this action is not maintainable.

If the merchandise was left with the plaintiff on sale, he could have proved that

fact in defense of the former action. If the merchandise or any portion of it, had been sold by the plaintiff, the defendants were entitled to recover therefor in the former suit under their count for money had and received.

ON EXCEPTIONS BY PLAINTIFF.

This was an action on the case for damages for breach of a contract of bailment. When the case came on to be heard, the defendant pleaded in bar a judgment of the Bangor municipal court, rendered in an action of assumpsit, brought to recover payment for the absolute sale and delivery of the goods which the plaintiff offered to show were the subject of the bailment covered by his written contract. The court ruled that the judgment referred to in the defendants' pleadings was a bar to the plaintiff's action and that the action could not be maintained.

To this ruling the plaintiff took exceptions.

Declaration. In a plea of the case, for that, whereas, hitherto, to wit, on the ninth day of February, in the year of our Lord one thousand eight hundred and ninety-eight, L. W. Savage, one of the defendants, and in behalf of said defendants, agreed in writing with the plaintiff that all goods which should be thereafter shipped from the defendants to the plaintiff, should be left on sale, and further agreed to and did consign certain goods of the defendants to the plaintiff, with the express and distinct understanding that they should be placed in the store of the plaintiff only as the property of the defendants, and not of the plaintiff, and that whatever of said goods were sold by the plaintiff, that he should account to the defendants therefor, and that the defendants should, at the plaintiff's request, take what was received for such sales, less a commission, and the balance of the goods unsold, to discharge any undertaking of the plaintiff in this behalf. And the plaintiff says that he has been and still is ready to account for all the goods so delivered to him by the defendants, and to return all goods unsold, as stipulated in the contract between them concerning the same; yet notwithstanding the agreement and contract so entered into by the defendants with the plaintiff, they thereafterwards brought a suit against the plaintiff as having purchased said goods outright, and summoned him to appear to some sort of a court in Bangor, with

reference thereto, and have taken a large amount of goods, to wit, the amount of two hundred and fifty dollars of the goods of the plaintiff, by force of a process issued by a court on account of said claim, and carried them away from the plaintiff's store, and the plaintiff says that in consequence of the contract of the defendants, and its breach, he has been greatly damaged in his reputation and in his business, in addition to the amount of goods which have been taken from him on account of the precept aforesaid, and has been put to great expense in consequence thereof, the whole damage amounting, as he says, to the sum of five hundred dollars.

Geo. C. Wing, for plaintiff.

Counsel cited: *Ressequie* v. *Byers*, 52 Wis. 650; *Bodurtha* v. *Felon*, 13 Gray, 413; *Bascom* v. *Manning*, 52 N. H. 132; *Barker* v. *Cleveland*, 19 Mich. 230; *Mondel* v. *Steele*, 8 M. & W. 858.

This was an action of damages for breach of a contract to build a ship in a specified manner. The defendant pleaded a judgment in a former action for the price, in which the same breach of a contract was pleaded, and a deduction was made from the price on account thereof. Held, that the plaintiff might still recover for damage accruing subsequent to delivery of the ship. Park, B., said,—"It must, however, be considered that in all these cases that goods sold and delivered with a warranty, and work and labor, as well as the goods, agreed to be supplied according to a contract, the rule which has been found so convenient is established, and that it is competent for the defendant in all of these, not to set off by a proceeding in the nature of a cross action, the amount of damages which he has sustained by a breach of the contract, and to the extent that he obtains, or is capable of obtaining an abatement of price on that account, he must be considered as having received satisfaction for the breach of the contract, and is precluded from recovering in another action to that extent, but to no more. This case was recognized in *Riggs* v. *Burbridge*, 15 Id. 598, which was an action for negligent construction of a kitchen range, and the defendant pleaded payment into court on an action for the price, of a sum which the plaintiffs took out in satisfaction. Held, no estoppel.

A former judgment is conclusive only as to matters directly in issue in the former suit, and not as to collateral matters. *Many* v. *Harris*, 2 Johns. 24, (3 Am. Dec. 386); *King* v. *Chase*, 15 N. H. p. 9, (41 Am. Dec. p. 675).

Nothing is to be deemed in issue, although controverted upon the trial, except the matter upon which the plaintiff's action proceeds, and which is controverted by the defendant's pleadings. *Smith* v. *McCool*, 16 Wall. 463, and cases reviewed in *Taylor* v. *Dustin*, 43 N. H. 493.

In *Griffin* v. *Seymour*, 15 Ia. 30, Baldwin, C. J., in his opinion, says,—"In order to enable the defendant to interpose the plea of a prior adjudication successfully, it must be made to appear that the actual point in issue between the parties has already been determined, and such determination or decision must have been upon the merits."

In *Fairfield* v. *McManey*, 37 Ia. 77, it is held that a recovery at law on the rights of action against which the defendant held a claim available as a defense, is not a bar to a subsequent action thereon by the defendant. And this same doctrine is held by APPLETON, C. J., in *Lord* v. *Chadbourne*, 42 Maine, 429, and *Howard* v. *Kimball*, 65 Maine, 330.

Geo. E. McCann, for defendants.

In this case the precise point relied upon by the plaintiff was determined by the former judgment in the Bangor Municipal court. The point there necessarily decided was were these goods "sold and delivered to this plaintiff"? If they had been consigned goods the question could not have been decided as it was. The question between sale and consignment was inevitably the question which was settled by that judgment. It can make no difference that the judgment in the Bangor municipal court was obtained by a default, and that the question there involved was not decided after a contest. A judgment by default amounts to a confession on the part of the defendant of all the material facts of the complaint. *Rowe* v. *Table Mt. Water Co.*, 10 Cal. 441.

A default after notice admits every material allegation, properly set forth in the declaration. *Toppan's Petition*, 24 N. H. 43.

Further than that, it admits every ground upon which a recovery is sought. *Mass. Mut. Life Ins. Co.* v. *Kellogg*, 82 Ill. 614.

A judgment by default in an action for goods sold and delivered operates as an admission of the defendant of a cause of action. *Parker* v. *Smith*, 64 N. C. 291.

A judgment by default for want of a plea in an action of assumpsit, where the account was filed in the declaration, was held an admission of indebtedness for the articles charged. *Paterick* v. *Ridgaway*, 4 Har. & J. (Md.) 312.

Where a judgment in a personal action, whether rendered on default or after contestation, is rendered by a court of competent jurisdiction, and is not obtained by fraud or collusion or erroneously or unlawfully entered up, it is conclusive as to the relation of debtor and creditor between the parties, and the amount of indebtedness, and cannot be collaterally impeached.

Counsel also cited: *Holmes* v. *Kennison*, 20 Johns. 268; *Loring* v. *Mansfield*, 17 Mass. 394; *Hollister* v. *Abbott*, 31 N. H. 442; *Wilbur* v. *Gilmore*, 21 Pick. 250; 1 Herman, Estop. and Res. Jud. §§ 265, 277, and pp. 308, 309.

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

FOGLER, J. This is an action on the case to recover damages for an alleged breach of a contract of bailment.

The defendants recovered judgment against the plaintiff in the Bangor municipal court for $25.80 on a writ containing an account annexed for items of merchandise amounting to $25.80 and also a count among others, for "money had and received."

In the present suit for damages the plaintiff alleges in his writ, and introduces a memorandum of contract tending to show that the goods for which the defendants recovered this judgment in the Bangor municipal court were not in fact sold to the plaintiffs by the defendants, but were consigned to him and left in his store "on sale," with the understanding that they should remain the property of the defendants and be accounted for when sold. He alleges that

he was ready to account for all goods thus delivered to him and to return any goods unsold; that in enforcing their judgment against him the defendants took and carried away a large quantity of his goods; "and that in consequence of the contract of the defendants and its breach, he has been greatly damaged." The presiding justice ruled that the judgment of the Bangor municipal court was a bar to the plaintiff's action, that this action could not be maintained, to which ruling the plaintiff excepts.

There are insuperable objections to the maintenance of the plaintiff's action.

In the first place it is not distinctly averred in the declaration nor shown by evidence that any of the goods in question alleged to have been consigned to the plaintiff remained unsold; nor is it expressly averred, even in general terms, that there had been any breach by the defendants of the alleged contract of bailment. Nor does it appear from the records of the Bangor municipal court, or from any other evidence in the case, that the judgment recovered by the defendants was necessarily based on the account for goods sold and delivered. For aught that appears there may have been satisfactory evidence before that court that the goods described in the account annexed had all been sold by the plaintiff, and the judgment may accordingly have been rendered on the count for money had and received. In that event it is plain that the institution of the suit by these defendants and the enforcement of the judgment recovered in that action, would not have been in violation of the terms of the alleged contract of bailment, but only in affirmation of it, and the plaintiff would not be aggrieved.

It is immaterial that the judgment in that case was finally rendered on default. It appears from the record that this plaintiff was duly subjected to the jurisdiction of that court by appearing as the party defendant and answering to the suit. He had full opportunity to present his defense and meet the case of the plaintiffs in that action by showing that the goods had not all been sold. If there was a contract of bailment in force between the parties at that time, the judgment by default operated as an admission that the goods had all been sold and that he was accountable for the full

amount of the money received by him. Upon that issue the judgment of the Bangor municipal court would have been final and conclusive between the parties. Freeman on Judgments, § 256; *Parks* v. *Libby*, 90 Maine, 56.

But secondly, if the plaintiff's declaration in this case could be construed to signify inferentially that some of the goods consigned to the plaintiff remained unsold at the date of the action in the Bangor municipal court, and that the contract of bailment set up by him was still subsisting at that time, if it be assumed that the judgment in that suit was based on the account annexed for goods sold and delivered, it is equally clear that the question of bailment raised by the plaintiff's declaration in this case was directly involved and necessarily decided in the former suit in the Bangor municipal court, and that the judgment rendered in that action is a bar to the maintenance of this one. On the plaintiff's theory that the defendants in this action sought to recover and did recover in the former suit for the articles charged in the account annexed as for goods sold and delivered to the plaintiff, when in fact they remained on sale and remained the property of these defendants under the special arrangement of the parties, it is manifest that proof of such a contract of bailment would have been a complete defense to the action. If the articles sued for were only consigned to this plaintiff to be sold by him as the property of these defendants, they were not "sold and delivered to this plaintiff;" and if they were not "sold and delivered," and the title did not pass, these defendants were not entitled to recover the price of them as for goods sold and delivered. In the plaintiff's view of the case the question of bailment was therefore necessarily involved and finally adjudicated in the former suit. The judgment rendered in that case is conclusive as to the relation of debtor and creditor between these parties, and as to the amount of the indebtedness. There is no suggestion of fraud or collusion, want of jurisdiction or error in law. That judgment remains unreversed and it cannot be collaterally impeached in the manner proposed. *Sidensparker* v. *Sidensparker*, 52 Maine, 481; *Smith* v. *Abbott*, 40 Maine, 442; *Embden* v. *Lisherness*, 89 Maine, 578; *Morrison* v. *Clark*, 89 Maine, 103; *Parks v. Libby*, 90 Maine, 56; Bigelow on Estoppel, 27.

In this view of the case, also, the judgment is not less conclusive because obtained by default after an appearance by the defendant. By submitting to a default, the defendant in that case admitted every material averment in the declaration and every ground upon which a recovery was sought.

The plaintiff cannot recover damages for the breach of a contract of bailment which has been judicially determined to have had no existence in fact.

Exceptions overruled.

JACOB S. WINSLOW, and others, in Equity,

vs.

LEONARD C. YOUNG, and others.

Cumberland. Opinion May 12, 1900.

Tenants in Common. Partnership. Agency. Contribution.

One tenant in common, without authority from his co-tenant, cannot create a personal liability against him by making improvements on the common property, or payments in regard to it, as to which the co-tenant was not under a legal liability. When the improvements add permanent value to the property, the tenant making them, if in receipt of the rents, may be permitted to hold them for his reimbursement; but his right to contribution extends no further.

The court will not decree a partnership to have existed when the parties did not intend to create one and its existence cannot arise as a legal inference from the facts.

Where trustees took a conveyance of land subject to an outstanding mortgage, which they personally agreed to pay, and holding the legal title upon a resulting, dry trust in favor of each individual owner, which the statute of uses would execute in his favor, and they removed the mortgage incumbrance by their voluntary payment of it in performance of their personal agreement, they are entitled to hold the property, or its proceeds under a sale by decree of the court, to the extent of their reimbursement; and will be accountable over to the other owners for the excess only.

Where such trustees voluntarily and unnecessarily assumed the mortgage on their individual responsibilities, and made other advances,—all without authority from the other owners,—their claim to reimbursement is limited to

the proceeds of the sales of the land; and they can only rely upon the land for reimbursement.

Upon a bill in equity seeking contributions for such voluntary payments the other parties may well say they did not desire redemption at a cost of more than double the amount realized from the sale of the property. *Held;* that no benefit resulted to them and no equity in favor of the trustees arises from the transaction.

In 1889, the plaintiffs and others purchased a tract of land at Sioux Falls, the several parties taking varying proportional interests. By tacit assent the title was taken by three of their number as trustees, but the deed contained no declaration of trust, nor the names of the beneficiaries.

There was never any agreement by the parties in interest, defining or limiting the trust, or the rights, powers or duties of the trustees, nor any declaration of trust by the trustees themselves. They held by what in law is termed a dry trust.

When the title was to be obtained, it was found that the land was subject to a mortgage for $45,000. The title was conveyed to persons agreed on as trustees, subject to that mortgage, which the grantees assumed and agreed to pay. No authority had been given to them to assume that mortgage in behalf of the other parties interested, nor did they have knowledge of its assumption till long after, and it was never assented to by them.

One mortgage note was paid from funds that had been paid in by the several parties taking interests in the purchase.

In 1896, these plaintiffs paid $27,676, the amount due upon the mortgage, which had been assumed by them, and upon a bill in equity sought contribution for this and other disbursements from the parties subscribing for interests in the property. No authority had been given for these payments by the parties sought to be charged, unless it was at a meeting of about one-half of the persons interested, held on December 30, 1890.

The original subscribers having previously declined to make further payments, it was then voted that the trustees "be authorized to call upon the proprietors for further payments," and that they "be authorized to raise any amount of money required to take up said mortgage which may not be paid by the part owners or proprietors, and to reimburse themselves from the first sales of land for all outlays, interest and expenses;" also that the trustees be authorized to sell all or any part of the land.

Held; 1. These votes were not binding upon the proprietors who were not present at the meeting, nor assented to by them:

2. That the parties taking interests were not partners:

3. That the trustees held the legal title upon a resulting, dry trust in favor of each individual owner, which the statute of uses would execute in his favor for his aliquot share of the estate in common and undivided. That this trust was not enlarged to an active trust by the action of a part of the cestuis que trust. That for all practical purposes, the action of a few at the December meeting became inoperative upon the trust estate or the powers and duties of

the trustees; *also*, that the votes were not binding upon the proprietors who were not present at the meeting, nor assented to by them:

4. The payment of the mortgage debt by the plaintiffs was voluntary, in performance of their personal agreement to assume and pay it. They are entitled to hold the estate bid in for them on its sale by decree of court to the extent of their reimbursement, and will be accountable over to the other owners only for the excess:

5. If the land is insufficient for this purpose, they have no claim for the deficiency upon the other owners.

ON REPORT.

This was a bill in equity, heard on bill, demurrer, plea, answers and proofs, brought to enforce contributions from the members of an alleged partnership or syndicate formed to purchase a certain tract of land in the city of Sioux Falls, South Dakota, known as the Phillips Avenue property.

The case appears in the opinion.

B. D. and H. M. Verrill; *J. W. Symonds*, *D. W. Snow*, *C. S. Cook and C. L. Hutchinson*, for plaintiffs.

Counsel argued: The legal effect of the arrangement which gradually developed between November, 1889, and the meeting held December 30, 1890, was that of a partnership. Where there is a community of interest in the subject matter of the enterprise, and an agreement to share in the profits, a partnership arises. *Doak* v. *Swann*, 8 Maine, 170; *Gilmore* v. *Black*, 11 Maine, 485; *Dwinel* v. *Stone*, 30 Maine, 384; *Banchor* v. *Cilley*, 38 Maine, 555; *Illingworth* v. *Parker*, 62 Ill. App. 650; *Robinson* v. *Parker*, 25 Wash. L. Rep. (D. C.) 497; *Hackett* v. *Stanley*, 115 N. Y. 625; *Buffum* v. *Buffum*, 49 Maine, 108; *Harding* v. *Foxcroft*, 6 Maine, 76.

A partnership exists when such a relation exists between two or more persons that each is as to all the others, in respect to some business, both principal and agent. "Agency test": *Cox* v. *Hickman*, 8 H. L. C. 268; *Bullen* v. *Sharp*, 1 C. P. 86; *Morgan* v. *Farrell*, 58 Conn. 413, p. 422; *Eastman* v. *Clark*, 53 N. H. 276; Sto. Part. § 1; *Seabury* v. *Bolles*, 51 N. J. Law, 103; *Harvey* v. *Childs & Potter*, 28 O. St. 319; *Farmer's Ins. Co.* v. *Ross*

& Lennan, 29 O. St. 429; *Beecher* v. *Bush*, 45 Mich. 188; 17 A. & E. Ency. 833, and cases cited.

"The legal entity theory of partnership" is practically recognized, though not affirmed, in *Meehan* v. *Valentine*, 145 U. S. 611, p. 623, citing with approval *Pooley* v. *Driver*, L. R. 5 Ch. Div. 458, p. 476. See Par. Part. p. 346; *Fitzgerald* v. *Grinnell*, 64 Ia. 261, p. 264; *Hosmer* v. *Burke*, 26 Ia. 253; *Chaffee* v. *Jones*, 19 Pick. 260; *Warner* v. *Smith*, 1 DeGex, J. & S. 337; *Meily* v. *Wood*, 71 Pa. St. 488; *Cross* v. *Nat. Bank*, 17 Kan. 336; *Robertson* v. *Corsett*, 39 Mich. 777, p. 784; *Roop* v. *Herron*, 15 Neb. p. 80.

Whether a partnership existed is an inference of law from the facts shown to have existed. *Dwinel* v. *Stone*, 30 Maine, 384, p. 386; *Beecher* v. *Bush*, 45 Mich. 188; *Harvey* v. *Childs*, 28 O. St. 319; *Clark* v. *Eastman*, 53 N. H. 276; Par. Part. p. 60; *Chapman* v. *Hughes*, 104 Cal. 302; *Kelley* v. *Bourne*, 15 Ore. 476.

The parties seem really to have had in mind a sort of unincorporated company, each subscriber to have a certificate showing his interest in the concern, and it was contemplated and understood that these certificates might be transferred without dissolving the enterprise, and rendering an accounting necessary.

Such an unincorporated association formed for the purpose of carrying on a joint enterprise is by operation of law a partnership. *Smith* v. *Virgin*, 33 Maine, 148; *Frost* v. *Walker*, 60 Maine, 468; *Cronkite* v. *Trexler*, 187 Pa. St. 100; *Hoadley* v. *County Com.* 105 Mass. 519; *Machinists' Nat. Bank* v. *Dean*, 124 Mass. 81; *Phillips* v. *Blatchford*, 137 Mass. 510; *Walker* v. *Wait*, 50 Vt. 668; *Farnum* v. *Patch*, 60 N. H. 294; *Gwinn* v. *Lee*, 6 Pa. Sup. Ct. 646; *Clagett* v. *Kilbourne*, 1 Black, 346; *Kelley* v. *Bourne*, 15 Ore. 476; *Horner* v. *Meyers*, 4 O. L. D. (Sup. Ct. Cin.) 404.

Where two or more persons engage in a joint enterprise to buy and sell lands, a partnership is formed. *Dudley* v. *Littlefield*, 21 Maine, 418; *Staples* v. *Sprague*, 75 Maine, 458; *Richards* v. *Grinnell*, 63 Ia. 45; *King* v. *Remington*, 36 Minn. 15; *Simpson* v. *Tenney*, 41 Kan. 561; *Hyman* v. *Peters*, 30 Ill. App. 134; *Flower* v. *Barnikoff*, 20 Ore. 132; *Chapman* v. *Hughes*, 104 Cal. 302; *Nirdlinger* v. *Bernheimer*, 90 Hun, 290; *Jones* v. *Murphy*,

24 S. E. Rep. 825; *Cronkite* v. *Trexler*, 187 Pa. 100; *Hulett* v. *Fairbanks*, 40 O. St. 233; *Canada* v. *Barksdale*, 76 Va. 890; Lind. Part. p. 51; *Newell* v. *Cochran*, 41 Minn. 374.

This arrangement by which a partnership was formed is not within the provision of the statute of frauds. *Collins* v. *Decker*, 70 Maine, 23; 17 A. & E. Ency. 962, citing many cases; *Holmes* v. *McGray*, 51 Ind. 358; *Dale* v. *Hamilton*, 5 Hare, 369; *Fall River Whaling Co.* v. *Borden*, 10 Cush. 458. See also *Richards* v. *Grinnell*, 63 Ia. 45, reviewing the authorities, and *Hamilton* v. *Halpin*, 8 So. Rep. 739, (Miss.).

The partnership was not of such a nature that it was dissolved by the death of a partner, or by the transfer of his share. *Smith* v. *Virgin*, 33 Maine, 148, p. 156; *Kahn* v. *Smelting Co.*, 102 U. S. 641; *Kimberly* v. *Arms*, 129 U. S. 512.

That by a special agreement a partnership may continue undissolved by the death of a partner must be taken as settled. *In re Shaw's Estate*, 81 Maine, 207; *Phillips* v. *Blatchford*, 137 Mass. 510; *Wild* v. *Davenport*, 48 N. J. 128; *Wilcox* v. *Derickson*, 168 Pa. St. 331; *Duffield* v. *Brainerd*, 45 Conn. 424; *McNeish* v. *Hulless Oat. Co.*, 57 Vt. 317; *Blodgett* v. *Am. Nat. Bank*, 49 Conn. 9; *Tenney* v. *N. E. Protective Assoc.*, 37 Vt. 64.

Respondents are bound in equity to contribute to reimburse the complainants for the expenditures made by them to protect and preserve the property of the syndicate and the interests of its members.

The complainants having been justified in advancing the money required to protect and preserve the syndicate property, the respondents are bound to contribute to reimburse them. 17 Am. & E. Ency. Law, p. 1213, and cases cited; *Beck* v. *Thompson*, 22 Nev. 109; *McGrath* v. *Cowen*, 57 O. St. 385; *Blodgett* v. *Am. Nat. Bank*, 49 Conn. 9; *Betjemann* v. *Betjemann*, (1895,) 2 Ch. D. p. 474.

If any of the respondents in the case at bar are insolvent or have removed without the jurisdiction of the court, the complainants are entitled to recover from those remaining contribution for the whole

amount due. *Whitman* v. *Porter*, 107 Mass. 522, citing *Cary* v. *Holmes*, 16 Gray, 127.

A resulting trust arose at the time of the taking of the title to the property of the syndicate by the trustees and upon payment of the purchase money therefor. *Dyer* v. *Dyer*, 2 Cox, 92; 1 Lead. Cas. in Equity, 165–203; *Baker* v. *Vining*, 30 Maine, 127; *Gilpatrick* v. *Glidden*, 81 Maine, 137.

An express trust was created by the deed of Pettigrew to the two parties named as trustees and further evidenced by letters and other forms of declaration signed by the trustees.

The deed naming the parties as trustees would appear to comply with the requirements of the statute of frauds.

Whether the trustees were such by appointment under an express trust or by virtue of a resulting trust makes no difference as to their rights and duties in this case.

The principle of contribution: *Dering* v. *Winchelsea*, 1 L. Cases in Eq. p. 78; 1 Pom. Eq. Jur. (Ed. 1892) § 411.

There is a distinct analogy between the case at bar and the cases where one of several co-owners or tenants in common of certain property incurs expense in the removal of an incumbrance on this property. *Kites* v. *Church*, 142 Mass. 586; *Hurley* v. *Hurley*, 148 Mass. 444; *Leach* v. *Hall*, 95 Ia. 611, p. 619; *In re Devlin's Estate*, 17 Pa. Co. Ct. 433, (Orp. Ct.); *Moon* v. *Jennings*, 119 Ind. 130; 7 A. & E. Ency. of Law (2nd Ed.) 353, and cases cited.

This burden of contribution follows the share or interest of each party in the syndicate, continuing as long as such share or interest exists.

J. A. and I. S. Locke; *H. R. Virgin and F. C. Payson*; *J. W. Manson and G. H. Morse*; *Edward Woodman*; *Jas. C. Fox*; *P. H. Gillin and H. J. Preble*; *and J. O. Bradbury*, for defendants.

Messrs. Locke and Locke for Clark, Gilman and John J. Gerrish argued that the full amount of $140,000 was not subscribed, and this is a condition precedent as stated by their own witness, Gerrish, and not contradicted, and thus a fraud was perpetrated upon these respondents by these plaintiffs.

Certain concessions were granted and advantages obtained by Gerrish and others while these respondents had a right to expect that they were interested, dollar for dollar, and on the same basis proportionately as themselves. Such benefit and advantages so obtained, the principles of equity will not allow them to retain. *Emery* v. *Parrott*, 107 Mass. 95–100.

No agreement was made for a meeting of the associates or of those who had agreed to pay their money, and no meeting of those so agreeing was ever holden. Their individual agreement did not constitute them an association. *Cheney* v. *Goodwin*, 88 Maine, 568.

This bill is multifarious and unreasonable. *Wilcox* v. *Arnold*, 162 Mass. 577. "A syndicate agreement which merely provides for raising money to purchase certain lands at a given price, without any provision for selling the lands and dividing the profits, does not constitute a partnership agreement." *Ferguson* v. *Gooch*, 94 Va. 1, (40 L. R. A. 234).

In *Irvine* v. *Fobes*, 11 Barb. 589, the court say: "So, the members of a telegraph company by the articles of association of which the promoter was authorized to receive subscriptions to capital stock, and if a subscriber failed to pay he forfeited his stock and became liable to an action at law or bill in equity for any deficiency, the property of which was to be vested in trustees, are not partners, but tenants in common, of the property and franchises of the company, and the majority cannot bind the minority unless by special agreement." *Leach* v. *Harris*, 2 Brewst. (Pa.) 571; *Dwinel* v. *Stone*, 30 Maine, 386; *Knowlton* v. *Reed*, 38 Maine, 249; *Woodward* v. *Cowing*, 41 Maine, 9; *Millett* v. *Holt*, 60 Maine, 169-171.

One of several persons uniting in an enterprise for the purchase of land which proves unsuccessful cannot claim repayment for advances from others because of a clause in the agreement providing for repayment of all sums advanced by him, as, in the absence of agreement, such clause will be considered to mean repayment out of the proceeds. *Bell* v. *McAboy*, 3 Brewst. (Pa.) 81.

In *Ferguson* v. *Gooch*, 94 Va. 1, the court declares: "A purchase of lands by real estate agents on behalf of a syndicate, of which they are members, when the agents are also secretly acting

as agents of the vendor, cannot be enforced against the other members of the syndicate." See also *Farnsworth* v. *Hemmer*, 1 Allen, 494.

Promoters are jointly and severally liable for false representations if they are all acting together for a common object. *Hornblower* v. *Crandall*, 78 Mo. 581; *Gelty* v. *Devlin*, 54 N. Y. 403; *Chandler* v. *Bacon*, 30 Fed. Rep. 538.

If the owner of the property assists the promoter in making a secret profit out of the transaction, the contract may be rescinded against him. *Atwool* v. *Merryweather*, L. R. 5 Eq. 464, note, 37 L. J. Ch. 35; *New Sombrero Phosphate Co.* v. *Erlanger*, L. R. 5 Ch. Div. 73; 4 Cent. L. J. 510; *Cortes Co.* v. *Tannhauser*, 45 Fed. Rep. 730; *St. Louis & U. S. Min. Co.* v. *Jackson*, 5 Cent. L. J. 317.

Mr. Woodman, for Young and estate of James Webb, having demurred to the bill for the last named, argued in support of the demurrer. Tate has never been released from his obligation to contribute $10,000 to the supposed partnership, nor from his liability to discharge the mortgage of $45,000, subject to which the real estate was purchased.

Furthermore it appears that Pettigrew, the person by whom the real estate in question was conveyed to the trustees, conspired with said Tate and Gerrish to misrepresent the value and the amount of the purchase price of the land purchased by the trustees, so that Tate was chargeable not merely on account of the obligation assumed by him to defray the mortgage subject to which the property was purchased, and on account of his agreement to contribute $10,000 to the joint purchase, but also as one of the parties to the fraud practiced in effecting the sale of the land by Pettigrew to the trustees.

Statute of Frauds: *Smith* v. *Burnham*, 3 Sum. 435; *Larkin* v. *Rhodes*, 5 Porter, (Ala.) 195; *Benton* v. *Roberts*, 4 La. Ann. 216; *Clancy* v. *Craine*, 2 Dev. Eq. (N. C.) 363; *Williams* v. *Gillies*, 75 N. Y. 197.

No partnership was in fact formed. Changes cannot be made in the personnel of a firm without the consent of all the partners.

If a partnership had in fact been formed, the death of each of the three who died worked a dissolution of the partnership, and the attempts of the living partners to substitute other persons in their places were wholly inoperative and of no effect unless accomplished with the knowledge and consent of all.

Not a particle of evidence can be found in the record showing that any one of the defendants requested these "Trustees" to make any expenditure whatever beyond the amount with which they had been furnished by the several subscribers, or agreed to reimburse them in whole or in part for such expenditures as they might make.

The plaintiffs' statement of account in their bill is misleading, and in other respects their bill is disingenuous and insincere.

In cases of Chapman and Dyer the subscriptions were paid either wholly or in part by transfers of property of uncertain value to Gerrish, the promoter, who in turn directed that the amount agreed upon as the price of the property should be credited by way of transfer from his own paid up interest, an interest which represented no cash contribution to the enterprise whatever, but only Gerrish's own commissions or profit in the transactions. That is, these plaintiffs purchased from Gerrish an interest in his commissions, and were credited with the amount of such purchase, although the "Syndicate" received no benefit or advantage or contribution of money on account of the transaction.

The plaintiffs in their bill have misrepresented the amounts of their own subscriptions; they have concealed the fact that their subscriptions were paid in part by transfers of property to the person whom they themselves represent as a swindler imposing upon all, from which transfers the "Syndicate" derive nothing; they have misstated the true amount due them in their account, and they have misrepresented the nature of the sale by which the property was finally disposed of, concealing the fact that they themselves were the purchasers at that sale. Their assertion of a partnership is an afterthought and a mere pretense; at the time of making the advances, on account of which they now seek contribution from the defendants, they looked to the property to secure

their advances, regarding it as of sufficient value to protect them from loss. The property is in fact of sufficient value to reimburse them for all advances and yield a profit. They are the owners of the property to-day; let them rely upon it to make them whole.

All of plaintiffs' witnesses are parties to this action, and the material part of their testimony, so far as it touches the interests of Webb's estate was as to matters prior to his death and is inadmissible under the provisions of R. S., c. 82, § 98.

Mr. Manson, for defendant Fuller, argued: Gerrish was offering and selling this land to each party in individual interests. They were not buying with a joint fund as joint owners. They did not make up so much money and pay for the land, each owning a joint interest proportionate to the amount of money each subscribed.

All of these purchasers considered themselves at liberty to buy or sell their interests whenever they saw fit. They never promised to pay any one but Gerrish anything, and their promises to Gerrish were not negotiable, and if assignable have never been assigned, and could not except subject to existing equities.

The deal arose without any joint interest in buying, without any common fund, without any common method of coming into ownership, each one paying in whatever he could best trade with Gerrish, and being placed on the books as an owner of so much according as Gerrish represented.

Every dollar's worth of liability sought to be imposed on any one of the respondents was unauthorized and every dollar expended was without the consent and without the knowledge of most of the parties now asked to contribute.

How did these trustees get the authority to accept a deed carrying with it $45,000 liability and impose such a liability on any one?

It cannot be implied that because the investors consented that a deed to certain real estate should run to them or should run to them subject to a mortgage, that they should have authority to give or create a personal obligation of the investors or by any act make the investors personally liable.

There was not any prior authority to accept such a deed. There is no evidence that the respondents ever knew that the trustees had pretended to assume such authority until this action was brought.

This was not a general trading partnership and one partner could not bind another to a personal liability not contemplated by him. *Bank* v. *Noyes*, 62 N. H. 35; *Huckabee* v. *Nelson*, 54 Ala. 12; *Baldwin* v. *Burrows*, 47 N. Y. 199.

The rule that the mortgagee can hold the grantee of the mortgagor is an exception to the general rule which can only apply when the conditions above described exist, only when the grantor could enforce payment from grantee, and subject to the equities between the grantor and grantee. So that in this case the mortgagees could never have had any rights against Fuller, nor can these complainants pay the mortgage as they did and enforce it against Fuller. *Garnsey* v. *Rogers*, 47 N. Y. 233; *Huebsch* v. *Scheel*, 81 Ill. 281; *Gaffney* v. *Hicks*, 131 Mass 124.

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

STROUT, J. In the autumn of 1889, Theodore Gerrish, acting as the agent for R. F. Pettigrew, of Sioux Falls, proposed to form a syndicate to purchase a tract of land on Phillips Avenue, in Sioux Falls, at the price of $140,000.

He presented his scheme to certain gentlemen in Maine who are parties to this bill. He represented that fabulous profits were to be realized from the transaction; that one-half of the purchase price could remain on mortgage at eight per cent interest for one and two years, and that probably sales of the land would be sufficient to extinguish the mortgage debt before its maturity. Under these representations the parties defendant, except Fuller, agreed with Theodore Gerrish to take interests in the purchase. The extent of these interests were in most cases measured by specific sums of money, and not in fractions. But in the case of Clark, his written contract with Gerrish was for five fifty-sixths of the purchase. The contract with all other Eastern takers was verbal.

A part of those taking interests paid in full for their several shares—others paid in part—but all the purchases were treated as of November 1, 1889. If payments were made later, interest was added from that date at eight per cent.

Theodore Gerrish suggested, perhaps with the knowledge and assent of some of the parties, certainly not all, that Chapman should act as cashier or treasurer. Some of the parties made payments to him; but the majority arranged with Gerrish personally, and he directed Chapman what interest to allow to each. So it was at Gerrish's suggestion without express assent of any other party, except Clark, that the title was taken by Winslow, S. C. Dyer and Tate as trustees. Pettigrew made his deed of the property to them on November 22, 1889, recorded June 9, 1890. The deed does not contain the names of the cestuis que trust, nor any declaration of what the trust was; nor was there ever any agreement among the parties defining or limiting the trust, and the rights, duties and powers of the trustees. They held the legal title under a dry trust, with no active duties in regard to it.

No objection appears to have been made subsequently by any of the parties to the conveyance to the trustees, nor is any made now. In his answer, Young says he was solicited by Theodore Gerrish to buy one undivided twenty-eighth part of the real estate, and that he so agreed with Gerrish. John J. Gerrish, Preble and Webb say the same as to their interests.

Clark, as shown by his written agreement with Gerrish, understood that he was buying five fifty-sixths of the tract.

They all say, and it is not denied, that it was a condition of their undertaking that the whole $140,000 should be taken and subscribed before the agreements to take interests should be binding. It is admitted by the plaintiffs that that amount was never raised. Although the moneys received by Chapman and Theodore Gerrish were applied to the purchase of the property, it does not appear that the parties defendant knew that $140,000 had not been secured till long afterwards.

When the title was to be obtained from Pettigrew, it was found that the land was under mortgage to Artemas Gale, to secure the

payment of two notes, one for $25,000 and the other for $20,000. The title was conveyed to Winslow, Dyer and Tate, as trustees, subject to that mortgage, which the grantees assumed and agreed to pay. No authority had been given to them to assume that mortgage in behalf of the other parties interested, nor do the other parties appear to have had knowledge of its assumption till long after; and it was never assented to by them. No meeting of the several takers of interests was ever held till December 30, 1890, nor any general understanding or arrangement made as to management or sale of the property.

Such application of the money in hands of Chapman and Theodore Gerrish was had, that the twenty-five thousand dollar mortgage note was paid therefrom in September, 1891.

In May, 1892, the Chapman Banking Company bought the Gale mortgage, on which the twenty thousand dollar note remained due, and had it assigned to Charles J. Chapman, who subsequently commenced proceedings to foreclose. Pending these proceedings, the trustees Winslow and Dyer having discovered what was before unknown to them or any of the Eastern parties, except Theodore Gerrish, that of the $140,000 given as the price of the land, $50,000, was to go to Theodore Gerrish, Tate, Pettigrew and Milliken, as bonus and commissions, the various subscribers declined to make further payments under their several agreements; and Winslow and Dyer, as trustees, instituted legal proceedings in South Dakota to eliminate Tate, Pettigrew and Milliken from interest in the property, and to close the trust and sell the property. They obtained a decree for sale, and under it sold the property in 1896, for $12,000; but it is admitted that this sale brought no money, and that it was in fact bid in for the trustees, who have or can have a deed of it without payment of anything. Before this, Tate had conveyed his interest in the property to Winslow and Dyer, the two other trustees; but the other owners of interests in the land had no knowledge and gave no consent to the release of Tate as trustee.

In May, 1896, these plaintiffs paid $27,676, the amount due upon the Gale mortgage which with other payments by them, or

by Winslow and Dyer, trustees, made an outlay of $34,777.78 in excess of moneys received, including the $12,000 for which the property was bid in, as a cash asset. Plaintiffs do not claim that they had any express authority from their co-purchasers to make these advancements upon their account, except such as was given in the meeting of December 30, 1890, the only meeting when a quorum was present, or any action taken. At that meeting a part of the subscribers were present, not all. The evidence, which rests in recollection only, shows about one-half of the members present. At that meeting it was voted that the trustees "be authorized to call upon the proprietors for further payments," and that they "be authorized to raise any amount of money required to take up said mortgage which may not be paid by the part owners or proprietors, and to *reimburse themselves from the first sales of land for all outlays, interest and expenses.*" Also, that the trustees be authorized to employ agents at Sioux Falls, to sell all or any part of the land at such prices as they consider for the interest of all.

Chapman kept some sort of record or memoranda, not produced, of the holdings of the various parties in the Phillips Avenue syndicate, as it was called; but nearly all of his entries appear to have been made at the suggestion or dictation of Theodore Gerrish. Folsom is entered as taking $10,000, at Gerrish's suggestion, but Folsom never consulted with any of his associates, nor was consulted by them in regard to it. He attended no meeting, answered no letters, and never showed any interest in the scheme. So J. J. Gerrish, having agreed to take an interest of $4500, and having paid $2250 on it, a little later Theodore Gerrish directed Chapman to transfer that share to the defendant Fuller, apparently as collateral for Theodore Gerrish's debt to Fuller. Various other peculiar transfers were made in the memoranda of Chapman, some of which are not very satisfactorily explained.

The grade of Phillips Avenue having been changed, to the damage of these lots, as the trustees believed, they desired to commence proceedings to recover compensation; and to that end asked the parties to sign a written agreement to unite to enforce the claim, and to pay pro rata to Chapman the expense of its prosecution, and

authorizing Winslow and S. C. Dyer, two of the trustees, to proceed. This was in November, 1894. The paper was signed by Winslow, S. C. Dyer, Chapman, Lowney and Young; but eight other parties in interest declined to be responsible for any part of the expenses, but did authorize the trustees to prosecute, holding them exempt from expense; and in the case of Mrs. Webb, where it was necessary that she should take letters of administration in South Dakota, Winslow and S. C. Dyer gave her a written guaranty to pay the expense of obtaining such letters, and to hold her harmless from costs or damages arising from prosecution of the claim.

The business was done very loosely. So little of it is in writing and so much rests upon uncertain recollection that it is very difficult to ascertain the precise facts, but we have extracted from the mass of evidence all that appears to be necessary to determine the legal and equitable rights of the parties.

The bill is brought to recover from the defendants, in the proportion of their holdings, the amount of advances by plaintiffs in excess of their receipts. It is ably argued that the true relation of all the parties was that of partners in a business to be conducted by the trustees. It is not claimed, nor is it shown, that the parties agreed upon or understood that they were forming a partnership in the ordinary manner by mutual consent; but it is claimed that the business or venture undertaken, and the means to accomplish it, and the method of raising funds therefor were such as to make it in law a partnership; and that the trustees, as holding the legal title and managing the property, were the agents of all the parties, and that what they did for the common interest of the concern was binding upon all.

It may be conceded that, under some circumstances, associated parties may be regarded in law as partners, when the parties themselves do not understand that a partnership exists. But before the law will imply such relation, contrary to the intention of the parties, it must appear not only that funds were contributed to a common object, but that the enterprise or business contemplated and intended to be carried on, is of such a character and purpose that

it cannot result in a successful issue if the proprietors are treated as tenants in common and not co-partners. As in *Farnum* v. *Patch*, 60 N. H. 294, where various persons took shares as stockholders for the purpose of starting and operating a grocery store, and were held to be partners.

So it may be that a partnership can be created by parol, the business of which is to deal in real estate without violating the statute of frauds. The authorities do not agree upon this. The affirmative is held in *Williams* v. *Gillies*, 75 N. Y. 197, and a contrary view is held in *Smith* v. *Burnham*, 3 Sumner, 435. Assuming that such partnership may legally be created by parol, we are to examine the acts of these parties and apply the rules of law to them and determine therefrom whether their rights and liabilities are to be governed by the law applicable to partnership.

It is undoubtedly true that the purchase was speculative, and that the proprietors expected their profits to arise from sales of the land. They did not contemplate building upon it or making other improvements, but simply to hold it for sale at advanced prices, which it was supposed would be obtained in a short time. There was therefore no necessity for a partnership to accomplish this end. Ownership as tenants in common was equally effective. The elements which justify a court in finding a partnership to result from the character of the business to be done are wanting.

One element of a partnership is a community of interest in the subject matter of it. But that alone is insufficient. Part owners of a ship are always treated as tenants in common and not as partners, though they have a community of interest in the ship, and share its profits and bear its losses in the proportion of ownership of each.

Another element is that each partner, from the relation itself, becomes the agent of all the others, having the jus disponendi of its property, and authority to bind the firm by contracts, within the scope of the business, and upon dissolution of the partnership by death of one of its members, the survivors become entitled to retain and dispose of the partnership effects for a settlement of its

affairs. *Dwinel* v. *Stone*, 30 Maine, 386; *Knowlton* v. *Reed*, 38 Maine, 250; *Berthold* v. *Goldsmith*, 24 How. 541.

In the present case, while there was community of interest, there was no element of agency in the individual parties. This objection might be met and overcome if, by agreement of all the proprietors, the title had been taken by the trustees under an active and defined trust to manage and dispose of the property. But this was not the case.

The title was taken by Winslow, S. C. Dyer and Tate, as trustees, without the knowledge of most of the parties; and although later when it came to their knowledge no objection was made,—and all parties may therefore be regarded as acquiescing in that action,—there never was any declaration of trust by the trustees; nor did the proprietors ever confer upon the trustees any authority to manage or dispose of the property. They held the legal title to the land upon a resulting, dry trust in favor of each individual owner, which the statute of uses would execute in his favor for his aliquot share of the estate, in common and undivided.

We do not overlook the meeting on December 30, 1890, at which some, but not all, of the proprietors were present, and voted to authorize the trustees to raise money to discharge the mortgage, and reimburse themselves from sales of land, and to sell part or all of the land. There is no evidence that the proprietors not present at that meeting ever assented to its doings, or had knowledge of them; consequently the authority there attempted to be given bound only those voting, and did not affect the others. It was therefore impracticable for the trustees to act under that vote.

They could not sell and convey any specific portion of the land, but only the undivided interest of those voting or assenting to the vote. The resulting trust could not be enlarged to an active, managing trust by the action of a part only of the cestuis que trust. So that, for all practical purposes, this action of a few became inoperative upon the trust estate, or the powers and duties of the trustees. While they continued to hold the legal title, they were not authorized to make a price upon the whole or any part of the land or sell it, except upon the request of all the proprietors and

on the terms they might suggest; nor had they the right to refuse to sell (except their own share) upon the terms dictated by all the others. They never became the agents of the proprietors to manage and dispose of the property.

When Winslow, Dyer and Tate took the title, a trust in the land resulted in favor of all who had paid towards its purchase, and we are satisfied from the evidence that all the parties so understood it. That Winslow and Dyer so understood it, is apparent from their statement in letter to Folsom on October 28, 1895, in which they say, "Owing to the fact that no declaration of trust was filed with the deed, the trustees were not authorized to act in any way for the owners."

Even if the payments of the several parties were regarded as payments to a common fund to purchase the property jointly, when the trustees took title without any trust declared by them or by the parties in interest and none was subsequently declared by agreement of all, the trust in Winslow and his associates resulted to the contributors in their several proportions, as an integral interest in the land and attached to it, and the individual owner could have compelled a conveyance of his individual share from the trustees if his share was fully paid—if not so paid, then upon payment of the amount due. Perry on Trusts, §§ 520, 521, 133; *Buck* v. *Swazey*, 35 Maine, 41.

Upon all the facts it is apparent that a partnership was not intended by the parties, nor can one result as matter of law. *Ferguson* v. *Gooch*, 94 Va. 6.

But plaintiffs claim contribution upon another ground: that regarding the rights of the cestuis que trust as those of equitable tenants in common, the plaintiffs have advanced a large sum to protect the property, and for the benefit of all; and therefore the loss should be borne pro rata by all.

To the maintenance of this claim there are formidable obstacles. While the proprietors intended that one-half of the purchase money could remain on mortgage, nothing in the case indicates that they contemplated a mortgage creating a personal liability, but rather that the land alone should be responsible. It is true the matter

was not discussed—the parties saw only prospective profits, and possible loss was not thought of. The trustees when they took title found it incumbered with the $45,000 mortgage. If they had taken title subject to the mortgage—in other words—taken title to the equity, it would have been practically in accord with the understanding of the parties. Instead, they reluctantly assumed and agreed to pay the mortgage, thus rendering themselves personally liable. They had no precedent authority from the other owners to do this; and the fact that it was done was not known to them for some years afterward and was never ratified by them. It was not known at the meeting December 30, 1890, when action was taken by part of the owners, really looking to payment of the $25,000 note then due rather than the $20,000 note which did not fall due till a year later. The plaintiffs understood this, for when in May, 1896, they paid the last mortgage note which the trustees had personally assumed without authority, they did not consult the other owners or seek any direction from them in the matter.

This appears in Mr. Chapman's testimony. It is true, he had endeavored with but little success to collect unpaid subscriptions, and in October, 1895, made an effort to get a meeting of the parties to take the matter into consideration, but less than a quorum attended and nothing was done. At the December meeting, 1890, those who acted only authorized the trustees to raise money, not paid by the owners to take up the mortgage "and to reimburse themselves from the first sales of land for all outlays, interest and expenses," thus carefully avoiding the assumption of personal liability.

As to these parties, the plaintiffs must be regarded as acting under the limitations and conditions of the vote, and cannot claim personal liability; and as to all the others, they have no authority whatever.

So far as any general equity for contribution ex equo et bono may be considered, it must be remarked that by the schedules in the bill a credit of $12,000 is given for proceeds of sale of the entire property under date of May 1, 1896, and on the same day plaintiffs charge payment of $27,676 to discharge the mortgage.

As the trustees had personally assumed the mortgage of their own volition, without authority from the other owners, they were obliged to pay it. But when they ask contribution towards that payment, the other parties may well say they did not desire redemption at a cost of more than double the amount realized on sale of the property. No benefit resulted to them, and no equity in favor of plaintiffs arose from the transaction.

Having paid the mortgage under their personal liability and made other voluntary advances, plaintiffs are entitled to hold the land bid in for them to the extent of their reimbursement, and will be accountable over to the other owners only for the excess. If the land is insufficient for this purpose, they have no claim for the deficiency upon the other owners. They voluntarily and unnecessarily assumed the mortgage on their individual responsibility, and made other advances without any authority from many of the owners, and authority from a few, limited to reimbursement from sales of the land, and they can only rely upon the land for reimbursement.

One tenant in common, without authority from his co-tenant cannot create a personal liability against him by making improvements on the common property, or payments in regard to it, as to which the co-tenant was not under a legal liability. When the improvements add permanent value to the property, the tenant making them, if in receipt of the rents, may be permitted to hold them for his reimbursement; but his right to contribution extends no further. *Williams* v. *Coombs*, 88 Maine, 183; *Preston* v. *Wright*, 81 Maine, 306; *Alden* v. *Carleton*, 81 Maine, 358; *Calvert v. Aldrich*, 99 Mass. 74; *Converse* v. *Ferre*, 11 Mass. 326. These trustees have no greater right.

Bill dismissed with one bill of costs.

H. GERTRUDE JONES *vs.* CITY OF DEERING.

Cumberland. Opinion May 12, 1900.

Way. Defect. Notice. Damages.

Held; that a stake four inches high in the line of the street curbing, upon which plaintiff stepped and received her injury, was a defect in the way; that it was placed there by the city engineer when the sidewalk was constructed, and was negligently allowed to remain long after work upon the sidewalk had been completed; that the plaintiff was in the exercise of due care, and that the injury resulted solely from the defective way, for which defendant is responsible.

In a case submitted to the law court, with jury powers to find the facts and assess damages, it appeared that the plaintiff was injured April 30, 1898. She was treated by skillful physicians; she suffered great pain, unable to sleep except under opiates, until November 29 when an operation was performed on her foot, pus taken out, a point of bone found diseased, and at the time of the trial below, in January, 1899, she was unable to step on that foot. Her attending physician was not able to state that she would certainly have a good foot. Another doctor testified that the plaintiff will always walk a little limpy, but may eventually have a good foot and walk without a cane or crutches.

It is considered by the court that the nature and painfulness of the injury, its long duration and probably a longer continuance and the future lameness and sensitiveness, also the statute limit of two thousand dollars as the maximum that can be recovered for an injury from a defective way, warrant an assessment of damages at one thousand dollars.

ON REPORT.

Action on the case for damages caused by a defective street or sidewalk, under R. S., c. 18, § 80, as amended by statute of 1895, c. 164, and submitted by the parties upon a report of the testimony by Mr. Justice STROUT to the law court, damages, if any, to be assessed by the full court.

The case appears in the opinion.

E. E. Heckbert and Fred V. Matthews, for plaintiff.

Scott Wilson, city solicitor of Deering, and *Carroll W. Morrill*, city solicitor of Portland, for defendant.

The stake was outside the traveled part of the earth sidewalk a

where a foot traveler in the exercise of ordinary care could not possibly step on it, or against it, while using that part of the way prepared for foot travel.

Towns and cities are not obliged to prepare the whole width of the way for travel. They have performed their duty when they have prepared sufficient width to provide a reasonably "safe and convenient way" for the public to pass over and along the same without injury, when in the exercise of ordinary care. *Perkins* v. *Fayette*, 68 Maine, 153; *Farrell* v. *Old Town*, 69 Maine, 73; *Witham* v. *Portland*, 72 Maine, 539; *Brown* v. *Skowhegan*, 82 Maine, 273; *Knowlton* v. *Augusta*, 84 Maine, 572; *Tasker* v. *Farmingdale*, 85 Maine, 523; *Morgan* v. *Lewiston*, 91 Maine, 566; 2 Dillon. Mun. Corp. (4th Ed.) §§ 1010, 1016.

The plaintiff when she reached the end of the brick walk, instead of continuing along the dirt walk, as her friend did, walked along the top of the curbing as it extended beyond the bricks, and then stepped off the end of the curb on top of the stake which resulted in the injury. No person walking slowly, as the plaintiff is very careful to state that she was, along the ground could possibly step on top of a stake projecting four inches or even three inches above the ground. One walking naturally might stub their toe against it, but never step on top of it.

The plaintiff unnecessarily and voluntarily continued along the curbing, was fully aware of the fact that she was walking along the curbing, and was about to step off the end and down and in so doing, we submit she acted at her own risk. *Leslie* v. *Lewiston*, 53 Maine, 468; *Witham* v. *Portland*, 72 Maine, 541; *Tasker* v. *Farmingdale*, 85 Maine, 523.

The burden is on the plaintiff to show due care, not on the defendant to show a lack of it. The plaintiff must show that the injury was in no degree attributable to any want of care on her part. The fault of the defendant city must be the sole cause of the injury. *Witham* v. *Portland*, 72 Maine, 539; *Mosher* v. *Smithfield*, 84 Maine, 334.

The evidence shows a heedlessness and a want of care in unnecessarily leaving the smooth and traveled dirt walk to walk along

the granite curbing and stepping off the end onto an untraveled part of the sidewalk practically the edge of a ditch or gutter between the prepared sidewalk and that part of the street prepared for carriages and teams.

The whole testimony goes no further than to show the street commissioner had an opportunity to acquire knowledge of the location of this stake; but opportunity to acquire notice does not constitute "actual notice". *Hurley* v. *Bowdoinham*, 88 Maine, 293. The fact that he knew stakes were used in the work is not notice to him that they were improperly used, or improperly allowed to remain where they would be a menace to the safety of the traveling public. *Emery* v. *Waterville*, 90 Maine, 485. If the stake constituting the alleged defect had been driven there by one of his workmen, it would be no notice to the street commissioner. *Rich* v. *Rockland*, 87 Maine, 188; *Emery* v. *Waterville*, supra.

The engineer had no duties to perform relative to the repairs of the street, so far as their safety and convenience were concerned.

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

STROUT, J. In June, 1897, the city council of Deering ordered a brick sidewalk to be built on Pearl street, between Forest Avenue and Deering Avenue. It was built in August of that year under the supervision and direction of the street commissioner, an officer, required by the charter to be annually elected by the council, whose duty is there defined, "to superintend the general state of the streets, roads, bridges . . . . sidewalks and lanes in the city; to attend to the repairs of the same." In performance of this duty the street commissioner was daily upon this work, and the sidewalk was constructed under his direction and control.

From the termination of the brick sidewalk an earth walk of equal width extended easterly to the railroad. The earth walk, at its junction with the brick, was of even grade with it and slightly descended in its course eastward. On the side of the brick walk next to the carriage way, there was a stone curbing, at grade with

the brick, all forming a part of the walk, the whole being six feet in width. The stone curbing extended easterly about four feet beyond the brick.

An ordinance of the city required an annual election by the council of a city engineer. His duties are defined, to "have charge of all the plans of streets belonging to the city; he shall make all surveys, admeasurements and levels of streets in the city and plans and profiles of the same . . . . and perform such other surveying and engineering services as may be required by the mayor and aldermen or any committee of the city council."

The charter also provides that when sidewalks have been constructed, they "shall forever thereafter be maintained and kept in order by said city. An ordinance in regard to sidewalks provides that "all work to be done under the supervision of the street commissioner, or to the satisfaction of the committee on streets and the city engineer."

The city engineer made the survey and established the grade of this sidewalk, and it was constructed in accordance therewith.

Both the street commissioner and the engineer say that it was necessary for the engineer to drive stakes in the line of the proposed curbing, at a distance of about fifty feet between them, to indicate the grade to which the workmen should make the walk, and another line of stakes about eighteen inches nearer the carriage way, to guide the excavation for the curbing; and that it was always done in this way, and was so done in this instance.

At the easterly end of the curbing and in line with its centre and about one foot from it there was a stake driven into the ground, and rising above it about four inches, and outside the line of curbing, and about eighteen inches therefrom another stake. Both these stakes we are satisfied were driven by the engineer, or by his direction, for the necessary purpose of construction, and were not removed when the work was completed, and were there on April 30, 1898, when the accident occurred.

The stake in line of the centre of the curbing is the one complained of. At that time it was weather worn, and so nearly the color of the earth walk as not to attract attention. As one of a

line of grade stakes and necessary to the purpose of construction of the walk, it cannot be regarded as a defect while temporarily there, during the continuance of the work. But when allowed to remain long after its necessary use and purpose had been accomplished, it rendered the walk defective. It "unlawfully impaired the reasonable safety and convenience of the way". That it was dangerous is apparent from the injury it inflicted upon the plaintiff. It is not clear from the evidence, whether the stake was round or square, but it was of small diameter, not exceeding two inches at most. If the stake was one of the grade stakes, as we are satisfied it was, it was placed there by the officers of the city who were specially charged with the duty of preparing and constructing the walk and must be regarded as the act of the city. In such case, the statute requirement of twenty-four hours notice of the defect, does not apply. *Holmes* v. *Paris*, 75 Maine, 560.

If it were otherwise, both the street commissioner and engineer knew of the existence of the line of grade stakes, of which this was one, at the time the work was done.

They were driven there by the engineer or by his direction, and improperly allowed to remain after the work had been completed. If not now able to recollect this particular stake, still the street commissioner must have had knowledge of its existence while at work on the ground, which is sufficient to meet the requirement of the statute.

At about two o'clock in the afternoon of April 30, 1898, the plaintiff and a female friend were walking slowly on and over the brick and stone sidewalk toward Forest Avenue, the plaintiff being on the side nearest the carriage way, and probably on or near the stone curbing which was a part of the sidewalk, where she had a right to be. When she stepped from the brick to the earth walk, which was there continued at the same grade, she stepped upon this grade stake, which turned her foot and badly sprained her ankle.

She had no previous knowledge of the existence of the stake, and its appearance at that time, after eight months' exposure to the weather, did not present sufficient contrast to the color of the earth

walk to attract attention. It appeared to be continuous, smooth and even. She cannot be charged with lack of reasonable care, nor of any contributory negligence. In our view, her injury was caused solely by the defective way, for which the defendant city is responsible. No other question is raised by the defendant.

By the terms of the report, the plaintiff's damages are to be assessed by this court. The accident occurred on the thirtieth day of April, 1898. She was treated by skillful physicians; she suffered great pain, unable to sleep, except under opiates, until November 29th, when an operation was performed on her foot, pus taken out, a point of bone found diseased, and at the time of the trial below, in January, 1899, she was unable to step on that foot. Dr. Bray, her attending physician, thinks that in a year she may "have a pretty good foot," if she does not develop any diseased bone there—but to the question, "Would you be able to state about the certainty of her having a good foot," he answered, "No, sir."

Dr. Cummings thinks she will ultimately have "a pretty good foot. It will always be sensitive. She will always walk, perhaps, a little limpy, but I think sometime, eventually, she will have a pretty good foot and walk without a cane and without a crutch." Considering the nature and painfulness of the injury, its long duration and probably longer continuance, and the future lameness and sensitiveness, and in view of the statute limitation of two thousand dollars as the maximum that can be recovered from a city for an injury from a defective way, we assess the damages in this case at one thousand dollars.

Judgment for plaintiff for one thousand dollars.

CHARLES W. PIERCE

vs.

BANGOR AND AROOSTOOK RAILROAD COMPANY.

Piscataquis. Opinion May 22, 1900.

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

The liability of a railroad company to make compensation for injury to property along its route by fire communicated by a locomotive engine in its use, created by statute, R. S., c. 51, § 64, is co-extensive with the right given to the railroad company by the same statute to insure such property.

For the company to be liable there must be such elements of permanency in the situation of the property that the railroad company may have a reasonable opportunity to protect itself against its liability by insurance. Upon this principle a railroad company is not liable for the destruction of property, under the statute, temporarily located along its route and which may be so soon and so readily moved that the company can not, by the exercise of reasonable diligence, protect itself against liability by insurance; but the company is liable under the statute for merchandise, lumber or other chattels regularly and permanently located along its route.

Held; that the property of the plaintiff destroyed by fire communicated by a locomotive engine, in the defendant's use, had such elements of permanency in its situation and other conditions as to place it within the protection of the statute.

The plaintiff testified that shortly before the fire he had taken an account of the ship-knees, the property destroyed; that in the first instance he made his memoranda upon a shingle, and subsequently, upon the conclusion of his account-taking, he transferred the result of his account to a small memorandum book. In answering a question as to the number and sizes of these ship-knees destroyed, he was allowed by the court to refer to the small memorandum book for the purpose of refreshing his recollection, against the defendant's objection as stated that, "this book is not a book of original entry." *Held;* that the ruling was correct; that for this purpose it was not necessary that the writing should have been an original one.

Where objection is made because the witness after referring to his memoranda had no independent recollection of the facts that he testified to, *held;* that this objection is also unavailing. A witness may be allowed to assist his memory by referring to writings, when he recollects having seen the writing before, although he has at the time of testifying no independent recollection of the facts mentioned in it, if he remembers that at the time he saw the writing before, he knew the contents to be correct.

ON MOTION AND EXCEPTIONS BY DEFENDANT.

Case under R. S., c. 51, § 64, for destruction of ship-knees by fire from defendant's locomotive engine.

The case is stated in the opinion.

H. Hudson and M. L. Durgin, for plaintiff.

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

Exceptions to testimony: The original shingle should have been produced—it being a fact that the witness had no independent recollection of the number and sizes of the twelve hundred and odd knees in and about his shed. "In cases where the witness after refreshing his memory, has no independent recollection of the facts to which he is called to testify, but relies on a memorandum which he says he once knew to be correct, the original writing must be produced in order that the court and jury may judge of the reliability of the evidence, and the opposing witness may have an opportunity to cross-examine the witness upon every part of it." 8 Ency. of Pl. & Pr. p. 142, and cases cited.

The book should have been verified by the plaintiff as a true copy of the shingle. When a witness after refreshing his memory, recollects the facts and testifies thereto from his own recollection of the same it is of no consequence whether the paper used is the original memorandum, or a copy thereof, provided he knows the facts stated in the original are true and that the paper used is a true copy of the original. 8 Ency. Pl. & Pr. p. 140, and cases cited; and upon both of these points he must be clear and explicit in his testimony before he can be allowed to refresh his memory from the copy. *Chicago, etc., R. Co.* v. *Alder*, 56 Ill. 344.

There are cases which hold that a witness may refresh his memory from any book or paper if he can swear to the fact from recollection. But that rule does not obtain in this case. Quantities and values are retained in the memory with great difficulty, and the plaintiff does not intend to swear as a matter of recollection, as to the number of different sizes of knees therefrom. He was unable to swear to the fact of the different numbers of each size, except as it appeared in this book—it was not a matter of memory with

him—it was a memorandum upon which he wholly relied, and for that reason we say the original should have been produced.

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

WISWELL, J. This is an action to recover damages for the destruction of a quantity of ship-knees belonging to the plaintiff and situated along the route of the defendant's railroad, by fire communicated by a locomotive engine in the defendant's use. The plaintiff's writ contains two counts, one, alleging that the destruction of the plaintiff's property by fire was caused by the defendant's negligence, the other, based upon the statute, R. S., c. 51, § 64.

At the trial there was no controversy as to the nature, location or description—except as to quantity—of the plaintiff's property, and the testimony on behalf of the plaintiff, as to the time during which and the manner in which he had been storing these ship-knees in the place where they were when destroyed by fire, was undisputed. Consequently the justice presiding instructed the jury, in effect, that the defendant was liable under the statute and that they need not consider the allegations of the defendant's negligence. To this instruction the defendant excepted, the only question presented thereby being as to whether the nature, situation and condition of the plaintiff's property and the length of time during which the place where the loss occurred had been used by the plaintiff for this purpose, were such as to bring this property within the meaning and protection of the statute upon which this count in the writ was based.

From the uncontradicted testimony upon the part of the plaintiff, these facts appear: The property destroyed by fire was along the route of the defendant's railroad, in fact, it was within and about a storehouse or shed on the company's land, placed there with the consent of the defendant's predecessor in the ownership of the road, and maintained, since 1892, with the implied consent of the defendant. It was built by the plaintiff in the year 1881 or 1882, for the purpose of storing ship-knees therein. The shed was an inexpensive one, costing originally, as testified by the plaintiff,

about $125, but it was a frame building, placed upon cedar posts set in the ground, its roof was boarded and shingled and its sides boarded, although the lower boards were removed from time to time as the plaintiff had occasion to do so for the purpose of putting in or taking out these knees. The building was ninety-two feet long, nineteen feet wide and sixteen feet posted on the one side and eleven to twelve feet on the other.

From the time that this shed was first built in 1882, ten years before the defendant commenced the operation of the railroad, up to the time of its destruction by fire, May 21, 1896, it had been continuously used by the plaintiff for the storage of knees, which he was engaged in the business of buying, getting out himself and selling; and during all of that time, according to the undisputed testimony in behalf of the plaintiff, he had also occupied the land in the immediate vicinity of the shed for the purpose of piling there these knees. A portion of the knees was each year brought there upon the defendant's railroad, unloaded from a siding near the shed, hauled some distance by the plaintiff to his mill to be finished or dressed, and then hauled back to the storehouse where and about which they were stored until sold, when they were generally shipped over the defendant's railroad. The plaintiff testified that this business had amounted during these years to something about $7000 each year.

Under these circumstances we think that the plaintiff's property, that outside of the shed as well as inside, came within the protection of the statute, and that the ruling that the defendant was liable for its destruction by fire admitted to have been communicated by one of its engines, was correct.

When this statute was first considered by the court in *Chapman* v. *Railroad Company*, 37 Maine, 92, the court construed it as giving to the railroad company a right to insure property along its route co-extensive with the company's liability for its destruction. "To make this right to insure property of any practical value to the corporation, the property must be of such a character and so situated, as to render insurance practicable by the use of reasonable diligence." And it was then decided that a railroad company is

not liable under this statute for property which is so temporarily located along its route that the company does not have a reasonable opportunity to insure it.

This general principle has been followed by the court in all of the cases that have come before it. For instance, in *Chapman* v. *Railroad Company*, supra, the court held that the property destroyed by fire had no established location, that it was deposited and removed with such facility as to render insurance impracticable and unavailable, and that consequently it was not within the meaning of the statute. In *Lowney* v. *Railway Company*, 78 Maine, 479, the decision of the court, that the company was not liable, was based upon the fact that the property destroyed consisted of movable articles, temporarily placed near the railroad track as in the case of *Chapman* v. *Railroad Company*.

But in *Stearns* v. *Railroad Company*, 46 Maine, 95, to recover damages for the destruction of a chair factory, the machinery and tools therein and chairs wholly or partially manufactured, together with stock used in their manufacture; in *Bean* v. *Railroad Company*, 63 Maine, 294, to recover for the destruction of a stock of goods in a store occupied by the plaintiff near the railroad track; and in *Thatcher* v. *Railroad Company*, 85 Maine, 502, to recover for the destruction of a quantity of lumber stored upon a piling ground near the defendant's track, which had been used by the plaintiff for the same purpose for a number of years in connection with his mill, with the knowledge of the defendant company which had built side tracks to facilitate the shipping of lumber from the piling place, this court held that in each of these cases the railroad company was liable.

The distinction between these two classes of cases is well marked; they are all decided upon the construction of the statute laid down by the court in the first case in which it was considered, that is, that the liability of the company should be co-extensive only with its practical opportunity to insure the property along its route for which it might be liable. For the company to be liable there must be such elements of permanency in the situation of the property that the railroad company may protect itself against its

liability, by insurance. Upon this principle a railroad company is not liable for the destruction of property, under the statute, temporarily located along its route and which may be so soon and so easily moved that the company cannot, by the exercise of reasonable diligence, protect itself against liability by insurance; but the company is liable under the statute for merchandise, lumber or other chattels regularly and permanently located along its route.

It is, of course, unnecessary in any of these cases that the identical articles should remain situated along the route for any particular length of time; these may be constantly changing as do the various articles in a stock of goods, while the stock itself, replenished from time to time, remains permanently in the place designed for it. The permanency here referred to means the permanent use of the particular place for the same kind of articles or goods. We think that the character of this property belonging to the plaintiff, and the long continued use that he had made of this storehouse, and its immediate vicinity, for the purpose of storing there his ship-knees, continuously since 1882, clearly bring the case within the meaning of the statute.

For the purpose of proving the number and sizes of the knees destroyed, the plaintiff testified that on the 12th and 13th days of May, a few days before the fire, he took an account of the same, in the first instance making his memoranda upon a shingle, the result of which he later, on the afternoon of the 13th, transferred to a small memorandum book. In answering a question as to the number and sizes of the knees that he had taken an account of, he referred to this memorandum book, when the counsel for the defense objected to such reference, giving as a reason that: "This book is not a book of original entry." The court overruled the objection and allowed the witness to refer to this book for the purpose of refreshing his recollection. The absence of the shingle upon which the original memoranda were made was unaccounted for. To this ruling the defendant excepted.

Objection is now made because the witness after referring to his memoranda had no independent recollection of the fact that he testified to. But this did not appear to be the case at the time

and objection was not made at the time for this reason. The justice presiding only ruled that the witness might refer to his book containing memoranda, made at the close of his stock taking, to refresh his recollection and the objection was that he should not be allowed to look at the book even for that purpose because it was not the book of original entry. For this purpose it was not necessary that the writing should have been an original one.

But even if the objection now urged had been made at the time, we think that it would have been unavailing. A witness may be allowed to assist his memory by referring to writings, "where the witness recollects having seen the writing before, and though he has now no independent recollection of the facts mentioned in it, yet he remembers that, at the time he saw it, he knew the contents to be correct." 1 Greenleaf on Evidence, § 437.

When the testimony relates to dates, figures, amounts or quantities, which can be retained in the memory, with difficulty if at all, this rule is, we believe, a necessary and wise one, and is productive of more good than harm. The rule as above stated is quoted in full and with approval in *Dugan* v. *Mahoney*, 11 Allen, 572.

The only question raised by the defendant's motion for a new trial is as to the amount of damages assessed by the jury, as this was the only question submitted to the jury. But this ground for a new trial is not urged by the defendant's counsel in argument, and we think that the amount of the damages assessed was authorized by the evidence.

Motion and exceptions overruled.

PRINCE A. STAFFORD

vs.

MAINE CENTRAL RAILROAD COMPANY.

Somerset. Opinion May 22, 1900.

Negligence. New Trial.

In an action for negligence, where the jury returned a verdict for the plaintiff, it appeared that the issues between the parties were all questions of fact for the jury and no doubtful questions of law were involved. The well-settled principles of law applicable to the respective rights and duties of the parties, as master and servant, were carefully given by the presiding justice and in such a manner as to fully protect the rights of the defendants.

While the court might possibly have drawn inferences and conclusions from the facts different than a jury, *held;* that the questions were such that reasonable and fair-minded men might differ about them, and that accordingly the verdict should not be set aside.

ON MOTION BY DEFENDANT.

This was an action on the case to recover for personal injuries received by the plaintiff while in the employ of the defendant company as a locomotive fireman. It was tried at the March term in Somerset county, and the jury returned a verdict of $3,391.25. The defendant thereupon filed a motion to set aside the verdict.

From the evidence it appeared that on April 3, 1895, the plaintiff was employed as a fireman on an engine which was hauling a freight train out of Bangor. After proceeding about five or six miles from Bangor on the run toward Waterville, one of the sight-feed glasses in a lubricating cup, burst or exploded and a piece of glass was driven into the socket of his right eye just below the eyeball. In consequence of the injury thus received, he was unable to work for about one month, but then returned to his work and after firing for two or three weeks he was placed in charge of an engine as an engineer and ran regularly from that time until some time in January, 1898, when he was directed to have his eyes examined by Dr. Holt of Portland, and it was found that the

vision of his right eye was imperfect and that it would be unsafe for him and for the public to be employed longer as an engineer. He was consequently dismissed from that position although another position was offered him by the railroad company. He did not accept further employment from the defendant company, and August 12, 1898, brought this action to recover for the injury to his eye.

He continued in the employ of the defendant company for a period of two years and a half after the injury and during this time, with the exception of the first two or three weeks, was employed as a locomotive engineer and ran upon regular trains. He claimed that his eye troubled him a great deal and grew gradually worse; and after this action was brought, under the advice of his physician, he went to a hospital and had the injured eye removed.

The lubricating cup is known as the Siebert cup, and was placed upon the left side of the boiler-head in the cab at a distance of about two feet above the head of the fireman, as he would stand in the cab. Its use is to oil automatically the cylinders of the locomotive while the locomotive is in motion. For that purpose two pipes known as the tallow pipes extend from the cup outside the boiler to the cylinders on either side. A pipe connects a condenser on top of the cup with the boiler. The cup is partially filled with water at first so that it shall stand about an inch in the sight-feed glass, then oil is poured in, the valve controlling the pipe which connects the condenser on top of the cup with the boiler is then open, the steam enters the condenser and is there condensed into water, which flows from the condenser into the cup and for each drop of water admitted into the cup one drop of oil is forced out. The oil rises drop by drop through the water in this sight-feed glass on either side and passes out through the tallow pipes to the cylinders, the pressure of steam in the steam chest being overcome by the boiler pressure, all of which is exerted upon this cup.

The plaintiff in his writ charged that the lubricating cup, the glass in which broke and caused the injury to the plaintiff, was unsuitable, improper and defective in this particular; that the

sight-feed glasses, through which the oil passed to reach the pipes leading to the cylinder, were not properly shielded, guarded, and protected, so that if they burst, the flying particles of glass would be prevented from doing injury to the plaintiff and his fellow workmen. No part of the cup was made of glass except the two sight-feed tubes one on either side.

The defendant contended that it was not liable to the plaintiff for the injuries sustained by him, because it had exercised ordinary care and foresight in equipping its engine with this cup; that it was of a standard pattern made by reputable manufacturers and in general use on the railroads of New England, without any shields or guards around the sight-feed glasses; that none were at that time provided by the manufacturers; that it had no knowledge that these glasses would explode with violence so that pieces of glass would be hurled with sufficient force to do injury to anyone; that all the means of knowledge which it had in regard to the liability of an explosion of this character were equally open to the plaintiff; that whatever danger attended the use of this cup as it was used upon the engine upon which the plaintiff was employed, was incidental to the plaintiff's employment as a fireman upon this locomotive engine; that all the danger connected with its use without shields or guards about the sight-feed glasses was obvious and open to the observation of a man of the age, experience, and intelligence of the plaintiff, or could have been discovered by him by the exercise of ordinary care and attention; that by continuing in the employ of the company without objection he assumed the risk of all danger by reason of the failure of the defendant to guard or shield these glass tubes, even if such a failure constituted negligence.

Forrest Goodwin, for plaintiff.

Charles F. Johnson, for defendant.

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

WISWELL, C. J. After a careful examination and consideration of this case we are not satisfied that the verdict for the plaintiff for

$3391.25 was so manifestly wrong as to warrant its being set aside.

The plaintiff was a locomotive fireman in the defendant's employ. While engaged in the performance of his duties as such he sustained serious injury, finally resulting in the loss of an eye, by the explosion of a glass tube, connected with an automatic lubricating cup attached to the boiler head.

His contention is that the cup as used and located was unnecessarily dangerous; that these glass tubes were so liable to explode and had so frequently exploded that the danger was, or should have been, known by the employer; that this danger might have been easily avoided by the use of some shield or guard about the glass tube, which, he claims, was entirely practicable without in any way destroying the efficiency of the lubricating cup, and that such shields were in use at the time of the accident and before. He further claims that this risk was not assumed by him, because the danger was not one incidental to his employment, and was not known by him previous to the accident.

These were all questions of fact for the jury. There were no doubtful questions of law involved. The well settled principles of law applicable to the respective rights and duties of the parties, as master and servant, were carefully given by the presiding justice, and in such a manner as to fully protect the rights of the defendant.

There was considerable evidence in support of the plaintiff's contentions; in fact, the controversy between the parties and their counsel was more as to the conclusions and inferences to be drawn from the facts, than as to the facts themselves.

It is quite possible that we would not have drawn the same inferences, or come to the same conclusions as did the jury upon some of these matters. But we think that these were questions about which reasonable and fairminded men might differ, and consequently do not consider that the verdict should be set aside.

Motion overruled.

S. JOSEPHINE CARLETON

vs.

AUGUSTUS D. BIRD, and others.

Knox. Opinion May 22, 1900.

Patents. Contracts. Jurisdiction. Covenant. Pleading. R. S. of U. S., § 711.

Where a suit is brought to enforce a contract of which a patent is the subject matter, the case arises on the contract and not under the patent-right laws of the United States.

Whenever a contract is made in relation to patent-rights, which is not provided for and regulated by an act of Congress, the parties, if any dispute arises, stand upon the same ground as other litigants in respect to the jurisdiction of the court.

In an action of debt brought upon the covenant of the defendants to pay a stipulated license fee for the use of an improved lime kiln and a new method for calcining stone in the manufacture of lime, covered by letters-patent issued to the plaintiff's grantor, the defendant claimed that during the period sued for they had not used the apparatus or method covered by the letters-patent; that during such period the apparatus and method used by them in their lime kilns were not covered by the plaintiff's letters-patent, and that the plaintiff had no patent on the apparatus or method used by the defendants. The plaintiff contended that the apparatus and method used by the defendants in the manufacture of lime during this period, if not precisely the same as those covered by the letters-patent, were practically and essentially the same, that they were in every sense identical, and were infringements of the plaintiff's patents.

Held; That this court is not deprived of its jurisdiction by reason of these contentions; that this is not a case arising under the patent-right laws of the United States, but is an action upon a contract, between citizens of the same state, of which the state courts have the exclusive jurisdiction. That it is not sufficient to oust the state court of its jurisdiction of a cause that a *question* incidentally arises under the patent laws; the United States statute gives the Federal court jurisdiction only of *cases* arising under such laws.

To constitute such a case the plaintiff must set up some right, title or interest under the patent laws, or at least make it appear that some right or privilege will be defeated by one construction, or sustained by the opposite construction of these laws.

An action upon a covenant contained in a contract under seal must be brought in the name of the covenantee. No one who is not named as a party in such a contract can sue upon its covenants.

Held; that this action brought by the grantee of two letters-patent, in her own name, upon the defendants' covenant to pay a license fee for the use of the apparatus and method covered by the letters-patent, which covenant is contained in a contract under seal between her grantor and the defendants, can not be maintained.

Elmer v. *Pennel*, 40 Maine, 430, overruled.

ON REPORT.

Action of debt to recover a license fee on lime manufactured by the defendants, by means of the apparatus and methods of the plaintiff for burning lime, as set out in two patents granted to one Granville E. Carleton for calcining stone in the manufacture of lime and cement, and by him set over and assigned to his wife, the plaintiff.

The case appears in the opinion.

Jos. E. Moore, for plaintiff.

Parties: The transfer of "right, title and interest" is an assignment "in the nature of a quitclaim deed, of whatever right title or interest the plaintiff has in the patent specified". *Gilmore* v. *Aiken*, 118 Mass. 94–7.

"Whether the form of conveyance is that of an assignment or a license, if it transfers all rights under the patent, it is an assignment and the transferee may sue in his own name." *Siebert Cylinder Oil-Cup Co.* v. *Beggs*, 32 Fed. Rep. 790.

After transferring all "right, title and interest" the assignment goes further and says, "the same to be held and enjoyed by the said S. Josephine Carleton, for her own use and behoof and for the use and behoof of her legal representatives, to the full end of the term for which said letters-patent were granted, as fully and entirely as the same would have been held and enjoyed by me had this assignment not been made."

This would certainly, in terms, convey all future interests and rights, whether royalties, license-fees or infringements; otherwise the assignee would not hold and enjoy it the same time the assignor could, had no assignment been made. *Railroad Co.* v. *Trimble*, 10 Wall. (U. S.) 367.

"Every assignee of whatever degree of removal from the original patentee occupies the same position and enjoys the same rights as any of his predecessors or co-owners, and is entitled to all the privileges and is subject to all the obligations conferred or imposed by the statutes upon the patentee and his assigns". 2 Robinson on Patents, § 767.

Where the owner of land, which he has leased for years, grants the reversion by absolute deed of mortgage, the grantee is entitled to all rents that subsequently become due, and may maintain an action against the lessee to recover them. *Burden* v. *Thayer*, 3 Met. 76.

As the rent is an incident of the reversion, if the lessor assigns or otherwise conveys his reversion, he cannot have any claim for rent subsequently accruing; but the right to the rent is transferred to his assignee. *Grundin* v. *Carter*, 99 Mass. 15, 16; *Harmon* v. *Flanagan*, 123 Mass. 288, 289.

In a general grant of the reversion, the rent will pass as an incident to it. *Beal* v. *Boston Car Spring Co.*, 125 Mass. 157–160.

If the obligations of the assignee to sustain the burdens put upon the patent by the assignor follows as an incident of the assignment, as in case of real estate where the grantee of the reversion takes it subject to the leases put upon it by the grantor, then the rest of the proposition must be true as to the patent. And the assignee, while bearing the burden, is also entitled to receive the benefits, and makes the analogy of the rights of the grantor and grantee under a patent and as to real estate perfect; and the rule governing real estate would also govern patents.

Jurisdiction: *Pratt* v. *Paris Gas Light Co.*, 168 U. S. 255, p. 279; *Hartell* v. *Tilghman*, 99 U. S. 547; *Albright* v. *Teas*, 106 U. S. 613; *David* v. *Park*, 103 Mass. 501, 503; *Holt* v. *Silver*, 169 Mass. 435; *Binney* v. *Annan*, 107 Mass. 94; 2 Robinson on Patents, §§ 856, 858, 865; *Metserole* v. *Union Paper Collar Co.*, 6 Blatchf. 356, (17 Fed. Cas. 9488).

Wherever a contract is made in relation to patent rights which is not provided for and regulated by an act of Congress, the parties, if any dispute arises, stand upon the same ground as other litigants

in respect to the jurisdiction of the court. *Blanchard* v. *Sprague*, 1 Cliff. 289, 299; *Wilson* v. *Sandford*, 10 How. 100; *Hill* v. *Whitcomb*, 1 Holmes, 317, 324; *Middlebrook* v. *Broadbent*, 47 N. Y. (Ap.) 443; *Union Mfg. Co.* v. *Louisburg*, 41 N. Y. (Ap.) 363; *Johnson* v. *Willimantic Linen Co.*, 33 Conn. 436; *Rich* v. *Atwater*, 16 Conn. 409; *Elmer* v. *Pennel*, 40 Maine, 430; *Jones* v. *Burnham*, 67 Maine, 93.

Infringement: Walker on Patents, § 335, et seq.; *Tilghman* v. *Proctor*, 102 U. S. 730; *Mowry* v. *Whitney*, 14 Wall. 620; *Cochran* v. *Deener*, 94 U. S. 787; *Starling* v. *St. Paul Plow Works*, 29 Fed. Rep. 790; *White* v. *Lee*, 14 Fed. Rep. 789; *Rogers* v. *Riessner*, 30 Fed. Rep. 525, 530; *Bartlett* v. *Holbrook*, 1 Gray, 114; *St. Paul Plow Works* v. *Starling*, 140 U. S. 184; *Machine Co.* v. *Murphy*, 97 U. S. 125; *Cantrell* v. *Wallick*, 117 U. S. 689–694; *Johnson* v. *Willimantic Linen Co.*, supra; Walker on Patents, § 304; 2 Robinson on Patents, § 820, and note 4; *Washburn Mfg. Co.* v. *Wire Fence Co.*, 22 Fed. Rep. 712; 3 Robinson on Patents, §§ 984, 1251, 1252.

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

Parties: *Walsh* v. *Packard*, 165 Mass. 189; *Flynn* v. *North Am. Life Ins. Co.*, 115 Mass. 450; *Saunders* v. *Saunders*, 154 Mass. 338.

Jurisdiction: *Elmer* v. *Pennel*, 40 Maine, 430; *Harlow* v. *Putnam*, 124 Mass. 556.

Infringement: 1 Robinson on Patents, § 288; 3 Robinson on Patents, § 894; *Case* v. *Brown*, 2 Wall. 320; *Duby* v. *Morse*, 146 U. S. 476.

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

WISWELL, C. J. Under date of March 12, 1889, two letters-patent, numbered respectively 399, 495 and 399, 496, were granted to one Granville E. Carleton, one of which related to an improved kiln, and the other to a new method for calcining stone in the manufacture of lime or cement.

On January 2, 1893, the patentee, while still the owner of both patents, entered into a written contract under seal with the defendants, by the terms of which he gave to them the right to use the apparatus and the method covered by these two letters-patent in certain of their lime kilns; and the defendants, upon their part, covenanted to make full and true returns, twice yearly, of the quantity of lime manufactured by them; and further, "to pay to the party of the first part (the patentee) two cents per cask as a license fee on every barrel of lime manufactured by said party of the second part (the defendants) in said kilns by means of the apparatus and method covered by said letters-patent." By mutual agreement of the parties the price was subsequently reduced to one cent per barrel. For several years subsequently the defendants used the patented apparatus and method, rendered accounts to the patentee of the quantity of lime manufactured by them, and paid therefor in accordance with the contract.

On September 25, 1894, the patentee, by sufficient deeds duly executed and recorded in the United States Patent Office, sold assigned and set over to his wife, the plaintiff, the patents described in and covered by these letters-patent. The language used in each of the deeds, applicable to the thing transferred, is as follows, "all the right, title and interest I have in the above described invention, as secured to me by letters-patent, for, to, and in the United States. The same to be held and enjoyed by the said S. Josephine Carleton for her own use and behoof, and for the use and behoof of her legal representatives to the full end of the term for which said letters were granted as fully and entirely as the same would have been held and enjoyed by me had this assignment and sale not been made."

This action of debt upon the defendants' covenant to pay a license fee, contained in the written and sealed contract of January 2, 1893, is brought by the grantee of the two patents, in her own name, to recover the stipulated license fee for the lime manufactured by the defendants in the year 1896. Two questions are raised relative to the plaintiff's right to maintain this action.

I. The defendants say in their plea that during the year 1896

they did not manufacture any lime by the use of the apparatus or under the method covered by the letters-patent above referred to. "That during said time the apparatus and methods used by them in said kilns and in their other kilns were not covered by the plaintiff's said letters-patent or either of them, and that the plaintiff has no patent on said apparatus and methods or any of them so used by the defendants, and that said apparatus and methods so used by the defendants, during the time aforesaid, and each of such apparatus and methods so used by the defendants, are not an infringement of the plaintiff's said letters-patent or either of them."

The contention of the plaintiff is, as shown by the evidence, that the apparatus and method used by the defendants in the manufacture of lime during this period, if not precisely the same as the patented apparatus and method, were practically and essentially the same, that they were in every sense identical and were infringements of the plaintiff's patents. Thereupon the defendants say that this question is not one which can be determined in the state court; that this court, by reason of the pleading and the contention of the parties, has been ousted of its jurisdiction of the cause and that the issue can only be tried in the courts of the United States.

However many practical difficulties may arise in the trial of an issue of this kind in a state court, we must consider the question of jurisdiction settled against the contention of the defense by the great weight, and, in fact, almost unbroken line, of authorities both federal and state.

By the United States R. S., § 711, the courts of the United States are given exclusive jurisdiction: "Fifth. Of all cases arising under the patent-right or copyright laws of the United States." But this is not a case arising under the patent-right laws of the United States. It is an action upon a contract, between citizens of the same state, of which the state courts have the exclusive jurisdiction. It is brought to recover the license fee stipulated in a written contract, wherein the respective rights of the parties to that contract are fully provided for; and the only question that arises is, whether the defendants, during the period sued for, have been using the apparatus and method covered by the letters-patent, which

they had a right to use under their license, and are consequently liable for the agreed royalty, although incidentally the question of infringement may arise.

But it is not sufficient to oust the state court of its jurisdiction of a cause that a *question* incidentally arises under patent laws, the statute referred to gives the courts of the United States jurisdiction only of *cases* arising under such laws. To constitute such a case the plaintiff must set up some right, title or interest under the patent laws, or at least make it appear that some right or privilege will be defeated by one construction, or sustained by the opposite construction, of these laws. *Starin* v. *New York*, 115 U. S. 248; *Germania Ins. Co.* v. *Wisconsin*, 119 U. S. 473.

The United States Supreme Court has frequently held that the federal courts had no jurisdiction, irrespective of citizenship, of suits to recover a royalty, or for the specific execution of a contract for the use of a patent, or of suits where a subsisting contract is shown governing the rights of the party in the use of an invention, and that such suits not only may, but must, be brought in the state courts. *Hartell* v. *Tilghman*, 99 U. S. 547; *Wilson* v. *Sandford*, 10 How. 99; *Albright* v. *Teas*, 106 U. S. 613; *Wade* v. *Lawder*, 165 U. S. 624. In the latter case it is said: "Where a suit is brought on a contract of which a patent is the subject matter, either to enforce such contract or to annul it, the case arises on the contract, or out of the contract, and not under the patent laws."

In *St. Paul Plow Works* v. *Starling*, 127 U. S. 376, an action commenced in the United States Circuit Court by a citizen of one state against a corporation of another to recover the royalty stipulated in a license to make and sell a patented article, the question whether the patent was valid was raised by the pleadings, the court said that it was unnecessary to decide whether the case should be considered as "arising under" the patent laws of the United States as it was unquestionably a "case touching patent rights" and therefore, by virtue of another statute, within the appellate jurisdiction of that court.

But in the recent case of *Pratt* v. *Paris Gaslight & Coke Co.*, 168 U. S. 255, this precise question, in principle, was decided.

It was there held that evidence of the invalidity of a patent and its infringement of a prior patent does not oust the jurisdiction of a state court in an ordinary action of assumpsit, when the state court has jurisdiction both of the parties and of the subject matter as set forth in the declaration, and the question of the invalidity of the patent is incidental to a defense of the lack of consideration and of a rescission of the contract. And further, that the power of the state courts to determine questions arising under the patent laws is not precluded by the statute above referred to which gives exclusive jurisdiction to the federal courts of cases arising under these laws.

In this case the court points out the distinction between questions arising under the patent laws and cases arising under these laws and says: "There is a clear distinction between a case and a question arising under the patent laws. The former arises when the plaintiff in his opening pleading—be it a bill, complaint or declaration—sets up a right under the patent laws as ground for a recovery. The latter may appear in the plea or answer or in the testimony. The determination of such question is not beyond the competency of the state tribunals."

To the same effect may be cited the decisions of many state courts. See *Bliss* v. *Negus*, 8 Mass. 46; *Nash* v. *Lull*, 102 Mass. 60; *Holt* v. *Silver*, 169 Mass. 435; *Dunbar* v. *Marden*, 13 N. H. 311; *Rich* v. *Atwater*, 16 Conn. 409; *Sherman* v. *Champlain Transportation Co.*, 31 Vt. 162, and many other cases which will be found cited in *Pratt* v. *Gaslight & Coke Co.*, supra.

It is true, that in *Elmer* v. *Pennel*, 40 Maine, 430, this court came to a different conclusion and decided that in a suit upon a note given for the conveyance of a patent right, proof that such patent was void, because an infringement of a prior one is not admissible, unless that fact had been previously determined by a Circuit Court of the United States. But this case has never been followed in this state, or elsewhere to our knowledge, and it has been so frequently criticised by other courts that we can not now regard it as an authority.

In view of the overwhelming weight of authorities, we must

consider the following to be the true principle, as stated by Mr. Justice Clifford, in *Blanchard* v. *Sprague*, 1 Cliff. 288: "Whenever a contract is made in relation to patent rights, which is not provided for and regulated by an act of Congress, the parties, if any dispute arises, stand upon the same ground as other litigants in respect to the jurisdiction of the court."

II. The remaining question is, whether this action upon the contract under seal of January 2, 1893, can be maintained by the plaintiff in her name. The case does not show any assignment of the contract to her, except in so far as the deeds of the patent rights, already quoted from, may have the effect of an assignment. And it is not claimed by the plaintiff that she is the assignee of a chose in action and could therefore, under our statute, maintain the suit in her own name. The defendants' covenant was to pay the stipulated royalty to the patentee, the other party to the contract, not to his assigns. It may be assumed, however, that the deeds to the plaintiff transferred to her the beneficial interest in all outstanding contracts respecting the patent.

But this does not enable her to maintain an action in her own name upon the covenant to pay royalties. Where the contract is under seal, the legal title is in the obligee, and the action must be brought in his name. *Farmington* v. *Hobert*, 74 Maine, 416. And although the covenant under seal with one person is expressed to be for the benefit of another, an action for its breach must be in the name of the covenantee. *Brann* v. *Maine Benefit Life Association*, 92 Maine, 341.

This has always been the rule at common law. In 1 Chitty on Pleadings, 3, this is said to be "an inflexible rule" respecting a deed inter parties. "When the deed is inter parties, that is an indenture, no one who is not named therein as a party can sue upon his covenants." 15 Encyl. of Pleading and Practice, 508. "In regard to contracts under seal, the law has always been that only those who were parties to them could sue upon them." *Saunders* v. *Saunders*, 154 Mass. 337.

No authority is cited sustaining the plaintiff's right to maintain this action, nor that a covenant such as the one in suit should be

subject to any exception to the general rule of the common law which has always been upheld in this state; but it is urged in support of the action that the position of the plaintiff is analogous to that of the grantee of the reversion of land under lease for a term of years, and that such grantee may maintain an action in his own name to recover the rent maturing after the grant of the reversion.

It is true, that such an action may be maintained by this grantee of a reversion, but it is probable that even this could not have been done at common law, and that the right of a grantee of the reversion of land to maintain an action upon a lease for rent accruing after the grant, was given by the statute 32 Henry VIII, c. 34, which became a part of our common law. It is said in 1 Chitty on Pleadings, 20: "But at common law none but parties or privies to *express* covenants, as the parties or their heirs or devisees, could sue thereon, the privity of contract being in such case wanting; and the grantee of the reversion is therefore considered as a mere stranger. This defect was remedied by the statute 32 Henry VIII, c. 34, which transfers the remedy and right of action to the grantee against the lessee or his assigns, although the grantee be not named in the lease." Although, it is said in *Patten* v. *Deshon*, 1 Gray, 325, that this right existed at common law independent of the statute referred to.

But however this may be, our attention has not been called to, and we are not aware of, any case which is an authority for an extension of the rule to the case of a personal covenant; while in several cases, where the covenant was more closely analogous to that of a lessee to pay rent than is true of the present case, the courts have declined to extend the rule to personal covenants.

In *Walsh* v. *Packard*, 155 Mass. 189, it was held that the covenant of the surety for the payment of the rent of leased premises was a personal one, and did not run with the land, and that consequently the administrator of the covenantee, and not his heirs, was the proper person to sue. To the same effect is the case of *Harbeck* v. *Sylvester*, 13 Wend. 608.

We are, therefore, of the opinion that a suit for the breach of a purely personal covenant, such as the one in suit, must be brought

in the name of the covenantee, and that this action, for that reason, can not be maintained. In accordance with the stipulation of the report the entry will be,

Plaintiff nonsuit.

STATE *vs.* WILLIAM C. MONTGOMERY, Appellant.

Franklin. Opinion May 28, 1900.

Hawkers and Peddlers. Constitutional Law. Stat. 1889, c. 298: 1893, c. 282, c. 306; 14th Amend. U. S. Const.

Section 1 of chapter 298 of the statute of 1889, as amended by chapter 282 and chapter 306 of the statute of 1893, relating to hawkers and peddlers, phohibits the peddling of certain classes of goods and chattels therein named, until the peddler shall have procured a license to do so. Section 2 of the same chapter provides that "the secretary of state shall grant a license" for peddling "to any citizen of the United States who files in his office a certificate signed by the mayor of a city, or by the majority of the selectmen of a town, stating to their best knowledge and belief that the applicant therein named is of good moral character; but such license shall be granted to no other person." It follows, therefore, that a citizen may obtain such a license, but that an alien cannot.

The court is of opinion that this statutory provision, which thus discriminates between citizens and aliens, is obnoxious to the Fourteenth Amendment of the Constitution of the United States, by which it is declared that no state shall "deny to any person within its jurisdiction the equal protection of the laws," and is therefore unconstitutional and void.

This statutory provision absolutely denies to an alien the privilege of an occupation open to citizens. It does not permit the alien within our jurisdiction to pursue a business occupation, and to acquire and enjoy property on equal terms with the citizen.

Held, also; that although the discrimination is not injurious to the respondent, still the Hawkers & Peddlers Act must be regarded as invalid in toto. The constitutional part cannot be separated from the unconstitutional part. The distinction between citizens and aliens is fundamental in the scheme for licensing. The statute being invalid as to aliens, if it were held nevertheless valid, as to citizens, it works a discrimination against citizens and in favor of aliens,—a result which the legislature plainly did not intend and which would likewise be unconstitutional.

State v. *Montgomery*, 92 Maine, 433, re-examined, and all points decided therein re-affirmed.

On Exceptions by Defendant.

This was a complaint before the Municipal court of Farmington, for a violation of the statute of 1889, c. 298, as amended by laws of 1893, c. 282 and c. 306.

The case was originally tried before that court and has been once before this court in the form of a report upon facts agreed. The case was argued at the July term, 1898, and is reported in 92 Maine, p. 433. In accordance with the decree there, the "case was to stand for trial," and was again tried at the February, 1899, term of this court in Franklin county. The jury returned a verdict of guilty.

At the close of the evidence, and before the presiding justice charged the jury, counsel for respondent requested that the following instructions on matters of law, numbered from one to fourteen be given by the presiding justice to the jury. The presiding justice refused to give any of said requested rulings and instructions, but did instruct the jury among other things, as follows, to wit, "that the defendant was amenable to the statute of this state, the act of 1889, c. 298, relating to hawkers and peddlers; that he was not protected or justified by any law of this state or by the Constitution of the state, or by the Constitution of the United States, or by any act of Congress, in performing these acts without a license granted to him under the provisions of our own statute."

The defendant duly took exceptions to the rulings and instructions, and refusal to instruct, of the presiding justice.

Requested instructions:

1st. That the public laws of the state of Maine, of the year 1889, c. 298, p. 263, as amended by the public laws of the state of Maine of the year 1893, c. 282, p. 336, and c. 306, p. 372, relating to licenses of hawkers and peddlers and which said laws read as follows: [Here follow the statutes recited in full] are repugnant to the constitution, treaties or laws of the United States, and especially that said public laws of Maine are repugnant to the fol-

lowing part of the Constitution of the United States, namely: Art. 1, § 8, clause 3, which is as follows: Congress shall have power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes," and said public laws of Maine are not valid.

Also, that said public laws of Maine are especially repugnant to Art. 1, § 8, of the Constitution of the United States.

Also, are repugnant to Art. 1, § 9, clause 5 of the said Constitution of the United States.

Also, to Art. 4, § 2, clause 1 of said Constitution of the United States, and said public laws of Maine relating to licenses of hawkers and peddlers are invalid on the ground of their being repugnant to said constitution, treaties or laws of the United States.

2d. That in this case there is drawn in question the validity of a statute of the said State of Maine, or an authority exercised under said authority of the State of Maine, on the ground of its being repugnant to the constitution, treaties or laws of the United States, and that said public laws of Maine above quoted are not valid, on the ground of their being repugnant to the constitution, treaties and laws of the United States.

3d. That in this case there is claimed a certain title, right, privilege or immunity under the constitution and statutes of the United States, and that said public laws of said State of Maine relating to licenses of hawkers and peddlers, and which are more particularly set forth above, under item No. 1, are repugnant to said title, right, privilege or immunity so claimed, and for that reason are not valid.

4th. That said public laws of Maine are not uniform, and they discriminate in favor of one class of individuals against another, and are not valid.

5th. That the evidence in this case shows that the respondent, Montgomery, was an agent or employee of the Chicago Portrait Co., a foreign corporation, duly organized and existing by the laws of the State of Illinois, and that all acts done by said Montgomery,

as shown by the evidence in this case, were commercial transactions between citizens of different states.

6th. That the evidence in this case shows that all pictures and picture frames which the respondent Montgomery carried for sale and exposed for sale without a license, were made out of the State of Maine and were sent into the State of Maine by said Chicago Portrait Co. by freight, directed to said Chicago Portrait Co., Farmington, Maine.

7th. That the evidence in this case shows that the respondent Montgomery, was an agent or employee of said Chicago Portrait Co., and that whether the transactions were conducted directly or entirely by the principals themselves, or in part by the agency of said Montgomery, is of no consequence; it is interstate commerce in both instances.

8th. That the State of Maine has no right to impose a license or tax as is provided in said public laws of Maine relating to licenses of hawkers and peddlers, and under the Constitution of the United States the power is expressly given to Congress to regulate commerce among the several states, and that the tax or license here involved is in reality a tax on the principals and their business, and ultimately on their goods, and, being so, it is necessarily a tax on interstate commerce.

9th. That Montgomery, the respondent, being only a soliciting agent and representative in this State of his principal, the Chicago Portrait Co., in the State of Illinois, any license or tax upon the principals will be tantamount to a tax upon the business of the principals, and a tax upon the business would operate as a tax upon the articles themselves, namely, the enlarged pictures and frames sent into this State.

10th. The laws of the State of Maine above quoted, relating to licenses of hawkers and peddlers, exempt a certain class of persons from the payment of the fees provided in said laws. This is repugnant to the Constitution of the United States.

11th. That the tax or license imposed by the above quoted

laws of the State of Maine, relating to hawkers and peddlers, is obnoxious to the Constitution of the United States, and for that reason is null and void, and that the evidence does not show that the respondent, Montgomery, has committed any offense under any valid laws of the State of Maine, and that the jury be instructed to return a verdict of not guilty.

12th. That said statutes of Maine discriminate against goods brought from foreign countries and are repugnant to the Constitution of the United States for that reason.

13th. That said statutes of Maine discriminate against citizens of said state of Maine and are repugnant to the Constitution of the United States and not valid.

14th. That the jury be instructed to return a verdict of not guilty.

A copy of the evidence is made a part of the case. The bill of exceptions also shows the written refusal seriatim of the presiding justice to each requested instruction.

Elmer E. Richards, county attorney, for State.

Clarence Hale, *Arthur F. Belcher and Joseph C. Holman*, for defendant.

The power of Congress to regulate commerce is complete in itself, and knows no limitations other than those prescribed in the instrument conferring it. *Gibbon* v. *Ogden*, 9 Wheat. 1; *Brown* v. *Maryland*, 12 Wheat. 419; *Leisy* v. *Hardin*, 135 U. S. 108.

All acts done by the respondents, as shown by the evidence in this case, were commercial transactions between citizens of different states.

The respondent being an agent or employee of the Chicago Portrait Company, it is immaterial whether the transactions were conducted directly or entirely by themselves, or any part by the agency of the respondent; it is interstate commerce in both instances, Montgomery being only a representative in this state of his principal in the state of Illinois. *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, pp. 494, 495; *State* v. *Scott*, 98 Tenn. 254.

Respondent being only a soliciting agent and representative in

this state of his principal, the Chicago Portrait Company in the state of Illinois, any license or tax upon the principals will be tantamount to a tax upon the business of the principals, and a tax upon the business will operate as a tax upon the articles themselves, namely the enlarged pictures and frames sent into this state, and is clearly a tax in violation of Item 5, of § 9, of Article 1 of the Constitution of the United States, which provides that,

"No tax or duty shall be laid on articles exported from any state." *Brennen* v. *Titusville*, 153 U. S. 289; *Brown* v. *Maryland*, 12 Wheat. 419; *Leloup* v. *Mobile*, 127 U. S. 640; *McCall* v. *California*, 136 U. S. 104; *Welton* v. *Missouri*, 91 U. S. 275; *Crutcher* v. *Kentucky*, 141 U. S. 58; *Lyng* v. *Michigan*, 135 U. S. 161; *State* v. *Coop*, 52 So. Car. 508.

The statutes of Maine discriminate against goods brought from foreign countries, and are repugnant to the Constitution of the United States. *State* v. *Furbush*, 72 Maine, 493; *Welton* v. *Missouri*, 91 U. S. 275; *Tiernan* v. *Rinker*, 102 U. S. 123; *Guy* v. *Mayor, etc., of Baltimore*, 100 U. S. 434.

The laws of Maine relating to licenses of hawkers and peddlers discriminate in favor of certain classes of citizens of said State of Maine and in favor of citizens of the United States as against citizens of other countries, and are repugnant to the Constitution of the United States. *St. Louis* v. *Speigel*, 90 Mo. 587; *Kneeland* v. *Pittsburg*, 11 Atl. Rep. (Pa.) 657.

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

SAVAGE, J. This case has been once before this court upon a report of facts agreed, 92 Maine, 433, with the result that the case was ordered to "stand for trial." At the trial at nisi prius, the respondent was found guilty of going about from place to place in Farmington, then and there carrying for sale and exposing for sale certain picture frames without being licensed therefor, and in violation of the laws of 1889, chap. 298, as amended by the laws of 1893, chap. 282, and chap. 306. He now brings the case forward upon exceptions to certain instructions which were given, and cer-

tain which were refused to be given, to the jury by the presiding justice. We do not deem it necessary to consider the exceptions seriatim. The several requested instructions present the grounds upon which the respondent bases his claim that the statute in question is unconstitutional; but we shall, we think, be able to dispose of the case by a consideration of the instruction which was actually given to the jury, and which was "that the defendant was amenable to the statute of this state, the act of 1889, chapter 298, relating to Hawkers and Peddlers; that he was not protected or justified by any law of this state or by the constitution of the state, or by the constitution of the United States, or by act of Congress, in performing these acts, without a license granted to him under the provisions of our own statute." This instruction raises in the broadest manner the constitutionality of the Hawkers' and Peddlers' Act. The facts relied upon by the state to support the prosecution are the same which are stated in the opinion in 92 Maine, 433. We shall not review that opinion, nor do we intend to change it. So far as concerns any point that was decided then, it stands.

Much of the argument of the learned counsel for the respondent, relating to the interstate commerce clause of the United States constitution, we think is inapplicable to the facts presented. In exceptions and in argument, they overlook the fact, as we deem it to be, that the picture frames in question, at the time of the alleged offense, had ceased in any way to be the subject of interstate commerce. They had been shipped to this state unsold. They had been taken from the carrier. The packages had been opened, and the respondent was carrying them about from place to place in this state offering them for sale. No person had agreed to buy them, or any of them, before they were shipped here. No person here was under any contract with regard to them. Another agent of the respondent's employer had secured orders for pictures, and "on securing an order," *left* a contract with the party giving the order, in which it was stated that "all portraits are delivered in appropriate frames" which patrons may buy or not as they desire. It does not even appear that the picture frames were in any way an

inducement to the giving of the order. It rather appears that the statement in the "contract" was made as an inducement to the patrons to buy, at some future time, picture frames "*at greatly reduced* prices." Quod est demonstrandum.

These considerations we think take this case out of the protection of the interstate commerce provision of the constitution giving to Congress the power to regulate "commerce among the states." Nor does the fact that the Hawkers' and Peddlers' Act may, under some conditions, be void as to goods which are at the time the subject of interstate commerce necessarily render it invalid as to all goods under all conditions.

A legislative act may be entirely valid as to some classes of cases and clearly void as to others. Cooley on Const. Limitations, 6th Ed., p. 213. Judge Cooley says: "If there are any exceptions to this rule, they must be of cases only where it is evident, from a contemplation of the statute and of the purpose to be accomplished by it, that it would not have been passed at all, except as an entirety, and that the general purpose of the legislature will be defeated if it shall be held valid as to some cases and void as to others." *Tiernan* v. *Rinker*, 102 U. S. 123; *Packet Co.* v. *Keokuk*, 95 U. S. 80. This is undoubtedly sound doctrine. To illustrate: If it were held otherwise, our highway damage law would have been rendered entirely inoperative by the decision in *Pearson* v. *Portland*, 69 Maine, 278, holding that a single provision in the statute which existed then was obnoxious to the clause in the Fourteenth Amendment declaring that no state shall deny to persons within its jurisdiction the equal protection of the laws. Such, too, would have been the effect upon our prohibitory liquor law by the decision in *State* v. *Intoxicating Liquors*, 85 Maine, 158, holding, under the laws which then existed, that intoxicating liquors in the possession of a common carrier and in transit from another state to this were "commerce among the several states," and so within the protection of the interstate commerce provision of the Constitution of the United States. But no one would claim, we think, that either of these statutes was to be regarded as wholly unconstitutional because a single provision was held unconstitu-

tional. *Presser* v. *People of Illinois*, 116 U. S. 252; *Rothermel* v. *Meyerle*, 136 Pa. St. 250.

Accordingly, we hold that whatever may be the effect of the statute as to goods which are properly subject to interstate commerce protection, it is clearly constitutional, in this respect, as to goods which have completed their transit, have ceased to be objects of interstate commerce, and have become a portion of the mass of the property in the state, as in this case. When goods are sent from one state to another for sale, or in consequence of a sale, they become part of its general property, and amenable to its laws, provided that no discrimination be made against them as goods from another state. *Robbins* v. *Shelby Co. Taxing District*, 120 U. S. 489; *Brown* v. *Houston*, 114 U. S. 622; *Howe Machine Co.* v. *Gage*, 100 U. S. 676. When a package is broken up for use or for retail, by the importer, it ceases to be under interstate commerce protection, and becomes subject to the laws of the state, and its sale may be regulated by the state like any other property. Cooley on Const. Limitations, 6th Ed., p. 717; *License Cases*, 5 Howard, 589; *Brown* v. *Maryland*, 12 Wheat. 419; *Cook* v. *Pennsylvania*, 97 U. S. 566.

A statute of a state, by which peddlers of goods, going from place to place within the state to sell them, are required, under a penalty, to take out and pay for licenses, and which makes no discrimination betwen residents of the state and those of other states, is not, *as to peddlers of goods previously sent to them by manufacturers in other states*, repugnant to the grant by the Constitution to Congress of the power to regulate commerce among the several states. *Emert* v. *Missouri*, 156 U. S. 296.

But the respondent goes further, and raises a question not raised at the former hearing of this case, and not then considered or decided. He says that the provision in section 2 of the Hawkers' and Peddlers' Act, which provides that a license shall be granted "to any citizen of the United States" . . . but "to no other person," is obnoxious to the Fourteenth Amendment to the Constitution of the United States, by which it is declared that "no State shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It is clear that by the provisions of the statute only citizens of the United States can be licensed to peddle. An alien cannot be licensed. A discrimination is made between citizens and aliens. Does this discrimination violate the constitutional provision which we have cited? This presents a federal question, and properly we seek an answer first in the decisions of the United States courts.

If this were a question of discrimination against "citizens of the United States," the solution would be easy. The *privileges and immunities* guaranteed by the clause in the Constitution, which declares that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states, are said in *Paul* v. *Virginia*, 8 Wall. 168, to be the relief "from the disabilities of alienage in other states; it (the clause in question) inhibits discriminating legislation against them by other states; it gives them the right of ingress into other states and egress from them; it insures to them in other states the same freedom possessed by the citizens of those states in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other states the *equal protection of their laws.*"

It is not in the power of one state, when establishing regulations for the conduct of private business of a particular kind, to give to its citizens essential privileges connected with that business which it denies to citizens of other states. See *Blake* v. *McClung*, 172 U. S. 239.

The use of the phrase "privileges and immunities," in the constitutional provision referred to, plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the Union for the purpose of engaging and when there, of engaging in lawful commerce, trade or business without molestation. *Ward* v. *Maryland*, 12 Wallace, 418; *Corfield* v. *Coryell*, 4 Wash. C. C. 371; *Slaughter House Cases*, 16 Wall. 36; *In re Watson*, 15 Fed. Rep. 511; *Sayre Borough* v. *Phillips*, 148

Pa. St., 482; *Bliss's Petition*, 63 N. H, 135; *State* v. *Lancaster*, 63 N. H. 267; *State* v. *Wiggin*, 64 N. H. 508.

The decisions all hold in effect, and some of them in terms, that the business of peddling, which is lawful in itself, cannot be regulated by a state so as to discriminate against citizens of the United States. We do not see how it could be held otherwise. It is a "privilege" to be enjoyed on equal footing with citizens of the state.

But, on the other hand, an alien is not a citizen. He is, however, a "person" whom the state cannot deprive of life, liberty or property without due process of law, and to whom the state cannot deny, while he is within its jurisdiction, "the equal protection of the laws." This was settled in *Yick Wo* v. *Hopkins*, 118 U. S. 356. It was the case of an unnaturalized Chinaman, and it was held that the "constitutional provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality." See also *Fraser* v. *McConway & Torley Co.*, 82 Fed. Rep. 257. While an alien is not entitled to the "privileges and immunities" of a citizen, strictly as such, under the first clause of the Fourteenth Amendment which we have quoted, he is, while within our jurisdiction entitled to the "equal protection of the laws."

And after all, the distinction between the practical rights of the citizen under the guaranty of "privileges and immunities" and the rights of the alien "within the jurisdiction," under the guaranty of "the equal protection of the laws" is, so far as the prosecution of the business of peddling is concerned, shadowy and unsubstantial. One has the privilege; the other the right of a protection equal to that of the citizen. This want of distinction is noticed by Swayne, J., in the *Slaughter House Cases*, 16 Wall. 36, who, after referring to the rights secured to citizens, said: "In the next category, obviously ex industria, to prevent as far as may be the possibility of misinterpretation, either as to persons or things, the phrases 'citizens of the United States' and 'privileges and immunities' are dropped, and more simple and comprehensive terms are substituted. The substitutes are 'any person', and

'life', 'liberty' and 'property', and 'the equal protection of the laws'. 'The equal protection of the laws' is guaranteed to all. 'The equal protection of the laws' places all upon a footing of legal equality, and gives the same protection to all for the preservation of life, liberty and property and the pursuit of happiness." To be sure, these words are found in a dissenting opinion, but they were not concerning any subject of dissent, and are entitled to weight as the expression of a wise and experienced judge. In fact, as we shall hereafter see, this construction of the phrase, "equality of the laws," has been adopted, with greater particularity, by the Supreme Court of the United States. It was concerning this clause that the court, in *Strauder* v. *West Virginia*, 100 U. S. 303, asked: "What is this but declaring that the law in the states shall be the same for the black as for the white, that all persons, whether colored or white, shall stand equal before the laws of the states, ... that no discrimination shall be made against them because of their color?"

The language of Justices Field and Clifford in *Ex parte Virginia*, 100 U. S. 339, is that, "the reach and influence of the amendment are immense. It opens the courts of the country to every one on the same terms, for the security of his person or property, the prevention and redress of wrongs and the enforcement of contracts; it assures to every one the same rules of evidence and modes of procedure; it allows no impediments to the acquisition of property and the pursuit of happiness, to which all are not subjected; it suffers no other or greater burdens or charges to be laid upon one than such as are equally borne by all others. . . . . It secures to all persons their civil rights upon the same terms."

Says Field, J., in *Neal* v. *Delaware*, 103 U. S. 370, dissenting from the proposition that practical exclusion of colored persons from the jury was a denial of that equality of protection which has been secured by the constitution and laws of the United States,—

"Equal protection of the laws of a state is extended to persons within its jurisdiction, within the meaning of the amendment, when its courts are open to them on the same condition as to others, with like rules of evidence and modes of procedure, for the security

of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; when they are subjected to no restrictions in the acquisition of property, the enjoyment of personal liberty and the pursuit of happiness, which do not greatly affect others; when they are liable to no other or greater burdens and charges than such as are laid upon others; and when no different or greater punishment is enforced against them for a violation of the laws."

Like definitions of the clause "equal protection of the laws" are found in *Pace* v. *Alabama*, 106 U. S. 583; *Minneapolis, etc., Ry. Co.* v. *Beckwith*, 129 U. S. 26.

In the *Civil Rights Cases*, 109 U. S. 3, it was declared that "many wrongs may be obnoxious to the prohibitions of the Fourteenth Amendment which are not in any just sense incidents or elements of slavery. Such for example, would be · · · denying to any person or class of persons, the right to pursue any peaceful vocations allowed to others. What is called class legislation would belong to this category, and would be obnoxions to the prohibitions of the Fourteenth Amendment. · · · The Fourteenth Amendment extends its protection to races and classes, and prohibits any state legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws."

In *County of Santa Clara* v. *Southern Pac. R. R. Co.*, 118 U. S. 396, (18 Fed. Rep. 385), it is said: "By equal protection is meant equal security to every one in his private rights,—in his right to life, to liberty, to property, and to the pursuit of happiness. It implies not only that the means which the laws afford for such security shall be equally accessible to him, but that no one shall be subject to any greater burdens and charges than such as are imposed upon all others under like circumstances. This protection attends every one every where, whatever be his position in society or his association with others, either for profit, improvement or pleasure."

See also *Ho Ah Kow* v. *Nunan*, 5 Sawyer, Circuit Court, 552, (Federal Cases, No. 6546.)

So in *Barbier* v. *Connolly*, 113 U. S. 27, it was said, "the Four-

teenth Amendment in declaring that no state 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property . . . . that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition." And such is the construction which this court, following the federal court, has given to the amendment in question. *Leavitt* v. *Canadian Pac. Railway Co.*, 90 Maine, 153.

While it is held that the Fourteenth Amendment does not interfere with the police power of a state, it is also held that the police regulations must be impartial. The court said in *Barbier* v. *Connolly*, supra, "though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which in carrying out a public purpose is limited in its application, if within the sphere of its operation, it affects alike all persons similarly situated, is not within the amendment." *Minneapolis, etc., Railway Co.* v. *Beckwith*, 129 U. S. 26; *State* v. *Dering*, 84 Wis. 585.

The specific regulations for one kind of business which may be necessary for the protection of the public can never be just ground of complaint because like restrictions are not imposed upon other business of a different kind. The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges upon the same conditions. *Soon Hing* v. *Crowley*, 113 U. S. 703.

See also *Missouri Pacific Ry.* v. *Mackey*, 127 U. S. 205; *Marchand* v. *Penn. R. R. Co.*, 153 U. S. 380; *Leavitt* v. *Canadian Pac. Railway Co.*, 90 Maine, 153.

The inhibition of the Fourteenth Amendment that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person, or class of persons, from being singled out as a special subject for discriminating and hostile legislation. *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181; *Janesville* v. *Carpenter*, 77 Wis. 288; *Nashville, etc., Ry. Co.* v. *Taylor*, 86 Fed. Rep. 168.

In re Tiburcio Parrott, 1 Fed. Rep. 481, holding unconstitutional a provision in the constitution of California which prohibited corporations from employing Chinese or Mongolians, the court said: "It appears that to deprive a man of the right to select and follow any lawful occupation . . . . is to deprive him of both liberty and property within the meaning of the Fourteenth Amendment."

A statute of Pennsylvania imposing a tax of three cents a day upon employers of foreign born, unnaturalized male persons, for each day that each of such persons may be employed, and authorizing the deduction of that sum from the wages of such employees, was held to deprive the latter of the equal protection of the laws. *Fraser* v. *McConway & Torley Co.*, 82 Fed. Rep. 257. The court said: "Evidently the act is intended to hinder the employment of foreign born, unnaturalized male persons. The act is hostile to and discriminates against such persons. It interposes to the pursuit by them of their lawful avocations, obstacles to which others under like circumstances are not subjected."

While it is true, as a general proposition, that if the law deals alike with all of a certain class, it is not obnoxious to the charge of a denial of equal protection, yet it is equally true that such a classification cannot be made arbitrarily. The state may not say that all white men shall be subjected to the payment of attorney's fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are

distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without any such basis. *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150. See *Pearson* v. *Portland*, 69 Maine, 278.

In the light of these interpretations of the Fourteenth Amendment, we are compelled to conclude that a statute which forbids peddling except under a license, and which provides that citizens of the United States may be licensed, and that aliens shall not be, is a denial of the "equal protection of the laws." It is an unconstitutional discrimination against aliens. It does more than impose unequal burdens and charges upon the alien. It absolutely denies him the privilege of an occupation open to citizens, which is more than a discrimination in burdens. It does not permit the alien within our jurisdiction to pursue a business occupation and to acquire and enjoy property on equal terms with the citizen. *Yick Wo* v. *Hopkins*, supra.

Nor can this discrimination be sustained as a constitutional exercise of the police power of the state. It must be noticed that the discrimination is not against a class, as criminals, as paupers, as intemperate, as disqualified by character or habits, or as harmful to society; but against a class solely as aliens. Such a discrimination is forbidden. *Gulf, Colorado & Sante Fe Ry.* v. *Ellis*, supra.

And, although, in this case the discrimination was not injurious to the respondent, because he was not an alien and was not thereby prohibited from obtaining a license, still, for reasons already suggested, we think the Hawkers' and Pedlers' Act must be regarded as invalid in toto. We cannot separate the constitutional part from the unconstitutional. The distinction between citizens and aliens is fundamental in the scheme for licensing.

The statute is invalid as to aliens. They may peddle without license. If we hold it is nevertheless valid as to citizens, it works a discrimination against citizens and in favor of aliens,—a result which we think the legislature plainly did not intend. Cooley on Constitutional Limitations, 213.

Exceptions sustained.

AUGUSTUS R. HARRINGTON, In Equity,

vs.

EMERY O. BEAN, Administrator.

Kennebec. Opinion May 26, 1900.

Set-Off. Judgment. Equity. R. S., c. 82, §§ 56, 63.

1. A judgment for damages for breach of a covenant of warranty in the conveyance of property will be allowed in reduction of the mortgage debt for such conveyance.
2. Where such judgment is not recovered till after judgment in a suit for foreclosure, but before foreclosure is complete, it will still be allowed in an equity process for that purpose.
3. Either party is entitled to have one judgment set off against the other, except as to taxable costs on which the attorney may have a lien.

See *Bean, Admr.* v. *Harrington*, 88 Maine, 460.

ON EXCEPTIONS BY PLAINTIFF.

The case is stated in the opinion.

L. T. Carleton, for plaintiff.

Counsel cited: R. S., c. 77, § 6, cl. XI; Stat. 1897, c. 322; Byles on Bills, § 350; Waterman on Set-Off, pp. 18, 23, §§ 17, 18; *Richardson* v. *Parker*, 2 Swan. 529; *Holmes* v. *Robinson*, 4 Ohio, 90; *Burns* v. *Thornburgh*, 3 Watts, 78; *New Haven Copper Co.* v. *Brown*, 46 Maine, 418; 2 Par. Con. p. 240 (Set-Off); *Simmons* v. *Williams*, 27 Ala. 507; *Bevall* v. *Squires*, 3 T. B. Monroe (Ky.) 372; *Lyman* v. *Estes*, 1 Maine, p. 182.

Fred Emery Beane, for defendant.

In Byles on Bills, p. 412, the defect of which Lord Mansfield speaks, and which the complainant quotes, was supplied by statute later on. These statutes "only give a set-off in case of mutual debts, that is, of ascertained money demands." "Hence it follows that there can be no set-off unless the demand for which the action is brought and the counter demand sought to be set off are both of them for specific sums of money." In the matter now presented one demand is for money and the other is for land.

In *Richardson* v. *Parker*, 2 Swan. 529, the set-off was allowed because of the mutuality of the accounts. The court says: "It cannot be doubted that it was the intention of the parties that the latter should discharge the former account." In *Holmes* v. *Robinson*, 4 Ohio, 90, the motion to setoff was denied. In order to warrant the set-off it seems to be equally well settled that the actual debts must exist in the same right.

In *Simmons* v. *Williams*, 27 Ala. 507, again the mutuality of accounts exists. The court holds that "the mere existence of mutual and independent debts" would not allow the set-off. Stat. 1897, c. 322, does not apply to pending actions.

The plaintiff's claim is to set off a judgment for money against a judgment for land. The claim had been outstanding almost twenty years when his action for damages was commenced. He neglected to enforce it until after the decease of Dexter. Plaintiff's debt rests on no other ground than that of a general creditor of this insolvent estate. There was never any express agreement that Dexter should give, and Harrington receive, damages for breach of covenant in payment of this debt. That being so, it cannot be allowed.

"In a foreclosure suit no claims or debts against the complainant can be setoff against the mortgage debt, except such as have been expressly agreed to be payment." *Dudley* v. *Bergen*, 23 N. J. 397. Counsel also cited: *Bird* v. *Davis*, 1 McCarter, (N. J. Eq.) 467; *Dolman* v. *Cook*, Ib. 56; *Fuller* v. *Eastman*, 81 Maine, 286; *White* v. *Williams*, 3 N. J. Eq. 376.

Equity must certainly put the plaintiff in the same and on equal footing with the general creditors of this estate, and the allowance claimed would be most inequitable and unjust, not only to the administrator, but to all other creditors.

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

EMERY, J. Harrington, the plaintiff, purchased of Francis Dexter, the defendant's testator, a parcel of land in Wayne and gave his note and a mortgage of the same land as security for part

of the purchase money. Dexter in his deed to Harrington, warranted the land to be free from all incumbrances. There was, however, an incumbrance of a right of flowage, which materially lessened the value of the land. After the death of Dexter the defendant, as administrator de bonis non with the will annexed, brought a writ of entry against Harrington to foreclose the mortgage. Harrington sought in that suit to have his claim for damages for breach of the covenant of warranty against incumbrances determined and allowed in reduction of or set-off against the mortgage debt. This was denied him upon the ground that the existence of the incumbrance was only a partial failure of consideration, and hence no defense at law to any part of the note. *Bean, Admr.*, v. *Harrington*, 88 Maine, 460. Accordingly in the foreclosure suit, notwithstanding the injury done the mortgagor, the full amount of the note, principal and interest, was fixed as the sum to be paid by him to prevent a foreclosure. That case seems to have been continued without the issuance of any writ of possession.

Harrington then brought an action for covenant broken against Bean, as representative of Dexter deceased, and recovered a verdict and judgment for $350, as damages for the diminution in the value of the land. This judgment has not been paid, nor has any writ of possession issued in the foreclosure suit. The estate of Dexter is insolvent and was represented insolvent February 10, 1896.

The question raised is whether Harrington is now entitled to have his judgment allowed in reduction of the amount to be paid to redeem the mortgage.

It is to be noted that the question arises in this case between the original mortgagor and mortgagee. What would be the rights of assignees without notice is not in question here. It is also to be noted that the mortgagor's claim against the mortgagee is not an independent claim to be allowed as a set-off, if at all, but is one that arose directly out of the mortgage transaction and directly reduced the consideration of the mortgage. That such a claim ought in "equity and good conscience" to be allowed on the mortgage debt should be self evident, and is abundantly supported by

decided cases. *Van Riper* v. *Williams*, 2 N. J. Eq. 407; *Union Bank* v. *Pinner*, 25 N. J. Eq. 495; *Holbrook* v. *Bliss*, 9 Allen 69; *Davis* v. *Bean*, 144 Mass. 360; *Northy* v. *Northy*, 45 N. H. 141; *Goodwin* v. *Henney*, 49 Conn. 563.

But it is urged that the court has already determined in the foreclosure suit that, in order to save the property, the mortgagor must pay the entire original purchase money and interest without any allowance for the damage the same court has since awarded him for the mortgagee's fault in the same transaction; and this notwithstanding the utter insolvency of the mortgagee's estate. The case of *Fuller* v. *Eastman*, 81 Maine, 286, is cited as conclusive against the power of the court to grant relief even in equity.

In that case, and the cases upon which it is based, the claim shut out in the second suit was one which was available in the first suit if seasonably interposed. In *Fuller* v. *Eastman*, the claim that payments had been made on the mortgage notes was available to the mortgagor in the foreclosure suit if he had then made such claim. Then was the time for him to make it if ever. In this case, however, the mortgagor's claim was not of that kind. It was not available in the foreclosure suit. The mortgagor indeed offered it and pressed it in that suit, but the court refused to allow it. It was held to be an unliquidated claim, the amount of which was not ascertainable by calculation, and hence it was not allowable in set-off,—R. S. Ch. 82, § 56;—nor in reduction of the agreed price in an action at law on the mortgage. *Bean* v. *Harrington*, 88 Maine, 460. Now, however, before the right to redeem has expired or the foreclosure proceedings are finished, the plaintiff's claim has been liquidated,—its amount judicially determined,—and it has been converted into a judgment debt of equal degree at least with the defendant's claim against him. This entitles either party to have one claim setoff against the other, except as to the taxable costs on which the attorney may have a lien. *Peirce* v. *Bent*, 69 Maine, 381. Again, it now appears that the estate of Dexter has since been declared insolvent. In such case even equitable claims against the estate are admissible in set-off to claims made by the executor. R. S., Ch. 82, § 63; *Lyman, Admx.*, v. *Estes*, 1 Maine,

182; *Fox* v. *Cutts*, 6 Maine, 240; *Medomak Bank* v. *Curtis*, 24 Maine, 36; *Ellis* v. *Smith*, 38 Maine, 114.

It cannot be that a court with full equity powers cannot reach the evident equity of this case and enforce it. The mortgagor has done no wrong, and is an innocent sufferer from a wrong done him by the mortgagee in the mortgage transaction. He only asks that the mortgage debt be chancered to that extent. We have no hesitation in saying that it should and can be done. And in doing it for that purpose, the bill can be and is sustained for an account and for redemption.

In stating the account the amount of the plaintiff's judgment against the Dexter estate will be allowed in reduction of the mortgage debt.

Decree accordingly.

WILLIAM T. HAINES, Attorney General,
on relation of Readfield Telegraph & Telephone Company,

vs.

MAURICE W. CROSBY.

Kennebec. Opinion May 26, 1900.

Telegraph and Telephone Companies. Corporations. Stat. 1895, c. 103.

While the statute of 1895, c. 103, prohibits telegraph and telephone corporations, organized under that act, from establishing a telegraph or telephone line in competition with an existing or authorized line without the consent of such existing company, it does not prohibit an individual, not incorporated, from establishing and operating such a line.

ON REPORT.

This was a bill in equity, heard on bill, answer and proofs, brought by the plaintiff corporation against the defendant to restrain him from carrying on a public telephone business over the line which he had constructed in the towns of Readfield and Wayne.

The plaintiff corporation was duly chartered under the general laws of the State of Maine, on May 28, 1895, with the right to

erect telephone lines and carry on telephone business throughout the territory specified in its certificate of organization. The line as built runs from Readfield Depot to Readfield Corner, also from Winthrop to Readfield Corner; from Readfield Corner to Kent's Hill; thence to West Mt. Vernon, Mt. Vernon Village and Vienna, with a public pay station in each place. This portion of the authorized territory has been covered by their line for several years and a public telephone business has been carried on therein.

The defendant built at first a private telephone line for his own convenience, but finally in the fall of 1899 extended the same, so that now he is carrying on a general public telephone business with a central office at or near Readfield Corner, and the line extends from Readfield Corner to Readfield Depot, practically duplicating the plaintiff's line, with another line extending to North Wayne. The number of subscribers on these lines was stated to be twenty.

L. C. Cornish, for plaintiff.

The fair construction of this statute is this: it does not prohibit a private individual or a firm from running a private line, for instance, between his place of business and his house or farm, as the defendant did in the first instance here; but the intention of the statute is to protect vested interests so far as carrying on a public telephone business is concerned; and that when one line is in operation between given points, no other line can be constructed between those points, or can be constructed between any other points where the first is authorized to run, unless by legislative consent. It cannot be disputed that the defendant is not running a private telephone line for his own personal convenience. He is operating a public line just as much as the plaintiff is. He has twenty subscribers who pay a rental to him of so much per year, and he has a central station where the various connections are made. He is therefore carrying on a public telephone business.

It was the evident intent of the legislature in 1885 (c. 378) to bring corporations, persons and associations all under one rule, and when the legislature in 1895 welded these two objects together, the same intention was expressed again. We therefore claim that in this view, the provisions of the law of 1895, (c. 103) in spirit

as well as in word, should apply to individuals as well as to corporations.

The statute does not base the right of non-interference upon the question of public convenience. It does not attempt to regulate the Telephone Co. and prescribe just how it shall manage its business, what connections it shall make or what it shall not make. Those are questions that can properly be addressed to the legislature and to the legislature alone, when the petition is put in for the so-called rival; but until that time it is immaterial.

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

The fact that in this same paragraph of the statute the words "company, firm or persons" are used to designate those with whom corporations organized hereunder shall not compete, and the words "person, firm" are omitted in describing those who shall not compete, indicates that it was the express intent of the legislature that the words "corporations organized hereunder" should not include persons or firms. Even if the word "corporation" could be so stretched in meaning as to include a person, this statute applies only to corporations organized under the statute. The defendant is not a corporation "organized hereunder". He does not owe his being to an act of the legislature. The legislature did not attempt to procure his right to operate and maintain a telephone line. It could not have done so if it would. The constitution of our state gives to men the right to acquire, possess and protect property. A right to acquire implies the right to enjoy. A telephone line is property. Any legislation which would prevent a natural person from constructing, or acquiring property in a telephone line, until he obtains the consent of a competitor would be as unconstitutional as a law which would prevent him erecting a grocery store without such consent.

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

STROUT, J. Chapter 103, § 3, of the statute of 1895, provides that "no corporation organized hereunder shall have authority,

without special act of the legislature, to construct its lines along the route or routes, used or authorized to be used, by any other telegraph or telephone company, person or firm, or between points connected, or authorized to be connected, by the lines of any such company, person or firm, unless it shall first obtain the consent of such other company, person or firm."

This statute is so prohibitive of competition, even if wholesome, that we are not inclined to extend its operation beyond its plain and specific language.

It prohibits "corporations" organized under the act from establishing a telegraph or telephone line in competition with an existing or authorized line without the consent of such existing company, but it does not prohibit an individual, not incorporated, from establishing and operating such line.

The defendant has constructed and maintained and operated a telephone line over part of the route of plaintiff's line, without its consent, and plaintiff seeks to prohibit him from so doing, under the statute of 1895.

It is the opinion of the court that the statute prohibition does not apply to the individual action of the defendant.

Petition dismissed with costs against the relator.

WINTERPORT WATER COMPANY

vs.

INHABITANTS OF WINTERPORT.

INHABITANTS OF WINTERPORT

vs.

WINTERPORT WATER COMPANY.

Waldo. Opinion May 28, 1900.

Towns. Water Company. Contract. Taxation. Principal and Agent. Priv. and Special Act, 1895, c. 25.

Upon an article in a warrant for a town meeting: "To see if the town will vote to contract with a water company for hydrant service for 20 years, as

per the company's proposal," when the proposal is in writing and is submitted to the town meeting, a vote of the town thereon to pay therefor the sum of $1000 per year, for not less than 20 years, as per the company's proposal, that calls for a further payment each year of such further sum as shall equal the amount of tax assessed upon the company for that year, is valid; and a contract, containing the terms of the proposal is valid, when executed by a committee chosen by the town for the purpose, even if the enabling act of the legislature says the contract may be executed by the selectmen. The town makes the contract, and may use either its selectmen or its committee to execute it, as it may please to do.

On Report.

This action was brought on an indenture, entered into between the Winterport Water Company and the town of Winterport, on the 9th day of May, 1896, to recover the sum of two hundred and fifty-eight dollars, and interest thereon; being the amount of the money tax assessed by the town on the property of said company for the year 1897.

The indenture provides "Item 13, in consideration of the construction and maintenance of said system of water works according to the foregoing agreements, said party of the second part in their said capacity, hereby agrees to pay to said company, its successors and assigns, the sum of one thousand ($1,000) dollars per year during said period of twenty (20) years for the use of the said twenty (20) hydrants as more particularly set out in this contract, and for water for the same, and for water for the purposes specified in Item 6 of this contract, and such further sum each year as shall equal the amount of tax, if any, assessed against said company, its successors and assigns, by said town of Winterport."

The declaration in the writ, among other allegations, sets forth "that the said town of Winterport, by its assessors, assessed upon the real estate of this plaintiff and upon certain personal property of this plaintiff claimed to be taxable in said town of Winterport . . . . the sum of two hundred and fifty-eight dollars; and the said assessors thereafterwards, to wit: on the fourth day of June, A. D. 1897, made a list of said taxes, so assessed against plaintiff, under their hands and committed the same to the collector of said town with a warrant of that date under the hands of said assessors for the collection of said tax." Payment of this tax

so assessed against the Water Company was duly demanded by the treasurer of the town of Winterport on the 19th day of October, 1898.

The declaration further sets forth that "said defendant has not paid such further sum for the year 1897 as was equal to the amount of the said tax assessed as aforesaid by said town of Winterport against said company, which sum became due and payable on the first day of July, 1897, to wit: the sum of two hundred and fifty-eight dollars, with interest thereon; said sum being due under and by virtue of said contract and the covenants by defendant thereto and therefor, as aforesaid, by reason and by force of the assessment aforesaid by said Winterport of said tax of two hundred and fifty-eight dollars against said company."

It was admitted that a tax was assessed against the company in 1897 by the town of Winterport, and suit is now pending for the collection of the same, and that the water company made a demand on the town for the payment of an additional amount to the Water company as rental, equal to the tax assessed in 1897.

The president of the Water company, in 1897, made a demand upon one of the selectmen of Winterport for the payment of an additional sum as rental equal to the tax assessed against the company for that year.

The case shows that no additional sum, as rental under the contract, has been paid the plaintiff by the town on account of any tax assessed against it for the year 1897.

Under the provisions of chapter 25, special laws of 1895, T. W. Vose, Fred Atwood, A. E. Fernald, S. H. Morgan, C. R. Hill, D. H. Smith, H. M. Heath, and such persons as they might associate with themselves in the enterprise, and their successors, were incorporated into a corporation by the name of the Winterport Water Company, "for the purpose of supplying the towns of Winterport and Frankfort, in the county of Waldo, and the inhabitants of said towns, with pure water for industrial, manufacturing, domestic, sanitary and municipal purposes, including extinguishment of fires."

Section 8 of said act provides—"Said corporation is hereby authorized to make contracts with the United States, and with cor-

porations and inhabitants of said towns of Winterport and Frankfort, or any village corporation or association in said towns, for the purpose of supplying water as contemplated by this act; and said towns of Winterport and Frankfort, or part thereof, are hereby authorized by its selectmen to enter into a contract with said company for a supply of water for any and all purposes mentioned in this act, and for such exemption from public burden as said towns and said company may agree, which, when made, shall be legal and binding upon all parties thereto. Any village corporation in said towns through its assessors, is also authorized to contract with said company for water for all public purposes."

The Winterport Water Company was duly organized, and at the annual town meeting held on the ninth day of March, 1896, under appropriate articles in the warrant, the town voted to exempt from taxation the stock and property of the Winterport Water Company for a term of twenty years; and under article 39, of the warrant, the town directed the selectmen to contract with the Winterport Water Company for water for fire purposes in the village for a term of twenty years; and under such vote the selectmen were to determine the number of hydrants to be located and the amount to be paid per year.

The selectmen did not exercise the authority; consequently, no contract was made under the vote of March 9th, 1896.

No action having been taken toward the execution of the contract authorized at the meeting held in March, 1896, a special town meeting of the inhabitants of the town was called for April 22, 1896.

The warrant contained, among others, the following articles:

2nd. "To see if the town will vote to contract with the Winterport Water Co., for not less than (20) twenty hydrants' service for a term twenty (20) years as per said company's proposal to act anything relating thereto.

3d. "To see if the town will choose a committee and give to such committee full authority to make and execute for and in behalf of the town, a contract with the Winterport Water Co. for

carrying out the provisions of Art. 2 of this warrant or act anything relating thereto."

WINTERPORT, April 13, 1896.

The action of the town on the foregoing warrant appears by the following record. . . . .

"On motion of G. H. Dunton, voted to pay the sum of one ($1,000) thousand dollars per year to the Winterport Water Co., for not less than (20) twenty hydrants' service for not less than 20 years, as per said company's proposal. Adopted, yeas 208, nays 135.

"On motion of F. W. Haley, that a committee of three be raised and that such committee have full authority to make and execute for and in behalf of the town and in the name of the town a contract with the Winterport Water Co., whose proposal has been accepted and adopted by a vote of the town and (under) Art. 2nd of the warrant for this meeting.

"On motion of Hon. Fred Atwood, Mr. Ellery Bowden, Mr. G. H. Dunton and Mr. H. E. Fernald be the committee for and in behalf of the town, and in the name of the town to make and execute the contract with the said Winterport Water Co., agreeable to the vote accepting and adopting the proposals of said Company as taken under Art. 2nd of the warrant for this meeting."

Under and by virtue of the authority thus given, the committee appointed by the town entered into a contract with the Water company, for a supply of water for municipal purposes, as above stated.

The second case was an action of debt to recover a tax assessed for the year 1897 against the Water company, amounting to two hundred and fifty-eight dollars.

It was agreed that any evidence offered by the parties in the first case and legally admissible in the second case may be regarded and considered by the court as evidence in the latter case, and any evidence offered by parties in the second case and legally admissible in the first case may be regarded and considered by the court as evidence in the latter case.

Plea, general issue.

The defendant, in its brief statement, set forth:

"That at said Winterport, on the ninth day of May, 1896, plaintiff and defendant made a contract, which ever since has been and now is in full force and effect, whereby among other things defendant agreed to furnish and supply water to plaintiff for fire and municipal purposes, for which and in consideration thereof, plaintiff agreed to pay and allow defendant each year a sum equal to any taxes assessed against defendant by plaintiff:

"That under said contract defendant has furnished and supplied water to plaintiff and thereby defendant has paid to plaintiff the amount of such alleged tax, and was and is entitled to be allowed by said plaintiff the amount of said alleged tax:

"That said alleged tax has been paid by defendant to the plaintiff."

N. and H. B. Cleaves, S. C. Perry; Ellery Bowden, for plaintiff.

Deeds and contracts, executed by an authorized agent of a person or corporation in the name of its principal, or in his own name for his principal, are in law, the deeds and contracts of such principal. R. S., c. 73, § 15; *Porter* v. *A. & K. R. Co.*, 37 Maine, 349; *Nobleboro* v. *Clark*, 68 Maine, 87.

Our court holds "the true rule in this state is, that where a deed is executed by an agent or attorney, with authority therefor, and it appears by the deed that it was the intention of the parties to bind the principal or constituent, that it should be his deed and not the deed of the agent or attorney, it must be regarded as the deed of the principal or constituent, though signed by the agent or attorney in his own name. In determining the meaning of the parties, recourse must be had to the whole instrument, the granting part, the covenants, the attestation clause, the sealing and acknowledgment, as well as the manner of signing. If signed by the agent in his own name, it must appear by the deed, that he did so for his principal. This may appear in the body of the deed, as well as immediately after the signature." *Simpson* v. *Garland*, 72 Maine, 42.

In *Bucksport & Bangor Railroad Company* v. *Buck*, 68 Maine, 85, our court says: "R. S., c. 3, § 5, as repeatedly construed by

this court, while in terms requiring the warrant to specify in distinct articles the business to be acted upon at a town meeting, leaves a large discretion to be exercised by the voters, when assembled, as to the disposition they may make of the matter submitted for their action. The statute requires that the articles in the warrant shall distinctly apprise the voters of the subject to be considered, without prescribing any rule for their action upon it. It is in general competent for the town to adopt or reject the proposition submitted, wholly or in part, or to adopt it with specific limitations or conditions."

The town refused to rescind the contract, but continued to appropriate money in ratification of it. *Otis* v. *Stockton*, 76 Maine, 506.

The acceptance and use of the works under the contract for their construction is a complete waiver of all patent defects in the location or construction of the same. Mr. Justice Brewer in *National Water Works Company* v. *Kansas City*, 10 C. C. A. 653, 666, (62 Fed. Rep. 853, 866), speaking for the court, said of the claim by the city for damages in that case on account of the inefficiency of the water works furnished by the lessor:

"It (the city) has for many years recognized and accepted this waterworks system as having been constructed in full compliance with the demands of the contract, and it is now too late to repudiate such recognition." *Illinois Trust & Savings Bank* v. *City of Arkansas City*, 76 Fed. Rep. 292.

Contract not one for exemption from taxation.

Counsel cited: *Portland* v. *Portland Water Co.*, 67 Maine, 135; *Grant* v. *City of Davenport*, 36 Iowa, 396, 398; *Bartholomew* v. *City of Austin*, 85 Fed. Rep. 359; *Ill. Cent. R. R. Co.* v. *McLean Co.*, 17 Ill. 261; *Ill. Trust, etc., Bank* v. *City of Arkansas City*, 76 Fed. Rep. 271; *New Orleans* v. *Water Works Co.*, 36 La. 432.

Where authority is given by charter to a town to make a contract with a water company by its selectmen, such contract is valid though executed by a special committee thereunto duly authorized by vote of the town.

If the provisions of the charter as to the method of making a contract are not absolutely mandatory, but directory merely, the contract is valid although the prescribed mode is not followed. Dillon, Mun. Corp. § 449; Beach, Pub. Corp. § 252; Tiedeman, Mun. Corp. § 165; 15 Am. & Eng. Encyc. of Law, p. 1088.

Directory and mandatory statutes: *Boothbay* v. *Race*, 68 Maine, 351, 354; *Rex* v. *Toxdale*, 1 Burr. 445; *Gallup* v. *Smith*, 59 Conn. 354; *Pearce* v. *Morrill*, 2 A. & E. 96; *Cusick's Election*, 136 Pa. 459; *Bladen* v. *Phila.* 50 Pa. 464; *Mussey* v. *White*, 3 Maine, 290; *Middle Bridge Props.* v. *Brooks*, 13 Maine, 391; *Veazie* v. *Mayo*, 45 Maine, 560; *Scarborough* v. *Parker*, 53 Maine, 253; *Farmington Savings Bank* v. *Fall*, 67 Maine, 135; *Kelley* v. *Mayor, etc., of Brooklyn*, 4 Hill, 263; *Marchant* v. *Langworthy*, 6 Hill, 646; *Striker* v. *Kelly*, 7 Hill, 9; *People* v. *Village of Yonkers*, 39 Barb. 266; *Barnes* v. *Ontario Bank*, 19 N. Y. 155; *Moore* v. *Mayor, etc., of N. Y.*, 73 N. Y. 238; *Ford* v. *Clough*, 8 Maine, 345.

Without relying on the special provision given the town of Winterport under the charter of the Winterport Water Company, as amended in 1895, the town could under its general statutory powers legally contract and raise money to procure a water supply for fire hydrants, school buildings and drinking fountains and agree to pay a sum equivalent to taxes in part payment of water rent, as provided in the contract in question. Dillon, Mun. Corp. § 146; Tiedeman, Mun. Corp. § 175; *Town of Livingston* v. *Pippin*, 31 Ala. 542; *City of Rome* v. *Cabot*, 28 Ga. 50; R. S., c. 3, §§ 46, 59; c. 26; c. 18, § 71; *Gale* v. *Berwick*, 51 Maine, 177.

Contract not contrary to public policy.

The contract in question is not contrary to public policy, but is in accordance with the settled policy of our State, as shown in the history of its legislation for more than twenty years. An examination of the various water company charters granted by the legislature, will show that in almost every instance the authority has been delegated to towns and cities to enter into contracts with such companies for a supply of water, and for such exemption from public burdens as the city or town and the company might agree.

The town, in exercising this power, was contracting for the private benefit of itself and its inhabitants, and is governed by the same rules that govern a private individual or corporation. *Ill. Trust, etc., Bank* v. *City of Arkansas City*, 76 Fed. R. 282.

In contracting for waterworks to supply itself and its inhabitants water, the city or town is not exercising its governmental powers, but its business or proprietary powers. "The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city itself and its denizens." 1 Dill. Mun. Corps. § 27; *City of Cincinnati* v. *Cameron*, 33 Ohio St. 336, 367; *Safety Insulated Wire & Cable Co.* v. *Mayor, etc., of Baltimore*, 13 C. C. A., 375, 377, 378, (66 Fed. R. 140, 143, 144); *Com.* v. *City of Philadelphia*, 132 Pa. St. 288; *City of Vincennes* v. *Citizens' Gas Light Co.*, 132 Ind. 126; *In re Binghampton Bridge*, 3 Wall. 51, 75; *Cartersville, etc., Co.* v. *Cartersville*, 89 Ga. 683; *Utica Water Works Co.* v. *Utica*, 31 Hun, 431; *Luddington, etc., Co.* v. *City of Luddington*, 78 N. W. Rep. 558; *Chenango Bridge Co.* v. *Binghampton Bridge Co.*, 3 Wall. 51.

In defense of the second case, the action to recover the tax assessed against the Water Company, the same counsel argued:

Under the contract made by the town of Winterport with the Winterport Water Company, it ought to be debarred from maintaining this action.

By the charter of the Water company, the town was authorized to make any agreement for exemption from public burdens as the town and the company might agree upon, which when made was to be legal and binding upon the parties thereto. Although the town, subsequent to the action of the annual town meeting held in March, 1896, held another town meeting and authorized a written contract, yet the exemption from taxation voted by the town, in favor of the water company in 1896 was never reconsidered, and still stands as the vote of the town.

The town agreed to pay the sum of one thousand dollars per year during the period of 20 years for the use of 20 hydrants, and such further sum each year as would equal the amount of tax, if any, assessed against the company.

The town did not contemplate at that time the assessment of any tax against the Water company and its property. In consideration of the agreements of the company, exemption of the Water company from taxation was a legal exemption. *City of Portland* v. *Portland Water Company*, 67 Maine, 135.

Under the terms of this contract the town should apply the water rental it agreed to pay, in excess of one thousand dollars, in satisfaction of such tax assessed against the company.

The vote of the town in March, 1896, to exempt this property from taxation, and the agreement executed by the town on the ninth day of May, 1896, should be construed together; and the amount due from the town for water rental, equal to the amount of the tax assessed for the year, should be applied by the town in satisfaction of the tax, without compelling the parties to resort to their several actions.

The terms of the contract show that the parties to this controversy estimated the value of this water plant to the town, if constructed, and being competent to contract, concluded that it was but fair to setoff the water rental, in excess of one thousand dollars for hydrants, against any taxes assessed, by the town.

But should it be determined by the court that it was not the duty of the town to apply this additional water rental, provided for in the contract, in satisfaction of the annual tax, then we have a legal claim under the contract for water rental equal to the amount of the annual tax assessed against the company for that year, and that question is distinctly raised in the first case.

Chas. A. Bailey; R. F. and J. R. Dunton, for Winterport.

Counsel argued in favor of the tax suit.

It is probably too late in the history of the law in this state, to deny the power of the Legislature to authorize towns, for a valid consideration, to enter into a contract with water companies for an exemption from taxes. *Portland* v. *Portland Water Co.*, 67 Maine, 135.

It is noticeable, however, that immediately following that decision, the Legislature passed the act, Laws 1878, c. 33, now incorporated in R. S., c. 6, § 6, Art. 10; "The aqueducts, pipes and

conduits of any corporation, supplying a town with water, are exempt from taxation, when such town takes water therefrom for the extinguishment of fires without charge. But this exemption does not include therefrom, the capital stock of such corporation, any reservoir or grounds occupied by the same, or any property, real or personal, owned by such company or corporation, other than as herein above enumerated."

This act, evidently, was intended to make a general application of the principles of the case above referred to, to all water companies, and expresses the legislative judgment of what are fair equivalents, when any water company asks for exemption from taxation, to wit: free water for the extinguishment of fires—exemption of pipes, aqueducts and conduits.

But under the doctrine of that case, notwithstanding this general declaration, it is doubtless competent for the state to legislate specially in favor of any particular company touching the matter of tax exemption.

If we concede here that the provisions of the act of 1895, c. 25, § 8, supersede the general law relating to exemption, still being in derogation of common right, and an express delegation of sovereign power, it is to be construed not only strictly, but strictissime. The instrument produced by the Water Company is in no sense a contract of the parties under the legislative power relied on. It is, therefore, as an instrument of defense to the tax suit that we wish to consider it.

All the proceedings of the parties bearing upon relief of the water company from taxation must be looked at through the enabling act above cited.

The vote of the annual meeting of 1896 "Voted, to exempt it from taxation" is too indefinite. This vote is not in any sense a contract; and the town, under the special authority given, if bound at all, must be bound by contract. Unless this vote is incorporated into a contract it stands as a purely gratuitous offer on the part of the town. "Exemption from taxation made through motives of public policy for which no consideration is given are not contracts." 25 Am. & Eng. Ency. of Law, 52; Cooley on Taxation, (2nd Ed.) 69.

At the time of the vote of exemption referred to, the company had no property; the vote is not to exempt property which the company may thereafterward acquire, nor improvements to be made; nor to exempt the company, eo nomine, from taxation; but simply to exempt the stock and property of the company. Whether this vote was sufficient, as expressed, to comprehend all the property which the company, thereafterward for twenty years, might acquire, and all stock holdings in that town during the same time, provided a formal contract had been made embracing its terms, we may not stop to inquire, inasmuch as it is manifest that that vote never entered into the contract which is under discussion.

The action of the town at the meeting which passed the vote of exemption, March 13, 1896, must be held to have reference solely to obtaining a municipal water supply, for a consideration to be paid for the same. The enabling act, ex vi termini, restricted it to that action alone.

When this second proposition of the company was acted upon by the town, April 22, any further consideration of the former action of the town, or any part of it, was absolutely at an end. A new and substituted basis, whatever it was, was there given on which to found the contract. And the contract itself shows that it was intended to be upon this new basis, in accordance with the vote of instruction to the committee then passed. It could not, if it would, embody the action of the former meeting, or any part of it; and it shows upon the face of it that it did not, for in its provision relating to taxes, and that is the feature we are dealing with now, instead of securing any positive exemption, it concedes the right of the town to levy taxes, reserving to the company only, in case of assessment, a corresponding increase in the annual water rate.

The article and vote both, it will be seen, contain the phrase "as per said company's proposal." This phrase to have any meaning, must be taken to mean, that at the meeting, the company would submit a proposition to furnish the town a twenty hydrant service with necessary specifications in detail, and ask the town to vote upon it.

In the vote of the town it must be taken to mean, that the town

has listened to the propositions of the company, and for all that is proposed, the town will give $1000 a year for the 20 hydrant service for the term of twenty years. Not $1000 plus some other sum; not $1000 and taxes added thereto, but just $1000.

And the law does not intend that the plainest proceedings of a simple town meeting shall be held to mean something different from what they express.

The contract is not executed in accordance with the power given. Being made under a special provision of the legislature, which not only prescribes the subject of the contract but also the manner in which it shall be executed, that mode must be strictly followed.

"Where the mode, in which the power of a municipal corporation upon any given subject can be exercised, is prescribed by its charter, that mode must be followed. The mode in such case constitutes the measure of power, and aside from the mode designated there is a want of all power on the subject." 15 Am. & Eng. Ency. of Law, 1042.

The provision authorizing this contract designates the selectmen of the town to execute the contract on the part of the town. It matters not that their duties are ministerial only. No other agents can perform that duty.

As tersely stated, by a modern text writer, "An act conferring special ministerial authority upon officers, in the exercise of which rights of property may be affected, or municipal liability incurred, must upon pain of vitiating the entire proceedings be strictly pursued." Endlich on Interpretation of Statutes, § 352.

"Whoever claims such exemption, must in obedience to strict construction, bring himself within both the letter and the spirit of the enactment." Ibid. § 356; 23 Am. & Eng. Ency. of Law, 399.

"Where the charter of the company requires contracts of a particular description to be in writing and signed by specified officers or approved in a specified manner, no agent can bind the company to a contract of that description unless it was executed in the manner prescribed." 17 Am. & Eng. Ency. of Law, 137.

Says Mr. Thompson in his valuable work on Corporations, "whatever may be the nature of the contract, sealed or unsealed, if the

charter or governing statute has prescribed a formality to be observed, that formality must be observed, or it will not be the contract of the corporation." 4 Thompson's Com. on Corp. § 5017.

Once it is admitted, that the power of exempting from taxation is exclusively sovereign power, it follows that every act tending towards the exercise of it is an act of sovereignty. That to whomsoever is delegated any power or duty relating to it, they become the agents of the state.

In this particular case the state saw fit to commit to the town of Winterport in its municipal capacity, a specially limited power —I think, perhaps, exceptionally so—the power to act, merely upon terms of an agreement—"in meeting the company," as Judge Cooley expresses it in his work on Taxation, page 69, "on the basis of bargain and consideration." This being done, the state steps in by its own appointed agents, the selectmen of the town, and does the rest. The town was to have, and can have, no agency in the formal execution of the contract. The appointment of the selectmen, eo nomine, for that duty was prohibitive of any appointment by the town. The state could just as well have designated any other agency; or failing to appoint, have devolved the duty by implication upon the town. But the all-controlling fact remains, that the selectmen were expressly named, and whatever the motive, this important function, of guarding the public interests in this final step of the proceedings, was not (in the suggestive phrase of Mr. Justice EMERY in *Thorndike* v. *Camden*, 82 Maine, 477) intrusted to "a friendly majority in a town meeting."

The error in this case manifestly lay in the assumption that this was the town's contract, not the state's, through its appointed agents; and I submit that both upon principle and authority the action of the town in the matter was ultra vires.

As to ratification, it is enough to say a town cannot ratify a contract it could not make. As stated by Dillon (3rd Ed.) § 463: "A municipal corporation may ratify the unauthorized acts and contracts of its agents and officers, which are within the corporate powers, but not otherwise." "Ratification," says PETERS, J., in *Lincoln* v. *Stockton*, 75 Maine, 147, "however proved, cannot

make good an act for which prior authority could not legally have been given, one without the scope of the corporate powers, or in excess of such powers in violation of law."

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

HASKELL, J. An action of covenant broken for not paying $258, a sum equal to the tax assessed against plaintiff in 1897. Plea, non est factum, which puts in issue the validity of the deed containing the covenant sued.

On April 22, 1896, a town meeting was called, "To see if the town will vote to contract with the Winterport Water Company for not less than (20) twenty hydrants service, for not less than (20) twenty years, as per said Company's proposal."

It was: "Voted to pay the sum of $1000 per year, for not less than 20 years hydrant service, for not less than 20 years as per said company's proposal."

Thereupon the deed was executed by the parties, covenanting that defendant should pay the $1000 yearly rental and such further sum, each year, as shall equal the amount of tax, if any, assessed against defendant.

The defendant contends that the covenant sued was not authorized by vote of the town. True, the vote is imperfect, and perhaps fatally so, were it not aided by the article in the warrant under which it was taken. That article is to see if the town would contract for twenty hydrants service, for twenty years, as per Water Company's proposal. That proposal was in writing and read to the town, and upon its reading, the vote was passed. The proposal contained various articles, and the town may fairly be said to have adopted its provisions. The vote must have meant that, if anything. Surely, it could not have meant simply the payment of $1000 yearly rental without being secured the service carefully specified in the proposal. That was specific, and carefully worded, and has been embodied literally in the deed. All its provisions were proposed and must have been considered as the pending question upon which the vote was taken. We think,

taking the whole proceeding together, that the town meant to, and, in words not so comprehensive as may be wished, did adopt the entire proposal. Other acts of the town, were they competent here, might strengthen this view, but, although they are in evidence, we do not think it best or necessary to consider them.

At the same meeting, under an article to see if the town would choose and empower a committee to execute the deed in behalf of the town, such committee was chosen and so executed the deed.

It is contended that the charter of defendant, Special Act 1895, c. 25, authorized defendant to contract for water supply, by its selectmen only, and not by a committee as here. Defendant town did not contract by a committee. It contracted itself, and authorized a committee to execute the contract in the name of the town. The subject matter of the contract was a municipal function, authorized by statute, that it might act upon directly, by vote, and cause its chosen agents to execute its action in its name. To be sure, the letter of the statute is "authorized, by its selectmen, to enter into contract, with said company for a supply of water." One construction may be that the selectmen might negotiate and conclude such a contract, and execute it in behalf of the town. Under this construction, no other method could be adopted, for the selectmen alone are given the power, and no one else. But the better construction is, that the town itself may contract, and that it may execute its contract by the selectmen, if it pleases. The method is permissive, not exclusive. Suppose the selectmen be incapacitated by sickness, or a majority of them be absent, or refuse to act, shall the town be prohibited from the exercise of its function by mischance, misfortune or the perversity of its selectmen? Shall the agent veto the act of his principal? It is more reasonable to say, that the town may act through the agency named, if it shall please, or by any agent that it may authorize for the purpose. The town is to act, not the selectmen, unless directed by the town to do so. The town did act, and voted the contract submitted to its meeting. Upon a proper article in its warrant, it chose a committee to execute the contract, in its name, that it had already adopted. This case resembles, in many particulars, *George* v. *School Dist.*

in Mendon, 6 Met. 497. There the district voted to build a school house, and chose a committee to make a contract therefor according to a proposal submitted. The meeting adjourned to a future day. Meantime, another meeting was called and held, and the town voted to build upon a new plan then proposed, and chose a committee to make the contract, and it was held that the contract so made was valid, and also that it rescinded the former vote. See *Nobleboro* v. *Clark*, 68 Maine, 87; *Haven* v. *Lowell*, 5 Met. 35; *Murdough* v. *Revere*, 165 Mass. 109; *Curtis* v. *City of Portland*, 59 Maine, 483.

Where the mode to contract, named in a statute is permissive merely, no good reason can be given why other modes may not be employed. If the mode be exclusive, that mode alone should be followed. One test is, to see if the act of the agent be ministerial only, for there he has no discretion, and is to merely carry into effect the will of his principal. If, however, he is to exercise judgment, so as to determine any rights of the principal, then his judgment is made an element in the transaction, and it cannot be consummated without it. In the case at bar, the town was authorized to contract for water. The contract was to be the town's contract, made by it. The selectmen had no official voice in the matter. They were permitted to execute the will of the town, if ordered to do so. No reason has been given why another, chosen, should not act also. We think the contract valid.

Defendant defaulted.

WINTERPORT *vs.* WINTERPORT WATER COMPANY.

Defendant defaulted.

EMERY, J., concurred in this case, but not in the first case.

EMERY, J. My views are these:—When the legislature imposes a public duty on a municipality or other public agency, the prescribed means and modes may often be regarded as directory only. When, however, the legislature merely confers a

power or privilege, without duty, upon a municipality or other legislative creature, then the prescribed means and modes are express limitations upon the power or privilege and must be strictly followed whatever the inconvenience. 23 Am. & Eng. Ency. Law 458, 465, and cases there cited. The statute in question here merely confers a power or privilege, without duty, upon a legislative creature. The legislature expressly, in terms, prescribed the particular agency by which the town was authorized to enter into a contract, viz., "by its selectmen." We must assume that the legislature prescribed this particular agency advisedly and for a purpose. It may have intended thereby to impose checks and delays upon municipal action, but, no matter what the purpose, those words were inserted in the statute and all the inconveniences and delays they occasion must be borne if the parties desire to avail themselves of the statute. To my mind the majority opinion is not supported by the cases cited, and its practical effect is to expunge from the statute words the legislature saw fit to insert, and to remove from the legislative grant a limitation the legislature saw fit to impose. I think this is beyond the legitimate power of the court, and hence that the Water Company is confined to its quantum meruit.

JOSEPH MARCOTTE *vs.* CITY OF LEWISTON.

Androscoggin. Opinion May 29, 1900.

Way. Defect. Notice. Pleading. R. S., c. 18, § 80.

In an action brought to recover damages for an injury to plaintiff's horse, caused by an alleged defect in a highway in defendant city, within fourteen days after the accident, the plaintiff gave written statute notice of it to the municipal officers of the city in which it was stated to have occurred on February 12, 1898, and the declaration alleged the same date. At the trial the plaintiff offered evidence tending to show that the accident occurred on the thirteenth instead of the twelfth. This evidence was excluded and the plaintiff excepted.

Held; that the evidence should have been admitted.

The notice having been given within fourteen days after the injury, as required by statute, the mistake in the date of the accident did not vitiate the notice and render it inoperative.

ON EXCEPTIONS BY PLAINTIFF.

The case appears in the opinion.

M. L. Lezotte; H. W. Oakes, J. A. Pulsifer and Forest E. Ludden, for plaintiff.

Counsel cited: *Blackington* v. *Rockland*, 66 Maine, 332; *Bradbury* v. *Benton*, 69 Maine, 194; *Wadleigh* v. *Mt. Vernon*, 75 Maine, 79; *Low* v. *Windham*, 75 Maine, 113; *Noonan* v. *Lawrence*, 130 Mass. 161; *Spellman* v. *Chicopee*, 131 Mass. 443; *Donnelly* v. *Fall River*, 132 Mass. 299; *Cronin* v. *Boston*, 135 Mass. 110; *Canterbury* v. *Boston*, 141 Mass. 215; *Savory* v. *Haverhill*, 132 Mass. 324; Buswell Personal Injuries, § 186; *Burghardt* v. *Van Deusen*, 4 Allen, 374; *Perry* v. *Botsford*, 5 Pick. 189; *Cunningham* v. *Kimball*, 7 Mass. 65; *Hastings* v. *Lovering*, 2 Pick. 214; *Little* v. *Blunt*, 16 Pick. 359; *Holt* v. *Penobscot*, 56 Maine, 15; *Liffin* v. *Beverly*, 145 Mass. 549; *Kaler* v. *Tufts*, 81 Maine, 63; *Chapman* v. *Nobleboro*, 76 Maine, 427; 16 Am. & Eng. Ency. Law, p. 792; *Rogers* v. *Shirley*, 74 Maine, 144; *Smiley* v. *Merrill Plantation*, 84 Maine, 322; *Hutchings* v. *Sullivan*, 90 Maine, 131; *Master* v. *Troy*, 50 Hun, 485.

H. E. Holmes, for defendant.

The intention of the statute is evidently to protect the town by requiring the party complaining to put the town in possession of the necessary facts for a full enlightenment on what claim it is required to meet. The numerous cases which have interpreted this statute requirement of written notice show this plainly.

No objection was made to the plaintiff's amending his declaration, which alleged that the accident took place on the 12th of February; but the objection is to his amending his notice to the municipal officers, or, what amounts to the same thing, introducing evidence of an accident happening on the 13th of February.

Under the Massachusetts statute which required the party complaining to set forth in his notice the "time, place and cause" of the accident, the court held the time of the accident to be as essential as the place and cause; and stated that the reason why the plaintiff is bound to be specific, as to time as well as to cause and place, is in order that the notice may be of substantial assistance to the proper authorities in investigating the question of their liability. *Noonan* v. *Lawrence*, 130 Mass. 161; *Donnelly* v. *Fall River*, 132 Mass. 299; *Cronin* v. *Boston*, 135 Mass. 110.

It is a hardship on the defendant to be obliged to meet a case materially different from what is expected from the notice which it received.

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

STROUT, J. Action to recover for injuries caused by a defective way. Within fourteen days after the accident plaintiff gave written notice to the defendant, in accordance with R. S., c. 18, § 80. This notice was served on February 23rd. In the notice the injury was stated to have occurred on February 12, 1898, and the declaration alleged the same date. At the trial, plaintiff offered evidence tending to show that the accident occurred on the thirteenth, instead of the twelfth. This evidence was excluded, and a verdict ordered for defendant. Plaintiff has exception.

Did this error in the date of the accident defeat the action? We think not. The cause of action was complete, if this was a defective way, of which defendant had twenty-four hours previous notice, and an injury was received thereby while plaintiff was in the exercise of due care, and without fault on his part. The date of the accident is in no sense an element. The statute is remedial, and to be construed and applied as such. The right to the remedy accrues when the injury is received—but to protect towns against possible fraud and stale claims, where opportunity for investigation may be lost, and discovery of evidence difficult, the statute requires the party, within fourteen days after its occurrence, to give written notice to the municipal officers, "setting forth his claim for damages, and specifying the nature of his injuries, and the nature and location of the defect which caused such injury." The manifest purpose of this requirement is to afford opportunity to the town officers to examine the place, ascertain from persons having knowledge of the facts, while the recollection is fresh, all the attending circumstances, and determine as to the liability of the town, and prepare its defense, if the town officers decide to defend. *Blackington* v. *Rockland*, 66 Maine, 332; *Wadleigh* v. *Inhs. of Mount Vernon*, 75 Maine, 79; *Low* v. *Windham*, 75 Maine, 113.

For all these purposes it is immaterial on what day the accident occurred. Nothing in the statute requires statement of the day. The notice must be given within fourteen days. If given within that limit, it will be sufficient, if no specific day is named. The plaintiff is allowed that time to ascertain the precise location and character of the defect, and the nature and extent of his injury, and to state them on paper—and the investigation of the town officers should cover the same range. The court would not be justified in importing into the notice a requirement, not in the statute, which is not of the essence of the right and is unimportant to the town.

It is quite easy, in reckoning back fourteen days, to make an error of one day, and it seems a hardship to deprive a party of all remedy because of such mistake. Plaintiff could have no object

intentionally to misstate, and it is inconceivable that in any investigation the town might make of the occurrence, it would fail to discover the facts as they were on the thirteenth, even if they were inquiring of the twelfth.

In indictments for crime, the offense must be alleged of a particular day—but except when time is an element in the crime, it may be proved upon any other day within the statute limitation. The same is true in all civil pleading. Is there any reason why this notice should be held bad, because of mistake of a single day, where there is no evidence nor any probability that the town was thereby misled, to its injury?

The notice in this case concludes, "this notice is given before the expiration of fourteen days since the accident," which would be a compliance with the language and purpose of the statute, without a specific date.

While this court has held that the notice should contain a particular description of the location and character of the defect in the way, and the nature of the injuries suffered, it has never held that it was necessary to state the day or the hour of the accident. To do so would impose upon the injured party a duty not imposed by the statute, nor within its reason and purpose, and might defeat a meritorious suit by a technicality not necessary or important to the rights of the parties. The notice must "set forth his claim for damages," but it need not state the amount claimed. *Morgan* v. *Lewiston*, 91 Maine, 571.

Notwithstanding the date of the twelfth in the notice and in the declaration, it was competent for the plaintiff to show that the accident occurred on the thirteenth.

The evidence should have been admitted.

Exceptions sustained.

WILLARD H. WATERMAN *vs.* ARTHUR L. MERROW, and others.

Androscoggin. Opinion May 29, 1900.

Referee. Arbitration. Pleading. Rule X. Assignment.

When parties agree that a referee, under rule of court, may find and report the facts, and thereupon his findings may be reported to the law court to render such judgment as the legal rights of the parties require, *held;* that the referee is the final judge of all matters of fact and questions of law relating to the introduction of testimony; and it is within his discretion to insist upon a compliance with Rule X, or to receive evidence without complying with it.

In such case, the only duty imposed upon the court by the report of the referee is to apply the law to the facts found and reported by him.

Rule X, relating to the denial of signatures and partnership, does not apply to hearings before referees, even when acting under a reference reserving exceptions in matters of law.

It is competent for a referee, in conducting hearings before him, to adopt any reasonable method which seems best calculated to promote the convenience of the parties and secure the ends of justice.

The defendants filed a plea of abatement in the court below for the non-joinder of other defendants, which was adjudged bad on demurrer, and the defendants were ordered to plead over. *Held;* that the defendants were not estopped from pleading and showing the truth in regard to their membership in the voluntary association alleged in the writ and declaration.

An assignment of an account made without consideration, and for the sole purpose of collecting it by suit in the name of the assignee for the benefit of the assignor, is deemed colorable only and inoperative to transfer the property in the account to the assignee, or the right to maintain an action upon it in his own name.

ON REPORT.

The case appears in the opinion.

H. W. Oakes, J. A. Pulsifer and Forest E. Ludden, for plaintiff.

Voluntary associations of this character are partnerships, especially with respect to their relations with strangers or third parties. *The Swallow*, Fed. Cas. No. 13665, Olcott, 334; *Williams* v. *Franklin Tp. Academical Assoc.*, 26 Ind. 310; *Coleman* v. *Coleman*, 28 Ind. 334; *Pipe* v. *Bateman*, 1 Iowa, 369, (1 Clark).

The members of a voluntary association in their relations to third persons are to be considered as partners. *Babb* v. *Reed*, 5 Rawle, 151, (28 Am. Dec. 650); *Cheney* v. *Goodwin*, 88 Maine, 563; *Chick* v. *Trevett*, 20 Maine, 462; *Davis* v. *Beverly*, Fed. Cas. No. 3627, 2 Cranch C. C. 35; *In re Mendenhall*, Fed. Cas. No. 9425; *Davidson* v. *Holden*, 55 Conn. 103; *Lawler* v. *Murphy*, 58 Conn. 294.

Rule X has all the binding and obligatory force of a statute. *Mayberry* v. *Morse*, 43 Maine, 176.

The plea of abatement left open under the general issue two questions only: 1st. Whether the alleged promises were or were not made by or in behalf of the said association; and 2nd. The value of the services rendered and materials furnished. Counsel cited: *Cassidy* v. *Holbrook*, 81 Maine, 589; Stephen on Pleading, (3rd Ed.) pp. 27, 35.

Admissions in pleadings are conclusive in same suit. Herman on Estoppels, p. 944. And where defendants plead in abatement the non-joinder of others whom they claimed to be co-partners, and succeed in their plea, the record is conclusive in another action against the parties setting up such plea, that the persons alleged in their plea were partners. Herman on Estoppels, p. 232, citing *Witner* v. *Schattner*, 15 *Serg. & Raw.* 150.

W. H. Newell and W. B. Skelton, for defendants, Babbitt and White.

D. J. McGillicuddy and F. A. Morey, for defendants, Douglass and Ellard.

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

WHITEHOUSE, J. This is an action of assumpsit on accounts annexed to the writ, in which the defendants are described as "members of a voluntary association known as the Maine Game & Protective Association."

The defendants filed a plea in abatement for the non-joinder of

numerous other defendants, but this plea was adjudged bad on demurrer, and the defendants ordered to plead over. Thereupon the action was referred to a justice of this court with the right of exceptions in matters of law; but while the hearing was in progress before the referee "the parties agreed that the referee might find and report the facts, and that thereupon the referee's findings of fact should be reported to the law court to render such judgment as the legal rights of the parties require." Accordingly the referee made and reported the following findings of fact:—

I find that the Maine Game and Protective Association, at the time the bills sued in this action were contracted, was an organized, unincorporated, voluntary association, and that the defendants, Merrow, Gifford, Curtis, Teel, Ledyard and Thompson were then members of said association. The defendants, Babbitt, Douglass, Ellard and White, deny that they were ever members of said association, but they did not, before the hearing, file affidavit denying partnership or membership, in accordance with the provisions of Rule X of the Supreme Judicial Court. The plaintiff claims that these defendants, Babbitt, Douglass, Ellard and White are estopped from denying membership in said association, by reason of certain allegations contained in their pleas in abatement filed in this case and afterwards adjudged bad; also that it is not open to these defendants to show that they were not members of said association, for the reason that they have failed to file affidavits denying partnership or membership as aforesaid. But against the objection of the plaintiff, I received the testimony of said Babbitt, Douglass, Ellard and White, to the effect that they were not members of said association; and I find that although they severally contributed from time to time to the purposes of the association, they were never members in fact, and never held themselves out as such to the plaintiff.

It is accordingly insisted by the plaintiff in argument, in the first place, that the defendants, as members of the association described in the writ, must be deemed partners in their relations to third persons, and that it was not open to any of them to introduce evidence to prove that they were not members of the association, for

the reason that they had omitted to file the affidavits required by the last provision of Rule X of this court.

But it has been seen that although it was originally agreed that the cause should be "referred with the right of exceptions in matters of law," this form of reference was superseded by an agreement that the referee "might find and report the facts" for the decision of the law court; and the case now comes to this court, not on exceptions, but on report of the facts found by the referee. The agreement that he should find the facts was unconditional, and invested him with the full powers of a referee finding the facts. That agreement contained no stipulation in regard to the manner of conducting the hearing, and reserved no questions for the court respecting the admissibility of evidence. The referee was the final judge of all matters of fact and of all questions of law relating to the introduction of testimony. Morse on Arbitration and Award, 214; *Hooper* v. *Taylor*, 39 Maine, 225. It was competent for him to admit or reject the testimony of those defendants who claimed that they were not members of the association, according to his views of the truth and justice of the matter. He might have reported in the alternative, presenting to the court the question of the admissibility of the evidence, as was done in *Hooper* v. *Taylor*, 39 Maine, supra.

But in determining the facts he exercised his full power as referee and made an absolute finding that the defendants Babbitt, Douglass, Ellard and White were not members of the association. With respect to the introduction of evidence it was in his discretion to insist upon a compliance with the provisions of Rule X, or to receive evidence without it. That rule obviously does not apply to hearings before referees even when acting under a reference reserving exceptions in matters of law. It is one of the general rules of the Supreme Judicial Court adopted for the purpose of regulating the practice in that tribunal. It is competent for a referee in conducting hearings before him, to adopt any reasonable method which seems to him best calculated to promote the convenience of the parties and secure the ends of justice.

In this case the referee received the evidence and found the facts

regardless of Rule X. The only duty imposed upon the court by the report of the referee was to apply the law to the facts found and reported by him. The construction of Rule X was not a question reserved for the consideration of this court (*Bucksport* v. *Buck*, 89 Maine, 320) and is not involved in the decision of the case.

But the plaintiff further contends that these defendants are legally estopped to deny this membership in the association by the recital in the plea in abatement "that the several supposed promises in said writ declared upon, if any such were made, were made jointly with" the other persons named.

It is a familiar rule in pleading that when a plea in abatement is adjudged bad upon demurrer, on an issue of law, the judgment is always quod respondeat ouster. *State* v. *Pike*, 65 Maine, 111; *Trow* v. *Messer*, 32 N. H. 361; 1 Chitty on Plead. (16 Ed.) 483. And it has been seen that such was the order of the court in this case. But if these defendants are still prevented from making their defense by the rule of legal estoppel which excludes all evidence of the truth, the privilege of defending upon the merits would be barren and illusory, and the order to plead over practically nullified. The subtle refinements of special pleading in the early history of the common law rarely exhibited a more effectual method of preventing a trial upon the merits of the case. It is feared that such a rule would have a perverse tendency to defeat the ends of justice. The defendants were not estopped by the plea in abatement from pleading and showing the truth in regard to their membership. Furthermore, the allegation in the plea of abatement is not in terms an unconditional averment of the defendants' membership in the association. It was simply a prescribed formula employed by counsel to aid in the solution of the question of membership. It was not signed by the defendants themselves, and would not necessarily have any probative force as evidence tending to show an admission by the defendants. *Rockland* v. *Farnsworth*, 89 Maine, 481. What consideration it was in fact entitled to receive from the referee under the circumstances which may have been disclosed by the testimony before him, it is unnecessary for this court to consider. The testimony is not

before us, and the finding of the referee that the defendants Babbitt, Douglass, Ellard and White "were never members in fact and never held themselves out as such to the plaintiff" is conclusive.

It appears from the report of the referee that the assignment to the plaintiff of the account of the Hall and Knight Hardware Co. was without consideration and made for the sole purpose of collecting it by suit in the name of the plaintiff. Such an assignment must be deemed colorable only and inoperative to transfer to the plaintiff the property in the account and the right to maintain an action on it in his own name. This account as well as that of J. W. Brackett, in support of which no evidence was introduced must therefore be excluded from the judgment in this case.

The result is that judgment is rendered in favor of the defendants Babbitt, Douglass, Ellard and White. But against all the other defendants the entry must be,

Judgment for the plaintiff.

JOHN P. DONWORTH, and others, *vs.* LOUISE J. SAWYER.

Aroostook. Opinion May 31, 1900.

Deed. Tenants in Common. Timber.

Massachusetts, in 1850, being the owner of Township 13, Range 7, Piscataquis county, exclusive of public lots conveyed 2000 acres to be selected in the east half of the township, by the grantor, in one or two lots; and 2000 acres from the west half of the township in lots not exceeding six in number,—all of said lots to be laid out at right angles with the town lines and so as not to interfere with lands of the grantor in the possession of settlers. *Held;* that the deed vested the title thereto in the grantees as tenants in common with the grantor in each half of the township in the proportion that 2000 acres bear to the whole acreage thereof, with a superadded right of selection, on partition proceedings, begun within a reasonable time; but this time has long since elapsed.

Also, held; that the same deed to the grantees, of all the pine and spruce timber standing on the township, to be taken off from time to time to suit their convenience, conveyed an interest in land that may descend to the heir, or be conveyed

to a stranger; and may be construed to convey the right to cut pine and spruce timber from the growth standing on the land at the date of the deed until the same shall have become exhausted, or the right to cut otherwise terminated.

ON REPORT.

Trover for the conversion of logs cut, removed and sold by the defendant from Township 13, Range 7, westerly of the east line of the State, in the season of 1897 and 1898. The plaintiffs were then the owners of said township and of all rights appertaining thereto, except 1000 acres, public lots, already set out and except to the extent of the grant contained in a deed from the Commonwealth of Massachusetts to Jewett and March, dated December 3d, 1850.

The defendant claimed no rights except under this deed and by mesne conveyances the defendant had all the rights of the grantees therein named.

The four thousand acres mentioned in the deed, two thousand in the easterly half of said township and two thousand in the westerly half thereof, had never been selected by the defendant, or by her predecessors in title, or set apart in severalty to her or them.

The township contains 22,040 acres exclusive of said public lots and the cutting by the defendant was general over it, except the public lots, and after written notice and prohibition by plaintiffs.

The case was reported to the law court by Mr. Justice WISWELL to determine all questions relating to the construction of the deed to Jewett and March and the legal rights of the parties.

All questions as to damages are to be determined after the decision of the law court in accordance with its opinion, by Honorable Andrew P. Wiswell and two other persons to be by him selected and minuted upon the docket in this case as referees.

(Deed.)

Know all men by these Presents, That I, whose name is undersigned and seal hereunto affixed, appointed Agent by the General Court of the Commonwealth of Massachusetts to make and execute conveyances agreeably to resolves of said Court, passed the seventeenth day of June, eighteen hundred and twenty, the ninth day of

April, eighteen hundred and thirty-nine, and the twenty-seventh day of February, eighteen hundred and forty-five, and by virtue of powers vested in me by said resolves, for and in consideration of the sum of seventeen thousand four hundred and seventy-nine dollars and ninety-six cents—paid for the use of said Commonwealth by George K. Jewett and Leonard March, both of the city of Bangor in the County of Penobscot and State of Maine, Merchants and Co-partners in trade, Assignees of Thomas F. Gould and John G. Weld, the original Contractors for the premises hereinafter described, the receipt whereof I do hereby acknowledge, have given, granted, sold and conveyed, and by these presents, in behalf of said Commonwealth, do give, grant, sell and convey unto the said George K. Jewett and Leonard March all the right, title and interest of the said Commonwealth in and unto the following described land, to wit:

Two thousand acres of land to be selected in the east half of Township number thirteen of the seventh range of Townships West of the East line of said State of Maine, in one or two lots, and two thousand acres from the west half of said Township in lots not exceeding six in number and all of said lots are to be laid out at right angles with the town lines, and so as not to interfere with my lands now in possession of Settlers, and also is hereby conveyed to the said Jewett & March all the pine and spruce timber standing on said Township number thirteen of the seventh range, to be taken off from time to time to suit their convenience. Provided, however, if any lot or lots of land shall be sold for settlement in said Township the timber on any lots so sold shall be removed the next lumbering season after notice is given to said Jewett & March or their assigns of the sale of any such lots, or as soon thereafter as may be practicable. Hereby meaning to be understood that this sale of timber shall not operate to retard the settlement of the Country, and it is further agreed, that no recourse is to be had to said Commonwealth for any deficiency in the quantity and quality of timber estimated to be thereon.

To Have and to Hold the aforegranted premises with all the privileges and appurtenances thereof to the said George K. Jewett

and Leonard March and to their heirs and assigns, to them and their use and behoof forever. In Witness Whereof, I have hereunto set my hand and seal this third day of December in the year of our Lord eighteen hundred and fifty.

GEORGE W. COFFIN. [L. S.]

Signed, sealed and delivered
in presence of us
EDW. A. SNELLING
CHAS. W. LEAVITT

J. W. Symonds, D. W. Snow, C. S. Cook and C. L. Hutchinson, for plaintiffs.

(1) The deed to Jewett and March does not have the effect to make them or their successors in title tenants in common with the grantor or its successors in title, nor to vest the fee to any part of the township in said Jewett and March, or their successors in title, until a selection of the 4000 acres shall have been made in accordance with the limitations and conditions contained in the deed.

It does not appear in the deed that the four thousand acres were intended to be conveyed to the parties to be held in common and undivided with the grantor. On the contrary the intention is plain, we submit, that the four thousand acres were to be selected and held in severalty by the grantees. It was expressly stipulated in the deed that two thousand acres, in not exceeding two lots, were to be selected from the east half of the township, and two thousand acres, in not exceeding six lots, from the west half of the township, and with the further express condition as to boundaries that said lots should be laid out at right angles with the town lines and so as not to interfere with lands then in possession of settlers. *Phillips* v. *Tudor*, 10 Gray, 82; *Blessing* v. *House*, 3 G. & J. 290, p. 291. This is not the case presented in *Brown* v. *Bailey*, 1 Met. 256.

There was granted to Jewett and March no general right of selection of a fractional part of the township at its just and proportionate value, nor even a general right to select four thousand acres without regard to value or location; but, as we have said, there was granted to them only a limited and restricted right, the limi-

tations and conditions upon the right of selection being in the nature of reservations in favor of the grantor. *Dyer* v. *Lowell*, 30 Maine, 219.

But assuming (which we deny) that the defendant is tenant in common with plaintiff in the township, still she would have no authority to cut the timber and to remove and sell the same as it appears from the report that she did do. If this were done without thirty days' notice in writing to her co-tenants, she would be a trespasser and liable in treble damage to them (R. S., ch. 95, § 5); and apart from the statute the cutting, removal and sale of the timber by her would be an unlawful conversion for which she would be liable in trover to the plaintiffs as her co-tenants. *Herrin* v. *Eaton*, 13 Maine, 196; *Strickland* v. *Parker*, 54 Maine, 268; *Dain* v. *Cowing*, 22 Maine, 349; *Carter* v. *Bailey*, 64 Maine, 464; *Wing* v. *Milliken*, 91 Maine, 387.

(2.) The grant of timber was only of "the pine and spruce timber" standing on the township at the date of the deed, and had no effect to pass any right or title to any trees that should after that date become timber.

"A deed is to be construed with reference to the actual rightful state of the property at the time of the execution. The parties are supposed to refer to this for a definition of the terms made use of in their deed." 3 Wash. R. Prop. (4th Ed.) 384; *Putnam* v. *Tuttle*, 10 Gray, 48; *Boults* v. *Mitchell*, 15 Pa. St. 365; *Warren* v. *Short*, 119 N. C. 39; *Whitted* v. *Smith*, 2 Jones, 36; *Irwin* v. *Patchen*, 164 Pa. St. 51; *Andrews* v. *Wade*, (Pa. Sup. Ct. Oct. 4, 1886) 6 Atl. Rep. 48; *Carter* v. *Williamson*, (Ga. Dec. 20, 1898) 31 S. E. Rep. 651; *Shiffer* v. *Broadhead*, 126 Pa. St. 260.

The words of the deed are "estimated to be thereon" not that should thereafterwards be thereon. An estimate of the timber then standing was the only estimate which was made or which it was practicable to make.

Under the second clause in the deed to Jewett and March nothing was conveyed to them except what was pine and spruce timber standing on the township at the date of the deed; the grant did not have the effect to convey after-grown trees of any class, either

those which should spring up subsequently to the date of the deed or those which after that date should develop into timber; and nothing went to Jewett and March by the deed except what was in fact pine and spruce timber at the date of the grant.

(3) What was meant by the phrase "pine and spruce timber" is to be determined by the common and understood meaning of such words, according to the custom in lumbering on St. John waters at the date of the deed.

Counsel cited: Century Dictionary; *Nash* v. *Drisco*, 51 Maine, 417; *Babka* v. *Eldred*, 47 Wis. 192; *Shiffer* v. *Broadhead*, 126 Pa. St. 260.

(4) The right to cut and remove the timber from time to time to suit the convenience of Jewett and March could not in any event extend beyond the lives of Jewett and March, whose personal convenience was the limitation imposed upon such right by the deed, and the grant, therefore, was only of so much of the timber standing on the township at the date of the deed as might be removed within the time limited. The provision as to the settlement of the town was simply a special limitation upon the time already fixed and could not operate in any way to enlarge such time.

Where a grant of growing trees or timber is made and a certain number of years stated within which the grantee shall have the right to cut and remove the same, the grant is only of such trees and timber as the grantee may cut and remove within the time stated. *Pease* v. *Gibson*, 6 Maine, 81; *Howard* v. *Lincoln*, 13 Maine, 122; *Webber* v. *Proctor*, 89 Maine, 404; *Reed* v. *Merrifield*, 10 Met. 155; *White* v. *Foster*, 102 Mass. 375.

The pine and spruce timber standing on said township . . . . to be taken off from time to time to suit their convenience, is a definite limitation of time upon the grant as effective as if the time had been limited to ten years.

The grant, even, is not to Jewett and March "their heirs and assigns." It could not operate to give assigns a longer time in which to take the timber off than it gave Jewett and March. *Whitted* v. *Smith*, 47 N. C. 39.

Doctrine of reasonable time: *Morris* v. *Sanders*, (Ky. Dec. 7, 1897) 43 S. W. 733; *Perkins* v. *Stockwell*, 131 Mass. 532; *Gilmore* v. *Wilbur*, 12 Pick. 120; *Atwood* v. *Cobb*, 16 Pick. 227; *Atwood* v. *Wade*, 6 Atl. Rep. 48; *Warren* v. *Leland*, 2 Barb. 613; *Webber* v. *Proctor*, 89 Maine, 407.

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

Both Maine and Massachusetts have always regarded the settling of the lands in Maine of great importance, and both states have held the lands owned by them as valuable for settling purposes rather than for timber.

The deed in question should be interpreted in the light of the facts, conditions and circumstances as they existed in 1850, not in the light of the facts, conditions and circumstances of to-day.

They were not given to be construed, by making fine distinctions and raising ingenious technicalities.

The Amer. & Eng. Ency. of Law, Vol. 11, page 512, states the rule thus: "He who interprets should as far as possible put himself in the position of the parties at the time the writing was executed, and cites *Baltimore & Ohio Railroad* v. *Brydon*, 65 Md. 198; *Nash* v. *Towne*, 5 Wall. 689.

The state regarded the land as valuable mainly for settling, and retained the soil for settling purposes and settling purposes only, and was willing that pine and spruce should continue to grow there till the town should be sold for settlement. When Jewett and March were through with the possession of it, the possession was to come back to the state not for lumbering purposes, not for the timber on it, but for settling purposes.

The deed conveyed all the pine and spruce growth (which would make timber) standing on the town at and from the time when the deed was executed up to the time the soil should be sold for settlement. The state could give a perpetual right to take off such timber or she could give a perpetual right subject to such right being defeated by a condition subsequent.

Leake on Contracts, p. 838, (Ed. of 1878) lays down the rule that a contract is to be construed with reference to the time of the

performance. The time when the timber is to be taken off is within one year after the lots are sold for settlement or as soon thereafter as practicable.

The word "timber" has no one fixed meaning but the meaning of the word is elastic and that meaning should be ascribed to it which comports with the context. The pine and spruce timber standing on this town means, we submit, the pine and spruce growth.

If Massachusetts did intend to convey only the timber standing at the date of the deed, we agree with the plaintiff that the word "now" should have been used, and we say further, that because the word "now" is not before the word "standing" is proof that it was not intended to be there, and that the word "standing" is used in contradistinction to the word "down," and the words "timber standing" mean growth. Almost the identical language in this deed is used in the deeds whereby the timber and grass on the public lots in this state are conveyed.

If the defendant's interpretation is put upon the deed, the words "timber standing" will be given a meaning which is not uncommon, the whole deed will be given a natural and logical and not a strained construction, and every part of the deed will be consistent with every other part. The grantees will own simply standing timber, as the deed calls for, and when the lots are sold for settlement the grantee will remove the timber on the lots sold just as provided in the deed.

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

HASKELL, J. Trover for the conversion of certain pine, spruce and cedar logs.

The defense is:

I. That the logs were cut from common lands of the plaintiffs and defendant.

Massachusetts, in 1850, being the owner of Township 13, Range 7, westerly from the east line of the State, containing 22,040 acres,

exclusive of public lots, conveyed to defendant's predecessors in title, "2000 acres of land to be selected in the East half the township . . . . in one or two lots; and 2000 acres from the West half of said township in lots not exceeding six in number, and all of said lots are to be laid out at right angles with the town lines and so as not to interfere with my lands now in possession of settlers." No selection of the lots or partition of the land has been made. The residue of the township belongs to the plaintiffs. The question is, are the parties tenants in common, or is the conveyance under which defendant claims inoperative and void?

There are cases which hold that a conveyance by one tenant in common of a specific quantity or parcel in severalty is inoperative against the co-tenants and voidable by them. One case of that sort is cited at the bar. *Phillips* v. *Tudor*, 10 Gray, 78. There, one tenant in common conveyed 64 rods from the common land, and it was held that, if the deed be valid as against all persons, except the other tenants in common, it could not take effect until the grantee had entered and made certain the parcel that he claimed to hold. So in *Soutter* v. *Porter*, 27 Maine, 405, it is held that a conveyance by one tenant in common of a part of the common property by metes and bounds, though inoperative against the co-tenants, may operate to convey the land to the grantee, when the grantor's part of the common property shall have been set out to him or his interest comprising it.

A deed by tenants in common with others of a specific number of acres from the common lands, less than their share, is valid, and conveys a fraction of the estate. *Small* v. *Jenkins*, 16 Gray, 155; *Jewett* v. *Foster*, 14 Gray, 495; *Battel* v. *Smith*, 14 Gray, 497; *Gibbs* v. *Swift*, 12 Cush. 393.

In *Brown* v. *Bailey*, 1 Met. 254, much relied upon by the plaintiffs at the bar, a testator devised one-fifth of his real estate to a son "to be taken where he shall choose or select at its just and proportionable value." The court held that the estate vested, with a privilege for the devisee to exercise or not at pleasure on partition.

Apply these doctrines to the deed in question. The grantor owned the whole township. It conveyed 2000 acres, not from

common lands, but from lands held in severalty, of land in the east half of the township, to be selected in one or two lots to be laid out at right angles with the town lines, and so as not to interfere with lands in possession of settlers. The manifest intention was to sell 2000 acres in the east half of the township. Had the deed said no more, the grantee would have taken his fraction of the east half of the township, in common with the grantor. *Sheafe* v. *Wait*, 30 Vt. 735; *Preston* v. *Robinson*, 24 Vt. 583. The deed does not say, to be held in common, but that is the logical result. It must be that or nothing. The clause, "to be selected," implies that title passed to be held in common until selected. The right of selection was not a condition precedent, but, as said in *Brown* v. *Bailey*, a right superadded, to be exercised or not at the will of the grantee upon partition, and if exercised then in lots at right angles with town lines and so not as to disturb settlers.

We think the defendant is a tenant in common with plaintiffs of the east half of the township in the proportion that 2000 acres bear to the whole acreage of that half of the township.

We also think that defendant is a tenant in common with plaintiffs of the west half of the township in the proportion that 2000 acres bear to the whole acreage of that half of the township.

We also think that the right of selection that might have been exercised by defendant, in both halves of the township, has been lost by lapse of time. It was a privilege to have been exercised within a reasonable time, and we think that has long since elapsed. The property was wild land, covered with growing timber. Portions of it may have been cut, of which defendant was entitled to her share, and it would be unfair to allow a selection to be now made from that portion uncut. That would be unequal and unjust. When no time is fixed within which an act is to be done, the law fixes a reasonable time. *Weymouth* v. *Gile*, 83 Maine, 437; *Mitchell* v. *Abbott*, 86 Maine, 338.

For the logs cut from the common lands by the defendant, to which she has no other title than as tenant in common, the plaintiffs may have damages, for the conversion of their shares therein. *Wing* v. *Milliken*, 91 Maine, 387; *Wheeler* v. *Wheeler*, 33 Maine,

347; *Carter* v. *Bailey*, 64 Maine, 458; *Strickland* v. *Parker*, 54 Maine, 263; *Dain* v. *Cowing*, 22 Maine, 347; *Herrin* v. *Eaton*, 13 Maine, 193.

II. That the pine and spruce trees from which the logs were cut were the property of defendant.

In the deed from Massachusetts, before mentioned, under which defendant claims title, was the grant "of all the pine and spruce timber standing on said township . . . . to be taken off from time to time to suit their [grantees,] convenience." If lots were sold for settlement, the timber was to be removed the next lumbering season after notice to grantees or their assigns of the sale, or "as soon thereafter as may be practicable." The sale of the timber was not to retard the settlement of the country, nor were the grantees to have recourse to the grantor for any deficiency in the quantity and quality of timber estimated to be upon the township.

It is common learning that the construction to be given deeds must have relation to the time and circumstances under which they were given, and that they are ordinarily to be construed most strongly against the grantor. *Field* v. *Huston*, 21 Maine, 69. The converse rule, however, applies to grants by the sovereign power when not purely commercial and especially when they are gratuitous and are not moved by a full and adequate consideration. Here the consideration was $17,479.96. This grant is clearly enough of pine and spruce trees standing on the land at the date of the deed, and of none other, to be removed at the convenience of the grantees or their assigns. *Putnam* v. *Tuttle*, 10 Gray, 48.

It is contended at the bar that the grant is not only limited to trees standing on the land at the date of the deed, but to pine and spruce trees then suitable for timber. But the grant is not of trees suitable for timber. It is of "pine and spruce timber." Now the word "timber" should be given the meaning suited to the purposes of the grant apparent from the whole deed. The timber of commerce is squared sticks of wood used in building. The trees from which they were cut became known as timber trees. "Command them that they hew me cedar trees out of Lebanon." "I will do all they desire concerning timber of cedar and timber of

fir." So, too, stock on hand for manufacturing purposes, regardless of its size, is called timber. "A man of Tyre, skilled to work in gold, and in silver, in brass, in iron, in stone and in timber, in purple, in blue and in fine linen and in crimson." The statutes of the United States in encouraging the growth of forests and prohibiting their destruction apply the word timber to all sorts of trees, young or old. So, too, under the statute of this state relative to driving logs, "pulp wood or any other wood product suitable for commerce or manufacture that may be conveniently driven to market," is held to be included in the word timber. *Bearce* v. *Dudley*, 88 Maine, 410.

The grantor's purpose, as expressed in the deed, was to foster the settlement of public domain, and, in furtherance of that purpose, it sold the pine and spruce in question, to be removed so that the land could the more easily be cleared. Its purpose was to clear the growth without regard to size, giving the grantees their own time to do so, but always fast enough to accommodate settlers. It wanted the forest cleared, not preserved; and we think, under all the circumstances, the meaning of "pine and spruce timber" was understood to be pine and spruce growth; that the word timber was not used in the sense of trees, suitable to then make timber, but as synonymous with trees or growth. There could have been no object to give to the word a different meaning, and we think the whole grant shows the purpose to have been not to grant trees only suitable for timber, but rather trees of the kind for timber, pine and spruce, timber trees. In other words, to grant the right of lumber from the pine and spruce standing at the date of the deed, at the grantees convenience until the then existing growth should have been removed, but fast enough to not retard settlement of the lands. Any other construction would be both inconvenient and lead to controversies that might be interminable. It is well known that pine and spruce lands in the region of this township do not reproduce the same kind of growth.

Nor is this construction of the deed an unnatural or strained one. The word "timber" is given meaning to fit the sense in which it is used. It may mean "wood suitable for building houses or ships,

or for use in carpentry, joinery, etc., trees cut down and squared or capable of being squared and cut into beams, rafters, planks, boards, etc.," or "growing trees, yielding wood suitable for constructive uses: trees generally; woods." Cent. Dict. "I learned of lighter timber cotes to frame." Prior. "The straw was laid below, of chips and fere wood was the second row, the third of greens and timber newly felled." Dryden. "We take from every tree lop, bark, and part of the timber, and tho' we leave it with a root thus hackt, the air will drink the sap." Shakespeare. The prairie is bare of timber. They sought shelter in the timber, meaning woods. The acts of congress encourage the planting of timber and protect it, meaning small trees.

In this State and some others the conveyance of growing trees to remain alive upon the land and to be cut in the future, is a conveyance of an interest in land, that may nourish and support the growth conveyed. The trees become chattels only when severed from the soil. Until then they are a part of it. *Dunn* v. *Burleigh*, 62 Maine, 24; *Hoit* v. *Stratton Mills*, 54 N. H. 109; *Howe* v. *Batchelder*, 49 N. H. 204; *Plumer* v. *Prescott*, 43 N. H. 277; *Kingsley* v. *Holbrook*, 45 N. H. 314; *Olmstead* v. *Niles*, 7 N. H. 522; *Putney* v. *Day*, 6 N. H. 430; *Heflin* v. *Bingham*, 56 Ala. 566; *Clap* v. *Draper*, 4 Mass. 266; *White* v. *Foster*, 102 Mass. 375.

It is not, as before said, a strained construction to hold that ordinarily a grant of growing timber to be construed most favorably to the grantee, conveyed the growth named with its increase, until the time for removal shall have elapsed. This seems to be the view taken in *Pease* v. *Gibson*, 6 Greenl. 81, although other questions were decided, and in *Howard* v. *Lincoln*, 13 Maine, 122. *Putney* v. *Day*, 6 N. H. 430, apparently adopts it. See *Knott* v. *Hydrick*, 12 Rich. 314.

Goodwin v. *Hubbard*, 47 Maine, 395; *Strout* v. *Harper*, 72 Maine, 270, and *Foster* v. *Foss*, 77 Maine, 279, throw but little light upon the question, but contain nothing against it.

In *McIntyre* v. *Barnard*, 1 Sanford Ch. 52, cited with approval in *Kellam* v. *McKinstry*, 69 N. Y. 264–269, and in *Lacustrine F.*

Co. v. *Lake Guano, etc., Co.*, 82 N. Y. 476–482, was the grant "all the pine timber standing or being" on the land to be cut and removed by January 1, 1841. The grant was made May 27, 1836. The court said: "The object of the grant was the sale of all the pine logs which should be taken off by January 1, 1841," citing *Pease* v. *Gibson* and *Howard* v. *Lincoln*. The last named case was a reservation. The same rule for construction that is applicable to a grant applies to limit the reservation. It was "of all the pine timber . . . . above the size of ten inches in diameter twenty feet from the stump," and the court held only such timber, existing at the date of the deed, was reserved. Surely that should be so, for the description was specific. All the cases cited at the bar by the plaintiffs but two uphold the same doctrine, and were cases of exceptions or reservations, or where the trees granted were specifically described either by size or adaptability for certain uses. These are the cases. *Nash* v. *Drisco*, 51 Maine, 417, was a sale of timber and bark down as small as ten inches, and the court held cord-wood was not conveyed and that the sale of timber excluded trees unsuitable for any purpose but fire wood. *Babka* v. *Eldred*, 47 Wis. 189, held that under a statute giving a lien on logs and timber, a lien did not attach to lath cut therefrom. *Shiffer* v. *Broadhead*, 126 Pa. St. 260, held that a grant of standing pine and hemlock timber was timber by a local custom to ten inches in diameter at top end of twelve-foot log, first cut from the butt. *Boults* v. *Mitchell*, 15 Pa. St. 364, was a reservation of timber suitable for sawing and rafting. *Warren* v. *Short*, 119 N. C. 39, was a sale of timber twelve inches in diameter at the stump. *Robinson* v. *Gee*, 4 Ired. 186, was a reservation of "saw-mill pine timber on the land standing or being, or which may hereafter stand or be, on the said land;" and it was held that the grantee was not liable in trespass for the cutting of pine saplings. *Whitted* v. *Smith*, 2 Jones, 36, was an exception of "all the pine timber that will square one foot," and it was held that only such timber as existed at the date of the deed was excepted. *Irwin* v. *Patchen*, 164 Pa. St. 51, is confused and of doubtful authority. It seems to hold that a parol reservation of

standing timber is limited to timber merchantable at the time. *Andrews* v. *Wade*, (Pa.) is not reported in the State reports, but is found in 6 Atl. Rep. 48, a per curiam opinion. It was a reservation of "all the pine and hemlock timber growing on said lands," and the court held that only trees of suitable size for use at the date of the reservation were included in it. This is the only case directly in point cited to sustain the plaintiff's contention. *Carter* v. *Williams*, 106 Ga. 280, was a lease of "all the round timber or timber suitable for turpentine purposes," and it was held that only such timber standing at the date of the lease passed.

There is another Pennsylvania case where the grantor reserved "all the pine timber" with the right to cut and remove it for twelve years. The court say: "The limitation upon the right of entry was a limitation upon the exception itself. It was a reservation of the timber for twelve years and no longer. After that time, the trees remaining passed with a grant of the soil to which they were attached. This is the construction placed upon such agreements in the lumber regions where they are frequent, and it accords with reason and common sense." *Saltonstall* v. *Little*, 90 Pa. St. 422; *Boisaubin* v. *Reed*, 1 Abbt. 161. Contra, *Irons* v. *Webb*, 12 Vroom, 203.

A sale of merchantable standing timber conveys that particular timber only and at once. *Haskell* v. *Ayers*, 35 Mich. 88. Same as to saw timber, *Monroe* v. *Bowen*, 26 Mich. 522.

The precise question, here at issue, does not seem to have been very much considered by the courts, and therefore it must be decided by applying the most reasonable construction to the deed of the parties. Where, as in this state, the grant of growing trees to remain affixed to the soil or the exception of them from the grant, is an interest in land, it is logical to consider the trees, and the right in the soil, and the growth of them as a unit and inseparable. Their owner is entitled to their increase. The grant of trees, or timber, or particular kinds of timber trees, should be held a grant of the growth, standing at the time of the grant. If the grant limit itself by size of tree, age, or adaptability for specified uses, then of course the particular described tree would pass and none

other. But where there is no limitation of that character, and the grant is of standing timber, to be taken off in the future, the common understanding would be that the grantee might cut timber from the lot until the present growth, suitable for the purpose, shall have been exhausted, or until the right to cut shall have expired by limitation, either express or implied.

That must have been the purpose of the grant in question. Massachusetts said to the grantees, for a valuable consideration, you may "log" for pine and spruce on the township at your pleasure, but fast enough to clear the land for settlers as they may come.

But it is said that the grant was limited to the grantees and could not be conveyed by them. We do not think so. The grant was of an interest in land, to be held by the grantees, "their heirs and assigns, to their use and behoof forever." The cases already cited sustain this view. See *Baxter* v. *Mattox*, 106 Ga. 354.

Our conclusion is that the plaintiffs and defendant are tenants in common of the township, and that plaintiffs may recover the value of their shares in the cedar logs cut by defendant, and also in any pine and spruce so cut that were not standing at the time of conveyance to Jewett and March in 1850.

Defendant defaulted.

FRANCES TASKER *vs.* INHABITANTS OF FARMINGDALE.

Kennebec. Opinion June 15, 1900.

New Trial. Verdict.

Three verdicts in favor of the plaintiff having been set aside by this court as against evidence, (85 Me., 523; 88 Me., 103; 91 Me., 521) at the fourth trial, no new testimony having been introduced, the presiding justice ordered a verdict for the defendant. *Held;* that such verdict was properly ordered, and exceptions thereto should be overruled. WHITEHOUSE, J., dissenting.

See *Tasker* v. *Farmingdale*, 85 Maine, 523; *Ib.* 88 Maine, 103; *Ib.* 91 Maine, 521.

On Exceptions by Plaintiff.

This was an action on the case to recover damages for personal injuries received through a defect in the defendant's highway.

After both plaintiff and defendant had presented all their testimony, the presiding justice ordered the jury to return a verdict for the defendant. To this order the plaintiff was allowed exceptions.

A. M. Spear, for plaintiff.

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

Sitting: Wiswell, C. J., Emery, Haskell, Savage, Fogler, Powers, JJ.

Fogler, J. This case has been three times tried to the jury and a verdict has, in each instance, been returned in the plaintiff's favor. Each verdict has been set aside by this court on the ground that the plaintiff's negligence contributed to her injuries. Eight justices of this court, four of whom are now members of the court, have concurred in setting aside one or more of such verdicts. At the fourth trial the testimony introduced by the parties differed in no material respect from that introduced at the former trials. The presiding justice properly ordered a verdict for the defendant. His ruling was in accord with the decision of this court, thrice expressed, and he must be considered as having acted under the direction of the Law Court.

We think the order of the presiding justice should stand and that the exceptions should be overruled.

Exceptions overruled.

Dissenting Opinion by Mr. Justice Whitehouse.

The justice who presided at the three jury trials of this case has hitherto been precluded by the statute from participating in the decisions of it by the law court. Although his rulings were only nominally brought in question, the exceptions were never argued before that court. Further discussion of the merits of the case may now be unavailing, but in order that his long silence may not

be deemed acquiescence, he feels constrained to express his dissent from conclusions which have seemed to him unwarranted and unjust, and to point out the original errors and misconceptions which led to this unfortunate result.

The covered carriage in which the plaintiff was riding in the town of Farmingdale, in the evening of the ninth day of May, 1891, was overturned by reason of the defective condition of the highway at the easterly end of a culvert extending nearly across the way; and the plaintiff thereby sustained a severe injury for which she seeks to recover damages in this action.

The highway in question was the river road and principal thoroughfare leading southerly from Augusta through Farmingdale to Gardiner. It had recently been subjected to a new mode of use by the construction of an electric railroad, which, at the point of the accident, was located on the westerly side of the highway. By reason of this fact extraordinary repairs had been made on the highway at that point, immediately prior to the accident, the effect of which was to widen the traveled part of the way by extending it to the easterly side. But the old culvert across the way at that point remained unchanged, the easterly end of it being more than two feet from the easterly side of the road. Before these repairs were made, the easterly shoulder of the road was more pronounced and nowhere extended beyond the easterly end of the culvert. The grass had been allowed to grow up over this shoulder, and the extreme easterly line of travel, as plainly marked by the wheel tracks and the growing grass, was two feet into the road from the easterly end of the culvert. Indeed, there was nothing in the condition or general appearance of the road, before the repairs, which would invite public travel out on the easterly side of the road beyond the end of this culvert. Thus the danger of driving carriages off of the easterly end of the culvert had been practically avoided.

But the conditions had been essentially changed by the repairs. Recognizing the tendency of even gentle and well-trained horses to become frightened when in close proximity to an electric car, especially in the evening when it is provided with a headlight, the

municipal officers of Farmingdale decided that reasonable safety and convenience required the road to be made smooth for travel to the extreme easterly limit. Thereupon, all of the stones, large and small, were removed from the old ditch, and by the aid of the plow and road machine, the old shoulder was partially removed and the entire surface of the road, at the north of the culvert, was smoothly wrought into a gentle slope from the centre of the road to the easterly bank. The old ditch no longer existed, and the road was so nearly level that, with the exception of the open drain at the end of the culvert hereafter described, it was entirely safe and convenient for travel, and was manifestly so designed, over the entire width from the railroad track to the easterly bank. The condition on the southerly side of the culvert was substantially the same. In effect the traveled way had been widened above and below the culvert, but the culvert itself had not at that time been extended in length to conform to this increase in the width of the wrought part of the road. It required an extension of more than two feet to correspond with the new line of travel created by the repairs. Furthermore, the culvert was entirely below the level of the road, and was so constructed that the easterly mouth of it was invisible in the day time at a distance of twenty feet to one approaching from the north. From the top of the ground, at the easterly end of the culvert, to the bottom of the drain there was a fall of two and one-half feet.

Here, then, was a dangerous trap, not only for the unwary, but for the reasonably careful driver. The road was so wrought as to invite the traveler to drive out to the extreme easterly bank; but if he did so drive and failed to discover the open end of the culvert in season to turn his course inward, the carriage would drop down two feet or more on the easterly side and inevitably be overturned. It is doubtful if this open drain, at the east end of the culvert, could be discovered in the day time in season to avoid such an accident, and it is quite certain that it would not be so discovered in the night time by the exercise of ordinary care on the part of the traveler not familiar with the existing conditions.

The plaintiff had been in the habit of driving over this road

before the construction of the street railway, and before these changes were made in the highway; but there is no evidence that she had ever been over it after these changes were made prior to the day of the accident. On the morning of that day she rode over it in a covered carriage, going northerly, with her two children; but she was not aware of the existence of this particular culvert and her attention was not attracted to the condition of the road at that point. Between eight and nine o'clock in the evening of the same day she was driving over it on her journey homeward, going southerly, when she saw the electric car with its head-light approaching to meet her. What subsequently occurred is thus described by the plaintiff in her testimony: "I have been accustomed to drive horses for the last twenty years. . . . . When I got down to the place of the accident, I remember that the electric car was coming and we didn't know whether the horse would be frightened, but I supposed he would not, because he was a very kind horse. After making a remark to the children, I concluded to drive outside to avoid the car as much as possible, and the first I knew the carriage tipped over. . . . . When I was driving down there I had hold of the reins very securely, I should say, because I was of course driving carefully on account of my children. I had the reins in both hands after the carriage tipped over. I reined my horse out to go on the opposite side of the road from the car at the time of the accident. So far as I could tell by the rolling along of the carriage the road was smooth, I should say; I thought there would be no difficulty. I think I could see the road along. I thought it looked smooth. I reined out to avoid the car as far as I could. When the horse saw the car he threw up his head and quickened his pace a little perhaps. Don't think I could tell how far from me the car was when I first saw it. It was all in plain view. I could see the head-light very plainly. It was coming right along. . . . . The first notice I had of anything as I was driving along was the dropping into the culvert, and I wondered what it was. I remember that plainly." On cross-examination she further testified: "I did not think the horse was afraid of the electric cars. I had driven it many times

before past the electric cars and he was not alarmed. I suppose he was safe to drive anywhere I had chosen. . . . . He quickened his pace slightly but was still going at a very moderate trot. . . . . He was under full control all the time and did not seem to be alarmed at all. . . . . The car was probably proceeding at its ordinary rate of speed."

Thus happened, what might reasonably have been anticipated would happen, under the same or similar circumstances. The plaintiff, in the exercise of her best judgment and of all the prudence and foresight of which she was capable, while endeavoring to avoid the probable consequences of a close proximity to the electric car, drove to the left side of the road, not into a ditch, in the ordinary sense of the term, but along a smooth and nearly level road wrought for public travel, until she reached the invisible culvert, which had not then been extended to correspond with the increased width of the traveled way, when the carriage dropped off of the easterly end of it into the open drain two and a half feet deep, and was overturned. She had been lured into the pitfall which had thus been created by the defendant town.

Upon these facts an appropriate verdict in favor of the plaintiff has three times been rendered by the jury and three times set aside by the law court. See 85 Maine, 523; 88 Maine, 103; 91 Maine, 521. But, with all deference to the action of the majority of the court who subscribed to those opinions, it is most respectfully submitted that the verdict of the jury was in each instance clearly justified by the evidence; and that the first opinion of the court which was adopted, as the basis and authority for the other two opinions, is shown by its own terms to have been founded on a misunderstanding of the condition of the road, and a consequent misapprehension of the testimony in regard to the plaintiff's conduct, and a misconception of the ground of the defendant's liability.

It is stated in the opinion that the plaintiff "was driving over a road with which she was perfectly acquainted." But it has been seen that, with respect to the actual condition of the road after the repairs were made, as it existed at the time and place of the accident, she was absolutely unacquainted with it.

It is stated in the opinion that "it is negligence to drive out of a well-wrought road and into the ditch without first ascertaining whether it will be safe to do so."

It has been seen that the plaintiff did not "drive out of a well-wrought road" into a ditch; but that she drove all the way inside of a "well-wrought road," so nearly level that she was unconscious of any inclination of the carriage until the left wheel suddenly dropped into the open drain at the end of the culvert. Here the process of widening the road had abruptly ceased and the work was left uncompleted.

It is stated in the opinion that "thoughtless inattention, the very essence of negligence, was the cause of the accident."

It has been seen that the plaintiff was driving with all the attention and vigilance of which she was capable, as a mother guarding the safety of her children, with all her senses and faculties alert in the endeavor to meet the exigencies of the situation; and that the negligent omission of the town to complete its repairs was the cause of the accident.

It is said in the opinion that "it is no excuse for driving into an unseen and unlooked-for culvert, that possibly it might not have been seen if it had been looked for." But it has been noted that the mouth of the culvert was obscure and hidden and absolutely invisible at a distance of twenty feet to an ordinary observer approaching from the north, even in the day time. In fact she had no knowledge of the existence of the culvert, and to the jury taking a view of the location it must have been manifest that she had no reason to look for a culvert at that point. This imputation of negligence against the plaintiff is also wholly unsupported by the evidence.

It is said in the opinion that her horse was not frightened and that she "unnecessarily reined him out of the road." It has been seen in the first place, that the horse was not "reined out of the road," but was wholly in the road all the while. It is true, that after the event it was known that the horse was not frightened; but the plaintiff testifies that when the horse saw the approaching car he threw up his head and quickened his pace and she "didn't know

whether he would be frightened or not." As a matter of extra care and precaution she drove to the extreme left of the road. This was the instinct of a prudent driver and not the act of a negligent one. The liability of even a safe and gentle horse to take fright at a street car approaching with a head-light in the evening, is a matter of common knowledge. If it can be deemed an error of judgment to drive so far to the left, it was an error disclosed only by that knowledge which comes after the fact, and an error which a great majority of prudent drivers would have committed under like circumstances. In any event it cannot be deemed a want of ordinary care and caution on her part. It is immaterial that there was a width of twenty-one feet of smooth road, east of the railroad track, on which the plaintiff might have driven across the culvert. She was driving where travelers with teams had a legal right to drive, and where they had been invited to drive by the acts of the town. It was all smoothly wrought for public travel, and if it had been made twice as wide, travelers would have been justified in using the entire width of it. It had every appearance of a safe and convenient road, and there was no indication of the pitfall which existed within the apparent limits of the traveled way.

The way was undoubtedly defective and unsafe in the respect and for the reasons above stated. It was so found by the juries who viewed the location, and it was practically conceded in the opinion of the court in imputing negligence to the plaintiff as the ground of the decision. The plaintiff sustained a severe injury by reason of that defect. She was in the exercise of all ordinary care, prudence and vigilance. All the requirements of the statute were fulfilled, and all the propositions underlying her right to recover fairly established by the evidence. This court still has the opportunity and the power to do justice in this case. The maxim of stare decisis is not applicable to such an opinion between the immediate parties, or to any case decided upon a misapprehension of evidence. No principle of law is imperilled by the correction of an error in a matter of fact. The stability and certainty of the law are not involved. Just pride of opinion, as well as a proper

sense of duty, must impel a court of justice to correct its error, not to adhere to it. *Shaw* v. *Boston and Worcester Railroad Corporation*, 8 Gray, 45.

To this end, the case should again be submitted to the jury.

NELSON HAM *vs.* CITY OF LEWISTON.

Androscoggin. Opinion June 15, 1900.

Way. Defect. Notice. Negligence. R. S., c. 18, § 80.

The jury gave a verdict for the plaintiff upon these facts:—The plaintiff, a man eighty-two years old, whose sight was somewhat defective, was driving upon one of the streets of the defendant city when his horse became frightened by the noise of steam escaping from a portable steam engine standing within the limits of the street, and used in hoisting materials for the erection of a building, and by reason of his horse being so frightened, the plaintiff was thrown from his carriage and received personal injuries.

Upon motion for new trial the defendant contended that, in view of the plaintiff's age and defective sight, it was negligence for him to drive upon a public street. It did not appear that the plaintiff's infirmities of age or sight contributed to his injuries. *Held;* that the motion cannot be sustained for that reason.

The presiding justice instructed the jury, that in determining whether the plaintiff was in the exercise of ordinary care, they should weigh all the circumstances, and that the condition of the plaintiff must be considered, and that he must use the degree of care for a man in his condition—such a degree of care as men who are near-sighted, as he was, being ordinarily prudent, would use under the same circumstances. *Held;* that the instruction was correct.

To prove that the defendant city had twenty-four hours' notice of the defect which caused the plaintiff's injury, the plaintiff relied upon an admission that an alderman of the city had at least twenty-four hours' notice that the steam engine and boiler were in the street, and apparently used in hoisting material into the building.

Held; that the jury was justified in finding that the city had actual notice that the engine was in the street for the purpose of being operated, and that such notice included the common knowledge that such an engine in its ordinary and proper operations would emit steam, thereby producing noise; and that, therefore, it had actual notice of the defect which caused the plaintiff's injuries.

On Motion and Exceptions by Defendant.

The case appears in the opinion.

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

H. E. Holmes, for defendant.

The court should not have left the question of what the alderman had notice of under the admission to the jury; but should have instructed them as a matter of law, the facts being admitted. When the facts in a case are found by uncontradicted and unquestioned testimony, or by agreement, or by special verdict, their legal effect is a matter of law to be determined by the court. *Todd* v. *Whitney*, 27 Maine, 480; *Witham* v. *Portland*, 72 Maine, 539.

The verdict is against the evidence,—the weight of evidence showing that the defect, if there was any, in the highway, was not the sole cause of the plaintiff's injury, other causes acting, the principal one being the plaintiff's contributory negligence.

The particular defect which caused the injury, and upon which the plaintiff relied, was the noise made by the blowing off of steam. The simple existence there of the boiler and engine was not the defect and was not claimed to be a defect. But it was not admitted that Dr. White, or any other municipal officer, had twenty-four hours' actual notice of the noise, which the plaintiff claimed frightened his horse, and which, he says, was the particular defect.

Counsel cited: *Priest* v. *Groton*, 103 Mass. 540; *Littlefield* v. *Webster*, 90 Maine, 213, and cases; *Pendleton* v. *Northport*, 80 Maine, 598; *Hurley* v. *Bowdoinham*, 88 Maine, 293; *Spaulding* v. *Winslow*, 74 Maine, 529.

Sitting: Wiswell, C. J., Emery, Haskell, Whitehouse, Strout, Fogler, JJ.

Fogler, J. The plaintiff brings this action to recover damages for personal injuries caused by an alleged defect in Main street in the city of Lewiston. The verdict was for the plaintiff and the defendant brings the case here upon a motion for new trial and

upon exceptions to instructions given to the jury by the presiding justice.

At the time when the accident occurred to the plaintiff there was standing, and had been standing for several weeks within the limits of Main street, and opposite a building in process of erection, a portable steam engine and boiler used for hoisting materials for the construction of said building. The shoe or planking, upon which the boiler and engine rested, extended from the outer curbing of the sidewalk into the paved and traveled part of the street a distance of about fourteen feet. On the day of the accident, the plaintiff, a man nearly eighty-three years of age and whose eyesight was somewhat defective, and whose physical strength was more or less impaired by age, was driving alone along Main street on his way to a certain store on Lisbon street which is at a right angle, or nearly so, to Main street. He was seated in an old-fashioned Concord wagon drawn by a horse ordinarily gentle and kind. When opposite the said engine and boiler, the plaintiff's horse became frightened by the noise caused by steam escaping from the engine, and started up quickly into a gait described by some of the witnesses as a gallop, and by others as a jumping or broken gait. In turning into Lisbon street the wagon slewed and struck some obstacle, probably a rail of the street railway track, and lurched to such an extent that the plaintiff was thrown or fell from his wagon to the pavement, producing the injuries complained of.

The defendant contends that the plaintiff is not entitled to recover for two reasons.

1. Because the plaintiff was guilty of contributory negligence; and, secondly, because he has not sufficiently proved that the municipal officers, or street commissioner, of the defendant city had twenty-four hours' actual notice of the defect which caused the injury.

The defense does not rely upon any particular act of negligence on the part of the plaintiff, nor upon any failure to conduct himself in any particular respect, with ordinary care, but contends that it was imprudent and negligent for a man of the plaintiff's

years and infirmities to drive a team alone upon the streets of the city. If this latter proposition were correct, it would not constitute contributory negligence unless his age and infirmities contributed to his injury. It appears from the testimony that the plaintiff was vigorous for a man of his age. He testified that, though his eyesight was defective, he could see a team or other obstacle ten rods away. After his horse became frightened he collided with no team or other obstacle. He at no time lost the entire control of his horse. The question of contributory negligence was properly submitted to the jury under, as we think, correct instructions. We cannot say that the determination of the jury upon that point was manifestly wrong.

The defendant excepts to the instruction given to the jury by the presiding justice upon this question of contributory negligence. We discover no error therein. The presiding justice, after stating to the jury the contention of the parties as to the weight which should be given to the fact of the plaintiff's defective sight, instructed them as follows:

"It is for you to say in view of all the circumstances whether Mr. Ham was in the exercise of ordinary care. It is true, however, that the circumstances must be weighed and the condition of the plaintiff must be considered. If a man is near-sighted and has trouble with his eyesight in a place when he is called upon to exercise and use his eyes, where seeing is necessary, he necessarily should use, and must use a greater degree of care than a man whose sight is perfect. But when you come to think of it, it is the same rule after all that I have already given you; he must use the degree of care, the ordinary care, for a man in his condition, such a degree of care as men who are near-sighted, as he was, being ordinarily prudent, would use under the same circumstances." The exceptions on this point must be overruled.

II. By a provision of R. S., ch. 18, § 80, the plaintiff was required, to enable him to recover, to prove that the municipal officers, or street commissioner, of the city of Lewiston had at least twenty-four hours' actual notice, before he received his injuries, of the defect of which he complains. As proof of such notice the

plaintiff relied upon the following admission made by the defendant at the trial: "It is admitted that one of the municipal officers, Dr. Ezra H. White, an alderman of the city of Lewiston, had at least twenty-four hours' notice that the steam engine and boiler were there at the time of the accident and had been for a period of several weeks before, and was apparently used to hoist material into the building." No other testimony as to notice was introduced. The defendant's counsel denies that the foregoing admission proves actual notice to the defendant of the identical defect which caused the plaintiff's injuries. He contends that, while the admission is proof of notice of the fact that the engine and boiler were standing within the limits of the street and apparently used for a certain purpose, it is not sufficient proof of notice of the noise emanating therefrom, which frightened the plaintiff's horse. He relies upon the rule, well settled in this state, that the actual notice required by the statute must be of the identical defect which caused the injury and that notice of a cause which may, or is likely to produce the defect, is not sufficient. *Smyth* v. *Bangor*, 72 Maine, 249; *Littlefield* v. *Webster*, 90 Maine, 213; *Gurney* v. *Rockport*, 93 Maine, 360.

The question whether the alderman had actual notice of the defect which caused the plaintiff's injuries, or only of a cause which produced such defect, was submitted by the presiding justice to the jury, and to this the defendant excepts; and contends that the justice should have instructed the jury as a matter of law, there being no conflict of testimony upon that point, that actual notice of the defect had not been proved. We think the question was properly submitted to the jury. When the testimony is oral (and in the case at bar the admission was oral in character) or the proof of actual notice is circumstantial, the question whether there has been actual notice is for the jury. *Rogers* v. *Shirley*, 74 Maine, 149, citing *Porter* v. *Sevey*, 43 Maine, 519.

We think the jury was not in error in finding for the plaintiff. The admission shows that the defendant city had notice, through its alderman, one of its municipal officers, that the engine and boiler stood within the street limits in close proximity to a building in

process of erection and was apparently used in hoisting materials into such building. We think the jury were justified in finding, as they must have found, that the city had notice that the engine was being used for some purpose, and that such notice included the common knowledge that such an engine in its ordinary and proper operations would emit steam, thereby producing noise; and that therefore it had actual notice of the defect which caused the plaintiff's injuries.

Motion and Exceptions overruled.

BURDICK BERRY *vs.* WALTER ROSS, and another.

Lincoln. Opinion June 15, 1900.

Shipping. Negligence. New Trial.

The owners of tow-boats are not common carriers nor insurers. Those who have the management of such boats are required to exercise reasonable care and caution and maritime skill. The tug is the dominant mind and will of the adventure. The master of the tow has no voice or volition in the construction of the tow or in its management.

It is the duty of the master of the tug to see that the tow is properly constructed, and that the lines are sufficient in quality and in length and securely fastened.

While employed in the waters of the home port of the tug, her officers are bound to know the channel, the shoals, the currents and the state of the tides and all risks and dangers incident to the employment and whether, in the state of the wind and water, it is safe and proper to come in with the tow.

A new trial will not be granted to permit the introduction of cumulative testimony, newly-discovered.

ON MOTION BY DEFENDANTS.

Action on the case for personal injuries sustained by the plaintiff, master of the schooner Ludwig Bill, by reason of the negligence of the captain of the defendants' steam tug, Ralph Ross, in towing the plaintiff's vessel on the fourth day of September, 1897, from Fort Point to Bangor.

Plea, general issue and the following brief statement by way of

special defense: That as a part of the contract of towage entered into between the parties as set out in the plaintiff's writ and declaration, it was understood and agreed between the parties that the Ludwig Bill should be towed astern of the Augustin Palmer by a line attached to the Palmer; that there was some probability that the Augustin Palmer might ground, and if the Palmer should ground, that the Ludwig Bill should sheer off and avoid a collision with the Palmer; that the plaintiff was fully advised as to how his vessel would be towed, of the risk of the Palmer grounding, of the necessity of keeping off his vessel, the Ludwig Bill, and avoiding a collision between the two vessels, and assumed the risks.

The jury returned a verdict for $3539.00 for the plaintiff.

The case is stated in the opinion.

C. E. and A. S. Littlefield, and O. F. Fellows, for plaintiff.

C. F. Woodard, for defendants.

The shortness of the line contributed to the consequences that followed and therefore contributory negligence on the part of the plaintiff.

"There may be cases where the danger about to be incurred is so very obvious that the master of the canal boat may be chargeable with contributory negligence in voluntarily exposing his boat to the peril without objection." *White* v. *Steam Tug Lavergne*, 2 Fed. Rep. 788, 793.

In the case of *Mason* v. *Steam Tug William Murtaugh*, 3 Fed. Rep. 404, it was held that the pilot of a tug showed want of ordinary care in attempting to cross the bay of New York with a boat in tow, while the hatches of such boat are uncovered, and the wind is blowing at the rate of about twenty-one miles an hour; and in the same case it was also held that the acquiescence of the master of the boat, who had had a long experience in crossing the bay at all seasons, constituted contributory negligence.

In the case of the *The M. J. Cummings*, 18 Fed. Rep. 178, it was held negligence on the part of the captain or pilot of the tug, to start on a trip with a tow, knowing that the tow was in a measure unseaworthy, that it steered poorly, and that the lake was rough, the wind strong, and the night was fast approaching. And

it was also held, that where the captain and owners of a canal boat and cargo permitted her to be taken as a tow, they having knowledge of all the facts stated, it was contributory negligence on their part.

The danger to be apprehended from too short a line was obvious, that in case the large vessel, the Palmer, should ground, so that her headway would be stopped, the smaller vessel drawing much less water, and so continuing afloat, would keep on and a collision ensue, unless the smaller vessel had room enough after the large vessel stopped to change her course and go out by the large vessel, and so avoid a collision.

This danger was as obvious to the plaintiff himself, and to any person having had experience with vessels and following the sea, as it could have been to the master of the tug. The question involved is not a question of technical or expert knowledge required only in towing vessels, or in the business of running tugs, but must have been a question of common knowledge to all persons familiar with the movement of vessels; and that the question was one of common knowledge to all persons familiar with the movement of vessels is shown in this very case, and by the conduct of the plaintiff's counsel in presenting their case.

The plaintiff himself having acquiesced in the use of the line of such length without a word of remonstrance, protest or suggestion that a longer line would be better, and having it wholly within his own power to have lengthened the line at any time, or to have refused to proceed with a line of such length, and as he could have enforced his refusal by casting the line off, he was guilty of contributory negligence. But the shortness of the tow line was not the cause of the accident. Plaintiff did not use reasonable care and skill to avoid it in the management of his vessel. Newly-discovered testimony is not cumulative (*Strout* v. *Stewart*, 63 Maine, 227; *Warren* v. *Hope*, 6 Maine, 479) "when the newly-discovered evidence relates to confessions or declarations of the other party as to some influential fact unknown to the petitioner at the time of trial, and inconsistent with the proofs adduced and urged by such party."

The plaintiff's leaving his wheel in the crisis was gross negligence. *Jonty Jenks*, 54 Fed. Rep. 1021.

It was contributory negligence on the part of the plaintiff to place himself in the position of peril in the narrow alley way between the rail and the house where he sustained the injuries complained of, and the only place, as the case shows, where he would have sustained any injury. While a person is justified under some circumstances in voluntarily placing himself in a position of danger, as for example in order to save life, or in the performance of a duty, or possibly under some circumstances even to save property, there must be a reasonable relation between the object sought to be attained and the chances of attaining it.

The test here is the same as in other cases: What one would be justified in doing is what a reasonably prudent and careful person would ordinarily do under the same circumstances. *Rexter* v. *Starin*, 73 N. Y. 601.

. . . . For a person engaged in his ordinary affairs, or in the mere protection of property, knowingly and voluntarily to place himself in a position where he is liable to receive a serious injury, is negligence which will preclude a recovery for an injury so received; but when the exposure is for the purpose of saving life, it is not wrongful, and therefore not negligent unless such as to be regarded as either rash or reckless." *Eckert* v. *L. I. R. R. Co.*, 43 N. Y. 505–6.

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

FOGLER, J. This is an action on the case in which the plaintiff sues to recover damages for personal injuries sustained by him through the alleged negligence of the defendant's agent and servant, the master of their steam tug, Ralph Ross.

The plaintiff was the master and owner of the schooner Ludwig Bill, of the burthen of about fifty-nine tons. In the forenoon of September 4th, 1897, the Bill was lying at Fort Point Cove near the mouth of Penobscot River, the plaintiff being on board as master, bound for Bangor, light. The defendant's tug engaged

with the plaintiff to tow his schooner up the river to Bangor; and also engaged to tow to Bangor the large four-masted schooner, Augustin Palmer, coal laden and drawing 20½ feet forward and 21½ feet aft. About noon of that day the tug came alongside the Bill and took a line belonging to that schooner. The plaintiff testifies that the line was eighty fathoms in length and that he so informed Capt. Bennett of the tug. Capt. Bennett testifies that, as he remembers, the plaintiff told him the line was sixty fathoms in length, but he is not positive upon that point. The men on board the Bill payed out the line until orders came from the tug to "belay", when the line on board the Bill was made fast to her port windlass-bitts. The captain of the tug testifies that he did not give the order to belay until he was informed by those on board the Bill that the line was nearly run out. This was denied by the plaintiff and the men of his crew. The length of line payed out was estimated by the plaintiff and his witnesses as from thirty-five to forty fathoms, while Capt. Bennett and other witnesses for the defendant estimated the length to have been forty-five or fifty fathoms. The captain of the tug testifies that, before he started with the Bill in tow, he told the plaintiff that he should tow him astern of the Palmer and that the plaintiff must keep a good look-out, as the Palmer was likely to take bottom going up the river. The plaintiff denies that Capt. Bennett made such statement to him. Each is corroborated to some extent by their witnesses. The tug, with the Bill in tow, proceeded to where the Palmer lay. The end of the tow line upon the tug was then transferred to the Palmer and was made fast to the Palmer's starboard quarter. The tug with her tow then proceeded up the river at the rate of six or seven miles per hour. In the vicinity of Indian Point, a mile or so above Bucksport, there was a shoal in the river. There was testimony, on the part of the plaintiff, tending to show that at that point there was a current which ran diagonally across the river from the easterly to the westerly side. This was denied by the defendants, but it was admitted that the tide would hug the vessel towards the westerly shore. The captain of the tug testified that there was a log in the steamboat wharf at Bucksport which would indicate to

him the depth of water upon the shoal; that if he could see the log, he would know that there was not 21½ feet of water over the shoal; that if he could not see the log, it would indicate that there was that depth of water over the shoal. He testifies that as he, with his tow passed the steamboat wharf, he could see the log and, therefore, knew that there was not 21½ feet of water over the shoal. The tide was then running up at about half flood. Captain Bennett testifies that shortly after leaving Bucksport, he hailed the Bill, through the captain of the Palmer, to the effect that the Palmer would take ground, and that the plaintiff must keep well outside of her to avoid a collision, and that shortly before reaching the shoal he repeated the order to the Bill in the same way. In this he is corroborated by Capt. Haskell, master of the Palmer. The plaintiff testifies that he received only one such order and immediately upon receiving it he put his helm hard down as far as possible, and kept it so as long as he remained at the wheel. The Palmer grounded up on the shoal and stopped. The Bill forged ahead by reason of the momentum which she had acquired; the line by which she was attached to the Palmer became slack and in the water. Neither the captain of the tug nor the captain of the Palmer testified that the plaintiff did not put his helm hard down, but both testified that the Bill did not obey her helm as she ought to have done if her helm was in that position. As the Bill approached the Palmer, her bow was outside of the Palmer, but her stern drifted in towards the Palmer's starboard quarter. When his vessel was near the Palmer, so that a collision seemed inevitable, the plaintiff left his helm, seized a cork fender, and went into the narrow space, a foot and a half or two feet wide between his cabin and his port rail, for the purpose of lowering the fender between his vessel and the Palmer for the purpose of breaking the force of the collision. The plaintiff does not remember whether he succeeded in so placing the fender, but while he was in that position the port quarter of his vessel struck the starboard quarter of the Palmer by which his port rail and several stanchions were crushed in, and the plaintiff was caught between his rail and his cabin, by reason of which one of his legs was so crushed that ampu-

tation was necessary and the bones of the other leg were broken in two places.

The plaintiff contends that such injuries were received through the negligence and want of ordinary care of the master of the tug, in several particulars, the principal of which are first, that the line by which the Bill was attached to the Palmer was of insufficient length considering the nature of the channel and the risks liable to be encountered; that the line should have been seventy fathoms in length, and that if the line had been of sufficient length he would have been farther from the Palmer when the latter grounded, and could undoubtedly have avoided the collision; secondly, that it was negligence to attach the line on his vessel to the port bitts forward and to the starboard quarter of the Palmer; that if the line had been attached to the same side of each vessel he would have been better enabled to keep outside the Palmer; and, thirdly, that it was gross negligence upon the part of the captain of the tug, when he saw the state of the water by his log in the steamboat wharf to proceed with his tow, knowing that the Palmer would inevitably ground upon the shoal, and that he should have waited until the state of the tide was such that there would be sufficient depth of water on the shoal for the Palmer to pass.

In answer to this contention of the plaintiff, the defendants answer that the line by which the Bill was attached to the Palmer belonged on board the Bill and that the plaintiff made no objection to the length of the line put out, nor to the manner in which she was attached to the Palmer; and that the captain of the tug having informed the plaintiff that the Palmer was likely to ground and he must look out, that the plaintiff thereby assumed the risk of the Palmer's grounding and of all the consequences incident thereto; that the plaintiff was guilty of contributory negligence in not keeping his schooner outside of the Palmer, especially when so ordered by the captain of the tug; and that the plaintiff was guilty of further contributory negligence by placing himself voluntarily in a position where he would be likely to be injured if the vessels collided.

The owners of tow-boats are not common carriers, nor are they

insurers, and the law of those relations have no application here. The highest possible degree of skill and care are not required of them. Those who have the management of such boats are bound to bring to the performance of the duty which they assume, responsible skill and care, and to exercise them in everything relating to the work until it is accomplished. They are required to exercise reasonable care and caution and maritime skill, and, if these are neglected and disaster comes, the tow boat must be visited with the consequences. The tug is the dominant mind and will in the adventure. The master of the tow has no voice or volition in the construction of the tow or in its management. It is the duty of the master of the tug, as the captains of the tow have no voice in making up the tow, to see that it is properly constructed and that the lines are sufficient in quality and length and securely fastened. This is his duty whether the tug furnish the line to the tow or the tow to the tug. In the nature of the employment, the officers of the tug can tell better than the man in the tow what sort of a line is required to secure the vessels in tow and to keep them in position. While employed in the waters of the home port of the tug, her officers are bound to know the channel, the shoals, the currents and the state of the tide and all risks and dangers incident to the employment, and whether in the state of the wind and water it is safe and proper to make the attempt to come in with her tow. If it is not, she should advise waiting for a more favorable condition of things. *The Margaret*, 94 U. S. 494; *The Syracuse*, 12 Wall. 167; *The Quickstep*, 9 Wall. 665; *The James Gray* v. *The John Fraser*, 21 How. 184; *Sproul* v. *Hemingway*, 14 Pick. 6.

Applying these principles of law to the testimony in this case, we cannot say that the verdict of the jury was manifestly wrong or the result of bias, prejudice or mistake. As no exceptions to the rulings or instructions of the presiding justice are taken, we must assume that the case was submitted to the jury under proper instructions. The testimony in several particulars is conflicting. The jury saw and heard the witnesses and decided the case, and their finding must stand.

The defendants contend strenuously that the plaintiff in leaving

his wheel and placing himself in the narrow space, between his cabin and the rail of his vessel, was guilty of contributory negligence. This must be considered in the light of the circumstances and exigencies of the case. When he left his wheel the two vessels were but a short distance apart. Captain Haskell of the Palmer testifies that the distance was about fifty feet. While the bow of the plaintiff's vessel was outside the Palmer, his stern was being drawn by the current or tide toward the Palmer's starboard quarter. It is not probable that a collision could have been averted by the use of the rudder. Although, as the jury found, the plaintiff was placed in this dangerous position through the negligence of the master of the tug, it was still his duty to do everything that he reasonably could to save the two vessels from injury. Had he failed to do this, he would have been guilty of negligence and responsible for the consequences. He had no time for calm deliberation, but must act, if he acted at all, at once. Seemingly the only thing he could do was to place a fender between the two vessels and thereby diminish the force of the collision. The use of a fender, if practicable, is usual in case of an impending collision between vessels. This the plaintiff, in the emergency in which he was placed, undertook to do. Was his action justified under the circumstances? The jury answered that question in the affirmative and we do not feel justified in reversing their decision.

We do not think the motion of the defendants for a new trial by reason of newly-discovered testimony can be sustained. The testimony upon which the defendants rely in this respect is that of Joseph H. Gilley and his wife, Lydia J. Gilley, to whose house the plaintiff was immediately taken after the accident, where he remained until he was able to be removed some four months afterwards. The fact that the plaintiff was at the house of these witnesses was known to the defendants, as one of them visited him there. We think by the exercise of due diligence the defendants might have discovered the testimony of these witnesses before the trial.

It is well settled that a party will not be granted a new trial on account of newly-discovered testimony when such testimony was

known to him, or by the use of due diligence might have become known to him.

"A new trial, to permit newly-discovered evidence to be introduced, should only be granted when such testimony is not cumulative and when there is reason to believe that the verdict would have been different if it had been before the jury." *Handley* v. *Call*, 30 Maine, 19; *Ham* v. *Ham*, 39 Maine, 263.

Cumulative evidence is additional evidence of the same kind, to the same point. *Glidden* v. *Dunlap*, 28 Maine, 379; *McLaughlin* v. *Doane*, 56 Maine, 290; *Parker* v. *Hardy*, 24 Pick. 246.

The testimony of Mr. and Mrs. Gilley, which the defendants claim was newly-discovered, was to the effect that the plaintiff while at their house made certain statements or admissions, which it is claimed were inconsistent with his right to recover in this suit. This testimony was cumulative, as testimony of the same kind and to the same point was introduced at the trial by the defendants. The testimony of these witnesses, upon which the defendants especially rely, is that the plaintiff said in their presence that he did not consider Captain Bennett to blame in the least, that he had no one to blame but himself for the accident. Whether the captain of the tug was in fault, and whether the plaintiff was to blame, is not dependent upon any opinion of either of those parties, but is to be determined by the facts proved.

Motions overruled.

GRANT OAKMAN *vs.* JAMES F. BELDEN, and another.

Kennebec. Opinion June 30, 1900.

Husband and Wife. Action. Alienation. Evidence.

A parent may not with hostile, wicked or malicious intent break up the relations between his daughter and her husband. He may not do this simply because he is displeased with the marriage, or because it was against his will, or because he wishes the marriage relation to continue no longer. But a parent may advise his daughter in good faith and for her good, to leave her husband, if he, on reasonable grounds believes that the further continuance of the marriage relation tends to injure her health, or to destroy her peace of mind, so that she would be justified in leaving him. A parent may, in such case, persuade his daughter. He may use proper and reasonable arguments. Whether the motive was proper or improper is always to be considered. Whether the persuasion or the argument is proper and reasonable, under the conditions presented to the parent's mind, is also always to be considered. It may turn out that the parent acted upon mistaken premises or upon false information, or his advice and his interference may have been unfortunate;—still, if he acts in good faith, for the daughter's good, upon reasonable grounds of belief, he is not liable to the husband.

In an action where a husband sought to recover from his wife's parents damages for the alienation of her affections, the court gave an instruction to the jury, in substance, that, "if the separation of the plaintiff's wife from him was the result of the active interference of the defendants, either by threats, persuasion or arguments, then the defendants were liable." *Held;* that the instruction placed upon the defendants a much more grievous burden of justification than parents ought to be compelled to bear, and is erroneous.

ON MOTIONS AND EXCEPTIONS BY DEFENDANTS.

Action on the case for alienating the affections of the plaintiff's wife by the defendants, who are her parents. The plea was the general issue. The action was tried to a jury in this court below at the October term of 1899, in Kennebec County, when the jury returned a verdict of $1154.00 for the plaintiff.

The case appears in the opinion.

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

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

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

SAVAGE, J. Action on the case by husband for the alienation of the affections of his wife by her parents, who are the defendants. The plaintiff obtained a verdict.

The plaintiff claims that the defendants unjustifiably interfered in his domestic affairs, and with intent to break up the harmonious and affectionate relations existing between him and his wife, wrongfully enticed, advised and persuaded her to leave him, which she did. The defendants, on the other hand, deny that they persuaded their daughter to leave her husband, and they claim, in addition, that such was the daughter's age and condition of health, and such was the plaintiff's cruel and abusive conduct towards her, endangering her health and destroying her peace of mind, they were justified in doing all that the evidence for the plaintiff tends to show that they did, even assuming it to be true. It is admitted that the marriage was clandestine, and against the will of the defendants, and that the wife returned to their home, not later than three weeks after the marriage, and has since remained there.

The jury were instructed that if the separation of the plaintiff's wife from him "was the result of the active interference of the parents," if they "put in their oar," and if "the wife would have gone back if it had not been for their interference, either by threats, persuasions or arguments, ... they have done him a wrong, and he is entitled to compensation for that wrong." To this instruction the defendants except, and we are now to inquire whether this instruction was correct in view of the evidence and the contentions of the parties.

Whoever wrongfully interferes in the relations of husband and wife, and entices the wife to leave the husband, is liable to him in damages. While a stranger may, without liability, harbor a wife who has left her husband, he may not persuade her to leave him, or not to return to him. Though she may have just grounds for a separation, yet she may choose to return, and a stranger has no right to intermeddle, and if he does so voluntarily, he must answer

the consequences. *Modisett* v. *McPike*, 74 Mo. 636. But it is universally conceded that a parent stands on different ground. Though the wife has gone out from the parental home, and has joined her husband "for better, for worse," and though she owes to him marital allegiance, and he possesses the first and the superior right to her affection and comfort and society, it is nevertheless true that the parental relation is not ended, nor has parental affection and duty ended. A husband may be false to his marital obligations, he may be immoral and indecent, he may be grossly cruel and abusive, he may become a confirmed drunkard, his conduct towards her may be such as to endanger health, and entirely destroy peace and comfort, so that she may properly leave him. In such case to whom shall she fly, if not to her parents? And from whom shall she seek advice if not from her parents? And such advice may, we think, be enforced by reasonable arguments. A parent may not with hostile, wicked or malicious intent break up the relations between his daughter and her husband. He may not do this simply because he is displeased with the marriage, or because it was against his will, or because he wishes the marriage relation to continue no longer. But a parent may advise his daughter, in good faith, and for her good, to leave her husband, if he, on reasonable grounds, believes that the further continuance of the marriage relation tends to injure her health, or to destroy her peace of mind, so that she would be justified in leaving him. A parent may, in such case, persuade his daughter. He may use proper and reasonable arguments, drawn, it may be, from his greater knowledge and wider experience. Whether the motive was proper or improper is always to be considered. Whether the persuasion or the argument is proper and reasonable, under the conditions presented to the parent's mind, is also always to be considered. It may turn out that the parent acted upon mistaken premises, or upon false information, or his advice and his interference may have been unfortunate; still, we repeat, if he acts in good faith, for the daughter's good, upon reasonable grounds of belief, he is not liable to the husband.

This conclusion is supported by the authorities. Chancellor Kent in *Hutcheson* v. *Peck*, 5 Johns. 196, said: "A father's

house is always open to his children; and whether they be married or unmarried, it is still to them a refuge from evil, and a consolation in distress. Natural affection establishes and consecrates this asylum. . . . . I should require, therefore, more proof to sustain the action against the father, than against a stranger. It ought to appear either that he detains the wife against her will, or that he entices her away from her husband from improper motives. Bad or unworthy motives cannot be presumed. They ought to be positively shown, or necessarily deduced from the facts and circumstances detailed. This principle appears to me to preserve, in due dependence upon each other, and to maintain in harmony, the equally strong and sacred interests of the parent and the husband. The quo animo ought then, in this case, to have been made the test of inquiry and the rule of decision."

In the well considered opinion in *Bennett* v. *Smith*, 21 Barb. 439, Strong, J., for the court, said: "When the conduct of a husband is such as to endanger the personal safety of his wife, or is so immoral and indecent as to render him grossly unfit for her society, so much so that she would be justified in abandoning him, her parents ought, and I have no doubt have the right, not only to receive her into, and allow her the comforts of their house, which even a stranger may do in such a case, but also to advise her to come and remain there. . . . And the same doctrine is applicable, in my judgment, to a case where the advice is given by a parent in the honest belief, justified by information received by him, that such circumstances exist, although the information may subsequently prove to have been unfounded. It is enough for his protection that he was warranted in such belief, and acted from pure motives." *White* v. *Ross*, 47 Mich. 172; *Tasker* v. *Stanley*, 153 Mass. 148.

It was held in *Holtz* v. *Dick*, 42 Ohio St. 23, that "if the motive of the intervening person (a parent) was pure and the appearances seemed to indicate necessity for interference, there can be no recovery, though no occasion for interference really existed." "Much will be forgiven the parents of a wife," the court say, "who honestly interfere in her behalf, though the interference was

wholly unnecessary, and may have been detrimental to her interest and happiness as well as that of her husband; still when the motive was, not the protection of the wife, but hatred and ill-will of the husband, it is no answer to his action that the offenders were his wife's parents." *Rabe* v. *Hanna*, 5 Hammond (O.) 530; *Gernerd* v. *Gernerd*, 185 Pa. St. 233; *Lockwood* v. *Lockwood*, 67 Minn. 476.

Some authorities seem to hold that the intent alone of the parent is decisive. In a recent Mississippi case it is said, "the question must always be, was the father moved by malice, or was he moved by proper parental motives for the welfare and happiness of his child? In his advice, and in his action, he may have erred as to the wisest and best course to be taken in dealing with a question so delicate and so difficult, but he is entitled in every case to have twelve men pass upon the integrity of his intentions." *Tucker* v. *Tucker*, 74 Miss. 93; 32 L. R. A. 623.

"The action for seducing the wife away from the husband is by no means confined to the case of improper and adulterous relations; but it extends to all cases of wrongful interference in the family affairs of others whereby the wife is induced to leave the husband. . . . . If, however, the interference is by the parents of the wife, or an assumption that the wife is ill-treated to an extent that justifies her in withdrawing from her husband's society and control, it may reasonably be presumed that they have acted with commendable motives, and a clear case of want of justification may be justly required to be shown before they should be held responsible." Cooley on Torts, 2nd Ed. p. 264.

After citing with approval the words of Chancellor Kent, in *Hutcheson* v. *Peck*, supra, Mr. Schouler says:—"But this does not justify even a parent in hostile interference against the husband; and the father must give up his daughter whenever she wishes to return, unless the proper tribunal has decided otherwise; though he might, we suppose, by fair arguments, urged to promote her true good, seek to persuade her from returning. The legal doctrine seems to be this, that honest motives may shield a parent from the consequences of indiscretion, while adding nothing to the right of actual control; the intent with which the parent acted being the

material point rather than the justice of the interference." Schouler's Domestic Relations, 3d Ed. § 41.

In the instruction complained of in the case at bar, the jury were told in substance, that if the separation of plaintiff's wife from him was the result of the active interference of the defendants, either by threats, persuasion or arguments, then the defendants were liable. This instruction, unqualified as it was, was erroneous, and placed upon the defendants a much more grievous burden of justification than parents in such cases ought to be compelled to bear.

It is unnecessary to consider the remaining exceptions further than to say that we perceive no error in the rulings complained of.

Exceptions sustained.

SKOWHEGAN WATER POWER COMPANY, and others, in equity,

vs.

LEVI W. WESTON, and others.

Somerset. Opinion July 10, 1900.

Waters. Deeds. Reservations. Equity.

Where there are two or more natural channels in a river, the respective rights of the riparian owners upon each of such channels, independent of grant, contract, statute or prescription, are well settled. The riparian owners upon each of such channels are entitled to have flow through their respective channels so much of the water of the river as would naturally flow there, and no more. The owners upon one channel can not lawfully, by widening or deepening their channel or by other means, cause a greater proportion of the water to flow through such channel than otherwise would. But if the natural flow through one channel is checked by dams or otherwise, and the flow of water through another channel is thereby increased, the riparian owners upon such other channel can lawfully make use of this extra flow. They can lawfully use all the water that nature or the acts of other parties send to them.

The Kennebec River at Skowhegan is divided into two channels by an island known as Skowhegan Island, and the island itself is again divided by a third channel which extends across the island near its north end, in a northeasterly direction, and substantially at right angles with the general course of the other two channels. These three channels are known as the northern, southern and middle channels.

The defendants are the owners of the northern part of this island, including that portion through which the water of the middle channel flows, together with the land upon both sides thereof, having acquired title thereto, by mesne conveyances, under an original deed in which the land conveyed, the north portion of the island, was described by metes and bounds.

Held; that the defendants acquired under this deed, excluding from consideration for the moment certain reservations therein, the ordinary rights of riparian owners; that such rights were acquired by them by becoming the owners of the soil through which the water flowed; that the grant was not a water right, nor of land with specified water rights, but of land with such water rights as go with the soil.

In this original deed, the grantor, who was the owner of substantially the whole of the island together with a tract of land upon the south shore of the southern channel, opposite the southeastern portion of the island, made various reservations for himself, his heirs and assigns, the important portions of which are as follows: The right "at all times to enjoy the free and unobstructed use of the water which shall run or be turned into the southern channel of Kennebec River at said island." Also, "the right to erect and maintain a dam or dams upon the channel or sluiceway in which said Weston's mills stand, (the middle channel) in order to save the water for the use of the mills upon the said southern channel, whenever the said Weston, his heirs or assigns, shall cease or omit to maintain dams sufficient for that purpose." Also, "the right to join a dam which may hereafter be erected to the north part of said island, and the same to repair, rebuild and maintain forever." Other reservations contained in the deed are not important in the determination of the questions involved. The defendants have acquired their title under this deed and their rights and privileges are subject to the reservations therein contained. The complainants claimed to have acquired all the rights and privileges reserved by the grantor in his deed to himself and his heirs and assigns.

Held; that the language used in the first reservation, "the free and unobstructed use of the water which shall run or be turned into the southern channel" means and is equivalent to, "the natural flow of the water that may run or be turned" into that channel: That by virtue of this reservation, those claiming under that deed are deprived of certain rights which as upper riparian owners upon the southern channel they would otherwise have had. But that there is nothing in the first reservation which deprives the owners of the middle channel of the use of all the water that naturally flows through, or is turned into their channel by dams upon, the other channels:

That the object and intent of the second reservation was to prevent the waste of water through the middle channel, not its use; that it does not prevent, and was not intended to prevent, the use by those claiming under that deed of any water that might be used in its flow through this channel, so long as the capacity of that channel is not improperly increased; and that the plaintiffs are not entitled to the relief prayed for, that the defendants may be restrained from interfering to prevent the erection by the plaintiffs of a dam across this

middle channel, because it is not claimed that any water is wasted through this channel or that the dams of the owners are insufficient to prevent such waste:

That the allegation in the bill that the defendants "by using new, larger and additional water wheels, are about to increase greatly the amount of water used therein beyond what they are entitled to, and thereby deprive the plaintiffs of a large portion of the water which they are entitled to have flow through said middle channel," does not entitle the plaintiffs to the relief prayed for, because the defendants, having the ordinary rights of riparian owners, subject only to the limitation mentioned in the second reservation, have the right to use any of the water that may naturally flow, or be caused by the acts of others to flow, through this channel, and to obtain the most advantageous use of this water for the development of power, they may employ the most improved water wheels and mechanical devices:

But that the allegation that the defendants were contemplating increasing the flow of water through the middle channel "by enlarging and deepening said sluiceway," to the injury of the complainant, states a cause of equitable relief:

That the truth of this allegation is sufficiently shown by the following admission made by the defendants at the hearing, in connection with the testimony that was being introduced as to excavations that had been made and as to the effect of such excavations in causing an increased flow of water: "It is admitted that what has been done by the defendants and what they propose to do, did have the effect and would have the effect to increase the flow of water in that channel beyond prior conditions:"

That the defendant cannot lawfully do this as against the owners upon either of the other channels, who would thereby be deprived of the flow through their channel of the quantity of water they were entitled to. And that as to this ground of relief, it makes no difference whether or not these complainants have succeeded to any of the rights and privileges reserved in the deed above referred to, so long as they are owners upon either of the other channels and entitled to the ordinary riparian rights of such owners: That the acts contemplated by the defendants in this respect should be restrained by injunction:

That another prayer of the bill, asking the court to determine the quantity of water which the defendants are entitled to have flow through the middle channel, and to apportion between the parties the quantity of water which they are entitled to have flow through their respective channels, can not be granted, such an apportionment having been already made by nature, except to the extent that the defendants have already increased the capacity of the middle channel by excavations, as shown by the admission above referred to:

That on account of this fact it will be necessary for the tribunal, which the parties have agreed upon, to determine the amount of such increased flow of water through this channel as has already been accomplished, and the method of preventing in the future the use by the owners of the middle channel of

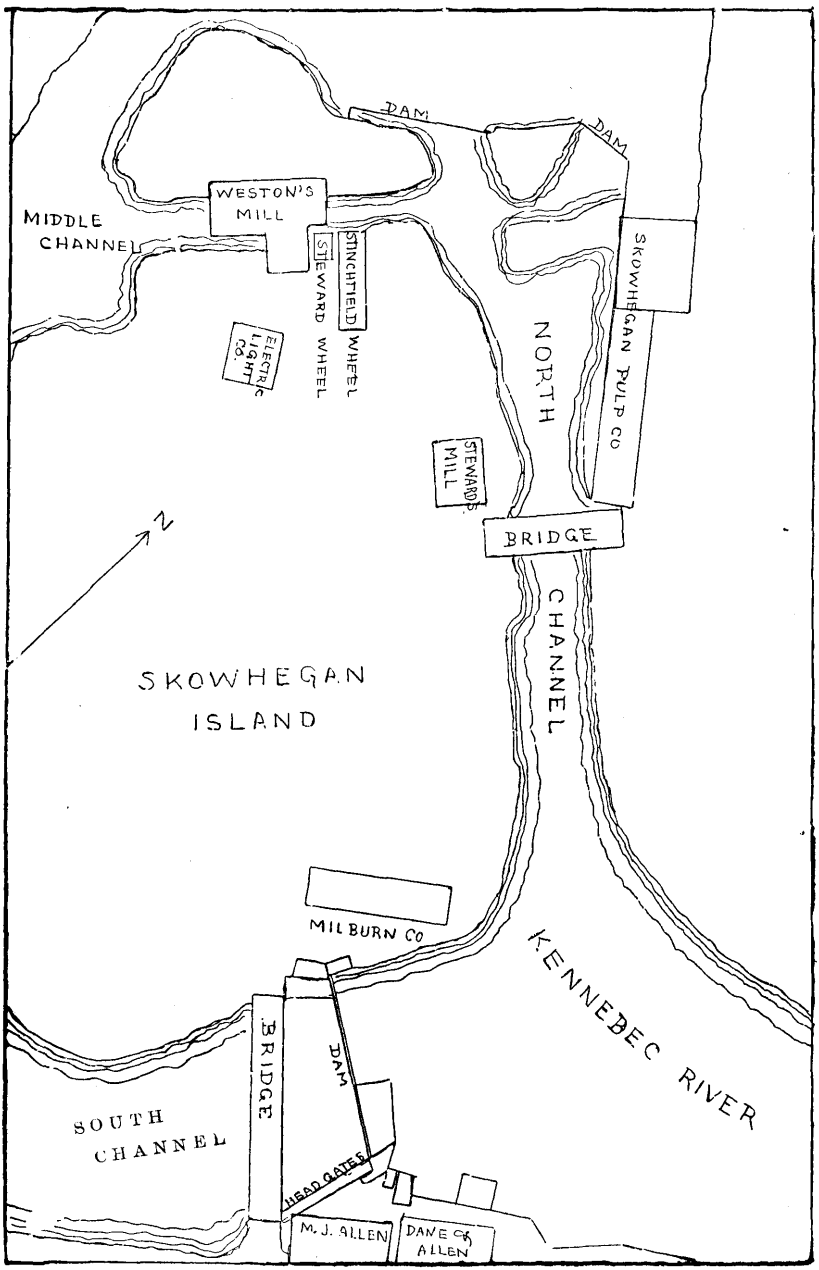
this increased amount of water, which should be restrained by injunction, as well as to determine the terms, in other respects of the permanent injunction to be granted in accordance with the opinion.

On Report.

Bill in equity, in which the plaintiffs allege, in substance, that they are the owners of the water power in the northern and southern channels of the Kennebec river, at Skowhegan; that the defendants' rights come wholly from the deed of James Bridge and are subject to its reservations; that they hold title under James Bridge to the benefit of those reservations, principally to all the water running in the southern channel and the right to erect a dam in the middle channel to preserve that right; that the defendants have the right to use only such quantity of water as was needed in running the mills in the middle channel in 1806, at the date of the Bridge deed; that the defendants are about to unlawfully enlarge the middle channel and use an unlawful amount of water; that such use would cause the plaintiffs irreparable injury. Wherefore, to prevent a multiplicity of suits they pray for a determination of the respective water rights of all the parties, an equitable apportionment of the water at all stages, a complete adjustment of all their respective rights, an injunction to prevent unlawful use and to restrain defendants from preventing the erection of a dam on the middle channel by the plaintiffs to preserve the water belonging to the southern channel and to prevent the contemplated deepening of the middle channel.

The answer, in substance, alleged that the southern channel begins below the inlet of the middle channel. It was admitted that defendants hold their title under and subject to the reservations of the Bridge deed. The title of the plaintiffs to claim under those reservations was denied. Denial was made of the alleged right to now erect a dam in the middle channel. It was asserted that defendants have a right to use all of the water that comes into their channel. It was denied that the channel is about to be unlawfully enlarged. Other facts and positions asserted in the bill and answer appear in the opinion of the court.

The case is stated in the opinion.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SOUTH CHANNEL
HEAD GATES
M. J. ALLEN
DANE & ALLEN

J. W. Symonds, D. W. Snow, C. S. Cook and H. L. Hutchinson; L. C. Cornish; A. K. Butler; and E. N. Merrill, for plaintiffs.

H. M. Heath and C. L. Andrews; S. J. and L. L. Walton; E. F. Danforth and S. W. Gould; Forrest Goodwin; and Turner Buswell, with them, for defendants.

Mr. Heath submitted an elaborate argument on the merits, and *Messrs. Walton & Walton* filed a brief on the questions of title.

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

WISWELL, C. J. The Kennebec River at Skowhegan is divided into two channels by an island known as Skowhegan Island, and the island itself is again divided by a third channel which extends across the island near its north end, in a northeasterly direction, and substantially at right angles with the general course of the other two channels. These three channels are known and will be spoken of herein, as the northern, southern and middle channels. All of these channels are capable of producing, and at the present time are used for the production of, water-power of considerable value and extent. The situation is such that the water which flows through either of these channels is not, and perhaps can not be, used for the production of power in either of the others.

The original complainants allege that they are the owners of the mills and privileges on the southern channel; the Skowhegan Pulp Company, admitted as a party plaintiff upon its own motion subsequent to the filing of the bill, is the owner of a power and privilege on the north channel; certain of the defendants are the owners of the middle channel and of the land upon both sides thereof; other defendants were made parties for reasons not necessary to be stated here.

The purposes of the bill are to obtain an apportionment of the flow of water which these respective riparian owners are entitled to, and also to restrain the defendants from increasing the capacity of the middle channel by blasting, making excavations and otherwise.

The hearing below proceeded for a while upon the idea that a final decree would be made by the sitting justice, but after a great amount of testimony had been introduced, it was deemed advisable, and the parties accordingly agreed, to report the case to the law court, for this court to settle the respective rights of the parties. It was also agreed that if the bill should be sustained, a further hearing should be had before a tribunal constituted by agreement of the parties, to determine all of the details of a final decree, in accordance with the opinion of the court.

In view of the stipulation of the parties, it will not be necessary for the court at this time to consider any controverted questions of fact involved, because there are sufficient facts admitted or undisputed to enable the court to settle the rules of law applicable to the contentions of the parties, and to determine the respective rights of the parties according to their contentions. Nor will it be necessary in this opinion to consider the title of the complainants, about which there is some controversy and in relation to which a great number of deeds have been introduced in evidence, as it is probable that our conclusions will render the dispute as to title unimportant. For the purposes of this opinion we will assume that the ownership of the complainants is as alleged in their bill. If at the subsequent hearing there should still be a controversy in this respect, or if it should appear at that time that there are others who should be made parties, these questions can then be determined, and amendments allowed and made as may be necessary before the final decree.

Independent of grant, contract, statute or prescription, the rights of these respective riparian owners are well settled in accordance with the elementary principles which were very concisely and clearly stated in *Warren* v. *Westbrook Mfg. Co.*, 86 Maine, 32. The riparian owners upon each of these channels are entitled to have flow through their respective channels, "so much of the water of the river as would naturally flow there and no more." "As between the channels, neither party can lawfully do anything by sheer dam, or by widening or deepening his channel, or by any other means, to cause a greater proportion of the water to flow

through his channel." "At the same time, if either party checks the natural flow through his own channel by dams, closed gates or otherwise, and thereby increases beyond nature the flow of water through the other channel, the other party on that other channel can lawfully make use of such extra flow. He can lawfully use all the water that nature or other parties send to him."

At the present time there is a dam upon each of these three channels, and thereby the water of the whole river is to some extent held back and accumulated for the purpose of obtaining a greater head. These riparian owners upon each channel, still considering only their rights as such, have the right to use so much of the accumulated water as would naturally flow through such channel, but the owners of one channel can not increase the capacity of their channel by enlarging it and thereby cause more of the accumulated water to flow through such channel, and less through the other channels, than otherwise would. Such are clearly the rights of these riparian owners, unaffected by any other consideration.

It then becomes necessary to consider how and to what extent, if at all, these rights have been modified by grant or otherwise. In the year 1806 James Bridge, it is admitted, was the owner of substantially the whole of Skowhegan Island together with a tract of land upon the south shore of the southern channel opposite the southeastern portion of the island. On October 29, 1806, he conveyed to William Weston, the predecessor in title of such of these defendants as are now owners upon the middle channel, the northern portion of the island. The description of the land conveyed was as follows: "All my right, title, interest and claim in and to a certain portion or parcel of Skowhegan Island situate in said Canaan, which parcel of said island lies on both sides of the channel or sluice-way in which said Weston's saw mills stand, and is bounded as follows, viz: Southeasterly by a line drawn across said island in a direction south, forty-four degrees west, and north forty-four degrees east, which line shall be distant three rods and no more southerly from the middle of the southeast end of the old Millhouse as the same stood in the month of July last; and bounded on all other sides by the waters of the Kennebec river;

with the buildings thereon and the privileges and appurtenances thereto belonging."

This deed, excluding from consideration for the moment the reservations, made the grantee the owner of the fee of all that portion of the island north of the described line, including the middle channel and the land upon both sides of it. So far, the water rights of the grantee under this deed were those of a riparian owner. They were not acquired by him by a grant of water rights, but by becoming the owner of the soil through which the water flowed. "Water rights acquired by grant, and not by ownership of the soil through which the water flows, depend upon the intention of the parties as expressed in the deed taken in connection with their situation and the subject matter of their transaction at the time of the conveyance." *Gray* v. *Saco Water Power Co.*, 85 Maine, 526. But that is not this case, as we have already seen. The grantee under this deed acquired the ordinary rights of a riparian proprietor. *Ashley* v. *Pease*, 18 Pick. 268; *Tourtellot* v. *Phelps*, 4 Gray, 370; *Hines* v. *Robinson*, 57 Maine, 324; *Whitney* v. *Wheeler Cotton Mills*, 151 Mass. 396.

The Bridge deed was a grant of land on a channel, on which mills were actually situated, the soil described by complete boundaries was the principal subject of the grant, the further words of description identified the grant of the soil and in no sense referred to the water rights. The grant was not of water rights, nor of land with specified and water rights, but of land with such water rights as go with the soil. And by this deed of the north portion of the island, bounded upon all sides, except upon the southeast, by the waters of the Kennebec River, the grantee also acquired the ordinary rights of a riparian owner upon the other two channels.

But this deed was subject to the following conditions and reservations:

(1.) "The said Bridge reserves to himself, his heirs and assigns the right to erect and remove at pleasure, mills and mill-dams upon the southern and eastern side of said island, and at all times to enjoy the free and unobstructed use of the water which shall

run or be turned into the southern channel of Kennebec River at said island."

(2.) "The said Bridge also reserves to himself, his heirs and assigns, the right to erect and maintain a dam or dams upon the channel or sluice-way in which said Weston's mills stand, in order to save the water for the use of the mills upon the said southern channel, whenever the said Weston, his heirs or assigns, shall cease or omit to maintain dams sufficient for that purpose."

(3.) "The said Bridge further reserves to himself, his heirs and assigns, the right to join a dam which may hereafter be erected, to the north part of said island, and the same to repair, rebuild and maintain forever, together with the right to pass and repass over said island with horses and teams and on foot at pleasure."

(4.) "And the said Bridge doth also reserve for himself, his heirs and assigns, the right and privilege, notwithstanding this conveyance, to do everything and anything which may be found convenient or advantageous for the mills and mill privileges in the aforesaid southern channel, and not injurious to the working said Weston's mills or privileges in the channel which crosses said island, and if any damage shall accrue to said Weston's mills or privileges aforesaid by erecting a dam over the northern channel, the said Weston shall have a right to recover the same of those who may erect the same dam." The foregoing reservations are numbered by us for convenience in referring to them.

The complainants allege that by virtue of various mesne conveyances they have become the owners of the mills and privileges on the southern channel, with all the rights and privileges reserved by James Bridge to himself, his heirs and assigns under and by virtue of the deed above referred to; and it is admitted that those of the defendants who are owners upon the middle channel have acquired their ownership by mesne conveyances from Weston, and that their rights and privileges are subject to the reservations contained in this deed.

The complainants' claim is that, by reason of these reservations, Weston and those that now claim under him, "were and are

entitled to the use of so much of the water flowing naturally through said sluice-way (the middle channel) as was necessary to operate the mill or mills upon said sluice-way at the date of said deed, or mills using the same quantity of water and no more; that the use of all the water in excess of said quantity which might flow or be turned into said southern channel, was expressly reserved under the provisions of said deed to said James Bridge and his heirs and assigns forever, and now of right belongs to the plaintiffs."

With respect to the question of the construction of these reservations, it is contended by the defendants, among other things, that the southern channel does not commence at the north end of the island, but only commences below the entrance to the middle channel, and that consequently the language of the reservations does not apply to the water which flows or is turned into that part of the river southwest of the island, but above the inlet of the middle channel. We do not think that this contention as to the place of commencement of the "southern channel," as the expression is used in the deed, can be sustained; but in our view of the proper construction of these reservations, this question is unimportant, and we will assume that the southern channel commences at the head of the island where the river is divided by the island into two branches.

With this assumption, can the plaintiffs' contention be sustained? We think not. By the first reservation Bridge reserved, among other things, the right "at all times to enjoy the free and unobstructed use of the water which shall run or be turned into the southern channel of Kennebec river at said island," for the use unquestionably of the mills and mill-dams which he contemplated erecting upon the southern and eastern side of the island and the land opposite, and which he had a right to erect, irrespective of the reservation, because he owned the land upon both sides of the channel there. In this connection, it is important to notice the fact that Bridge contemplated at the time of the conveyance, as shown by the deed, that a dam would be built across the northern channel from the main land to the northern end of the island, and

he reserved the right, in the third reservation, "to join a dam which may hereafter be erected, to the north part of said island," which would undoubtedly have the effect of turning more water into the channel south of the island than would otherwise flow there.

Independently of the reservation, the original grantee, under the Bridge deed, became entitled to use all the water that nature or the acts of others upon the other channels, caused to flow in his channel. We do not think that this reservation limited that right. Bridge reserved the right to the free and unobstructed flow, that is the natural flow, of the water that flowed in the southern channel in a state of nature. He foresaw that, if a dam should be built across the northern channel from the north end of the island, the right to join which to the island he reserved, additional water would be turned into the southern channel; consequently he reserved the free and unobstructed flow of such additional water, that is, the natural flow thereof, for the use of mills which were to be built by him below upon the southern channel.

We think that the language used in this reservation, "the free and unobstructed use of the water which shall run or be turned," etc., means and is equivalent to "the natural flow of the water that may run or be turned" into that channel. By virtue of this reservation the grantee was deprived of certain rights which, as an upper riparian owner upon the southern channel, he would have had except for the reservation. Those claiming under that deed, as against the owners of the rights and privileges reserved in the Bridge deed, can do nothing upon the southern channel to impair the free and unobstructed flow of water in that channel, although, as we have seen, were it not for the reservation they would be entitled to all of the rights of an upper riparian owner upon that channel, including the right to make such reasonable use of the water therein as the law allows to upper owners upon a stream.

But we think that there is nothing in the reservations, so far considered, that deprives the owners of the middle channel of the use of all the water that naturally flows through that channel or that is turned therein by dams upon the other channels. The

expression "free and unobstructed use of the water which shall run or be turned," etc., can not mean more than the use of all the water that may naturally flow in that channel either in a state of nature or by reason of the dam upon the other channel contemplated at the time of the grant; and there is nothing in the situation or use of these various water powers, at the time of the grant under consideration, to cause us to enlarge the obvious meaning of the language used.

But, in the deed under consideration, Bridge made another important reservation, viz: "The right to erect and maintain a dam or dams upon the channel or sluice-way in which said Weston's mills stand, in order to save the water for the use of the mills upon the said southern channel, whenever the said Weston, his heirs or assigns, shall cease or omit to maintain dams sufficient for that purpose." Taken literally this reservation would give those claiming thereunder the right to prevent the flow of any water whatever through the middle channel, but such a construction is not claimed by the plaintiffs.

We think that the last clause in this reservation clearly shows the extent of what was intended. Bridge appreciated that without such a right, as was herein reserved, the water power on the southern channel might become of little value if the owners of the middle channel should at any time cease to use the water for the production of power and cease to maintain a dam upon this channel. Under these circumstances the water retained by dams, upon the northern and southern channels, would flow to waste through the middle channel greatly to the detriment of these water powers. To prevent such a waste he reserved what might become a very valuable right. But its object and intent was to prevent the waste of water through that channel, not its use. It was to save water for the use of the mills on the southern channel which would otherwise be put to no use on the middle channel.

It did not prevent, and was not intended to prevent, the use by Weston and those claiming under him of the water that Weston was using at that time, or of any water that might be used in its

flow through this channel, so long as the capacity of that channel was not improperly increased.

By virtue of this reservation, the owners of the mill privileges upon the southern channel, who have acquired the rights reserved in the Bridge deed, are entitled at any time to build and maintain upon the middle channel, when the owners do not themselves do so, a dam of sufficient capacity and height to turn back into the southern channel all water not actually used in the middle channel, taking into consideration the height of the dams upon the other channels, and the level of water that would be retained by such dams in conjunction with a sufficient dam upon this channel. But they are not entitled by such a dam to prevent the flow of so much of the water into that channel as would naturally flow there, so long as the same is put to use in the production of power.

We do not think that the fourth reservation affects any of the questions under consideration. What then are the respective rights of these parties, and how have they been affected by the Bridge deed and its reservations? By that deed Weston became the owner of the land described, including the middle channel and the land upon both sides of it; as such owner of the soil he acquired the ordinary rights of a riparian owner upon the middle channel, subject only to the right reserved by the grantor to build and maintain sufficient dams to prevent the waste of water through this channel, when and if the owner should cease to maintain such dams. As such riparian owner he had the right to use any of the water that might naturally flow, or be caused by the acts of others to flow, through this channel. To obtain the most advantageous use of this water for the development of power he could, and those claiming under him can, employ the most improved water wheels and mechanical devices. They may use all the water that flows through the channel in its natural condition, and use it in such a way as to produce the most beneficial results. But they can not by widening, deepening or straightening this channel increase its capacity to the detriment of the riparian owners upon the other channels.

It is unnecessary to further consider the nature and extent of the

right reserved by Bridge to build and maintain dams upon its middle channel in order to prevent the water therein from flowing to waste, because, although one of the prayers of the bill is that the defendants may be restrained from interfering to prevent the erection by the plaintiffs of a dam across this middle channel, as provided in the deed, we do not understand that it is claimed that any water is wasted through this channel, or that the dams of the owners are insufficient to prevent such waste. Nor is it necessary to further consider the riparian rights of these defendants upon the other channels, as such rights are not in controversy here.

Such being the rights of the owners of the middle channel, what relief are these complainants entitled to in this proceeding? They have alleged that the defendants, "by enlarging and deepening said sluice-way, and by using new, larger and additional water wheels, are about to increase greatly the amount of water used therein beyond what they are entitled to, and thereby deprive the plaintiffs of a large portion of the water which they are entitled to have flow through said southern channel."

The allegation of the use by the defendants of larger and additional water wheels does not, as we have seen, entitle the complainants to relief. This the defendants have a right to do. But the allegation that the defendants are contemplating increasing the flow of water through the middle channel, by enlarging and deepening their channel to the injury of the complainants, states a cause of equitable relief. The truth of this allegation is sufficiently shown for the present purposes by the following admission made at the hearing: "It is admitted that what has been done by the defendants and what they propose to do, did have the effect and would have the effect to increase the flow of water in that channel beyond prior conditions." This admission was made in connection with the testimony that was being introduced as to excavations that had been made, and as to the effect of such excavations in causing an increased flow of water.

This the defendants have no right to do as against the owners upon either of the other channels, who would thereby be deprived of the flow through their channel of the water that they are

entitled to. And, as to this ground of relief, it makes no difference whether or not these complainants have succeeded to any of the rights and privileges reserved by Bridge in his deed to Weston, so long as they are owners upon either of the other channels and entitled to the ordinary riparian rights of such owners. This consideration may do away with a large portion of the controversy as to the plaintiffs' title.

Another prayer of the bill is, that the court will ascertain and determine the quantity of water which the defendants are entitled to use and to have flow through this middle channel, and that provision may be made for apportioning the water of the river between the plaintiffs and the defendants, and for regulating their enjoyment thereof according to their respective rights. We have already stated fully our views in regard to the defendants' rights. So far as an apportionment of the water of the river is concerned, this has already been done by nature, and no relief could be granted, other than that already referred to, were it not for the fact, as shown by the admission, that the capacity of the middle channel has already been increased by the defendants so as to increase the flow of water therein beyond prior conditions.

On this account, it will be necessary for the tribunal, which the parties have agreed upon, to determine the amount of such increase in the flow of the water as has already been accomplished, and the method of preventing in the future the use by the owners of the middle channel of this increased amount of water, as well as to settle and determine the details of the terms of a permanent injunction to be granted in accordance with this opinion.

The owners upon each of these channels are entitled to have flow through such channels so much of the accumulated water as will naturally flow therein, in its natural state and condition, and no more.

Bill sustained and remanded for further hearing and proceedings in accordance with the stipulation of the parties.

ALICE N. HUSSEY *vs.* BENJAMIN W. FISHER.

Kennebec. Opinion July 17, 1900.

Mortgage. Lien. Record. Notice. Law and Equity Act. R. S., c. 73, § 12; c. 90, § 5, cl. 1; Stat. 1893, c. 217, §§ 4, 8.

1. In equity the mortgagee has a lien only on the mortgaged property, which does not become a title until foreclosure perfected without redemption.
2. Payment of the mortgage debt after foreclosure begun but before it is perfected extinguishes the mortgage lien, and the mortgagor or his assignee is then entitled to the possession of the property.
3. The record of a mortgage in the usual form stating the condition of the conveyance is notice to the world that the mortgage grantee had a lien only, which may in fact have been extinguished by performance of the condltion before a recorded foreclosure was actually perfected, even though the recorded foreclosure seemed to have been perfected by lapse of time.

Held; that these equitable principles can be interposed directly in bar of an action at law by a grantee of the mortgagee without other notice than what appears of record.

ON REPORT.

Real action. Plea, general issue, with the following brief statement of further defense under the Law and Equity Act, Stat. 1893, c. 217:

And for a brief statement of special matter of defense to be used under the general issue pleaded, the said defendant further says:

1st. That the title, if any, of the plaintiff to the premises in question arises out of a seizure and a sale on execution of the same as the property of one Stephen D. Blaisdell upon a judgment recovered by said plaintiff against said Blaisdell at the October term of the Supreme Judicial Court for 1898.

2nd. That on the 20th day of September, 1884, one Joanna Woods, then the legal owner of said premises, mortgaged them to said Stephen D. Blaisdell for the sum of two hundred and fifty dollars, and further advances, a copy of which said mortgage is hereto annexed marked "Plaintiff's Exhibit A," and had given at the same time her note for two hundred and fifty dollars, and on

the 20th day of June, 1885, a further note for seventy-three dollars and eighty-four cents.

3rd. That the notes aforesaid not having been paid at maturity the said Stephen D. Blaisdell began process of foreclosure of said mortgage by publication, the first notice being published on the 27th day of April, 1888, a copy of the record of which is hereto attached marked "Plaintiff's Exhibit B."

4th. That on the 12th day of April, A. D. 1889, the said defendant purchased the premises described in plaintiff's writ of said Joanna Woods, taking from her a deed of warranty of the premises, subject to the mortgage given by her to said Stephen D. Blaisdell, which mortgage the said defendant assumed and agreed to pay, which said deed was dated April 12, 1889, and recorded April 15, 1889, in Kennebec registry of deeds, book 376, page 325, and a copy of which is hereto attached marked "Defendant's Exhibit C."

5th. That the said defendant thereupon requested the said Stephen D. Blaisdell to render him a true and correct statement of the amount due upon said mortgage and upon said 12th day of April, 1889, such account was rendered showing the amount due to be four hundred and forty-eight dollars and five cents, a copy of which statement is hereto annexed marked "Defendant's Exhibit D."

6th. That on the 15th day of April, 1889, before the period of redemption of said mortgage had expired, and after he had purchased said premises, the said defendant paid to S. & L. Titcomb, who had said mortgage and notes in their possession, said sum of four hundred and forty-eight dollars and five cents, whereupon the said attorneys, S. & L. Titcomb, wrote the following upon the back of said mortgage:

"April 15, 1889.

The debt secured by the within deed of mortgage having been paid in full, said mortgage is hereby discharged.

STEPHEN D. BLAISDELL.
By S. & L. Titcomb,
His Attorneys."

7th. And said defendant says that, supposing the above to be a sufficient legal discharge he took no further writing or discharge of any kind from said Blaisdell, or his attorneys, nor did he record said writing, and that since said 15th day of April, 1889, he has remained in the undisputed possession of said premises down to the date of this writ.

8th. And the said defendant is informed and believes that said S. & L. Titcomb were the due and legally authorized attorneys of said Stephen D. Blaisdell, and that they duly paid over to him the proceeds of said sum of four hundred and forty-eight dollars and five cents so received by them.

9th. The defendant therefore avers that having redeemed said premises from said mortgage within one year after the first publication of said foreclosure notice, said mortgage was never legally foreclosed, and the said plaintiff in this action acquired by said levy and sale only the title which then remained in the said Stephen D. Blaisdell, if any there was.

Wherefore, the said defendant avers that the matters herein set forth constitute good ground for relief either in law or in equity, and therefore submits them to this Honorable Court and prays that he may receive such relief against the claims of the plaintiff, and especially that the title of the plaintiff, if any, may be decreed to be that of a trustee of a mere dry trust, and that the said plaintiff may be ordered and directed to convey said title, if any, to the said defendant upon proper terms, and for such other and further relief as to the court may seem meet, and for his costs.

The case appears in the opinion.

A. M. Goddard, for plaintiff.

Notice: *Hull* v. *Noble*, 40 Maine, 459; *Bradley* v. *Merrill*, 88 Maine, 319; *Bailey* v. *Knapp*, 79 Maine, 195; *Williamson* v. *Wright*, 75 Maine, 35; *Lawrence* v. *Tucker*, 7 Maine, 195; *Porter* v. *Sevey*, 43 Maine, 519; *Goodwin* v. *Cloudman*, 43 Maine, 577; *Jones* v. *McNarrin*, 68 Maine, 334. The plaintiff having no notice of the payment of the mortgage, she was under no obligation to go

outside the record to ascertain whether or not the mortgage had been paid or discharged during, or subsequent, to the foreclosure period. To hold otherwise and to permit parties ten years after a mortgage had been foreclosed of record to prove by parole, or by producing an unrecorded discharge, that the mortgage had been paid after commencement and record of foreclosure proceedings to the prejudice of purchasers or attaching creditors without notice, would imperil all the titles in this state which depend on mortgage foreclosures.

Payment and unrecorded discharge of a mortgage after record of foreclosure cannot affect the rights of creditors attaching after expiration of foreclosure without notice. Law and equity apply different rules to the subject of mortgages. *Stewart* v. *Crosby*, 50 Maine, 130. The mortgage vests the legal title and seizin in the mortgagee. *Jones* v. *Smith*, 79 Maine, 446. Payment after condition broken does not revest the title in the mortgagor, and the legal estate will remain in the mortgagee until released by some adequate form of conveyance. *Jones* v. *Smith*, supra. The statute prescribes only three methods for discharging mortgages of real estate. R. S., c. 90, §§ 28, 29. "A deed of release" mentioned in § 28 means an instrument under seal. Bouv. Dict., "Deed."

The alleged discharge in this case was not a deed of release, because not under seal; neither was it signed by the "person authorized to discharge" the mortgage, as no written previous authority from, or subsequent written ratification by Blaisdell is shown. The discharge is not a legal discharge, and not legally entitled to record.

Defendant not entitled to equitable relief, in this case, under the Law and Equity Act. The mortgagee did not hold the legal title in trust for the mortgagor; nor would such a trust be implied by law. R. S., c. 73, § 12; *Knapp* v. *Bailey*, 79 Maine, 195. Under attachment and sale, the plaintiff acquired all rights which she could have acquired by attachment and levy. *Woodward* v. *Sartwell*, 129 Mass. 210; *Millett* v. *Blake*, 81 Maine, 531. Equity will not hold the discharge to be "an instrument of defeasance". Even so, it could have no greater effect than a legal instrument of

defeasance, and neither could defeat the plaintiff's title without notice. R. S., c. 73, §§ 9, 12; *Bailey* v. *Myrick*, 50 Maine, 171.

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

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

EMERY, J. The material facts are these: The real estate in question consists of a tenement house and lot in Kennebec county occupied by various tenants. It formerly belonged to Joanna Woods who in 1884 mortgaged it by deed, in the usual mortgage form with the one year foreclosure clause, to one Mr. Blaisdell to secure the payment of certain promissory notes described in the mortgage. This mortgage was duly recorded in the proper registry of deeds. In 1888, the notes not then having been paid, the mortgagee, Blaisdell, gave notice by publication of his purpose to foreclose the mortgage by reason of condition broken, according to the statute, R. S., ch. 90, § 5, cl. 1. This notice, dated April 18, 1888, was also duly recorded, and it is conceded that, unless before exercised, the right of redemption would have expired April 18, 1889.

The mortgagor, Mrs. Woods, within the redemption year, to-wit, April 12, 1889, conveyed the real estate to Mr. Fisher, the defendant, by warranty deed, the grantee (Mr. Fisher) however undertaking to pay the mortgage debt due Blaisdell, the mortgagee. He did pay that debt in a few days, on April 15th, 1889, three days before the right of redemption would have expired. The mortgagee, Blaisdell, delivered to him the promissory notes and also the mortgage deed, having indorsed on the deed over his signature the following, viz:

"April 15, 1889. The debt secured by the within mortgage having been paid in full, said mortgage is hereby discharged." Nothing however was put upon the records in the registry of deeds indicating any such discharge. Mr. Fisher, having obtained his deed from Mrs. Woods and having paid off the mortgage, caused the various tenants of the real estate to attorn to him, and there-

after managed the estate and collected the rents to his own use. The mortgagee never was in possession.

In 1898, nearly ten years afterward, the plaintiff, Mrs. Hussey, had a claim against Mr. Blaisdell the mortgagee above named, and on June 16, 1898, caused to be made thereon a general blanket attachment of all his real estate in Kennebec county. She then had no notice of any of the facts above recited, except so far as she was chargeable with notice by what appeared of record in the registry of deeds. Having obtained judgment on that suit, she caused the execution to be levied upon the real estate in question as the property of her debtor, Blaisdell, the mortgagee in the mortgage above described. At the execution sale she purchased the real estate at the price of the amount of her judgment and received the usual sheriff's deed therefor.

Relying on the title, if any, thus acquired, Mrs. Hussey has brought this action at law, a writ of entry, to recover the real estate above described from Mr. Fisher. The latter, the defendant, has pleaded the general issue at law,—and has also pleaded in the form of a brief statement under the general issue the facts above recited, in accordance with the Law and Equity Act of 1893, ch. 217, § 4, as interpreted in *Miller* v. *Packing Co.*, 88 Maine, 605.

The defendant's argument is, that the facts recited and pleaded show, perhaps the legal title, or in any event the equitable title to be in him, and that even if his title be only equitable it bars this action through the operation of the statute cited, without the intervention of any suit in equity to enforce that title.

The plaintiff's argument is,—that by the law of this state the mortgage deed conveyed to Mr. Blaisdell, the legal estate, the fee, —that while payment of the mortgage debt before condition broken may ipso facto revest the legal estate in the mortgagor, payment after condition broken does not have that effect, but leaves the legal estate in the mortgagee though, perhaps, to be held in trust for the mortgagor to be released upon demand,—that whoever in good faith acquires from the mortgagee that legal estate, appearing of record to be a legal estate, without notice of the trust, i. e. of the payment after condition broken, is protected even in

equity against the cestui que trust, the mortgagor,—that the facts recited show that she did thus acquire the legal title and hence is entitled to judgment in this action at law, whatever might be the result in equity.

In answer to the suggestion that a levying creditor like herself is not entitled to that protection against unknown equities, which is accorded to innocent purchasers for value, she invokes the statute, R. S., ch. 73, § 12, which enacts that "a title derived from levy of an execution cannot be defeated by a trust however declared or implied by law unless the . . . creditor had notice thereof." In answer to the suggestion that according to the cases *Crooker* v. *Crooker*, 46 Maine, 250, and *Houghton* v. *Davenport*, 74 Maine, 590, the court has an equity power to remove from property held in trust an attachment made by a creditor of the trustee in good faith without notice, she points out that her attachment had become merged and completed in a levy of execution, and argues that, whatever the court could do with a mere attachment, it cannot unloose her completed levy.

As this case is presented, we have now no occasion to consider any distinction between the legal and the equitable title to land under mortgage, nor to consider whether the defendant's title, if any he have, is available at law or only in equity. Though the action is at law, yet, if the facts show a defense heretofore available only in equity, we must under the Law and Equity Act cited (1893, Ch. 217), hold this action to be thereby barred. Indeed, should there be disclosed "any conflict or variance between the principles of law and those of equity" as to this subject matter, the principles of law must give way to those of equity. Ibid. § 8.

In equity, at least, has long prevailed the doctrine,—that the debt is the substance, and that the mortgage securing it is a mere incident which always disappears with the disappearance of the substance,—that, whatever the form of the mortgage, in reality the mortgagee has not the fee, the legal title, but only a lien, which remains only a lien, until by proper foreclosure proceedings and the continued default of the mortgagor he converts the lien into a title, —that payment of the mortgage debt any time before foreclosure

perfected, even though begun, extinguishes the debt, the lien and all interest of the mortgagee.

In this case the mortgage debt was fully paid and the mortgagee's lien or interest was thereby completely extinguished before foreclosure perfected, and long before the plaintiff undertook to attach such interest. Hence the equitable doctrine, being now by the statute made applicable to actions at law, plainly bars this action unless the plaintiff can successfully interpose want of notice under the statute above cited by him, viz: R. S., ch. 73, § 12.

There was, however, no want of notice within the purview of that statute. The plaintiff was plainly warned by the record itself that the interest she undertook to attach was only that of a mortgagee, and was liable to have been extinguished by the payment of the mortgage debt before the expiration of the redemption year. Such warning was all the more explicit from the absence of any evidence that the mortgagee had ever entered under his mortgage or obtained any judgment thereon. The presence upon the record of the notice of foreclosure, by publication only, did not lessen the likelihood of subsequent payment nor dim the clearness of the warning. She was still distinctly informed by the record that the existence of any attachable interest in the mortgagee depended upon the controlling fact whether the mortgage debt had been paid before the expiration of the redemption year. She was practically directed by the record to ascertain that fact by effectual inquiry.

The mere lapse of a year after the first publication of notice of foreclosure, even without anything appearing of record to affirmatively indicate payment within the year, did not of itself work a perfected foreclosure,—did not constitute an assurance that the debt had not been paid within the year, especially as the mortgagee did not appear to have been in possession. Only the lapse of the year without payment would make the mortgagee's interest of such a nature as to be attachable. The fact of payment or non-payment of the mortgage debt was still the controlling fact confronting the plaintiff and which she neglected to ascertain.

This conclusion is in accordance with the previous decisions of this court. In *Moore* v. *Ware*, 38 Maine, 496, the defendant, the

assignee of a mortgage deed and in possession, claimed protection against the holder of one of the mortgage notes upon the ground that he was a bona fide purchaser for value without notice. The court decided that the mortgage itself gave him notice that he must hold any interest under the mortgage for the benefit of the holders of the notes. In *Lunt* v. *Lunt*, 71 Maine, 377, it was decided that the mere deed of a mortgagee not in possession conveyed no interest in the mortgaged premises, even at law. In *Jordan* v. *Cheney*, 74 Maine, 359, the facts were these: The mortgagee had transferred the mortgage notes to the plaintiff without assigning the mortgage. He afterwards obtained a quitclaim deed of the mortgaged land from the mortgagor, and thus appeared upon the record to hold both interests, that of mortgagor and mortgagee. The defendant purchased by deed from him for value and in good faith without any notice except such as the record gave him. It was held that the land followed the debt and that no interest therein passed to the defendant,—that the record as it stood was notice to him that the debt might still be outstanding in the hands of other persons. *Lord* v. *Crowell*, 75 Maine, 399, was like this an action at law, a writ of entry. The plaintiff was the assignee of the mortgage debt evidenced by promissory notes. The defendant was in possession of the mortgaged premises as a purchaser for value without actual notice under a subsequent warranty deed from the mortgagee who was in possession taking the rents and profits. The plaintiff subsequently sued the mortgagor on the mortgage notes, recovered judgment and levied his execution on the mortgaged premises. The effect of these proceedings by the plaintiff was held to be,—that the mortgage debt was satisfied,—that the interest of the mortgagee was extinguished,—that the interest of the defendant in possession under a warranty deed for value and without actual notice was also extinguished,—that the record itself disclosed the nature and infirmity of the interest the defendant assumed to purchase,—and that he had no defense even to the action at law.

It is urged in argument that this conclusion will render uncertain, if not valueless, all titles derived from a mortgagee. Not so. A mortgagee can always have the fact of non-payment of the mort-

gage debt judicially and conclusively ascertained and declared and made a matter of record. If he prefers to foreclose the mortgage simply by publication of notice of foreclosure without any judicial proceedings, and rest his title upon such foreclosure alone, he should carefully preserve evidence that the debt has not been paid. It is further urged that this conclusion does away with all necessity for the placing upon the record by the mortgagor any evidence of the discharge of the mortgage. Again not so. No one need take a mortgagor's title, till the mortgage is cleared from the record as well as extinguished in fact. The appearance upon the record of a mortgage not discharged of record, is a dark cloud upon the mortgagor's title. The placing upon the record the statutory evidence of payment is still necessary to relieve the mortgagor of the burden of proving payment in fact, and is still necessary to a clear marketable title in him.

The defendant, upon his theory that under his brief statement he is entitled to affirmative relief in equity, asks for a decree that the plaintiff shall release to him all title acquired under her levy. It is evident, however, that a judgment for the defendant in this action is sufficient relief.

Judgment for defendant.

FANNIE N. HERRICK *vs.* WALTER H. SNOW, Trustee.

Piscataquis. Opinion July 21, 1900.

Trusts. Equity. Law. Will. Charge on Realty.

A testator bequeathed his personal estate to a trustee in trust for the support of the testator's minor son, and bequeathed his real estate to the same trustee upon other trusts. The personal estate was exhausted in the payments of debts and charges and no part thereof came into the hands of the trustee.

Held; that the trustee cannot provide for the support of the child from the proceeds of the real estate.

The enforcement of trusts is, of necessity, within the jurisdiction of courts of equity, and an action at law will not lie against a trustee to recover a trust fund, or any portion thereof, so long as the trust remains open.

AGREED STATEMENT.

The case appears in the opinion.

G. W. Howe, for plaintiff.

J. B. Peaks and E. C. Smith, for defendants.

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

FOGLER, J. This is an action of assumpsit wherein the plaintiff sues the defendant in his capacity as trustee of the estate of Charles A. Snow, deceased, for the board of Charles H. Snow, minor son of said deceased, from November 1893 to November 1895.

The case is submitted upon an agreed statement and a copy of the last will and testament of said Charles A. Snow. It is admitted for the purposes of the case that said Charles H. Snow is the only child of said Charles A. Snow, deceased, and that the plaintiff furnished the board sued for. It is not claimed that the defendant, either individually or as trustee, requested or authorized such board to be furnished, or expressly promised to pay therefor; but it is contended by the plaintiff that the defendant, as trustee under the will of the father, is obliged to provide for the support of the son and that a promise to pay therefor is implied by law.

The testator by his will appointed two trustees. One declined the trust and the defendant was appointed in his stead by the probate court by virtue of the provisions of R. S., ch. 68, § 5. The other original trustee having died, the defendant is now the sole surviving trustee.

By the fifth clause of the will the testator bequeathed his personal estate to the trustees named therein, providing among other things, "the income and balance of said personal property and so much of the principal as may be necessary, is to be used for the proper care and education of my said son, Charles Henry, and what may be left from the proceeds of said personal property is to be paid by said trustees to my said son when he shall arrive at the age of twenty-one years".

The entire personal property of the estate was used by the

administrator for the payment of debts and charges, and no portion thereof ever came to the hands and possession of the defendant or of his co-trustee. The trust, having thus failed, the defendant is under no obligation, so far as the personalty is concerned, to provide for the support of the testator's minor son.

The sixth clause of the will is as follows: "Sixth. I give and devise to I. W. Hanscom and Albert Murray my homestead farm on Pleasant River in Milo, including the wood lot separated from said homestead by land owned by Stephen Snow. To have and to hold to the said I. W. Hanscom and Albert Murray in trust, that the said Hanscom and Murray shall oversee the management and improvement of said farm, and yearly and every year, account and pay over to my sister, Clementine, the clear profits derived from said farm, after deducting the necessary expenses of carrying on the same. My sister Clementine and my niece, Ivy, are to have a home and support from said farm so long as they shall live. When my son, Charles H., arrives at the age of twenty-one years he is to have, if competent, the complete ownership in fee and control of said farm, subject to the life interest above named, of my said sister and niece. In the event of my said son's death before the age of twenty-one, said homestead farm is to be given in fee to my three sisters and niece, Ivy, in equal shares."

The testator's sister, Clementine, died May 5, 1895; his niece, Ivy, is living.

It is contended in behalf of the plaintiff that, inasmuch as the provision for the support of the minor son contained in the fifth clause of the will, has failed, the defendant, as trustee, is authorized and it is his duty to provide for the support of the minor son out of the real estate.

We do not think so. The real estate is devised upon a trust separate and distinct from that of the personalty. The duties and powers of the trustee, in relation to the real estate, are clearly and unambiguously stated by the testator. The support of his minor son is not included as one of the purposes of the trust. We cannot enlarge the powers and duties of the trustee to meet the unforeseen exigencies of the case.

Moreover, if the defendant held as trustee funds chargeable with the support of the testator's child, the plaintiff could not maintain this action at law. Her remedy, if any she has, is in equity. Enforcement of trusts is, of necessity, within the jurisdiction of courts of equity. An action at law is not maintainable between a trustee and a cestui que trust in matters arising out of the trust. *Sanford* v. *Lancaster*, 81 Maine, 434; *Johnson* v. *Johnson*, 120 Mass. 465; *Norton* v. *Ray*, 139 Mass. 230.

An action at law does not lie against a trustee to recover a trust fund, or any part thereof, so long as the trust remains open. *Davis* v. *Coburn*, 128 Mass. 377.

Judgment for defendant.

JOHN F. PROCTOR, In Equity, *vs.* EDWARD M. RAND, Trustee.

Cumberland. Opinion August 25, 1900.

Equity. Practice. Trusts. Relinquishment. Estoppel. Evidence.

The decision of a single justice upon matters of fact in an equity hearing should not be reversed unless it clearly appears that such decision is wrong. The burden to show the error falls upon the appellant. He must show the decree appealed from to be clearly wrong; otherwise it will be affirmed.

Held; in this case, that the appellant has failed to sustain this burden; and that, on the contrary, the finding of facts by the court below is amply sustained by the evidence in the case.

Upon a bill to enforce an express and resulting trust in land, the appellant alleged that, at the time of the purchase and conveyance of the lot in question, he made one-half of the cash payment; that the other half was made by John W. Lane, the defendant's testator; that subsequently the income received from the land was shared by them equally; that payments upon the note and mortgage given back by Lane, to secure a part of the purchase price, were made from the income of the land and by contributions equally made by them. Thereupon, the appellant claims that a trust resulted in his favor by implication of law, as to one-half in common of the premises, and that defendant's testator became seized thereof in trust for him. He further alleges in his bill that Lane made written declarations of trust, on three different dates, in which he acknowledged the trust. The defendant in his answer denied all the important allegations relied upon by the plaintiff.

At the hearing before a single justice, upon bill, answer, replication and proof, the appellant introduced evidence tending to prove the existence of a trust in his favor, both as resulting by implication of law, and by reason of the declarations of trust made by the defendant's testator. The justice who heard the cause did not decide whether or not the facts relied upon by the appellant did create a trust in his favor, but decided that whatever rights the appellant may have had earlier in or to this property, either as beneficiary or otherwise, had been voluntarily released and abandoned by him on or before June 1, 1889, in and by virtue of a new arrangement with the defendant's testator. A decree was consequently rendered by him dismissing the bill.

Assuming that the evidence introduced by the appellant was sufficient to show that a trust had once existed in his favor, as to one undivided half of the property in question, it is considered by the court that the evidence in the case, fully sustains this finding of fact, and warrants the decree dismissing the bill.

No question is raised by the plaintiff, and it is unnecessary to decide, as to what extent the acts and conduct of the trustee and the cestui que trust, they being sui juris, are competent for the purpose of showing that a trust, which had once existed, had been voluntarily relinquished by the cestui que trust in, and in consideration of, some subsequent transaction between them, because the acts and conduct of the appellant in this case subsequent to June 1, 1889, and the reliance thereon by the defendant, are sufficient to estop the appellant from denying that he had so relinquished his equitable interest in this property, whatever that interest may have been.

The appellant offered in evidence one of the memoranda, or declarations of trust, which had an unsigned paper, prepared after the death of Lane and attached by mucilage, and containing, among other things, an agreement that this property should be held by the defendant as trustee, etc., and also an assignment to a third party of all the appellant's "right, title and interest in and to the within agreement and declaration to which this is annexed and the property therein described." Objection having been made to the admission of the memorandum while this paper remained attached to it, the court excluded it until the unsigned paper was detached, which was finally done.

The memorandum, signed by Lane, was then admitted without objection and the appellant took exception to the exclusion of the other paper. *Held;* that the ruling was unquestionably correct.

IN EQUITY. ON EXCEPTIONS AND APPEAL BY PLAINTIFF.

The case is stated in the opinion.

Clarence W. Peabody, for plaintiff.

Declarations of trust: R. S., c. 73, § 11; Ames' Cases on Trusts, note p. 178; *McLellan* v. *McLellan*, 65 Maine, 500, and cases cited; *Steere* v. *Steere*, 5 Johns. Ch. 1; *Second Unit. Soc. in Portland* v. *Woodbury*, 14 Maine, 281; *Frost* v. *Frost*, 63 Maine,

399; *Blake* v. *Collins*, 69 Maine, 156; *Barrell* v. *Joy*, 16 Mass. 220; *Montague* v. *Hayes*, 10 Gray, 609; *Robson* v. *Hartwell*, 6 Ga. 589, 604; *McLaurie* v. *Partlow*, 53 Ill. 340, 345; *McCubbin* v. *Cromwell*, 7 Gill. & J. (Md.) 157; *Kingsbury* v. *Burnside*, 58 Ill. 310; *Newkirk* v. *Place*, 47 N. J. Eq. 477; *Smith* v. *Wilkinson*, 3 Ves. Jr., 705; *Forster* v. *Hale*, 5 Ves. 308,315; *Dale* v. *Hamilton*, 3 Phill. 266, 272.

Resulting trust: *Buck* v. *Pike*, 11 Maine, 9; *Dwinel* v. *Veazie*, 36 Maine, 509; *Baker* v. *Vining*, 30 Maine, 121; *Burleigh* v. *White*, 64 Maine, 23; *Buck* v. *Swazey*, 35 Maine, 41; *Dudley* v. *Bachelder*, 53 Maine, 403; *Hull* v. *Russell*, 36 Maine, 115, 124.

Edward M. Rand, for defendant.

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

WISWELL, C. J. In this bill in equity against the defendant as trustee under the will of John W. Lane, deceased, the plaintiff seeks the enforcement of a trust as to one-half, in common and undivided, of a lot of land situated at the corner of Pearl and Congress streets in the city of Portland, which trust in his favor he claims both as resulting by implication of law and under alleged declarations of trust made by the defendant's testator.

He alleges in his bill, in substance, that at the time of the purchase and conveyance of the lot in question to Lane, one-half of the cash payment was made by himself and one-half by Lane; that subsequently the income received from said premises was shared by them equally and that payments upon the note and mortgage, given back by Lane to secure a portion of the purchase price, were made from the income of the premises and by contributions equally made by them; that consequently a trust resulted by implication of law in his favor as to one-half in common of the premises, and that Lane became seized thereof in trust for him.

He also alleges that on December 9, 1885, Lane made a declaration of trust in which he acknowledged that he stood seized and held one-half in common and undivided of the premises in trust for the

plaintiff, his heirs and assigns forever; and that on December 10, 1886, Lane made a similar declaration of trust; that Lane died on September 15, 1889, and that under his will the defendant became seized of the premises charged with the same trust in favor of the plaintiff.

The defendant in his answer denies all the important allegations relied upon by the plaintiff. The case was heard by a justice of this court upon bill, answer, replication and proof and comes here upon an appeal from his decree dismissing the bill, and also upon an exception to a ruling excluding certain testimony.

There is no question as to the following facts: The lot in question was conveyed to Lane by an absolute deed of warranty on July 31, 1883, and the legal title remained in him until his death on September 15, 1889, and has since been in the defendant as a testamentary trustee under Lane's will. The cash payment of $500 made at the time of the purchase, was paid equally by the plaintiff and by Lane, that is, the whole sum, in the first instance, was paid by the plaintiff and one-half thereof was subsequently repaid to him by Lane. The justice who heard the cause found: "That thereafterward (subsequent to the purchase) during the life-time of Lane, he received all the income, and paid all the charges on the land, and made payments upon the mortgage debt, and since his death Rand has continued to receive the income and pay charges and has fully paid the mortgage debt. Proctor has contributed nothing to these payments." That this is true, relative to the time since Lane's death, is uncontradicted.

On December 10, 1884, Lane made a written statement, signed by him, respecting various lots of land in which he was in different ways concerned with the plaintiff, and some of which he held as security for the plaintiff's notes and for his indorsements, in which he makes use of the following language as to the lot in question: "I also hold deed of land on the corner of Congress and Pearl streets of James H. Smith & Bro. and under lease to Oren Hooper, the net profits from sale of said property or income to be divided equally with the said Proctor."

A year later, on December 9, 1885, Lane made and gave to the

plaintiff another memorandum similar to the latter, referring to various lots of lands in which they were jointly concerned, which contains the following statement respecting the lot in question: "I also hold a deed of land corner of Congress and Pearl streets of James H. Smith and Henry St. John Smith, and under lease to Oren Hooper, in which property the said Proctor is jointly interested, and the net profits derived from the sale thereof, or the income therefrom, is to be divided equally with the said Proctor."

Again, on December 10, 1886, in another memorandum of the same kind, made and signed by Lane and delivered to the plaintiff, the same language was used respecting the lot in question.

The justice who heard the cause did not decide whether or not these facts, either the original payment by the plaintiff of one-half of the cash purchase price, or the subsequent statements of Lane, claimed to be declarations of trust, would create a trust in favor of the plaintiff as claimed by him, saying in his finding of facts filed and made a part of the case: "Without deciding whether this claim is well founded, or whether Proctor's interests were only in the income or profits when the lot should be sold, I pass to later transactions, which seem to me decisive of this cause."

Assuming, without deciding, that the facts already stated would create a trust in behalf of the plaintiff, as to one undivided half of the lot in question, it is only necessary now to inquire whether the further finding made by the justice who heard the cause, that whatever right the plaintiff may have had by virtue of the facts above referred to was subsequently voluntarily relinquished by him in other transactions between him and Lane, is justified by the evidence. This finding is expressed by the sitting justice in these words: "It is clear from the written agreements of the parties, and the acts, admissions and claims of Proctor since June 1, 1889, and since the death of Lane, that whatever right Proctor may have had earlier in or to this lot, or the profits on its sale, or as beneficiary of a trust therein, that, by arrangement with Lane, such right had been released and abandoned by Proctor on or before June 1, 1889, and that thereafter he only claimed a right to pur-

chase, not evidenced by any writing nor proved to have been agreed to by Lane in any manner."

The decision of a single justice upon matters of fact in an equity hearing should not be reversed unless it clearly appears that such decision is erroneous. The burden to show the error falls upon the appellant. He must show the decree appealed from to be clearly wrong, otherwise it will be affirmed. *Young* v. *Witham*, 75 Maine, 536; *Paul* v. *Frye*, 80 Maine, 26; *Hartley* v. *Richardson*, 91 Maine, 428.

In the opinion of the court the appellant has failed to sustain this burden; upon the contrary, we think that the finding of facts is amply sustained by the evidence of the case.

The defendant offered in evidence a duplicate of the memorandum of December 9, 1885, already referred to, which bears upon its back the following indorsement, signed by both Proctor and Lane: "Cancelled June 1,—'89—by new agreement." On the same day Lane had caused to be drafted an agreement referring to various lots of land, not identical with those referred to in the previous statements, and of which, he says in the statement, deeds are "to be delivered to said Proctor when the notes now held by me or indorsed by me for the said Proctor shall be paid." This memorandum also contains the following statement: "All agreements signed by me previous to this date are to be cancelled." Before this memorandum of June 1, 1889, was signed or delivered to the plaintiff, it was shown to him for his approval and he caused the following statement to be written therein: "The property on the corner of Pearl and Congress Sts. bot. of the Smiths and under lease to Oren Hooper and Son is to be delivered to said Proctor, he paying me the amount that I have paid out and one thousand dollars bonus on the same." But when the memorandum was taken back to Lane he refused to sign it until this latter clause had been stricken out, when he did sign it and delivered it to the plaintiff's clerk.

It is true, that Proctor claims that he did not accept this paper of June 1, 1889, with the erasure; but, as said by the sitting justice, "he never demanded back his cancellation of the statement of December 9, 1885, nor returned to Lane the statement of June 1,

1889, nor made any complaint to Lane in regard to it. He relied upon the paper to establish his rights to lots mentioned therein, and not included in the prior statement, and produced the paper at this hearing."

On November 22, 1889, shortly after the defendant's qualification as trustee, the plaintiff presented to the defendant a written, though unsigned, statement of his claim to the same lots mentioned in the memorandum of June 1, 1889, and to one other lot not mentioned therein. In this written statement the plaintiff used this language with reference to the lot in question: "The Hooper property, corner of Pearl and Congress streets belongs to me, on my paying inside of a year from Sept. 22d, 1889, the amount John W. Lane has invested in it over and above rents he has received and also a bonus to said Lane of 1000 dollars." This claim being similar to the clause which he had caused to be inserted in the statement of June 1, 1889, but is entirely inconsistent with the claim that he now makes that Lane held one-half of the property in trust for him, either because of a resulting trust by reason of the original purchase, or as an express trust because of the alleged declarations of trust.

In view of these facts, the cancellation of the memorandum of December 9, 1885; the statement in the memorandum of June 1, 1889, that: "All agreements signed by me (Lane) previous to this date are to be cancelled;" the claim made by the plaintiff at the time that the memorandum of June 1, 1889, was drawn, as shown by the clause which he caused to be inserted therein; the fact that even that clause was erased by Lane before he signed the paper; and finally the claim made by the plaintiff in the written statement handed by him to the defendant, shortly after the latter's qualification as trustee, we think that the finding and conclusion of the sitting justice to the effect that any right that the plaintiff might have earlier had in this lot or its income or profits, or as a beneficiary of a trust therein, had been, by virtue of an arrangement with Lane, released and abandoned by the plaintiff on or before June 1, 1889, are amply sustained by the evidence.

No question is raised by the plaintiff, and it is unnecessary to

decide, as to what extent the acts and conduct of the trustee and the cestui que trust, they being sui juris, are competent for the purpose of showing that a trust, which had once existed, had been voluntarily relinquished by the cestui que trust in and in consideration of some subsequent transaction between the parties, because the acts and conduct of the plaintiff in this case subsequent to June 1, 1889, and the reliance thereon by the defendant, are certainly sufficient to estop the plaintiff from denying that he had so relinquished his equitable interest in this property, whatever that interest may have been.

The memorandum of June 1, 1889, signed by Lane, and which contained the statement that: "All agreements signed by me previous to this date are to be cancelled," referred to a number of pieces of property not mentioned in any of the prior statements. Shortly after the defendant's qualification as trustee, the plaintiff produced this memorandum and at the same time presented to the defendant the statement above referred to of the different pieces of property held by Lane in which he was concerned, and which he was entitled to receive upon making certain payments; this statement referred to all of the properties mentioned in the memorandum of June 1, together with an additional lot. Subsequently a settlement was made between the plaintiff and the trustee, under the authority of the probate court, based upon this claim and upon the memorandum of June 1.

After acting upon this memorandum and obtaining a settlement with the trustee based thereon, and after making a claim relative to his interest in this property, which, as we have seen is entirely inconsistent with the one made by him in his bill, it is too late now for the plaintiff to repudiate the statement contained in that memorandum, that all previous agreements were to be cancelled and the irresistible inference to be drawn from the transaction, and to claim that, instead of merely having an option to purchase the property within a limited time, he is a cestui que trust as to one-half of the property.

We are satisfied that the finding and conclusion of the sitting justice were fully justified, and that the plaintiff's conduct, subse-

quent to June 1, 1889, estops him from denying that there had been such a relinquishment of his interest in the property as was found by the justice who heard the cause.

The plaintiff also excepts to a ruling excluding a paper offered by him. When the memorandum of December 10, 1886, was offered it appeared that there was attached to it by mucilage another paper, unsigned, not in the hand writing of either of the parties, dated January 31, 1890, after Lane's death, and said to have been drawn by an attorney of the plaintiff.

This unsigned paper does not show by whom it was to be signed, although very likely when drawn it was intended that it should be signed by the plaintiff. It contained an agreement that this property in question should be held by the defendant as trustee, "as security for the payment of any sums of money due from me upon any notes indorsed by said Lane for my benefit (if any such there are) and not mentioned in the petition for leave to settle filed in the probate court for Cumberland county and acted upon January, 1890, all other conditions of said holding not to be affected by this assent." And also an assignment to a third party of "all my right, title and interest in and to the within agreement and declaration to which this is annexed and the property therein described."

Objection was made to the admission of the memorandum of December 10, 1886, while this paper remained attached, and the court excluded the memorandum until the unsigned paper was detached; this was finally done; the memorandum signed by Lane was then admitted without objection and exception taken by the plaintiff to the exclusion of this other paper.

We can conceive of no reason why this unexecuted paper should have been admitted. It was never completed. It was not in the possession of the defendant, and there was no satisfactory evidence that he had any knowledge of its existence. No legitimate inference of any kind could have properly been drawn from it. We think the ruling was unquestionably correct.

Appeal dismissed. Exceptions overruled.
Decree below affirmed with additional costs.

LARKIN D. SNOW *vs.* GEORGE F. RUSSELL.

Cumberland. Opinion September 10, 1900.

Lis Pendens. Evidence. Stat. 1893, c. 301.

The rule of lis pendens has been abrogated in this state by statute.

A judgment that is res inter alios is not admissible in evidence against one not a party to the record.

See *Snow* v. *Russell*, 93 Maine, 362.

ON EXCEPTIONS BY DEFENDANT.

This was a real action to recover a certain piece of land on India street in Portland. Plea, the general issue with a brief statement.

The premises in dispute were owned by Submit C. Russell, who died February 7, 1896, in Portland, leaving a husband, John H. Russell, his son and her step-son, George F. Russell, two sons, William W. Davis and Lemuel T. Davis, one grandson, Charles D. Merrill, son of her deceased daughter, and two great grandchildren, Henry Merrill and Frances Merrill, the children of a deceased sister of Charles D. Merrill.

Submit C. Russell left a will which was duly presented with a petition for its allowance at the probate court, Cumberland county, on the thirteenth day of February, 1896, which was duly proved and allowed on the third Tuesday of March, 1896, by which her husband, John H. Russell, was appointed executor.

The will was made a part of the exceptions.

On the eleventh day of February, 1896, William W. Davis quitclaimed to John H. Russell all his real and personal estate left by his mother, Submit C. Russell.

On the eighteenth of February, 1896, Lemuel T. Davis and Charles D. Merrill entered into an agreement with John H. Russell by which Davis and Russell were to release their interest in Mrs. Russell's estate and make no opposition to probate of her will and to receive therefor $1,500.

On the eleventh day of March, 1896, Lemuel T. Davis and Charles D. Merrill conveyed by quitclaim to John H. Russell all

their interest in the real estate of Submit C. Russell, which is the land in controversy, and took from him a mortgage to secure a note which he gave at the time for fifteen hundred dollars with interest payable annually, which mortgage was recorded on the thirteenth day of March.

This mortgage was assigned in blank by Lemuel T. Davis and Charles D. Merrill and the note by them indorsed, and left with John F. Proctor, a real estate broker, to negotiate.

John F. Proctor testified that he advanced on the mortgage the sum of one thousand dollars, and that he sold it to the plaintiff for fifteen hundred dollars on the thirtieth day of March, and at that time filled out the blank assignment, bearing date February 13th, to Snow and delivered to him the note indorsed as above stated, which assignment was not recorded until July 9, 1897.

The defendant offered in evidence a decree of the Supreme Judicial Court in a cause in equity wherein John F. Russell et als. were complainants v. Lemuel T. Davis et als. rendered on the eighth day of November, 1897, which was excluded by the presiding justice.

The material portion of the decree made after the decision of this court in *Snow* v. *Russell*, 93 Maine, 362, thus excluded is as follows:

"That said mortgage deed upon the real estate, described in said bill of complaint, given by said John H. Russell to said Lemuel T. Davis and said Charles D. Merrill, and dated the eleventh day of March, A. D. 1896, and recorded in Cumberland registry of deeds, book 636, page 21, and the note thereby secured be and hereby are declared null and void; and that the said Lemuel T. Davis and said Charles D. Merrill be and hereby are ordered and directed to surrender forthwith said note to said John H. Russell, and cancel, release and discharge said mortgage deed.

"That said John H. Russell deposit with the clerk of this court, for the use and benefit of said Lemuel T. Davis and Charles D. Merrill the two deeds of release made by him on the twenty-seventh day of March, A. D. 1896, releasing to said Lemuel T. Davis and to said Charles D. Merrill all the interest conveyed by

them, and each of them, to him by their quitclaim deeds of March 11, 1896, to be delivered to them on demand."

The brief statement of facts in the bill of exceptions discloses that the mortgage was assigned to the plaintiff, Snow, before the bill in equity was filed, and to which he was not a party or privy.

W. R. Anthoine and T. L. Talbot, for plaintiff.

Counsel cited: *Putnam Free High School* v. *Fisher*, 34 Maine, 172; Stat. 1893, c. 301.

The purpose of our registry law is to protect grantees from the voluntary or involuntary conveyances of their grantors.

The law does not oblige an assignee of a mortgage to record the assignment in order to aid one who seeks to make him a party to a suit in equity to annul the mortgage.

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

Res djudicata: While the plaintiff was not made a party to the bill in equity in which said decree was rendered, he is bound by the decree, because at the time of bringing the bill he had no record title whatever; and the plaintiffs therein had no knowledge previous to the filing of the decree of any claim of title to, or interest in, said mortgage by Snow; so that it was impossible to make said Snow a party. He stood in no better position than if said assignment had never been made, or not made until after the decree was filed. Consequently the matter became res djudicata not only as to the mortgagees, but as to him, and therefore admissible in evidence.

In the case of redemption from a mortgage, the mortgagee makes his tender, and brings his bill to redeem against the mortgagee or his assignee of record. If it were otherwise, he might never be able to redeem, as new records of previous assignments might be made at any stage of the proceedings. Same principle should apply here as in case of mortgage.

The statutes (c. 301, stat. of 1893,) requiring abstract of bill to be filed in registry of deeds to prevent future conveyances has no application in this case, as the assignment was delivered to Snow on the thirtieth day of March and the bill was not filed till March

31st, the next day, so that any record made that day could not have affected an assignment made the day previous. The only question is whether Snow by not recording his assignment, or giving any notice of the same, is not bound by the decree.

The negligence of the plaintiff, Snow, in not recording his assignment and not giving any notice of the same to the plaintiffs in the bill before the decree was filed, so that he could be made a party to the same, is an estoppel to this action. It is not a question of the time of the making of the assignment, but of the negligence of Snow in not recording the same.

Counsel cited: (Foreclosure of mortgage) *Mitchell* v. *Burnham*, 44 Maine, 286; (Lis pendens) Cent. Law Jour. vol. 21, p. 408; *Wilfgong* v. *Johnson*, 41 West Va. 283; *Zane* v. *Fink*, 18 West Va. p. 693–720.

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

PER CURIAM. The judgment excluded was res inter alios. The doctrine of "lis pendens," if otherwise applicable, is made inapplicable by the statute of this State. The ruling below was therefore not erroneous and the decision is,

Exceptions overruled.

JARVIS C. PERRY, and others, in equity,

vs.

ROCKLAND AND ROCKPORT LIME COMPANY.

Knox. Opinion September 21, 1900.

Lease. Renewal. Landlord and Tenant.

Plaintiff's had a lease of a quarry for one year from April 16, 1898, with the privilege to renew the same for one, two, three, four, five, six or seven years.

This provision gave the plaintiffs an election to renew the lease for any one of the periods named, but it was an election to be exercised once for all. When

once exercised the right would be exhausted, and no second election could be made. To be effective, the election must be made during, or at the expiration of, the term granted in the lease.

No election was made within that time.

After the expiration of the year granted by the lease, plaintiffs held over without objection from the then owners of the quarry, and nine months thereafter gave notice to extend the lease for seven years.

Held; that this notice was ineffectual because not given in time, and that such holding over could not be regarded as an election to hold for seven years.

Held; also, that after the expiration of the year's term granted in the lease, plaintiffs were tenants at will, and that that tenancy was determined by the conveyances of title to the quarry to the defendant in January and March 1900.

The defendant never having recognized the plaintiffs as its tenant, their possession of the mine is without right.

ON REPORT.

This was a bill in equity, heard on bill, answer and proofs to compel the defendant, who is the present owner of a lime quarry, known as the Blackington farm and quarries, in Thomaston, to make, execute, acknowledge and deliver to the plaintiffs a lease of the same for the term ending April 16, 1906.

The facts appear in the opinion.

H. M. Heath and C. L. Andrews; D. N. Mortland and M. A. Johnson, for plaintiffs.

Cases of a present demise for the original term and the optional period, with a distinct ruling that no new lease was necessary to continue the term: *Sweetser* v. *McKenney*, 65 Maine 225; "for five years and as much longer as the lessee desires". *Holley* v. *Young*, 66 Maine, 520, for one year and "we further agree to lease, etc., at the price and conditions named as long as he wishes to occupy the premises." *Harris* v. *Howes*, 75 Maine, 436; lease for five years with option in lessee to continue the lease for five years after that date. *Willoughby* v. *Atkinson Co.*, 93 Maine, 185, a lease for three years "with the privilege at the end of the said term of re-leasing for a term of ten years or any part thereof at the same yearly rental." Language equivalent to that in our lease. *Kramer* v. *Cook*, 7 Gray, 550; "to hold for the term of three years . . . . and at the election of the lessee for a further

term of two years." *Atlantic Nat. Bank* v. *Demmon*, 139 Mass. 420. Lease for the term of one year with the privilege of two years more at the option of the lessee. *Stone* v. *St. Louis Stamping Co.*, 155 Mass. 267, for one year with clause, "it is further agreed that this lease may be extended for two years by the lessees giving thirty days' notice of such intention, etc." *Kimball* v. *Cross*, 136 Mass. 300, lease for one year with the privilege of continuing five years. *Chretien* v. *Doney*, 1 N. Y. 419, a lease for one year, "B to have the privilege to have the premises for one year, one month and twenty days longer, etc." *House* v. *Burr*, 24 Barb. 525, a lease for two years "with the privilege of two years more if desired." *Austin* v. *Stevens*, 38 Hun, 41, lease for one year "with the privilege of a further term of one, two and three years." *Terstegge* v. *First German Benevolent Society*, 92 Ind. 82, (47 Am. Rep. 135), for five years "with the privilege of five years more." *Montgomery* v. *Commissioners*, 76 Ind. 362, (40 Am. Rep. 250), lease for three years "with the privilege of keeping them two years longer upon the same terms at the option of the lessee." *Delashman* v. *Berry*, 20 Mich. 292, (4 Am. Rep. 392), one year "with the privilege of having the same for three years at the same rent and at the option of the lessee." *Clarke* v. *Merrill*, 51 N. H. 415, "five years from and after October 17, 1865, with the right to extend this lease five years longer if the lessee shall so elect at the expiration of said term." *McBrier* v. *Marshall*, 126 Penn. St. 396, for five years "with the privilege of having said lease renewed for the term of five years." A parallel case. *Falley* v. *Giles*, 29 Ind. 114, a lease for the term of two years with the further privilege to the lessee to hold the premises upon the same terms for the additional term of one, two or three years at the election of the lessee. *Lyons* v. *Osborn*, 45 Kans. 650, the privilege of continuing this lease." *Hughes* v. *Windpfennig*, 10 Ind. App. 122, "with the privilege of renting the same for three years longer." *Schroeder* v. *Gememder*, 10 Nev. 355, "with the privilege of two more." *Fleischner* v. *Citizens' Investment Co.*, 25 Oreg. 119, "optional with the lessees to renew the same for two years." Parallel with our language. *Pickard*

v. *Kleis*, 56 Mich. 604, "with the privilege of three." *Chandler* v. *McGinning*, 8 Kans. App. 421, "with the privilege of extension not to exceed one year." Other similar cases are: *Ins. Co.* v. *Nat. Bank*, 71 Mo. 60; *Hobbs* v. *Balony*, 86 Md. 68; *Orton* v. *Noonan*, 27 Wisc. 286; *Bradley* v. *Slater*, 50 Neb. 682; *Tracy* v. *Albany Exchange Co.*, 7 N. Y. 472, (57 Am. Dec. 538); *Hall* v. *Spaulding*, 42 N. H. 259. In *Ranlet* v. *Cook*, 44 N. H. 512, (84 Am. Dec. 92), the court went further. The lease was for a term of ten years with an agreement that the lessor would at the expiration of that time renew the lease for a further term of ten years. Held, that no new lease was necessary. In *Livingston* v. *Kilmback*, 10 Johns. 336, held that an instrument containing words of a present demise will amount to a lease though it provide for a future lease; this would be deemed a covenant for future assurance. Wood on Landlord & Tenant, p. 678, states the rule: "When a tenant by the terms of the lease has an option to remain for a longer period such an optional term is not a new demise, but a continuation of the old one." The principle running through this long line of cases was foreshadowed in the early case of *Poole* v. *Campbell*, 12 East, 168, where it was said, that a clause for a future lease does not of itself necessarily intend that the instrument must be only an agreement for a lease if the intention of the parties appear to be otherwise. But *Holley* v. *Young*, 66 Maine, 520, since approved and followed in *Harris* v. *Howes*, supra, and *Willoughby* v. *Atkinson Co.*, supra, should set the question at rest.

In all of the cases above cited, the lease in each case being held to be a present demise for the original term and the optional term, it was held that the election of the tenant to exercise his option was the only act necessary to continue the term, and that relief in equity was not necessary.

The rule of construction seems to be unbroken that where the privilege of renewal is given wholly to the lessee, to be exercised by the simple fact and act of election, the lease is a present demise for the optional term and no new lease is necessary. This lease stipulated for no notice of any kind and fixed no time when the election should be made.

Other cases holding continued occupation under a renewal privilege and payment of rent to be, if unexplained, sufficient evidence of waiver by lessor of performance of stipulation to elect at a given time agreed and a continuation of the term are: *Myers* v. *Silljaks*, 58 Md. 321; *Jones* v. *James*, 4 Tex. App. 311; *Kelso* v. *Kelley*, 1 Daly, (N. Y.) 419; *Hyatt* v. *Clark*, 118 N. Y. 563. The inference of fact is that lessees had exercised their privilege of renewal. Settlement of accounts and acceptance of rent was a waiver of all cause of forfeiture therefor accruing and a waiver of performance of the duty of election at any particular time. See *Ingle* v. *Wallach*, 1 Wall. 61.

The right to renew the lease for seven years determinable at the end of one, two, three, four, five or six years at the option of the lessees: *Doe* v. *Dixon*, 9 East, 14; *Dann* v. *Spurrier*, 3 B. & P. 399; *Price* v. *Dyer*, 17 Ves. 363; *Powell* v. *Smith*, 14 L. R. Eq. 85; *Hersey* v. *Giblett*, 18 Beav. 174. The right to elect was suspended until exercised in fact. Right seasonably exercised by holding over and paying rent. As stated in *Franklin Land Co.* v. *Card*, 84 Maine, 528, a tenant under a written lease, holding over, is not a tenant at will where the lease clothes him with superior rights. In the case at bar, the lessees held over under their contract. *Moss* v. *Barton*, 1 L. R. Eq. p. 476; *Buckland* v. *Papillon*, 2 L. R. Ch. 67.

That the right to elect between periods was a continuing right, should follow from the principle that by holding over under a renewal right and paying rent under the terms of the lease all the rights of the lease remain until exercised. At common law, payment and receipt of rent implied a continuation of the same rights as the parties had under the old lease. *Schuyler* v. *Smith*, 51 N. Y. 309; *Clarke* v. *Howland*, 85 N. Y. 204. A fortiori, when the rent is paid and received under a contract privilege of renewal.

Renoud v. *Daskam*, 34 Conn. 512, simply decides that the true construction of the agreement is that the election for another term was to be exercised on or before the expiration of the term. *Thiebaud* v. *First Nat. Bank*, 42 Ind. 212.

Time not of essence, substantial compliance sufficient: *Reed* v.

St. John, 2 Daly, (N. Y.) 213. Specific performance decreed: *Cunningham* v. *Pattee*, 99 Mass. 248; *Biddler* v. *McDonough*, 15 Mo. App. 540; *Arnot* v. *Alexander*, 44 Mo. 25, (100 Am. Dec. 252, and note).

Treating the contract as subsisting, after the time fixed for completion, as by claiming rent under the agreement, waives the delay. *Hudson* v. *Bartram*, 3 Madd. 440; *Comber* v. *Hackett*, 6 Wisc. 323, (70 Am. Dec. 467); *Clark* v. *Jones*, 1 Denio, 516, (43 Am. Dec. 706).

Specific performance is always decreed where the delay in performing conditions is excused by the act of the other party. *Hull* v. *Noble*, 40 Maine 459. Parties by conduct may waive time of performing conditions. *Chamberlain* v. *Black*, 55 Maine, 87.

H. B. Cleaves; J. H. and J. H. Drummond, Jr.; Clarence Hale; C. E. and A. S. Littlefield, for defendant.

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

STROUT, J. On April 16th, 1898, the then owners of a lime-rock quarry, leased a portion of it to the plaintiffs for the term of one year from that date. The rights of the parties to this suit depend upon the clause in the lease, which reads:—"The term of this lease shall be one year from the sixteenth day of April, A. D. 1898, with the privilege to the said Perry Brothers of renewing the same on the same terms for one, two, three, four, five, six or seven years additional."

Neither during the term of one year, nor at its termination, did the plaintiffs give any notice to the lessors of an intention to renew, or continue occupancy of the quarry, for either of the periods as to which they had an election. But they did in fact remain in possession thereafter, to which lessors made no objection. Shortly before the expiration of the year's term, plaintiffs removed to this quarry and set up a boiler in place of one before used. The rent reserved was four cents net stumpage per cask for all good stock quarried, and was payable on the first day of January each year.

Rent has been paid to the first day of January, 1900, to the then owners. In May, 1899, the title to three-fourths of the quarry became vested in William T. Cobb, trustee, who by his deeds of June 7th and June 26th, 1899, conveyed it by quitclaim to the Penobscot Bay Manufacturing Company, which company conveyed it by warranty deed to the defendant on January 18th 1900. And on the fifth day of March, 1900, the remaining one-fourth was conveyed to the defendant.

The deeds to Cobb contained the provision: "This conveyance is subject to a lease of a portion of said quarry and real estate from this grantor to Perry Brothers, dated April 16th, 1898, and all right, title and interest in and to said lease, together with the rentals therefrom accruing after June 1, 1899, are hereby assigned and transferred to the said Cobb, as trustee." A similar provision is contained in the deeds from Cobb to the Penobscot Bay Manufacturing Company. In the deed from that company to the defendant is the clause:—"And also subject to any existing rights under a writing or lease to Perry Brothers, dated April 16, 1898, and all right, title and interest of the said Penobscot Bay Manufacturing Company in, to, or under and by virtue of said writing or lease, together with the rentals hereafter accruing therefrom, are hereby assigned, set over, transferred and conveyed to the grantee." No similar provision was contained in the deed of one-fourth from Frohock and others.

The defendants therefore must be regarded as taking title with notice of whatever rights, if any, plaintiffs then had, but their rights were not thereby enlarged.

Under the lease, plaintiffs had the right to renew or extend the lease for one, two, three, four five, six or seven years at their option. They had one right of election and only one, to be exercised by the will of the plaintiffs communicated to the lessors or the then owners of the reversion. *Cunningham* v. *Pattee*, 99 Mass. 252. Good faith, fair dealing, as well as the law, required that the election should be made during the original term of the lease, or at its expiration. *Renaud* v. *Daskam*, 34 Conn. 512; *Thiebaud* v. *First Nat. Bank*, 42 Ind. 222; *Darling* v. *Hoban*, 53 Mich. 599; *Shamp* v. *White*, 106 Cal. 221.

Notwithstanding the fact that, shortly before the expiration of the specific term of the lease, plaintiffs placed in the quarry another boiler, the evidence satisfies us that neither at that time, nor at the expiration of the year, had the plaintiffs arrived at the conclusion to have their term extended for any definite time. The matter appears not then to have passed beyond the experimental stage. Benjamin C. Perry, one of the plaintiffs, says that, at about the time he set up the horizontal boiler, which he places at the 13th or 14th of April, 1899, McNamara, one of the original lessors and then part owner of the quarry, said to him "it looks as though you had come to stay," and that he does not remember what reply he made. McNamara says that he asked Perry what he was doing, and he answered: "I guess I have come to stay with you. I am going to set up this larger boiler." This answer is not such as would be expected, if at that time Perry had decided to take an extension of the lease for one or more years. It is more consonant with the idea of awaiting results before making an election.

Nine months after the expiration of the year's term in the lease, plaintiffs notified defendant in writing that they had elected to continue the lease, but not specifying for what term. Enclosed with this notice was draft of a lease for seven years, which plaintiffs asked to have executed. Defendant declined to execute the proposed lease, and distinctly claimed that plaintiffs' option terminated at the end of the first year; and that plaintiffs having failed to exercise their option, their right had expired, and claimed possession of the mine on April 16th, 1900. This notice of the exercise of plaintiffs' option was too late. The term of the lease had expired. Plaintiffs had failed to exercise seasonably their option, and the right to do so had terminated, yet plaintiffs remained in possession and were not ejected by the then owners, as they might have been, and rent was paid to the then owners and accepted by them until January 1st, 1900. No rent has been paid to or accepted by defendant.

It is strenuously argued that by thus holding over by consent of the reversioner, the plaintiffs had exercised their election and perfected their right to an extended term for the extreme period of

seven years. The cases cited do not sustain such broad claim. In *Kramer* v. *Cook*, 7 Gray 550, the lease gave an election to lessee to extend for a further definite term at an increased rental. The tenant held over and paid two quarters rent at the increased rate. This was rightly held to justify the inference of election. In *Hersey* v. *Giblett*, 18 Beavan, 174, Hughes agreed to let and Hersey to take a house "as a yearly tenant," and "should Hersey wish for a lease of the premises, Hughes will grant the same for seven, fourteen or twenty-one years." Hersey occupied for seven years, and then called for a lease, and filed a bill for specific performance. It was held that the contract created a tenancy from year to year, with an option to the lessee to ask for a lease from the beginning for twenty-one years, determinable at his option for seven or fourteen.

In some jurisdictions it is held that, where the lease authorized a renewal or extension for a definite term, holding over by consent amounts to an election to hold for the extended term. So held in *Terstegge* v. *First German Ben. Society*, 92 Ind. 82; *Delashman* v. *Berry*, 20 Mich. 292; *Insurance & Law Building Co.* v. *Missouri Bank*, 71 Mo. 58; *McBrier* v. *Marshall*, 126 Pa. St. 390. But the Indiana court held in *Whetstone* v. *Davis*, 34 Ind. 510, and *Folley* v. *Giles*, 29 Ind. 114, that where the lease provided for a term of one year, with the privilege of the premises for two or three years, holding over after the first year operated only as an election to hold for one year. In *Buckland* v. *Papillon*, 2 Law Reports, Chancery Appeals, 67, there was an agreement to let certain premises for three years, and also when called upon by the tenant to grant him a lease for three years, seven years or the whole term. Under that agreement it was held that the option was not gone at the end of the three years. It could hardly have been held otherwise. Numerous cases are cited by counsel, to which we do not specifically refer, as they afiord no additional aid in the solution of the question involved here.

The insuperable difficulty in this case is, that the option to extend the lease was not for a definite period, but for any number of years not exceeding seven which plaintiff should desire. If the holding

over was evidence of an election, for how long a term was it? Suppose within the second year the tenant had vacated, could the landlord recover rent for the seven years? Or would the tenant be allowed to say he elected to hold for one year only?

Some courts make a distinction between a right to renew a lease, and the privilege of extension—treating the former as a covenant, requiring a new lease, and the latter, if the option is exercised, as a holding under the original demise. In this state, such distinction is not regarded; in either case, the additional term is treated as arising from the original demise. *Willoughby* v. *Atkinson Co.*, 93 Maine, 186.

At common law under a lease for a year or a term of years, holding over by the tenant, by consent of landlord, created a tenancy from year to year, and mere holding over without consent, a tenancy at sufferance. But under our statutes, holding over after expiration of the term creates a tenancy at will. *Franklin Land Co.* v. *Card*, 84 Maine, 532.

Kendall v. *Moore*, 30 Maine, 330, was a case where under a lease for a year, the tenant held over about six months and paid one quarter's rent. The landlord claimed rent for the entire year, but the court held that the lessee was tenant at will, and not liable for rent beyond the time of his occupancy.

The plaintiffs in this case failed to make seasonably an election to have the lease extended, and the term therefore ended on April 16th, 1899. Thereafterward they held the premises as tenant at will to the then owners. The conveyances of title to the defendant in January and March, 1900, terminated their tenancy and all right of possession. *Seavey* v. *Cloudman*, 90 Maine, 536.

Defendant has never recognized the plaintiffs as its tenant. Their holding therefore is without right.

Bill dismissed with costs.

STATE *vs.* INTOXICATING LIQUORS BY LIBEL,

and Grand Trunk Railway Company of Canada, Claimant and Appellant.

Cumberland. Opinion September 21, 1900.

Intox. Liquors. Inter-State and Const. Law. R. S., c. 27, § 31.

The Act of Congress of August 8, 1890, commonly known as the "Wilson Act," was not intended to, and does not cause the power of a state to, attach to interstate commerce shipments whilst the merchandise is in transit under such shipments, until its arrival at the point of destination and delivery there to the consignee.

Intoxicating liquor was shipped from Portsmouth, N. H., in October, 1899, by the Boston and Maine, and the Grand Trunk Railroads, accompanied by a continuous way-bill, and was consigned to a person in Lewiston, Maine. While it was in the car, standing on the siding at Auburn, it was seized by the Auburn police officers, taken from the car and removed to the depository where seized liquors are kept. At the time of its seizure it was in transit, not having reached its destination nor having been delivered to the consignee.

According to the authority of the Supreme Court of the United States in the case of *Rhodes* v. *Iowa*, 170 U. S. 412, in a similar case, it follows that this seizure was made while the liquor continued to be an interstate shipment, and before it had become subject to the operation of the laws of the state of Maine.

Held; that the seizure was therefore premature and unauthorized.

Whether, after actual notice to the consignee of the receipt of the goods in the freight warehouse, and neglect on his part to remove them after the lapse of a reasonable time, the warehouseman may under some circumstances be deemed to hold them as agent of the consignee, and the act of interstate commerce accordingly be held complete, is a queston which was not considered by the federal court, nor does it arise in the case at bar; for it distinctly appears here that the liquor was seized before it had reached its destination, and before its delivery to the consignee.

Held; that while, therefore, intoxicating liquor continues to be recognized by federal authority as a legitimate subject of interstate commerce, that clause of § 31 of chap. 27 of the revised statutes of Maine which declares that "no person shall knowingly bring into the state . . . . any intoxicating liquor with intent to sell the same in the state in violation of law," must be held inoperative as repugnant to the constitution of the United States.

AGREED STATEMENT.

This was a search and seizure process under c. 37, § 31, R. S., begun in the municipal court of Auburn, and followed by the usual proceedings, upon a libel against the liquors seized for their condemnation under the statute.

The Grand Trunk Railway of Canada intervened as claimant and filed the following claim for the liquors:

And now comes The Grand Trunk Railway Company of Canada, a corporation created and existing under the laws of the Dominion of Canada, and a citizen of said Dominion of Canada, said corporation being a common carrier, and specifically claims the right, title and possession in the items of property hereinafter named, as having a right to the possession thereof at the time when the same were seized.

And the foundation of said claim is that they were in possession of said Grand Trunk Railway Company of Canada, and were in transit from Portsmouth in the State of New Hampshire to Lewiston in the State of Maine, and were taken from the lawful possession of said The Grand Trunk Railway of Canada on the sixth day of October, A. D. 1899, from a box car standing on said Company's track near the depot of said company, situated on the east side of Main street, in Auburn, in the county of Androscoggin, by Fred L. Austin, one of the constables of said Auburn, and this claimant declares that said items of property were not so kept or deposited for unlawful sale, as is alleged in the libel of said Fred L. Austin and in the monition issued thereon. The property claimed as aforesaid is as follows:—

One barrel containing thirty-two (32) gallons of ale, marked Defunct Moncul, Lewiston, Maine.

Dated at Auburn, in said County, this nineteenth day of October, in the year of our Lord one thousand eight hundred and ninety-nine.

The Grand Trunk Railway Company of Canada,
By JAMES A. BYRON, its Agent.

The liquor was declared forfeited by a pro forma ruling in that court, and the claimant appealed to this court, where the parties agreed to the statement of facts as substantially stated in the opinion of the court.

C. A. and L. L. Hight, for claimant.
George E. McCann, county attorney, for State.

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

WHITEHOUSE, J. This case comes to the law court on the following agreed statement of facts:

"The liquor concerned in this case had been shipped at Portsmouth, New Hampshire, via Boston and Maine Railroad and Grand Trunk Railway, accompanied by a continuous way-bill, and was consigned to a person in Lewiston, Maine. While in transit and before delivery to consignee, it was seized by the police officers at Auburn.

"On the night of October 6th, A. D. 1899, a car containing the intoxicating liquors in question, while in the ordinary course of transportation, was attached to Grand Trunk train No. 43 at Lewiston Junction and was drawn thence to the city of Auburn. There, to secure the convenience of passengers, and to enable them to alight at the station platform at Lewiston, this car was left standing on the siding. When the passenger coaches had been taken to the passenger station at Lewiston, the engine and crew returned to the siding at Auburn for the purpose of removing this car to the freight house track in Lewiston, where the liquors were to have been delivered to the consignee.

"The liquor had been shipped by a brewery company doing business at Portsmouth, in the state of New Hampshire, and was being carried, accompanied by a continuous way-bill, issued by the Boston and Maine Railroad at Portsmouth, from said Portsmouth by way of the Boston and Maine Railroad to Portland, and thence by way of the Grand Trunk Railway to Lewiston. While it was standing on the siding at Auburn it was seized by the Auburn police officers, taken from the car and removed to the depository where seized liquors are kept. At the time of its seizure it was in transit, not having reached its destination nor having been delivered to the consignee."

It was contended by the Grand Trunk Railway Company of Canada that the seizure of this liquor by the police officers of Auburn, before its delivery to the consignee, was in violation of the third clause of section eight of the first article of the Constitution of the United States, conferring upon Congress the power "to regulate commerce with foreign nations and among the several states." But the judge of the municipal court held that the seizure was legal and declared the liquor forfeited. From this decision the claimant appealed to the supreme judicial court.

It is manifest that the seizure of the liquor in question, under the circumstances disclosed in the agreed statement of facts, must be justified, if at all, by the provisions of section thirty-one of chapter twenty-seven of the revised statutes of Maine, and of chapter 728 of the act of congress of August 8, 1890. Section 31, chap. 27 of the R. S. is as follows:

"No person shall knowingly bring into the state, or knowingly transport from place to place in the state, any intoxicating liquors with intent to sell the same in the state in violation of law, or with intent that the same shall be so sold by any person, or to aid any person in such sale, under a penalty of fifty dollars for each offense. All such liquors intended for unlawful sale in the state may be seized while in transit and proceeded against, the same as if they were unlawfully kept and deposited in any place."

The act of congress of August 8, 1890, commonly known as the Wilson act, is in these terms:

"All fermented, distilled or other intoxicating liquors or liquids transported into any state or territory, or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

It is insisted, however, in behalf of the claimant that, inasmuch as the transportation of intoxicating liquors from one state to

another is declared to be interstate commerce, the regulation of which has been committed to congress by the federal constitution (*Bowman* v. *Chicago & Northwestern Railway*, 125 U. S. 465) any construction of these statutes which would authorize a seizure of liquors under the circumstances disclosed in the case at bar, would give to the statute of Maine an extra-territorial operation and, to that extent, render the act repugnant to the constitution of the United States, as hereinbefore stated.

The *Bowman case*, supra, (125 U. S. 465) decided before the passage of the Wilson act of August 8, 1890, was an action to recover damages against a railway company for refusing to carry the liquor in question from Illinois into Iowa. In defense the company sought to justify its refusal by the provisions of the Iowa statute which prohibited the delivery of intoxicating liquors within that state. But it was the opinion of a majority of the court that the transportation of such liquors from one state into and across another was interstate commerce, and as such was protected from the operation of state laws from the moment of shipment until the act of transportation was terminated. It was accordingly held, although by a divided court, that the statute of Iowa of the same scope and effect as the Maine statute above quoted, so far as it affected interstate commerce, was repugnant to the constitution of the United States and void.

In *Leisy* v. *Hardin*, 135 U. S. 100, announced two years later, but prior to the passage of the Wilson act of 1890, it was held, also by a divided court, three justices dissenting, that the right to sell the imported liquor in the original packages free from interference by state laws was also protected by the federal constitution, as by the act of sale alone the merchandise would become mingled with the common mass of property in the state. "Up to that point of time," say the court, "we hold that in the absence of congressional permission to do so, the state had no power to interfere by seizure, or any other action in prohibition of importation and sale by the foreign or non-resident importer. . . . . The responsibility is upon congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the state in

dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action."

Thereupon Congress promptly interposed by enacting the Wilson law above quoted, declaring that all such liquors transported into any state "shall, upon arrival in such state" . . . . "be subject to the operation and effect of the laws of such state."

But recognizing the paramount authority of the federal decisions upon this subject, our own court announced its judgments in two cases which had arisen prior to the passage of the Wilson act, viz: *State* v. *Intox. Liquors, Michael Burns, claimant*, 82 Maine, 558, and *State* v. *Intox. Liquors, Boston & Maine Railroad, claimant*, 83 Maine, 158.

The construction of the Wilson act was not determined by the Supreme Court of the United States until it was brought directly in question in the case of *Rhodes* v. *Iowa*, 170 U. S. 412. In that case the intoxicating liquor in question was transported under a continuous way-bill from Illinois to a point in Iowa by one line of railway, and thence by another line of railway, wholly within the latter state, to the place of its destination. The package had been removed from the car and deposited on the platform by the trainmen. It was then carried by the plaintiff, the station agent at that point, into the freight warehouse, where it remained about an hour, when it was seized by a constable under a search warrant. For this act of moving the goods from the platform to the freight house, the plaintiff in error was convicted in the state court under the statute of Iowa of unlawfully conveying intoxicating liquor "from one place to another in the state." Whether the consignee had actual notice of the arrival of the package, and a reasonable opportunity to remove it from the freight warehouse before the seizure did not appear. It was held by the federal court, again divided, three justices dissenting, that this conviction was erroneous, for the reason that the act of the plaintiff in thus moving the package was a part of the interstate commerce transportation, and was performed before the law of Iowa could constitution-

ally attach to it. In the majority opinion it is said: "We think that, interpreting the statute by the light of all its provisions, it was not intended to, and did not cause the power of the state to, attach to an interstate commerce shipment whilst the merchandise was in transit under such shipment and until its arrival at the point of destination and delivery there to the consignee."

Whether, after actual notice to the consignee of the receipt of the goods in the freight warehouse, and neglect on his part to remove them after the lapse of a reasonable time, the warehousemen may under some circumstances be deemed to hold them as agent of the consignee, and the act of interstate commerce accordingly be held complete, is a question which was not considered by the federal court. Nor does it arise in the case at bar; for it distinctly appears here that the liquor was seized by the police officers in the cars of the railway company while it was standing on the siding at Auburn before it had reached its destination in Lewiston, and it is expressly conceded in the agreed statement of facts that the seizure was made while the liquor "was in transit and before its delivery to the consignee". It follows that upon the authority of *Rhodes* v. *Iowa*, supra, this seizure was made while the liquor continued to be an interstate shipment, before the transportation of it had terminated and before it had become subject to the operation of the law of the State of Maine. The seizure was therefore premature and unauthorized.

The observation of Chief Justice PETERS in *State* v. *Burns*, 82 Maine, 558, supra, respecting the federal case of *Leisy* v. *Hardin*, supra, is equally applicable to *Rhodes* v. *Iowa*, above cited: "The opinion of a minority of the court sitting in that case appears to be very elaborate and exhaustive of the question involved, and may commend itself to many as containing the better conclusion. Our obedience is due, however, to the judgment which prevails."

While, therefore, intoxicating liquor continues to be recognized by federal authority as a legitimate subject of interstate commerce, that clause of section 31 of chapter 27 of the revised statutes of Maine which declares that "no person shall knowingly bring into the state . . . . any intoxicating liquor with intent to sell

the same in the state in violation of law", must be held inoperative as repugnant to the constitution of the United States.

The entry must therefore be,

Judgment for the claimant.
Order for return of liquors to issue.

GEORGE N. PAGE, Trustee, in Equity,

vs.

ABNER PAUL MARSTON, and others.

Somerset. Opinion October 15, 1900.

Will. Trusts. Duration. Accounting. R. S., c. 68, § 12.

In giving judicial construction to wills the court seeks only to discover and give effect to the testator's intention as disclosed by the language of the will itself, viewed in the light of any avowed or manifest object of the testator.

A testator, by the residuary clause of his will, gave the residue of his estate to certain kindred in equal shares "provided that the share of [nephew] shall be held in trust by him for his son [grand-nephew] and that said [nephew] shall have full power to sell, convey and reinvest for the benefit of his said son during his minority on giving bonds as testamentary trustee." *Held;* that the trust terminated when the grand-nephew became twenty-one years of age.

Upon a bill of interpleader to obtain the construction of a will and the directions of the court as to the disposal of the trust property, certain creditors who had lent money to the cestui que trust during his minority, taking an assignment of his share in the estate as security, were made parties to the bill.

Held; that, as the creditors had begun suits at law to recover their loans and which were then pending, the validity of their claims must be determined in the actions at law; and that no question touching their rights in these actions can properly be considered in a bill of this character.

It is competent for this court sitting in equity, when all the parties interested are before it, to allow a trustee to make a final settlement of his account, he having asked in his bill to be allowed to do so, although he was appointed trustee by the probate court and gave bond as such to that court.

ON REPORT.

Bill in equity, heard on bill and answers, to obtain the construction by the court of the residuary clause of the will of the late

Abner Coburn; also to obtain the directions of the court respecting the termination of the trust contained therein, and for the protection of the trustee in the disposal of the trust property.

The case appears in the opinion.

S. J. and L. L. Walton; Turner Buswell, for plaintiff.

D. D. Stewart, argued for Alonzo C. Marston.

E. N. Merrill, for Kocher and others, creditors.

H. V. Morehouse, for Abner Paul Marston.

Geo. E. Whitaker, for Sisson, creditor.

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

WHTEHOUSE, J. This is a bill in equity brought by the plaintiff as trustee, under the will of Abner Coburn, for the purpose of obtaining a construction of that clause of the will creating the trust, and an authoritative declaration respecting the termination of the trust, and the manner in which it shall be executed in order to accomplish its purpose and protect the trustee in the disposal of the property in his hands.

The clause of the will in question is as follows: "The residue of my estate of whatever kind and wherever situated I give and devise to my kindred as follows; viz: to the children of my deceased sister Eliza C. Marston; to the children of my deceased brother Samuel W. Coburn; and the children of my deceased brother Stephen Coburn, in equal parts, provided that the share of Alonzo C. Marston shall be held in trust by him for his son Abner Paul Marston and that said Alonzo C. Marston shall have full power to sell, convey and reinvest for the benefit of his said son during his minority on giving bonds as testamentary trustee."

Alonzo C. Marston declined to accept the trust, and thereupon the plaintiff, George N. Page, was duly appoiuted trustee for Abner Paul Marston under the above clause in the will by the probate court of Somerset county, and promptly entered upon the discharge of his duties. Abner Paul Marston became twenty-one years of

age on the 4th day of October, 1899, and the plaintiff seeks to have the court decree whether the trust should terminate at that time, or if not when, and upon what contingency it should terminate, and asks that his doings as trustee in selling and contracting to sell certain parcels of real estate belonging to the trust, and in making payments and expenditures for the benefit of his cestui que trust, may be confirmed.

The separate answers of Joseph H. Sisson and John R. Kocher, and the joint answer of Lillie E. Kocher and Elise Smout, defendants, respectively, state that Abner Paul Marston, before reaching his majority, made an assignment to Sisson of his interest in the estate of Abner Coburn to secure a loan of $8060, a second assignment to Kocher to secure a loan of $8500, and a third assignment to Kocher and Smout to secure a loan of $17,000; and all contend that the trust terminated when Abner Paul Marston attained the the age of twenty-one years, and that he then became entitled to receive all of the property held in trust for him by the plaintiff.

The answer of Alonzo C. Marston and Abner Paul Marston, the other defendants, states that since Abner Paul became twenty-one years of age, and since the filing of the plaintiff's bill, viz: on the 25th day of January, 1900, they agreed in writing between themselves upon a full settlement and division of all of the property devised and bequeathed by the will in question to Alonzo C. and Abner Paul Marston, or either of them, and in the possession and control of the plaintiff, and made a joint conveyance of the entire property to George H. Collins of Alameda county, California, in trust for their use and benefit; that George H. Collins is, therefore, now authorized to receive the entire property from the plaintiff, and that the answers of the other defendants preferring claims against the property under the assignments made by Abner Paul during his minority present no question properly cognizable by this court in this proceeding. They accordingly ask that, upon a full settlement of the plaintiff's account as trustee, he be ordered to convey and pay over to George H. Collins all of the property so devised and bequeathed to them by Abner Coburn.

After the filing of the last named answer, George H. Collins

presented a petition asking that he be allowed to intervene and become a party defendant and adopt as his own the answer of Alonzo C. and Abner Paul Marston. His petition was granted and Geo. H. Collins has duly entered his appearance as a party defendant.

It is evident that the validity of the claims preferred by the defendants above named, who made loans to Alonzo Paul Marston and accepted assignments from him as security before he became of age, must be determined in the actions therefor now pending in a court of law, and that no question touching the right of the parties in the subject matter of these actions can properly be considered in this bill in equity brought to obtain a construction of the will and a settlement of the trustee's accounts; for it is conceded by all parties that, under the terms of the will, all of the property in question was to be held in trust during the minority of Abner Paul Marston. But it is claimed in behalf of the defendants that it was not to be held in trust after he became of age. It is contended that the clause in the will above quoted should be construed as if written as follows, viz: "provided that the share of Alonzo C. Marston shall be held in trust for his son Abner Paul Marston . . . . during his minority," and "that said Alonzo C. Marston shall have power to sell, convey and reinvest for the benefit of his said son," during his minority.

It must not be forgotten that, in giving a judicial construction to a will, the court is only seeking to discover and give effect to the intention of the testator as disclosed by the language of the will itself, viewed in the light of any avowed or manifest object of the testator.

The language of the will here in question is clearly susceptible of the meaning contended for by the defendants, as illustrated above, by transposing the different parts of the sentence creating the trust. It is by no means an extraordinary grammatical construction to make two clauses of a sentence subject to the modification of a single adverbial phrase. The testator evidently intended to provide that Alonzo should hold his share only in trust for his son, and reinvest it for his benefit, during his minority. The sug-

gestion of a trust during the lifetime of the son is not justified either by the language of the special clause in question or by any circumstances disclosed by the will. At the time Abner Coburn made this will, Abner Paul Marston, his namesake, was a child of tender years. He had developed no characteristics from which it could be anticipated that he would not be entirely competent to manage his own affairs when he reached the period of maturity and discretion. This was an express, active trust in which, by the terms of the will creating it, the trustee was charged with the performance of active and responsible duties with respect to the control, management and disposition of the trust property for the benefit of his son; but there seems to be no sufficient ground for its continuance beyond the limitation named in the will. It would appear to have been the intention of the testator that the "share of Alonzo C. Marston" should become the absolute property of the son at the expiration of the trust, although it must be admitted that this intention was obscurely and inadequately expressed; but whatever his purpose may have been in regard to the respective interests of father and son in this "share," it was undoubtedly intended to be held and enjoyed by one or both of them absolutely after the expiration of the trust; and they have since, by written agreement between themselves, settled the question of the proportion or estate to be enjoyed by each, and joined in a deed conveying the entire trust property to a new trustee.

Although the plaintiff was appointed trustee by the probate court of Somerset county and gave bond as such to that court, he asks in his bill not only for a construction of the will and for directions in regard to the execution of the trust, but also for a settlement of his account as trustee; and inasmuch as all persons interested are now before the court as parties to this bill, it seems advisable to allow the plaintiff to make a final settlement of his account in the equity court. See R. S., ch. 68, § 12; Pom. Eq. Jur. §§ 1063, 1064, 1421. It seems also, as stated by Mr. Perry in his work on Trusts, "to be a reasonable requirement, on the part of the trustee, when he parts with the fund and the muniments of title, and in some sort, with the means of defense, that he should

be secured against future litigation. . . . . Therefore it is usual, upon final settlement and transfer of the trust property to the parties entitled, to discharge the trustee by a formal release of all claims, executed by all the cestuis que trustent who are sui juris." 2 Perry on Trusts, § 922.

A decree is, therefore, to be entered that the bill be sustained; that the plaintiff be authorized and directed to present to this court held by a single justice, an itemized account of all his receipts and expenditures, and charges for compensation as trustee of Abner Paul Marston, with a full statement of all his doings in the administration of that trust, that the same may be examined either by such justice or by a master to be appointed for that purpose, with a view to the final settlement and confirmation of the same; that when such accounts shall have been approved and allowed and all the doings, contracts and conveyances of the plaintiff as such trustee shall have been confirmed by the court, upon the execution and delivery to the plaintiff of a sufficient release, signed by Abner Paul Marston and George H. Collins of all claims against him as trustee and discharging him from all further liability on account of such trust, the plaintiff shall convey, transfer and deliver to George H. Collins, the grantee and trustee hereinbefore named of Alonzo C. and Abner Paul Marston, all of the property and fund belonging to this trust remaining in his hands and possession; and that thereupon the trust be declared terminated and the plaintiff discharged from all further responsibility thereunder, except for the execution of deeds of conveyance of any portion of the trust property which he may have become bound to deliver by virtue of contracts that shall have been confirmed by the court.

Decree accordingly.

MELINDA HATCH

vs.

FIRST NATIONAL BANK OF DEXTER.

Penobscot. Opinion October 30, 1900.

Bills and Notes. Certificate of Deposit. Negotiability. Current Funds.

A certificate of deposit payable in current funds to the order of the depositor on return of the certificate properly indorsed with interest at three per cent per annum, if on deposit six months, is negotiable.

The term "current funds" when used in commercial transactions as the expression of the medium of payment is construed to mean current money, or funds which are current by law as money.

Making such a certificate payable on its return properly indorsed creates no such contingency as to payment as affects its negotiability. The language used expresses no more than the law implies as the duty of the holder in the absence of any such stipulation.

The amount of payment is not rendered uncertain by such an interest clause.

If payment be demanded at any time within six months, the amount payable is certain; it is the face of the certificate.

If payment be not demanded until after six months, the amount payable is equally certain; it is the face of the certificate and interest to the time of payment. The sum payable at any given time is ascertainable upon the face of the certificate, and that is sufficient.

Exceptions do not lie to rulings that fail to raise any question of law.

ON EXCEPTIONS BY DEFENDANT.

Assumpsit upon a certificate of deposit, issued to one Olive Hodge by the defendant bank, and claimed by the plaintiff as a gift by indorsement and delivery before the death of the donor. The case appears in the opinion.

Besides the facts stated in the opinion of the court, it appears from the bill of exceptions that the plaintiff presented the certificate at the First National Bank of Dexter on May 3d or 4th, 1897, and requested the payment of $50.00, which the cashier paid to her; but at the same time requested her to promise that she would get Olive Hodge to indorse the certificate, otherwise he would not pay

any more money on the certificate, which Mrs. Hatch the plaintiff promised to do. Subsequently, on the same day, May 4th, 1897, Olive Hodge did indorse her name on the certificate; and on the trial it was a question of dispute, between the parties, as to whether Olive Hodge at the time of her indorsement made a gift of the certificate to the plaintiff as her property,—the plaintiff contending that it was a gift to her, and the defendant contending otherwise, and that it belonged to the estate of Olive Hodge, who died July 22d, 1898.

It was admitted by both parties that her death occurred on that day and that nothing had been paid by the defendant on the certificate previous to her death, except as appears indorsed on the certificate.

Subsequently to the 22d, the day of her death, plaintiff presented the certificate to the cashier, and requested payment, to which request the cashier testified that he would pay no more on the certificate to plaintiff for the reason that he had been forbidden by Joel C. Pease, the executor of Olive Hodge's will, from paying it—that said executor claimed that it belonged to the estate of said Olive Hodge.

The defendant requested the court to instruct the jury, that if it was a mere gift made by Olive Hodge to the plaintiff in manner aforesaid, it would not authorize her, the plaintiff, to demand payment of the balance remaining unpaid represented by the certificate but still unpaid after her death. The court refused to give the instruction, to which the defendant duly excepted.

L. B. Waldron, for plaintiff.

J. and J. Willis Crosby, for defendant.

Not a negotiable instrument: Stat. 3 & 4 Anne, c. 9; *Miller* v. *Race*, 1 Smith, Lead. Cas. p. 853; Bigelow, Bills and Notes, p. 12, et seq.; *Collins* v. *Lincoln*, 11 Vt. p. 268; *Jones* v. *Fales*, 4 Mass. p. 255, et. seq.; *Joy* v. *Foss*, 8 Maine, p. 455; *Matthews* v. *Houghton*, 11 Maine, p. 377; *Dennett* v. *Goodwin*, 32 Maine, 44; *Holbrook* v. *Payne*, 151 Mass. pp. 384–5; *Whitney* v. *Eliot Nat. Bank*, 137 Mass. 351; Time of payment uncertain: *Stults* v. *Silva*, 119 Mass. 137; *Way* v. *Smith*, 111 Mass. 523; *Hubbard* v. *Mosely*, 11 Gray, 170.

Payable on condition of return of certificate indorsed.

Sum to be received by holder is uncertain: Bigelow, Bills and Notes, p. 17, and cases cited, especially *Mahoney* v. *Fitzpatrick*, 133 Mass. 151–2.

Not a perfect gift: *Fairfield Sav. Bank* v. *Small*, 90 Maine, 546, and cases.

SITTING: EMERY, WHITEHOUSE, SAVAGE, FOGLER, POWERS, JJ.

SAVAGE, J. This action is brought by the plaintiff as indorsee on a certificate of deposit of the following tenor:—

The First National Bank, Dexter, Maine, Jan. 6th, 1897.

Olive Hodge has deposited in this bank five hundred and sixty dollars payable in current funds to the order of herself on return of this certificate properly indorsed.

Int. at 3% per annum if on deposit 6 mos.

No. 2236. C. M. Sawyer, Cashier.

The defendant requested the presiding justice to rule, that the action could not be maintained by the plaintiff, as indorsee, for the reason that the certificate of deposit in question was not a negotiable instrument. The presiding justice declined so to rule, and the defendant excepted.

The defendant contends that the instrument is non-negotiable for three reasons: First, because it was written payable in "current funds;" secondly, because of the clause "Int. at 3% per annum, if on deposit 6 mos.;" and lastly, because of the condition of payment expressed in the words, "on return of this certificate properly indorsed."

That a certificate of deposit, as such, is a negotiable instrument is held by almost unanimous authority, 2 Daniel on Negotiable Instruments, § 1702; *Miller* v. *Austen*, 13 How. 218; and is not here denied by the learned counsel for the defendant. They only contend against certain features in the certificate before us. This court, following universal authority, has recently defined a negotiable instrument to be one which runs to order or bearer, is payable

in money, for a certain, definite sum, on demand, at sight, or in a certain time, or upon the happening of an event which must occur, and payable absolutely and not upon a contingency. *Roads* v. *Webb*, 91 Maine, 406. If the certificate in question does not conform to these requirements, it must be held to be non-negotiable.

The first objection is that it is not made payable in "money," that "current funds", in which it is made payable, should not be judicially interpreted to mean "money." We do not think this contention should prevail. This subject has been discussed exhaustively by many courts, and the conclusions they have reached on the one side and the other are not in harmony. But we think that the modern and better doctrine is that the term "current funds" when used in commercial transactions as the expression of the medium of payment should be construed to mean current money, funds which are current by law as money, and that when thus construed, a certificate of deposit payable in current funds, is in this respect, negotiable. It is well known that certificates of deposit are commonly made payable in "currency" or in "current funds," and we believe that the interpretation we have given is in accord with the universal understanding of parties giving and receiving these instruments, an understanding which we should resort to as an aid to interpretation, unless the words themselves fairly import some other meaning. Some courts hold that evidence may be received to show the meaning of the terms "currency", "current funds." But, in the absence of evidence, these courts come to opposite conclusions. For instance, in Iowa, the court holds that notes payable in currency are prima facie non-negotiable, but that evidence may be received to prove that the word "currency" describes that which by custom or law is money, and thus the instruments may be shown to be commercial paper. *Huse* v. *Hamblin*, 29 Iowa, 501. On the other hand, in Michigan, it was held that where a certificate of deposit was made payable in currency, "prima facie, at least, that must be held to mean money current by law, or paper equivalent in value circulating in the business community at par." "Such, we think," said the court, "is the general signification, the fair import and the ordinary legal effect of the term." *Phelps* v. *Town*, 14 Mich. 374; *Phoenix Ins. Co.* v. *Allen*, 11 Mich. 501.

Still other authorities hold that the terms "currency" or "current funds" used in commercial paper, ex vi termini, mean money. Judge Campbell, in *Black* v. *Ward*, 27 Mich. 191, after a critical examination of a mass of authorities, declared that, with few exceptions, "the general course of authority is in favor of the negotiability of paper payable in currency, or in current funds. And these decisions rest upon the ground that those terms mean money, as the necessity of having negotiable paper payable in money is fully recognized."

"The term 'funds,'" say the court in *Galena Ins. Co.* v. *Kupfer*, 28 Ill. 332, "as employed in commercial transactions, usually signifies money. Then the term 'current funds' means current money, par funds or money circulating without any discount." Respecting an instrument payable in "current funds," the Maryland court said: "The words 'current funds' as used in the paper before us mean nothing more or less than current money, and so construed the instrument was negotiable." *Laird* v. *State*, 61 Md. 311. See also *Miller* v. *Race*, 1 Burr. 452; 1 Smith's Leading Cases, 808. The Supreme Court of the United States had occasion, in *Bull* v. *Bank of Kasson*, 123 U. S. 105, to pass upon the negotiability of an instrument which had been made payable in "current funds." That court said: "Undoubtedly it is the law that, to be negotiable, a bill, promissory note or check, must be payable in money, or whatever is current as such by the law of the country where the instrument is drawn or payable. There are numerous cases where a designation of the payment of such instruments in notes of particular banks or associations, or in paper not current as money, has been held to destroy their negotiability. But within a few years, commencing with the first issue in this country of notes declared to have the quality of legal tender, it has been a common practice of drawers of bills of exchange or checks, or makers of promissory notes, to indicate whether the same are to be paid in gold or silver, or in such notes; and the term 'current funds' has been used to designate any of these, all being current and declared, by positive enactment, to be legal tender. It was intended to cover whatever was receivable and cur-

rent by law as money, whether in the form of notes or coin. Thus construed, we do not think the negotiability of the paper in question was impaired by the insertion of those words." See *Chrysler* v. *Renois*, 43 N. Y. 209; *Howe* v. *Hartness*, 11 Ohio St. 449; *Citizens' Nat. Bank* v. *Brown*, 45 Ohio St. 39; *Telford* v. *Patton*, 144 Ill. 611. The case of *Klauber* v. *Biggerstaff*, 47 Wis. 551, holding that a certificate of deposit payable in currency is negotiable is sometimes cited as distinguishing between "currency" and "current funds," but we think the distinction is more in language than in meaning, for the Wisconsin court, after carefully defining the term "currency," add: "This construction of the term 'currency' might perhaps properly be extended to the term 'current funds.' It must extend to the latter term whenever it is used in the legal sense of money."

Another contention of the defendant is, that the certificate of deposit is not negotiable because it is not payable absolutely, but only contingently, "on return of this certificate properly indorsed." We think this is not such a contingency as affects the negotiability of the certificate. The language expresses no more than the law implies as the duty of the holder in the absence of any such stipulation. 2 Daniel on Negotiable Instruments, § 1707; *Smilie* v. *Stevens*, 39 Vt. 315.

Further, it is contended that this certificate is uncertain as to amount, by reason of the interest clause; and therefore is not negotiable. No time of payment is mentioned in the certificate. It is accordingly payable on demand. If payment be demanded at any time within six months, the amount payable is certain; it is the face of the certificate. If payment be not demanded until after six months, the amount payable is equally certain; it is the face of the certificate and interest to the time of payment. In this respect, the certificate is like a note payable at a time certain, with interest at a specified rate, from the date of the note, or from maturity, if it is not paid at maturity. Such notes are held negotiable. As in the case of a note on demand or on time, the time when it may be actually paid is uncertain, so it is uncertain when this certificate may be presented and payment demanded. But whenever

that may be, the sum to become absolutely payable upon it at any given time is ascertainable upon its face, and that is sufficient. *Smith* v. *Crane*, 33 Minn. 144; *Towne* v. *Rice*, 122 Mass. 67; *Hope* v. *Barker*, 112 Mo. 338; *Crump* v. *Berdan*, 97 Mich. 293; 1 Daniel on Negotiable Instruments, § 53. This disposes of the exceptions relating to the negotiability of the certificate.

At the trial, the plaintiff claimed that Olive Hodge, when she indorsed the certificate, gave it to her as her property, and this the defendant denied. The defendant requested the presiding justice to instruct the jury that "if it was a mere gift made by Olive Hodge to the plaintiff in manner aforesaid it would not authorize her, the plaintiff, to demand payment of the balance remaining unpaid represented by the certificate but still unpaid after her (Olive Hodge's) death," which request was refused, and exception was taken.

We do not think, upon the facts stated, that this exception raises any question of law. The bill of exceptions does not state what was the "manner aforesaid" in which the gift was made; it merely states that it was "a question in dispute between the parties" whether there was a gift or not.

If there was a gift, which was a question of fact, of course, the property in the certificate remained in the plaintiff both before and after the death of Olive Hodge.

Exceptions overruled.

INHABITANTS OF TOPSHAM

vs.

MARGARET P. PURINTON.

Sagadahoc. Opinion October 31, 1900.

Taxes. Assessment. R. S., c. 3, § 10; c. 6, §§ 35, 97, 100, 142.

A supplement to the invoice and valuation and list of assessments for taxation purposes, under R. S., c. 6, § 35, before such supplemental assessments are committed to the collector, must be accompanied with a certificate under the hands of the assessors, stating that they were omitted by mistake.

Held; that the list of supplemental assessments, in this case, is not shown by the record evidence to be duly authenticated by the signatures of the assessors.

The healing provisions of R. S., c. 3, § 10, and c. 6, § 142, relating to errors and omissions, are not applicable until a tax-list is first shown to be in existence, under the hands of the assessors.

The court considers that the practice of interpolating in the record of original assessments an unsigned list of supplemental taxes without a certificate that they were "omitted by mistake" from the first assessment, as was done in this case, would induce an unwarrantable laxity in the performance of official duties which would result too often in oral controversies, uncertainty and doubt in regard to the regularity and validity of the assessment.

An original assessment was duly signed by the assessors, but a supplemental list was written into the original record upon a blank page between the last item of the original assessment and the concluding certificate and signatures of the assessors under the following caption, viz: "Resident supplemental. Committed Nov. 13, 1897." This supplemental list against the defendant was not accompanied by any certificate that it was omitted from the original list by mistake, nor was it authenticated by the signatures of the assessors, apart from the fact of its insertion in the original record. A warrant committing supplemental assessments was signed by the assessors who described themselves as selectmen and contains a recital that they were omitted by mistake.

Held; that the record evidence does not show that the list of supplemental assessments in this case are duly and sufficiently authenticated by the signatures of the assessors; nor is there requisite proof of the existence of a supplementary list of taxes signed by the assessors, as the law requires, supplied by the warrant to the collector issued afterward for the collection of certain sums set against the names therein written.

ON REPORT. FACTS AGREED.

Action of debt to recover a tax.

The case is stated in the opinion.

Weston Thompson, for plaintiff.

H. M. Heath and C. L. Andrews, C. D. Newell, with them, for defendant.

SITTING: WISWELL, C. J., WHITEHOUSE, STROUT, SAVAGE, POWERS, JJ.

WHITEHOUSE, J. This is an action of debt to recover a supplemental tax assessed against the defendant November 13, 1897, on "money at interest in excess of debts, $25,000."

It is not in controversy that on the first day of April, 1897, the defendant was an inhabitant of Topsham liable to taxation in that

town, and that she was legally taxed in the original assessment of that year. But she disputes the right of the plaintiffs to recover the amount of the supplemental tax assessed against her on the ground that the assessment of that tax was not legally made, and for two principal reasons: first, because the supplementary list of taxes of November 13 was incorporated in the original assessment made and committed to the officer June 19, over the signatures of the assssors appended to that assessment, and was not otherwise signed by them; and second, because the assessors failed to certify in the latter assessment that the supplementary taxes "were omitted by mistake from the original assessment."

Section 97 of ch. 6, R. S., relating to the assessment of taxes requires assessors to "make perfect lists thereof under their hands" and section 100 of the same chapter declares that "they shall make a record of their assessment and of the invoice and valuation from which it was made; and before the taxes are committed to the officer for collection, they shall deposit it, or a copy of it, in the assessors' office, if any, otherwise with the town clerk, there to remain."

Section 35 of the same chapter further provides that "they may, during their term of office, by a supplement to the invoice and valuation, and the list of assessments, assess such polls and estates their proportion of such tax according to the principles on which the assessment was made, certifying that they were omitted by mistake. Such supplemental assessments shall be committed to the collector with a certificate under the hands of the assessors, stating that they were omitted by mistake."

It appears from an examination of the record in this case that the original assessment was duly signed by the assessors, but that the supplemental list was written into the original record upon a blank page between the last item of the original assessment and the concluding certificate and signatures of the assessors under the following caption, viz: "Resident supplemental. Committed Nov. 13, 1897." The assessment against the defendant is as follows: "Purington, Margaret P. Money at interest in excess of debts $25.000," and states the amount of her supplemental tax to be

$425; but this supplemental list is not accompanied by any certificate that it was omitted from the original list by mistake, and apart from the fact of its insertion in the original record, was not authenticated by the signatures of the assessors. But the warrant committing these supplemental assessments to the collector Nov. 18, 1897, is signed by the assessors, though described as "selectmen of Topsham" and contains a recital that they were "omitted by mistake."

It is contended by the learned counsel, for the plaintiff, that the assessors had a right to adopt their signatures on the original record of June 19 to support the later assessment of November 13, and that there was a sufficient authentication of the supplemental assessment both by the signatures on the original record and those on the above named warrant to the collector of November 18 for the collection of the alleged supplemental tax.

It was properly observed in *Cressey* v. *Parks*, 76 Maine, 534, that "when forfeitures are not involved, proceedings for the collection of taxes should be construed practically and liberally;" but it is the opinion of the court that the list of supplemental assessments in this case is not shown by the record evidence to have been duly and sufficiently authenticated by the signatures of the assessors. To countenance the practice of interpolating in the record of original assessments an unsigned list of supplemental taxes without a certificate that they were "omitted by mistake" from the first assessment, as was done in this case, would induce an unwarrantable laxity in the methods of performing official duties, which would too often result in oral controversies, uncertainty and doubt in regard to the regularity and validity of the assessment. Whether or not such an interpolation of a supplemental tax was made by a single member of the board in the absence and without the participation of his associates, or was done in their presence and with their express approbation, would often become a disputed question of fact. Such a controversy, indeed, is shown to have arisen in the case at bar; but in the view here taken, the merits of that controversy become immaterial, and allusion to it is only made for the purpose of illustrating the mischievous consequences of such a practice.

It is true, that section 10 of chapter 3 R. S. provides for the amendment of "omissions or errors" in tax lists, and section 142 of chap. 6 declares that the assessment shall not be rendered void by "errors, mistakes and omissions of the assessors." But in *Inhabitants of Norridgewock* v. *Walker*, 71 Maine, 181, the court said: "Before one proceeds to amend errors or supply omissions in a tax list, there must be a tax list in existence, such as the law requires 'under the hands of the assessors,' and that is precisely where the record proof is deficient. It is true that this record is not required to be under the hands of the assessors; a copy will answer; but the original must appear to have been under the hands of the assessors, and this the record fails to show. . . . . In order to make the healing provisions of that section (142 c. 6) applicable there must first be an assessment under the hands of the assessors."

Nor is the requisite proof of the existence of a supplementary list of taxes, signed by the assessors as the law requires, supplied by the warrant to the collector of November 18 for the collection of certain sums set against the names therein written. For if it be assumed that this warrant was signed by three assessors in their capacity as assessors, though described as selectmen, it is not in the form required by law, with a list of assessments appended and referred to in the warrant, as in *Norridgewock* v. *Walker*, 71 Maine, supra, and *Bath* v. *Whitmore*, 79 Maine, 182, but it is in terms a direction to collect certain amounts from the persons named. The supplemental assessment was not incorporated in the warrant. It fails to supply the deficiency in the record evidence of the supplemental assessment relied upon by the plaintiffs.

Judgment for the defendant.

GEORGE P. THOMPSON *vs.* SULLIVAN MORSE.

Piscataquis. Opinion November 7, 1900.

Sales. Warranty. New Trial.

In an action for breach of warranty of soundness of a horse, it is not necessary that the proof should be in the identical language of the allegation in the declaration.

It is sufficient if it is the same in substance, if it means the same.

Held; in this case, that the evidence did tend to support the plaintiff's allegations; and, further, that it was sufficient to justify the verdict for the plaintiff.

A new trial on the ground of newly-discovered evidence will not be granted when it appears that the evidence taken under the motion, so far as it is properly open to consideration, is not newly-discovered; or when the evidence is not properly open to consideration, because it is not stated in the motion itself what is expected to be proved; and, also, because it is nowhere alleged or shown that it was unknown to the moving party at the time of the trial, and could not have been discovered by him by the exercise of reasonable diligence.

ON MOTIONS BY DEFENDANT.

Action for breach of warranty in the sale of a horse by the defendant to the plaintiff.

The case appears in the opinion.

W. E. Parsons and C. W. Hayes, for plaintiff.

J. B. Peaks, for defendant.

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

SAVAGE, J. Action for breach of warranty of a horse. The verdict was for the plaintiff. The defendant has filed two motions for a new trial; one on the ground that the verdict was against law and the evidence, and the other based on newly-discovered evidence.

The defendant denies the alleged warranty. He says the horse,

though about six years old, was an unbroken colt, and so known to be by the plaintiff at the time of the trade. Further, the defendant contends that the plaintiff is not entitled to hold his verdict, because he introduced no proof which supported his allegations of warranty. The allegations are that the defendant warranted that the horse was "all right and never did a wrong thing," that the horse was "kind and all right and never did a wrong thing." The plaintiff testified that he told the defendant that he wanted a horse that was perfectly safe for his wife and his boy to drive anywhere, that was "all right and kind and gentle and smooth," and that the defendant then said, "this buckskin" (the horse in question) "filled the bill." To be sure, the defendant claims that this conversation did not relate to the buckskin horse, but to another horse which he was proposing to sell to the plaintiff. Which horse it did refer to was a question of fact for the jury. We are now inquiring only whether the evidence, if true, supported the declaration. We think it did. It tended to support the allegation that the defendant warranted the horse to be "kind and all right." But more than this, the plaintiff testified respecting the warranty as follows: "He," the defendant, "said he hired Lanpher to break this colt. Lanpher took it and drove it all round town, took his wife and baby in and drove anywhere, and he never done a wrong thing, except if they drove up beside of anybody with a team and wanted to stop and talk, it wouldn't stand, that is the only thing the colt ever done; the *colt was perfect*, except it had been turned out to pasture, he says, for the last year, it would be coltish, probably have to have it drove some before your wife can handle it." Besides this, there was the evidence of a third person that the defendant had admitted in his presence that he told the plaintiff that "the horse was kind and gentle, never did a wrong thing." Undoubtedly the proof must support the allegations. Probata secundum allegata. But it has never been held in a case of this kind, and it is not the law, that the proof must be in the identical language of the allegation. It is sufficient if it is the same in substance, if it means the same. To say that a horse is "perfect" must mean that he is, at least, "kind and all right."

Accordingly, we think the plaintiff's evidence did tend to support his allegation, and, if believed, was sufficient to justify a finding that there was a warranty as alleged.

Now to recur to the question of fact. Was there a warranty? The plaintiff affirms it; the defendant denies it. And there is little evidence upon this point outside their respective statements. The jury believed the plaintiff's version, and the defendant fails to make it clear to us that the jury was wrong. This first motion cannot be sustained.

Nor can the defendant be aided by his second motion, based on newly-discovered evidence. In this motion, the defendant alleges that he believes he can prove by Osgood P. Martin that the plaintiff informed Martin that he knew the colt in question was an unbroken colt, and that he was so informed by the defendant when he bought it. He also makes an allegation, similar in substance, as to what he believes he can prove by Walter Kneeland. In his motion the defendant states no other new evidence that he expects to introduce. Martin's testimony fails to support the allegation in the motion. Kneeland's testimony does tend to support it, but Kneeland also testifies that the defendant himself was the one to whom plaintiff admitted that he was told that the colt was not broken. This evidence, therefore, was not newly-discovered. If true, it was known to the defendant at the time of the trial, and should have been used by him then.

If we proceed to consider the other things testified to by the witnesses under this motion, we shall find that the remaining evidence given by Martin relates to a conversation with one of the plaintiff's witnesses, and only tends to discredit him as a witness. This does not afford sufficient ground for a new trial, as was decided in *State* v. *Beal*, 82 Maine, 284. And of the remaining evidence given by Kneeland, it is enough to say that it is purely cumulative.

But, as a matter of practice, it must be said that the other pieces of evidence are not properly open to consideration by us; first because they are not stated in the motion itself, as expected to be proved, *Gilbert* v. *Woodbury*, 22 Maine, 246; *Merrill* v. *Shattuck*, 55 Maine, 374; and also because it is nowhere alleged or shown

that they were unknown to the defendant at the time of the trial, and could not have been discovered by him by the exercise of reasonable diligence. The allegations in the defendant's motion and affidavit relate only to the evidence which we have already considered, that the plaintiff knew the colt was unbroken, and was so informed by the defendant when the trade was made.

Motions overruled.

JOHN R. MCCUTCHEN, by Guardian,

vs.

SAMUEL CURRIER.

Kennebec. Opinion November 8, 1900.

Action. Trespass. Limitations. R. S., c. 81, §§ 84, 88.

When the statute of limitations has once begun to run, it is not interrupted by a subsequent disability.

Actions of assault and battery must be commenced within two years after the cause of action accrues.

The plaintiff's ward was assaulted September 12, 1894, and soon after became insane. The plaintiff having been appointed guardian June 27, 1899, begun his action subsequently to recover damages. *Held;* that the action is barred by the statute of limitations.

As the injured party was not insane when the cause of action accrued, the plaintiff's action is not taken out of the general rule of limitations by R. S., c. 81, § 88, which provides that "if a person entitled to bring any of the aforesaid actions is . . . insane . . . when the cause of action accrues, the action may be brought within the time limited herein, after the disability is removed."

AGREED STATEMENT.

The case is stated in the opinion.

E. W. Whitehouse, for plaintiff.

Fred Emery Beane, for defendant.

SITTING: WISWELL, C. J., WHITEHOUSE, STROUT, SAVAGE, POWERS, JJ.

SAVAGE, J. Action of trespass to recover damages for an assault and battery, alleged to have been committed September 12, 1894. Plea, the general issue and the statute of limitations. The case shows that the plaintiff became insane about one month after the alleged assault and has so continued ever since. He was adjudged insane June 27, 1899, and on the same day a guardian was appointed. Subsequently the guardian brought this action. The defendant has all the time been a resident of Kennebec county, and the plaintiff has been under no disability to sue, except insanity. The sole question presented is, whether under this state of facts, the action is barred by the statute of limitations. We think it is.

Revised Statutes, chap. 81, § 84, provides that actions of assault and battery shall be commenced within two years after the cause of action accrues. This cause of action accrued September 12, 1894. More than two years had elapsed when this action was commenced. It was therefore barred by the statute.

But, the plaintiff claims that this action is taken out of the provisions of section 84, which we have cited, by section 88, which reads as follows: "If a person entitled to bring any of the aforesaid actions is a minor or a married woman, insane, imprisoned, or without the limits of the United States, when the cause of action accrues, the action may be brought within the times limited herein, after the disability is removed."

We think, however, that the plaintiff does not bring himself within the provisions of this latter section, for he was not insane when the cause of action accrued. Relief is afforded by section 88 only when the disability existed when the cause of action accrued. Such is the express language of the statute, and we cannot enlarge or qualify it. To the same effect, also, are the authorities. *Butler* v. *Howe*, 13 Maine, 397; *Phillips* v. *Sinclair*, 20 Maine, 269; *Eager* v. *Commonwealth*, 4 Mass. 182; *De Arnaud* v. *United States*, 151 U. S. 483; Wood on Limitations of Actions, § 239.

When the statute of limitations has once begun to run, it is not interrupted by a subsequent disability. *Allis* v. *Moore*, 2 Allen, 306; *Oliver* v. *Pullam*, 24 Fed. Rep. 127; *Clark* v. *Traill*, 58 Ky. 35; *Cotterell* v. *Dutton*, (by Lord Mansfield) 4 Taunton, 825; Angell on Limitations, § 196. See, also, cases cited in note to *Doyle* v. *Wade*, 11 Am. St. Rep. 334.

Judgment for defendant.

JAMES C. WALCOTT, and others,

vs.

CHARLES F. RICHMAN.

Charles W. Morse, Trustee. Emeline W. Richman, Claimant.

Penobscot. Opinion November 16, 1900.

Trustee Process. Exceptions. Attachment. Sales. R. S., c. 86, §§ 32, 79.

1. Strictly, a claimant of funds, attached upon trustee process, cannot have exceptions to the decision of the presiding justice charging the trustee until by proper allegations an issue has been formed between him and the plaintiff.
2. Where however the plaintiff, the trustee and the claimant afterward file a written stipulation that the law court may nevertheless consider such exceptions and agreeing to abide by its judgment, the law court may in its discretion proceed to determine the questions thus raised.
3. When a consignor ships merchandise by a common carrier and at the same time negotiates for value a bill of exchange drawn for the price upon the consignee at his previous request, the payee or indorsee of such bill of exchange is entitled to the funds as against a subsequent attaching creditor of the consignor.
4. Where such consignee takes the goods from the carrier into his own possession and a few days afterward sells them as his own without asking instructions from the consignor, he will be adjudged to have accepted the goods and to have become liable therefor to the holder of such bill of exchange, although he wrote the consignor that the goods were not what he expected.
5. Upon exceptions in trustee process the law court can examine and determine the whole case as upon appeal.

ON EXCEPTIONS BY CLAIMANT.

Trustee process. At a hearing on the question as to whether or not the alleged trustee should be charged, the presiding justice adjudged the trustee chargeable for the funds in his hands; to this adjudication the claimant of the funds took exceptions and asked that the whole case be considered on the exceptions. The whole testimony, the disclosure of the trustee and his examination were made a part of the exceptions, accompanied with a written stipulation of all the parties submitting the question to the decision of the law court.

J. D. Rice, for plaintiffs.

The goods remaining the property of the principal defendant under our statute, they were liable to trustee process. This is true even if the goods could have been attached directly. *Balkham* v. *Lowe*, 20 Maine, 369; *Smith* v. *Cahoon*, 37 Maine, 281; *McDonald* v. *Gillett*, 69 Maine, 271; *Daniels* v. *Marr*, 75 Maine, 397.

Merely receiving the horses in his barn the night before is not necessarily an acceptance, but he may have an opportunity to reject them after a reasonable time for acceptance. *Morse* v. *Moore*, 83 Maine, 473. But the claimant's position is no better even if the goods had been accepted, and the horses were at the time the property of the trustee. The doctrine that a written promise to accept a non-existing bill is a virtual acceptance is admitted to be good law; but there are certain conditions to this general principle which modify and govern it. The rule was given in *Coolidge* v. *Payson*, 2 Wheat. (U. S.) 66, and has been followed by our courts. *Gates* v. *Parker*, 43 Maine, 544; *Plummer* v. *Lyman*, 49 Maine, 229.

An inspection of these cases and others following the U. S. decision above cited disclose the following conditions: 1. The promise should describe the bill to be drawn so as to identify and distinguish it from all others. Story on Bills, 249; 3 Kent's Com. 84; *Coolidge* v. *Payson*, supra.

2. The bill must be in accordance with the tenor of the promise. In the case of *Gates* v. *Parker*, supra, the variance from the promise was simply that the draft was made payable to a different person, yet the court said: "Non haec in foedera veni," and ordered a nonsuit.

The facts in the case under consideration are much stronger. The draft not only fails to comply in quantity with the order but also quality, twenty horses having been sent instead of sixteen or eighteen, and instead of good quality they were of an inferior grade. In *Boyce* v. *Edwards*, 4 Pet. (U. S.) 111, so strictly was this condition enforced that an order "to draw for any amount of cotton that he may buy" held not an acceptance, being too indefinite. The bill must be described in terms not to be mistaken. The description must be sufficient to identify the bill when sued on and such as can apply to no other bill; it must result from the promise itself, and can not be aided by any statement on the face of the bill. *Carnegie* v. *Morrison*, 2 Met. 406.

If the bill is not drawn in accordance with the provisions of the promise to accept, the latter can not be held an acceptance of the draft. *Lindley* v. *First Natl. Bank of Waterloo*, 76 Iowa, 429, (14 Am. St. Rep. 254).

The evidence discloses that the claimant was the mother of the principal defendant, and that the whole proceedings were for the purpose of defrauding the creditors from obtaining any property of the defendant. All the circumstances of the case go to show this: The fact that the draft was never presented for either acceptance or payment, and that no notice was sent that this draft was even drawn till nearly a month after the trustee suit was brought, and then, merely notice was given to the attorney of the trustee that the draft was in the hands of the claimant.

P. H. Gillin, for trustee.

A. J. Merrill, for claimant.

SITTING: EMERY, WHITEHOUSE, SAVAGE, FOGLER, POWERS, JJ.

EMERY, J. At the return term of this trustee process October, 1897, Mr. Morse, the trustee, made his disclosure in due form under oath in which he stated that, at the date of the service of the process upon him, he had in his hands $1373 75-100 due Richman the principal defendant for horses sold by Richman to him. He

did not then disclose that any other person claimed the fund. The case thereafter lay dormant until the January term, 1900, when it was brought up, and according to the bill of exceptions, "At a hearing on the question, as to whether or not the alleged trustee should be charged, the presiding justice adjudged the trustee chargeable for the funds in his hands." The only issue regularly formed in the case was between the plaintiff and the trustee, and upon that issue between them the ruling was, of course, right and the trustee did not except.

One Emeline W. Richman, however, did file a bill of exceptions as claimant of the funds disclosed, and this bill of exceptions the presiding justice allowed. So far as the record before us shows, Mrs. Richman is not in a position to have exceptions allowed or considered. Her appearance as claimant was entered upon the docket by counsel at sometime, but it does not appear when. She did not file any petition to be "admitted as a party to the suit so far as respects her title to the goods, effects or credits in question." She did not file any pleadings or allegations of fact, nor take any steps to form an issue between her and the plaintiff upon which the court, with or without a jury, could render a judgment which should bind and protect them and the trustee. Her exceptions, therefore, should in strictness be dismissed without further consideration. R. S., c. 86, § 32; *Bunker* v. *Gilmore*, 40 Maine, 88; *Hardy* v. *Colby*, 42 Maine, 381; *Dalton* v. *Dalton*, 48 Maine, 42; *Thompson* v. *Reed*, 77 Maine 425.

All the three parties, however, have signed and filed a written stipulation submitting to the court the question between the plaintiff and the claimant as to which of them is entitled to the fund, disclosed by the trustee as in his hands, and agreeing to be bound by its judgment thereon. We venture, therefore, to consider what the evidence proves upon that question.

The undisputed evidence shows these facts;—Mr. Morse (the trustee) a horse dealer at Bangor had often bought horses from Mr. Chas. F. Richman (the principal defendant) a horsedealer at East Buffalo, N. Y. May 6, 1897, Richman wrote Morse proposing to sell him a car load of horses on thirty days time. May 9 following,

Morse telegraphed Richman as follows: "Ship sixteen or eighteen if you can ship them worth the money, good big stock, one pair extra drivers, make thirty days draft, answer." May 10th, Richman shipped a car load of twenty horses to Morse at Bangor, and the same day drew his draft on him against the horses so shipped on thirty days for $1746—payable to his, Richman's, own order. This draft he indorsed and delivered to Jones Bros. in part payment of his note held by them. Mrs. Emeline W. Richman, the claimant, was Richman's surety on this note, and paid it, and Jones Bros. thereupon indorsed and transferred the draft to her.

The horses arrived at Bangor on the evening of May 13, and were the same evening unloaded from the car by Morse and placed in his barn. The next morning, May 14, this trustee process was served upon Morse, whereupon he telegraphed Richman, the consignor, as follows: "Have been trusteed to-day action against you. Court makes me hold funds. Can't honor draft, see letter." A few days later he sold the horses. Before the return term of the trustee process he was notified that Mrs. Richman held the draft and upon it claimed the proceeds of the horses. As already stated, however, he made no mention of this in his disclosure, but Mrs. Richman has voluntarily appeared and submitted her claim to the judgment of the court.

Upon the foregoing facts there can be no question that Mrs. Richman is entitled to the fund, that fund, being the proceeds of the horses, against which the draft held by her was drawn by the consignor at the time of the shipment, and in pursuance of the consignee's direction at the time of the purchase. The draft drawn and negotiated under such circumstances was, at least, as an equitable assignment of the fund, which would be operative against a subsequent attachment by trustee process. *Robbins* v. *Bacon*, 3 Maine, 346; *Littlefield* v. *Smith*, 17 Maine, 327; *Simpson* v. *Bibber*, 59 Maine, 196; *Exchange Bank* v. *McLoon*, 73 Maine, 498; *Jenness* v. *Wharff*, 87 Maine, 307.

But at the hearing in January, 1900, more than three years after filing his disclosure as above stated, Mr. Morse testified as a witness that, at the time he unloaded the horses from the car and

put them in his barn after their arrival, he was very much dissatisfied with them, and did not accept them;—that after sending the telegram above quoted he wrote the consignor Richman, that the horses were not what he expected.

The plaintiff claims that this testimony proves that the horses were not accepted,—that, therefore, Mr. Morse at the time of the service of the trustee process did not owe the consignor, or his assignee, anything for the horses, but the horses were still the property of the consignor, "entrusted to and deposited in his [Morse's] possession,"—and that the draft did not operate to pass any title to the horses. Assuming for the moment that the horses were not accepted and remained the property of the consignor, it may be questioned whether they were "entrusted to and deposited in his [Morse's] possession," in the statutory sense of those words so as to be attachable by trustee process. The mere fact that the goods of one are in the possession of another and left there by the owner does not make them attachable by trustee process. The statutory words imply some fiduciary or at least contractual relation between the owner and depositary as to the custody of the goods. *Howard* v. *Card*, 6 Maine, 353; *Skowhegan Bank* v. *Farrar*, 46 Maine, 293. In *Grant* v. *Shaw*, 16 Mass. 342, it was declared that the consignee of goods could not be held as trustee of the consignor until he had accepted the goods. In *Staniels* v. *Raymond*, 4 Cushing, 314, the owner left a cow with the alleged trustee upon trial to be purchased by the trustee if satisfactory. Before the expiration of the time allowed for the trial, the trustee declined to purchase and re-delivered the cow, but the owner nevertheless left the cow in the possession of the trustee. It was held that the trustee was not chargeable. The decision was put on the ground that to make a depositary of goods chargeable as trustee, he must be under some contractual obligation to the owner to return or pay for the goods in his possession.

It would seem, therefore, that if the plaintiff is correct in his assumption that the horses were not accepted, the consignee Morse could not be charged at all as trustee, and that exceptions by the trustee would have to be sustained.

We have no occasion, however, to decide that question. These exceptions are by the claimant alone. We are satisfied, also, that Morse did in effect accept the horses, and was chargeable as trustee for their price or value. He took the horses from the possession of the carrier into his own possession. He did not notify the carrier or consignor of any non-acceptance. He merely wrote the consignor that the horses were not what he expected. A few days afterward, without consulting the consignor, he sold the horses. This he could not have rightfully done unless he had accepted them. His telegram on the day of the service of the trustee process, and his sworn disclosure within six months thereafter, show his then understanding that he had accepted them. These acts and statements, at or near the time, far outweigh his testimony given over three years afterward.

It is urged in argument that the draft was made in fraud of creditors. We find no evidence of fraud. The indorsees were all creditors of the drawer, and it was lawful for him to pay them rather than the plaintiff so far as this process is concerned.

From the above findings of law and fact it follows that the fund in the hands of the trustee belongs to Mrs. Richman, the claimant. This conclusion requires the exceptions to be sustained, and the trustee to be discharged from this suit. *Porter* v. *Bullard*, 26 Maine, 448.

According to the stipulation filed, it is also to be adjudicated that the fund in the hands of the trustee, Morse, belongs to the claimant, Mrs. Richman. Although the case came to the law court technically upon exceptions, yet upon exceptions in a trustee process the law court has full power, not only to sustain or overrule the exceptions, but also to re-examine and determine the whole case, to remand it for further proceedings, or to make such final disposition of it as justice requires. R. S., c. 86, § 79.

Exceptions sustained.
Trustee discharged from this suit.
Fund adjudged to the claimant.

FIDELIA TABBUTT *vs.* GEORGE F. GRANT.

Washington. Opinion November 22, 1900.

Deed. Right of Way. Non-User.

1. Where the owner of a larger tract of land conveys out of it a smaller tract and in the deed reserves to himself and his heirs a right of way across the conveyed land which becomes definitely located, a right of way over that particular location becomes vested in the grantor as effectually as if by express grant.
2. Such right of way so acquired is not released or lost by mere non-user; nor by the use for a time of another way across the same land instead of the first way, unless there was an agreement between the parties for a substitution.
3. Such an agreement for substitution is not established by evidence that no objection was made to the use of the new way;—and it is negatived by evidence that the owner of the servient estate denied all and any right of way.

ON MOTION BY DEFENDANT.

This was an action on the case for disturbing the plaintiff's right of way.

The facts are stated in the opinion.

A. D. McFaul and John F. Lynch, for plaintiff.

W. R. Pattangall and J. W. Leathers; and H. H. Gray, for defendant.

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

EMERY, J. The plaintiff formerly owned a tract of land 325 acres in extent situated upon both the east and west sides of the highway. On the west side of the road was her dwelling-house. On the east side of the road, and nearly opposite the dwelling-house, was a spring of water about twenty-five rods from the road. This spring had been used in connection with the house until there was a well worn path between the two.

In 1879, the plaintiff conveyed out of this tract a smaller tract of 100 acres on the east side of the road and including the spring. In the deed of conveyance, however, was this clause, "Be it also provided that I, Fidelia Tibbetts [the plaintiff] and my heirs shall have the use of the spring on said lot, also right of way to the same." After this conveyance the plaintiff continued to use the spring and the old path thereto for at least ten years, as the way reserved in the deed. This clause in the deed and the facts above recited vested in the plaintiff, as by express grant, a right of way to the spring over this particular path, at least so long as she remained the owner of any part of the original tract. *Winthrop* v. *Fairbanks*, 41 Maine, 307; *Bangs* v. *Parker*, 71 Maine, 458, 460.

In 1898, the defendant, having succeeded to the title to the 100 acre tract, (the servient estate) built, against the plaintiff's protest, a fence along the highway across this path, thus shutting the plaintiff out from its use for access to the spring. This action is for such obstruction.

The defendant shows no release by deed, but claims that the evidence of the conduct and statements of the parties show a release of the plaintiff's right of way over this particular path as effectual as one by deed. It appears that some six years before the fence was built, the plaintiff removed from the house opposite the spring to another house on her remaining land, leaving a son and his family in the old house. During the entire six years she used another and different and more convenient path to the spring without objection. During the same time the son living in the old house used the old path to the spring. The plaintiff did not personally make any use of the old path after her removal to the other house.

Of course, mere non-user of a definite right of way for any period does not of itself extinguish the right. The defendant, however, contends that the evidence shows an executed agreement for a substitution of the new path, for the old one, by which the plaintiff acquired the right to use the new path, and in consideration thereof surrendered the right to use the old path. Such an agreement may be made by parol, and when executed,—when in pursu-

ance thereof the owner of the right of way begins to use the new path, and the owner of the servient estate shuts up the old path,— then the former acquires the right to use the new path and effectually releases the right to use the old path. Such an agreement can be shown by conduct as well as by words, but it must appear that there was an agreement. If the conduct of the parties fails to show that, it does not change their rights. *Bangs* v. *Parker*, 71 Maine, 458; *Fitzpatrick* v. *Boston and Maine R. R.*, 84 Maine, 33; *Smith* v. *Barnes*, 101 Mass. 275.

The evidence in this case fails to show such an agreement. The plaintiff's use of the new path does not appear to have been by permission obtained. It was simply without objection. The defendant did not attempt to extinguish or incumber the old path by any permanent erections until he built the fence in 1898, when he was met with a prompt protest. No such conduct or situation appears here as appeared in *Ballard* v. *Butler*, 30 Maine, 94; *Fitzpatrick* v. *Boston and Maine R. R.*, supra, or in the Massachusetts cases cited by the defendant. Further, the absence of an agreement for a substitution of paths affirmatively appears from the evidence for the defendant. He did not know the plaintiff had any right of way anywhere across his land until after he built the fence. He was ignorant of the reservation in the deed. When met by the plaintiff's protest against the fence, he did not claim there was a substitution, but challenged her to show any right anywhere.

The verdict for the defendant clearly is not sustained by the evidence.

Motion sustained. Verdict set aside.

JOHN W. KELLEY, In Equity,

vs.

YORK CLIFFS IMPROVEMENT COMPANY.

York. Opinion November 23, 1900.

Equity. Specific Performance. Stock.

1. It is never obligatory upon the court to decree the specific performance of a contract. The court will always exercise an unfettered discretion to refuse such a decree until it is satisfied that the contract is fair and equitable and was entered into advisedly, understandingly and without mistake.
2. In this case, if the contract is susceptible of the construction placed upon it by the plaintiff, it is manifestly unequal; and, further, was evidently made under a mistake on the part of the defendant as to a material fact.

IN EQUITY. ON APPEAL.

Bill in equity, heard by the court below, upon bill, answer and replication, where a decree was entered dismissing it with costs.

The facts appear in the opinion.

G. F. Haley and Leroy Haley; John W. Kelley, for plaintiff.

Counsel argued:

First. That by-law 15 and the resolution of the directors passed Nov. 2, 1892, were valid and binding upon the company.

Second. That the transaction would not impair the assets of the company nor injure the rights of the other stockholders or creditors.

Third. That the by-law and resolution added to the stock a power it would not have had but for them, and the company cannot repudiate this; that no one but creditors or other stockholders, by becoming parties to this bill can do so, and then only by showing that their interest will suffer.

Fourth. That the tender was sufficient.

Fifth. That by no other means than by the granting of the relief prayed for can the plaintiff obtain his rights.

Counsel cited: (1.) Cook, Stock & Stockholders, §§ 311, 312; *Dock* v. *Cordage Co.*, 167 Pa. St. 370, (citing *City Bank of Columbus* v. *Bruce*, 17 N. Y. 507; *Coleman* v. *Oil Co.*, 51 Pa. St. 74; *Clapp* v. *Paterson*, 104 Ill. 26); *Vent* v. *Duluth Coffee, etc. Co.*, 67 N. W. Rep. 70, (citing *Browne* v. *Plow Works*, 64 N. W. Rep. 66); *Currier* v. *Lebanon Slate Co.*, 56 N. H. 262; *Republic L. Ins. Co.* v. *Swigert*, 25 N. W. Rep. 680; *Piscataqua F. & M. Ins. Co.* v. *Hill*, 60 Maine, 178; *Thompson* v. *Moxey*, (N. J.) 20 Atl. Rep. 854; *Franco Texan Land Co.* v. *Bouseelet*, 7 S. W. Rep. 761; Thompson, Corp. § 1557; *Dupee* v. *Boston Water Power Co.*, 114 Mass. 37.

(3) Creditors alone can impeach a sale of stock to the company.

Under the theory of the following cases, the preservation of the rights of the creditors being the only reason for a limitation upon the power of corporations to purchase their own stock, it has been held that creditors alone may impeach such a transaction. And since, where a receiver is appointed to take charge of the property and assets of the corporation, he is, for the purpose of determining the nature and extent of his title, regarded as representing only the corporate body itself, and not its creditors and shareholders, and is vested by law with the estate of the corporation, and for purposes of litigation takes only the rights of the corporation such as could be asserted in his own name,—a resolution of the company, duly passed, canceling all certificates for stock not fully paid, and issuing new paid up certificates for the amount of the surrendered stock actually paid, was held to be, in effect a purchase by the company of the unpaid stock at its par value, and binding between the corporation and the stockholders, so that it could not be avoided by a receiver of the company. Thompson on Corporations, § 2063; *Republic Life Ins. Co.* v. *Swigert*, 135 Ill. 150.

The company cannot object. It is estopped.

This provision of the contract constituted a material, substantial part of the consideration and inducement for the purchase of the stock. *Vent* v. *Duluth Coffee, etc. Co.*, 67 N. W. Rep. 70. In

that case the court held that the agreement added to the stock the power for a stockholder to return his stock and recover the price paid for it in money. In the case at bar we ask its cost in land according to agreement. In *New England Trust Co.* v. *Abbott*, 162 Mass. 148, the court held an agreement that the corporation should have the right to buy the stock valid and shows the reason for allowing corporations to buy their own stock, and that the stockholder was bound by the agreements. See *Franco Texan Land Co.* v. *Bouseelet*, supra.

If the minds of the parties did not meet upon the payment of stock, but did meet upon the payment of cash, yet the plaintiff when he obtained the stock had a right to offer it in lieu of cash; because the stock had attached to it the right and power to pay for land, and the mind of the defendant and the mind of the original purchasers of the stock met upon the proposition that it would be received as cash for the purchase of land, and after that without the consent of the stockholder and action by the defendant that power could not be taken from it.

A purchase by the corporation does not amount to a reduction of the capital stock. *Western Improvement Company* v. *Bank*, 72 N. W. Rep. 657; note to § 283 Cook on Stock and Stockholders; also *N. E. Trust Co.* v. *Abbott*, 162 Mass. 148; *Dupee* v. *Boston Water Power Co.*, supra; *Leland* v. *Hayden*, 102 Mass. 542.

Geo. C. Yeaton, for defendant.

SITTING: WISWELL, C. J., EMERY, STROUT, SAVAGE, FOGLER, POWERS, JJ.

EMERY, J. This is a bill in equity in which the court is asked to decree the specific performance of an alleged contract for the conveyance of two parcels of land at York Cliffs. As to such applications generally, it seems advisable to iterate and affirm what was said by this court in *Mansfield* v. *Sherman*, 81 Maine, 365, viz: "Such an application is addressed to the sound discretion of the court. Not every party who would be entitled as of right to damages for the breach of a contract is entitled to a decree for its

specific performance. Before granting such a decree, the court should be satisfied not only of the existence of a valid contract, free from fraud, and enforceable in law, but also of its fairness and its harmony with equity and good conscience. However strong, clear and emphatic the language of the contract, however plain the right at law; if a specific performance would, for any reason, cause a result, harsh, inequitable or contrary to good conscience, the court should refuse such a decree and leave the parties to their remedies at law. In an equity proceeding, the complainant must do equity and can obtain only equity."

From the evidence in this case we find the following facts. The York Cliffs Improvement Company was organized in 1892 to purchase, improve, lease and sell lands at York Cliffs, a summer resort. It purchased some 400 acres of land, laid it out into lots, built a hotel and made other improvements. It incurred some debts, but did not sell much land and was not a financial success. In August, 1898, the plaintiff, in behalf of a client who did not wish his name to be known, approached the president and some of the directors of the company with a view to purchase the two parcels in question. After some negotiation the bond of the company in the sum of $15,000, was given to the plaintiff for the conveyance of the land to him on or before September 10, 1898, upon condition of "the said Kelley paying to the said company on delivery of said deed of fifty-three thousand seven hundred and fifty dollars less the sum of fifteen thousand dollars and interest thereon, etc." The deduction was the amount of two existing mortgages on the land which Kelley was to assume and pay.

Instead of tendering the above named sum in money when calling for the deed of conveyance, the plaintiff Kelley, or his client, procured certificates of shares of the company's stock to the amount of 381 shares of the par value of $100 each, which however were not standing in the name of either on the books of the company. These certificates, indorsed or assigned in blank, the plaintiff tendered to the company (with an accompanying bill of sale of them) as good for $38,100, of the agreed purchase money. The balance ($600) he tendered in money. This tender of part money and part stock was refused.

The plaintiff claimed a right to tender stock instead of money under a by-law of the company adopted at the time of its organization of the following tenor, viz:

"Any stockholder shall have the right at any time to convert any or all of his holdings in the capital stock of the company into holdings in real estate upon such terms as may from time to time be prescribed by the directors;" which by-law was supplemented by a resolution of the board of directors passed November 2, 1892, "that hereafter the stock of this company shall be accepted at not less than its par value in payment for land."

It does not appear that the plaintiff or his client owned any of the stock of the company at the time of making the contract and execution of the bond for the conveyance. Indeed, a reasonable inference from the evidence is that he did not. A question is, therefore, raised whether the by-law and resolution include purchasers who were not stockholders at the time of the contract for purchase. We do not find it necessary to decide that question now, as this suit is more properly determinable upon other controlling facts.

About the time of the adoption of the resolution, a schedule price list of the company's lots of land was made and approved. No lots appear to have been sold for or paid for in stock, and for many months before this contract no sales at all appear to have been made. The business of the company had been for some time at a stand still. The president and the director, who made this contract for the company, both testify that the by-law and resolution had never been acted upon, and had escaped their memory,—that these were not in their minds, and that no allusion was made to either of them or to stock payments during the negotiations,—that they made a price less than forty per cent of the schedule price and understood they were selling at that reduced price for cash. They were aged men, upwards of eighty, and we see no reason to doubt the truth of their testimony.

There is also evidence that the land was saleable at that time at a price in money in the neighborhood of $50,000 while the stock, par value of $100, was not saleable for over a few dollars per

share. Indeed, some of the stock pledged as collateral had been sold after advertising for $1 per share, the pledgor not choosing to buy it in though apprised of the time and place of sale.

The most that can be extracted for the plaintiff out of the evidence is, that the officers of the company, supposing they were making an advantageous sale for money, by mistake made a disastrous sale for stock of doubtful value. Whether the sale was for money or for the stock was of great moment to both parties. Waiving the questions (1) whether the company had the power to sell its assets for its stock, and (2) whether the by-law, resolution and bond will bear the construction contended for by the plaintiff,—it must be evident that a contract so construed would be largely one-sided. The plaintiff would obtain land of considerable money value for stock of little money value, while the defendant would suffer loss and be seriously crippled in its resources. These considerations, the mistake and the inequality, are enough to show that the court should not enforce specific performance, but should leave the plaintiff to such damages as he can recover at law, if any. *Mansfield* v. *Sherman*, 81 Maine, 365.

Decree below affirmed with costs on the appeal.

OSCAR C. S. DAVIES *vs.* EASTERN STEAMBOAT COMPANY.

Kennebec. Opinion November 26, 1900.

Common Carrier. Agent. Telegram. Shipping.

The court will not infer, as matter of law, the authority of the captain of a passenger steamer, to charge the owner with the duty of delivering telegrams addressed to its passengers.

Such authority is a question of fact, to be established by evidence.

In the absence of any evidence tending to prove that it is a part of the business habit or custom of the defendant, a common carrier of passengers by water to receive telegrams for delivery to its passengers; or that it knew or permitted this to be done by its officers, servants or agents, the defendant is not liable for the non-delivery of a telegram addressed to a passenger on board its steamer and by direction of the captain accepted by the purser for delivery

ON EXCEPTIONS BY PLAINTIFF.

Action on the case against a steamboat company, as a common carrier of passengers, for damages arising from the non-delivery of a telegram. The case was tried to a jury who returned a verdict for the defendant, and the plaintiff took exceptions to the ruling of the presiding justice.

The case is sufficiently stated in the opinion.

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

In this case Wentworth, the addressee of the telegram, was a fare-paying passenger, and as such the defendant company owed him all the duties and assumed toward him all the obligations of a common carrier of passengers. He was the agent or servant of the plaintiff, traveling on the plaintiff's business, and the plaintiff's money eventually paid for his trip on the steamer of the defendant company. The telegram in question related to the business for which he was employed and for which he was traveling, and its non-delivery to him, the agent or servant, resulted in damage to his principal or master, the plaintiff in this case. For a breach, therefore, of the carrier's duty toward the servant while so engaged in the master's business, the breach being in relation to a matter directly connected with that business and resulting in damage therein to the master, and to the master alone, the carrier is responsible to the master. It is held, for instance, that where a third party wrongfully prevents the agent from the performance of his duties as agent, the principal, if his interests are injured by such wrongful act, may recover from the third party to the extent of his loss caused by such injury. 1 Am. & Eng. Encly. of Law, (2d ed.) 1179–1180; *St. Johnsbury, etc., R. R. Co.* v. *Hunt*, 55 Vt. 570, (45 Am. Rep. 639). If the acceptance of this telegram be assumed to create a bailment, and it be further assumed that such bailment was gratuitous, both of which propositions we dispute, the defendant company was a mandatary, and must "exhibit diligence appropriate to what it undertook." 16 Am. & Eng. Ency. p. 398 et seq. (ordinary care). Thompson on Negligence, p. 50. "A mandatary, whether with or without pay, who accepts and

undertakes to perform a trust or mandate, must exhibit diligence appropriate to what he undertakes." He also defines a mandatary as "a person who receives goods to perform some act without compensation in relation to them." And see Encly. supra: "In some conditions and relations a high degree of care is required, and failure to observe that care is called 'slight negligence,' while it should be observed that the high degree required only furnishes the test as to what will constitute ordinary care under the circumstances. The same is true when only a slight or a moderate degree of care is required."

This proposition is the equivalent of Wharton's rule of "diligence appropriate to what is undertaken." Now what degree of diligence is appropriate to the undertaking, by a common carrier, of delivering a telegraphic message directed to one of its passengers? A telegram, unlike a bale of hay, from its very nature implies importance, the necessity of haste, of prompt delivery. Doubtless at least one-half of all telegraphic messages come as a surprise to the receiver. There is no right to assume that the addressee will call for it, or that he knows anything about it. The only thing that the sending of the telegram implies is, that the sender knows the course of travel of the addressee. In other words, even on the assumption of a gratuitous bailment, the degree of care required, from the nature of the circumstances, is a high one and failure to observe that care would be actionable negligence. But the charge was "that the defendant would be required to use slight diligence only."

Counsel cited: *Bacon* v. *Casco Bay Steamboat Co.*, 90 Maine, 46; *Palmer* v. *Penobscot Lumbering Association*, 90 Maine, 193.

This case is governed by the law regulating the carriage of passengers. What were the duties and obligations of the defendant towards his passenger in relation to this telegram? The telegram was directed to the boat, for a passenger on the boat, was offered to the captain and by his direction was delivered to the purser, who could easily find the addressee in the usual round of his duties while collecting fares and tickets. Observe, in passing, that if the captain had declined to receive the telegram, the plaintiff would

doubtless have been promptly notified of that fact, and would have had a chance to take any other measures possible to prevent loss. But the telegram was accepted. Now what authority had the captain, as such, to accept a telegram for a passenger?

The captain of a steamer is the supreme authority while on board his vessel. So far as the management of his boat and the treatment and care of passengers is concerned he has, while on the trip, absolutely no superior. His word is law. He is theoretically and practically the corporation itself. *Ardesco Oil Co.* v. *Gibson*, 63 Pa. St. (13 P. F. Smith,) 146; Hutchinson on Carriers, §§ 629, 631, 632; *Farmer's & Mechanic's Bank* v. *Champlain Trans. Co.*, 23 Vt. 186, (56 Am. Dec. 68).

"Where the particular act is done in furtherance of the general purpose of the carrier, and is within the scope of the servant's authority, the carrier is liable even though the act be a trespass." 2 Am. & Eng. Enc. Law, (1st ed.) 754; *Moore* v. *Fitchburg R. R. Corp.* 4 Gray, 465; *Holmes* v. *Wakefield*, 12 Allen, 580; *Coleman* v. *N. Y. & N. H. R. R. Co.*, 106 Mass. 160.

In the case of *Finley* v. *Hudson Electric R. R. Co.*, 64 Hun, 373, it is laid down that "the root of the master's liability for the servant's act is his consent, express or implied, and when his acts are done within the scope of his employment, or for his master's benefit or in the furtherance of his interest, although not strictly in the line of his duty, yet in the course of his employment, the master's assent is implied and he is accordingly held liable."

The acceptance of that telegram for a passenger was clearly incidental to the business of carrying passengers. A common carrier is bound to use all such reasonable precautions as human judgment and foresight are capable of to make his passenger's journey safe and comfortable. *Edwards* v. *Lord*, 49 Maine 279; *Knight* v. *P. S. & P. R. R. Co.*, 56 Maine, 234.

It is by no means necessary to rest this case on the proposition that the carrier was bound to accept this telegram. There are many acts which a carrier is not, perhaps, bound to perform for its passengers, but which it may do in the general prosecution of its

business or safe, comfortable and convenient carriage; and having so undertaken, it is obliged to perform those acts with care. It is not, for instance, obliged to furnish camp-stools, but if it does furnish them, they must be reasonably well adapted to their purpose. Slight care in their selection and preservation would not answer: "Gross negligence" would not be the test. They must use due care according to the circumstances. Hutchinson, § 515.

John Scott, for defendant.

SITTING: WISWELL, C. J., WHITEHOUSE, STROUT, SAVAGE, POWERS, JJ.

POWERS, J. This is an action against a common carrier of passengers by water to recover damages resulting from the non-delivery of a telegraphic message directed to "G. L. Wentworth, Str. to Boothbay, Bath, Maine." Wentworth was a carpenter employed by the plaintiff to go from Augusta via Bath to Isle of Springs, and there build a cottage. The message directed a change in the building, and was offered by the telegraph company to the captain of the defendant's steamer, upon which Wentworth was a fare-paying passenger, and by direction of the captain it was delivered to the purser of the same steamer. The case was tried in the Superior Court of Kennebec county, resulting in a verdict for defendant, and the plaintiff excepts to the instruction to the jury, that the defendant would be required to use slight diligence only in endeavoring to deliver the telegram, and would be liable only for gross negligence for failure to deliver it to the proper party.

The defendant sets up, that in directing the telegram to be delivered to the purser, the captain acted in excess of his authority, and outside of the scope of his employment and of the business in which he was engaged, and that, therefore, the defendant itself never received the telegram or became charged with the duty of its delivery.

The nature and scope of the defendant's business, whether the particular act was necessary for its successful prosecution, the

usual and ordinary course of its management by those engaged in it at the time and place where it was carried on, were questions of fact for the jury to be determined from all the circumstances of the case; and from them it was for the jury to say whether the act in question was within the authority of the agent or the scope of the business of the principal which he was employed to transact. The court cannot infer, as matter of law, the authority of the captain of a passenger steamboat to charge the owners with the duty of delivering telegrams to its passengers. It is a matter of fact, to be established by evidence and found by the jury. The exceptions fail to show that any evidence was offered in this case which would warrant such a finding.

The defendant was a common carrier of passengers by water. Its contract resulting from the relation of carrier and passenger, nothing else appearing, was to transport its passenger safely and with proper regard for his comfort and convenience, together with such articles and money as might be properly contained in the baggage which he brought with him. The exceptions show no express contract with the passenger for more than this, and nothing from which more can be implied. They utterly fail to show that it was any part of the defendant's business, habit, or custom to accept telegrams for delivery to its passengers, or that it knew or permitted this to be done by its officers, servants, or agents. In general the business of common carriers of passengers on our inland waters, and that of receiving and delivering telegrams, are entirely separate and distinct, and the latter is in no proper and legal sense incidental to or connected with the former. Common carriers of passengers make no charge for such a service, and its very responsible duties and burdens should not be imposed upon them without their consent unless some rule of public policy requires it.

We cannot infer that it is necessary for the safety, comfort, or even convenience of the passenger that the duty of the delivery of a telegram addressed to him should be gratuitously imposed upon the passenger carrier. The telegraph company to whom the message has been intrusted is engaged in that business, and has the equipment and servants specially trained for carrying it on. For

an adequate consideration it has entered into an express contract to deliver the message, and usually knows its contents, importance, and urgency. In discharging that duty it may select its own means and agents, and is responsible for any neglect on their part. The defendant, therefore, owed no contractual duty to its passenger to receive and deliver the telegram. It does not appear that it was a part of its business or incidental thereto. If not, it necessarily follows, nothing else appearing in the case, that the act of the captain of the defendant's steamboat was outside of the scope of the business in which he was engaged, and not connected with the service which he had been employed to perform. For such acts the defendant is not liable unless it held the captain out to the world as having authority, and the case is barren of any such showing. *Bowler* v. *O'Connell*, 162 Mass. 320.

It is true, as urged by the plaintiff, that the captain is the general agent of the owners, but a general agent is not an unlimited agent. His authority is necessarily restricted to the transactions and concerns within the scope of the business of the principal. Am. & Eng. Encyl. of Law, 2 Ed. Vol. 1, page 990. To bind his principal he must act within the usual and ordinary scope of the business he is employed to transact; his authority is measured by the usual extent of his employment. 1 Parsons on Contracts, p. 41. A shipmaster is a limited agent and can only bind the owners by contracts relative to the usual employment of the ship and means requisite to that employment. KENT, J., in *Leonard* v. *Lord*, 52 Maine, 389. The principal is liable for the authorized act of his agent because it is his own act, and for the acts of his agent within the scope of the authority which he holds him out as having, or knowingly permits him to assume, because to permit him to deny it would be to permit him to commit a fraud upon innocent persons. Am. & Eng. Encyl. of Law, 2d Ed. Vol. 1, Page 990.

In the case at bar no habit or custom is shown, no holding out to the world of the captain as having authority to do the particular act. It was his own act and not that of his principal. The defendant itself never received the telegram and never became charged with the duty of its delivery, and it is therefore unnecessary to consider

the instruction given as to the degree of diligence to which the defendant was bound, or the degree of negligence for which it would be liable.

Exceptions overruled.

WILTON HUNT *vs.* ALFRED M. CARD, and others.

Kennebec. Opinion December 1, 1900.

Railroad. Land Damages. Bond. Repeal of Statutes. R. S., c. 51, § 20.

1. The condition of a bond will be construed as far as possible under legal rules to effectuate the purpose for which the bond was given.
2. Recitals in the condition of a bond are evidence against the obligors of the existence of the matters recited. Misrecitals, however, will not invalidate the bond.
3. The validity of official acts recited in the condition of a bond will be presumed, prima facie at least, against the obligors. The recital of a railroad location is presumed to mean a valid location, or at least one that the parties have agreed to consider valid.
4. The court will take judicial cognizance as to what railroad company is authorized to make a particular location for a railroad, and a recital of a railroad location will be presumed to mean one by the company authorized to make it.
5. The provisions of R. S., c. 51, § 20, relative to proceedings for assessment of damages for lands taken for railroads, were intended to secure uniformity of procedure throughout the state, and hence supersede and repeal any different procedure provided in earlier charters.
6. The recital in the record of the court of county commissioners that notice upon the petition was given as ordered (the order being also a matter of record), and that the party respondent attended the hearing, is prima facie evidence that such notice was given.
7. The obligors in a bond given to guarantee the payment of such judgment as the obligee should recover against a third party are bound by whatever judgment the third party becomes bound by in the matter, notwithstanding irregularities which might have vitiated the judgment upon appeal or certiorari.
8. The obligee in a bond to secure the payment to him of the damages which may be awarded to him for his land taken for a railroad, is not bound to prove that the damages have not been paid to the clerk of courts.

ON REPORT.

Action of debt upon a bond executed by the defendants and delivered to the plaintiff, to secure the payment of damages for his land taken by the Wiscasset & Quebec Railroad for the extension of said road from Burnham to Pittsfield. The plea was the general issue, and a brief statement in which the defendants claim that "none of the conditions precedent in said supposed writing obligatory have ever been done or performed by the obligee therein or anyone in his behalf, and the defendants have fully performed all of the conditions of said supposed writing obligatory."

The action was brought in the Superior Court for Kennebec county and reported by the presiding justice to this court.

The case appears in the opinion.

Chas. F. Johnson, for plaintiff.

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

Counsel argued:

1. Plaintiff has not shown any legal assessment of damages against anybody. (a) He has not shown any location as a foundation for the assessment of damages. (b) The record of an assessment of damages put in must be sustained, if sustained at all, under a statute, under which the county commissioners had no jurisdiction of this case. It is entirely irregular, void and a nullity under the statute under which they did have jurisdiction; and under any statute it is not sufficient, because the land to which it refers is not definitely described; and it does not appear in the petition that the petitioner was the owner at the time of the taking of the land by the railroad company, a necessary prerequisite to his right to maintain the petition.

2. Because this bond has nothing to do with the Wis. & Queb. R. R., and to show that it has, contradicts the written instrument.

3. If to show that it relates to that railroad is not a contradiction of the terms of the bond, then the plaintiff has not sustained the burden which is upon him to establish that fact.

4. Even if it does refer to that railroad, and damages have been legally assessed against it, this bond is not to answer for the

default of identifying the railroad described in it, and how much land the signers of the bond agree to be responsible for the damages on; and we submit that they might as well be held for any other railroad in the state as for the Wis. & Queb.; that it is only competent to show that it is the Wis. & Queb. railroad if the location of that road had been recorded in the registry of deeds, and it otherwise answered the description of the road on account of which they agreed to be responsible.

Counsel cited: *Bangor* v. *Co. Com.*, 30 Maine, 270; R. S., c. 18, § 3; *Prentiss* v. *Parks*, 65 Maine, 561; *Penobscot R. R. Co.* v. *Weeks*, 52 Maine, 456; *Hayford* v. *Co. Com.*, 78 Maine, 155; *Small* v. *Pennell*, 31 Maine, 270; *Ware* v. *Co. Com.*, 38 Maine, 492; R. S., c. 51, § 19; *Downs* v. *Fuller*, 2 Met. 135; *Bath Bridge & Turnpike Co.* v. *Magoun*, 8 Maine, 292; *Harkness* v. *Waldo Co. Com.*, 26 Maine, 356; *Inhabitants of Windham, Petitioners*, 32 Maine, 452; *Parsonsfield* v. *Lord*, 23 Maine, 511; *Cornville* v. *Co. Com.*, 33 Maine, 238; *White* v. *Riggs*, 27 Maine, 114; *Carpenter* v. *Spencer*, 2 Gray, 408.

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

EMERY, J. This is an action of debt upon a bond, the execution and delivery of which are not denied. The condition of the bond is as follows: "Whereas the United States Construction Company is about to construct a narrow gauge railroad, leading from Burnham to Pittsfield, and crossing the land of Will Hunt, as indicated by the location of said railroad, filed with the register of deeds, in the counties of Waldo and Somerset. Now if the said United States Construction Company shall well and truly pay to the said Will Hunt any and all land damages and costs of court adjudged by the county commissioners, of Waldo county to be due said Will Hunt by reason of the construction of said railroad across the land of said Will Hunt, as aforesaid, within ninety days of said adjudication of said county commissioners, then this bond shall be void, otherwise to be in full force."

In order to properly determine the validity of the various defenses made to the action, it is advisable to first ascertain the occasion and purpose of the bond, and what has been done under it. From the recitals in the bond and from extraneous facts shown by admissible evidence, the following state of affairs may be assumed, viz: Some railroad company had made a location for a railroad from Burnham to Pittsfield across the land of the plaintiff, and had filed a description of such location with the register of deeds in each of the counties of Somerset and Waldo. The United States Construction Company, named in the bond, desired to construct the railroad over this location where it crossed the plaintiff's land without first paying him his damages, or taking any measures to have his damages appraised, or otherwise to acquire the right to take his land for such purpose. The obligors also desired this course to be taken. The plaintiff was willing the Construction Company should proceed at once with the construction of the railroad, upon receiving security that his proper damages as for a legal taking should be paid within a fixed time afterward. The obligors in this bond undertook to guarantee such payment, for considerations satisfactory to them. No agreement was made as to the amount of the damages, and the obligors guaranteed the payment of such amount as the county commissioners of Waldo county should adjudge to be due for the taking. The bond was evidently given and accepted to effectuate the above-named purposes. It is also evident that, if the condition of the bond should be performed by the obligors and such performance accepted by the plaintiff, the obligee, he would be estopped from questioning the validity of the location, and the authority of the Construction Company to build the road. *Fernald* v. *Palmer*, 83 Maine, 244.

The Construction Company immediately after the delivery of this bond began work on the plaintiff's land and partially, at least, constructed a railroad across it. At the next term of the county commissioners' court, for Waldo county, the plaintiff presented his petition to have appraised his damages for the taking his land for railroad purposes, and recited in this petition that his land had been taken by the Wiscasset and Quebec Railroad Company under

a location recorded in the registry of deeds of Waldo county. The county commissioners ordered notice to the railroad company under R. S., c. 51, § 20. At the time and place named in the notice, Mr. Van Etten, the manager and representative of the Construction Company, appeared before the commissioners and a hearing was had upon the petition. The commissioners adjudicated the plaintiff's damages to be $175, and entered such adjudication of record. The damages thus awarded do not appear to have been paid, and hence this action. The obligors in the bond now make several points in defense.

1. That it does not appear that any railroad was ever legally and effectually located across the plaintiff's land, or that any such location was ever filed in the registry of deeds in Waldo county. The recitals in the bond, however, are sufficient evidence of such location and filing as against the obligors, at least until contradicted.

2. That the plaintiff made the Wiscasset and Quebec Railroad Company, the party respondent to his petition for damages, instead of the United States Construction Company, the party they became sureties for. We take judicial cognizance of the public fact that the only party having any authority to make such location, and take land therefor, was the Wiscasset and Quebec Railroad Company. It is not to be presumed that the obligors, in reciting in their bond the location of the railroad to be built, had in mind an unauthorized, or even an ineffectual, location. On the contrary, it is to be presumed that they assumed and intended to represent to the plaintiff that the location was lawful and effectual. It sufficiently appears, therefore, that the location referred to in the bond was that made by the Wiscasset and Quebec Railroad Company,—and that that company was the proper party respondent in proceedings to procure an adjudication of the damages by the county commissioners. Again, the Construction Company, for which the obligors became sureties, appeared by its manager, Mr. Van Etten, before the commissioners in answer to the petition. This circumstance in itself tends to prove that dam-

ages to be adjudicated in proceedings against the Railroad Company were the damages intended to be guaranteed by the bond.

3. That the petition and notice thereon were under R. S., ch. 51, § 20, instead of under the legislative charter of the railroad company, which provided for a different and longer notice to the company. The charter provision was enacted in 1854. The general statute was enacted in 1871 and re-enacted in the revision of 1883 ch. 51, § 20. It applies in terms to "all cases of petition to the county commissioners of any county praying for the assessment of damages on account of any railroad corporation having taken lands therein." One evident purpose of the general statute was to secure uniformity of procedure over the whole state in all such cases, and therefore the statute, being subsequent, must be held to have repealed the inconsistent provision in the charter of the company. *Starbird* v. *Brown*, 84 Maine, 238.

4. That there is no evidence that the notice ordered was given. The record of the county commissioners recites that notice was given as ordered. At the time and place named in the notice, Mr. Van Etten, the manager of the Construction Company the obligors' principal, attended the hearing. These facts are, at least, prima facie evidence that the notice was given or waived.

5. Sundry alleged insufficiencies in the petition and irregularities in the subsequent proceedings are set up. The obligors, the defendants, admit that these do not invalidate the judgment as against collateral attack by the Wiscasset and Quebec Railroad and were open to that company only upon certiorari or appeal. They claim, however, that they were not parties to that proceeding or judgment,—could not be heard upon certiorari or appeal, and hence are free to attack collaterally. But they did become parties to a written agreement with the plaintiff to guarantee to him the payment of what should be adjudged as due him from the party taking his land, the necessary and only proper party to the proceedings for such adjudication. They must have known, and hence agreed, that the proceedings to ascertain the amount due him should be against the party lawfully taking his land, or the Wis-

casset and Quebec Railroad Company. They, therefore, by implication agreed to be represented by that company in the proceedings and to abide by the judgment against it. They did not stipulate for notice to them, nor for an opportunity to question any thing. They, in effect, agreed that an adjudication valid against the company should be valid against them. They cannot now, after such an adjudication has been obtained, rightfully insist on more. *Judge of Probate* v. *Quimby*, 89 Maine, 574.

6. That there is no evidence that the Construction Company or the Railroad Company did not deposit with the clerk of the courts security for the amount of damages as by law it might do. There was no such provision in the bond. The defendants stipulated that payment should be made to the plaintiff. In any event, it was not for the plaintiff to prove the negative, and there is no suggestion that the security has been deposited.

In fine, the defendants have obtained what they presumably sought for in giving the bond. Their objections to making the agreed payment (those which we have above noticed and any others) seem to us clearly futile.

Judgment for the plaintiff for the penal sum and execution to issue for the whole sum.

ROSWELL C. BOOTHBY *vs.* FRANCOIS LACASSE.

Androscoggin. Opinion December 3, 1900.

Evidence. Experts. Negligence. Fire. Jury.

In an action for negligently setting fire on defendant's land which communicated to plaintiff's land and did damage, defendant offered "expert testimony as to the course and direction of the fire across land intervening between plaintiff and defendant, and that the surface of said intervening land, and the trees and objects thereon indicated that the fire which went over said intervening land went from the south toward said burnt piece of the defendant, and not from said burnt piece of said defendant," which was excluded, and exception taken.

A jury of practical men are fully capable of judging the course of the fire from the appearances on the ground, direction of the wind, indications upon the trees not wholly consumed, and all other existing conditions. No special skill, study or training, beyond that of the ordinary man of common intelligence and experience, is required or involved. It is not a subject for expert testimony.

ON EXCEPTIONS BY DEFENDANT.

This was an action on the case for negligence in the setting and caring for fire, lawfully set and made by the defendant on his land, for the purpose of clearing it in the usual course of husbandry.

The case is stated in the opinion.

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

W. H. Judkins and J. G. Chabot, for defendant.

Maine cases, like *State* v. *Watson*, 65 Maine, 74, and *Pulsifer* v. *Berry*, 87 Maine, 405, do not hit the case.

Krippner v. *Biebl*, 28 Minn. 140, is a case somewhat in point. In that case, the defendant set fire in his grain stubble, after plowing around the field to prevent its spreading. The fire "jumped" the space so plowed. The fact being material as to how far a fire in stubble would be liable to "jump" a fire-break, under certain conditions of wind and vegetation, it is competent for a witness, shown to have had actual knowledge of such conditions, and to have had sufficient experience with such fires, to give his judgment or opinion as to such fact.

As to the admissibility of expert evidence touching the effects of natural forces: *Western Ins. Co.* v. *Tobin*, 32 Ohio St. 77; *Folkes* v. *Chadd*, 3 Dougl. (Eng.) 157; *Frantz* v. *Ireland*, 66 Barb. 386; *Union Pac. R. R. Co.* v. *Gilland*, 4 Wyoming, 395.

If relevant, it is admissible, however slight its weight. "Testimony cannot be excluded as irrelevant, which would have a tendency, however remote, to establish the probability or improbability of the fact in controversy." *Trull* v. *True*, 32 Maine, 367; *Nickerson* v. *Gould*, 82 Maine, 512.

Additional authorities: 1 Starkie Ev. 1; *Ball* v. *Hardesty*, 38 Kans. 540; *Ohio & M. Ry. Co.* v. *Webb*, (Ill. Sup.) 33 N. E. Rep. 527.

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

STROUT, J. Action for negligently setting fire on defendant's land which communicated to plaintiff's land and did damage. Defendant offered "expert testimony as to the course and direction of the fire across land intervening between plaintiff and defendant, and that the surface of said intervening land, and the trees and objects thereon indicated that the fire which went over said intervening land went from the south toward said burnt piece of the defendant, and not from said burnt piece of said defendant," which was excluded, and exception taken.

Opinions of witnesses skilled in the subject matter are admissible, when the subject so far partakes of the nature of a science or trade as to require a previous course of study or habit in order to the obtainment of a knowledge of it, but they cannot give opinions upon matters of common knowledge. *White* v. *Ballou*, 8 Allen, 408; 1 Greenl. Ev. § 440.

Whether the risk of fire is greater in an unoccupied building than in an occupied one, is not a question for expert evidence. *Joyce* v. *Maine Ins. Co.*, 45 Maine, 170; *Cannell* v. *Phoenix Ins. Co.*, 59 Maine, 582; *Thayer* v. *Providence Ins. Co.*, 70 Maine, 532. Nor whether the blowing of a locomotive whistle was reasonable or unreasonable. *Hill* v. *P. & R. Railroad Co.*, 55 Maine, 444. Nor as to the management of fires burning in heaps of brush, and lingering in piles of brands. *Pulsifer* v. *Berry*, 87 Maine, 408. Nor whether it is common for a fire to spread from leeward to windward across an open space; nor whether large fires make their own currents, frequently eddying against the prevailing wind. *State* v. *Watson*, 65 Maine, 76.

A jury of practical men are fully capable of judging the course of the fire from the appearances on the ground, direction of the wind, indications upon the trees not entirely consumed, and all other existing conditions. No special skill, study or training, beyond that of the ordinary man of common intelligence and experience, is required or involved. The offered evidence was properly excluded.

Exceptions overruled.

JOHN E. HESLAN *vs.* JOSEPH BERGERON.

Androscoggin. Opinion December 3, 1900.

Bills and Notes. Payable at Bank. Evidence. R. S., c. 32, § 10.

By the statutes of Maine (R. S., c. 32, § 10) it is provided that, in an action on a promissory note payable at a place certain, either on demand, or on demand at or after a time specified therein, the plaintiff shall not recover, unless he proves a demand made at the place of payment prior to the commencement of the suit.

In an action to recover upon promissory notes payable at a bank, but not on demand or on demand after date, it appeared that they were not presented at the bank before suit brought. *Held;* that it was not necessary to do so.

The maker of promissory notes is an incompetent witness, in an action by the indorsee against the maker, to prove their illegal inception, until notice of such illegality is brought home to the plaintiff.

ON EXCEPTIONS BY DEFENDANT.

Assumpsit by an indorsee against the maker of promissory notes.

The plaintiff claimed, and offered evidence tending to show, that the notes were indorsed and sold to him before maturity, for a valuable consideration, and without notice of any illegality in the contract. No evidence appeared in the case that the notes or any of them were ever presented at the First National Bank of Lewiston, for payment, the place specified thereon as the place of payment. The court, against the seasonable objection of the defendant ruled that presentation at said First National Bank for payment was not a condition precedent to recovery thereon.

The defendant, the maker of said notes, offered himself as a witness to prove that the consideration for the notes was the price of intoxicating liquors bought by the defendant of the payee in Boston, and intended for unlawful sale within the state of Maine. The presiding justice excluded his evidence upon this point. The defendant excepted to both of these rulings.

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

M. L. Lizotte, for defendant.

Counsel cited: Daniel, Negotiable Instruments, (4th ed.) § 1217: "The better opinion is, that negotiable instruments enjoy no immunity from the general doctrines of evidence, and that any party to a written contract, negotiable or otherwise, is competent to testify as to its invalidity."

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

STROUT, J. The notes in suit were payable at the First National Bank, in Lewiston. They were not presented at that bank before suit brought. It was not necessary to do so. If the maker was ready to pay them on presentation at the bank, that could be shown in defense. *Stowe.* v *Colburn*, 30 Maine, 32.

This action is by the indorsee against the maker. The ruling that the maker of the notes was an incompetent witness to prove their illegal inception, until notice of such illegality was brought home to the plaintiff, was correct. *Baxter* v. *Ellis*, 57 Maine, 178. The rule is different when the action is between the original parties to the note. *Smith* v. *McGlinchy*, 77 Maine, 153.

Exceptions overruled.

ADA C. MCKENNEY *vs.* LEROY S. BOWIE, and others.

York. Opinion December 3, 1900.

Bills and Notes. Corporations. Evidence. Limitations. R. S., c. 55, §§ 1, 2, 3.

Members of an association, but not legally incorporated, are liable upon contracts lawfully made by the associated persons.

The following promissory note, the signers thereon never having been incorporated, is held by the court to be the personal obligation of the signers:

"$400. DURHAM, MAINE, July 7th, 1891.

For value received the Trustees and Treasurer, or their Successors in office, of the Durham Agricultural and Horticultural Society promise to pay Ada C. Sturgis, or order, the sum of four hundred dollars in one year from date, with interest.

LEROY S. BOWIE.
RUFUS PARKER.
CHARLES H. BLISS.
HIRAM J DRINKWATER.
M. W. EVELETH.
Trustees.
WILLIAM STACKPOLE,
Treasurer."

Held; that the parties to this suit being associates, and not having pleaded in abatement that the others bound with them are not joined in the action, they cannot escape liability on the note, whether it is regarded as the note of the association, or of the individual signers.

Held; that as all the payments on the note were made by one defendant alone, nothing ever being paid by either of the other signers, the note is taken out of the statute of limitations as against said defendant; as to all others it is barred.

The legal incorporation of an agricultural society, under R. S., c. 55, §§ 1, 2 and 3, is not established by introducing a book entitled records of the society and which begins with the statement, "agreeable to a legal warrant, a meeting was called, etc." and then proceeds to state the doings of the meeting, which are signed by the secretary,—the original warrant not being produced, and no copy of it, or its service, is contained in the book, and no statement that it was issued by a magistrate, or that any service was made, and no statement of the persons present at the meeting.

ON REPORT.

This was an action of assumpsit brought by the plaintiff (formerly Sturgis) against the defendants upon the following promissory note.

"$400. DURHAM, MAINE, July 7th, 1891.

For value received the Trustees and Treasurer, or their Successors in office, of the Durham Agricultural and Horticultural Society promise to pay Ada C. Sturgis, or order, the sum of four hundred dollars in one year from date, with interest.

LEROY S. BOWIE.
RUFUS PARKER.
CHARLES H. BLISS.
HIRAM J. DRINKWATER.
M. W. EVELETH.
Trustees.

WILLIAM STACKPOLE,
Treasurer."

The plaintiff claimed that the note, as made, was the note of the defendants, and that they were personally liable thereon.

The defendants claimed that it was the note of the Durham Agricultural Society; that the defendants signed for the society, in their capacity as trustees and treasurer, and that they were not personally liable on the same. Other facts appear in the opinion.

B. F. Cleaves, H. T. Waterhouse and G. L. Emery, for plaintiff.

Written as is this note, evidence is inadmissible which would tend to show the existence of a corporation, when the note itself does not pretend to be a promise for or in behalf of any others than the signers themselves.

Not a corporation note. Counsel cited: *Randall* v. *Harriman*, 75 Maine, 497; *Mellen* v. *Moore*, 68 Maine, 390; *Fogg* v. *Virgin*, 19 Maine, 352; *Chick* v. *Trevett*, 20 Maine, 462; *Sturdivant* v. *Hull*, 59 Maine, 172.

Neither Mr. Bliss nor anybody else claims that, as to the last four payments indorsed on the note, he gave plaintiff any knowledge or notice that he was claiming to pay this money for or in

behalf of any one but himself. We contend that this note binds the individual signers; and the law says that payment made by any signer, without disclosing the fact that he is making such payment for and in behalf of some one else who is liable on the note, is to be regarded as the payment of the one making it, and that he is bound. *Holmes* v. *Durrell*, 51 Maine, 201, 203; *Tainter* v. *Winter*, 53 Maine, 348, 350.

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

The words "Trustees and Treasurer or their Successors in office," in the body of the note fairly import a promise for and in behalf of the society, and added to this, they signed their names to the instrument as Trustees and Treasurer. They do not use "I" or "we" as in cases where signers are held personally liable, nor do they, in fact, use any words indicating a personal promise. The defendants used language indicating an intention to bind the society.

In *Simpson* v. *Garland*, 72 Maine, 40, the language was: "We, the subscribers for the Carmel Cheese Manufacturing Co., promise to pay." The defendants in that case offered to prove that there was such a corporation as the Carmel Cheese Manufacturing Co.; that the defendants were directors of said corporation and authorized to make a note for the corporation; that the note was for money, and that the money was appropriated for the use of the corporation. In that case the court held that it was the note of the corporation and not that of the signers.

This was a corporation. The records are not artistically made up or fully complete. One would not expect them to be so,—they having been made by an uneducated people. But the statute, under which this society was organized, was not intended to provide for that strictness of procedure which would be required of a business corporation.

The defendants having pleaded the general issue and the statute of limitations, the indorsements would be a renewal and prevent the statute from running only as to the society, but not as to them if they were otherwise liable.

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

STROUT, J. The defendants claim that the note in suit was not the promise of the defendants, but of the Durham Agricultural Society, which, they say, was a corporation organized in 1886 under R. S., c. 55, §§ 1, 2 and 3. Those sections provide that seven or more persons may apply in writing to a justice of the peace in the county, who may issue his warrant directed to one of the applicants, requiring him to call a meeting, and after the service provided, that the applicants at such called meeting may organize a corporation. The evidence introduced fails to show an incorporation of the Durham Agricultural Society under the statute. There is no evidence that seven or any number of persons applied to a justice of the peace, nor that any justice ever issued a warrant.

A book is introduced, headed "Records of the Durham Agricultural Society," which begins with the statement,—"Agreeable to a legal warrant, a meeting was called May 8th, 1886," and then proceeds to state the doings at the meeting, which are signed "J. L. Wright, Sec." The original warrant is not produced, and no copy of it or its service is contained in the book, and no statement that it was issued by a magistrate, or that any service was made, and no statement of the persons present at the meeting. Mr. Wright, it is true, expresses his opinion that it was a legal warrant, but it is possible the court might think differently if it was produced. He was not the authorized tribunal to determine its legality. *Maddocks* v. *Stevens*, 89 Maine, 336.

It is said that a corporation of the same name was organized in 1892, by some, if not all of the original associates, perhaps as a result of doubt of the legality of the first attempt. But as this was after the date of the note in suit, it is of no importance here.

To form a corporation under the statute, its terms must be complied with, and this must be proved when the existence of the corporation is in controversy. *Utley* v. *Union Tool Co.*, 11 Gray, 139; Morawetz on Corporations, § 132.

Nor does the case fall within the principle that, under some circumstances, a legal organization may be inferred from the grant of

a charter, and the performance of corporate acts, without production of a record of its first meeting, as in *Sampson* v. *Bowdoinham Steam Mill Corp.*, 36 Maine, 79.

When this note was given, there appears to have been an association of individuals, including the defendants, who were acting under the name of the Durham Agricultural Society, but no corporation. Five of the signers of the note were designated as "trustees," and the sixth as "treasurer." Not being incorporated, all of the associated persons were liable upon contracts lawfully made by the association. Those sued being associates, and not interposing the objection that others bound were not sued, cannot escape liability on the note, whether it is regarded as the note of the association or of the individual signers.

The note was given July 7, 1891, payable in one year, and suit brought March 1, 1899. The statute of limitations is interposed. The note bears various indorsements, the last of which was in 1896. One other payment thereon of $21.90 made on November 4, 1897, is proved and admitted, and should be allowed. All payments were made by Charles H. Bliss, one of the signers. Nothing was ever paid by either of the other signers. As to him, therefore, the note is taken out of the statute of limitations. As to all the others it is barred.

This result is reached, if we treat the note as that of the association, as claimed by the defendants. But we regard the note as the personal obligation of the signers. It does not purport to be the promise of the association, but it is the promise of the "trustees and treasurer or their successors in office." If there had been a corporation, and it was intended as its promise, the use of the term "successors in office" was without meaning. A corporation has no successor—its life is continuous, until dissolved.

In either case, no defense is disclosed, except the statute of limitations.

Judgment for plaintiff against Charles H. Bliss for amount of the note, less $21.90 paid November 4, 1897, and not indorsed, and judgment for all other defendants.

ALONZO ALLEN *vs.* THE BOSTON AND MAINE RAILROAD.

York. Opinion December 3, 1900.

Negligence. Verdict. Railroads.

Whether the injury received by plaintiff was caused by the negligence of the defendant, without fault on the part of the plaintiff, is an issue to be submitted to the jury.

Where the evidence is conflicting, and the jury find the issue in favor of the plaintiff, and it may be that the court would have arrived at a different conclusion, yet the court is not at liberty to substitute its judgment for that of the jury, which is the constitutional tribunal to determine the facts, there being no suggestion of bias or undue influence on their part, and the evidence being such that different minds might reach different conclusions.

The rule that a rapidly moving train has a precedence, over the traveler, at a crossing on the highway, does not apply to stationary trains. As to these, neither has precedence, but each should act with due regard to the other, the right of passage being equal to each.

ON MOTION BY DEFENDANT.

The facts appear in the opinion.

E. P. Spinney, for plaintiff.

Trainmen must keep sharp lookout to avoid collisions at crossings, and it is the duty of trainmen to avoid a collision if they can.

It is the duty of both engineer and fireman to keep a lookout ahead of their locomotive.

If the employees of a railroad company, whose duty it is to watch the tracks, fail to discover the peril of persons at a crossing, when reasonable attention would have enabled them to do so in time to have prevented the infliction of injury, the company is liable. *Purinton* v. *M. C. R. R. Co.*, 78 Maine, 569; *Garland* v. *M. C. R. R. Co.*, 85 Maine, 519; 4 Am. & Eng. Ency. of Law, p. 909, et seq. and cases.

In *Webb* v. *P. & K. R. R. Co.*, 57 Maine, 117, the following was deemed negligence: "The engineer in charge testifying that he did not see Webb's team until the engine was within ten feet of him, and that the brakeman who was looking out on the side from

which Webb was approaching, gave him (the engineer) no notice."

New trial: A verdict should not be set aside as against evidence, where there is evidence, on both sides, unless in extraordinary cases, where it is manifest that the jury have mistaken or abused their trust, and the verdict is manifestly against the weight of evidence and glaringly erroneous. *Weld* v. *Chadbourne*, 37 Maine, 227; *Tower* v. *Haslam*, 84 Maine, 86; *Dodge* v. *Dodge*, 86 Maine, 393.

In *Dodge* v. *Dodge*, above cited, where much of the evidence was irrelevant and contradictory, the court said: "The weight of evidence depends upon the intelligence, the character, and credibility of the witnesses."

The question of negligence, even in cases where the facts are undisputed, and where intelligent and fair-minded men may reasonably arrive at different conclusions, is for the jury. *Rhoades* v. *Varney*, 91 Maine, 226; *Elwell* v. *Hacker*, 86 Maine, 416; *Nugent* v. *B. C. & M. R. R.*, 80 Maine, 62.

New trial not granted because court would have drawn different inferences, and arrived at a different conclusion; and the court can not substitute its judgment for that of the jury. *Hill* v. *Nash*, 41 Maine, 585; *Elliott* v. *Grant*, 59 Maine, 419; *Lowell* v. *Newport*, 66 Maine, 78; *Parks* v. *Libby*, 92 Maine, 133.

Where the evidence is conflicting upon points vital to the result, a verdict will not be reversed, unless the preponderance against it is such as to amount to a moral certainty that the jury erred. *Enfield* v. *Buswell*, 62 Maine, 128; *Hunter* v. *Heath*, 67 Maine, 507; *Smith* v *Brunswick*, 80 Maine, 192.

G. C. Yeaton, for defendant.

While it has sometimes been judicially held that the right of neither the traveler along the highways nor the railroad company at crossings was superior to that of the other, it has also been many times declared that, in the exercise and enjoyment of these rights, the railroad must necessarily have precedence. *Lesan* v. *M. C. R. R.*, 77 Maine, 85, 89, 90; *Smith* v. *M. C. R. R.*, 87 Maine, 339, 347, and cases cited.

And many well-considered cases have held that "in this particu-

lar" the right of the traveler was "subordinate." *Newhard* v. *Penn. R. R. Co.*, 153 Penn. St. 417, 421; *Ohio & Miss. Ry. Co.* v. *Walker*, 113 Ind. 196; *Black* v. *Bur. C. R. & M. Ry. Co.*, 38 Iowa, 515; *Conkling* v. *Erie R. R. Co.* (N. J. Law, June, 1899); *Morris* v. *Chic. M. & St. P.*, 26 Fed. Rep. 22.

Was it the latter? Quite as clearly, and nearly as often, have courts refused redress to those who choose to take such visible risk. *Merrigan* v. *B. & A. R. R.*, 154 Mass. 189, 191; *Chic., etc., R. R. Co.* v. *Houston*, 95 U. S. 697; *Smith* v. *M. C. R. R.*, 87 Maine, 339, 351, 352; *Mott* v. *Detroit, G. H. & M. Ry. Co.* (Mich. May 9, 1899), 15 Am. & Eng. R. R. Cases, 113; *No. Pac. R. R. Co.* v. *Freeman*, 174 U. S. 379, 384.

Where then was plaintiff's due care? Applying perfectly well-settled principles of law to facts, as plaintiff discloses them, can this conclusion be escaped?

Returning home with an empty, open, farm wagon, he rashly and needlessly rushed a dull horse laterally off a planked crossing as he attempted to hurry through a railroad freight yard, with which he was entirely familiar, at a time when cars were being shifted in and out over it, and precisely when he saw a locomotive with two cars coupled to it "kick" a third toward a house-track, and stop only twenty feet away; then, when fully committed to the foolhardy enterprise, he perceived the locomotive again coming toward him, instead of himself stopping until it had gone past, still pushes on, "urging" his horse, until, in his self-invited panic, he swings his wagon wheel clear of the planking, though inside the rail, and was tilted out. In every logical and legal sense all he has suffered therefrom has arisen solely from, and must remain chargeable to, his own negligent want of ordinary care.

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

STROUT, J. Plaintiff had a verdict for injuries sustained at a highway crossing of defendant in North Berwick. We are asked to set it aside as against evidence.

At the place of the accident there were six tracks, where trains were made up. It was broad daylight. A freight train had crossed the highway, and stopped within twenty or thirty feet of the crossing on the northerly track, the locomotive heading towards the highway. The conductor left his cab and went to the rear of the train to unshackle a car. Plaintiff was approaching from the southerly side, in plain sight of the train, but was not seen by the engineer till his horse's head was "right out by the forward end of the engine," when he put on the brake. The engineer was on the side of the engine farthest from the plaintiff as he approached, and when seen by him, the horse must have been well over the crossing.

The engineer says that when he had passed the crossing to leave a car, he stopped the locomotive, and immediately started forward toward the crossing. Plaintiff says it stopped a minute or so while a car was unshackled, and as he was about crossing, the engine started without warning — the trainmen say the bell was rung. The planking at the crossing was seventeen to nineteen feet wide. The engineer says the engine was stopped when it had lapped on the planking about two feet—plaintiff says it did not stop till it had entirely passed the planking. His horse was not afraid of locomotives; neither horse nor wagon was struck. Apparently the accident happened by the horse swerving away from the locomotive, beyond the planking, and the carriage wheel cramping on the rail and throwing plaintiff out. The horse and carriage passed over the track clear of the locomotive. Defendant claims that plaintiff was negligent in attempting to cross the track when he did; while plaintiff claims that the locomotive being stationary he had a right to cross, and that the engineer should not have started while he was on, or evidently attempting to pass over, the crossing.

If plaintiff was seen by the engineer in his attempt to cross (and it is difficult to see why he was not) and while the engine was stationary, it would be a fault to start it, even if the plaintiff was negligent in making his attempt. If thus stationary, it is claimed plaintiff was justified in believing that it would not start while he was passing, he being then in close proximity to the crossing.

The rule that a rapidly moving train has precedence, at a cross-

ing, over the traveler on a highway, does not apply to stationary trains. As to these, neither has precedence, but each should act with due regard to the other, the right of passage being equal to each.

All these questions were submitted to the jury, under instructions not excepted to, and they have found the defendants guilty of negligence, and that the plaintiff was not guilty.

It may be that the court would have arrived at a different conclusion, if called upon to pass upon the facts. But the constitutional tribunal for the determination of facts having found the issues in favor of the plaintiff, and there being no suggestion of bias or undue influence on their part, and the evidence being such that different minds might reach different conclusions, we do not feel authorized to disturb the verdict.

Motion overruled.

GEORGE PEIRCE *vs.* MORSE-OLIVER BUILDING COMPANY.

Penobscot. Opinion December 8, 1900.

Corporations. Directors,—Acts of, how proved.

Directors, individually, cannot bind or affect the rights of a corporation.

While it is not necessary that the votes of the directors of a corporation should be formal ones, nor necessarily in formal meetings, nor that they should be proved by record, but may be shown by circumstances or conduct, the directors must act as a board and not as individuals. Whatever the directors may do, the source of their authority must be found ultimately in some action of the board as such.

Held; in this case, that it was incumbent on the plaintiff to show either that Charles B. Brown had authority as agent of the defendant to make the contract relied upon, or was held out by the directors as having authority, or that the contract was assented to and ratified by the directors after it was made.

The acts and conversations of the various directors, which are relied upon by the plaintiff, were not those of the board, or under any authority of the board, which has been shown. They were rather the acts and conversations of some but not all of the individual directors, acting separately; on the plaintiff's own version, the corporation was not bound.

ON MOTION BY DEFENDANT.

Assumpsit for breach of contract.

The plaintiff's claim was based upon an alleged contract which he says he made with the defendant, the defendant acting through an agent, and that under this contract he agreed to furnish and set up the granite in the building which the defendant was about to erect, and that the defendant agreed to accept from him and pay him for this granite at the stipulated price of $15,787, if pink granite should be used, or $15,000, if gray granite should be used; that the defendant refused to carry out this contract, and that he, though he did nothing and incurred no expense in the way of executing his part of the contract, has failed to make the profits which he thinks he might have made had the contract been fulfilled.

The defendant denied that it ever made any such contract, or that it ever had any agent authorized to make any such contract, and further says that there is no evidence in the case to show that the plaintiff would have made any profits had the contract been made and fulfilled. Verdict for plaintiff, $3,097.60.

The case is stated in the opinion.

R. F. and J. R. Dunton, for plaintiff.

On the question whether a person is the agent of a corporation or not, the same presumptions are applicable to such bodies as to individuals. 2 Greenl. Evidence, § 62, *Maine Stage Co.* v. *Longley*, 14 Maine, 444.

Authority in the agent of a corporation may be inferred from the conduct of its officers, or from their knowledge and neglect to make objection, as well as in the case of individuals. *Fitch* v. *Steam Mill Co.*, 80 Maine, 34; *Sherman* v. *Fitch*, 98 Mass. 64; *Badger* v. *Bank of Cumberland*, 26 Maine, 435.

When the alleged principal is a corporation, a ratification may be shown by proving that the officers, who had the power to authorize the act, knew of it and adopted it as a valid act of the corporation, although no formal vote is passed by them. *Murray* v. *Nelson Lumber Co.*, 143 Mass. 250.

Corporations almost universally enter into contracts through

their duly accredited agents; indeed, it would be practically impossible, in most cases, for the whole body of corporators to act directly. It has been held that a corporation may give its assent to a contract by vote of its shareholders or members, at a meeting duly convened. In such cases, the majority speak as agent for the whole association; and the powers of the majority are derived directly from the unanimous agreement of the corporators. As a rule, however, corporations contract through a board of directors, or inferior agents, whose powers are fixed by the provisions of the charter, by the terms of their appointment, or by custom. Morawetz on Corporations, § 337.

It was formerly the rule that a corporation could appoint an agent only by a formal resolution of its board of directors, and under its corporate seal; but this doctrine has long since been abandoned, and the authority of an agent to make the contract may now be shown, as in the case of individuals. It may be by showing an express appointment, or implied from the adoption or recognition of his acts by the corporation. It is now also held that, in the absence of a formal provision in its charter or the law of the state under which it exists, a corporation may confer authority upon an agent to perform any duty within the scope of its corporate powers by parol, and that such authority may be implied, as in other cases. And such ratification need not be by a formal vote or resolution of the board of directors. Beach on Contracts, § 998.

Agents may be appointed in the same manner as the agents of individuals; no formalities are required, nor is the use of a corporate seal necessary unless the contrary be expressly provided for by the company's charter. If a person is allowed to act as the agent of the company with its knowledge and acquiescence, the corporation is bound. Morawetz on Corporations, § 54.

The authority of the agent often depends upon the course of dealing which the company, or its directors, have sanctioned.

It may be established without reference to the official record of the board by proof of usages, etc., and by the acquiescence of the board charged with the duty of supervising and controlling the company's business. Id. § 509.

Statements of an alleged agent may be admitted, when they are a part of the transaction itself. So where it is sought to charge a party with contract liability, such statements must undoubtedly be introduced. Id. § 540 a.

Damages. Counsel cited: Beach on Contracts, § 1720; *Tibbetts* v. *Haskins*, 16 Maine, 283.

C. F. Woodard, for defendant.

SITTING: WISWELL, C. J., EMERY, SAVAGE, FOGLER, POWERS, JJ.

SAVAGE, J. Action to recover damages for the breach of an alleged contract whereby the plaintiff was to furnish the granite to be used in the construction of the defendant's building. The plaintiff recovered a verdict, and the case is now before us upon the defendant's motion for a new trial.

The following facts do not appear to be in dispute. The defendant corporation was organized for the purpose of erecting a business block in the city of Bangor. Llewellyn J. Morse, Hiram P. Oliver, Hiram H. Fogg and Franklin A. Wilson were the only stockholders and they were also the directors. After the organization, in April, 1899, although certain business was transacted, there was no recorded action of the directors prior to June 9, following. While the work on the foundation was proceeding, invitations were issued to several contractors, on or about May 10, 1899, for sealed proposals "for all the labor and materials required for the erection of the Morse-Oliver Building." Three proposals were received and opened May 22. On the following day all these bids were rejected. Among the proposals so received and rejected was one by Charles B. Brown. The plaintiff furnished no proposal to the corporation, but he had previously given to Brown a proposal to furnish the granite, and Brown's proposal for the whole building was based, so far as the granite was concerned, upon plaintiff's proposition. It seems that the bids were unexpectedly high, and that thereupon the directors, by modifications of the plans and otherwise, sought to lessen the cost of the

structure. On June 9, the directors at a formal meeting voted "that all negotiations and contracts between this company and any other persons, firms or corporations for furnishing any material or performing any labor above the foundation on the Morse-Oliver block are hereby cancelled," and at the same meeting awarded the contract for the granite to another party; and these facts are relied upon by the plaintiff as evidence of the breach of his contract. In the meantime, however, the plaintiff had done nothing whatever towards carrying out the contract on his part, and, of course, the defendant had received no benefit.

The plaintiff does not claim that he made a contract directly with the corporation itself, acting by its directors, but he says he made it with the above named Charles B. Brown, acting for the defendant, on May 24. It is incumbent upon him, therefore, to show either that Brown had authority to make the contract, or was held out by the directors as having authority, or that the contract was assented to and ratified by the directors after it was made.

The plaintiff testified at the trial that Brown did, in fact, make the contract with him, claiming to act as agent of the defendant. He did not offer direct proof of the appointment of Brown as agent, with authority to make the contract; but he claims that the legitimate inferences which may be drawn from the conduct and words of the directors afford sufficient proof of the fact, to sustain the verdict; and if this be not so, then that there is sufficient proof, furnished by their conduct and words, that the directors assented to and ratified the contract. On the other hand, the defendant denies that Brown even assumed to make a contract for the corporation. It claims that he was not in fact its agent, and had no authority to make a contract for it; and further, that, if there is anything in the conduct and language of the directors to justify any inference favorable to either of the plaintiff's positions,—all of which the defendant denies,—it was only the conduct and language of a part of the directors acting individually and not as a board.

We do not find it necessary to discuss the evidence upon which the plaintiff relies to support his propositions of fact, further than

to say we are not very much impressed by his version. Not only is he contradicted in material matters by all the directors with whom he had any conversations, and by Brown and by the architect,—all of which is worthy of consideration, though not decisive,—but, aside from that, taking into account the circumstances as they existed at the time the plaintiff says the contract was made, it seems to us very improbable that Brown made such a contract as is alleged, or that he had authority, or that the directors ratified any such contract. Nor do the detached bits of conversation with individual directors, as testified to, appear to us to warrant the conclusions which the plaintiff has drawn from them. So much upon the assumption, that the directors, acting as the plaintiff says they acted, could bind the corporation.

The fatal difficulty with the plaintiff's case is, that he has failed to show that the directors in what they did acted as a board, or even that all of them acted at all. It is not claimed that Mr. Wilson, one of the directors, had any conversation with the plaintiff, and the case does not show that he took any part in any negotiations relative to the granite contract. The plaintiff must rely upon the words and acts of the other directors, with one or more of whom he had conversations at different times. And as to these directors, we think, it is clear that at these times they were acting individually, and not assuming to act as a board.

Now if Brown had authority, it must have been given him by the directors. It could have come from no other source. And the directors could give authority only by acting as a board. This is a fundamental rule. 2 Cook on Corporations, § 713 a; 3 Thompson on Corporations, p. 2834. In a meeting, the majority of those present decide, but it is still the decision of the board, as such. Directors may appoint agents. They may appoint one or more of their own number as agents. They might in this case have delegated to one, two or three directors the power to appoint Brown as agent for awarding the granite contract. It would have been competent for the board of directors as such to come to a mutual understanding with Mr. Wilson that the other three directors were to be the active agents of the board in appointing

sub-agents and awarding contracts. But the case does not show that the board had such an understanding. It follows, therefore, that whatever was said or done by the other directors was said or done by them individually and not as a board. But directors, individually, cannot bind or affect the rights of the corporation. It is not necessary that their votes should be formal ones, nor necessarily in formal meetings, nor that they should be proved by record. But whatever they do, the source of their authority must be found ultimately in the action of the board, as such. These principles are established by the following authorities: *Morrison* v. *Wilder Gas Co.*, 91 Maine, 492; *Elliot* v. *Abbot*, 12 N. H. 549; *Buttrick* v. *Nashua & Lowell R. R.*, 62 N. H. 413; *Building & Loan Asso.* v. *Childs*, 82 Wis. 460; *State* v. *People's Benefit Asso.*, 42 Ohio, 579; *Stoystown & Greenburg Turnpike Co.* v. *Craver*, 45 Pa. St. 386; *Baldwin* v. *Canfield*, 26 Minn. 43; *Schumm* v. *Seymour*, 24 N. J. Eq., 143; *First Nat. Bank* v. *Christopher*, 40 N. J. Law, 435; *Cammeyer* v. *United German Lutheran Churches*, 2 Sandf. Ch. 186; *In re Marseilles Extension Ry. Co.*, 7 Ch. App. 161; 2 Cook on Corporations, §§ 712, 713 a; 3 Thompson on Corporations, pp. 2834, 2866. Although we have no occasion now to pass upon the question, the general trend of authority seems to be to the effect that the acts of even all of the directors, acting separately, do not bind the corporation. So much, it is said, logically follows from the inherent nature and purpose of a board of directors. If this be so, much more should it be true that the acts of less than all of the directors, acting separately, should fail to affect the corporation. Applying the established rules of law, the case fails to show that Brown had any previous authority to make the contract.

Nor does the plaintiff stand on firmer ground in attempting to show acquiescence or ratification. The same rules of law must apply as in the case of an attempt to show previous authority. To be sure, acquiescence or ratification need not be shown by a vote. Either may be shown by circumstances or conduct. *Murray* v. *Nelson Lumber Co.*, 143 Mass. 250; but it must be the acquiescence or ratification of the board, and not merely of a part of the directors

acting individually. As a director may acquire the power to bind the corporation by the habit of acting with the assent and acquiescence of the board, (4 Thompson on Corporations, p. 3657), so his unauthorized acts, or those of any agent, may be confirmed by the approbation and acquiescence of the board. But in either case, it is the board that acts or acquiesces, and not the directors, as individuals.

In this case, the plaintiff did nothing. He furnished no granite; he made no contracts with other parties for the granite; he did not even know where the granite was to come from. There was nothing for the directors to assent to or acquiesce in, except the alleged contract itself. And although the plaintiff claims that he told some or all of the other directors that he had made a contract for the granite with Brown as agent for the corporation, it does not appear that Mr. Wilson knew that the plaintiff had a contract or that he claimed to have one.

The plaintiff places much stress upon the vote of the directors passed June 9, 1899, to which we have already referred. He claims that this vote was directed to his granite contract, because no other contract, within the terms of the vote, had then been made. If this be so, and if it be true that individual directors had previously held Brown out as having authority to make such a contract, or if the directors then understood that the plaintiff claimed that Brown had assumed authority to make it, then this vote of June 9, which is the first action of the directors as a board shown in the case, relating to the plaintiff's contract, did not acquiesce in it, did not assent to and ratify it, but did expressly repudiate it. The claim of ratification must fail.

Motion sustained.

ELLEN DUFFY, In Equity,

vs.

METROPOLITAN LIFE INSURANCE COMPANY.

Penobscot. Opinion December 8, 1900.

Life Insurance. Release. Fraud. Duress. Equity Verdicts.

A mother, who was the beneficiary in a life insurance policy, and her son, the insured, gave a release under seal, to the defendant company, of all their rights under the policy. The complainant, after the son's death, now asking for a restoration of the policy, and claiming that the release on her part was obtained by duress and through the false and fraudulent representations of the agent of the defendant company who procured it; *it is held*, that the release by the insured did not bind the complainant.

The moment a policy is issued, the beneficiary obtains a vested interest in it, and in the money which may become due upon it, which the insured cannot release without the assent of the beneficiary..

Held; also, that the evidence falls far short of showing duress. The threat relied upon, giving it the broadest possible significance, was not a threat which carried with it any reasonable sense of impending danger. Mere threats of criminal prosecution do not constitute duress.

Held; further, that the statements of the agent to the complainant, that the insured had obtained the policy through false and fraudulent representations in his application, were made upon a reasonable belief that the statements were true, and that the company had a lawful right to attempt to secure a release of the policy. Under the circumstances developed by the evidence, for the agent to state to the complainant as a fact, that the representations in the application were false, was not fraudulent, though it might have been untrue.

Held; further, that whatever was the character of the agent's statements, the complainant has failed to satisfy the court that she was deceived by them, and without proof of this she cannot be permitted to disregard her release. She knew, as well as the agent claimed to, whether the statements of the insured in his application which were claimed to be false and fraudulent, were so, or not. She may not have known them to be false, but the court is of opinion that she was not deceived.

In the trial of an issue in equity, the verdict of a jury is only advisory, and must be so considered in this case.

ON REPORT. IN EQUITY.

Bill in equity to compel the defendant to return to the plaintiff a policy of life insurance, issued upon the life of her son, John M. Duffy, in which she was the beneficiary, and which she claimed she was induced to deliver to the company by the false and fraudulent representations of its agent. Her prayer was for a decree compelling the defendant to deliver the policy to her, and for general relief.

The policy was issued April 7, 1898, to John M. Duffy. He died December 16th, 1898, of consumption, and about the first of January, 1899, the company received a letter from Mrs. Duffy's attorney, asking for proofs of death under the policy, and upon refusal to furnish same, this bill was filed.

The case was tried before a jury at the January term, 1900, of the Supreme Judicial Court at Bangor, upon the following issues of fact: "Did the defendant company, by its agent Zimmerman, fraudulently and for the purpose of deceiving the complainant and of inducing her to surrender the policy of life insurance referred to, make false representations to the complainant, relative to certain alleged false statements and representations made by the insured in his application for insurance, as alleged in the complainant's bill, and was she thereby deceived and induced to surrender said policy? Ans. Yes.

"Was said John M. Duffy in sound health on the seventh day of April, 1898? Ans. Yes.

"Did said John M. Duffy have an habitual cough on the fourth day of April, A. D. 1898? Ans. No.

"Did said John M. Duffy have consumption on either the fourth day of April, A. D. 1898, or the seventh day of April, A. D. 1898? Ans. No."

No decree was entered upon the return of the verdict, but the parties entered into a stipulation to report the case to the law court upon a full report of the evidence, and the answers to the questions submitted to the jury; the law court to give such weight to the answers to the questions made by the jury, as the court believes such answers are entitled to, and to decide all questions of law and fact involved and to order such a decree as the rights of the parties

require. It was further agreed that in case the law court decided the case in favor of the plaintiff, a decree should be made for the payment of the amount due upon the policy.

The case appears in the opinion.

P. H. Gillin and T. B. Towle, for plaintiff.

J. H. and J. H. Drummond, Jr.; L. C. Stearns, for defendant.

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

SAVAGE, J. On April 4, 1898, John M. Duffy made application to the defendant company for insurance on his own life for the benefit of his mother, Ellen Duffy, and on April 7 the defendant issued its policy whereby, in the event of the death of John M. Duffy, it promised to pay five hundred dollars to Ellen Duffy, if living, otherwise to the legal representatives of the insured. The premiums of three dollars and one cent each were made payable on the seventh days of April, July, October and January. The premiums for April and July, 1898, were paid, but none afterwards. In his application, Duffy made the following representations: "I have never had any of following complaints or diseases, consumption, ... disease of the lungs, ... habitual cough," and "I am now in sound health." It is conceded that by the terms and conditions of the application and policy, if these representations were untrue, the policy was void. The defendant claims that they were untrue, and that Duffy, at the time he made his application, was not in sound health, that he had an habitual cough and incipient consumption.

On August 2, 1898, Ellen Duffy executed and delivered to an agent of the company, a release, under seal, of all her rights under the policy, and delivered up the policy, which was then in her possession. The next day John Duffy joined in the release which his mother had signed, and the company paid him fifteen dollars therefor. Nothing further was done by Mrs. Duffy or John, until after John's death December 16, 1898, when Mrs. Duffy brought this bill of complaint, alleging among other things, that the release which

she signed was obtained from her without consideration, and by duress, and through the false and fraudulent representations of the agent of the company, and asking for a restoration of the policy.

In its answer, the company asserts that John Duffy made the representations which we have referred to, in his application, and that they were untrue, and it denies that the release was obtained by duress or fraud.

At the trial, certain questions were submitted to a jury, who answered that the agent of the company did make false and fraudulent representations to the complainant for the purpose of deceiving her, and that she was thereby deceived and induced to surrender the policy. The jury also answered that John Duffy was in sound health, and had neither an habitual cough nor consumption on the date of his application to the company. Thereupon the case was reported to the law court, with the stipulation that "the law court is to give so much weight to the answers to the questions made by the jury as the court believes such answers are entitled to, and to decide all questions of law and fact involved and to order such a decree as the rights of the parties require."

A verdict of a jury upon issues of fact tried before them in equity proceedings is to be regarded as advisory only, *Redman* v. *Hurley*, 89 Maine, 428, and as such we must regard the verdict in this case. It is our duty to examine the issues and the evidence as if originally submitted to us, and while we may give great weight to the conclusions of the jury upon disputed issues of fact, still their findings should not be sustained unless they satisfy the conscience of the court. *Larrabee* v. *Grant*, 70 Maine, 79. In the case we are now considering, if the result could be based solely upon the answers to the question whether John Duffy made false representations in his application or not, whether he was then in sound health or not, we might order a decree in accordance with the verdict, although possibly we might think that the evidence preponderated to the contrary. That is one of those doubtful questions involving a pure issue of fact concerning which the judgment of twelve good men and true is of great value. But when the verdict depends upon the proper application of somewhat com-

plex rules of law to the evidence, it is necessarily of less weight. But a decision that John Duffy was in sound health when insured does not decide the case. The defendant claims that in any event the complainant has released her interest under the policy. And that claim we must now consider. If the release was valid, then this bill cannot be maintained.

The release was executed by both the complainant and the insured. It was under seal, and therefore proof of consideration is not required. So far as the release by the insured is concerned, no question is raised but that it was his free and voluntary act. But the insured by his release could not bind the complainant, who was the beneficiary. The moment the policy was issued, the beneficiary obtained a vested interest in it, and in the money which might become due upon it, and the insured could not assign nor surrender it without her assent. This principle is too well settled to require the citation of authorities, and is not controverted by the defendant in this case. The sole question is, was the release executed by the complainant a valid one on her part. We think it was. The evidence falls far short of showing duress. The complainant testified that the agent told her if she insisted upon holding the policy and ever pressed it for a settlement, the company could punish her for trying to obtain money by false and fraudulent representations, and that she signed the release through fear of punishment, and by reason of the threatening talk of the agent. This is all the evidence there is of duress. The language of the agent, taken literally as stated by the complainant, was no more than the expression of an opinion as to what the company *could* do. But giving it the broadest possible signification, it was not a threat which carried with it any reasonable sense of impending danger. Mere threats of criminal prosecution do not constitute duress. *Harmon* v. *Harmon*, 61 Maine, 227; *Higgins* v. *Brown*, 78 Maine, 473.

But, further, the complainant in her bill alleges that the agent "falsely and fraudulently represented to her that the policy was utterly void and worthless," and that the insured "John M. Duffy had falsely and fraudulently represented certain facts concerning

his health which caused said company to issue said contract of insurance," and upon this point she testified that the agent told her that the company had ordered him "to lift the policy because it was utterly void," and further that the agent told her that her son "had obtained the policy through false and fraudulent representations." This is all. She did not testify what those representations were, nor that the agent told her what they were. But the agent testified, and his testimony taken in connection with the allegations of the plaintiff in her bill leads us to believe that he did tell her what the representations were which were alleged to be false, and that they were the representations that he was in "sound health" and that he never had an "habitual cough."

The statement of the agent, as testified to by complainant, that the policy was void was evidently based upon the alleged misrepresentations in the application, and undoubtedly was so understood by Mrs. Duffy.

As bearing upon this point, we gather from the testimony offered by the complainant that John M. Duffy had had a cold in the winter of 1898, that he was confined in the house by it five days, and that he had a physician, though the complainant testified that John did not cough then nor later, until June, 1898. John's employer, a witness for the complainant, testified as follows:

"Q. Did you ever hear him cough through the month of April in your store?

A. I have no recollection of hearing it, sir; in fact he didn't have—I don't know as he had much of a cough; seemed to be kind of a—I should say sort of a—well, tired feeling more than anything else.

Q. And that was in July, when he left?

A. That was in June; along in June he told me he should have to take a rest, go up in the woods; didn't feel, not so well as usual, he said."

Duffy did leave the store July 2, and went into the woods, and never afterwards returned to work. He died of consumption the middle of the December following. It appears that the officers of the defendant company, in New York, as early as May 4,

1898, received information that Duffy was not in sound health, and had consumption, at the date of the policy, and directed an investigation of the case to be made. That the company received such information does not, of course, prove that it was true, but it does have an important bearing upon the good faith, the want of fraud, of the company in directing the investigation and in seeking to cancel the policy. It tends to rebut the allegation of intent to deceive. The evidence satisfies us that on August 2, the date of the release, the officers and agent of the company had reason to believe, and they apparently did believe, that John M. Duffy's representations in his application were untrue; and if so, they had a right to seek a cancellation of the policy. Under such circumstances, for the agent to state to the complainant as a fact, that the representations in the application were false, would not be fraudulent, though it might be untrue.

But whatever may have been the character of the agent's statements, the complainant fails to satisfy us that she was deceived by them, and without proof of this she cannot ask us to disregard her release. *McDonald* v. *Trafton*, 15 Maine, 225; *Pratt* v. *Philbrook*, 33 Maine, 17; *Flanders* v. *Cobb*, 88 Maine, 488. The complainant and her son John lived together as members of one family, in the intimacy of mother and son. All matters relating to his health and his habitual cough, or want of it, were as well known to her as the agent claimed them to be to himself. He made no statement of a fact outside the limits of her daily observation. He did not claim to have means of knowledge that she did not possess. So far as his statement involved an opinion, her opinion was as good as his, and based on a far more intimate acquaintance. She knew, as well as he claimed to, whether his statements to her were true or false. She may not have known them to be true, but, we think, she was not deceived by them. In her testimony she does not claim that she was deceived, but rather lays great stress upon the threats of the agent, the alleged duress. Our conclusion is strengthened by the fact that though she now claims that the conduct of the agent was coercive and false and fraudulent, and therefore entirely reprehensible, she appears to have acquiesced for

several months; and during the lifetime of her son, and while it might have been possible by his aid and testimony to prove the falsity of the agent's statements, she took no steps to right her wrongs, to have the release annulled, and the policy restored.

Therefore, notwithstanding the verdict, the entry must be,

Bill dismissed with costs.

ADELIA M. MOORE, Appellant,

vs.

ELIJAH PHILLIPS, and another.

Waldo. Opinion December 11, 1900.

Probate. Appeal. Adoption. R. S., c. 63, §§ 23, 24; c. 67, § 36.

The right of appeal given by R. S., c. 63, § 23, to any person aggrieved by any order, sentence, decree or denial of a judge of probate is conditional, and the appeal can be prosecuted only upon the appellant complying with the requisites of the statute.

Revised Statutes, c. 67, § 36, gives a right of appeal only to the petitioner, and to the child, from the decree of the judge of probate relating to the adoption of such child.

ON EXCEPTIONS BY APPELLANT.

This was a petition for adoption. Samuel Young the grandfather of the child, six years old, consented to the adoption. On the petition notice was ordered on Adelia M. Moore, the mother of the child. A copy of the petition and order was served on her. She appeared and claimed her child and objected to its adoption.

The judge of probate decreed that the prayer of the petition be granted. From this decree she appealed.

The petitioners moved to dismiss the appeal because she has no right of appeal, and because the court has no jurisdiction. The court sustained the motion. To this ruling the appellant excepted.

L. M. Staples, for appellant.

R. F. and J. R. Dunton, for appellee.

SITTING: WISWELL, C. J., EMERY, WHITEHOUSE, FOGLER, POWERS, JJ.

POWERS, J. The appellant excepts to the ruling of the judge at nisi prius dismissing her appeal from the decree of the judge of probate, granting to Elijah Phillips and wife the adoption of the child of the appellant and her deceased husband.

By R. S., c. 67, § 36, a right of appeal is given only to the petitioner and to the child by its next friend. *Gray* v. *Gardner*, 81 Maine, 558. The mother might have taken an appeal for the child as its next friend. *Murray* v. *Barber*, 16 R. I. 512. She did not, however, undertake to appeal for the child.

The appeal both in form and substance is her own. It sets forth that she is interested as the mother of the child, that she is aggrieved by the decree, and that she appeals therefrom. The reasons of appeal are personal to herself. They are, in substance, that she has not consented to the adoption, that she has not abandoned the child, that she does not want the petitioners to have him but wants him herself, that she is able to care for him and wishes him to be adopted by her present husband. They have no reference to the interest and welfare of the child, the paramount consideration in cases of adoption. Plainly this is not an appeal of the child by his next friend.

Neither can appellant's right to appeal be sustained under R. S., c. 63, § 23, which gives a right of appeal to any person aggrieved by any decree of a judge of probate. It is not every person that is dissatisfied with a decree of the probate court who is "aggrieved" within the meaning of the statute, but only those who have rights which may be enforced at law and whose pecuniary interest might be established in whole, or in part, by the decree. *Deering* v. *Adams*, 34 Maine, 41; *Briard* v. *Goodale*, 86 Maine, 100. Without deciding whether the appellant in the present case falls within that class, it is sufficient to say that the right of appeal under this section is conditional, and that the appeal can be prosecuted only upon complying with the requisites of the statute. *Bartlett, appellant*, 82 Maine, 210.

Except in cases arising between a ward and his guardian, the appellant within twenty days from the date of the decree must "file in the probate court his bond to the adverse party, or to the judge of probate for the adverse party, for such sum and with such sureties as the judge approves, etc." R. S., c. 63, § 24. The case at bar does not show that the appellant ever filed the bond required. The statute has prescribed the conditions upon which an appeal may be claimed, and until these have been complied with, no right of appeal exists and no appeal can be entertained in the appellate court. "In the hearing of a probate appeal the first duty of the appellant is to establish his right to appeal. Ordinarily unless this is made affirmatively to appear the appeal will be dismissed." *Pettingill* v. *Pettingill*, 60 Maine, 419; *Briard* v. *Goodale*, supra.

Exceptions overruled.

CHARLES E. MORRIS

vs.

WESTERN UNION TELEGRAPH COMPANY.

Washington. Opinion December 11, 1900.

Contract. Stock. Telegraph.

A contract between a stockbroker and a customer for the sale and purchase of stock is void, when the parties do not intend a delivery of the stock and payment of the purchase price, but only a settlement of the difference between the contract and the market price. The true nature of the transaction is determined not by the form of the contract but by the intention of the parties.

The sender of a telegram relating to such an illegal transaction cannot invoke such a contract, or the gain or loss resulting from it, to measure the damages sustained by him in consequence of it's non-delivery.

ON REPORT.

This was an action of assumpsit for alleged failure of the Western Union Telegraph Company to deliver seasonably a message sent from Eastport to Boston April 18th, 1899, relative to a

contract for stocks. The plaintiff claimed special damages to the amount of $145, claiming that he lost this sum, because, under the special and peculiar terms and usages of his contract, his three-point margin was exhausted and his stock was sold at a loss instead of a profit.

The case appears in the opinion.

J. H. McFaul, for plaintiff.

Duties and liabilities of telegraphs. Croswell, Elec. §§ 402, 408, 510, 528, 534; *Ayer* v. *W. U. Tel. Co.*, 79 Maine, 493; *Fowler* v. *W. U. Tel. Co.*, 80 Maine, 381; *Pinckney* v. *W. U. Tel. Co.*, 19 So. Car. 71, (45 Am. Rep. 765); *W. U. Tel. Co.* v. *Reynolds*, 77 Va. 173, (5 Am. & Eng. Corp. Cases, 182; 46 Am. Rep. 715); *W. U. Tel. Co.* v. *Harding*, 103 Ind. 505, (10 Am. & Eng. Corp. Cases, 617); *Fleischner* v. *Pac. Tel. Co.*, 55 Fed. Rep. 738; Croswell, Elec. § 510, p. 450, and cases.

Purchase or sale on margin is a legal method of doing business. 14 Am. & Eng. Ency. Law (2nd. Ed.) p. 608, and cases.

The form of future contract which the law classes as a gambling contract is that in which, at the inception of the contract, it is the intention of the parties thereto not to deliver the chattels bargained for but to settle the differences only. *Rumsey* v. *Berry*, 65 Maine, 570; *Harvey* v. *Merrill*, 150 Mass. 1, (15 Am. St. Rep. 159); *Northrup* v. *Buffington*, 171 Mass. 468.

But if one party intends bona fide delivery and the other does not intend delivery, but intends to settle the differences, such a contract can be enforced at the option of the party intending bona fide delivery. 14 Am. & Eng. Encyc. of Law (2nd. Ed.) p. 611; *Rumsey* v. *Berry*, supra; *Barnes* v. *Smith*, 159 Mass. 344.

O. D. Baker, for defendant.

In any event, only nominal damages can be recovered, because no special damages are alleged; and, in fact, no damages at all except through the ad damnum at the end. Special damages must be specially alleged or this fact cannot be proved. See specially *Acheson* v. *Telegraph Company*, 96 Cal. 641, where the writ averred the negligent transmission of a message, and that in conse-

quence thereof the plaintiff lost the purchase (or sale) of a certain commodity, and that his loss thereby was $600. On default the court ordered judgment for the sum thus claimed, but the court above reversed that judgment, holding that under such an allegation, damages could only be nominal.

This case was far stronger for the plaintiff than the case at bar, because here the first and second counts contain no allegations whatever on the subject of damages, either general or special. See also *McAllen* v. *Telegraph Co.*, 70 Tex. 243.

The plaintiff can not recover at all, even under a writ properly drawn, because delay in delivery was due wholly to breaking down of all wires between Eastport and Boston; and this breaking down of wires was due to natural causes against which no diligence on the part of the defendant could avail, and in fact, all due diligence was exercised by defendant to repair the wire damage as early as possible.

The contract relied on between the plaintiff and Rogers & Co. through Hayden, the broker, was an illegal and gambling contract, under which no legal rights whatever could be acquired, neither against Rogers & Co.—who were parties to the illegal contract, and therefore participes criminis—nor, a fortiori, against the defendant, who was innocent of wrong. The plaintiff claims that if his telegram had been seasonably transmitted to Boston, his stock would have been treated as sold at 255 by virtue of this special usage, Rogers and Co. would have paid him back his original deposit of $60 and 4¼ points profits, $85, making a total of $145. But before the telegram was, in fact, delivered in Boston, the price of the stock in New York had declined from 255 to 247¾, and by the special terms of the plaintiff's contract, as understood between the parties, he lost not only his chance for profits, but his original deposit of $60 and the "deal" was at an end. *Bibb* v. *Allen*, 149 U. S. 481, and cases cited. See, also, 1 L. R. A. 140, 141, cases collected in note.

Written contracts for future delivery are not conclusive upon the question of good faith. The real question is, whether the sale is bona fide or merely a wager. *Fortenbury* v. *State*, 47 Ark. 188.

The contract itself, is merely a notice by the local agent of the Boston "bucket shop" that he has "contracted in his own name with Rogers & Co. to buy 20 shares" of stock. It does not, even on its face, purport to be an actual purchase by anybody.

Besides, the fact that by the peculiar custom of Rogers and Co., the plaintiff was at liberty any time to treat his stock as sold and his contract at an end at the closing price of the previous day on the stock exchanges, is, of itself, proof that no actual sale was made or contemplated, because people cannot and do not expect to make actual purchases or sales of a high priced and fluctuating stock, like the Metropolitan, at the identical price at which it was last sold on a previous day, as it might well open on the succeeding day at a price many points advanced from what it closed the day before.

Especially is this point applicable where, by the peculiar usage, the plaintiff's contract is supposed to be "closed" at a time when the stock exchanges of New York are all closed for business, and no sales, in fact, are being made, *i. e.* between the closing of the exchanges at 3 P. M. on one day and their opening at 10 A. M. the next day.

No glozing statement printed in a headline can override these admitted facts, or blind the eyes of the court to the actual nature of this transaction. The actual conduct of the parties, and their special agreements admittedly made, which might nullify the supposed purchase before it could possibly be completed, speak louder than headlines, which parties vainly use to evade the law and dupe the court. *W. Un. Tel. Co.* v. *Harper*, 15 Tex. Civ. App. 37; *Gist* v. *Tel. Co.*, 45 So. Car. 344.

Nor can a recovery be had in such a message against the telegraph company, even though the contract by the law of the state where it was made, was legal, if it is illegal, or contrary to good morals or public policy in the state where it is sought to be enforced. 2 Kent's Com. *458.

As a proposition of law, while it does not necessarily follow that a telegraph company will be liable for such special damages even if they had notice of the special terms of the sender's contract, it does follow as a settled rule of law, that without such notice the

defendant cannot be held. *Hadley* v. *Baxendale*, 9 Exch. 349; *Telegraph Company* v. *Hall*, 124 U. S. 444, at pp. 454, 5, 6. See for a full discussion on this subject, Gray on Telegraphs, §§ 80 to 99 inclusive; 5 Am. & Eng. Encyc. of Law, (1st. Ed.) pp. 13, 14, 15, 16.

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

POWERS, J. On April 15th, 1899, the plaintiff directed one Hayden, a correspondent at Machias, Maine, of F. A. Rogers & Co. of Boston, to buy for him of said Rogers & Co. twenty shares of Metropolitan Street Railway stock at $250½ and a quarter added for commission, making $250¾, and at the same time deposited with him $60.00 and received from him the following memorandum:

"DUPLICATE.

Trade No. 2. Margin Three Protect.

We solicit and receive no business except with the understanding that the actual delivery of property bought or sold upon orders is in all cases contemplated and understood.

To Mr. Chas. E. Morris;

In obedience to your orders, as your agent, in my own name, I have this day contracted with F. A. Rogers & Co. of Boston to buy twenty shares of Metro. at 250¾.

Date.	Called.	Limit.	Deposit.
Apr. 15	250¾	47¾	60.00"

This transaction is termed by plaintiff's witnesses a deal. According to the custom of F. A. Rogers & Co. all deals could be closed and stock treated as sold at any time before ten o'clock the next morning at the closing price of the day before on the New York Stock Exchange, and the difference between the buying and selling price adjusted on that basis. On April 17th the closing price of the stock above named was $255, and before nine o'clock the next morning plaintiff delivered to the agent of the defendant at its office, in Machias, a telegram addressed to said Rogers & Co.

Boston, directing them to "Close Metro., fifty five." At the opening of the Stock Exchange on the 18th this stock fell to 247 3/4 and according to the method of doing business and the understanding between the parties, the plaintiff's "deal was exhausted", his rights under the contract terminated, and his margin of $60 lost. Plaintiff brings this action for the non-delivery of the telegram, and claims to recover as damages the $60 margin, and $85, the difference between the purchasing price, $250 3/4 and $255, the price at which he ordered his deal closed.

If the case stopped here, it might not be difficult to determine the true nature of the dealings between the plaintiff and F. A. Rogers & Co. It is admitted, however, that "in such a transaction or deal, the method of business in the plaintiff's deal is as follows: Such trades are made on quotations only, no actual stock being in fact sold; but settlement of differences are fully made when the deals are closed as to profits or losses." This admission is fatal to the plaintiff's case. It strips the transaction of the semblance of legitimate business with which the memorandum endeavored to clothe it, and leaves it a naked bet or wager upon the rise and fall of the price of the stock, which the law terms a gambling contract, and pronounces immoral and void. The particular disguise, or subterfuge to which the parties have resorted to prevent their real intention from appearing in the terms of the agreement, cannot control. The form is immaterial. To seek to evade the law by using the forms of law is a well known device. In such cases the court will not hesitate to determine and declare the true nature of the transaction. The intention is the crucial test. If the parties at the inception of the contract actually intend that the goods shall be delivered and the purchase price paid then the contract is lawful, but if they intend to settle differences only, then it is unlawful. *Rumsey* v. *Berry*, 65 Maine, 570; *O'Brien* v. *Luques*, 81 Maine, 46; *Dillaway* v. *Alden*, 88 Maine, 230; *Nolan* v. *Clark*, 91 Maine, 33; *Irving* v. *Miller*, 110 U. S. 409; *Embrey* v. *Jemison*, 131 U. S. 336.

In the case at bar, notwithstanding the written memorandum, the parties could not have "contemplated and understood the actual

delivery of property bought and sold" when it is admitted that by their method of doing business no actual stock was in fact sold, but trades were made on quotations only and settlements made of differences only. It would require stronger evidence than this case discloses to satisfy a court that parties engaged in a certain business actually intend in the prosecution of that business to do "in all cases" that which according to their method of conducting the business they never do in any case. The plaintiff had no stock to to sell and the parties never intended the sale of any. His contract with Rogers & Co. was a gambling contract, and no loss growing out of it could in legal contemplation have been suffered by the plaintiff from the defendants failure to deliver the message. "Neither he nor the receiver can invoke the illegal contract, or the gain or loss resulting from it to measure the damage sustained by him in consequence of an erroneous transmission" or non-delivery of the message. 25 Am. & Eng. Encyl. of Law, (1st Ed.) p. 814.

Neither in this case can he recover any price for transmission and delivery, for each count in the declaration alleges that the toll for transmitting, carrying and delivering the message was to be collected from Rogers & Co., and there is neither allegation nor proof that it has ever been paid by any one.

Judgment for defendant.

MARY J. WEBBER, Executrix, in Equity,

vs.

WILLIAM T. JONES, and others.

Penobscot. Opinion December 11, 1900.

Will. Devise. Remainder. Residue. Distribution. Counsel Fees.

1. A testator made the following devise: "I also give and bequeath my youngest son W. T. J. the farm upon which he now lives during his lifetime, then to his children, if any, if none, to his nearest relatives."

Held; that the devise gave a life estate to W. T. J. with contingent remainder to his children, as a class. A child of W. T. J. living at the death of the testator, but having deceased before the death of the life tenant, took no interest which descended to his heirs; but an after-born child of W. T. J. if living at the time of her father's death, will then take by way of executory devise a vested interest in fee in common with her surviving brothers and sisters.

2. The residuary clause was as follows: "And lastly as to the residue of my real and personal estate whatever, after paying my just debts, I wish my grandchildren to have a good academic education to be paid for out of my estate, the remaining amount if any, to be kept on interest until said children are twenty years of age, then what the amount is to be divided between my said grandchildren."

Held; that when a legacy is made to a class as "grandchildren," and there is by the will a postponement of the division of the legacy until a period subsequent to the testator's death, every one who answers the description, so as to come within that class at the time fixed for the division, is entitled to share, but no others. By this rule the heirs of a grandchild, who was living at the death of the testator but who died before the time fixed for distribution, will take nothing; but an after-born grandchild, if living at the time fixed for distribution, will share.

Also, held; that the distribution under this bequest should take place when the youngest grandchild becomes twenty years of age.

ON REPORT. IN EQUITY.

Bill of interpleader, heard on bill and answers, to obtain the construction of the will of Rufus Jones, late of Veazie, deceased.

The case is stated in the opinion.

A. L. Simpson, for plaintiff.

Matthew Laughlin, for William T. and Ella R. Jones.

C. A. Bailey, for others.

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

SAVAGE, J. Bill to obtain the construction of the last will and testament of Rufus Jones, late of Veazie. The will was executed May 23, 1894, and Mr. Jones died the following August. He left surviving him two sons, Rufus L. Jones and William T. Jones, and one daughter, Mary J. Webber, the complainant, all of whom were married. There has never been any child born to either Rufus L. Jones or Mrs. Webber. But William T. Jones at the

time of his father's death had three children living,—Fred A., born in 1881, Frank E., born in 1883, and Nellie S., born in 1888. Since the testator's death, Fred A. Jones has died; and in 1896 another child, Helen A., was born to William T. Jones.

The will of Rufus Jones, in addition to certain pecuniary and specific bequests to his children and others, contained the following paragraphs, which are the only ones that it is necessary for us to consider.

1. "I also give and bequeath my youngest son, W. T. Jones the farm upon which he now lives during his lifetime, then to his children, if any, if none, to his nearest relatives."

2. (Following other bequests) "And lastly as to the residue of my real and personal estate whatever, after paying my just debts, I wish my grandchildren to have a good Academic education to be paid for out of my estate, the remaining amount, if any, to be kept on interest until said children are twenty years of age, then what the amount is, to be divided between said grandchildren."

This will is said to be holographic, and we do not question the statement.

The estate has been in the process of settlement, the debts and pecuniary legacies have been paid, the real estate, except the farm mentioned above, has been sold and the proceeds put on interest, and the executrix holds the residuary fund for distribution under the will.

The questions presented by the bill are, in substance, what interest did Fred A. Jones, the child of William T. Jones, who has died since the death of the testator, take either in the "farm" or the residuary fund, and if any, did that interest descend upon his death to his father and mother as heirs; next, does Helen A. Jones, born since the testator's death, take any interest in the "farm" or the fund; and lastly, when may the residuary fund be distributed. For convenience in discussion we shall consider these questions first with reference to the "farm," and then with reference to the residuary fund.

I. As to the "farm."

The will gives a life estate to William T. Jones, with remainder over to his children, if any; and, if there are no children, then to his nearest relatives. Whether Fred A. Jones had a descendible interest in the remainder, or not, will be ascertained by determining whether the remainder to the "children" was vested or contingent. If it was vested, he had at the death of the testator a present fixed interest to take effect in possession upon the termination of the life estate; and that interest was transmissible, devisable, descendible. He could convey it, and upon his death intestate and unmarried, it would descend to his father and mother. But not so, if the remainder was contingent. In that event, his interest would depend upon his surviving his father. If he died before his father's decease, there would be nothing to descend to his father and mother.

The law favors vested remainders, and it is a rule that remainders shall be deemed to be vested rather than contingent, if they can properly be so construed; but not to defeat the intent of the testator. *Richardson* v. *Wheatland*, 7 Met. 169. It is the expressed intent of the testator, interpreted by his language, in the light of legal principles, which controls the construction of a will. And in this case, we think the intent shown by the will was to create a contingent remainder in the children of William T. Jones. The devise was to the chiidren as a class, and was made to them "if any" that is, if any living; and if they were not living, then to others. And we think the language used fairly implies an intention that this contingency should be determined at the time of the death of the life tenant, rather than at the death of the testator. The testator appears to have intended that his son William T. should have the life estate and no more, that when William T. died, "then" the farm should go to the children. Such an expression as "then" or "after the death of" the life tenant, has been held not to be conclusive, and had the testator stopped there, there might be more doubt. But he followed the estate further, and provided that in case there were no children,

the estate should go to still another class, not his own heirs, not the heirs of the remaindermen, but the nearest relatives of the life tenant, and these might be other and different persons than the heirs of the remaindermen. Now whether the estate will ultimately vest in the children or their heirs, or in other relatives of William T., is contingent upon a future uncertain event; namely, whether there shall be any "children" surviving at the time of the death of their father. 4 Kent's Commentaries, (6th Ed.) 208. A test which is found in some of the decided cases is appropriate here. Let it be supposed that one or more or all of the children should, in the lifetime of their father, convey their shares of the remainder to other parties (and this they may do if the remainder is vested,) and that all should die before their father, then it would result that nothing would be left to pass to the nearest relatives of the father, a result directly opposed to the provisions of the will, and which could not have been intended by the testator. *Spear* v. *Fogg*, 87 Maine, 132; *Richardson* v. *Wheatland*, supra. This general conclusion seems to be in accordance with the previous decisions of this court. *Hunt* v. *Hall*, 37 Maine, 363; *Read* v. *Fogg*, 60 Maine, 479; *Spear* v. *Fogg*, 87 Maine, 132. We think, therefore, that Fred A. Jones took only a contingent remainder, and left no interest which could descend to his heirs.

But as to Helen A. Jones, the after-born child, the case is different. We think she is let in, and if living at the death of her father, she will then take by way of executory devise a vested interest in fee, in common with her surviving brothers and sisters. The authorities all agree that in case of a devise over, in general terms, to a class, as "children," to take effect in the future, or upon the happening of a contingency, it is open to let in after-born children; and it is even held by some authorities, if not all, that the rule applies equally well in the case of vested remainders. 1 Jarman on Wills, (5th Ed.) 154; *Campbell* v. *Rawdon*, 18 N. Y. 412; *Dingley* v. *Dingley*, 5 Mass. 535; *Hatfield* v. *Sohier*, 114 Mass. 48; *Moore* v. *Weaver*, 16 Gray, 305; *Haskins* v. *Tate*, 25 Pa. St. 249.

II. As to the residuum.

This legacy is also made to a class, the grandchildren of the testator. It is a fund to be distributed, and the time of distribution is fixed at the period when "said children [grandchildren] are twenty years of age." The rule is that where a legacy is given to a class of individuals, not by a designatio personarum, but in general terms, as "to the grandchildren of A.," and no period is fixed for the distribution of the legacy, it is to be considered as due at the death of the testator; and none but children who were born or begotten previous to that time can share in the legacy. But where there is by the will, a postponement of the division of the legacy until a period subsequent to the testator's death, every one who answers the description, so as to come within that class at the time fixed for the division, is entitled to share, though not in esse at the death of the testator, unless there is something in the will to show a contrary intention on the part of the testator. And persons living at the death of the testator, but afterwards deceased before the time of distribution, are not entitled to share. The class takes in all who answer the description at the time fixed for distribution, and no others. *Jenkins* v. *Freyer*, 4 Paige, 47; *Worcester* v. *Worcester*, 101 Mass. 128; *Hall* v. *Hall*, 123 Mass. 120; *Fosdick* v. *Fosdick*, 6 Allen, 41; Opinion of Judge HASKELL, *in re Estate of John B. Brown*, 86 Maine, 572; Woerner's Law of Administrators, § 434. This rule excludes Fred A. Jones, or his heirs, from participation in the residuum. But it will let in Helen A. Jones, if alive at the time fixed for distribution.

III. As to the time of the distribution of the residuary fund.

The language is when "said children are twenty years of age." It is unfortunately indefinite. We must ascertain again, if we can, the intention of the testator. Did he intend the distribution should take place when the oldest grandchild, or when the youngest, should become twenty years of age? We think the latter. This construction will satisfy the literal import of the language, which is in the plural. It also seems to be in keeping with the other purposes expressed in the residuary clause. He therein

said it was his wish that his grandchildren should have a good academic education to be paid for out of his estate, and the remainder only was to be kept on interest until the time of distribution. But one distribution is provided for. The language does not admit of the construction that each is to be paid his share when twenty years of age. Now if the fund shall be distributed when the oldest is twenty years old, and while the younger ones are still of the age to be recipients of a "good academic education," the express wish of the testator will be defeated. He evidently did not intend that result. It may be that from circumstances he did not anticipate other grandchildren, an anticipation not verified in this case, and it may be that the birth of subsequent grandchildren will postpone the distribution longer than he expected. But that is not to the point. He evidently expected all the grandchildren first to be educated at the expense of the estate, and then, when the academic education of the youngest might reasonably be expected to be completed, namely, at the age of twenty years, the grandchildren should come into possession of what remained. And we so construe the will.

The devisees and legatees in their answers unite with the executrix in asking for a construction of the will. The questions raised are those about which doubts might well exist. Therefore we think that costs, including reasonable counsel fees, should be allowed to all parties, to be paid by the executrix and charged in her account of administration.

Decree accordingly.

S. GERTRUDE SWIFT *vs.* SILVEA A. GUILD.

Knox. Opinion December 14, 1900.

Sale of Real Estate. Seizure on Exon. Record. R. S., c. 76, §§ 22, 38, 42; c. 81, § 59; Stat. 1880, c. 241; 1881, c. 80.

A seizure of real estate on execution is not effectual against a subsequent purchaser, who has no notice of the seizure, unless it is recorded in the registry of deeds as provided by R. S., c. 81, § 59; but such unrecorded seizure, if followed by a sale in the manner provided by law, is sufficient to convey title to the purchaser, if no rights of third parties intervene.

Held; that the sale in this case vested title in the plaintiff's grantor, although the seizure was not recorded, as no rights of a third party were affected.

ON EXCEPTIONS BY DEFENDANT.

Forcible entry and detainer against defendant as disseizor. Plea, general issue with brief statement of title in defendant.

It was admitted that the defendant was the original owner in fee of the land described in the writ, and that she has lawful title thereto, unless the evidence in this case shows that she has parted with the same.

The court ruled that the proceedings upon the execution were sufficient in law to pass the title from defendant to plaintiff's grantor, and that therefore the plaintiff should recover. To this ruling the defendant excepted.

The case is stated in the opinion.

L. F. Starrett, for plaintiff.

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

A seizure upon the execution is a necessary step in divesting the defendant's title. There was no subsisting attachment in the suit on which the execution was issued. The sale, therefore, depends solely upon the proceedings after the execution was in the hands of the officer, to be satisfied. This is the sale of the land, and not of an equity of redemption. "Real estate attachable," . . . . "may be taken on execution and sold, as rights of redeeming real

estate mortgaged, are taken on execution and sold." R. S., c. 76, § 42.

This statute reads substantially the same as section 32 of the same chapter, providing for the taking and selling on execution of rights to redeem.

The officer can only sell the property seized; is only authorized to sell real estate after having advertised it for at least thirty days. He must necessarily sell the real estate owned by the debtor at the time he seized and advertised it. If the debtor had no title at that time, the proceedings of the officer would convey none, even though the debtor might, before the sale actually took place, have acquired title to the premises.

"Subsequent proceedings, in order to vest the title in the purchaser, have reference to the time of the seizure, and depend upon the state of the title, as it then was. *Bagley* v. *Bailey*, 16 Maine, 153." *Benson* v. *Smith*, 16 Maine, 426.

"The title is not changed, unless what the statute requires to produce this effect, appears of record. If it does not, the land remains the property of the debtor, and the judgment is unsatisfied." *Chandler* v. *Furbish*, 8 Maine, 410; *Ladd* v. *Blunt*, 4 Mass. 403.

Our court have specifically held in *Carleton* v. *Ryerson*, 59 Maine, 438, that "to constitute a valid attachment of real estate," . . . . "the officer's return on the writ must show that the 'attested copy', required to be filed in the office of the register of deeds, was in fact filed." *Bessey* v. *Vose*, 73 Maine, 217.

If an attachment of real estate is not valid unless the officer's return shows the filing of the copy in the registry of deeds, surely a seizure made under a provision of the statute using the same language, cannot be valid, unless the officer's return shows that the necessary certificate was filed with the register of deeds. This is the one thing which distinguishes a seizure of real estate upon execution in the case where there is no subsisting attachment, from a seizure where the attachment made on the original writ has not yet expired.

No return was ever, in fact, made of this seizure, to the registry

of deeds, and it is not, therefore, a question solely of a deficient return, but it is, in fact, a failure to do some of the acts made necessary by the statute as preliminary to a valid sale of real estate upon execution.

SITTING: WISWELL, C. J., WHITEHOUSE, STROUT, SAVAGE, POWERS, JJ.

STROUT, J. The contention is whether the sale of the land in controversy on execution, by the officer, was valid and sufficient to vest the title in plaintiff's grantor.

Sales by an officer are in invitum, and his return must show compliance with the statute requirements. Here the officer returns that he seized the land on February 21, 1893, and on the same day posted the required notices and within the time limited by statute advertised notice of sale, and sold the property on April 8, 1893; but his return does not show that within five days after the seizure he filed in the registry of deeds, "an attested copy of so much of his return on the execution as relates to the seizure, with the names of the parties, the date of the execution, the amount of the debt and costs named therein, and the court by which it was issued", as provided by R. S., c, 81, § 59. It is claimed that this omission is fatal. No other objection is raised.

The officer must first seize the land. If it is proposed to make an extent upon it, the seizure is regarded as complete and the extent commenced when the appraisers are chosen and sworn. *Allen* v. *Portland Stage Co.*, 8 Maine, 210; R. S., c. 76, § 22.

If proposed to sell a right of redemption, "the seizure on execution is considered made on the day when notice of the sale is given". R. S., c. 76, § 38.

Prior to the enactment of c. 80 of the statute of 1881, now incorporated in R. S., c. 76, § 42, unincumbered land could not be sold on execution. By that statute such real estate may be sold "as rights of redeeming real estate mortgaged, are taken on execution and sold". The seizure in such case is deemed complete when the notice of sale is given. Subsequent proceedings relate to the

time of seizure, and the sale may in fact be made after the return day of the execution, if the seizure was during its life. R. S., c. 76, § 38.

Prior to the statute, c. 241 of the laws of 1880, now contained in c. 81, § 59, R. S., no record of a seizure on execution was required for any purpose. If the seizure was made by posting notice, in case of sales of equities, or by choosing and having sworn the appraisers, in case of an extent,—and these proceedings were followed to completion as provided by law,—the title of the judgment debtor passed as of the date of the seizure; all intervening attachments or conveyances were cut off. *French* v. *Allen*, 50 Maine, 437. But it was obvious that after such seizure, and before sale or extent, the debtor might convey the land to a bona fide purchaser, who had no knowledge of the seizure and no means of acquiring it, and such purchaser might find his title invalid, as a result of a subsequent sale or extent upon the land.

To obviate this danger, and to afford protection to innocent parties, the statute was amended so as to provide, as it now does, that "no seizure of real estate on execution, where there is no subsisting attachment thereof made in the suit in which such execution issues, creates any lien thereon," unless recorded within five days. It will be observed, that a record of seizure is not required, if there was an existing attachment, because the record of that would be notice of the incumbrance. As against the judgment debtor, the seizure is good, if not recorded, but it does not create a lien which may displace subsequent bona fide purchasers without notice. That such is the true construction of the statute is apparent from the later language of the same section, that if the copy of the officer's return is "not so filed the seizure takes effect from the time it is filed." The same provision is made as to recording attachments. In neither case is the attachment or seizure declared invalid, if not recorded within five days, nor is a new attachment or seizure required, but the protective lien attaches when the record is made, deriving its vitality from the antecedent seizure or attachment. The record is important to protect innocent parties; it is of no importance to the debtor. He does not

suffer if a record is never made, nor can he be injured by a subsequent sale or extent upon the land, under an unrecorded seizure.

As against this defendant, the judgment debtor, the seizure and sale in this case were sufficient to vest the title in the purchaser, the plaintiff's grantor, although the seizure was not recorded in the registry of deeds. It would be otherwise as against a bona fide purchaser, after the seizure and before the sale, who had no notice of the seizure on execution. *Houghton* v. *Bartholomew*, 10 Met. 138, approved by this court in *Hobbs* v. *Walker*, 60 Maine, 184; *Bagley* v. *Bailey*, 16 Maine, 154. In *Carleton* v. *Ryerson*, 59 Maine, 438 and *Bessey* v. *Vose*, 73 Maine, 217, the rights of innocent parties were involved.

Registry laws are designed for the protection of innocent parties, and should be so construed as to effect that object, and not operate an injustice. In this view the courts have very generally held that actual notice of a prior conveyance or other infirmity of title is equivalent to registry. *Houghton* v. *Bartholomew*, supra.

The ruling excepted to was in accordance with these views.

Exceptions overruled.

ARTHUR BOYD, Assignee in Insolvency,

vs.

GEORGE W. PARTRIDGE, and another.

Waldo. Opinion December 15, 1900.

Insolvency. Preference. Equity. R. S., c. 27, § 56; c. 70, § 33.

A mortgage given by a debtor to secure a debt to a prior existing creditor, which has not been recorded at least three months prior to commencement of insolvency proceedings, is dissolved by R. S., c. 70, § 33, notwithstanding it has passed into the hands of a bona fide purchaser.

The assignee in insolvency may in equity compel the bona fide assignee of such a mortgage to cancel and discharge it.

IN EQUITY. ON APPEAL.

This was a bill in equity brought to procure the cancellation and discharge of a mortgage of real estate. The case was heard below on bill, answer and proofs, where it was sustained and a decree made sustaining the bill. The defendants appealed to this court.

The facts are stated in the opinion.

R. F. and J. R. Dunton, for plaintiff.

A transfer of notes does not assign the mortgage given to secure them. R. S., c. 70, 33; *Dwinel* v. *Perley*, 32 Maine, 197; *Warren* v. *Homestead*, 33 Maine, 256; *Stone* v. *Locke*, 46 Maine, 445.

When the security for a note is void under the act, an indorsee for value obtains no better right than the payee if the security is not of a negotiable character. The security passes with the note only as an incident, and is subject to the same defense in the hands of the indorsee as it would have been in the hands of the payee. *In re Kansas City Manfg. Co.*, 9 N. B. R. 76.

The purpose of the insolvent law is to break up attachments and other liens, and to secure an equal distribution of the debtor's property among his creditors. *Wright* v. *Huntress*, 77 Maine, 179; *Owen* v. *Roberts*, 81 Maine, 439.

O. F. Fellows, for defendants.

Partridge holds the mortgage in trust, for the benefit of Black who is the holder of two notes secured by it.

It is settled by the clear weight of authority that when a mortgage, given at the same time with the execution of a negotiable note and to secure payment of it, is subsequently, but before the maturity of the note, transferred bona fide for value with the note, the holder of the note, when obliged to resort to the mortgage, is unaffected by any equities arising between the mortgagor and mortgagee subsequently to the transfer, and of which he, the assignee, had no notice at the time it was made. 15 Am. & Eng. Ency. of Law, pp. 855, 856. Citations: Jones, Mortg. (4th Ed.) 834.

The rule of equity is that where there is a purchase of real or personal estate from the legal owner, to which a third party has an equitable title, and the purchase is made in the usual course of busi-

ness, without notice of the equitable title, for a valuable compensation paid therefor, or if the purchaser incurs any new responsibilities upon the credit thereof, he is to be considered a bona fide purchaser, against whom the owner in equity can have no relief. But if no consideration is paid, and the property be assigned and received in payment of or as security for a pre-existing debt, the assignee must take it subject to all the equity to which the assignor was subject. *Clark* v. *Flint*, 22 Pick. p. 243, citing *Root* v. *French* 13 Wend. 571; *Buffington* v. *Gerrish*, 15 Mass. 156.

It is a well established principle, that a deed fraudulent in is creation may become valid by matter ex post facto; as where a deed is made to defeat creditors, and the fraudulent grantee conveys to a bona fide purchaser for a valuable consideration and without notice of the fraud, such purchaser shall hold against the claims of the creditors of the first grantor. *Glidden* v. *Hunt*, 24 Pick. p. 225, citing Bac. Abr. Fraud, c. 1, § 134.

The assignee in bankruptcy takes the title to the bankrupt's property, subject to all equities, liens or incumbrances which existed against the property in the hands of the bankrupt, whether created by operation of law or by act of the bankrupt, except such attachments and transfers as the law avoids. *Yeatman* v. *New Orleans Sav. Inst.*, 24 U. S. p. 589.

Notes and mortgage are valid in the hands of one to whom they have been indorsed and assigned without knowledge of the fraud. *Sprague* v. *Graham*, 29 Maine, p. 160; *Pierce* v. *Faunce*, 47 Maine, p. 507.

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

POWERS, J. On January 6, 1898, one Littlefield gave to the defendant, Partridge, a mortgage of real estate to secure a prior existing debt represented by three notes of $400.00 each payable in one, two and three years respectively from that date. The mortgage was recorded May 2, 1898, and on June 4, 1898, Partridge sold and assigned two of the notes to an innocent purchaser,

Herbert Black, the other defendant. A petition in insolvency was filed against Littlefield June 8, 1898; he was duly adjudged insolvent and his estate conveyed to his assignee in insolvency, the complainant, who brings this bill praying to have the mortgage discharged and cancelled. The defendants appeal from the decree of the presiding justice declaring the mortgage null and void and ordering its discharge.

They contend that, the assignment of the notes being in equity an assignment pro tanto of the mortgage, Black, the bona fide assignee, had a right to rely upon the record and should be protected against unknown and latent defects in the title. *Pierce* v. *Faunce*, 47 Maine, 507. This is true were it not for R. S., c. 70, § 33, which provides that in insolvency proceedings the assignment from the judge to the assignee "shall relate back to the commencement of proceedings in insolvency and vest the title to all the property and estate of the debtor, not exempt from attachment and seizure on execution in the assignee, although the same is then attached on mesne process as the property of the debtor, or is claimed under a mortgage given by the debtor to secure a debt to a prior existing creditor, which has not been recorded at least three months prior to commencement of insolvency proceedings, and such assignment dissolves any such attachment made within four months, and any such mortgage which has not been recorded at least three months preceding the commencement of such proceedings." The question here is not as to the rights of the defendant Black if no such statute existed, but whether by its terms and intent this statute applies to such a mortgage in the hands of a bona fide assignee.

The main purpose of the insolvent law was to secure to all the creditors of the insolvent an equal participation in the distribution of his estate, not only against zealous creditors who might seek to enforce their claims by attachment, but also against those whom the insolvent might seek to prefer by giving security for their debts. "Among creditors equality is equity." Yet the law rewards the vigilant. There should be some period of time beyond which other creditors could not safely sleep upon their rights. The statute has

fixed this at four months in the case of attachments and three months after record, which is notice to other creditors, in the case of mortgages given to secure prior existing debts. Its words are clear and comprehensive. It contains no exception. Nothing is said about the mortgagee or the assignee of the mortgagee, but it declares without limitation or qualification that the mortgage given to secure a prior existing debt, and which has not been recorded three months at the time of commencement of insolvency proceedings, shall be dissolved and the title to the property vest in the assignee in insolvency. No plainer terms could be employed, and we believe if the legislature had intended to limit the application of the statute so as to exclude from its operation mortgages assigned to innocent purchasers, it would have said so as in the case of innocent purchasers of notes given for intoxicating liquors. R. S., c. 27, § 56. As we have already said, the genius and purpose of the insolvent law is equality among creditors. It should be so construed as to further the object for which it was enacted. To interpolate into it the exception, contended for by the defendants, would be to defeat its obvious policy and deprive it of all substantial force and effect. There is in regard to such mortgages no other limitation or condition except that of three months record. If this does not embrace mortgages in the hands of a bona fide assignee, then no lapse of time would be necessary. The debtor might at any time mortgage all his assets to one of his creditors, and as soon as he learned that the mortgage had passed into the hands of a bona fide assignee, file his petition in insolvency, and the only title which would vest in his assignee in insolvency would be that to a worthless equity of redemption. Few cases would be found in which the innocent purchaser real or pretended would be wanting. Such a construction would prevent equality among creditors, foster litigation, and promote fraud, and cannot receive the sanction of this court.

The innocent indorsee takes the note knowing that the contract has been entered into by the parties with reference to the existing law, and that the debt may be discharged by proceedings in insolvency. He takes the mortgage which secures the note with equal

knowledge that that contract also has been entered into with reference to the existing law and that the mortgage, if given for a prior existing debt, will be dissolved by insolvency proceedings commenced within three months from the date of its record. We perceive no greater hardship in the one case than the other. The law gives him notice, that if he sees fit to purchase mortgages which have not been recorded three months, he must ascertain at his peril the consideration upon which they were given.

Decree below affirmed with costs.

Execution to issue therefor.

AROLINE E. HALL, Administratrix,

vs.

EMERSON-STEVENS MANUFACTURING COMPANY.

Kennebec. Opinion December 17, 1900.

Negligence. Master and Servant. Defective Machinery.

Plaintiff's intestate was killed by the bursting of a grindstone in defendant's mill. Whether it burst from inherent defects, known to the defendant, or which should have been known to it if reasonable care and inspection had been exercised, was a dominating issue in the case.

That issue the jury found for the plaintiff. Although the evidence was conflicting, the court cannot say that the jury erred in the finding.

Defendant claimed that the stone slipped in its collar, and thus caused the bursting, and requested an instruction that if so caused, and "that resulted from the adjustment of the stone by Lester Knox, the defendant is not responsible, as he was a fellow-servant" of plaintiff's intestate.

Another requested instruction was, that "if the defendant exercised ordinary care and fulfilled its duty in the selection of the stone up to the time when Knox began to run it, it was not the duty of the company to subsequently examine the stone." Both requests were refused.

As to the first, *it is held;* that the suitable adjustment of the stone was the duty of the master; that if such duty was delegated to a servant, and he was negligent in its discharge, such negligence was that of the master, for which he is responsible.

As to the second request, *it is held;* that if the stone before hanging and turning off presented a shelly and unsafe appearance, and such appearance indicated a possible or probable lack of cohesion throughout its structure, even if, when the shelly place was turned off it then appeared sound and its use seemed to be justified, still, if the original apparent defect was such as to suggest a doubt as to its interior cohesive quality to a man of ordinary prudence and sagacity, it was the duty of the defendant to resolve the doubt by subsequent examination.

ON MOTION AND EXCEPTIONS BY DEFENDANT.

Action to recover for the death of the plaintiff's intestate, brought under chap. 124 of the statute of 1891.

The plea was the general issue. The verdict, for the plaintiff in the sum of $1500.

The plaintiff alleged that her intestate Charles E. Hall, was killed by the bursting of a grindstone while at work in the scythe shop of the defendant corporation in Oakland, on the 5th day of May, 1899, and that the defendant's machinery which was furnished the said Hall to work with in said shops, was defective, which defect caused his injury and death.

The case appears in the opinion.

W. T. Haines, for plaintiff.

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

We were entitled to the rule, as a matter of law, that if the master had fulfilled his duty up to the point when the servant assumed the full control of the machine, there was no subsequent duty of examination in the absence of information as to new defects. *Rice* v. *King Philip Mills*, 144 Mass. 229; *Moynihan* v. *Hills Co.*, 146 Mass. 586; *Johnson* v. *Towboat Co.*, 135 Mass. 209.

The master does not engage that the machinery will always remain in the same condition. It is the duty of the servant to observe and report when he has better means of observing defects than the master has. *Baker* v. *Alleghany R. R. Co.*, 95 Pa. St. 211, (40 Am. Rep. 634); *Eicheler* v. *St. Paul Furn. Co.*, 40 Minn. 263.

The facts not being in controversy, it is a question of law whether Knox, in the adjustment of the stone, occupied, as to Hall, the position of vice-principal, or was his fellow-servant. *Donnelly* v. *Granite Co.*, 90 Maine, 117.

Assumption of risk: *Judkins* v. *Me. Cent. R. R. Co.*, 80 Maine, 418, 425; *Mundle* v. *Hill Mfg. Co.*, 86 Maine, 400, 406; *Wheeler* v. *Wason Mfg. Co.*, 135 Mass. 298; Beach, Cont. Neg. 140; *Nason* v. *West*, 78 Maine, 254; *Stuart* v. *West End Street Ry. Co.*, 163 Mass. 391.

Negligence in the adjustment and management of the appliances not chargeable to the master where the placing and adjustment of the detached appliances is a part of the work to be done by the servant. *Peschel* v. *C. M. & St. P. R. Co.*, 62 Wis. 338; *McGinty* v. *Athol Reservoir Co.*, 155 Mass. 187, 188, and cases cited; *Kelley* v. *Norcross*, 121 Mass, 508; *Donnelly* v. *Granite Co.*, supra.

To keep the stone properly adjusted was the daily and constant duty of the grinder. *Bjbjian* v. *Woonsocket Rubber Co.*, 164 Mass. 214, 219.

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

STROUT, J. Hall, the plaintiff's intestate, was killed by the bursting of a grindstone, on which he was at work in defendant's mill. He was at the time in the service of the defendant, as a scythe-finisher, and was rightfully using the stone in doing the work for which he was employed. The stone was suspended over a spindle which run through it, but did not come in contact with it. It was held by collars of iron, fitted with a flange for holding disks of wood. One collar was stationary with the spindle, the other adjustable and movable, held in place and adjusted by a nut working on a powerful screw. It was not controverted that such was the usual and proper method for hanging the stone. The adjustment of the collars is a matter of nice and careful judgment.

Lester Knox did all of the scythe-grinding by the piece. Defendant furnished the machinery and each scythe-grinder selected his own stone from those furnished by the defendant, and with the assistance of his fellow-grinders hung it as a part of his price by the piece. This stone was hung by Knox. Plaintiff's intestate, as a scythe-finisher, had the right to use the grinding stones for grinding dies or other tools. He had nothing to do with the selection or hanging of the stones.

When it burst, it split transversely into two parts of about equal size. It was not then running at a dangerous speed. At the trial, the cause of the bursting was sharply contested. Plaintiff claimed that this stone was defective and unsuitable for the purpose, and that this was known to the officers of the defendant, or should have been known to them, if they had exercised proper care and caution; and that the bursting was the result of such defect. The defendant denied this, and assigned as the cause, that the stone slipped in the collar and dropped upon the spindle and was thus thrown out of its true and even bearing, and that this produced the result.

It was also claimed that if such slipping was in consequence of negligent hanging by Knox, or in taking proper precautions after it was hung, to correct any fault that arose from its operation, that such negligence was that of a fellow-servant for which defendant is not responsible.

Defendant made three requests for instructions, which were not given, and took two exceptions to the charge.

The first two requests need only be noticed, as the learned counsel concedes that if these were rightfully refused, all the other exceptions must be overruled. The first request was, "if the jury are satisfied that the defendant exercised ordinary care and fulfilled his duty in the selection of the stone up to the time when Knox began to run it, it was not the duty of the company to subsequently examine the stone, and for any failure on the part of Knox to report the crack testified to by Foster, the company would not be chargeable with negligence."

Although the company would not be in fault for failure of Knox to report a crack which he discovered while operating the stone, as defendant's servant, it cannot be stated as an absolute proposition of law that it was not the duty of the company to examine it, after it was put in operation. Whether such duty devolved upon it, depended upon circumstances and considerations which should be taken into account. If the stone, before hanging and turning off, presented a shelly and unsafe appearance, and such appearance indicated a possible or probable lack of cohesion throughout its struc-

ture, even if, when the shelly place was turned off, it then appeared sound and its use seemed to be justified, still, if the original apparent defect was such as to suggest a doubt as to its interior cohesive quality to a man of ordinary prudence and sagacity, it was the duty of the defendant to resolve the doubt by subsequent examination. *Cole* v. *Warren Mfg. Co.*, 63 N. J. L. 626.

The stone had been in the mill a year as a rejected stone, from its apparent condition. It was the only one there near the close of the grinding season in the spring of 1899, when one was needed to finish the work. It was hung doubtingly and experimentally, as stated by Pinkham, to test it by turning down. If when the shelly place was turned off, it appeared sound, yet whether, with knowledge of its previous condition, the care and judgment defendant was required to exercise, suggested a probability that it still lacked cohesion and might be dangerous to use and therefore called for careful subsequent examination, was a matter for the jury to determine.

The master's obligation to his servant "involves the exercise of every kind of care and diligence which is necessary to give him knowledge of the condition as to safety of his machinery and appliances, so far as such knowledge is obtainable by reasonable effort. His duty relates to the condition of these articles when they came to the hands of his servants for use, and the performance of that duty must carry him just so far into details as it is reasonably necessary to go, in view of the nature and risks of the business, to enable him reasonably to protect his servants from a danger which he should prevent." *Moynihan* v. *Hills Co.*, 146 Mass. 592.

The difficulty with the request is that it crystallized both law and fact into an absolute rule of law, and therefore was rightly refused.

The second request was, "if the injury was caused by the slipping of the stone on the collars, and that resulted from the adjustment of the stone by Lester Knox, the defendant is not responsible for such act of Lester Knox, as he was a fellow-servant of Mr. Hall."

The duty of the master to his servant is well stated in *Johnson*

v. *Boston Tow Boat Co.*, 135 Mass. 213, where it is said: "The master is bound to use ordinary care in providing suitable structures and engines and proper servants to carry on his business, and is liable to any of their fellow-servants for his negligence in this respect. This care he can and must exercise, both in procuring and in keeping or maintaining such servants, structures or engines.

"If he knows, or in the exercise of due care might have known, that his servants are incompetent, or his structures or engines insufficient, either at the time of procuring them, or at any subsequent time, he fails in his duty." The same doctrine has been uniformly held by this court. *Buzzell* v. *Laconia Mfg. Co.*, 48 Maine, 116; *Donnelly* v. *Granite Co.*, 90 Maine, 110. If the master delegates this duty to a servant, and he is negligent in its performance, such negligence is that of the master, for which he is responsible. *Elmer* v. *Locke*, 135 Mass. 577; *Hough* v. *Railway Co.*, 100 U. S. 218.

Great care and good judgment were required in the selection of the stone and in its hanging. It was a part of the machinery and appliances for defendant's business, which were within the duty of the master. In discharging that duty, Lester Knox, though for most purposes a fellow-servant of Hall, stood in the place of the master. If in the adjustment of the stone by him, he failed to exercise due care, and in consequence the stone slipped and Hall was thereby injured, the defendant was responsible, if Hall himself was free from fault.

If structures and appliances furnished and set up by the master are sufficient and reasonably safe, the operation of the machine is within the duty of the servant; and the care, supervision and incidental changes, such as oiling, changing rolls or gears, which are needed in the orderly running of the machines, are regarded as the business of the servant, as to which his negligence is not imputed to the master. *Johnson* v. *Boston Tow Boat Co.*, supra. This request was rightly refused.

Upon the issue of fact the testimony was voluminous and contradictory. The jury found for the plaintiff, and we are asked to set the verdict aside as against the evidence.

It appears that this stone came to the mill with others in April, 1898. When it arrived, Pinkham, defendant's treasurer and general manager, was sick and absent from the works. During his absence, Andrews, defendant's bookkeeper, was manager. Lester Knox, the grinder, called the attention of Andrews to it. Andrews says he saw a "shelly place on it"; he "didn't know whether best to hang it or not"; he "didn't want to take any responsibility." He told Knox he "guessed we wouldn't take any chances on it. We would get another stone". That this stone was deducted from the bill, and another shipped by the shipper, nothing being paid for this one. He says the stone "was cracked" when it came. He does not claim to be a judge of the quality of stone.

He also says that just before they had got through grinding, in the spring of 1898, Knox wanted a stone to finish the grinding, that this was the only one left, but it was not used, and another was sent for.

The accident happened May 5, 1899. About ten days prior to that this stone had been hung, and during that time had been in use. Defendant's witnesses say there was a shelly place on its side, and that, by direction of Pinkham, it was hung tentatively, to turn off the shelly place, with the view of ascertaining whether it was sound below that; that the shelly place was ground off, and that the stone then appeared sound. Some of the witnesses say that after this, a small seam appeared on the face of the stone, which was ground off on using. Plaintiff's witnesses say a crack was developed, which spouted water, which they regarded as a danger signal. This was denied by witnesses for the defense.

There was much conflicting testimony as to the appearance and condition of the stone after it burst. Some witnesses say they discovered a crack—and iron rust, indicative of a previous crack. Other witnesses deny any such appearance. The stone itself was brought to court and examined by the jury. The question of the quality and condition of the stone, whether defective or not, and if defective in fact, whether it was known to the officers of the company, or should have been known if they had used reasonable diligence to ascertain, and whether such defect caused the stone to

burst was submitted to the jury under clear and careful instructions. Upon this issue the jury have found in favor of the plaintiff.

Without reviewing the evidence, it is sufficient to say that there was testimony which, if believed, would justify the finding. It is true there was strong conflicting testimony. It was the province of the jury to determine what the fact was. Other minds might have reached an opposite conclusion. We cannot say that the verdict is clearly against the evidence, nor do we see any ground for disturbing it for bias or misapprehension.

Exceptions and motion overruled.

EDWARD F. GETCHELL, Administrator,

vs.

BIDDEFORD SAVINGS BANK.

SAME, In Equity, *vs.* BIDDEFORD NATIONAL BANK.

York. Opinion December 18, 1900.

Gift. Delivery. Husband and Wife. Trust. Presumption. Practice.

1. To effectuate a gift there must be a delivery to the donee, or an express declaration of trust in his favor.
2. Where a husband delivers to his wife the property itself, or the evidences of title thereto, the relationship may raise a presumption that the transaction was a gift, but where there is no such delivery, there is no such presumption.
3. Where a husband deposits his own money in a savings bank in his wife's name without delivering to her the bank book, or expressly declaring a trust in her favor, the money so deposited does not vest in the wife.
4. Where a husband with his own money buys corporate stock and has the certificates made out in his wife's name and holds them without delivering them to her, or expressly declaring a trust in her favor, the stock so purchased does not vest in the wife.
5. The elimination by counsel of formal and irrelevant matters from the case sent to the law court is commended.

ON REPORT.

The first case was an action of assumpsit for money had and received. The issue presented by the pleadings was the ownership of a deposit in the Biddeford Savings Bank of $1151.87 and interest from October, 1889, which then stood in the name of Martha M. Moore.

The second case was a bill in equity, heard on bill, answer and proof, to determine the ownership of five shares of the stock of the Biddeford National Bank, at the time of the death of Martha M. Moore, in September, 1889.

The case appears in the opinion.

H. Fairfield and L. R. Moore, for plaintiff.

Whenever the real purchaser, the one who pays the price, is under a legal or, even in some cases, a moral obligation to maintain the person in whose name the purchase is made, equity raises the presumption that the purchase is intended as an advancement or gift to such recipient, and no trust results.

If, therefore, a purchase of either real or personal property is made by a husband in the name of his lawful wife, or in the joint names of himself and wife, or such a purchase is made by a father in the name of his legitimate child, or in the joint names of himself and child, no trust results in favor of the husband or father, but the transaction is presumed to be a gift or advancement to or for the benefit of the wife or child. 2 Pomeroy, Eq. Jur. § 1039, and cases. 2d. Story's Equity Jurisprudence, § 1204, is to the same effect.

The Massachusetts court in *Whitten* v. *Whitten*, 3 Cush. 197, says: "It is, therefore, an established doctrine, that where the husband pays for land conveyed to the wife, there is no resulting trust for the husband; but the purchase will be regarded and presumed to be an advancement and provision for the wife. This is fully supported by various cases, as well as by the text writers."

In this State, WHITMAN, C. J., in *Spring* v. *Hight*, 22 Maine, 411, says: "If a husband thinks proper to pay for an estate and to direct the conveyance of it to be made to her, in the absence of any intention, manifested at the time to the contrary, it will be presumed to be for an advancement to her."

In *Stevens* v. *Stevens*, 70 Maine, 93, the court says: "It is undoubtedly a well established principle in equity, that in ordinary cases when land is conveyed to one person on the payment of the consideration by another, a resulting trust will be presumed in favor of him who pays the consideration. When however the purchase is made by a husband and the conveyance is to the wife, this principle does not apply, but the presumption is that it was intended for the benefit of the wife."

The court, in *Sidmouth* v. *Sidmouth*, 2 Beav. 447, says that the receipt of dividends of investments made in the name of his son was not sufficient to rebut the presumption of a gift.

Between husband and wife, his possession of her property is her possession. *Lane* v. *Lane*, 76 Maine, 525.

Limitations: The admr. was the only party who could bring an action and he was not appointed till May, 1898. Williams on Ex'rs. (1880); Book 7, L. R. A. Note p. 658.

Edwin Stone, for defendants.

The cases cited by plaintiff and many others, on the same subject, with but one exception, all relate to conveyances of real estate,—and the exception was a case in which the stock certificate had been duly assigned and delivered, but the transfer had not been made on the stock book of the corporation.

In the case of *Stevens* v. *Stevens*, 70 Maine, 93, cited by counsel, the court evidently, for obvious reasons, intended that a distinction should be made between conveyances of real estate and personal property, in such cases. In all the cases cited the facts were essentially different from the facts in this case.

A delivery, to make a valid change of title, is just as essential, when the transaction is between husband and wife as between other parties, and no delivery whatever is shown in this case. But to make this presumption good and sufficient the courts have uniformly held that there must be a clear, manifest intention by the husband to make the advancement. *Spring* v. *Hight*, 22 Maine, 408.

The husband's acts, in this case, are the strongest possible declaration of his intentions. He never delivered the pass-book

nor the stock certificate. The evidence is conclusive on this, in the defendant's favor. He appropriated all the income from the bank stock. This is also conclusively established by the records of the bank. His wife never claimed the money or stock. Every act of both these parties is wholly inconsistent with the plaintiff's claim.

A court of equity will lend no aid towards perfecting a voluntary contract or agreement, nor regard it as binding so long as it remains executory. Weighing all the evidence in the case, the presumption on which the plaintiff relies is overcome very clearly. It establishes beyond controversy that Joshua Moore never intended and never did, in law, lose the control, dominion or title to the money and bank stock involved in the two actions.

It has long been settled law in this and other states, that a mere deposit of money in a bank, by one person, in the name of another, without any declaration of trust, or notice to the latter, is not sufficient to pass the title, or to create a trust. *Pope* v. *Burlington Savings Bank*, 56 Vt. 284; *Brown* v. *Brown*, 117 N. Y. 421; *Mabie* v. *Bailey*, 95 N. Y. 206; *Marcy* v. *Amazeen*, 61 N. H. 131; *Parkman* v. *Suffolk Savings Bank*, 151 Mass. 218; *Case* v. *Dennison*, 9 R. I. 88; *Kerrigan* v. *Rantigan*, 43 Conn. 17; *Alger* v. *North End Savings Bank*, 146 Mass. 418; *Stone* v. *Bishop*, 4 Clifford, C. C. 593.

Here there was no act shown to have been done to pass the title. There is a complete absence of proof of any delivery, or intent to give. If there is an intention to give, that intent must be carried into effect by an actual delivery. *Robinson* v. *Ring*, 72 Maine, 142.

There must be some clear and distinct act to transfer the title. *Lane* v. *Lane*, 76 Maine, 521; *Dole* v. *Lincoln*, 31 Maine, 422.

Words of gift are not sufficient. They alone convey no title and are not the basis of an action. *Carleton* v. *Lovejoy*, 54 Maine, 445; *Hanson* v. *Millet*, 55 Maine, 184; *Reed* v. *Spaulding*, 42 N. H. 114.

When the question of ownership is between the estates of deceased husband and wife, and the books show deposits in the name

of the wife, evidence of the following facts is admissible. The husband's ability and the wife's inability to earn and accumulate; the opening of the account by the husband; the depositing and withdrawing of sums in and from the account by the husband; that the pass-book was usually in the possession of the husband, or else in their joint possession; that no administration was taken out on the wife's estate for four years after her decease. *Kennebec Savings Bank* v. *Fogg*, 83 Maine, 374.

In this case the defendant proves conclusively: (1) that the husband opened the account; (2) his ability and the wife's inability to earn and accumulate; (3) the depositing and withdrawing by him; (4) that the pass-book was never delivered to her; (5) that administration was not taken out on her estate until about nine years after her decease, but soon after his decease; (6) that she had no knowledge of the account in the Savings Bank.

Laches: *Crooker* v. *Houghton*, 61 Maine, 337; *Whittemore, Petr.* 157 Mass. 46; *Peabody* v. *Flint*, 6 Allen, 52; *Fuller* v. *Melrose*, 1 Allen, 166; *Lawrence* v. *Rokes*, 61 Maine, 38; *Sullivan* v. *Portland and Kennebec R. R. Co.*, 94 U. S. 806.

SITTING: WISWELL, C. J., EMERY, WHITEHOUSE, STROUT, SAVAGE, POWERS, JJ.

EMERY, J. These cases come before the law court upon report with a brief but comprehensive record from which all mere formal and irrelevant matters have been eliminated. By making up such a record, counsel have saved their clients expense and costs, and have presented the case more clearly, without in the least endangering any right. Such a course is commended.

The competent evidence leads us to believe the following to be the material facts. Mr. Moore, in the lifetime of his wife, purchased five shares in the Biddeford National Bank, which he paid for with his own money. The certificates, however, were at his request made out in the name of his wife. These certificates he kept in his own files in the bank vault, and he drew the dividends, receipting for them in his own name. It does not appear that his

wife ever had the certificates or ever knew that the shares were in her name. After her death Mr. Moore surrendered the certificates to the bank and induced the bank officers to issue new certificates in his own name.

Also, in his wife's lifetime, Mr. Moore deposited a sum of his own money in her name in the York County Savings Bank, taking out a deposit book in her name. Later he withdrew this deposit from that bank and deposited it in the Biddeford Savings Bank and again taking out a deposit book in her name. This book was kept at the bank, Mr. Moore being one of its officers. It does not appear that either deposit book was ever seen by Mrs. Moore, or that she ever knew of either deposit. Shortly after her death, Mr. Moore induced the bank to pay to him the entire deposit.

Mr. Moore did not make to either bank, or to his wife, any statement of his purpose in either of these transactions. So far as appears, he had the stock and money put in his wife's name merely for his own convenience, or to become her property in case she should survive him, but otherwise to remain his property.

Mr. Moore, however, survived his wife some eight years. After his death, her heirs procured the appointment of the plaintiff as administrator upon her estate. The plaintiff thereupon brought a bill in equity against the National Bank to compel it to issue to him as such administrator certificates for the five shares of its stock. He also brought an action at law against the Savings Bank to recover the amount of the deposit standing in her name at her death.

We have no occasion to consider what would have been Mrs. Moore's right in this property after the death of her husband had she survived him, for she did not survive him. Nor is it the question whether the transactions above recited operated to vest in Mrs. Moore in her lifetime the strict legal title to the property. That might be, and yet the actual beneficial ownership remain all the time in Mr. Moore. In such case she would simply have held that legal title in trust for him, and the court could compel her administrator to transfer it to the administrator of Mr. Moore's estate. *Gray* v. *Jordan*, 87 Maine, 140. The only question is

whether the actual, beneficial ownership was transferred to Mrs. Moore, for, if it was not, her administrator cannot maintain a suit against either bank for yielding up the property to the actual beneficial owner.

That such ownership was not transferred to Mrs. Moore must be apparent. There was no gift completed by delivery, nor was there any complete declaration of trust in her favor,—one or the other of which was essential to vest the property in her. *Robinson* v. *Ring*, 72 Maine, 140; *Northrop* v. *Hale*, 73 Maine, 66-71; *Norway Savings Bank* v. *Merriam*, 88 Maine, 146.

The plaintiff urges that, as between husband and wife, it should be presumed that a gift was intended. That relationship is a circumstance, but not a controlling one. Even if a gift was intended, it was not perfected. *Kennebec Savings Bank* v. *Fogg*, 83 Maine, 374.

Bill in equity dismissed with costs.
Judgment for the defendant in the action at law.

CHARLES E. WEEKS *vs.* RUFUS F. CRIE, and others.

Knox. Opinion December 19, 1900.

Sales. Stat. of Frauds. Entire and Separate Contracts. R. S., c. 111, § 4.

The application of the statute of frauds in the case of the purchase of a number of articles at the same transaction, may depend upon whether there is one contract or more.

The mere fact that a separate price is agreed upon for each article, or even that each article is laid aside as purchased, makes no difference so long as different purchases are so connected in time or place, or in the conduct of the parties, that the whole may fairly be considered as one transaction.

But whether there is one entire contract for the whole, or whether the contract for each remains separate and distinct, may depend upon many circumstances, and presents a question of fact to the jury.

Where there are two separate contracts of sale, one for herring and one for hake, the acceptance and receipt of the herring will not take the contract for the hake out of the statute of frauds.

But if there is in fact only one contract, for both herring and hake, negotiated for, it may be successively, a delivery followed by an acceptance and receipt of the herring will take the hake out of the statute.

An instruction in such a case which withdraws from the jury the consideration of other facts and circumstances, having a tendency to show the character of the contract, is deemed erroneous.

Whether negotiations, under all the circumstances, constitute one contract or more is a question of fact, and should be submitted to the jury.

On Exceptions by Defendants.

Assumpsit to recover damages for non-delivery of a quantity of fish, which the plaintiff alleged he purchased of the defendants under an oral contract. The defendants denied the contract and invoked the statute of frauds.

The verdict was for plaintiff, and damages assessed at $128.70.

At the trial, the plaintiff claimed, and introduced evidence tending to prove, that on the first day of November, 1898, the defendants orally agreed to sell him from three to five hundred drums of hake at $1.65 per kentle, to be delivered at Rockland when called for by him; and at the same interview agreed to sell him ten barrels of split herring at $4.25 per barrel, to be delivered in Rockland by next boat from Criehaven, which would be within one week; that he, the plaintiff, orally agreed with the defendants to purchase said hake and herring on said terms; that the herring were delivered according to the agreement and paid for by the plaintiff; that on the twentieth day of January, 1899, the plaintiff requested the defendants to deliver him three hundred drums of hake in accordance with the alleged agreement, and that the defendants refused to deliver them to him.

The defendants denied that they agreed to sell the plaintiff any hake, but admitted that they did sell the plaintiff the ten barrels of herring which were delivered according to agreement.

There was no evidence showing or tending to show that the alleged contract was in writing, or that any memorandum thereof was signed by the defendants, or that anything was paid in earnest to bind the bargain, or that any part of the hake were delivered; and the defendants claimed that if a verbal agreement for the sale of the hake was made, it was void under the statute of frauds.

The presiding justice, among other things, instructed the jury as follows:

"And so I instruct you that if the contract for the hake and the contract for the herring were made at the same interview, even if the contract for the hake was finished and concluded before the contract for the herring was made—that even under those circumstances, the delivery of the herring would take the contract for the sale of the hake out of the statute of frauds. It would be a part delivery, so that the statute of frauds would not apply. I so instruct you pro forma, for the purposes of this trial, in order that you may reach and pass upon the question of fact between the parties."

"And I instruct you further, for the purposes of this trial, that if the defendant agreed to sell the hake in controversy here to the plaintiff, and the plaintiff agreed to purchase them—if their minds concurred in making such a contract, the plaintiff would be entitled to recover, regardless of the statute of frauds. If I am wrong in this law, of course, as I said before, there is a way open to have the error rectified."

To which instructions of the presiding justice to the jury, the defendants by their counsel, then and there, before the jury retired, excepted, and were allowed their exceptions.

The charge of the presiding justice was made a part of the exceptions.

J. E. Moore, for plaintiff.

R. F. and J. R. Dunton, for defendants.

SITTING: WISWELL, C. J., WHITEHOUSE, STROUT, SAVAGE, POWERS, JJ.

SAVAGE, J. At the trial of this case, the plaintiff claimed and introduced evidence tending to show that the defendants, in November 1898, orally agreed to sell him from three to five hundred drums of hake at $1.65 per kentle, to be delivered at Rockland when called for by him; and at the same interview agreed to sell him ten barrels of split herring at $4.25 per barrel, to be delivered in Rock-

land by next boat from Criehaven, which would be within one week; that he, the plaintiff, orally agreed with the defendants to purchase the hake and the herring upon these terms. It was admitted by the defendants that they sold the herring to the plaintiff, as claimed, and that they were delivered according to the agreement, and paid for by the plaintiff. The plaintiff, in January 1899, demanded three hundred drums of hake to be delivered in accordance with the alleged agreement, but the defendants refused to deliver them; and to recover damages for that alleged breach of contract, this action was brought.

The defendants denied that they agreed to sell any hake to the plaintiff. But the jury, under instructions to which no exceptions were taken, have found they did make such a contract. In this contingency, the defendants claim, that if any such contract of sale was made, it was oral merely, and being for more than thirty dollars, it was invalid under the statute of frauds. The case shows that no memorandum was made, and nothing was given in earnest to bind the bargain; and the defendants claim that no part of the goods sold were accepted and received by the purchaser, so as to bind the defendants to deliver the hake. This last proposition is controverted by the plaintiff, and hereon, as will be seen, the case hinges.

The presiding justice, among other things, instructed the jury that "if the contract for the hake and the contract for the herring were made *at the same interview*, even if the contract for the hake was finished and concluded before the contract for the herring was made, that even under those circumstances the delivery of the herring would take the sale of the hake out of the statute of frauds," and further, that "if the defendants agreed to sell the hake in controversy here to the plaintiff, and the plaintiff agreed to purchase them,—if their minds concurred in making such a contract, the plaintiff would be entitled to recover, regardless of the statute of frauds."

To these instructions, the defendants have excepted. It will be observed that the presiding justice in both instructions virtually withdrew from the jury the consideration of any facts upon which

the defense of the statute of frauds was based. In the latter instruction he did so expressly. He placed the right of the plaintiff to recover solely upon the determination of the question whether there was in fact an agreement of sale between the parties, whether their minds met. But in the former instruction he no less withdrew from the jury the consideration of the statute of frauds, for he instructed the jury that the delivery of the herring, a fact not in dispute, would take the sale of the hake out of the statute "if the contract for the hake and the contract for the herring were made *at the same interview*," a fact likewise not in dispute, if any contract was made for the hake. That is, the defendants, by their bill of exceptions, do not show or claim that if any contract was in fact made for the hake, it was not made at the same interview in which the contract for the herring was made. That question does not appear to have been controverted. If it was, it was incumbent on the defendants to have made it appear so in their bill of exceptions. The only question, therefore, really passed upon by the jury under either instruction, or both combined, was whether the parties made a contract for the hake, and the jury found that they did.

The statute of frauds, R. S., chap. 111, § 4, provides that "no contract for the sale of goods, wares or merchandise, for thirty dollars or more, shall be valid, unless the purchaser accepts and receives part of the goods, or gives something in earnest to bind the bargain, or in part payment thereof, or some note or memorandum thereof is made and signed by the party to be charged thereby, or by his agent." The contracts for the hake and the herring, regarding them now separately, were both executory contracts. One applied to three hundred drums of hake, with an option in the purchaser to take not exceeding five hundred drums, to be delivered when called for; the other applied to ten barrels of herring, to be delivered by next boat, within one week. But the statute of frauds is as well applicable to executory contracts as to executed. *Edwards* v. *Grand Trunk Railway*, 48 Maine, 379; *Carman* v. *Smick*, 3 Green, N. J. L. 252; *Gilman* v. *Hill*, 36 N. H. 311.

The plaintiff, however, contends that the contracts for the hake

and the herring constituted in fact but one entire contract for hake and herring, and that his acceptance and receipt of the herring, a part of the merchandise contracted for, took the sale out of the statute, as to the whole. The defendants admit the "delivery" of the herring, and we understand from that admission, that they also admit that the herring were accepted and received by the plaintiff. The phrase "delivered by the seller" is frequently used in such cases in the sense of "accepted and received by the purchaser," and not unnaturally, for a receipt by the purchaser necessarily presupposes a delivery by the seller. This is not entirely accurate, however, for the statute makes acceptance and receipt by the purchaser the test of the removal of the statutory bar.

Now if there were two separate contracts of sale, one for the herring and one for the hake, it is clear that the acceptance and receipt of the herring did not take the contract for the hake out of the statute, for an acceptance under one contract cannot make another contract valid. But if there was in fact only one contract, for both herring and hake, negotiated for, it may be successively, a delivery followed by an acceptance and receipt of the herring did take the hake out of the statute. It is unquestionably the law, in such case, that an acceptance and receipt of part of the articles purchased, or of all of one class of articles purchased, necessarily takes the whole contract out of the statue. *Elliott* v. *Thomas*, 3 M. & W. 170. So that if the contract in this case was single and entire, it was proper for the presiding justice to rule that the delivery of the herring took the hake out of the statute. For, although the question whether there is an acceptance and receipt under the contract is ordinarily for the jury, yet, in this case, the admission that the herring was so accepted carried with it necessarily the contract as to the hake, provided only that it was a single contract. There was nothing left on this point for the jury to decide. But this conclusion follows only upon the assumption that there was but a single contract. The application of the statute of frauds, in case of the purchase of a number of articles at the same transaction, may depend upon whether there is one contract or more. The mere fact that a separate price is agreed upon

for each article, or even that each article is laid aside as purchased, makes no difference so long as the different purchases are so connected in time or place, or in the conduct of the parties, that the whole may be fairly considered as one transaction. Brown on the Statute of Frauds, § 314; *Baldey* v. *Parker*, 2 B. & C. 37; *Scott* v. *Eastern Counties Railway Co.*, 12 M. & W. 33. Such is the common case of a number of articles purchased at private sale, of a shopman for instance, at the same time, though at separate prices. Brown on the Statute of Frauds, §§ 335, 336. The same doctrine was applied in a case where the parties made bargains for the purchase and sale of several lots of timber, at different places, some miles apart, the bargains being made at the different places and at separate prices, but all on the same day. *Biggs* v. *Whisking*, 14 C. B. 195. Such purchases may be regarded as entire, though composed of separate parts. But whether such negotiations for separate articles result in one entire contract for the whole, or whether the contract for each remains separate and distinct, may depend upon many circumstances. It raises a question of fact properly to be passed upon by a jury. Were the transactions near in time or place, or similar in circumstances? What was the conduct of the parties? Was the seller a merchant engaged in the regular course of his business in his shop or store? What was the language used? What are the proper inferences to be drawn as to the intention of the parties? The answers to these and other like questions solve the problem. If the circumstances are such as to lead to a reasonable supposition that the parties intended that the whole series of transactions should constitute one trade, they may be regarded as one entire contract; otherwise, not.

Now, in the case at bar, the jury were instructed, in effect, that if the two contracts for sale were made at the same interview, that would be sufficient. We think this ruling was erroneous. Even if there were no other facts or circumstances to be considered, which is hardly supposable, it cannot be said as a matter of law that the mere fact that the negotiations for the herring and the hake were made at the same interview resulted in a single contract. They may have constituted one contract only, and they

may not. If not, then the hake were not taken out of the statute by the acceptance of the herring. Whether the negotiations constituted one contract or more, was a question of fact, and should have been submitted to the jury.

Exceptions sustained.

SARAH E. GLYNN *vs.* MICHAEL GLYNN.

Cumberland. Opinion December 21, 1900.

Husband and Wife. Divorce. Minors. Burden of Proof.

A father who is himself without fault, in discharging the obligation which the law imposes upon him to support his infant child, has a right to furnish such support at his own home.

When it does not appear that he has failed, or is unwilling to there suitably provide for his child, a mother who without cause deserts her husband and willingly takes with her their minor child cannot maintain an action against the father for the support of such child furnished after a divorce obtained by him for desertion, no decree for the care, custody, or support of the child having been made.

In such case the burden is upon the plaintiff to show that there existed a necessity for furnishing the support, and that this necessity was occasioned by the defendant.

AGREED STATEMENT OF FACTS.

This was an action of assumpsit brought in Portland Municipal Court for the sum of forty-two dollars, on an account annexed in the writ for board, care and clothing of Mary E. Glynn the minor child of plaintiff and defendant from December 21, 1898, to June 1, 1899; writ dated June 10, 1899. The general issue was pleaded, and on July 25, 1899, judgment was rendered for plaintiff for the amount sued for. The defendant appealed to the Superior Court, where the parties agreed to the following facts, which were reported by the presiding justice to this court.

"It is admitted that Michael Glynn obtained a divorce from Sarah E. Glynn, on his own libel, at a term of the Supreme Judicial Court of the State of Maine, held at Portland within and

for the county of Cumberland, on the second Tuesday of October, A. D. 1898, for the cause of desertion:

"That in his said libel, it is admitted that said Michael Glynn did not ask for the care and custody of their minor child, Mary E. Glynn, or make any reference to said child:

"It is admitted that neither parent has ever petitioned for the care and custody of the person of said minor child, nor has there been any decree relating to the support and maintenance of said child:

"That at the time said Sarah E. Glynn left her husband, she willingly took with her said minor child, and that the said child has been with her and in her possession, in said Portland, ever since:

"It is admitted that the items of supplies were furnished to said minor by said Sarah E. Glynn according to the account annexed and the charges for the same are reasonable and proper."

John B. Kehoe, for plaintiff.

A father is bound to support his infant children. 2 Ken. Com. *191; 1 Chitty, Contr. 213; *Brow* v. *Brightman*, 136 Mass. 187; *State* v. *Smith*, 6 Maine, 462; *Garland* v. *Dover*, 19 Maine, 441.

A divorced wife may recover for support of children when their custody is not decreed to her. *Finch* v. *Finch*, 22 Conn. 411; *Hancock* v. *Merrick*, 10 Cush. 41; *Brow* v. *Brightman*, 136 Mass. 187; *Carlton* v. *Carlton*, 72 Maine, 115; *Webster* v. *Webster*, 58 Maine, 139; *Blake* v. *Blake*, 64 Maine, 177.

Irrespective of any statutory provision relating thereto, a father is bound by law to support his minor children; but it is otherwise with the mother during the life of the father.

The mother may maintain an action against the father for the necessary support of their minor children, furnished by her after a divorce a vinculo decreed to her for "desertion and want of support," no decree for custody or alimony having been made. *Gilley* v. *Gilley*, 79 Maine, 292.

It is a matter of common knowledge that a father is entitled by law to the services and earnings of his minor children. It is

equally well known that this right is founded upon the obligation which the law imposes upon him to nurture, support and educate them during infancy and early youth, and it continues until their maturity, when the law determines that they are capable of providing for themselves. *Benson* v. *Remington*, 2 Mass. 113; *Dawes* v. *Howard*, 4 Mass. 98; *Garland* v. *Dover*, 19 Maine, 441; 2 Kent's Com. *190 et seq; Schouler's Domestic Relations, 321.

The purpose of the statute of 1895, c. 43, § 1, was to confer on mothers more rights to the care and custody of their children, and not to add to the burdens of mothers. It was never the intention of the legislature to change the duty of supporting minor children, which had rested on the father for half a century. It does not apply to a case like this at bar, where the father and mother are divorced, but applies only to cases where the father and mother, though continuing in the marriage relation, are living apart. These observations also apply to stat. of 1895, c. 41, on which defendant also relies. That chapter relates to the appointment of guardians, and has no application to the case at bar.

Under the law, as it has always been decided in this State and in Mass. and under the circumstances of the case at bar, taking into account the actions of the father at the time of the divorce proceedings in totally ignoring even the existence of the child, his gross neglect to make any provision for its support since, the absence of any offer on his part to take the child and support it, and his continued abandonment of the child, all made it imperative that somebody should furnish it necessaries, for which he would be liable, on the ground of agency, at least; and there is no legal disability in the mother, or any legal or logical reason why he should not be as liable to her as to any other person furnishing such necessaries to his child.

Charles J. Nichols and Levi Turner, for defendant.

When *Gilley* v. *Gilley*, 79 Maine, 292, was decided, R. S., c. 67, § 3, declared that, the father was the natural guardian of the child if competent, in preference to the mother. That statute as amended by c. 41 of the public laws of 1895 reads: "The care of the

person and the education of the minor shall be jointly with the father and mother, if competent."

Again under the statute of 1895, c. 43, § 1, the father and mother jointly have the care and custody of the person of their minor child. These two amendments were in effect at the time plaintiff deserted her husband and willingly assumed the care of her child; and were in force at the time she furnished the supplies declared for in this case.

A divorced parent, where nothing is said as to the custody of minor children, having elected to exercise the rights given her by the new statute, logically and by legal intendment, must be as absolutely and completely bound to the support and maintenance of that child as if custody of the child had been specifically decreed to her in the divorce proceedings, as she is held to be bound to do in such cases as *Hall* v. *Greene*, 87 Maine, 122.

An action at law is not the proper form of procedure for the enforcement of these rights against him. The proper remedy for the plaintiff would be by application to the court in some subsequent proceeding in the original cause of the divorce. *Hall* v. *Green*, supra.

SITTING: WISWELL, C. J., WHITEHOUSE, STROUT, SAVAGE, POWERS, JJ.

POWERS, J. In 1898 the defendant obtained a divorce from the plaintiff for desertion. At the time the plaintiff deserted her husband, she willingly took with her their minor child, who has since remained with her. This is an action of assumpsit to recover for the board, care and clothing of the child since the divorce. No decree has ever been made in the divorce proceedings in regard to the care, custody and support of the child.

Irrespective of any statutory provision the father is bound by law to support his minor child. *Gilley* v. *Gilley*, 79 Maine, 292. This however is a limited obligation; it does not attach to the father under all circumstances, or in favor of all persons. A minor who abandons his father's house without the father's fault carries

with him no credit on the father's account, not even for necessaries. *Weeks* v. *Merrow*, 40 Maine, 151. "When the authority of the parent is abjured, without any necessity occasioned by the parent, all obligations to provide for him," the child, "ceases." *Angel* v. *McLellan*, 16 Mass. 27. Referring to the above language of Parker, C. J., the court in *Dodge* v. *Adams*, 19 Pick. 432, say: "It would be no less true, that where the child is induced by another person to leave the family of the father without any necessity for so doing, the person thus influencing him to leave, would, in case he should furnish supplies, have no cause of action against the father." It is necessary for the preservation of the parental authority and for the welfare of the child, that the father, who is himself without fault, in discharging the obligation which the law imposes upon him, should have the right to provide for the child under his own roof where he can exercise some judgment and supervision as to the wants of the child, and the character, cost and necessity of the supplies furnished.

In the case at bar the father was in no fault. He neither deserted his wife nor abandoned his child. There is no suggestion in the facts submitted that he did not treat them kindly, or that he failed to suitably provide for them at his own home. As between the parties in this case, it necessarily follows, from the fact that the divorce was granted to the husband for the desertion of his wife, that the plaintiff was in the wrong; that her act in abandoning her home and deserting her husband was without reasonable cause or justification and without the defendant's consent. There may be separation, but there cannot be desertion by consent. The word itself negatives such a proposition. It affirmatively appears, therefore, that the defendant did not consent to the plaintiff leaving him, and we cannot infer that he consented to the going from home of the child whom the plaintiff willingly took with her at that time. This case is here upon an agreement of facts by the parties, and we cannot assume or infer a fact which they have not agreed upon. *Trafton* v. *Hill*, 80 Maine, 503. Under such circumstances, the plaintiff stands in no better position than would an intermeddling stranger, who should induce a child to leave its father's home without his fault.

In *Gilley* v. *Gilley*, supra, cited and relied upon by the counsel for the plaintiff, the facts differed materially from the present case. There the father had not only deserted the plaintiff, who had obtained a divorce from him on that ground, but he had been absent from the State for many years prior to the decree, and had never returned or furnished any support whatever during the time, a virtual abandonment of his children. The opinion in that case is based upon the ground that a father who deserts his infant child, and makes no provision for its support, is liable to one who furnishes it with necessary supplies, citing *Dennis* v. *Clark*, 2 Cush. 352; *Reynolds* v. *Sweetser*, 15 Gray, 80; *Hall* v. *Weir*, 1 Allen, 261; and *Camerlin* v. *Palmer Co.*, 10 Allen, 539; that a divorce without a decree as to the custody and support of the children did not affect the father's duties and obligations, and that when the bond of matrimony was dissolved, the parties became as good as strangers. We have already seen that a stranger, under the circumstances presented by the case at bar, could not maintain an action against the father.

Foss v. *Hartwell*, 168 Mass. 66, was a case which in many respects closely resembles the one before us. The father had obtained a divorce from the mother for desertion without any decree being made as to the support or custody of their minor son. After the divorce the mother met the son on his way from school and took him to the home of the plaintiff, whom she had meanwhile married. Upon being asked by the father with whom he preferred to live the boy, who was then thirteen years of age, said he preferred to live with his mother. From this arrangement the father did not dissent, but the next day sent the boy's personal effects to him at the plaintiff's house. It was held that the plaintiff had no right without communicating with the father to look to him for the child's support. "All the cases cited show very plainly that, when the wife leaves without cause, taking her child with her, the fact that her husband does not attempt to compel her to give up the custody of the child does not of itself authorize her to bind him for its support" say the court in *Baldwin* v. *Foster*, 138 Mass. 449. True, in that case, there was evidence that the

father was able and willing to furnish the child with a suitable home, and to support it, and that he so notified the plaintiff, the maternal grandfather of the child. The agreed statement of facts in the present case is silent upon this point. The support of his minor children by the father is not only a legal obligation and a natural duty, but the dictates of humanity and the promptings of affection impel parents, whether fathers or mothers, to support and provide for their offspring. It is not to be presumed that the defendant neglected his duty, or was unwilling to perform it. *Trafton* v. *Hill*, supra. We quote once more, as applicable to the case at bar, from the opinion in the case of *Dodge* v. *Adams*, supra. "The plaintiff does not show that any necessity existed for his interference, any want of full and adequate provision for the children at the house of their father, or any facts tending to prove that it was necessary to maintain them elsewhere. So far as it appears in the case, they left without the consent of the father, and without any fault upon his part. . . . . The proof of such facts must come from the plaintiff. The burden is upon him to show that there existed a necessity for furnishing these supplies, and that this necessity was occasioned by the defendant."

It is not claimed by the counsel for the plaintiff that the mother, who has voluntarily assumed the exclusive custody of her child, has any greater right to maintain an action against the father for its support since the enactment of the laws of 1895, c. 43, § 1, than she had at common law. On the other hand, we do not find it necessary for the determination of this case to consider the question raised by the defendant that the statute along with the joint right to custody given, carried with it the joint duty of support, and that the mother, who exercises that right to the exclusion of the father, thereby assumes the sole responsibility for supplying the necessities of her child. Grave doubts may be entertained whether that statute was intended, under any circumstances, to add to the burdens of the mother; but upon this question we express no opinion.

Judgment for the defendant.

INHABITANTS OF WALDOBORO *vs.* INHABITANTS OF LIBERTY.

Lincoln. Opinion December 21, 1900.

Reform School. Paupers. Notice. R. S., 1857, c. 143, § 20; 1883, c. 142, § 5.

Revised Statutes, c. 142, provides that the town, from which a boy is committed to the reform school, shall be liable for his "expenses of clothing and subsistence" not exceeding one dollar a week. Such town, when it has paid the amount to the reform school may recover it from the town in which the boy had his legal settlement.

No formal notice, as in cases of paupers, is required. The town first paying may recover of the town of settlement, the amount paid, after demand of payment, limited only by the statute of limitations; but it cannot recover the costs of commitment.

Jay v. *Carthage*, 48 Maine, 353, distinguished.

AGREED STATEMENT.

Assumpsit under R. S., c. 142, § 5, to recover the sum of one dollar per week for the expense of clothing and subsistence of one George Barlow in the state reform school, from the date of the boy's commitment, June 2, 1893, to the date of the writ.

The case was submitted by the parties to the law court upon the following agreed statement of facts:—

"This is an action of assumpsit, brought under the provisions of R. S., c. 142, § 5. George Barlow, the minor for whose clothing and subsistence at the state reform school the plaintiffs claim to recover in this action, was committed to the reform school by appropriate proceedings before a magistrate under § 3 of said chapter. It is admitted that the boy resided in Waldoboro at the time of his commitment, and had his pauper settlement in Liberty, the defendant town, at said time, and during the time for which plaintiffs claim to recover. It is further admitted that the plaintiffs have paid the several amounts claimed in their writ, and aggregating the sum of two hundred and ninety dollars and eighty-six cents, up to the date of the writ, being one dollar per week from the time of said Barlow's commitment, which is agreed to be June 1, 1893, until the day of the date of the writ, and the expenses of commitment.

"It is further agreed that notice was given to the defendant town of the amount then paid to the superintendent of the reform school, on the twenty-second day of September, 1897, and that such notice was sufficient in form. The defendants admit their liability from June 22, 1897, being three months prior to the time of said notice, but claim that they are not liable for payments made prior to the last mentioned date. The plaintiffs admit that no notice was given prior to the date given, Sept. 22, 1897, and claim that none was necessary. It is further agreed that the amount paid by the plaintiffs to the reform school on account of said Barlow from June 22, 1897, to date of the writ is seventy-eight dollars.

"The question involved is accordingly hereby reported for the determination of the law court, as an agreed statement."

O. D. Castner, for plaintiff.

Enoch Foster, O. H. Hersey; Arthur Ritchie, for defendant.

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

STROUT, J. George Barlow was committed to the reform school June 1, 1893. At that time his residence was in Waldoboro, but his pauper settlement was in Liberty.

Under the statute, Waldoboro, in the first instance, became liable to pay to the superintendent of the reform school "the expenses of clothing and subsistence" of the boy there, not exceeding one dollar a week. This has been paid by plaintiff town up to the date of the writ, and this suit is to recover the amount so paid from the defendant town.

Notice of the amount thus paid by plaintiff was given to the defendant on September 22, 1897. Liability since, and for three months prior to, that date is admitted, but denied as to all earlier amounts.

It is claimed that the town, in which his settlement is, can only be made liable by a written notice given to it, as in the case of a pauper; and that such notice creates a liability for expenses incurred subsequently, and for three months only prior thereto.

In support of this contention we are cited to cases involving the expense of persons committed to the insane hospital, which are claimed to be analagous. They are *Bangor* v. *Fairfield*, 46 Maine, 558; *Naples* v. *Raymond*, 72 Maine, 213, and *Bowdoinham* v. *Phippsburg*, 63 Maine, 497. These were cases where the persons committed were paupers at the time of commitment. The expenses there of such paupers might well be considered as pauper supplies; as much so, as if the town authorities had placed a pauper needing medical or surgical treatment in a private hospital, the expense of which would be regarded as pauper supplies.

In *Jay* v. *Carthage*, 48 Maine, 353, also cited by the defendant, the patient was not a pauper. There is a dictum in that case, that to authorize recovery, written notice must first be given to the town in which the settlement is, analagous to the notice required under the pauper law, under which antecedent expenses for three months and subsequent expenses may be recovered, as provided in case of paupers. The only authority cited is *Bangor* v. *Fairfield*, supra, which was the case of a pauper. The question of the necessity of the notice, as a condition of recovery, was not raised or discussed in that case by counsel, though the sufficiency of the notice given, was. The case cannot be considered as a decisive authority that such notice is an indispensable condition precedent to, and limiting the time for which, recovery may be had. Support, however, is given to the proposition by the language of the statute in force when that case was decided, which provided that the town from which the commitment was made may recover the amount it has paid from "the insane, if able, or of persons legally liable for his support, or of the town where his legal settlement is, *as if incurred for the ordinary expenses of any pauper.*" R. S., 1857, c. 143, § 20. This concluding phrase might well be regarded as adopting the mode and condition of recovery provided in c. 24 in regard to paupers.

The statute, R. S., c. 142, § 5, in regard to the reform school, contains no similar language. It has the plain provision that the town which has paid the expenses at the reform school of a boy committed from it, "may recover the money paid by them of the

parent, master or guardian of such boy, or of the city or town in which he has a legal settlement." There is no reference to the pauper law.

Commitment to the reform school, on conviction of an offense, does not make the boy committed a pauper—nor do the furnishing of sustenance to him by the State while he is there confined by it, have that effect.

No purpose designed to be subserved by the notice from a town furnishing pauper supplies, to the town of the pauper's settlement, fails, if no notice is given, in case of a boy in the reform school. Under the notice that a person has become chargeable as a pauper, the town liable may remove the pauper or make more economical provision for his support, or may on investigation ascertain that no pauper supplies have been furnished, if early notice of the claim is given.

But a boy in the reform school cannot be removed by the town, nor can it control the expense of his support, nor escape its payment up to the statute limit of one dollar a week, nor protect itself by allowing him to become self-supporting, as he might be, if of suitable age and at liberty.

It is not perceived that a notice to the town liable, such or similar to that required in case of paupers, can be of any possible service or benefit to the town liable. The statute does not provide for such notice, and being of no utility, if given, it seems unreasonable by construction, to read it into the statute. A demand of payment before suit brought is sufficient. This was done in this case.

The first item in plaintiff's account is cash paid for commitment, $12.61. The statute permits recovery for "the expenses of clothing and subsistence," and nothing more. This item, therefore, cannot be recovered.

The total amount paid by plaintiff up to the date of the writ is $290.86. Deduct $12.61 not recoverable, leaves $278.25 for which plaintiff is entitled to judgment.

Judgment for plaintiff for $278.25 and interest from date of writ.

JOHN RICHARDSON *vs.* GEORGE E. WATTS, and others.

Washington. Opinion January 1, 1901.

Partition. Parties. Possession. Deed. R. S., c. 88, §§ 2, 4.

In a petition for partition, all persons interested, if known, must be made parties; if unknown, it must be so alleged. New parties cannot be subsequently cited into court as respondents.

Held; that as Charles William Barker is one of the owners in common of the flats, and is not made a party to these proceedings, and as it is not alleged nor shown that he was unknown, and as no reason is shown, if any there could be, for not joining him as a party, the partition proceedings cannot be maintained.

In a petition for partition, sole seizin in the respondent may be established by a possession commenced twenty years before the trial, though less than twenty years before the commencement of the suit.

The court may correct an obvious error in a deed so as to make the calls consistent with each other, and the description perfect; but cannot include in the description land which the calls, fairly construed, do not include. Upon the facts in this case, *held;*

1. That the manifest error in the calls in the deed of the "Barker lot" so-called, from John Sawyer to Charles F. Barker may be, and should be, corrected by extending the east line of the Barker lot southerly far enough, so that following the remaining courses and distances the last call will end at the "well."
2. That, as to the strip of upland between the "Barker lot" and Cross Cove, respondents Watts and Stevens have acquired title in severalty by adverse possession.
3. That the respondents Stevens and Watts were not co-tenants with the petitioner and his predecessors in title,—Stevens not at all,—and Watts not until April 1881, at which time, the ouster, in law, had already occurred.
4. That the adverse possession of Watts was not interrupted, under the circumstances in this case, by his taking deeds from the heirs of John Sawyer.
5. That Watts intended to claim and did claim title as far as to the shore, and that is sufficient in this respect as a basis for the claim of adverse possession, though he may have been mistaken as to the true line.
6. That respondent Watts has also acquired title by adverse possession to the strip of upland between the road and Cross Cove, easterly of the "Barker lot."
7. That Stevens has acquired title by adverse possession to the flats included in his deed from Martha E. Barker.

8. That Watts has not acquired title by adverse possession to any of the flats; that as to the flats, his title by disseizin is not extended beyond the line of actual occupation.

9. That all the Walker heirs, except Charles William Barker and Louise Barker Bagley, having conveyed to Watts their interest in the flats south of the shipyard, the present owners of them in common are Charles William Barker, Louise Barker Bagley, the respondent Watts and the petitioner, respondent Stevens being sole seized of a specific portion.

ON REPORT.

The case appears in the opinion.

H. H. Gray, for petitioner.

Difficulty of partition no objection. If they would avoid the difficulty they ought to agree to buy, or sell. *Hanson* v. *Willard*, 12 Maine, 146; *Wood* v. *Little*, 35 Maine, 107.

A man is deemed to have seizin of the land co-extensive with the boundaries stated in his deed. *Brackett* v. *Persons Unknown*, 53 Maine, 228, 230, 231.

Where one has a right to use land for certain purposes, his occupation of it must be presumed, prima facie, to be in accordance with his legal right. *Mowe* v. *Stevens*, 61 Maine, 592.

As between tenants in common, mere possession accompanied by no act that can amount to an ouster of the other co-tenant, or give notice to him that such a possession is adverse, will not be held to amount to a disseizin of such co-tenant. Before it will have that effect there must be notorious and unequivocal acts of exclusion. *Hudson* v. *Coe*, 79 Maine, 83; *Ingalls* v. *Newhall*, 139 Mass. 268 (272); *Bellis* v. *Bellis*, 122 Mass. 414; *Silva* v. *Wimpenney*, 136 Mass. 253.

A conveyance of all the right, title and interest in a deed does not convey the land itself, or any particular estate in it, but the grantor's right, title and interest in it alone. The covenants in a deed are qualified and limited by the grant and cannot enlarge it. *Coe* v. *Persons Unknown*, 43 Maine, 432.

The administrator's deed from John Richardson to Margaret Richardson having been given for more than 25 years, and the petition and license for sale appearing regular, it will be presumed

in absence of evidence to the contrary that other formalities have been complied with. *Austin* v. *Austin*, 50 Maine, 74.

Monuments in a deed control courses and distances. *Haynes* v. *Young*, 36 Maine, 557; *Chandler* v. *McCard*, 38 Maine, 564; *Melcher* v. *Merryman*, 41 Maine, 601; *Robinson* v. *White*, 42 Maine, 209; *Beal* v. *Gordon*, 55 Maine, 482; *Chadbourne* v. *Mason*, 48 Maine, 389.

Possession of the land under a deed for more than twenty years will not give a title to such portion as lies beyond the lines therein described. *Dow* v. *McKenney*, 64 Maine, 138; *Worcester* v. *Lord*, 56 Maine, 265.

If the construction of a deed is doubtful, the practical construction put upon it by the parties and their successors may be looked at in connection with the deed itself and the circumstances existing at the time of its execution. *Whittenton Mfg. Co.* v. *Staples*, 164 Mass. 319.

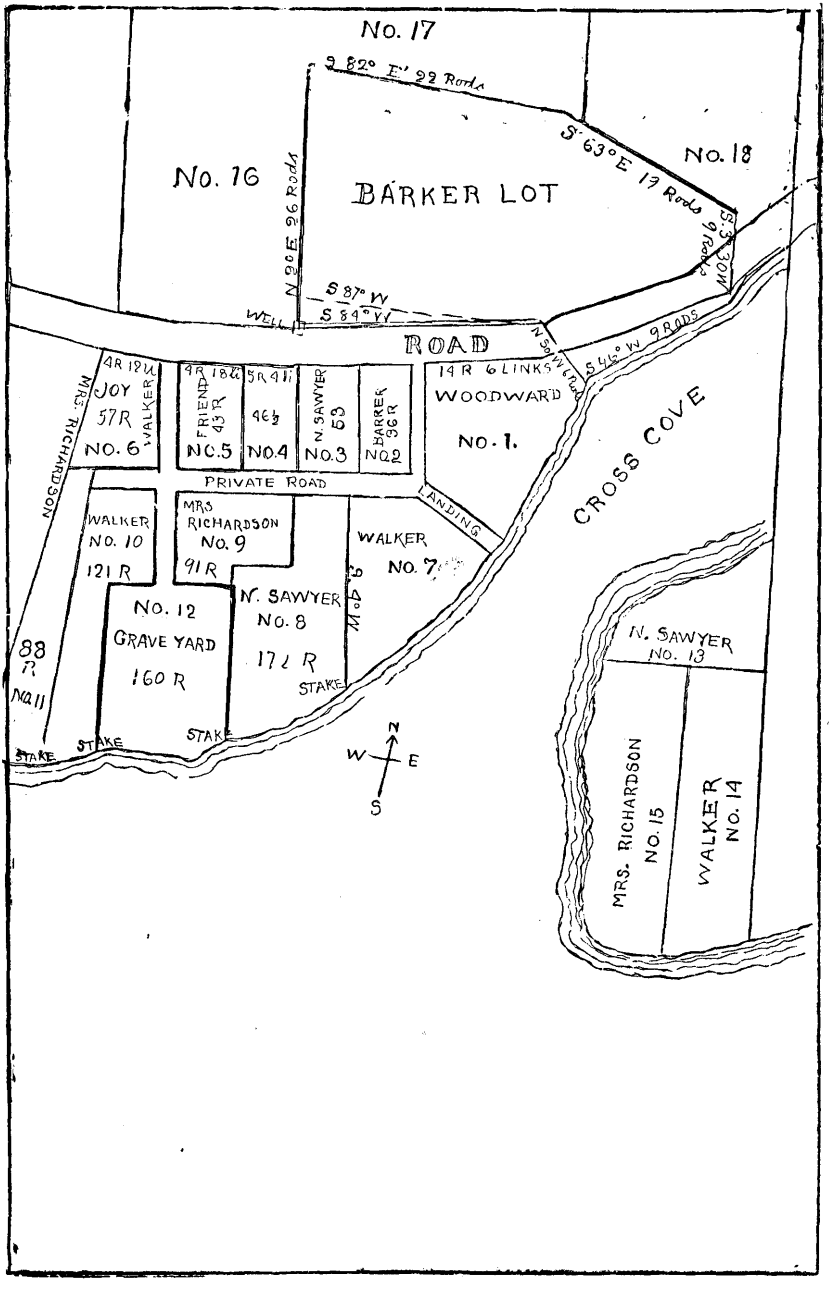
If a deed fixes exactly the location of all the lines and boundaries of the land conveyed, its construction cannot be controlled or affected by parol evidence. *Olson* v. *Keith*, 162 Mass. 485; *Stowell* v. *Buswell*, 135 Mass. 340.

C. B. Donworth and F. I. Campbell, for respondents.

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

SAVAGE, J. Petition for partition of lands in Jonesport formerly belonging to John Sawyer.

Prior to 1850, John Sawyer was the owner of a large tract of land, consisting of upland and flats, the southerly end of which extended to low water mark in tide water in Cross Cove, so-called. The premises described in the petition are a parcel of this larger tract. Running easterly and westerly across this tract, and near Cross Cove, there was then, and is now, a road. In 1850, John Sawyer conveyed to Charles F. Barker a portion of the larger tract, containing about four and three-quarters acres, and the land so conveyed has since been known as the "Barker lot." The "Barker


No. 17
S 82° E 92 Rods
S 63° E 19 Rods
No. 18
No. 16
BARKER LOT
N 20° E 96 Rods
S 87° W
S 84° W
WELL
ROAD
S 46° W 9 RODS
14 R 6 LINKS
WOODWARD
NO. 1.
CROSS COVE
4R 18L
JOY
57R
NO. 6
WALKER
9R 18L
FRIEND
43 R
NO. 5
9R 9L
9½
NO. 4
N. SAWYER
53
NO. 3
BARKER
36 R
NO. 2
MRS. RICHARDSON
PRIVATE ROAD
LANDING
WALKER
NO. 10
121 R
MRS
RICHARDSON
No. 9
91 R
WALKER
NO. 7
N. SAWYER
NO. 8
17½ R
No. 12
GRAVE YARD
160 R
88
R
NO 11
STAKE
STAKE
STAKE
STAKE
N. SAWYER
NO. 13
MRS. RICHARDSON
NO. 15
WALKER
NO. 14
N
W
E
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lot" included lands upon both sides of the road. Upon the death of John Sawyer, the remainder of the tract descended to his heirs, one-third to Margaret Richardson, a daughter, one-third to Nathaniel Sawyer, a son, and one-third to the heirs of Mary Walker, a deceased daughter. Of this last third, one-fourth descended to Joshua S. Walker, a son of Mary Walker, one-fourth to Sylvia J. Woodward, a daughter, one-fourth to Margaret S. Thompson, a daughter, and one-fourth to the seven children of Mary Ann Barker, a daughter, then deceased. The names of these seven children were Charles William Barker, Ellen M. Barker, now Mrs. Cummings, Mary Barker Joy, Carrie A. Barker, now Mrs. Greely, Evelyn Barker, Ada Barker, Louise Barker Bagley, the last named being one of the defendants in this proceeding. After the death of John Sawyer, his son, Nathaniel Sawyer, died, in 1873, intestate and without issue. The petitioner claims that the interest of Nathaniel Sawyer in the estate was legally conveyed by his administrator to Margaret Richardson. The defendants deny the validity of this conveyance, and claim that Nathaniel Sawyer's interest descended to his sister, Margaret Richardson, and to the children and grandchildren of his deceased sister, Mary Walker. The conclusion to which we have arrived renders it unnecessary for us to pass upon the validity of this administrator's conveyance.

Prior, however, to the sale by the administrator, all the heirs of John Sawyer, being also all the heirs of Nathaniel Sawyer, except Louise Barker Bagley, by an instrument under seal, appointed James A. Milliken, B. F. Carver and George W. Smith, as commissioners, and empowered them to make partition of the John Sawyer tract of land, and in this instrument the parties mutually covenanted "to abide by the action and report of said commissioners, and to complete and affirm the same by quitclaim deeds to each other as said commissioners shall assign and report." The commissioners subsequently went upon the premises, established the outside boundary lines to the satisfaction of the parties, and made partition of the tract in accordance with a plan made and returned by them as a part of their report. They plotted and divided the land into eighteen lots, which they assigned to the heirs. That part of the

estate lying north of the road they divided into three lots, numbered 16, 17 and 18, lot 16 lying on the westerly side of the tract, and lot 18, on the easterly. Lots 16 and 18 extended on the south to the road, for a part of their widths at least, but lot 17, between them, extended only to the north line of the "Barker lot." Lots 1 to 15 inclusive lay on the south side of the road, and some of them bordered on Cross Cove. The commissioners assigned to Margaret Richardson lots 4, 5, 9, 11 and 15 south of the road, and lot 16 north of the road; to the heirs of Mary Walker lots 2, 6, 7, 10 and 14 south of the road, and lot 18 north of the road; and to the heirs of Nathaniel Sawyer lots 3, 8 and 13 south of the road, and lot 17 north of the road.

July 28, 1875, all the heirs of Mary Walker conveyed by deed of quitclaim to Margaret Richardson "all that part of the real estate of John Sawyer, late of Jonesport, deceased, comprised in lots number 4, 5, 9, 11, 15 and 16 according to the survey and plan of the John Sawyer estate made by J. A. Milliken, B. F. Carver and George W. Smith, dated July 7, 1875, meaning by these presents to confirm and make final the partition of said John Sawyer estate, made by the said Milliken, Carver and Smith." In this deed, Louise Barker Bagley joined as grantor, though she had not been a party to the original agreement for partition. On the same day, Margaret Richardson conveyed by deed of quitclaim, to the heirs of Mary Walker, by name, including Mrs. Bagley, all her interest in lots 2, 6, 7, 10, 14 and 18 according to the same survey and plan, and expressed to be for the same purpose. It does not appear that any conveyance was made of the lots assigned to the heirs of Nathaniel Sawyer. Margaret Richardson died intestate in 1890, leaving the petitioner as her sole heir.

The petitioner claims that there is a strip of upland, lying between the road and Cross Cove, south of the "Barker lot," and that east of the "Barker lot" and south of lot 18 there is another strip of upland, between the road and Cross Cove, and that neither of these strips of upland (in fact, one continuous strip) is included in the "Barker lot," nor in the partition made by the heirs of John Sawyer; and hence that the title to these parcels remains in

common and undivided in the heirs, and in the assigns of the heirs, of John Sawyer, of whom he, the petitioner, is one. These parcels of upland, with the flats adjacent thereto, are comprised within the description of the premises sought to be divided in this petition.

On the other hand, the defendants deny that the petitioner has any title or interest in the premises. The defendants Watts and Stevens claim, instead, that the original deed of the "Barker lot" from John Sawyer to Charles F. Barker conveyed all the land between the side lines from the road to the shore of Cross Cove, and that by mesne conveyances from Charles F. Barker, they own in severalty, specific portions of the "Barker lot," Stevens claiming a small lot on the south of the road extending from the road to the shore, and Watts claiming the remainder of the "Barker lot" on both sides of the road.

Although, as heretofore stated, both of these parcels of upland are contiguous and form but one narrow strip of land along the shore of Cross Cove, we shall consider them separately, and, for convenience, we shall designate the upland south of the "Barker lot" as the "Barker lot strip," and the upland easterly of the "Barker lot" as the "easterly strip."

First as to the "Barker lot strip." The contentions of the parties make it necessary to examine more particularly the description in the deed of John Sawyer to Charles F. Barker of the "Barker lot." It is as follows:—"Commencing at my well on the north side of the town road opposite my house running north 2 degrees east 26 rods, thence S. 82 E. 22 rods, thence S. 63 E. 19 rods, thence S. 3-30 W. 9 rods, thence South 46 W. 9 rods, thence South 85 West 6½ rods, thence 50 West 6 rods, thence S. 87 W. to the place of beginning." It will be observed that all the calls in the deed, except the last, are limited by specific courses and specific distances, and that the last is limited by a specific course and a monument, the well, which was the place of beginning. It is conceded that if the description be applied to the premises in question, following the courses and distances as they read in the deed, the last call will not end at the place of beginning, but at a point about one rod and thirteen links northerly therefrom. There is, therefore,

some mistake in one or more calls in the deed, and we must ascertain, if we can, what the mistake is, and if it can properly be done, we must correct it, so as to give effect to the description as the parties intended it to be. This, we think, can be done. The petitioner contends that the error is in the course given in the last call, and that it should be corrected by swinging the last line to the southward until the end strikes the well. The defendants claim that the error is in the distance given in the fourth call, and that it should be corrected by lengthening that course from nine rods to about eleven rods.

Without attempting a full discussion of the evidence, we may say that, on the whole, we find that our minds incline to the latter theory. The deed shows that the description was according to a plan made by Ichabod Bucknam, and the evidence shows that this plan was made ten or more years earlier than the deed. Whether the error was made in Bucknam's survey or in copying the courses and distances from the plan into the deed, we cannot tell. Nor do we know the shape of the shore line when the plan was made, nor its distance from the road. The general shape of the southern line of the lot, as formed by the fifth, sixth and seventh calls in the deed, lends considerable force to the suggestion that it was intended that this line should conform substantially to the bank of Cross Cove in that locality, at high water mark. If so, it would tend to show that the distance given in the fourth call is too short. Again, the fourth call as given ends near the center of the road, and it seems rather improbable that this should have been intended, taking into account the general situation of the land and of the lines as they were. The evidence also shows that the contour of the land, at the fourth call, is uneven and pitches sharply towards the road, rendering it more difficult to make a perfect survey, shortening the distance which could be measured by chain at one time, and adding to the likelihood of a miscount or other error in chaining. But, whatever may have been the precise cause of the error, we think the probabilities of an error in distance in the fourth call are greater than those of an error in course in the last call; and we think that the east line of the "Barker lot" should be

extended southerly far enough, so that following the remaining courses and distances the last call will end at the well.

But even this construction of the deed does not carry the "Barker lot" to high water mark. There still remains some upland between the "Barker lot" and Cross Cove. The defendants urge that it was the obvious intention of the parties that the deed should convey all the upland, and we have already said that there is force in the suggestion. If the construction of a deed is doubtful, the practical construction put upon it by the parties and their successors may be looked at in connection with the deed itself and the circumstances existing at the time of its execution. *Whittenton Mfg. Co.* v. *Staples*, 164 Mass. 319. And, as we shall have occasion to point out hereafter, we think the practical construction given this deed by the parties and those who succeeded them tends very strongly to show that they all supposed that the "Barker lot" extended to the shore. But the difficulty is that the deed does not so extend it. Correcting the error as we have, there is no longer any doubt about the construction of the deed. The boundaries are made certain and we cannot enlarge or extend them. We may correct an obvious error so as to make the calls consistent with each other, and the description perfect, but we cannot include in the description land which the calls, fairly construed, do not include.

But the defendants, Watts and Stevens, claim further that, wherever the line established by the deed may be, they have acquired title in severalty to the "Barker lot strip" by adverse possession.

It is shown, and not denied, that Charles F. Barker and all his successors in title in the "Barker lot" down to the present time have been in the open, notorious and exclusive possession of the strip of upland in question, but the petitioner contends that the possession has not been adverse. He claims that the original entry by Charles F. Barker was permissive, and that nothing is shown, at least until after Watts and Stevens purchased their lots in 1879, to change the character of the possession. We think that, contrary to this claim, it might well be argued from the conduct of

the parties, and especially from the original partition proceedings in 1875, to which all of the heirs of John Sawyer became parties, that it was supposed that the "Barker lot" went to the shore. If this piece of upland in dispute possesses the value claimed for it by the petitioner, it is difficult to understand why it was omitted from the partition, unless the parties understood that it was a part of the "Barker lot." At the same time, it is apparent from the plan made by the commissioners that a survey of the "Barker lot" by the description in the deed showed then, as it shows now, that the "Barker lot" did not extend to the shore. But, whatever may have been the character of the possession originally, we think the evidence clearly shows that the possession of Watts and Stevens has been adverse from the times they respectively took their deeds, October 20, 1879, and October 22, 1879. Their disseisins had not continued twenty years at the time this petition was brought, but more than twenty years had elapsed at the time of the trial, and that was sufficient. In a petition for partition, a sole seisin in the respondent may be established by a possession commenced twenty years before the trial, though less than twenty years before the commencement of the suit. *Saco Water Power Co.* v. *Goldthwaite*, 35 Maine, 456; *Brackett* v. *Persons Unknown*, 53 Maine, 238.

We have not failed to notice certain particulars wherein the petitioner criticises the defendants' claim of title by adverse possession, and the evidence supporting it. First, he says that the parties were tenants in common, and that there is no evidence of such ouster of co-tenants, or such notice to them, as should be regarded as sufficient proof of ouster or disseisin. The answer is that the defendants were not co-tenants with the petitioner and his predecessors in title,—Stevens not at all,—and Watts not until April, 1881, when he took from some of the Walker heirs a quitclaim deed of "any part of the Barker shipyard that may belong to us by survey." But at that time the disseisin had commenced, —in law, the ouster had already occurred.

Again, the petitioner urges that the twenty years' possession of defendant Watts was interrupted and his claim defeated by his

taking the deed in question, and by taking similar deeds from other heirs later; that this was a recognition of the title of the heirs of John Sawyer. We do not think so. It is abundantly in evidence that from the time the first of these deeds was given, there has been a dispute concerning the title to the "Barker shipyard," that is, to some or all of the land south of the road, and including the strip of upland now in question. Just when the dispute originated does not appear, but it appears that in 1880 or 1881, one Taylor made a survey of "Barker lot," and the survey disclosed that the "Barker lot strip" lay south of the line, and this fact seems to have become known to all the parties interested. Whether an existing dispute led to the survey, or whether the survey gave occasion for the dispute, is immaterial. The fact is clearly shown that there was a dispute. Watts claimed to own to the shore. This claim was denied by Margaret Richardson, and later by this petitioner. All the upland, both the "Barker lot strip," and the "easterly strip," had been known as the "shipyard," and in 1881, Watts, being about to build a house on "shipyard" land, was forbidden by Mrs. Richardson, by letter, from putting the building on "her land," claiming that it was undivided land. The reply of Watts, dated June 8, 1881, clearly shows that he then claimed the land adversely. Among other things, he said "I will wait as long as you want me to for you to decide whether you or I own the land, but I shall expect damages for every day that the building is detained." To this, Mrs. Richardson answered: "Just received your note saying you would proceed no further until my claim was established, expecting damages till that time, so I hereby say I recall my note, and you can proceed as though nothing had been said." It does not appear that Watts has ever waivered in his claim. We think that, under such circumstances, the adverse possession of Watts was not interrupted by his buying in and extinguishing whatever title the other heirs had. *Bean* v. *Bachelder*, 74 Maine, 202. His disseisin, at least as to Mrs. Richardson and the present petitioner, was not thereby purged. Instead of yielding his claim, he seems to have been fortifying it against the contingency of a future lawsuit.

Finally, it is contended that the case presented is one where there was a mistake as to the true bounds, and that there is no evidence that either Watts or Stevens ever intended to claim beyond the true line wherever it might be, and that, therefore, they gained no title by adverse possession south of the true line of the "Barker lot" as we have found it to be. *Worcester* v. *Lord*, 56 Maine, 265; *Dow* v. *McKenney*, 64 Maine, 138.

But, though there may have been a mistake as to the true line, we think that the evidence shows that what they intended to claim, and did claim, was the title as far as to the shore. If that was what they intended to claim, the mistake in the line is unimportant. This court said in *Ricker* v. *Hibbard*, 73 Maine, 105, "The intention is the test and not the mistake. It is not unusual for an adverse possession to begin under a mistake as to title; perhaps it is so in most cases where the party is honest. If he goes into possession, fully believing that he has a good title, and intending to hold under that title, surely such a claim would not be rendered invalid by a discovery after twenty years that the title was not good."

In this connection, we may observe that the petitioner claims that the defendants have no title by deed south of the road. This claim is based upon the petitioner's construction of a mortgage, afterwards foreclosed, given by Charles F. Barker to George Walker, and which is one of the links in the defendants' chain of title to the "Barker lot." But we think it is unnecessary to further consider this claim, for if we assume that the defendants failed to get title to any of the land south of the road by deed, the evidence satisfies us that the defendants would have obtained title to the whole of that land, both above and below the original south lines of the "Barker lot," by adverse possession, for the reasons and upon the principles hereinbefore stated as being applicable to the narrow strip south of those lines. Besides, in any event, the petitioner has no title north of the "Barker lot" south line.

We hold, therefore, that the petitioner has no title to the "Barker lot strip," and cannot have partition thereof.

Next as to the "easterly strip." This strip of upland, a rod or two in width, is plainly not within the description in the Barker deed. When Watts bought of Martha E. Barker in 1879, he went into possession of all of the land south of the road, as far west as the Stevens lot, and has since retained it. He has occupied the whole "shipyard." His deed, by reference to prior deeds, described his purchase as "the homestead of the late C. F. Barker." The description gave no metes and bounds, and he testifies that he did not then know of the original deed to Barker. Barker, in his lifetime, had been in possession of the whole shipyard, including this strip as well as the "Barker lot strip," and Watts may well have understood that his purchase included all the land embraced in the "shipyard." The evidence satisfies us that the occupation by Watts of the "easterly strip" was adverse, as well as notorious, continuous and exclusive.

Many of the suggestions made in reference to the "Barker lot strip" apply equally well to this "easterly strip," but we need not repeat. The petitioner, therefore, cannot have partition of this strip.

We will now consider the remaining parcel or parcels of the premises described in the petition, which are flats. It is clear that Watts gained no title by his original deed to the flats adjacent to the "Barker lot." On the other hand, the deed to Stevens appears to cover a portion of the flats adjoining his upland. To this, the grantor of Stevens had no title either by deed or adverse possession. But inasmuch as Stevens held under a recorded deed which included a strip of upland and some portion of the flats, we think it may well be held that the title by adverse possession which he has acquired to the upland extends also to the flats included in his deed. *Brackett* v. *Persons Unknown*, 53 Maine, 238. But Watts has not gained title by adverse possession to any of the flats. He has not held under a recorded deed which included the flats, and his title by disseisin is not extended beyond the line of actual occupation, as was decided in *Thornton* v. *Foss*, 26 Maine, 402. Watts has however acquired certain interests in the flats south of the "Barker lot" by deeds from the Walker heirs, and in the same manner, in the flats south of the road and east of the east line of the Barker

lot extended. To properly understand the condition of the title, we should notice that in the report of the commissioners appointed by the heirs to make partition, lot 18 is described as bounded on the south by the road, and does not include the strip of upland which we have designated as the "easterly strip." The plan accompanying the report upon inspection does not show clearly whether the "easterly strip" was surveyed and plotted as a part of lot 18 or not. Margaret Richardson, the petitioner's predecessor in title, conveyed to the Walker heirs her interest in lot 18 according to "survey and plan." The question has not been argued by counsel, and we do not decide whether the "easterly strip" was included in the plan of lot 18 or not. If it was, then the petitioner has had no title to it or to the flats adjoining, because they were quitclaimed by his mother, Margaret Richardson, to the Walker heirs. But assuming, as the petitioner contends, that the strip is not a part of lot 18, what is then the condition of the title to these flats, as well as to the flats south of the "Barker lot"? Prior to any conveyances to Watts, they were owned in common and undivided by Margaret Richardson and Joshua S. Walker, Margaret S. Thompson, Sylvia J. Woodward, Carrie A. (Barker) Greeley, Evelyn Barker, Ada Barker, Charles William Barker, Ellen M. (Barker) Cummings, Mary C. Joy and Louise Barker Bagley. Mrs. Woodward, Mrs. Cummings and Mrs. Joy have conveyed to Watts all their interest in all the flats, "beginning at center of road on base line between land of E. M. Sawyer and said lot No. 18, running around south side of said No. 18, and south of the road in Cross Cove so-called to C. M. Woodward's east line." And as if that were not sufficiently explicit, Mrs. Cummings and Mrs. Joy also conveyed "all our claim to all land, flats and privileges south of Barker lot now owned by said Watts."

Mr. Walker, Mrs. Thompson, Mrs. Greeley, Evelyn Barker and Ada Barker have conveyed to Watts "any part of the Barker shipyard that may belong to us by survey." The "shipyard," as we have seen, embraced both of the narrow strips of upland in controversy. The deeds of these latter grantors purport to convey the upland which is not included in a survey of the Barker lot. These conveyances of the upland presumably conveyed the inter-

ests of the grantors in the adjacent flats, and in this case we hold that they did so, in fact, there being nothing here to show the contrary. *Snow* v. *Mt. Desert Island Real Estate Co.*, 84 Maine, 14.

Therefore, as we construe the deeds, all the Walker heirs, except Charles William Barker and Louise Barker Bagley, have conveyed to Watts their interest in the flats south of the shipyard. Charles William Barker and Louise Barker Bagley have conveyed nothing to any one. The petitioner has the interest of Margaret Richardson. The owners of the flats, therefore, are Charles William Barker and Louise Barker Bagley, George E. Watts and the petitioner; and Charles G. Stevens sole seized of a specific portion.

The defendants in this proceeding are George E. Watts, Charles G. Stevens and Louise Barker Bagley, and the petition alleges that no others have any interest. It appears that one party having no interest in common and undivided is made a defendant, and that one party having an interest in common is omitted.

Under these circumstances, can this petition be maintained? We think not. The error of misjoinder of Stevens might be cured by a discontinuance, but we know of no method by which new parties to a proceeding of this character can be cited into court as defendants. Yet, the very nature of the proceeding required that all parties interested, if known, shall be made parties. The statute, R. S., c. 88, § 2, requires a petitioner to "state the names of the other tenants in common, and their places of residence, if known, and whether any or all of them are unknown."

Service is then made upon the parties named. Then it is provided in section 4, that "when the co-tenants are not all named in the petition" (necessarily those alleged to be unknown), the court may make a special order of notice. In this case there is another co-tenant, and it is neither alleged that he was unknown, nor it does not appear that he was unknown in fact, nor is reason shown, if any there could be, for not joining him as party defendant; and, of course, no notice has been given to him, whether known or unknown.

For these reasons, we think the petition must be dismissed.

Petition dismissed with costs; but without prejudice as to the flats adjacent to land of Watts.

WASHINGTON FOSS *vs.* IRA WHITEHOUSE.

SAME *vs.* SAME.

Piscataquis. Opinion January 1, 1901.

Tax. Arrest. Fees. Action. Tort. Assumpsit. R S., c. 6, § 142.

1. When a tax collector has demanded and received from a tax payer more than is due and more than appears to be due according to his lists, he must refund the excess to the tax payer, even though he has paid the amount into the town treasury.
2. When a tax collector, having arrested a tax payer for non-payment of taxes, exacts as a condition of release a larger sum for fees of arrest and commitment than he is legally entitled to, he must refund not only the excess but the entire sum so exacted.
3. If the assessors of taxes have jurisdiction to assess the particular tax against the particular person, the tax so assessed will be valid and collectible notwithstanding errors, mistakes and omissions in procedure by the assessors, collector or treasurer.
4. Declarations, not accompanying official acts, by a tax collector, that he had received money upon a particular tax, are not evidence against the town, nor any subsequent collector, that such money was so received.
5. When a tax payer has paid to the tax collector the amount of a tax valid and collectible, and the collector has paid the amount as such tax into the town treasury, the tax payer cannot recover the amount back from the town, nor from the collector, in an action of assumpsit, although he made the payment solely to obtain his release from an unlawful duress put upon him by the collector to compel such payment.
6. When a person who has been subjected to unlawful imprisonment prosecutes to judgment an action of assumpsit to recover back money paid to obtain his release, he cannot maintain an action of tort to recover any other damages resulting from the same imprisonment.

ON REPORT.

The first of these two actions was assumpsit to recover back money paid by the plaintiff, on account of taxes claimed to be due the town of Wellington, and fees paid to the defendant for arresting the plaintiff and committing him to jail.

The second action was trespass, involving the same facts.

By consent of the parties, the case in trespass was reported to

the law court upon the same evidence that was introduced in the action of assumpsit between the same parties, wherein the testimony was taken out at the same term. But as the counsel for the defendant claimed that, if judgment was rendered against him in the action of assumpsit, it could be pleaded in estoppel in this action, it was stipulated by the parties that, if decision should be rendered against the defendant in the action of assumpsit, the defendant should have the same benefit as if judgment in such case had been previously rendered against him and said judgment pleaded as an estoppel in the case.

If, in the second case, the court decided that the action could be maintained, notwithstanding the disposition of the previous case, then the case was to come back for trial for the assessment of damages only; otherwise judgment to be for the defendant.

The case appears in the opinion.

J. S. Williams, for plaintiff.

H. Hudson, for defendant.

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

EMERY, J. The plaintiff Foss was resident, and liable to taxation, in the town of Wellington on April 1, 1892, and has been ever since. That year the total tax assessed against him for all purposes was $27.29. The collector of taxes for that year, and for several years before and after, was Mr. Small, who duly demanded of the plaintiff the payment of his tax. Mr. Small died in 1895 without having settled with the town for the full taxes of 1892. His tax collector's book containing the warrant and lists for that year showed the sum of $5.31 as paid, and a balance of $21.98 as remaining due and unpaid on the tax against the plaintiff. The assessors of 1895 thereupon appointed Ira Whitehouse, the defendant, special collector to collect the unpaid taxes of the year 1892 and committed to him a warrant for their collection and a list of unpaid taxes, upon which list was the name of the plaintiff as owing a balance unpaid of $21.98.

The defendant, armed with his commission, warrant and lists, asked of the plaintiff the balance apparently due on his tax of 1892. The plaintiff informed the defendant that he had paid on this tax to Small, the collector in 1892, $20 more than appeared to have been credited. He paid the defendant what he claimed to be the true balance, $1.98, and took his official receipt therefor, but he expressly refused to pay the remaining $20 or any part thereof. He was afterward applied to several times for the remaining sum alleged to be due, but he always refused to pay upon the ground that he had before paid the amount to Small. At length, on July 1, 1897, the defendant arrested the plaintiff upon the tax warrant and committed him to jail for the non-payment of the balance of the tax. He certified upon the copy of the warrant left with the jailer that the amount of the tax to be paid was $21.98 and that the amount of the costs of arrest and commitment to be paid was $14. The plaintiff thereupon paid both sums to the jailer and was released. The jailer paid these sums to the defendant, who afterward accounted to the town for the plaintiff's 1892 tax as fully paid.

I. The plaintiff subsequently, September 5, 1898, brought against the defendant this action of assumpsit, with the usual money counts of money paid and money had and received, to recover back the sums so paid.

1. The defendant concedes that, in certifying the amount of the tax to be paid, he omitted (inadvertently he claims) to deduct the $1.98 previously paid to him on the tax by the plaintiff, and hence that he should refund that sum with interest. He accordingly submits to judgment therefor in this action.

2. As to the costs of arrest and commitment paid, the defendant contends they cannot be recovered of him in any event, but only of the town. Such fees and charges, however, belong to the collector and not to the town, and the town cannot be held to repay them, at least, until it has received them into its treasury, of which fact there is no evidence. *Briggs* v. *Lewiston*, 29 Maine, 472. They were exacted by the defendant and paid by the plain-

tiff under the duress of actual imprisonment. Unless the defendant had the strict legal right to cause such imprisonment and continue it until the costs were paid, he should refund them with interest. The burden is upon him to show such strict legal right, —to show a legal warrant and lawful procedure under it from beginning to end. If he went beyond his warrant or the law, or stopped short of its full execution,—if he exacted under it anything to which he was not entitled,—all his authority under it vanished, and whatever he acquired under it from the plaintiff for himself he must refund with interest. *Robbins* v. *Swift*, 86 Maine, 197.

He admittedly exacted $1.98 too much. Further, he did not certify the costs in detail as required by law, and we find the sum named and exacted to be somewhat more than the strict legal costs he was entitled to demand. This misconduct, even if inadvertent, deprived him of all right to demand the $14, and of all right to retain it. The defendant does not object to the form of this action and submits to judgment here, if we find him liable at all.

3. The remainder of the sum demanded and received by the defendant, viz. $20, he in effect paid over to the town as the plaintiff's money, paid upon his tax of 1892. As to this item, the plaintiff's first contention is that he had before paid it to the collector of 1892, Mr. Small, and hence the town had no claim against him for it. Of this, however, he has not satisfied us. He never had any official receipt or other voucher for it. He shows no entry of it upon any collector's or treasurer's account. The most he shows, to prove his contention, is that he left with a third party $20 to be paid to the collector on that tax, and that this third party handed the sum to the collector's wife. He fails to show that the wife had any authority to receive it, or ever handed it to her husband, the collector. The wife of an officer is not presumed to be his deputy or agent in official matters. A payment to her is not ipso facto a payment to the officer. True, there was evidence of parol statements by the collector that he had received the $20 from his wife, but those statements were not made as part of any

official res gestae and hence are not competent evidence against the town or the defendant. On the other hand, it seems to us probable that whatever sums did come to the collector's hands were properly credited on plaintiff's taxes for other years.

The plaintiff's next contention is, that the tax of 1892 was not valid against him, by reason of sundry errors and omissions of the assessors and the collectors and particularly in the warrant to the collector. It appears, however, that the assessors for 1892, were duly elected and sworn and were acting as such,—that they had jurisdiction to assess, and did assess the state, county and town taxes for that year, including the tax against the plaintiff. By R. S., ch. 6, § 142, it is expressly provided that no "error, mistake or omission by the assessors, collector or treasurer shall render it [the tax] void." Under this statute the objections urged by the plaintiff against the collector's warrant, or the proceedings of the collector or assessors do not render the tax invalid, it appearing as above stated that the assessors had jurisdiction. *Hemingway* v. *Machias*, 33 Maine, 445; *Rogers* v. *Greenbush*, 58 Maine, 390; *Gilman* v. *Waterville*, 59 Maine, 491; *Hayford* v. *Belfast*, 69 Maine, 63. One objection urged against the assessment is that the assessors assessed $1500 for town charges, while the town only voted $1000 for that purpose. It appears, however, that the town further voted $300 for the poor, and $200 for bridges, and that the assessors simply condensed the three items into one. This at the most was a mere irregularity.

The tax being valid, notwithstanding the errors, mistakes and omissions of the various officers, it was the plaintiff's duty to pay it, and having paid it, even though under the unlawful duress of the collector, he cannot recover it back from the town, although it has gone into the town treasury. It is as much his duty to allow the money to remain in the town treasury as it was to pay it. The town may conscientiously retain it, and hence no action of assumpsit can be maintained against the town therefor. *Smith* v. *Readfield*, 27 Maine, 145.

If, under the above circumstances, the plaintiff cannot recover back of the town the money which was paid into the town treasury

upon a valid tax against him, can he recover it from this defendant in this action of assumpsit?

In considering this question all considerations of the tortious character of the defendant's conduct must be laid aside. They are waived and precluded by the nature of the action brought. The plaintiff has based his claim for recovery upon an obligation arising either from an express or tacit promise, or from the requirements of equity and good conscience. He has not shown any promise, express or tacit. Has he shown that equity and good conscience require such payment? We think not.

Whether the money was paid to the defendant, or to the jailer for him, it was in effect paid to the town as a sum due the town. *Briggs* v. *Lewiston*, 29 Maine, 472. Granting that in collecting it, he was guilty of errors, mistakes, omissions and even oppression which might have subjected him to appropriate actions for any damages caused by them, he was still collector of taxes and acting as such. The plaintiff was in duty bound to pay the tax to him. He was the only person authorized to receive it of the plaintiff and receipt for it to him. He did not collect and retain it for himself, but collected it for, and paid it over to, the town, which, as we have seen, is entitled ex aequo et bono to retain it. The defendant cannot recover it back from the town should he be required to pay it back to the plaintiff. The plaintiff's tax would remain paid. He would then have a double satisfaction, and the defendant be twice mulcted, contrary to equity and good conscience. Decisions in actions of trespass do not apply here, since in such actions considerations ex aequo et bono do not enter, while this action of assumpsit is based on such considerations.

In this action, therefore, the judgment for the plaintiff must be for the first two items only, viz. $15.98 with interest.

II. The foregoing, however, is not the end of the discussion. The plaintiff also brought at the same time an action of trespass for the arrest and commitment, but he elected to try his action of assumpsit first. It is stipulated by the parties that the action of assumpsit shall have the same effect upon the action of trespass as

if judgment had been rendered in the former and pleaded in the latter case. We have now to consider that effect.

The plaintiff could have recovered in the action of trespass (assuming the declaration to contain the necessary allegations) all the damages suffered by him in body, mind or estate, including all the items of damage recoverable in assumpsit. He needed to bring this one action only for all his damages, compensatory and punitory. He saw fit, however, to sort out from all the elements of the damage done him three items of money loss and to bring an action of assumpsit for those alone, which action under the stipulation is to be regarded as prosecuted to judgment.

It is common learning that a plaintiff cannot thus split up a cause of action and bring several actions for the different items of damage resulting from the one cause of action. If he does bring an action for some only of such items of damage, he is barred from bringing another action for any other items of damage from the same cause. So, if he brings several actions simultaneously and prosecutes one to judgment first, he cannot proceed with the other actions. As said by this Court in *Ware* v. *Percival*, 61 Maine, 391, a plaintiff cannot "recover part compensation in assumpsit thus waiving the tort, and then resorting to it (the tort) as an existing wrong, recover the residuum of damages in another form of action." As said by the Supreme Court of the United States in *United States* v. *Throckmorton*, 98 U. S. 65: "There are no maxims of the law more firmly established, or of more value in the administration of justice, than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy; namely, 'interest rei publicae ut sit finis litium,' and 'nemo debet bis vexari pro una et eadam causa.'"

The prohibition is not only against twice recovering, but is against twice vexing. Its purpose is to protect the court as well as the defendant. It is unreasonable, therefore not allowable, to require the court or the defendant to go more than once over the same case, the same evidence, where there is any one process which will afford the plaintiff full relief. Thus, where a plaintiff brought an action of trespass de bonis asportatis to recover the value of

goods taken from his close by a trespasser thereon, he was held barred from maintaining an action of trespass quare clausum fregit to recover damages for the breaking and entering the close. *Johnson* v. *Smith*, 8 Johns. 383. So, where the plaintiff brought an action of trover for the value of a horse forcibly taken from him, he was held barred from maintaining an action of trespass to recover damages for the violent trespass. *Hite* v. *Long*, 6 Randolph, 457, (18 Am. Dec. 719). See also *King C. M. & S. & P. Rwy. Co.*, 50 L. R. A. 161, published since this opinion was written.

It is true, that from the original arrest to the final release the defendant may have performed various and different acts against the plaintiff, but these particular acts were only links in the chain of acts constituting the legal wrong of false imprisonment of which the plaintiff now complains. His damages have resulted not from any one disconnected act, but from the one connected, continuous tort, though composed of numerous links. One action will now suffice to determine the whole matter, the arrest, imprisonment, all the illegalities and all the damages. One sum will compensate for all. The plaintiff cannot now twice vex the court and the defendant on account of that arrest and imprisonment. In this respect, the case is analogous to a case of malicious prosecution, which is composed of various acts done at various times and places while the prosecution itself is a whole. Only one action can be maintained for damages resulting from it. The very beginning of a malicious prosecution may be an injury to the reputation of the person against whom the prosecution is begun, but for this injury to his reputation such person cannot maintain an action of slander and also an action of malicious prosecution for other damages. *Sheldon* v. *Carpenter*, 4 N. Y. 579.

In his action of assumpsit the plaintiff has properly caused the court and the defendant to go over the whole case, the law and the evidence, from beginning to end. He cannot require either the court or the defendant to go over it again in another action.

In the action of assumpsit,

Judgment for the plaintiff for $15.98 and interest from July 1, 1897.

In the action of trespass,

Judgment for the defendant.

LAWRENCE BLIGH

vs.

BIDDEFORD AND SACO RAILROAD COMPANY.

York. Opinion January 5, 1901.

Death. Action.

No action, at common law, by a father lies for the instantaneous death of a minor son.

ON EXCEPTIONS BY PLAINTIFF.

The facts appear in the opinion.

B. F. Cleaves, H. T. Waterhouse and G. L. Emery, for plaintiff.

This is not an action to recover for the death of a person, for which no action is given at common law for such an injury; nor is this an action brought by the personal representative under our recent statute. But it is merely an action brought to compensate the plaintiff for the loss of that to which he was entitled, viz: the services of his minor son during minority. The case involves two propositions: first, has a parent or master any right of action for the loss of services of his minor child or servant; second, what would be the amount of such damages.

Counsel cited: *Wilton* v. *Middlesex R. R.*, 125 Mass. 130; *Morgan* v. *Southern Pacific R. R.* 17 L. R. A. p. 71; *Texas & P. R. R. Co.* v. *Morin*, 66 Texas, 133; *Ford* v. *Munroe*, 20 Wend. 210; *Caldwell* v. *Brown*, 53 Penn. 453; *Lehman, Admr.*, v. *City of Brooklyn*, 29 Barb. 234; *Hartman* v. *Bergen County Traction Co.*, 61 N. J. L. 682; *Baker* v. *Flint, etc., R. R. Co.*, 16 L. R. A. 154.

Hampden Fairfield, L. R. Moore, N. B. Walker, for defendant.

Counsel cited among other cases: *Sawyer* v. *Perry*, 88 Maine, 46; *McKay* v. *Dredging Co.*, 92 Maine, 458; *Gulf, Colorado & Sante Fe Ry. Co.* v. *Beall*, 41 L. R. A. 807, and note.

SITTING: WISWELL, C. J., EMERY, STROUT, SAVAGE, FOGLER, JJ.

STROUT, J. A son of the plaintiff, aged two years, was run over and instantly killed by an electric car of the defendant. This action is brought by the father to recover for loss of service, expenses of burial, etc.

At common law, no remedy by action existed for loss of life. By statute of 1891, an action is given to the personal representatives of the deceased, for the benefit of persons therein named. This suit is not under that statute.

We are aware of the case *Ford* v. *Munroe*, 20 Wend. 209, in which such an action was sustained. But it does not appear in that case that the killing was instantaneous. We have found no other case in which an action by the father for loss of services has been sustained, where the death of the minor was instantaneous. The decisions in Massachusetts are the other way. *Moran* v. *Hollings*, 125 Mass. 93; *Carey* v. *Berkshire Railroad*, 1 Cush. 475; *Kearney* v. *B. & W. R. C.*, 9 Cush. 108. It was early so adjudged in England. *Baker* v. *Bolton*, 1 Camp. 493, and has remained the doctrine of the English courts until the statute 9 and 10 Vic., c. 93, afforded a remedy to an administrator for the benefit of the persons named in the act.

Whether the law ought to allow a remedy like that claimed in this case, is for the legislature to determine. As the law now is, none exists. The nonsuit was properly ordered.

Exceptions overruled.

JOSEPH W. SYMONDS, and others, in Equity,

vs.

WESTON LEWIS, and another.

Cumberland. Opinion January 5, 1901.

Corporations. Director. Preference.

The law does not permit a director of an insolvent corporation to take a conveyance of substantially all its available assets to secure a prior debt to himself, to the detriment of creditors.

In this case, property exceeding ninety-four thousand dollars belonging to the Richards Paper Company was conveyed to Moses, plaintiffs' assignor, by absolute bill of sale, but in fact as collateral security for a pre-existing debt to him, when the corporation was hopelessly insolvent; and included all its property, except its real estate and a comparatively small amount of bills receivable. Moses was a director and treasurer of the company at the time.

Held; that the conveyance is void as against creditors of the corporation.

ON REPORT.

Bill in equity, heard on bill, answer, replication and proof.

This was a bill in equity brought by the plaintiffs, as assignees of Galen C. Moses of Bath, against the defendants as assignees of the Richards Paper Company of Gardiner. Both assignments were at common law.

The case appears in the opinion.

J. W. Symonds, D. W. Snow, C. S. Cook and C. L. Hutchinson, for plaintiffs.

The vote of June 17, 1898, and bills of sale pursuant thereto, the acts of Richards, clerk of the company, in reference to the delivery of the property to Weeks as agent of Moses, the charging of all the property upon the books of the Richards Paper Company as sold to Moses, certainly as between the company and Moses vested the title to all the same in him; and Moses was entitled to hold, and your complainants, as his assignees, are entitled to hold as against the company, and its assignees at least, all said property

to the extent of the amounts directly due from said company to Moses, and also to the extent of any payments which he shall be compelled to make on account of his liability for the accommodation of the company. The defendants, who are simply the common law assignees of the Richards Paper Company, are not in any position to object to the validity of the vote and sale by the company to Moses. The defendants are mere assignees under a common law assignment, and their right is simply to take and distribute, in accordance with the terms of said assignment, the property therein conveyed to them. 1 Am. & Eng. Ency. of Law, p. 854; *Washburn* v. *Hammond*, 151 Mass. 142; *Newbert* v. *Fletcher*, 84 Maine, 413; *Smyth* v. *Sprague*, 149 Mass. 310; *Ballantyne* v. *Appleton*, 82 Maine, 574.

Under such assignment, these defendants would take no property which prior thereto had been conveyed by their assignor, even if such conveyance had been made with the express intention of giving preference to a single creditor, or in express fraud of creditors generally. *Buell* v. *Buckingham Company*, 16 Iowa, 284, and cases cited in the two opinions by Cole and Dillon, JJ.; *City of St. Louis* v. *Alexander*, 23 Mo. 483-527.

If the company was insolvent and the directors, including Moses, knew it, or were in position to know it, then it was competent for the company, and it had full legal right to prefer any one of its creditors, even one of its directors, for bona fide debts, and other creditors could not avoid such purpose except by proceedings in bankruptcy, or under some special statute. *First Natl. Bank of Easton* v. *Smith*, 133 Mass. 31; *Traders Bank* v. *Steere*, 165 Mass. 393; *Sawyer* v. *Levy*, 162 Mass, 191.

The fact that Mr. Moses was a director did not make it unlawful for him to receive security from the company for a bona fide debt. As stated in *Buell* v. *Buckingham*, supra, the fact that Mr. Moses was an officer in the corporation did not deprive him of the right to enter into competition with other creditors for the security of a debt justly and honestly due him from the corporation, and, a fortiori, of new debts he was proposing to assume for the corporation. The right of a director of a company to take security for a

bona fide debt due from the company to him must follow the right of such director to contract with the corporation.

There is nothing in law, or in equity, which forbids the directors of a corporation from contracting with it. *Railroad Company* v. *Claghorn*, 1 Spear's Eq. 562; *Twin Lick Oil Co.* v. *Marbury*, 91 U. S. 587; *Ryan* v. *Williams*, 100 Fed. Rep. 176.

L. C. Cornish and M. S. Holway, for defendant.

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

STROUT, J. In 1894, the Richards Paper Company had a pulp plant at South Gardiner which cost $360,000. It also had a mill at Skowhegan, which cost $68,000, but was valued in 1898 at $20,000 to $30,000, and under mortgage for $12,500. In 1896 a mortgage was placed upon the Gardiner plant to secure bonds to the amount of $150,000, of which $12,000 were issued, and the balance placed in hands of Galen C. Moses to use as collateral to the company's notes that might be given in its business, and were so used by him. The company lacked funds for a working capital, and Mr. Moses undertook to furnish them, as cash advances or by his personal indorsement of its paper. On August 1, 1894, the directors of the company voted that the manager be authorized to secure Mr. Moses on the products of the company, or on any supplies on hand or which should be purchased, for any personal indorsements he might make on the company's notes, and to pay him a commission of one per cent therefor, on the basis of four months' paper. This vote was never rescinded, but nothing was done under it, except paying the commission for his indorsements till near the time of the assignment of the company to the defendants, on August 30, 1898. From 1893, to the failure of the company in 1898, Mr. Moses was a director and treasurer of the company. During all this time the company appears to have conducted a losing business—its liabilities in excess of its assets, exclusive of real estate, increasing from $143,000 on January 1, 1897, to $200,900 on July 1, 1898. Meantime its debt to Moses for advances had grown to $35,000, and he was liable as indorser of

its paper in excess of $200,000—all of the $150,000 mortgage bonds, except $12,000 which had been issued, were pledged as collateral for the outstanding notes of the company. Mr. Moses became alarmed, and at his request a meeting of the directors was called and held on June 17, 1898. At this meeting Mr. Moses was desirous to be released, and to have a period fixed beyond which he should not be required to furnish funds for the company. At his urgent request, and after considerable objection and discussion, it was voted "that the clerk be authorized to sell to G. C. Moses the stock of logs and supplies owned by the company," and on the same day an absolute bill of sale to Moses was made of the logs and supplies, which included all the property of the company except its real estate, and accounts due amounting to $4,338.41. The property thus conveyed to Moses amounted to $94,912.26. Moses says this conveyance was as collateral security for his debt and for his liability as indorser of the company's notes, and was made in the absolute form partly to avoid a preference under the bankrupt law, in case bankruptcy should occur, and incidentally to protect the property from attachment by creditors. Henry Richards, clerk and manager of the company, says Mr. Moses expressly disclaimed a desire for a preference, and took the bill of sale to protect the property from attachment. George H. Richards, president of the company, says that Moses told him on September 5, 1898, that the assets transferred to him ought not to be applied to his personal debts, but should go to pay the company's debts for logs and supplies.

After the bill of sale to Moses, there was no visible change of possession of the property or its management. The stock was manufactured in the mill, the insurance was unchanged, the products shipped in name of the company, new supplies bought and billed in its name. All the product of the mill was shipped to one house—it was billed to that house in Moses' name, and checks for it returned to him, which he, in the main, if not entirely, passed to the credit of the company, and which went into the company's bank account. Certain entries of the transaction were made in the books of the company, and a formal delivery made,

but no indication of change was apparent to any general creditor, or to any one, outside the officers of the company.

At the time of this transfer, the corporation was hopelessly insolvent. Its plant at South Gardiner sold in the fall of 1899, when pulp was commanding an exceptionally high price, for $50,000. The plant at Skowhegan was valued at $20,000 to $30,000, the company's interest being the equity over a mortgage for $12,500. Its total assets did not exceed $166,000—while its total liabilities were $323,000. June 20, 1898, three days after the transfer of its assets to Moses, he and a number of stockholders and some of the directors, entered into a written agreement to use their efforts to re-organize the company with a view to put it on sound financial basis, and if that was not effected before August 1, 1899, that the property should be sold, Moses agreeing in the meantime to use his best efforts to furnish money and supplies to keep the mill running till that time, or until re-organization, or sale, if not prevented by attachment or other action of creditors.

August 30, 1898, the Richards Company assigned to the defendants and Moses assigned to the plaintiffs, who claimed to hold all the property covered by the bill of sale to Moses, and to exclude the defendants therefrom.

By arrangement between the parties the property was left in the hands of defendants, to be manufactured and turned into cash, the proceeds to be held to await determination of the rights of the parties. This was done, and defendants now hold $42,433.05 as the net proceeds. The complainants seek to have this sum paid over to them as assignees of said Moses.

The transfer to Moses cannot be upheld. At common law a debtor may prefer a creditor to the exclusion of others—but a different rule prevails when the creditor is a director of an insolvent corporation debtor. The directors in such case are not strictly trustees for the general creditors, though sometimes so-called, but they owe them a duty, which is inconsistent with the taking of a security for prior indebtedness to their detriment. The assets of an insolvent corporation are a trust fund for its creditors. *Beach*

v. *Miller*, 130 Ill. 167. As said by Justice HASKELL, speaking for the court, in *Clay* v. *Towle*, 78 Maine, 89: "His [the director's] duty required that he should know the financial standing of the corporation, and he is presumed to have performed it. If he has been recreant in guarding the interests intrusted to his care, he cannot be allowed to set up such dereliction of duty to his own profit and advantage over other creditors, who had a right to rely upon his judicious action, and discreet management, for the equal benefit of all interested in the affairs of the corporation."

While this corporation was a going concern, but in fact hopelessly insolvent, as was well known to the directors, Mr. Moses took a conveyance of practically all its available assets, to secure a prior indebtedness of the corporation to himself. Notwithstanding the forms of law were observed in the bill of sale, a formal delivery made, and various entries made in the books of the corporation, the insurance was not changed and all the materials included in the bill of sale remained ostensibly in possession of the corporation and were used, as before, in the operation of the mill, and the product shipped in the name of the company, though billed to the consignee in the name of Moses. The mill was kept running under the same management from the date of the transfer, June 17, 1898, to August 30, 1898, when the assignment was made to the defendants. Meantime the corporation was contracting debts for supplies, and creditors were ignorant of the transfer to Moses and of the financial standing of the corporation.

It is claimed that a present consideration for the transfer may be found in the undertaking of Moses to further furnish funds for the corporation. But he made no further advances, nor in any way agreed to do so, as a part of the transaction or in connection with it. His agreement of June 20 made no reference to the conveyance of the 17th, and evidently was not based upon it. It was an undertaking specially in the interest of Moses and for his benefit, and not for the assumption of additional liability on his part. No consideration for the sale, except prior indebtedness, is shown. The transfer to him was void as against creditors. Whether so intended or not, it was nevertheless a fraud upon them.

O'Donnell v. *Steel Co.* 53 Ill. Ap. 314; *Richards* v. *N. H. M. Fire Ins. Co.* 43 N. H. 263; *Haywood* v. *Lincoln Lumber Co.* 64 Wis. 639; *Hopkins' and Johnson's Appeal*, 90 Pa. St. 69; *Baxter Moses*, 77 Maine, 480; *Clay* v. *Towle*, supra; *In Re Brockway Man. Co.* 89 Maine, 121; *Koehler* v. *Black River Falls Iron Co.* 2 Black, 719; *Howe* v. *Sandford*, 44 Fed. Rep. 231; *Ogden* v. *Murray*, 39 N. Y. 202.

The utmost effect that could be given to the sale to Moses would be to treat it as conveying the title, charged with a trust for all creditors, which a court of equity would enforce. But the better opinion, and one more consistent with the authorities and sound public policy, is that the conveyance to him was void, as against creditors.

Complainants insist that defendants by the assignment took only the interest which the corporation had at that time—and that, if the conveyance to Moses was fraudulent as to creditors, it was valid against the corporation and cannot be avoided by the assignees. It is a sufficient answer to say that, as the proceeds of the property are in the actual possession of the respondents, and as they belong in equity to the creditors of the corporation, and not to the plaintiffs as assignees of Moses, this court will not disturb that possession, but allow defendants to distribute the funds among the creditors of the corporation, who ought to receive them. It will not aid the plaintiffs to obtain the fruits of an illegal contract.

Although it is unnecessary to decide whether assignees under a voluntary assignment can avoid a fraudulent conveyance of their assignor, in favor of creditors, there is great force in the reasoning of Gibson, C. J., in *Englebert* v. *Blanjot*, 2 Whar. 240,—"what then is the interest of a debtor in property fraudulently conveyed by him? As regards benefits to himself, absolutely nothing; but as regards benefits to those attempted to be defrauded, something tangible and substantial. For the benefit of those, the ownership remains in him as a trustee ex maleficio. On no other principle could the legal title be sold even on a judicial process against him, yet it is constantly seized in execution as his and sold as his. The title remains in him so far as is necessary to protect the interest of

his creditors. . . . . If a fraudulent conveyance be void as to creditors, it follows that the title remains in the debtor, as to his creditors, and why may he not convey it for their benefit? It would be a shallow rule that would disable him from yielding to them voluntarily what they might wring from him by process." *Buehler* v. *Gloninger*, 2 Watts, 226. In *Pillsbury* v. *Kingon*, 33 N. J. Eq. 287, it is held that an administrator of an insolvent estate, so far represents creditors that he may maintain suit to have a fradulent conveyance of his intestate set aside. In *Shears* v. *Rogers*, 3 B. & Ad. 363, it is said, "that whenever a man makes a gift of goods which is fraudulent and void as against creditors, and dies, he is considered to have died in full possession, with respect to the claims of creditors, and the goods are assets in the hands of his executor." It is not perceived why the voluntary assignee should not have the same right.

Bill dismissed with costs.

HENRY W. LAMBERTON *vs.* WILLIAM S. GRANT.

Kennebec. Opinion January 7, 1901.

Limitations. Foreign Judgment. U. S. Const. § 1, Art. 4. R. S., of U. S. c. 81, § 101. Minn. Statutes.

Statutes of limitations are laws of process, and where they do not extinguish the right itself, are deemed to operate upon the remedy merely, and all questions arising under them must be determined by the law of the state where the action is brought and not by the law where the contract is made.

Held; that the statute of limitations of Minnesota, prescribing the effect of absence from the state with respect to the time when an action may be commenced, pertains solely to the remedy, and neither interprets, qualifies nor extinguishes the right. It does not constitute a part of the judgment, and cannot follow it beyond the bounds of Minnesota. Its field of operation is in the enacting state, and it cannot be asserted in support of an action in a sister state.

Under section 1, of Art. 4 of the U. S. Constitution, and the act of Congress approved May 26, 1790, the judgment of a foreign court is made in an action upon the same in another court a debt of record, not examinable upon its

merits; but it does not carry with it into another state the efficacy of a judgment upon property or persons to be enforced by execution. To give it the force of a judgment in another state, it must be made a judgment there and can only be executed in the latter as its laws may permit. It is therefore put upon the footing of a domestic judgment; by which is meant, not having the operation and force of a domestic judgment, but a domestic judgment as to the merits of the case, or subject matter of the suit.

The plea of the statute of limitations, in an action instituted in one state on a judgment obtained in another state, is a plea to the remedy; and consequently the lex fori must prevail in such a suit.

ON REPORT.

The case appears in the opinion.

Geo. W. Heselton, for plaintiff.

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

SITTING: WISWELL, C. J., WHITEHOUSE, STROUT, SAVAGE, POWERS, JJ.

WHITEHOUSE, J. This is an action of debt on a judgment for $9338.85 rendered by the District Court of Minnesota November 10th, 1877. The cause of action on which the judgment was rendered accrued September 1st, 1873, through a guaranty by the defendant of certain promissory notes dated respectively June 30th and July 17th, 1871. The plaintiff is a resident of Minnesota and the defendant a resident of Farmingdale in the State of Maine. The writ in this case is dated January 28th, 1899.

It appears that no part of this judgment has ever been paid. Section 1 of Art. 4 of the Constitution of the United States provides that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state;" and the act of congress passed May 26, 1790, after providing the mode of authentication, declares that "the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from whence the said records are or shall be taken." By this law the judgment of the court "is made a debt of record, not examinable upon its merits; but it does not carry with it into another state the efficacy of a

judgment upon property or persons to be enforced by execution. To give it the force of a judgment in another state, it must be made a judgment there and can only be executed in the latter as its laws may permit. . . . . It is therefore put upon the footing of a domestic judgment; by which is meant, not having the operation and force of a domestic judgment but a domestic judgment as to the merits of the case, or subject matter of the suit." *McElmoyle* v. *Cohen*, 13 Peters, 312.

In the case at bar, however, no question is made respecting the validity of the judgment in suit at the time it was rendered by the court in Minnesota. The defendant was a resident of that state at the time of the commencement of the action in which this judgment was rendered, and duly appeared by counsel and answered to the suit. There is no suggestion and nothing upon the face of the record to show, that the District Court of Minnesota did not have jurisdiction of the subject matter of the suit as well as of the parties thereto. Its adjudication, therefore, established the relation of debtor and creditor between the parties and determined the amount of the indebtedness as a matter of record. It was a final and conclusive judgment between them.

But the defendant pleads nul tiel record and in accordance with the specification set out in his brief statement, contends that under a statute of Minnesota, which is printed as a part of the record in this case, the judgment in suit survived for a period of ten years and no longer, and that it accordingly ceased to exist as a judgment on the tenth day of November, 1887.

Section 254, Title 21 of Chapter 66 of the General Statutes of Minnesota for 1866, as amended by Chapter 67 of the Session Laws of 1870, is as follows: "On filing a judgment roll, upon a judgment requiring the payment of money, the judgment shall be docketed by the clerk of the court in which it was rendered, and in any other county, upon filing in the office of the clerk of the District Court of such county, a transcript of the original docket; and thereupon the judgment from the time of docketing the same, becomes a lien on all the real property of the debtor in the county, owned by him at the time of the docketing of the judgment, or

afterward acquired; said judgment shall survive, and the lien thereof continue, for the period of ten years and no longer."

In this amended form, the statute has been in force as the law of Minnesota since February 12th, 1870. In the Gen. Stat. of 1878, it appears as § 277 of chap. 66. It is shown by the transcript of the record introduced in evidence that the judgment in suit was one for the payment of money and that it was filed and docketed November 10th, 1877. It is, therefore, confidently claimed in behalf of the defendant that the rights of the parties to this suit must be determined by the provisions of this statute, and that according to its plain and unambiguous terms the judgment in suit has been extinct more than eleven years prior to the commencement of this action. It could "survive for the period of ten years and no longer" from November 10th, 1877.

In the interpretation of a statute recourse is properly had to the decisions of the courts which have placed a construction upon it in the state in which it was enacted, such decisions being deemed essentially a part of the law itself. So in determining what scope and effect shall be given to the statute above quoted, recourse is necessarily had to the official opinions of the Supreme Court of Minnesota. It is contended by the defendant that the construction given to the statute by that court is in harmony with his contention that the judgment declared upon was not in existence at the date of the plaintiff's writ.

In *Newell* v. *Dart*, 28 Minn. 248, decided August 5th, 1881, the judgment was rendered, filed and docketed June 23rd, 1870, and on the twenty-first day of September, 1878, the plaintiff brought a creditor's bill asking that certain property belonging to the defendant on which he had no statutory lien, might be applied in part satisfaction of his judgment. October 8th, 1880, the District Court rendered its decision for the defendant holding that the judgment ceased to exist June 23, 1880, during the pendency of the plaintiff's bill. On appeal the decision of the District Court was affirmed by the Supreme Court. In the opinion the court say: "The plaintiff's right to the relief sought depends entirely upon the existence of his judgment. . . . . If the plain-

tiff's judgment is dead, his whole case falls to the ground. It is provided by statute that a 'judgment shall survive, and the lien thereon continue, for a period of ten years and no longer.' Gen. Stat. 1878, Chap. 66, § 277. In the present case this period expired June 23rd, 1880, and during the pendency of this action. Hence, before the final trial and decision of this case, and before judgment rendered thereon, plaintiff's judgment had ceased to exist either as a cause of action or a lien, unless kept alive by the commencement and pendency of this action beyond the statutory period of ten years. . . . . We do not think the pendency of this action had any such effect. . . . . We are, therefore, of opinion that plaintiff's judgment became barred and ceased to exist either as a cause of action or as a lien during the pendency of this action." This decision was rendered by a unanimous court and stands unreversed.

In *Dole* v. *Wilson*, 39 Minn. 330, a judgment was recovered against the defendant in the District Court for $10,000 in October, 1876. On appeal this judgment was affirmed by the Supreme Court in October, 1877, and a second judgment for $31 costs was rendered against him. By reason of the false representations of the defendant in regard to his financial condition, the plaintiff refrained from taking any measures to enforce these judgments until October, 1887, more than ten years after the recovery of the judgment in the District Court. He then brought this bill in equity to reach property alleged to have been conveyed by the defendant to his wife in fraud of creditors. In refusing to grant the relief thus sought the court say: "This action was commenced in October, 1887, more than ten years after the recovery of the plaintiff's judgment in the District Court; but a little less than ten years after his judgment for costs in this court. The plaintiff is seeking through the equitable jurisdiction of the court to have this land appropriated to the satisfaction of his judgment after the judgment itself has expired by lapse of time. Equity will regard the statutory limitation upon the life and enforcibility and will not interfere to enforce its satisfaction by means of its peculiar remedies, ... if by the plaintiff's own neglect the judgment

has been suffered to remain unsatisfied until it ceased to exist as a legal obligation."

"As respects the judgment for costs in this court, the result is the same. That judgment was still in force when this action was commenced, but it had expired before the cause was brought to hearing in the District Court. It was held in *Newell* v. *Dart*, 28 Minn. 248, that a judgment is not kept alive by the pendency of an equitable action to enforce satisfaction, and that the expiration of the judgment pending such an action terminates the right of action. As respects the alleged fraudulent conveyance of the defendant, what has been said above is applicable to both judgments alike. But, as this latter judgment was still a valid obligation when this action was commenced, we see no reason why, upon the facts alleged, the plaintiff was not entitled to recover a renewed money judgment against the judgment debtor."

In *Spencer* v. *Haug*, 45 Minn. 231, decided January 13th, 1891, the defendant claimed title to the land in dispute under a sale made May 20th, 1872, on an execution issued on a judgment rendered and docketed May 19th, 1862. The principal question presented was whether the execution sale took place during the life of the judgment. In the opinion the court say: "It was settled by *Newell* v. *Dart*, 28 Minn. 248, that the sale on execution must be made within the life of the judgment. The case is, therefore, reduced to the proper method of computing time in order to determine when the ten years expired." As May 19th, 1872, was Sunday, it was held that under another statute of Minnesota the ten years would include May 20th, and that the sale on the execution was made within the life of the judgment. To like effect was the decision in *Ashton* v. *Slater*, 19 Minn. 347, and in *Hanson* v. *Johnson*, 20 Minn. 194.

The defendant claims that by this line of decisions the Supreme Court of Minnesota has construed the statute in question according to its plain terms and manifest intent, and uniformly held that such a judgment "shall survive for a period of ten years and no longer," and that at the expiration of that time it ceases to exist as a judgment and also as a cause of action. His contention in defense is,

that at the date of the plaintiff's writ in this case, there was no subsisting judgment in Minnesota upon which an action of debt would lie either in Minnesota or in Maine.

On the other hand, the plaintiff argues that the statute upon which the defendant relies must be construed in connection with the statute of limitations of Minnesota. The sections to which he invites special attention are found in chapter 66 of the Gen. Stat. of 1878, as follows:

Sec. 3. Actions can only be commenced within the period prescribed in this chapter, after the cause of action accrues, except where in special cases a different limitation is prescribed by statute.

Sec. 4. No action for the recovery of real property, or for the recovery of the possession thereof, shall be maintained unless it appears that the plaintiff, his ancestor, predecessor or grantor was seized or possessed of the premises in question within fifteen years before the commencement of the action.

The periods prescribed in the preceding sections for the commencement of action are as follows:

Sec. 5. Actions upon Judgments or Decrees. Within Ten Years.

First: An action upon a judgment or decree of a Court of the United States or any state or territory of the United States.

Sec. 15. If, when the cause of action accrues against a person, he is out of the State, the action may be commenced within the time herein limited after his return to the State; and if, after the cause of action accrues, he departs from or resides out of the State, the time of his absence is not part of the time limited for the commencement of actions.

It is conceded that the defendant has not resided in Minnesota since 1877, and the plaintiff claims that § 277 relied upon by the defendant, declaring that judgments "shall survive for the period of ten years and no longer," must be construed in connection with sections 4 and 5 prescribing ten years as the limitation of actions

on judgments and with section 15, relating to absence from the state. He contends that under these statutes, so construed, if the defendant should now return to Minnesota, an action of debt against him on this judgment would be sustained by the courts of that state; and if sustainable in Minnesota, he argues that it is equally sustainable in Maine.

In support of this contention the plaintiff cites two decisions of the Supreme Court of Minnesota, viz: *Sandwich Mfg. Co.* v. *Earl*, 56 Minn. 390, and *Osborne* v. *Heuer*, 62 Minn. 507. In the former case (*Sandwich Mfg. Co.* v. *Earl*), the plaintiff recovered judgment March 12th, 1883, and brought an action of debt thereon February 17th, 1893, but the cause was not decided until February 1st, 1894. The defendant invoked the statute relied on by the defendant in this case, and the authority of *Newell* v. *Dart*, supra, in support of his contention that the judgment "survived for a period of ten years and no longer," and that it became extinct during the pendency of the action. In the opinion the court say, inter alia: "There is but one point more which we need to notice and that is the contention of the defendant that the statute of limitations had run on the plaintiff's cause of action whereby an action thereon was barred for the reason, as defendant claims, that if the plaintiff would avail itself of the statute it must conclude, finish or complete the action and all proceedings thereunder within the ten years. But Gen. Stat. 1878, c. 66, par. 277, which provides that such judgment 'shall survive and the lien thereof continue for a period of ten years and no longer,' must be construed in connection with Gen. Stat. 1878, c. 66, par. 4 and 5, which provide that an action may be commenced on a judgment . . . . within ten years. This permits an action to be commenced upon any such judgment on the very last day of the ten years limited, and to say that such action would close on the very next day after the expiration of the ten years would frequently result in rendering sections 4 and 5 above referred to inoperative. A judgment constitutes of itself a cause of action, and like other causes of action a suit may be brought upon it within the time limited by statute, and such suit may proceed to trial and judgment even

after the expiration of the ten years limited for commencing actions upon such judgments, *Dole* v. *Wilson*, 39 Minn. 330."

It has been noticed that in this case the action was commenced within the "period of ten years" after the judgment was rendered and docketed, and that the statute which gives the judgment life for only ten years, and the statute of limitations which bars an action upon it in ten years, could reasonably be construed together in order that the rights of the parties might be determined as of the date of the writ.

Osborne v. *Heuer*, 62 Minn. 507, was an action on a promissory note. The plaintiff had obtained judgment February 16th, 1884, and January 2nd, 1893, the judgment being unpaid, Holzkamp, one of the defendants, gave the note in suit, which contained a statement that it was "given for the purpose of securing and getting an extension of time on account of said judgment." The action on this note was commenced prior to February 16th, 1894, within ten years from the rendition of the judgment, but was not tried until June, 1894. In reversing the decision of the court below the Supreme Court say: "When plaintiff rested, the court on motion of the defendants, dismissed the action, on the ground as stated in the record, that the note was given as collateral to the judgment, and inasmuch as the judgment had 'ceased to exist,' (meaning we assume, that it was barred by the statute of limitations) the plaintiff could not recover on the collateral. The correctness of this ruling is the only question presented by this appeal. The court seems to have assumed that the note was simply collateral security for the payment of the judgment. Whether this was correct, or whether it operated as conditional payment, and a suspension of the debt until the maturity of the note, we need not inquire, for the court was clearly in error in holding that the judgment was barred by the statute of limitations. The giving of the note in question was clearly an acknowledgment and a new promise on the part of Holzkamp, which took the case out of the operation of the statutes as to him. The lien of the judgment on real estate, if any, may have ceased by reason of the lapse of ten years from its rendition; but the judgment remained a subsisting debt against Holzkamp, upon which an action might be brought."

The significance of this language, in the last sentence of the opinion, must be determined with reference to the facts stated, and the question necessarily involved and actually adjudicated. The court simply decided that, where a promissory note is given for a judgment before the expiration of ten years from its rendition, an action on the note which is commenced within ten years from the rendition of such judgment is maintainable, although not tried and concluded until after the expiration of such period of ten years. The principle involved in this decision is in entire harmony with the previous decisions of the court and parallel with the doctrine of *Sandwich Mfg. Co.* v. *Earl*, 56 Minn. supra; and that doctrine, as already seen, is that although section 277 declares that a judgment "shall survive ten years and no longer;" yet, in order to give reasonable scope to sections 4 and 5 of the statute of limitations, an action on a judgment commenced within ten years from its rendition may be finished after the expiration of the ten years. But the case is plainly not an authority for the proposition that either section 277, Ch. 66, Gen. Stat. 1878, or section 5 of the statute of limitations or any other statute of Minnesota, authorizes the maintenance of an action of debt on a judgment commenced more than ten years after its rendition. Nor has any other case been cited by counsel or otherwise brought to the attention of the court in which it has been so held by any court in Minnesota.

Nor has any case been discovered in which it has been held by the courts of Minnesota that section 277 of chap. 66, should be construed in connection with section 15 of the statute of limitations, providing that the time of the defendant's "absence from the state is not a part of the time limited for the commencement of actions," so that an action on this judgment might now be maintained against the defendant in Minnesota if he should return and be served with process in that state.

But, whether or not an action on this judgment is now maintainable in Minnesota in the event above named, is a question which the decision of the principal case does not require the court to determine. Assuming that it might be held in that state, that

under section 277 the judgment "survived ten years and no longer," and had ceased to exist as a judgment, but that under section 15 of the statute of limitations the judgment might still be received there as sufficient evidence of a subsisting debt to support an action upon it by proving the defendant's non-residence, it by no means follows that an action of debt on the judgment can be maintained in this state, against the defendant's plea of nul tiel record, by virtue of a provision in the statute of limitations of Minnesota regulating the remedy in that state. It is a well settled and familiar principle that remedies on contracts are to be regulated and controlled by the law of the place where the action is brought, and not by the law of the place of the contract. *Thibodeau* v. *Levassuer*, 36 Maine, 362; *Mowry* v. *Cheesman*, 6 Gray, 515; Wood on Lim. of Actions, § 8, and cases cited. It is equally well settled that laws of limitation are laws of process, and where they do not extinguish the right itself, are deemed to operate upon the remedy merely, and all questions arising under them must in like manner be determined by the law of the forum and not by the law of the situs of the contract. *DeCouche* v. *Savelier*, 3 Johns. Ch. 190; *McElmoyle* v. *Cohen*, 13 Peters, supra; Wharton's Conflict of Laws, § 533. In *Townsend* v. *Jemison*, 9 How. 407, the court say: "The uniform administration of the law has been that the lex loci contractus expounds the obligation of contracts, and a statute of limitation prescribing a time after which a plaintiff shall not recover, unless he can bring himself within its exceptions, appertains ad tempus et modum actionis institudendae, and not ad valorem contractus."

It cannot be questioned, that sections 4, 5 and 15 of chapter 66 of Gen. Stat. of Minnesota of 1878, are distinctively a statute of limitations. Sections 4 and 5 expressly relate to the "time of commencing actions," and section 15 prescribes the "effect of absence from the state" with respect to the time when an "action may be commenced." This enactment is uniformly treated as an ordinary statute of limitations by the courts of Minnesota as shown by the cases above cited from that state. It prescribes a law of process, and pertains solely to the remedy. It neither interprets, qualifies, nor extinguishes the right conferred by the judgment.

It does not constitute a part of the judgment, and cannot follow it beyond the bounds of Minnesota. Its field of operation is in the enacting state and, it cannot be asserted in support of the plaintiff's action in a sister state.

On the other hand, the principle is equally well settled that when the statute in question not only destroys the right of action, but operates also to extinguish the cause of action, the right or debt itself, it may be successfully invoked as a bar to the action in whatever state it may be brought. Wharton's Confl. of Laws, § 538; Wood on Lim. of Actions, §§ 8 and 9, and authorities cited. In such case the lex loci contractus and not the lex fori, will control. *McMerty* v. *Morrison*, 62 Mo. 140; *Fletcher* v. *Spaulding*, 9 Minn. 64. In Wood's Lim. of Actions, § 8, the author says: "Where the law of prescription or limitation of a particular country not only extinguishes the right of action, but the claim of title or cause of action itself, ipso facto, and declares it a nullity after the lapse of the prescribed period, such law of prescription or limitation may be set up in any other country to which the parties may remove, as an absolute bar by way of extinguishment, provided the parties have been resident within the foreign jurisdiction during the whole period of limitation, so that the law has actually operated upon the case as an extinguishment of the claim, and not merely as a limitation of the remedy."

It has been seen that sect. 277 of chap. 66 of the Gen. Stat. of Minnesota for 1878, declares that a money judgment "shall survive for ten years and no longer," and that under the decisions of that state, it ceases to exist as a judgment at the end of that time. This statute prescribes the condition on which the plaintiff accepted his judgment. It is a qualification of his right in the statute creating it. Its purpose was not to limit the right of action upon it. That purpose is accomplished by sect. 5 of the statute of limitations, declaring that the action must be commenced within ten years. Section 277 is not a statute of limitations. It was distinctly so held in *Ashton* v. *Slater*, 19 Minn. 347. It extinguishes the judgment itself at the end of ten years. The condition thus becomes an integral part of the judgment and

follows it to every jurisdiction in which the parties may reside. After the lapse of ten years it is no longer a subsisting judgment upon which an action of debt can be maintained in this state. True, there is here no statute of limitations upon such a judgment, but only a rebuttable presumption of payment after the lapse of twenty years; and it is conceded that the plaintiff's jndgment has not been paid. But by the law of the state creating it, its life was limited to ten years, and after the lapse of twenty-three years it must be held to have expired by its own limitation. See *St. Louis Type Foundry Co.* v. *Jackson*, 128 Mo. 119.

Judgment for the defendant.

STATE *vs.* FLAVIUS O. BEAL.

Penobscot. Opinion January 9, 1901.

Indictment. Variance. Nuisance. Practice. R. S., c. 17, §§ 11, 17; c. 18, § 95.

An indictment charged that the whole of a piazza erected and maintained by the defendant, and described by metes and bounds, was a nuisance. Assuming, as the defendant claimed that the proof was that only portions of the piazza were within the street, *held;* that there is no fatal variance, for that reason, between the allegation and the proof.

Failure to prove the allegation of an offense of this sort, to the extent charged, does not necessarily result in a fatal variance between allegation and proof; nor did it, in this case.

It is not a question of the identity of the offending thing, but only to what extent the thing offended.

An abatement of a nuisance will not be ordered when, for any reason, it cannot properly or lawfully be carried into effect, as when a building is described as wholly a nuisance, but not all of it is such.

In such case, the county attorney may properly enter a nolle prosequi as to so much of the building as is not a nuisance, and thus make the record of conviction the correct basis for an order of abatement, if such order is in other respects deemed proper and advisable.

The court are not bound to consider questions raised in argument that are not reserved in the bill of exceptions.

Exceptions do not lie when it appears that the presiding justice did not withhold from the jury the consideration and decision of any facts which are material and pertinent to the issue.

ON EXCEPTIONS BY DEFENDANT.

Indictment against the defendant for erecting, maintaining and continuing a nuisance, to wit, a certain piazza on the front of the Penobscot Exchange hotel in Bangor, which obstructed a certain public highway known as Exchange Street in Bangor.

To the indictment, respondent pleaded not guilty.

The alleged nuisance is set out in the indictment as follows: "And the jurors aforesaid, upon their oath aforesaid, do further present that Flavius O. Beal of Bangor, in the County of Penobscot aforesaid, on the first day of October, A. D. 1898 did unlawfully and injuriously erect and build and cause to be erected and built in and upon the easterly side of said (Exchange) street a certain piazza sixty-three feet long and six and sixty-five one-hundredths feet wide with a platform three and one-half feet high and with a roof over the same supported by pillars and steps leading from the sidewalk upon said street to the platform of said piazza on the north and south ends thereof, and steps leading from the sidewalk to said platform on the westerly side thereof, said piazza being attached to and built upon the westerly side of a certain hotel located upon the easterly side of said (Exchange) street known as the Penobscot Exchange."

It was admitted that the easterly bounds of Exchange street can be made certain by records or monuments. That May 6, 1836, said Exchange street was widened by the city of Bangor eighteen feet—eight feet of land being taken on the easterly side of said street and ten feet being taken on the westerly side of said street, and that the easterly line of said Exchange street, as widened, ran parallel to the westerly wall of said Penobscot Exchange and distant five inches therefrom.

The defendant offered testimony tending to show that three flights of stone steps upon the westerly side of said Penobscot Exchange, leading up into said hotel from Exchange street, and two flights of stone steps or roll-ways leading down from said street

into the basement on said westerly side of said hotel, one flight or roll-way being located near the northwesterly corner of said hotel and the other flight or roll-way being located near the southwesterly corner of said hotel, had existed from the time said hotel was built in 1828 until 1880, and that in consequence thereof and by virtue of the statute the line of said stone steps and roll-ways became the true bounds of Exchange street so far as the territory covered by the steps and roll-ways was concerned.

The defendant also offered testimony tending to show that portions of the said piazza, described in said indictment as constituting a nuisance, were erected within the limits of the territory covered by said stone steps and roll-ways.

It was admitted by the defendant that so much of said piazza as was not erected within the limits of the territory, covered by said stone steps and roll-ways, was within the limits of said Exchange Street.

The court instructed the jury as follows: "On the other hand, the contention of the government is, in the first place, that the steps are not a part of the building, and no matter for what period they existed, they could not change the bounds of Exchange Street; and, in the second place, that, even if it were true in law that the steps were a part of the building, and true in fact that they existed for a period of forty years, so that the bounds of the street as to the territory covered by the steps would be thereby changed, that as a portion of this piazza was still within the limits of the street as claimed by the State, and as admitted in substance by the defense, that the position on the part of the respondent would constitute no defense to this indictment. Now, gentlemen, I instruct you, as a matter of law, that if you are satisfied,—and I understand it is admitted, or that there is no substantial contention about it,—that the bounds of Exchange Street can be made certain by records as has been testified to by Mr. Coombs, and that a portion of the piazza was erected by Mr. Beal within the limits of Exchange Street, then all the evidence introduced by the defense in this case admitting it to be true, would constitute no defense to this indictment."

The jury returned a general verdict of guilty.

The defendant requested the following instructions:

1. That the stone steps leading to the Penobscot Exchange constituted a part of the building itself and although the jury should find that the bounds of Exchange Street were made certain and that said stone steps stood within said bounds, yet if said steps had so stood for forty years subsequent to May 6, 1836, then the erection and continuance of said steps on Exchange Street until they were torn down (in 1880) were legally justified and said steps did not and could not be deemed a nuisance.

2. That if the jury find that the stone steps stood and were maintained within the line of Exchange street for a period of forty years subsequent to May 6, 1836, then said steps as located became the bounds of said street at the points of their location; and if upon removal thereof in 1880, other steps were erected in their place, such new steps so far as they covered the territory embraced within the limits of the stone steps are not and cannot be deemed a nuisance.

3. That so much of the present structure as is built and maintained upon the land covered by the stone steps leading to the Penobscot Exchange is lawfully there, and is not and cannot be deemed a nuisance.

4. That in order to convict, the government must prove the nuisance as laid in the indictment. That the nuisance as laid in the indictment is a certain piazza 63 feet long, and 6 and 65-100 feet wide, with a platform 3 and 1-2 feet high and with a roof over the same supported by pillars and steps leading from the sidewalk upon said street to the platform of said piazza on the north and south ends thereof, and steps leading from the sidewalk to said platform on the westerly side thereof. That the whole structure just described is indicted as an entity and in its entirety as constituting the nuisance, but if the jury find that any portion or portions of said structure are within the limits of the stone steps as aforesaid and that said stone steps had existed for forty years subsequent to May

6, 1836, then such portion or portions are legally there and do not constitute a nuisance.

5. The alleged nuisance being described in the indictment with exactness and particularity as a piazza 63 feet long, 6 and 65-100 feet wide, with a platform 3 and 1-2 feet wide, etc., etc., and it being impossible to strike out the whole averment without taking from the indictment the part essential to the allegation of the offense intended to be charged, it is necessary that the whole description should be proven exactly as it is set forth; and if you are satisfied that the stone steps or any flight thereof existed continuously for a period of forty years after May 6, 1836, and that any portion of this piazza is within the area covered by said steps, then I instruct you that such part is legally there and does not constitute a nuisance, and that this respondent cannot be held upon this indictment.

6. The alleged nuisance being described in this indictment as a piazza 63 feet long, 6 and 65-100 feet wide, etc., etc., and attached to and built upon the westerly side of the Penobscot Exchange Hotel and in and upon the easterly side of Exchange Street, if you are satisfied that the easterly line of said street is situated five inches westerly from the westerly wall of said hotel, and that any portion of this piazza is within the five inches between said line and said wall, then I instruct you that this respondent cannot be held upon this indictment.

The presiding justice refused to give the requested instruction except so far as they were already embraced in the instructions given by him to the jury. To the instructions and refusals to instruct the defendant excepted. The indictment, docket entries, charge of the presiding justice to the jury and the evidence taken in the cause were made part of the exceptions.

B. L. Smith, County Attorney, for State.

Counsel argued: (1) The indictment is sufficient and there is no variance;

(2) That the steps are no part of the building, but are simply appurtenant thereto, and that even if defendant acquired title to

the land upon which the steps rested, under the statute, it gave him no title to the intervening spaces, and is no defense to this indictment against the present structure, which is an entirety covering the entire area:

(3) The evidence offered would constitute no defense, because an individual cannot acquire, against the public, a prescriptive right to maintain a nuisance, no matter for what length of time he may continue the same.

(4) Defendant cannot justify the present nuisance by showing that he has acquired a prescriptive right to maintain another nuisance dissimilar in character and extent.

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

So far as the territory covered by the steps and roll-ways is concerned, and so much of the piazza as is erected within said line, it cannot be deemed a nuisance. *Commonwealth* v. *Blaisdell*, 107 Mass. 234; *Hyde* v. *Middlesex*, 2 Gray, 267; *Farnsworth* v. *Rockland*, 83 Maine, 508.

Buildings fronting on public ways when the bounds can be made certain, when they have been continuously maintained for a period of more than forty years, shall not be deemed nuisances. The stone steps and roll-ways attached to the hotel were constituent parts of the building itself and therefore manifestly fall within the meaning of the word "buildings" as used in the statutes. The exterior lines, therefore, of these steps and roll-ways became the bounds of the easterly side of Exchange street at the respective points where the steps and roll-ways were located; and their erection being legalized by lapse of time, and the eastern boundaries of Exchange street at these points by force of the statute being defined by the line of the steps and roll-ways, the steps and the roll-ways thereby ceased to be within the limits of the highway. *Stetson* v. *Bangor*, 73 Maine, 359.

So much of the present structure as rests upon the territory covered by the stone steps and roll-ways is rightfully and legally there, and under the statute is not a nuisance and cannot be abated as such. So much of the structure as rests upon the intervening

land, we admit is unlawfully there; but the trouble with this indictment is that the whole structure as an entity and in its entirety is indicted as a nuisance—not merely the portion of the structure that is unlawfully there, but such portions of the structure as are innocently and legally there, and for this reason, in brief, we contend that this indictment cannot be maintained. *State* v. *Sturdivant*, 21 Maine, 13.

It being impossible to strike out the whole averment without taking from the indictment the part essential to the allegation of the offense intended to be charged, it is necessary that the whole description should be proven exactly as it is set forth. *States* v. *Howard*, 3 Sumner, 14; *Commonwealth* v. *Wellington*, 7 Allen, 299.

What would ensue, if upon a general verdict of guilty in this case, an abatement of the nuisance should be ordered by the court? By the language of the warrant, the form of which is prescribed in R. S., c. 17, § 13, the sheriff is commanded to forthwith cause the nuisance as particularly described in the indictment and of which the respondent was adjudged guilty to be abated; so that under such a warrant, the sheriff would be compelled to abate as a nuisance this whole piazza, although certain parts of it were legally and rightfully maintained, and were declared by the statutes not to be a nuisance. It would seem at least to be illogical, if not unauthorized, for the court to order these portions of the piazza to be destroyed and removed which are legally and rightfully there under the law. What is unlawfully there, the court could order abated if it knew, or could ascertain from the indictment or the verdict, what portions of the structure were unlawfully there; but we are unable to see how it could order to be abated such portions of the structure as were lawfully there.

The statute does not authorize the removal of a building fronting on the public way, when the bounds can be made certain unless it has been there less than forty years; if it has been there forty years, or more, its continuance is justified and it cannot be removed. This indictment condemns the whole structure as a nuisance—the innocent as well as the offending part—the lawful as well as the unlawful portions.

In a criminal case, the court cannot direct a verdict of guilty even when the facts are admitted beyond dispute, and the question of guilt or innocence depends wholly upon a question of law which the court must determine. *U. S.* v. *Taylor*, 11 Fed. Rep. 470.

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

SAVAGE, J. Indictment for nuisance, wherein the defendant is charged with having unlawfully and injuriously erected, continued and maintained, within and upon the easterly side of Exchange Street in Bangor "a certain piazza sixty-three feet long, and six and sixty-five hundredths feet wide with a platform three and one-half feet high, and with a roof over the same supported by pillars, and steps leading from the sidewalk upon said street to the platform of said piazza on the north and south ends thereof, and steps leading from said platform on the westerly side thereof, said piazza being attached to and built upon the westerly side of a certain hotel located upon the easterly side of said street known as the "Penobscot Exchange," to the great damage and common nuisance of all the citizens of the state.

The erection and maintenance of such a structure as is described in the indictment is not denied by the defendant. But he claims, and at the trial offered evidence tending to show, that a portion of the land covered by the piazza is not now within the limits of Exchange Street; that for more than forty years prior to the building of any piazza three flights of stone steps led up from the street into the hotel; and two roll-ways led down from the street into the basement of the hotel, that though these steps and roll-ways, or some portions of them, were originally within the street limits, yet by reason of their having existed there for more than forty years, the line of the stone steps and roll-ways had become, under the provisions of R. S., chapter 18, § 95, the true bounds of Exchange Street, so far as the territory covered by the steps and roll-ways was concerned. The defendant's evidence further tended to show that portions of the piazza described in the indictment were erected within the limits of the territory covered by the stone steps and

roll-ways, while defendant admitted that the remainder of the piazza was within the limits of Exchange Street, and his learned counsel, in argument, very frankly and properly concede that the portion of the piazza admittedly within the limits of Exchange Street is legally a nuisance.

In brief, then, the position of the defendant as to the facts is, that the piazza complained of is built in part over land which had formerly been occupied for more than forty years by the stone steps and the roll-ways; and that substantially all of the remainder is over land between the flights of steps and between the steps and the roll-ways, but within the limits of the street; or briefer still, that part of the piazza as described is without the street limits, and part within. And from this arises the only defense offered. The indictment charges the whole piazza, described by metes and bounds, to be a nuisance. The defendant says truly that so much of it as lies outside of the street limits is not a nuisance, and hence he argues that if the proof be that only a part of the piazza is a nuisance, then there is a fatal variance between the proof and the allegation, that the state must prove all the piazza described to be a nuisance, or the indictment cannot be maintained. For this purpose he asked to have his evidence tending to prove his claims, as we have defined them, submitted to the jury, and presented several requests for instructions, all in effect bearing upon the question of variance. The presiding justice declined to give the requested instructions, but did instruct the jury, among other things, that if they were satisfied that the bounds of Exchange street could be made certain by records, and that a portion of the piazza was erected by Mr. Beal within the limits of Exchange street, then all the evidence introduced by the defense in this case, admitting it to be true, would constitute no defense to this indictment. Exceptions were taken to this instruction and to the refusals to instruct.

All the evidence introduced in the case tended to show only that some portions of the piazza were outside the street limits. This was the defense. The instructions, therefore, were to the effect that, if part of the piazza was within the street, the fact that other

parts were not, would constitute no defense. And so of the refusals to instruct. A single question is presented by the exceptions,—that of the alleged variance. Assuming the facts to be as claimed by the defendant, do they show a defense to this indictment? If they do, the exceptions must be sustained; if not, the instructions were correct, and the defendant has not been aggrieved.

The question may be viewed in a two-fold aspect. In the first place, the building is described with great particularity. Its length and width and other particulars are alleged with exactness. And the defendant, assuming, as we now do, that the building as described is not all within the street, argues that it is necessary that the whole description should be proven exactly as it is set forth, that no part of the description can be rejected as surplusage, and that it is impossible to strike out the whole descriptive averment without taking from the indictment the part essential to the allegation of the offense intended to be charged. It is undoubtedly true, that when a person or thing necessary to be mentioned in an indictment is described with even unnecessary particularity, all the circumstances of the description must be proved; for they are all made essential to the identity, 1 Greenleaf on Evidence, § 65; and a variance in proof of particulars is fatal, for proof of identity may depend upon preciseness of description. *State* v. *Noble*, 15 Maine, 476. But in this case no complaint is made either in exceptions or argument that *a* piazza with the particulars described was not proved with sufficient particularity; but the complaint is that all of the piazza so described and proved was not within the street. And this raises another, and, we think, a different question, and that is, does the failure to prove the allegation of an offense to the extent charged result in a fatal variance between allegation and proof. We think not necessarily. It is laid down by Mr. Wharton in his work on Criminal Evidence, § 145, that failure to prove allegations of number, quantity and magnitude in their entirety is not a fatal variance, where the proof pro tanto supports the charge. And we think this case falls within the principle of that rule. The piazza in this case was charged to be wholly a nuisance, to the limits of the description, and the state sought to

prove that fact. If the state failed to prove it to the full extent, it is not the less true, as admitted in argument, that the piazza in parts was a nuisance. If one were charged with creating a nuisance by placing a log twenty feet long in the street, would it be reasonable to hold that the prosecution must fail if it should appear that six inches of one end of it extended beyond the street line? We think it would not. And what would be true of a log is true of a piazza. The law requires no such nicety even in criminal pleading. By so holding, no right of the defendant is jeopardized. His defense is not thereby made more difficult or uncertain.

The question here relates not to the identity of the offending thing, but only to what extent the thing offended. The defendant places great reliance upon *Commonwealth* v. *Wellington*, 7 Allen, 299, where the defendant was indicted for desecrating a public burying ground, described by metes and bounds, and the question arose whether the whole land described had ever been used, occupied or appropriated as a burying ground. The court held that failure to prove the entire land to be a burying ground would give rise to a fatal variance, and placed their decision upon the rule, which we have already stated, requiring exact proof in matter of description. If there be no distinction between that case and this, we can only say that we are not convinced by the reasoning of that court. The rule, as we have already stated, touches the identity of the thing alleged to be offending, and upon the branch of this case, which we are now considering, that question does not arise.

The defendant also urges upon us the consideration that the statutes, under which this prosecution has been begun, authorize the court, besides imposing a fine, to award an abatement or removal of the nuisance, R. S., c. 17, § 11; and that by the warrant which the statute prescribes, R. S., c. 17, § 13, the sheriff is commanded to forthwith cause the nuisance as particularly described in the indictment, and of which the defendant was adjudged guilty, to be abated. The argument is, that the warrant must follow the description in the indictment, and that consequently, in case of a general verdict of guilty, a building, all of which is alleged to be

a nuisance, though only a part of it may be proved to be so, may, and must, if warrant issues, be ordered to be abated, the lawful portion of it as well as the unlawful.

If the court called upon to render judgment were required to order an abatement, this position of the defendant would be one of great weight and perhaps decisive, for it cannot be that a prosecution for a nuisance can be sustained if it must result that a building must all be abated, where only a part of it is proven to be a nuisance. We think that the answer to this proposition is, that the court is not required to order an abatement, if for any reason it cannot properly or lawfully be carried into effect. Whether there shall be an abatement or not rests in the legal discretion of the court, and we cannot presume that such discretion will ever be violated. The judge, to whom application is made for judgment of abatement, must hear and decide this question like all others. If it appears that a building described as wholly a nuisance is not all of it such, it will be his duty to refuse to order its abatement; and he may refuse for other and sufficient reasons. The matter of abatement, and the hearing and decision thereon, are entirely distinct from the trial of the main issue of guilt before the jury; and the decision is only to be made when the question arises.

Moreover it is proper that the county attorney should enter a nolle prosequi as to so much of the piazza as is not within the limits of the street. By adopting such a course, a record of a conviction may itself be made the correct basis for an order of abatement, if such an order is in other respects deemed proper and advisable by the justice to whom application is made.

The defendant argues that the presiding justice exceeded his authority in directing a verdict for the state, but this point was not saved by the exceptions; and if it had been, it would not be tenable, for the justice did not withhold from the jury the consideration and decision of any facts which were material and pertinent to the issue.

We think the defendant's exceptions should be overruled.

Exceptions overruled.
Judgment for the state.

CHARLES. E. DOLE, in Equity,

vs.

THE BANGOR AUDITORIUM ASSOCIATION, and another.

Penobscot. Opinion January 24, 1901.

Lien. Expiration. R. S., c. 91, § 32.

In September, 1897, the plaintiff agreed orally with the defendant to wire the defendants' auditorium building for electricity in accordance with the rules and regulations of the New England Insurance Exchange, for which he was to receive compensation by the day.

The plaintiff quit work November 27, 1897, and notified the Insurance Exchange that the work was ready for inspection. The inspection was not made till the first of October, 1898, and thereafterwards the plaintiff was notified by the inspector that a cut out cabinet was required. November 10, 1898, the plaintiff, without any further contract with the defendants, put in the cut out cabinet, charging therefor the sum of $1.90.

The plaintiff thereupon brought a suit in equity to enforce a lien on the building for his services performed in 1897, and for putting in the cut out cabinet in November, 1898.

Held; That the plaintiff's lien for labor performed in 1897 expired because he instituted no proceedings to enforce the same within the time required by statute, and that such lien was not preserved or revived by the work done in 1898.

IN EQUITY. ON APPEAL.

The case appears in the opinion.

T. W. Vose, for plaintiff.

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

SITTING: WISWELL, C. J. WHITEHOUSE, SAVAGE, FOGLER, POWERS, JJ.

FOGLER, J. This is a bill in equity brought to enforce an alleged lien upon a building, and upon the land on which it stands, for labor and materials furnished for the construction of the building. The case comes here upon the plaintiff's appeal from a decree of a single justice dismissing the bill with costs.

By the terms of a verbal contract entered into between the plaintiff and the Bangor Auditorium Association in September, 1897, the plaintiff agreed to wire the large auditorium building of the Association for electricity, in accordance with the rules and regulations of the New England Insurance Exchange, and have it ready for use at the time of the Maine Musical Festival, to be held about the middle of the following month, for which the building was constructed, and to receive compensation therefor by the day.

The plaintiff commenced work September 30, 1897, and testifies that he "got it in shape to open" on the night of the festival, but that it was not completed at that time. After the festival he went back and worked till November 27th, and notified the insurance exchange that the work was ready for inspection. The inspection was not made till about the first of October, 1898, and thereafterwards the plaintiff was notified by the inspector that he must put in a "cut out cabinet," which he did on November 1st, 1898, charging therefor, $1.90. After putting in such cabinet, he filed in the office of the city clerk, November 10th, 1898, a statement claiming a lien on the building and the defendant's interest in the land on which it stands, for his whole bill, including his account for work done in 1897, nearly a year prior to the filing of the statement.

After he stopped work November 27th, 1897, he did no work on the building, and furnished no material therefor until he put in the cut out November 1, 1898.

The plaintiff claims that, as, under his agreement he was to wire the building to the acceptance of the New England Insurance Exchange, and that as the cut out cabinet was required by its rules, the contract was not completed until this cut out was put in, and that whether it was put in immediately or not for a year afterwards, his lien on the building and lot would continue for forty days thereafter, and that the filing of the statement of his claim within the forty days, revives his lien for his whole account for labor and materials.

The plaintiff's testimony shows that, when he entered into the contract to do this work in 1897, he had in his possession a copy of the rules and regulations of the New England Insurance

Exchange, that such rules required a cut out cabinet such as he was instructed in October, 1898, to furnish, and that he knew of the rule as to the cut out at that time.

He testifies that one of the chief reasons for not putting in the cut out cabinet in November, 1897, was that he didn't have time, and the building not being used every day it was let go from day to day, awaiting inspection.

After stopping work in November, 1897, the plaintiff presented his bill amounting to $749.28 to the Auditorium Association, and on December 10, 1897, received $500, in part payment thereof. After receiving notice from the inspector he put in the "cut out" without the consent or knowledge of any officer or agent of the Association authorized to contract in its behalf. It will be noted that the plaintiff was employed, not under an entire contract for a specified sum, but by the day. There seems to us no good reason for the delay in putting in the "cut out." It can hardly have been lack of time, for only five hours were required to do the work. There was no necessity of awaiting inspection for the plaintiff knew that the "cut out" was required by the rules. The delay may have been on account of the plaintiff's inattention or neglect, or it may have been for the purpose of continuing or reviving his lien.

The statute, R. S., ch. 91, § 32, provides that a lien for labor and materials furnished for the erection or repair of a building, shall be dissolved unless the lien claimant within forty days after he ceases to labor or furnish materials, files in the office of the clerk of the town in which such building is situated, a true statement, subscribed and sworn to, of the amount due him with all just credits given, together with a description of the property intended to be covered by the lien, sufficiently accurate to identify it and the names of the owners of the property, if known, which shall be recorded in a book kept for that purpose by said clerk. The purpose of the statute is to give notice to any and all persons of the lien incumbrance. In the present case the plaintiff ceased to furnish labor and materials for the building, November 27, 1897. Apparently his duty in regard to the building had ceased. The

agents of the owner so understood it. The plaintiff said or did nothing to indicate that such was not his understanding. We think his lien was dissolved in forty days after that date.

A lien once lost cannot be revived by subsequent work. *Woodruff* v. *Hovey*, 91 Maine, 116; *Cole* v. *Clark*, 85 Maine, 336; *Darrington* v. *Moore*, 88 Maine, 569.

Nor do we think that the trifling labor performed and materials furnished by the plaintiff in November, 1898, to complete what was left incomplete by him nearly a year before, either purposely or by inadvertence, revived the lien. *Hartley* v. *Richardson*, 91 Maine, 427; *Baker* v. *Fessenden*, 71 Maine, 294.

To hold otherwise would not be in accord with the purpose or spirit of the statute.

Appeal dismissed.
Decree below affirmed with additional costs.

CHARLES B. ROUNDS, Administrator, *vs.* JOHN B. CARTER.

Washington. Opinion January 24, 1901.

Negligence. Fellow-Servant.

In operating machinery, or in the ordinary use of appliances furnished, a servant assumes the risk of injury from the negligence of his fellow-servant, if the servant employed is competent for the service required of him.

Supplying safe machinery and appliances is one thing; the operation in the business for which they are used, is another.

A platform car used by a contractor to convey sleepers had four stakes standing at the forward end of the car in the usual places, one of which was too long to clear a bridge under which the train passed. Either the jar of the car by the striking of the stake against the bridge, or the rebound when it cleared it, caused the plaintiff to fall to the track, where he was killed.

The stake was not a permanent fixture to the car and had been placed there by a fellow-servant. It was an instrumentality only, used when needed, then discarded.

Held; that loading the cars, and the necessary binding or otherwise securing the articles transported, when they were of such character as to require it, including the selection of stakes from a large and suitable quantity fur-

nished, pertained to the ordinary use of the car, within the scope of the servant's employment, and to which the duty of the master did not extend.

ON MOTION BY DEFENDANT.

This was an action brought by the administrator of one Daniel T. Dooley, who was killed at Calais, May 27th, 1898, by falling from a car belonging to a construction train used by the defendant in certain parts of the works of building the Washington County railroad. The jury returned a verdict for the plaintiff of $3,000.

The case appears in the opinion.

R. J. McGarrigle, Geo. M. Hanson and Chas. B. Rounds, for plaintiff.

Duty of employer to employee: *Shanny* v. *Androscoggin Mills*, 66 Maine, 420; *Guthrie* v. *Maine Central R. R. Co.*, 81 Maine, 572; *Cayzer* v. *Taylor*, 10 Gray, 274; *Snow* v. *Housatonic R. R.* 8 Allen, 441; *Coombs* v. *New Bedford Cordage Co.*, 102 Mass. 572; *Neveu* v. *Sears*, 155 Mass. 303.

Acts of fellow-servants: *Stevens* v. *E. & N. A. Ry.* 66 Maine, 74; *Shanny* v. *Androscoggin Mills*, 66 Maine, 420; *Mayhew* v. *Sullivan Mining Co.*, 76 Maine, 100; *Ford* v. *Fitchburg R. R. Co.*, 110 Mass., 240; *Cayzer* v. *Taylor*, 10 Gray, 274; *Holden* v. *Fitchburg R. R. Co.*, 129 Mass. 268, 276; *Moynihan* v. *Hills Co.*, 146 Mass. 586; *McIntyre* v. *Boston & Maine Railroad*, 163 Mass. 189; *Laning* v. *N. Y. Cent. R. R. Co.*, 49 N. Y. 521, 532; Buswell on Personal Injuries, (2nd Ed.) § 193.

Risks from improper appliances: *Buzzell* v. *Laconia Mfg. Co.*, 48 Maine, 113; *Shanny* v. *Androscoggin Mills*, 66 Maine, 420; *Mayhew* v. *Sullivan Mining Co.*, 76 Maine, 100; *Hull* v. *Hall*, 78 Maine, 114; *Mundle* v. *Hill Mfg. Co.*, 86 Maine, 400; *Rhoades* v. *Varney*, 91 Maine, 222; Buswell on Personal Injuries, (2nd Ed.) §§ 208, 217, 218.

W. R. Pattangall, for defendant.

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

STROUT, J. Defendant was a contractor in building the Washington County railroad. In the performance of his contract, he

hired a locomotive, engineer and fireman, and some platform cars, paying the owners a rental which included the wages of these men. He employed the engine and cars in transporting his laborers to and from their work, and in carrying railroad ties, tools and other articles used upon the work. Some of the men operated the train, and attended to the loading and unloading of the commodities transported, while others worked upon the road in its construction; but all were engaged in the common business of the defendant, in the construction of the railroad, and all were fellow-servants. Toward them Carter occupied the relation of a master. As such master it was his duty to furnish reasonably safe machines, appliances and instrumentalities for the work in which his servants were engaged. For any negligence in this respect, which should cause an injury to a servant, he would be responsible. But in operating the machines, or in the ordinary use of the appliances furnished, the servant assumed the risk of injury from negligence of his fellow-servant, if the servant employed was competent for the service required of him.

Dooley, plaintiff's intestate, was in the employ of Carter, as a laborer on the railroad, and traveled to and from his place of labor on the platform cars. When ties were transported, they were confined on the car by stakes inserted in sockets at each end. On the evening of May 27, 1898, while returning from his work on a platform car, with seven or eight other laborers thereon, he was thrown from it and received injuries which resulted in his death shortly after. At the time of the accident four stakes were standing on the forward end of the car in the usual places, one of which was too long to clear a bridge under which the train passed, and struck the sleepers of the bridge, jarring the car. It does not appear who selected the stakes from a large quantity at the tie yard, nor who put them in the sockets upon the car. Presumably it was done by some of defendant's servants engaged in transporting ties, on that day. They were not there when the train took the laborers out in the morning. Dooley was standing near the long stake, but it is not clear whether his hand was upon it or not. Either the jar of the car by the striking of the stake against the

bridge, or the rebound when it cleared it, probably caused Dooley to fall to the track, where he was run over by the wheels of that and the following car. The vital question is whether Carter is responsible for the accident, by reason of a failure to perform his duty.

No complaint is made that the engine and cars were not suitable and sufficient, nor that the employees were not competent for the discharge of their duties. But it is claimed, that the error in having a stake of too great length was the fault of the master. We cannot concur in this view. The stake was not a permanent fixture to the car. It constituted no part of the car, as a car. It was only an instrumentality, used when needed, and then discarded. It was of sufficient quality and strength for the use. It was not necessary when laborers were transported and was not designed for use by them when in transit. Loading the cars, and the necessary binding or otherwise securing the articles transported, when they were of such character as to require it, including the selection of stakes from a large and suitable quantity furnished, pertained to the ordinary use of the car, within the scope of the servant's employment, and to which the duty of the master did not extend. It was incidental to and a part of the work in which they were engaged. The master's duty was performed when he had supplied suitable materials for the servant's use, and competent men for their several duties. Supplying safe machinery and appliances is one thing—their operation in the business, another.

Cassidy v. *Maine Central Railroad Co.*, 76 Maine, 488, bears a striking analogy to this case. There a person in charge of a construction train, ordered a servant to jump upon a car, while in motion. In doing so he caught upon a stake in a platform car, which was not properly secured by the dog or pawl which served to keep the stake in a firm and upright position, and thereby fell under the wheels and was injured. It was held that the conductor who gave the order, and the employee who put the pawl in place, were fellow-servants with the person injured, and that the negligence was that of the servant and not of the railroad company.

In the leading case of *Farwell* v. *Boston & Worcester Railroad*

Corp. 4 Met. 49, Chief Justice Shaw, in delivering the opinion of the court, said:—"The general rule, resulting from considerations as well of justice as of policy, is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services. . . . . And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master."

In *Johnson* v. *Boston Tow-Boat Co.*, 135 Mass. 209, where a servant was injured by the breaking of a rope used in hoisting goods, in consequence of the neglect of a fellow-servant, who knew it to be defective, to supply a new one, in accordance with a duty which the master had imposed upon him, the court said: "It was incidental to the use of the apparatus—a part of its contemplated use—that the rope should be occasionally renewed; and when the defendant had furnished the means for that renewal, and employed Moore to make the renewal whenever needed, it employed him as a servant, and not as agent or deputy." The master was held not liable. So where the chief engineer on a steam vessel, whose duty it was to see that the machinery was kept in order; an underlooker in a mine, whose duty it was to examine the roof of the mine and prop it when dangerous; the general foreman and manager of extensive builders and contractors; the superintendent having the general charge and management of a large manufacturing establishment, and having the management of lighting the mill and manufacturing gas for that purpose;—in all these instances the doctrine as to fellow-servants was held to apply, and the negligence of such servant was not imputed to the master. *Searle* v. *Lindsay*, 11 C. B. (N. S.) 429; *Hall* v. *Johnson*, 3 H. & C. 589; *Gallagher* v. *Piper*, 16 C. B. (N. S.) 669; *Albro* v. *Agawam Canal Co.*, 6 Cush. 75. So the conductor of a freight train is held to be a fellow-servant with a brakeman on the same train for whose negligence, causing injury to another servant, the

master is not liable. *N. E. Railroad* v. *Conroy*, 175 U. S. 323. So where in moving a building, the arrangement of blocks and pulleys was made by fellow-servants, who took them from a number at their disposal, and the hook upon one proved defective and caused an injury to a servant, the master was held not liable—the use of the block and hook as they were used being a temporary incident of a particular job. *Harnois* v. *Cutting*, 174 Mass. 398. So where a derrick, in itself sufficient, was moved from place to place as occasion required in the business, it was held that the moving and adjusting it in place was one of the duties of the workmen, and connected with and a part of the work in which they were engaged, and if there was negligence in its adjustment when moved, it was their negligence, and not that of the master. *McGinty* v. *Athol Reservoir Co.*, 155 Mass. 187. See also *Elmer* v. *Locke*, 135 Mass. 577; *Beaulieu* v. *Portland Co.*, 48 Maine, 291; *Killea* v. *Faxon*, 125 Mass. 485; *Brady* v. *Norcross*, 172 Mass. 333; *Holden* v. *Fitchburg R. R. Co.*, 129 Mass. 272.

So where a railroad corporation furnishes for the use of its servants a sufficient supply of suitable links for connecting its cars, it is not bound to prevent the use of dangerous and unsuitable links by its servants. *Miller* v. *N. Y., N. H. & H. R. R. Co.*, 175 Mass. 363.

Applying these principles to the facts of this case, it is apparent that the selection of stakes, and placing them in position on the platform car to hold the ties in place, were among the duties of the servants, connected with, incidental to and a part of the work in which they were engaged; and that their negligence in the performance of such duties was not the negligence of the master, and he is not responsible for an injury resulting therefrom to another servant, engaged in the same general employment of building the railroad.

Upon the evidence Carter is not shown to be in fault, and the verdict against him is contrary to the law of the case.

Motion sustained. Verdict set aside.
New trial granted.

EDWIN F. COBURN *vs.* CHARLES H. NEAL, and another.

Franklin. Opinion January 24, 1901.

Payment. Mistake.

A voluntary payment made under a mistake of law cannot be recovered back. See *Neal* v. *Coburn*, 92 Maine, 139.

AGREED STATEMENT.

The case appears in the opinion.

H. L. Whitcomb, for plaintiff.

F. W. Butler, for defendants.

SITTING: WISWELL, C. J., EMERY, STROUT, SAVAGE, FOGLER, JJ.

SAVAGE, J. The facts in this case are fully stated in *Neal* v. *Coburn*, 92 Maine, 139.

The plaintiff indorsed a forged check to the defendants. The defendants indorsed it to others, and it was subsequently paid by the drawee bank and charged by it to its depositor, the alleged drawer. After payment, the forgery was discovered. Then the check was returned through the several parties through whose hands it had previously passed, until it came to the defendants, who, upon demand, took it up and paid for it. The defendants then offered to return the check to the plaintiff and demanded repayment of the amount paid by them. The plaintiff agreed to pay the whole amount, and did pay one hundred dollars. Having successfully resisted suit for the balance unpaid (*Neal* v. *Coburn*, supra,) the plaintiff now seeks to recover back the one hundred dollars which he did pay. Can he do it? We think not.

As held in *Neal* v. *Coburn*, the plaintiff was under no legal obligation to pay the one hundred dollars and his promise to pay the balance of the check was without consideration. But the plaintiff evidently supposed that he was legally liable to pay. He

misapprehended the law, and that mistake led him to pay voluntarily. A voluntary payment, however, made under a mistake of law cannot be recovered back. *Norton* v. *Marden*, 15 Maine, 45; *Norris* v. *Blethen*, 19 Maine, 348; *Fellows* v. *School District, No. 8 in Fayette*, 39 Maine, 559; *Livermore* v. *Peru*, 55 Maine, 469; *Bragdon* v. *Freedom*, 84 Maine, 431; *Parker* v. *Lancaster*, 84 Maine, 512. According to the stipulation, the entry must be,

Plaintiff nonsuit.

LLEWELLYN GODING

vs.

BANGOR & AROOSTOOK RAILROAD COMPANY.

Aroostook. Opinion January 29, 1901.

Railroad Crossing. Equity. Law.

Before a court in equity should grant a decree of specific performance of an alleged contract and compel a railroad company to build and maintain a grade crossing over its track, except in cases where public convenience may require it, or perhaps where there might be very great individual inconvenience if it were not ordered, the court should be satisfied that the danger to public travel will not thereby be substantially increased, or that the additional burden placed upon the railroad company would not be greatly disproportionate to the benefit that would be derived by the individual.

A grade crossing over a railroad track is a place of recognized danger, and every additional crossing necessarily increases to some extent, that danger. Although the time has not yet arrived when such crossings can be altogether dispensed with, they should not be unnecessarily increased for the mere inconvenience of an individual. And the court should not compel the maintenance of such a crossing, unless good and sufficient reasons exist therefor.

It is considered by the court, that the situation in this case is such that, if a decree were granted, the benefit that would be derived by the plaintiff would be slight in comparison with the additional burden placed upon the railroad company, and that the danger to travel upon the railroad would be considerably increased if the construction and maintenance of this crossing were ordered.

If the plaintiff is right in his contention as to the existence of the contract relied upon, he may recover adequate pecuniary compensation for all damages

that he has sustained by reason of the failure of the company to perform such contract.

ON REPORT.

Bill in equity, praying for specific performance, heard on bill, answer and proofs.

From the allegations in the plaintiff's bill it appears that on the 10th of December, 1895, he executed and delivered to the defendant company in consideration of one hundred and fifty dollars, a warranty deed of a strip of land in Masardis containing two and one-half acres for a right of way; that the defendant company agreed to construct and maintain a farm crossing on this strip of land. He also alleged in his bill that prior to the delivery of this deed, and at the date of its delivery also, the person to whom he delivered the deed and from whom he received the money consideration therein named as agent of the company, agreed that the company would construct such farm crossing, and that relying upon such agreement he delivered the deed of the right of way, and he prayed the court to decree that this alleged oral contract be specifically performed. The answer denied the contract to construct the farm crossing.

S. S. Thornton and Ira G. Hersey, for plaintiff.

Specific performance: *Pickering* v. *Pickering*, 38 N. H. 400; *C. B. & Q. R. R. Co.* v. *Reno*, 113 Ill. 39; *Crane* v. *Decamp*, 21 N. J. E. 414; *McClure* v. *Otrich*, 118 Ill. 320; *Plummer* v. *Keppler*, 11 C. E. Green, (N. J.) N. S. 481.

Like contracts have been specifically enforced. (1.) To construct approaches to a railroad track. *Wilson* v. *Furness R. R. Co.*, L. R. 9. Eq. cases. (2.) To locate a depot at a certain place. *Telford* v. *C. P. & M. R. R. Co.*, 172 Ill. 559; *Hall* v. *P. & E. Ry. Co*,, 143 Ill. 163; *C. B. & Q. R. R. Co.* v. *Boyd*, 118 Ill. 73; *C. & E. I. R. R. Co.* v. *Hay*, 119 Ill. 493. (3.) To construct a railroad-siding. *Lylton* v. *Gt. Northern R. R.* 2 K. & T. 394; *Greene* v. *West Cheshire Ry. Co.*, L. R. 13 Eq. 44; *W. C. Mfg. Co.* v. *H. P. & F. R. R. Co.*, 23 Conn. 373. (4.) To build a railroad crossing. *Post* v. *W. S. R. R. Co.*, 123 N. Y. 580; *Jones* v. *Seligman*, 81 N. Y. 191.

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

The contract should be established by evidence that is clear and convincing. *Goodwin* v. *Smith*, 89 Maine, 506. Full, definite and conclusive. *Bennett* v. *Dyer*, 89 Maine, 517. So plain as to preclude doubt or hesitation in reaching a conclusion. *Woodbury* v. *Gardner*, 77 Maine, 71.

If a contract itself is inequitable, or if its enforcement would be oppressive, or if it would impose a burden upon the defendant entirely disproportionate to any advantage the plaintiff might derive therefrom, or in cases where the public interests would be prejudiced thereby, specific performance will not be decreed. *Conger* v. *N. Y. W. S. & B. R. R. Co.*, 23 N. E. Rep. 983. So that it necessarily follows that a less strong case is sufficient to defeat a suit for a specific performance than is requisite to obtain the remedy. 3 Pomroy Eq. Jur. § 1405, note 1.

Counsel also cited: *Murtfeldt* v. *N. Y. W. S. & B. R. R. Co.*, 7 N. E. Rep. 404; *Richmond* v. *Dubuque etc. R. R. Co.*, 33 Iowa, 422; *Clark* v. *Rochester etc. R. R. Co.*, 18 Barb. 350; *Chicago & A. R. R. Co.* v. *Schoeneman*, 90 Ill. 258; *Cincinnati, etc., R. Co.* v. *Washburn*, 25 Ind. 259; *Columbus, etc., R. Co.* v. *Watson*, 26 Ind. 50.

SITTING: WISWELL, C. J., EMERY, WHITEHOUSE, SAVAGE, FOGLER, JJ. POWERS, J., did not sit, having been of counsel for defendant.

WISWELL, C. J. The defendant's railroad extends through the plaintiff's farm. The right of way therefor was obtained by a deed from the plaintiff to the railroad company, for a consideration named therein of one hundred and fifty dollars. But the plaintiff claims that there was an additional consideration; that the defendant's agent who procured the conveyance of the right of way and who agreed with the plaintiff in relation to the terms for such conveyance, promised in behalf of the company, as a further consideration therefor, that the railroad company should build and maintain a farm crossing on the plaintiff's farm across the railroad track.

In this bill in equity, the plaintiff seeks a decree for a specific performance of this alleged contract. The case comes to the law court upon report.

The plaintiff's contention is denied by the defendant and there consequently arises an issue of fact about which there is considerable controversy between the parties. But we do not deem it necessary to determine this question. Assuming, without deciding, that the alleged agreement was made as part of the consideration for the conveyance, we do not think that specific performance should be decreed.

The granting of a decree for specific performance is always discretionary with the court. The contract relied upon in any case may be proved in the most satisfactory manner, and still there may be reasons why the court, in the exercise of its discretion, should not compel the specific performance of that contract. We think that such reasons exist in this case, and that before a court should compel a railroad company to build and maintain a grade crossing over its track, except in cases where public convenience may require it, or perhaps where there might be very great individual inconvenience if it were not ordered, the court should be satisfied that the danger to public travel will not thereby be much increased, or that the additional burden placed upon the railroad company would not be greatly disproportionate to the benefit that would be derived by the individual.

Very much is required of railroads to meet the demands of the public for the rapid transportation of passengers and freight, to comply with which the utmost diligence must be exercised and everything that affords unnecessary opportunities for danger must be done away with. A grade crossing over a railroad track is a place of recognized danger, and every additional crossing necessarily increases, to some extent, that danger. The time has not yet arrived when such crossings can be dispensed with altogether, at least in sparsely settled communities, but they should not be unnecessarily increased for the mere convenience of an individual. At least, we think, the court should not compel the maintenance of such a crossing unless good and sufficient reasons exist therefor.

In this case, in the opinion of the court, the benefit that would be derived by the plaintiff, if a decree were granted, would be slight in comparison with the additional burden placed upon the railroad company, and the danger to travel upon the railroad would be considerably increased. It appears that just north of the place of the proposed crossing there is a cut for a distance of eight hundred and seventy feet, through which the railroad track runs on a curve, so that a train coming south would enter this cut near the northerly limit of the plaintiff's land and continue on a curve all the way through this cut until it reached the place of the proposed farm crossing, which, because of the curve and cut, would be shut out from the view of the approaching train. It is argued, and it seems to us with much force, that upon this account the proposed crossing would be much more dangerous than under other conditions. South of the place of the proposed crossing, and only two hundred and thirty feet distant therefrom, there is already a highway crossing over the track, so that if this crossing were ordered, there would be two grade crossings within a distance of two hundred and thirty feet. And by reason of this highway crossing over the railroad track, the plaintiff can, with slight inconvenience, use that crossing for his purpose.

For these reasons we do not think that the relief asked for should be granted. We are, perhaps, more ready to come to this conclusion because of the fact that the plaintiff is not without ample remedy. If he is right in his contention, he may recover adequate pecuniary compensation for any and all damages that he has sustained by reason of the failure of the company to perform the contract made by its authorized agent in this respect.

As we have come to this conclusion, for the reasons above stated, and not because of a decision adverse to the plaintiff upon the issue of fact, the bill should be dismissed without costs.

So Ordered.

CHARLES V. LOOK *vs.* JOHN P. NORTON.

Somerset. Opinion January 29, 1901.

Exceptions. Crops. Possession. Contract for purchase of land.

Although an instruction to the jury may be erroneous, it does not follow that exceptions thereto should be sustained. It must also appear that the excepting party was prejudiced by the instruction complained of. A plaintiff is not prejudiced by an erroneous instruction, if the action cannot be maintained, independently of the instruction complained of.

A person in possession of real estate by the permission of the owner, and under a contract of purchase, is entitled to the crops gathered by him while his possession is allowed to continue. The relations of the land owner and the person in possession by his permission, under a contract of purchase, are analogous, so far as the ownership of the crops is concerned, to those of landlord and tenant, or mortgagor in possession and mortgagee.

Such land owner cannot maintain trover for the conversion of crops by the person in possession, if severed by him while his possession is allowed to continue.

Held; that in this case, the plaintiff did not retake possession of the farm until after the crops sued for had been gathered and taken away by the defendant under the permission received by him from the person who was in possession under a contract to purchase, and that a jury would not be justified in finding otherwise.

ON EXCEPTIONS AND MOTION BY PLAINTIFF.

This was an action of trover for the conversion of a quantity of apples and grass, cut by the defendant on the Coughlin farm in New Vineyard in July 1893. The defendant pleaded the general issue. The fee of the farm since November 8th, 1890, had been in the plaintiff, Look, by warranty deed. Look resided in Starks, about eight miles distant from the Coughlin farm. In November, 1890, Look gave one Orcut a bond for a deed of the Coughlin farm.

There was no provision in the bond that Orcut should have possession, but he entered into possession of the farm and lived upon it. The plaintiff claimed that the conditions of the bond had been broken.

April 13, 1893, Orcut let the farm to the defendant Norton by lease not under seal, and in the early part of July, 1893, defendant

cut the grass, and later in the same fall gathered the apples growing upon said farm, for which grass and apples this action was brought.

It was contended in defense that Look consented to Orcut's occupation in the spring of 1891 and was informed of the lease to Norton before the grass was cut and acquiesced in it, and that he was thereby equitably estopped from asserting his title against the defendant.

The court instructed the jury as follows:

"And I say to you, as matter of law, if you find the facts are supported by the evidence as contended for by the defendant, and that there was no negligence on the part of the defendant in not informing himself more fully than he did, under all the circumstances, in relation to the true state of the title, and find that the plaintiff was informed either by Mr. Orcut himself or by his brother-in-law Mr. Kennedy, and he omitted to give any information, to make any objection to Mr. Orcut or to give any information to Mr. Norton as to the true state of the title, and if you find that there was negligence on his part in omitting to do so and that Mr. Norton was misled to his prejudice, the plaintiff would be equitably estopped by his conduct from asserting his claim, at this time, thus to the prejudice of the defendant; and the rights of the parties would be precisely the same as though he had assented to it in advance—it would amount to an acquiescence in it afterwards,—a ratification of it by his conduct, if you find his conduct to be as I have explained.

Mr. Gower. "I understand that Mr. Look would not be under obligation to go over there eight miles to give this information to Mr. Norton?"

The Court. "You will consider whether there is any such obligation resting upon him under those circumstances or not. I do not say to you, as matter of law, that he was not under obligation to. It is a question of fact for you to consider whether he remained silent when he ought to have spoken, or whether there was negligence on his part in omitting to give Mr. Norton information." A verdict was returned for the defendant.

To all which rulings and instructions and refusals to instruct, the defendant was allowed exceptions.

Geo. W. Gower, for plaintiff.

The bond was a personal obligation, conveying no interest in the land to Orcut; hence he could convey none to Norton. *Bussey* v. *Page*, 14 Maine, 132; *Shaw* v. *Wise*, 10 Maine, 113; *Newhall* v. *U. M. Fire Ins. Co.*, 52 Maine, 180; *Cook* v. *Walker*, 70 Maine, 232; *Bailey* v. *Myrick*, 50 Maine, 171; *Niles* v. *Phinney*, 90 Maine, 124.

Estoppel: Pom. Eq. Jur. §§ 803-4-5-8-10, and cases; *Martin* v. *Me. Cent. R. R. Co.*, 83 Maine, 100.

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

SITTING: WISWELL, C. J., STROUT, SAVAGE, POWERS, JJ.

WISWELL, C. J. We do not think that the instruction of the presiding justice, relative to the doctrine of equitable estoppel, was called for by the facts of the case, or that the necessary elements of such an estoppel existed. But, even if the instruction was on that account erroneous, it does not follow that the exceptions should be sustained. It must also appear that the excepting party, the plaintiff in this case, was prejudiced by the instruction complained of. In this case we do not think that the plaintiff was thereby prejudiced, because, in our opinion, the action was not maintainable, independently of the doctrine of estoppel.

These are the uncontroverted facts: the action is trover for the alleged conversion of the hay and a quantity of apples grown upon a farm, in the summer of 1893, the legal title to which was unquestionably in the plaintiff. He had purchased the farm for and at the request of one Orcut. He gave a bond to Orcut for the sale of the farm to him, and Orcut gave back notes to the plaintiff for the purchase price. The bond contained no provision as to the possession of the farm, but it was understood by both of them that Orcut was to have possession, and shortly after the time of the purchase Orcut went into possession, with the knowledge and consent of the plaintiff, and in accordance with the original understand-

ing between them at the time of the purchase of the farm by the plaintiff.

Orcut paid the first $50 note at or about the time when it became due, and caused the second $50 note, which became due in May, 1893, to be paid at its maturity. In the spring of 1893, Orcut, desiring to go to another part of the state temporarily to find employment at his trade as a stone cutter, let the premises to the defendant for the year. The defendant cut and hauled away the hay and gathered and took away the apples, under this authority derived from Orcut. These acts of the defendant constitute the conversions relied upon by the plaintiff.

Under these circumstances, the plaintiff cannot maintain trover for the conversion of the hay and apples taken by the defendant, by virtue of the letting from Orcut, because the plaintiff did not own these crops. The relations of the plaintiff and Orcut were analogous, so far as the ownership of the crops is concerned, to those of landlord and tenant, or mortgagor in possession and mortgagee. While a person in possession of real estate under a contract of purchase, in some respects and for some purposes, is not a tenant, yet, so far as his ownership of crops severed by him while he remains in possession is concerned, his rights are similar to those of a tenant. In a certain sense he is a tenant at will. *Lapham* v. *Norton*, 71 Maine, 83.

The landlord, or mortgagee out of possession, cannot maintan trespass quare clausum for any mere injury to the possession, because such an action being for an injury to the possession must be brought by the person whose possession has been injured. *Lawry* v. *Lawry*, 88 Maine, 482; *Hewes* v. *Bickford*, 49 Maine, 71. It is, of course, otherwise when the injury is to the realty itself. *Leavitt* v *Eastman*, 77 Maine, 117.

No more can such landlord or mortgagee maintain trover for the conversion of crops taken by the tenant or mortgagor in possession, because such crops belong to the tenant, or mortgagor in possession, if severed by him while his possession is allowed to continue. The same principle necessarily applies between the owner and one who is in possession by permission of the owner under a contract to

purchase. In this case the possession of the defendant was that of Orcut.

It is true, that the plaintiff claims to have taken possession of the farm in the fall of 1892, and again in the spring of 1893. But we do not think that his contention, in this respect, is supported by the evidence, or that a jury would be justified in so finding. It would not be profitable in this opinion to discuss the evidence in this respect.

It is sufficient to say that, after a careful examination of all the evidence, we are satisfied that the plaintiff did not retake possession of this farm until after the crops sued for had been gathered and taken away by the defendant under the permission received by him from Orcut.

Exceptions overruled.

ALBERT E. SMALL

vs.

THE ALLINGTON & CURTIS MANUFACTURING COMPANY.

Cumberland. Opinion January 29, 1901.

Negligence. Fellow-Servant. Vice-Principal.

The doctrine that a superior servant is, on that account, a vice-principal representing his master, rather than a fellow-servant with others employed by the same master and engaged in the same work, does not prevail in this state, and is not supported by the weight of authority. The master's liability to one servant for the negligence of another in no way depends upon the superior rank of the negligent servant.

A servant of any grade may be employed in the discharge of the particular and personal duties which the master owes to the servant, as when he is engaged in the duty of providing safe, suitable and sufficient machinery and appliances. While engaged in such employment, although at other times he may be only a fellow-servant with other employees, he becomes a vice-principal and his master is liable for his negligence, because the performance of these duties can not be delegated by a master so as to relieve himself from the consequence of negligence in these respects.

The test which determines the master's liability for the negligence of one em-

ployee whereby injury is caused to another, is the nature of the duty that is being performed by the negligent servant at the time of the injury, and not the comparative grades of the two servants.

Held; that the evidence in this case does not disclose any negligence upon the part of the defendant. That the accident whereby the plaintiff sustained injury was caused by the negligence of the plaintiff and his fellow-servants, or some one of them; and that the defendant had performed its full duty when it had provided suitable appliances necessary for the work that was being done at the time of the accident, and had employed competent and sufficient workmen.

Held; also, that the defendant's superintendent, although occupying the position of a vice-principal while engaged in the performance of those duties that the defendant owed to its employees, in providing all necessary and proper appliances and materials, in the performance of the work that was being done at the time of the accident, was a fellow-servant of the plaintiff, who was employed and engaged in carrying out the same purpose, and that even if any negligence could be attributed to the superintendent in the performance of this work, it was the negligence of a fellow-servant, for which the defendant is not liable.

On Motion by Defendant.

Action on the case to recover for personal injuries, tried to a jury in the Superior Court, for Cumberland County. The plaintiff obtained a verdict of $500.

The case appears in the opinion.

Enoch Foster and O. H. Hersey, for plaintiff.

Where the negligence of the master and a co-servant employed by the master combined in causing injury to another employee, the master is not excused from liability therefor, for it is nevertheless the negligence of the master. *Myers* v. *Hudson Iron Co.*, 150 Mass. 125, 137; *Griffin* v. *B. & A. R. R. Co.*, 148 Mass. 143, 145, and cases; *Fuller* v. *Jewett*, 80 N. Y. 46, 52. In that case, as the general doctrine is held, it is stated that a negligent servant, acting under the direction of the master, is the representative of the master, and not a mere co-servant with the one who sustains the injury. The act or omission is the act or omission of the master, irrespective of the grade of the servant whose negligence caused the injury, etc.

The same principle is held in *Guthrie* v. *M. C. R. R.*, 81 Maine, 572, 579, and cases cited.

H. R. Virgin and F. C. Payson, for defendant.

SITTING: WISWELL, C. J., WHITEHOUSE, STROUT, SAVAGE, POWERS, JJ.

WISWELL, C. J. Action to recover for personal injuries alleged to have been caused by the defendant's negligence. The verdict was for the plaintiff, and the case comes here upon the defendant's motion for a new trial.

At the time of the accident, the plaintiff was in the employ of the defendant and was engaged with others in the work of hoisting and placing in position a large metal appliance, to be used for the purpose of collecting sawdust and shavings, and known as a dust collector. The defendant, a corporation doing business in the state of Michigan, had made a contract with the Williams Manufacturing Company, of Portland, to furnish for the latter this dust collector, and to place the same in position on top of the boiler house of its plant. This appliance had arrived in Portland, the framework within which it was to be placed had been constructed by the Manufacturing Company, as provided in the contract, and the plaintiff and other employees of the defendant had commenced hoisting the collector by means of ropes and blocks, sometimes called a double fall and tackle. Just before the accident the collector had been hoisted nearly, but not quite far enough, when the two blocks came together, and it became necessary to unfasten the tackle and rearrange the blocks so that the additional hoisting could be accomplished. To do this, it was necessary to temporarily secure the collector in place, while the fall and tackle was unfastened and rearranged.

The plaintiff and other servants of the defendant, fellow-servants of the plaintiff, had placed planks, blocks and props under the collector for this purpose, and the plaintiff was on top of the collector unfastening the tackle, when it fell a few feet and the plaintiff was thrown to the roof of the boiler house sustaining some, but not very serious, injury.

There is no intimation that any of the appliances furnished by the defendant were insufficient for the purpose, or that there was not an abundance of suitable materials of all kinds with which to

do this work of hoisting. Nor is there any claim made that the servants employed by the defendant were incompetent or insufficient in number, and no allegation of that kind is contained in the writ.

The accident was unquestionably caused by the failure of those engaged in securing this collector in its temporary position, while the tackle was to be unfastened, to exercise sufficient care. But this was the fault of the plaintiff and his fellow-servants, or some one or more of them. The defendant had performed its full duty when it had provided suitable appliances necessary for the work of hoisting and placing in position this collector, and had employed competent and sufficient workmen.

But it is urged that the defendant's superintendent, by reason of his entire superintendence of this work, and of the absence of the employer, was not a fellow-servant of the plaintiff, but that he was a vice-principal; that he had the immediate supervision of the work and that he was negligent in not giving more explicit instructions as to temporarily securing the collector, and in not himself seeing that this was properly and safely done, and that the defendant is liable for any negligence of his.

The doctrine that a superior servant is, on that account, a vice-principal representing his master, rather than a fellow-servant with others employed by the same master and engaged in the same work, does not prevail in this state, and is not supported by the weight of authority. The master's liability to one servant for the negligence of another, in no way depends upon the superior rank of the negligent servant. A servant of any grade may be employed in the discharge of the particular and personal duties which the master owes to the servant, as when he is engaged in the duty of providing safe, suitable and sufficient machinery and appliances. While engaged in such employment, although at other times he may be only a fellow-servant with other employees, he becomes a vice-principal and his master is liable for his negligence, because the performance of these duties can not be delegated by a master so as to relieve himself from the consequence of negligence in these respects. The test which determines the master's liability for the

negligence of one employee whereby injury is caused to another, is the nature of the duty that is being performed by the negligent servant, at the time of the injury, and not the comparative grades of the two servants. *Beaulieu* v. *Portland Company*, 48 Maine, 291; *Blake* v. *Maine Central Railroad Company*, 70 Maine, 60; *Doughty* v. *Penobscot Log Driving Company*, 76 Maine, 143; *Conley* v. *Portland*, 78 Maine, 217; *Dube* v. *Lewiston*, 83 Maine, 211; and the recent case of *Rounds* v. *Carter*, ante, p. 535. See also the very full and exhaustive collection of authorities upon this question in 12 Am. and Eng. Encyl. of Law, 2d. Ed. 933, et seq.

In *Donnelly* v. *Granite Company*, 90 Maine, 110, the court speaks of the superintendent as a vice-principal, standing in the place of the defendant, but the alleged negligence of this superintendent was in the performance of those duties which the law imposes upon an employer, in providing for the safety of his servants, and the court merely decided, in accordance with the universal doctrine, that the servant is not required to take the risk of carelessness of those who undertake to discharge, under the master's directions, the master's duty towards him, even if they are also servants of the same master.

In this case the superintendent represented the defendant at Portland and was undoubtedly in the position of a vice-principal while he was engaged in the performance of those duties that the defendant owed to its employees, in providing all necessary and proper appliances and materials, both as to quantity and quality. But in doing the work of hoisting this dust collector into its position, he was a fellow-servant of the plaintiff who was employed for and engaged in carrying out the same purpose, and even if any negligence can be attributed to the superintendent in the performance of this work of temporarily securing the collector, necessarily incidental to the employment of both the superintendent and the plaintiff, it was the negligence of the fellow-servant for which the defendant is not liable according to the unbroken line of authorities in this state.

The case discloses no negligence upon the part of the defendant, and no circumstances from which such negligence can properly be

inferred. In rendering a verdict for the plaintiff the jury must have been influenced by some improper motive.

Motion sustained.
New trial granted.

LUCY H. PULSIFER *vs.* EDWIN C. DOUGLASS.

Androscoggin. Opinion January 29, 1901.

Burial. Husband and Wife. Cemetery.

It is the duty of a husband to provide a suitable place for the burial of the body of his deceased wife, and he has a paramount right to determine where the place of her burial shall be.

But when that duty has been performed, and the body has been buried in the lot of another with the consent, both of the husband and of the owner of the lot, the husband does not have the right without the consent of the lot owner, to enter thereon and remove the body.

A dead body, after burial, becomes a part of the ground to which it has been committed, and an action of trespass may be maintained by the owner of the lot, in possession, against one who disturbs the grave and removes the body, so long, at least, as the cemetery continues to be used as a place of burial.

Under some circumstances a court of equity, which, in this country, where there are no ecclesiastical courts, has jurisdiction of controversies relative to the place of burial of a dead body, may permit a husband to remove the body of his deceased wife from the lot of land of another, as where the burial was not with the intention or understanding that it should be her final resting place.

ON REPORT.

This was an action of trespass quare clausum, in which the plaintiff sought to recover damages of the defendant for a wilful and malicious trespass upon her private lot in Mount Auburn Cemetery; the digging up and carrying away by the defendant of the remains of her sister recently buried there, to some place to the plaintiff unknown.

The case appears in the opinion.

H. W. Oakes, J. A. Pulsifer, and F. E. Ludden, for plaintiff.

Counsel cited, with other cases: 3 Am. & Eng. Ency. of Law, (1st Ed.) p. 52, and cases cited; *Lakin* v. *Ames*, 10 Cush. 221; *Fox* v. *Gordon*, 40 Leg. Int. 374; *Wynkoop* v. *Wynkoop*, 42 Pa. St. 293, (82 Am. Dec. 513); 2 Waterman on Trespass, 845; *Weld* v. *Walker*, 130 Mass. 423; *Pierce* v. *Swan Point Cemetery*, 10 R. I. 227; *Regina* v. *Sharpe*, Dears. & B. C. C. 160, 163, S. C. 7 Cox C. C. 214, 216.

Revised Statutes, c. 124, § 27, simply relieve the defendant from liability of criminal prosecution.

Damages: *Thirkfield* v. *Mountain View Cemetery Assoc.* 12 Utah, 76, 41 Pac. Rep. 564.

A. K. P. Knowlton, for defendant.

What defendant did was in good faith, and not wrongfully, unlawfully, forcibly or maliciously, but in accordance with the law regulating and permitting the disinterment of dead bodies. Revised States, as amended, 1891, chap. 118, § 7.

Defendant acted under permit from the city clerk and superintendent of burials of the city of Auburn in accordance with the statutes of Maine, and ordinance of the City of Auburn. Revised Ordinances, Chap. 28, sections one and two; the said ordinances having been admitted, in the case at the hearing.

All the rights of the plaintiff were and are subject to and restricted by the statutes, and the ordinances of Auburn.

All acts that were done, directed or participated in by the defendant or any persons in the removal were done lawfully.

The rights of plaintiff are so restricted by statute and ordinances as to debar her from maintaining her action.

The husband of the deceased woman by his consent to the burial, thereby acquired such an interest in the burial lot, as to warrant his request for removal, under the legal restrictions.

No objections were made to the granting of the permit for removal of the remains.

The law does not require, that the plaintiff should have had knowledge of the intention of removal, or her permission for the removal.

The disinterment and removal was done by a legally appointed or chosen undertaker.

The statute, as to removal of interred bodies, abrogates the common law and provides for grants or licenses for such removals. *Com.* v. *Cooley*, 10 Pick. 36.

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

WISWELL, C. J. Action of trespass quare clausum for an alleged unlawful entry upon the cemetery lot of the plaintiff and the removal therefrom of the body of the plaintiff's sister which had been buried therein about a month prior to the disinterment. The body was that of Mrs. Sarah A. Webb, and we think that it must be inferred from the case that the burial in the plaintiff's lot was with the consent of the husband of the deceased. The disinterment and removal of the body of Mrs. Webb were done by the defendant at the request of her husband. The case comes to the law court upon report.

It is not only the duty of a husband to provide a suitable place for the burial of the body of his deceased wife, but he unquestionably has the paramount right to determine upon the place of her burial. *Durell* v. *Hayward*, 9 Gray, 248. But when that duty has been performed, and the body has been buried in the lot of another with the consent, both of the husband and of the owner of the lot, the husband does not have the right, without the consent of the lot owner, to enter thereon and remove the body. A dead body, after burial, becomes a part of the ground to which it has been committed, and an action of trespass may be maintained by the owner of the lot, in possession, against one who disturbs the grave and removes the body, so long, at least, as the cemetery continues to be used as a place of burial. *Meagher* v. *Driscoll*, 99 Mass. 281; *Weld* v. *Walker*, 130 Mass. 422; *Bessemer Land & Imp. Co.* v. *Jenkins*, 111 Alabama, 135 (56 Am. St. Rep. 26).

But under some circumstances a court of equity, which, in this country, where there are no ecclesiastical courts, has jurisdiction of controversies relative to the place of burial of a dead body, may

permit a husband to remove the body of his deceased wife from the lot of land of another, as where the burial was not with the intention or understanding that it should be her final resting place. *Weld* v. *Walker*, supra. See also a discussion of the law upon this subject in *Pierce* v. *Proprietors of Swan Point Cemetery*, 10 R. I. 227.

The defendant is, therefore, liable for a technical trespass, at least, notwithstanding he was acting at the request of the husband. The plaintiff claims large damages, both actual and punitive, including damages for her distress of mind, upon the ground that the defendant's acts were wanton and malicious and performed without due regard to the proprieties of the occasion.

We do not think that the evidence substantiates the plaintiff's contention in this respect, but, upon the contrary, we are of opinion, that in removing the body to another place of burial the defendant, and those employed by him, proceeded with due propriety and decency, and as the body was removed for and at the request of the husband, that the plaintiff should be confined to a recovery of actual damages measured by the injuries done to her lot, which we assess at twenty dollars.

Judgment for plaintiff.
Damages assessed at $20.

DANIEL W. BRADT *vs.* PERSIS M. HODGDON.

Androscoggin. Opinion January 29, 1901.

Will. Power of Sale. Bond. R. S., c. 71, § 4.

A testator may devise his real estate to his executor for the purpose of selling the same, or he may devise it to others subject to the exercise of a naked power of sale, which he gives to his executor.

There is a well settled distinction between a devise of land to an executor to sell, and a devise that an executor shall sell, or that land shall be sold by him. A devise of the first description gives a power coupled with an interest, and the estate passes to the executor; while the latter are instances of a naked power.

A testator devised and bequeathed the residue of his estate to his children and their heirs forever, in equal shares. By the next clause in his will he authorized his executors and the survivor of them, or any successor, "to sell at public or private sale any or all my real estate at such time or times as they may see fit and invest the proceeds safely, the same to go as herein provided for my real estate. But this provision in regard to the sale of my real estate is not intended to interfere with the right of my wife and children to convey said real estate in the same manner as they could convey the same were this power to the executors to sell not inserted in this will."

Held; that the testator expressly gave a naked power to his executors to convey this real estate for the purpose of the conversion of the same into money, which should take the place of the real estate and go to the devisees in the place thereof, and that this power was duly executed by the surviving executor by his conveyance to the defendant.

R. S., c. 71, § 4, which requires persons licensed by the probate court to give bond before proceeding to make sales of real estate, does not apply to an executor who makes a sale of real estate in execution of the power vested in him by the will.

Hanson v. *Brewer*, 78 Maine, 195, explained.

AGREED STATEMENT.

The case appears in the opinion.

Ralph W. Crockett, for plaintiff.

The power of an executor to convey the real estate of his testator is a power which is strictly construed. Such conveyances being in derogation of the rights of heirs and devisees, the purchaser has always been held to be bound to show strict compliance with statutory requirements if his title is called in question. *Campbell* v. *Knights*, 26 Maine 224; *Parker* v. *Nichols*, 7 Pick. 111; *Snow* v. *Russell*, 93 Maine, 362, p. 374.

Here the executor attempted to convey under the provisions of the will. The will contained no provision exempting the executor from giving bond for the sale of real estate. It did excuse him from filing an official bond as executor, but such bond has no connection with the bond for sale of real estate mentioned in chap. 64, § 8. *Snow* v. *Russell*, supra.

The rule laid down by the courts seems to be that the executor has the power to convey only when he is clothed with something more than mere authority to settle the estate, or in other words, when he is made a quasi trustee. There seems to be no case in

which real estate is specifically devised to legatees where a conveyance by the executor has been upheld except when necessary to carry out the provisions of the will itself. *French* v. *Patterson*, 61 Maine, 203; *Gould* v. *Mather*, 104 Mass. 283; *Putnam Free School* v. *Fisher*, 30 Maine, 523; *Hanson* v. *Brewer*, 78 Maine, 195; *Richardson* v. *Woodbury*, 43 Maine, 206; *Deering* v. *Adams*, 37 Maine, 264.

In this case, however, the testator specifically devised the real estate to his children, giving them full power to sell and convey. The case of *Whittemore* v. *Russell*, 80 Maine, 299, is analogous.

W. H. Judkins, for defendant.

The evident intention of the executor was to convey under the power expressed in item sixth of the will.

The intention of the testator is plain. While he intended that the "rest, residue, and remainder" should go to his children in equal shares, as provided in item fifth, knowing that some of the children were minors; that the real estate was situated in different states, and having full confidence in the judgment and integrity of his executors, and the survivor of them, he very wisely gave to them a power to sell this scattered real estate, and invest the proceeds for the benefit of his children. In item first of his will he appointed his brother G. H. Bradt and his wife Sarah F. Bradt, his executors, and guardians of his children, adding "and I desire that they be not required to give bonds in either capacity." In appointing new executors in his codicil, he does so, "with the same provision as to not giving bonds."

The intention manifested by the whole instrument governs, when expressed according to the rules of law. *Morton* v. *Barrett*, 22 Maine, 257; *Fisk* v. *Keene*, 35 Maine, 349; *Deering* v. *Adams*, 37 Maine, 264; *Shaw* v. *Hussey*, 41 Maine, 495; *Doane* v. *Hadlock*, 42 Maine, 72; *Cotton* v. *Smithwick*, 66 Maine, 360; *Andrews* v. *Schoppe*, 84 Maine, 170; *Roberts* v. *Stevens*, 84 Maine, 325; *Hamilton* v. *Wentworth*, 58 Maine, 101; *Emery* v. *Union Soc.*, 79 Maine, 334; *In Re Estate John B. Brown*, 86 Maine, 572.

The deed is sufficient to convey. *Ladd* v. *Chase*, 155 Mass. 417,

422; *Gould* v. *Mather*, 104 Mass. 283, 291; *Hall* v. *Preble*, 68 Maine, 100.

The power is ample. *Coil* v. *Pitman*, 46 Mo. 51; *Wood* v. *Hammond*, 16 R. I. 98; *Smyth* v. *Anderson*, 31 Ohio St. Rep., 144.

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

WISWELL, C. J. This is a real action. The demanded premises at one time belonged to Daniel Bradt, who died in 1877, leaving a will which contained the following clauses:

"Fifth. All the rest, residue and remainder of my estate real personal and mixed I give, devise and bequeath to my children to be divided among them share and share alike and to their heirs forever."

"Sixth. I authorize my executors hereinbefore named and the survivor of them and any successor or successors that may be appointed in said trust to sell at public or private sale any or all my real estate at such time or times as they may see fit and invest the proceeds safely, the same to go as herein provided for my real estate. But this provision in regard to the sale of my real estate is not intended to interfere with the right of my wife and children to convey said real estate in the same manner as they could convey the same were this power to the executors to sell not inserted in this will."

The will was duly admitted to probate in the state of New Hampshire, where the testator resided at the time of his death, and letters testamentary issued to the executors named in the will. Subsequently, on July 16, 1878, the will was admitted to probate in Androscoggin county in this state, where the demanded premises are situated, and letters testamentary were issued to the then surviving executors. On August 9, 1887, Peter P. Bradt, at that time the sole surviving executor, and in his capacity as executor conveyed the demanded premises to the defendant, by a sufficient deed, for an actual consideration of $5000. Prior to making this conveyance he had obtained no license from a probate court and had not given the bond referred to in R. S., c. 71, § 4.

The plaintiff is one of the children of Daniel Bradt, the testator, and claims an undivided portion of the premises by virtue of the fifth clause in the will, above quoted. The defendant is the purchaser under the deed above referred to from the sole surviving executor. The question is which of these parties has the better title. The plaintiff's contention is that the deed from the surviving executor of the will of Daniel Bradt did not convey the premises to the defendant, because "the title to the real estate vested immediately in the children of the testator, of which the plaintiff was one, and the executor being in no sense a trustee, no title vested in him and he had no power to convey the real estate." In other words, that a testator cannot give his executor a naked power to convey his real estate for the purpose of its conversion into money, unless he also devises to him the legal title to such real estate.

This is not the law. A testator may devise his real estate to his executor for the purpose of selling the same, or he may devise it to others subject to the exercise of a naked power of sale, which he gives to his executors. The authorities and text books are full of such cases, and it often happens that it is a somewhat difficult question to decide whether the executor takes the title, or only a mere naked power to dispose of the title in order to effect the purposes of the will.

Although a will may not contain any express words or grant to executors, or any technical words of limitation to them, yet, by implication, a fee will vest in them, if upon a view of the whole will, such a fee be indispensable for the purpose of carrying into effect the objects of the testator. *Deering* v. *Adams*, 37 Maine, 264. And sometimes the provisions of the will may be such that the court will construe an authority to sell as vesting, by implication, the title to the premises in the executor. As did this court in *Hanson* v. *Brewer*, 78 Maine, 195. But the statement in the opinion in that case that: "It is well settled that an authority to sell, vested in an executer by the testator's will, vests in him the legal title also," is too broad and not in accordance with the weight of authority. This was not at all necessary to a decision of that case.

There is a well settled distinction between a devise of land to executors to sell, and a devise that executors shall sell, or that land shall be sold by them. A devise of the first description gives a power coupled with an interest, and the estate passes to the executors; but the latter are instances of a naked power. 3 Redfield on Wills, 137; 1 Sugden on Powers, 131; 11 Am. & Eng. Encyl. of Law, 1035, et seq., and cases cited; *Larned* v. *Bridge*, 17 Pick 339; *Shelton* v. *Homer*, 5 Met. 462; *Fay* v. *Fay*, 1 Cush. 93.

In the present case the testator expressly gave a naked power to his executors, or the survivor of them or any successor, to convey this real estate for the purpose of the conversion of the same into money, which should take the place of the real estate and go to the devisees of the real estate in the place thereof. That power was duly executed by the surviving executor by his conveyance to the defendant.

The plaintiff further claims that this conveyance was ineffective because the executor, before making the sale, did not give the bond required by R. S., c. 71, § 4, and that he was not excused by the will from giving such bond. This section reads as follows:

"Persons licensed as aforesaid, before proceeding to make such sales, leases or exchanges, shall give bond to the judge for a sum, and with sureties to his satisfaction."

But this executor did not sell under authority obtained from the probate court. The sale was in execution of a power vested in him by the will. The sale was authorized by the will for the purpose of converting the real estate into money. The probate court could not have authorized the executor to sell the real estate for that purpose: it is not within the provisions of the statute which provides that the probate court may authorize the sale of real estate for certain purposes.

The statute requires a bond to be given by "persons licensed as aforesaid." The executor in this case was not licensed and could not have been. Executors who make sales of real estate by virtue of authority vested in them under a testator's will, both those having the title vested in them for the purpose of making a sale, and those who only have a power to sell without interest, need not give

the bond above referred to. *Larned* v. *Bridge*, supra; *Newton* v. *Bronson*, 13 N. Y. 587, and cases cited in the notes thereto, 67 Am. Dec. 105.

In a recent case in this state, *Green* v. *Alden*, 92 Maine, 177, this court held that where real estate, situated in this state, was devised by a foreign testator to his executors as trustees for the purpose of selling the same to carry out the objects of the will, the will being duly probated in the state where the testator resided, and letters testamentary issued in that state to the executors, it was not necessary to have letters testamentary issued to them in this state, or to qualify as executors by giving bond, in order to make a valid transfer of that title.

In accordance with our conclusions the defendant is entitled to judgment, and such will be the entry.

Judgment for defendant.

PORTLAND RAILROAD EXTENSION COMPANY, Appellants.

Cumberland. Opinion January 30, 1901.

Statutes. Appeal. Street-Railroads. Stat. 1893, c. 268; 1895, c. 84; 1897, c. 249; 1889, c. 119.

Chapter 119, Public Laws of 1899, did not repeal chapter 249, Public Laws of 1897, which gave, if that act is constitutional, an appeal to the Supreme Judicial Court from the decision of the board of railroad commissioners upon the question as to whether public conveniences requires the construction of a street railroad.

The only effect of the act of 1899, in this respect, was to make the question as to whether public convenience requires the construction of a street railroad for public use, determinable by the railroad commissioners in the first instance, before they indorsed their approval upon the articles of association of the corporation, instead of later. The right of appeal to the Supreme Judicial Court, from their determination of that question, is given now precisely as it was before, except that the question must be earlier decided in the proceedings.

The court expresses no opinion upon any constitutional question which may be involved, no such question being raised or argued by the counsel.

ON EXCEPTIONS BY PORTLAND AND ROCHESTER RAILROAD.

This was an appeal filed in this court below by the Portland Extension Railroad Company from the decision of the board of railroad commissioners that public convenience did not require the construction of a proposed electric railway from Westbrook to Gorham. At the October term, 1899, the Portland & Rochester Railroad, a party interested and which duly appeared by counsel at the hearing before said railroad commissioners in the proceeding, in which this appeal purports to have been taken, and whose appearance in such proceeding was duly entered of record by said board of railroad commissioners, filed a motion that this appeal be dismissed from the docket of this court. This motion to dismiss was copied and made part of the exceptions.

The motion to dismiss was overruled by the presiding justice, and to such ruling of the presiding justice overruling the motion to dismiss as aforesaid the said Portland & Rochester Railroad seasonably excepted.

The case is stated in the opinion.

C. F. Libby, F. W. Robinson and Levi Turner, for appellants.

J. W. Symonds, D. W. Snow, C. S. Cook, C. L. Hutchinson; N. & H. B. Cleaves, for P. & R. R.

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

WISWELL, C. J. The appeal of the Portland Extension Railroad Company from the determination of the railroad commissioners that public convenience did not require the construction of its proposed electric railway, was duly taken and entered at the October term 1897, of this court for Cumberland county, in accordance with the provisions of c. 249, Public Laws of 1897. At the term of its entry a demurrer was filed by the Portland & Rochester Railroad, a party interested and of record at the original hearing before the railroad commissioners. This demurrer was overruled at nisi prius and the ruling was sustained by the law court upon exceptions, but in that decision the court refrained from expressing

any opinion upon grave constitutional questions, not argued, but which the court suggested might be involved.

At the October term 1899, after the decision of the law court upon the demurrer had been announced, the Portland & Rochester Railroad filed a motion to dismiss the appeal, which motion was overruled by the justice presiding and the case comes to the law court upon exceptions to this ruling.

This motion to dismiss is based upon the sole reason that the statute giving the right of appeal "was repealed without exception or reservation" by the legislature of 1899. And the counsel arguing in favor of the motion state in their brief that the motion "is based wholly upon the change of legislation since the date of the former hearing."

So that, with the exception of certain preliminary questions of procedure, which, in view of our conclusion need not be considered, the only question presented, argued or to be determined is, whether or not the right of appeal given by the act of 1897, if that act is constitutional, was repealed by the legislature of 1899. And again we express no opinion upon the question respecting the constitutionality of the act which purports to give the right of appeal. This question will be considered and determined when ever the learned counsel representing these parties see fit to present and argue it, or when it may otherwise arise. Although we shall hereinafter speak of these statutes as if there were no constitutional question involved, it must be understood that we do so merely for convenience and without expressing any opinion, even by implication, in regard thereto.

For a clear understanding of the question here presented, it will be necessary to consider the original act, c. 268, Public Laws of 1893, and its subsequent amendments. The first section of that act provides for the organization of a corporation for the purpose of constructing, maintaining and operating a street railroad for public use, and contains certain requirements relative to the articles of association and the amount of capital stock. By the second section it is provided that the articles of association shall not be filed until the capital stock, not less than four thousand dollars for each

mile of road to be constructed, had been subscribed in good faith by responsible parties, and five per centum thereof paid in cash. By section three, when it is shown to the satisfaction of the railroad commissioners that all of the provisions of the first two sections have been complied with, it is made their duty to indorse a certificate of such facts and of their approval upon the articles of association. The fourth and fifth sections contain no provisions that need be here referred to. By the sixth section, as it originally existed, it was provided that every corporation organized under the foregoing provisions, before commencing the construction of its road, should present to the railroad commissioners a petition for approval of location, defining its courses and distances, accompanied with a map of the supposed route, and with the written approval of the proposed route, as to streets, roads or ways by the municipal officers of the cities and towns in which such railway is to be constructed in whole or in part. Provision was also made in that section, in case the municipal officers should not approve the route and location, for an appeal to the Supreme Judicial Court, for the determination of the appeal and the certification of the decision to the railroad commissioners, which should be received by them in lieu of the approval by the municipal officers. Thereupon the commissioners should, subject to the provisions of section nine, not important here, indorse their approval upon the petition for approval of location, and the corporation might then, after the performance of some formal requirements, proceed with the construction of its road.

By c. 84 Public Laws of 1895, the sixth section of the act of 1893 was amended, so as to require the railroad commissioners to approve the location, "and find that public convenience requires the construction of such road," in which case the commissioners should then indorse their approval on the petition for approval of location, and the corporation might then proceed with the construction of its road, after the performance of the formal requirements.

By c. 249 Public Laws of 1897, this sixth section was again amended by inserting a provision to the effect that any party of

record who is dissatisfied with such determination upon the question of whether or not public convenience required the construction of the road, might appeal therefrom to the Supreme Judicial Court, and the details in relation to such appeal were therein provided. This is the amendment under which this appeal was taken by the Portland Extension Railroad Company.

By c. 119 Public Laws of 1899, which is claimed to have repealed the act giving an appeal from the determination of the commissioners upon the question of public convenience, the whole of the amendment made by the previous legislature, relative to a determination by the commissioners of the question of public convenience and an appeal from their decision, upon this question, to the Supreme Judicial Court, was stricken out of that section. But the legislature of 1899, by the same act, made that same provision, relative to a determination by the commissioners of the question of public convenience, in almost identically the same language, a part of section three of the original act of 1893, and the provision of the act of 1897, relative to an appeal to this court, a part of that act in precisely the same language. So that that part of section three of the original act, which relates to the question here under consideration, is made to read as follows: "Any party of record who is dissatisfied with such determination (upon the question of public convenience) may appeal therefrom, at any time within fifteen days from the date of filing such certificate, to the supreme judicial court next to be holden in any county where any part of said railway is located, more than thirty days from the date of filing said certificate with said clerk as aforesaid, excluding the day of the commencement of the session of said court." And the identical language of the act of 1897, relative to an appeal by any interested party, in any case heard prior to the passage of that act, was retained and made a part of section three.

The effect of this act of 1899 is simply this: prior to that act, in accordance with section three as it formerly existed, it was the duty of the railroad commissioners to indorse their approval of the articles of association of such a corporation whenever they were satisfied that all the provisions of the two preceding sections had

been complied with. It was not their duty at that time to approve the location, or to determine the question whether public convenience required the construction of the road. They had nothing to do with either of these two questions at the time the articles of association were presented for approval, but before the corporation could commence the construction of its road, the location had to be approved, and the question of public convenience determined by the commissioners, subject to an appeal from their determination of the latter question, given by the act of 1897. That is, prior to the act of 1899, the corporation was organized, its capital stock subscribed, the necessary amount paid in and the articles of association approved by the commissioners, all before the question of public convenience arose. Now, by virtue of the amendments contained in the act of 1899, it is the duty of the commissioners to determine whether public convenience requires the construction of the road before they indorse their approval upon the articles of association.

But the right of appeal to the supreme judicial court from their determination of that question, is given now precisely as it was before, except that the question must be earlier decided in the proceedings. The sole apparent purpose of the legislature, in making these amendments, was to have the question of public convenience determined in the first instance when the articles of association are filed with the commissioners, and at the same time that they are to satisfy themselves that the provisions of the first two sections have been complied with, instead of later, and the right of appeal from their determination of this question is given as clearly by the amendment of 1899 as it was in that of 1897.

The latter act merely made a transposition of the entire provision relative to a determination of the question of public convenience by the commissioners, and an appeal from that determination, from the sixth to the third section of the original act, in order that this question should be finally passed upon before the organization of the corporation was fully perfected.

In the opinion of the court this transposition in no way affects the right of the appellant to prosecute its appeal taken under the

act of 1897, which right of appeal is given by the act of 1899 in identically the same language. It was not necessary for the appellant to take a new appeal merely because, under the present statute, the question must be earlier decided in the proceedings by the commissioners.

Exceptions overruled.

JOSEPH B. PEAKS, and another, *vs.* ORRIN P. MAYHEW.

Piscataquis. Opinion January 30, 1901.

Husband and Wife. Necessaries. Attorneys.

A wife who wilfully deserts her husband without his fault and against his will, forfeits all right to have her support from him, and carries with her no authority to pledge his credit even for articles which might be held necessaries if she had left for his fault.

There is no rule of law, or principle of justice, which will raise a presumption of agency in favor of a wife to enforce an obligation on the part of her husband, which for her own fault has ceased to exist.

Held; that the burden is upon the plaintiff seeking to recover for necessaries furnished to a wife who with plaintiff's knowledge is living apart from her husband, to show that they either lived apart by mutual consent, or that the separation was occasioned by the fault or misconduct of the husband.

With respect to the liability of the husband, no valid reason can be given for distinguishing legal services from medical attendance or from any other services or articles which cannot be excluded as a matter of law from the class of necessaries; and whether or not, in a given case, a wife living apart from her husband can pledge his credit for legal services rendered in her behalf by one who knows of the separation, must be determined as in the case of other services or articles classed as necessaries,—not primarily by the fact that the alleged necessaries or the means of obtaining them, have not been supplied by the husband, but by ascertaining whether or not the wife wilfully deserted her husband and lived apart from him without his fault, and thus forfeited her right to pledge his credit for necessaries.

Held; that a wife who lives apart from her husband by reason of her own adultery, and is under indictment for that offense, has no authority to pledge her husband's credit for the legal services of counsel who knows of the separation, although he is informed and believes that she is innocent of that charge.

In such a case, the liability of the husband is not to be determined by the personal knowledge of counsel respecting the guilt or innocence of the wife. By her own flagrant breach of her marriage vow and duty, she has forfeited all right to pledge his credit for necessaries of any kind. The counsel's knowledge that she is living apart from her husband and is under indictment for adultery, is sufficient to put him on inquiry to learn the cause of the separation, and if he afterwards renders services in her defense by her employment alone, he does so at his peril and the husband will not be liable.

ON EXCEPTIONS BY DEFENDANT.

The case appears in the opinion.

J. B. Peaks and E. C. Smith, for plaintiffs.

Counsel cited: *Artz* v. *Robertson*, 50 Ill. App. 27; *Conant* v. *Burnham*, 133 Mass. 505. The services of the attorneys in defending the husband's wife do not fall within the rule of necessaries which can or may be provided at the husband's home. The services are necessaries under a rule which does not apply to any other necessaries. *Warner* v. *Heiden*, 28 Wis. 517, (9 Am. Rep. 515); *Shepherd* v. *Mackoul*, 3 Camp. 326; *Morris* v. *Palmer*, 39 N. H. 123. To say that the wife should not have counsel because she was not living at home at the time she was arrested, would be to deny her the constitutional right to have counsel.

C. W. Hayes and W. E. Parsons, for defendant.

SITTING: EMERY, WHITEHOUSE, SAVAGE, FOGLER, POWERS, JJ.

WHITEHOUSE, J. This was an action to recover for professional services, rendered by the plaintiffs as attorneys at law, in conducting the defense of a criminal prosecution for adultery against the defendant's wife. She was indicted and tried jointly with her alleged paramour who employed separate counsel. There was evidence tending to prove that, at the time these services were rendered, the wife was living apart from her husband, and for some time prior thereto had been living apart from him without his fault and against his will, although he had furnished her a suitable home and requested her to remain there. There was also evidence tending to show that, at and before the time the services were rendered, the plaintiffs had knowledge that the wife had

separated from her husband, and it was not in controversy that they were rendered without any express promise on the part of the defendant to pay for them. The trial for adultery resulted in a disagreement of the jury, and the defendant's wife subsequently returned to her husband and renewed cohabitation with him. At the next term of court the government entered a nolle prosequi on the indictment.

It was contended in behalf of the defendant, as a matter of law, that if his wife was living apart from him without his fault and against his will, she thereby forfeited her right to receive support from him; and had no authority to pledge her husband's credit for the counsel fees in question, although the plaintiffs did not know that her separation from her husband was caused by her own fault.

But the presiding justice instructed the jury, inter alia, as follows: "Ordinarily, in regard to the more material things of life, a wife cannot pledge the credit of the husband when she leaves the home which he has supplied for her, and leaves at that home a suitable place where she could have lived and received the necessities of life for her comfort and support. It is not a necessity in such a case. But this rule does not apply to this particular case, where it is not sought to recover compensation for such material necessities which might or might not have been supplied at the home of her husband. But the wife being away from the husband, if it was reasonably necessary for her to have counsel, it then would be proper for her to pledge her husband's credit unless he supplied in some way counsel to defend her during her trial, or unless he provided means for her.

"If, in a case where the husband and wife were living apart, the husband should supply means to the wife to employ counsel and to pay counsel, then it would not be necessary for her to employ counsel with his credit, because she had means of her own with which to employ and pay counsel. . . ."

"So, then, the matter of separation, whether through fault of the husband or the wife: I instruct you for the purposes of this trial, is not a material question in the case except so far as I shall

hereafter allude to it and make an exception, because if you find that it was necessary, in the position in which she was last September, to employ counsel, to have counsel, then she would have a right to pledge the credit of her husband to pay counsel, unless he had employed counsel for her or furnished in some way or other means for her to make her defense. . . . .

"The only issue, perhaps, that is presented in this case then, as to the questions of liability under this instruction which I have given you, is as to whether or not the plaintiffs were employed by this woman upon the credit of her husband."

The instruction that it was not a material question in the case "whether the separation was through the fault of the husband or the wife," must be deemed an erroneous statement of the law applicable to this case.

As presented by the bill of exceptions, the instruction must be considered upon the assumption that the jury might have found that the defendant had furnished a comfortable home for his wife and supplied her with all the necessaries suitable to her situation and his own circumstances and condition in life, and that she abandoned this home and lived apart from her husband without fault on his part, against his will, and without any justifiable cause. Under such circumstances, it is a well-settled and elementary principle in the law of domestic relations, requiring no citation of authorities for its support, that a wife who thus wilfully deserts her husband without just cause, at the same time forfeits all right to have her maintenance and support from him, and carries with her no authority to pledge his credit even for articles which might be essential to her health, comfort and support, and therefore properly deemed necessaries for which the husband would be liable if she had left for his fault. But, by a wilful violation of duty on her own part, she relieves her husband from the observance of the marital obligation, which would otherwise rest upon him. There is no rule of law, or principle of justice, which would raise a presumption of agency in favor of a wife to enforce an obligation on the part of her husband which for her own fault has ceased to exist. In case of the wife's desertion of her husband, the presumption changes to the

side of the husband, and the burden is upon the plaintiff who seeks to recover for necessaries furnished the wife, with knowledge of the separation, to show that they either lived apart by mutual consent or that the separation was occasioned by the fault or misconduct of the husband. Schouler's Domestic Relations, p. 93; 1 Chitty on Cont. 248; 15 A. & E. Enc. of Law, (2 ed.) p. 888, and authorities cited; 1 Bishop on Mar. and Divorce, § 570; *Benjamin* v. *Dockham*, 132 Mass. 181; *Brown* v. *Mudgett*, 40 Vt. 68; *Thorne* v. *Kathan*, 51 Vt. 520; *Walker* v. *Simpson*, 7 Watts. & Serg. 83 (S. C. 42 Am. Dec. 216). The rule is as well sustained by reason and justice as by authority; for it is manifest that the opposite doctrine would necessarily tend to break down the reasonable and salutary restraints imposed by the solemn compact of marriage, and thereby defeat, in a large degree, the great moral and social purposes which the conjugal union was designed to subserve.

In *Thorne* v. *Kathan*, 51 Vt. supra, the plaintiff sought to recover for medicine furnished to a wife on a physician's prescription, while she was living apart from her husband, under circumstances from which it did not appear that the separation was caused by the fault of the husband; and it was held that the wife could not pledge the husband's credit for medicine thus furnished, and judgment was accordingly rendered for the defendant. In the opinion the court say: "There is and can be no dispute as to the law governing this subject. . . . . When the wife abandons her husband's bed and domicile 'unbeknown to him,' and makes her abode and home elsewhere, she does an act inconsistent with conjugal rights and duties; she deserts her duties and abandons her rights, and does not carry with her her husband's credit, unless she show that this estrangement is caused by the fault of the husband."

It was not questioned in that case that medical attendance and medicines properly belonged to the class of necessaries, nor that the medicines furnished by the plaintiff were in fact necessary for the proper treatment and relief of the defendant's wife; and it was not claimed that he had furnished her with any means to obtain the medicines without pledging his credit for them; but as she had

abandoned her home and was living apart from her husband without his fault, she thereby forfeited her right to pledge his credit even for necessaries.

It is equally well established in both England and America that legal services may under some circumstances properly fall within the class of necessaries for which the husband may be liable. *Ottaway* v. *Hamilton*, 3 C. P. D. 393; *Wilson* v. *Ford*, L. R. 3 Ex. 63; *Conant* v. *Burnham*, 133 Mass. 503. But no case has been cited by counsel, or otherwise brought to the attention of the court, in which either medical attendance or legal services furnished to a wife while she was living apart from her husband without his fault and against his will, have ever been declared to be necessaries for which, under such circumstances, she could pledge the credit of her husband without his consent. In *Conant* v. *Burnham*, 133 Mass. supra, it inferentially appears that the wife was living with her husband, but had sufficient cause for leaving him; for he had committed an assault and battery upon her and instituted a criminal prosecution against her, and the court deemed it no hardship to require him to pay for legal services rendered in the defense of his wife when his own act had created the necessity for them. In *Wilson* v. *Ford*, L. R. 3 Exch. 63, supra, the husband had possessed himself of all his wife's property and deserted her without notice, leaving her in the house in which she had been living with him unprovided with the means of subsistence. Under these circumstances, the expenses of a suit by the wife to obtain subsistence and a restitution of her conjugal rights, were properly held to be "necessaries" for her. In *Ottaway* v. *Hamilton*, 3 Com. P. Div. 393, the plaintiff was a solicitor employed by the wife to obtain a divorce from her husband on the ground of cruelty and adultery. The divorce was granted, and it was simply held, that the plaintiff had a common law right to sue the husband for expenses incurred beyond the taxable costs in the divorce proceedings, as for "necessaries" supplied to the wife.

In 1 Bishop on Mar. & Div. § 554, the author says: "In general, we may say, that necessaries are such articles of food or apparel or medicine, or such medical attendance or nursing, or such

provided means of locomotion, or provided habitation and furniture, or such provision for her protection in society, and the like, as the husband, considering his ability and standing, ought to furnish to his wife for her sustenance and the preservation of her health and comfort."

In *Conant* v. *Burnham*, 133 Mass. supra, an attempt was also made to define the term necessaries as "whatever naturally and reasonably tends to relieve distress, or materially and in some essential particular, to promote comfort either of body or mind."

But whether or not articles or services which cannot be excluded as a matter of law from the class of necessaries, may reasonably be deemed necessaries in a given case when furnished to a wife living apart from her husband, must be determined by the jury as a matter of fact upon the special circumstances of that case. *Raynes* v. *Burnett*, 114 Mass. 424.

It is manifest, however, from all of the foregoing, that with respect to the liability of the husband, no valid reason can be given for distinguishing legal services from medical attendance, or from any other services, or articles which cannot be excluded as a matter of law from the class of necessaries; and whether or not, in a given case, a wife living apart from her husband can pledge his credit for legal services rendered in her behalf by one who knows of the separation, must be determined as in the case of other services or articles classed as necessaries,—not primarily by the fact that the alleged necessaries or the means of obtaining them have not been supplied by the husband, but by ascertaining whether or not the wife wilfully deserted her husband and lived apart from him without his fault and thus forfeited her right to pledge his credit for necessaries. Whether or not the separation is caused by the fault of the husband or the wife is, therefore, not only a "material question" but the decisive test in determining the liability of the former for necessaries furnished the wife while living apart from her husband.

It also appears from the charge that the presiding justice further instructed the jury as follows:

"I say that there is an exception to this. If she has left her

husband by reason of her own adultery and the counsel she employs, or seeks to, upon the credit of her husband knows that she is guilty of adultery and has left her husband by reason thereof, then he cannot be employed upon the credit of the husband. But, if she has left by reason of her own adultery and the counsel employed does not know that, is informed and believes that she is innocent, and is employed upon the credit of her husband, then the husband is liable."

For the reasons already given in support of the conclusion upon the first proposition, this instruction must also be deemed erroneous. A wife who lives apart from her husband by reason of her own adultery, and is under indictment for that offense, has no authority to pledge her husband's credit for the legal services of counsel who knows of the separation, although he is informed and believes that she is innocent of that charge. In such a case, the liability of the husband is not to be determined by the personal knowledge of counsel respecting the guilt or innocence of the wife. By her own flagrant breach of her marriage vow and duty, she has forfeited all right to pledge his credit for necessaries of any kind. The fact that the counsel whom she seeks to employ has knowledge that she is living apart from her husband and is under indictment for adultery, is sufficient to put him on inquiry to learn the cause of the separation, and if he afterwards renders services in her defense by her employment alone, he does so at his peril and the husband will not be liable. 1 Chitty on Cont. 250, and cases cited; *Walker* v. *Simpson*, 7 Watts & Serg. supra; 2 Kent's Com. 147; 1 Bishop on Mar. & Div. 620.

The fact that the defendant condoned any misconduct on the part of his wife by receiving her back, and resuming cohabitation with her, is not a ratification by him of her employment of counsel while she was living apart from him without his fault, and does not render him liable to pay for the services then rendered. *Oinson* v. *Heritage*, 45 Ind. 73 (S. C. 15 Am. Rep. 258); 1 Chitty on Cont. 250; 1 Bishop on M. & D. 577.

Exceptions sustained.

HERBERT W. TRAFTON, Appellant, In re Scates, Insolvent.

Aroostook. Opinion January 31, 1901.

Insolvency. Appeal. R. S., c. 70, §§ 12, 25.

By R. S., c. 70, § 12, it is provided that "no appeal in insolvency lies in any case under this chapter unless specially provided for herein."

Held; that an attorney who rendered services to the assignee of an insolvent, and whose claim therefor has been denied by the court of insolvency, has no right of appeal from the decision of that court.

Nor is such claim a "debt, claim or demand" under § 25 of the insolvent law, existing at the time of the filing of the debtor's petition and provable against the insolvent's estate; but is an indebtedness incurred by the assignee in the liquidation of the affairs of the insolvent's estate.

ON REPORT.

The appellant, a member of the bar of Aroostook county, having been employed by the assignee, in insolvency of the estate of Eben E. Scates, presented to the judge of the court of insolvency a bill for services rendered by him in preparing for trial and trying a case against the estate of the said Eben E. Scates. This bill was disallowed by the judge of the court of insolvency, who indorsed on the petition for its allowance and payment from the funds of the estate his decision as follows:

"Within petition is denied and refused. The allowance of within bill of $50 being a matter of discretion, I therefore disallow the same."

The report did not disclose whether the services rendered were for the benefit of the insolvent personally, or to resist a claim against his estate.

The claimant thereupon took an appeal to this court.

H. T. Powers, for appellant.

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

WHITEHOUSE, J. The appellant, an attorney at law, was employed by the assignee in insolvency of Eben E. Scates, to defend

an action at law pending in the Supreme Court against the insolvent debtor. For the professional services rendered in pursuance of this employment, he presented a bill to the court of insolvency. The bill was disallowed by that court, and thereupon the appellant duly claimed an appeal to the Supreme Judicial Court. By agreement of the parties the case now comes on report to the law court, and the sole question for its determination is whether or not the appellant has the right to appeal from such a decree of the court of insolvency.

It is provided in section 12 of chapter 70, R. S., that "No appeal in insolvency lies in any case arising under this chapter unless specially provided for herein," and it is the opinion of the court that the attempted appeal in the case at bar is not one of those provided for by the insolvent law.

Section 25 of chapter 70 above named provides for an appeal to the Supreme Court from the decision of the judge of the insolvency court, "allowing or disallowing in whole or in part any debt, claim or demand against the debtor or his estate"; but the words "any debt, claim or demand," in this statute must be considered with reference to the specific meaning attached to each of the words "debt," "claim", or "demand" in the preceding instances in which they have been severally used in the same section of the statute, and thus interpreted in accordance with the rules suggested by the maxims, noscitur a sociis and ejusdem generis. Associated words are properly held to take their color from each other, the more general receiving a meaning analogous to the less general. Endlich on Inter. of Statutes, § 400. The first sentence of section 25 of the statute in question, provides that "all debts due and payable from the debtor at the time of the filing of the petition by or against him, and all debts then existing but not payable until a future day . . . . may be proved against the estate of the insolvent." And in every instance in which the word debt, claim or demand is employed in this section, prior to the last sentence, it is descriptive of a debt or claim existing at the time of the filing of the petition, and provable against the estate of the insolvent.

The claim of the appellant, in this case, was not a debt existing

at the time of the filing of the insolvent's petition and was not provable against his estate. It was an indebtedness incurred by the assignee in the liquidation of the affairs of the insolvent estate.

If otherwise justified, it would have been an appropriate charge in the assignee's account rendered to the court of insolvency; and if not allowed by that court, the assignee might have been personally liable to the counsel employed. In this respect he occupies a position similar to that of executors and administrators, who are allowed in their accounts a reasonable sum expended for professional aid where legal counsel appears to have been necessary to protect the interests of the estate. Such an allowance to executors is expressly authorized by statute in this state, but the practice is equally well established by the decisions of the courts in the absence of any statute. *Forward* v. *Forward*, 6 Allen, 497.

In the case at bar the appellant's claim for professional services does not appear to have been stated in the assignee's account, but was presented to the court in a separate petition. This petition was "denied and refused," and the claim "disallowed" by the judge of the court of insolvency. From such a decision no appeal is given by the statute.

The entry must therefore be,

Appeal dismissed.

CHARLES A. JONES, Trustee in Bankruptcy,

vs.

JOSEPH A. STEVENS.

Penobscot. Opinion January 31, 1901.

Bankruptcy Act, 1898, §§ 1, 31, a, 67, f. Attachment. Time.

An attachment made at ten o'clock in the forenoon, on the ninth day of September, 1898, against a person who is insolvent, is dissolved by the filing of a petition in bankruptcy, by or against the person whose property is attached, in the office of the U. S. District Court, on the ninth day of January, 1899, at 2.30 o'clock, in the afternoon, providing he is subsequently adjudged a bankrupt, under the provisions of the Bankruptcy Act of 1898, to the effect that all levies, judgments, attachments or other liens, obtained through legal proceedings, against a person who is insolvent, "at any time within four months prior to the filing of the petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt."

The computation of time in all cases arising under the Bankruptcy Act is regulated by a provision in the act to the effect that, "the number of days shall be computed by excluding the first and including the last." In order to determine whether or not the attachment was within four months prior to the time of the filing of the petition, it is necessary to reckon back from the ninth day of January, 1899; so reckoning, the ninth day of January is the first day and must be excluded in accordance with the provision of the act above referred to. Excluding that day, the ninth day of the preceding September is clearly within the four months prior to the filing of the petition.

Held; that the clause of the act which provides, "that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry," is not applicable to this case; because the suit is not against the purchaser, but is against the deputy sheriff who, upon an execution against the bankrupt, seized goods as the property of the bankrupt which at the time were the property of the plaintiff, as trustee, by virtue of the bankruptcy proceedings, the attachment upon the original writ having been made within four months prior to the filing of the petition in bankruptcy.

Westbrook Mfg. Co. v. *Grant*, 60 Maine, 88, explained.

ON REPORT.

Agreed statement.

The case appears in the opinion.

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

J. B. Peaks and E. C. Smith, for defendant.

Counsel cited: *Westbrook Mfg. Co.* v. *Grant*, 60 Maine, 88; *Bigelow* v. *Wilson*, 1 Pick. 485; *Wilton Mfg. Co.* v. *Butler*, 34 Maine, 440.

The trustee took the property of the bankrupt Weymouth subject to the lien under our attachment, if the lien attached more than four months prior to the filing of the bankrupt's petition, as we claim it did in this case. *Voyles* v. *Parker*, 4 Fed. Rep. 210; *Bowman* v. *Harding*, 56 Maine, 559; *Leighton* v. *Kelsey*, 57 Maine, 85; *Perry* v. *Somerby*, Id. 552.

The only proper construction, which can be placed upon the conflicting sections of the bankruptcy act relating to liens by attachment, will be that the lien attaches and relates back to the time of the attachment.

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

WISWELL, C. J. This is an action of trover, wherein the plaintiff is the trustee in bankruptcy of Moses S. Weymouth, bankrupt, and the defendant is a deputy sheriff who attached the goods, the conversion of which is sued for, upon a writ against Weymouth.

The only question presented is whether or not the attachment was dissolved by the subsequent proceedings in bankruptcy. The attachment was made on the ninth day of September, 1898, at ten o'clock in the forenoon. Weymouth's voluntary petition in bankruptcy was filed in the clerk's office of the U. S. District Court, in this District on the ninth day of January 1899, at 2.30 o'clock in the afternoon. He was duly adjudged a bankrupt, January 14, 1899. No question is raised as to his insolvency at the time of the attachment.

Section 67, subdivision f, of the Bankruptcy Act of 1898, so far as applicable, is as follows: "That all levies, judgments, attachments, or other liens, obtained through legal proceedings, against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed

null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt," etc.

It will be noticed that the language of the section is, "at any time within four months prior to the filing of a petition in bankruptcy against him." But this section must be construed as including voluntary, as well as involuntary cases, because of the first section of the act, relating to the meaning of words and phrases, which provides: "A person against whom a petition has been filed shall include a person who has filed a voluntary petition." *In re Richards*, 96 Fed. Rep. 935; *in re Vaughan*, 97 Fed. Rep. 560.

The only question, then, is whether or not this attachment made on September 9, 1898, at ten o'clock A. M. is "within four months prior to" January 9, 1899, at 2.30 o'clock P. M., the time of the filing of the petition. If it is within the four months prior to this time, the attachment has been dissolved and the action is maintainable, otherwise not.

It is unnecessary to consider the general rule as to the computation of time, or the authorities in relation thereto, among which there is much difference of opinion; because, by a section of the bankruptcy act, congress regulated the method of computing time whenever time is to be computed according to the provisions of that act. That section is as follows: "Sec. 31, Computation of time—a. Whenever time is enumerated by days in this act, or in any proceedings in bankruptcy, the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday."

This rule provided by congress for the computation of time is decisive of the question involved. In order to determine whether or not the attachment was within four months prior to the filing of the petition, we must reckon back from the 9th day of January, 1899; reckoning backward, the ninth day of January is the first

day, and, in accordance with the rule above referred to, must be excluded. Excluding that day, the 9th day of the preceding September is clearly within the four months prior to the filing of the petition.

This result is in accordance with the construction by the United States Supreme Court of similar provisions in the Bankruptcy Act of 1867. In that act the rule in relation to the computation of time enacted by congress was that the same "shall be reckoned, in the absence of any expression to the contrary, exclusive of the first and inclusive of the last day, unless the last day shall" be dies non within the judicial sense. By that act it was also provided that transfers of property made by an insolvent debtor, "within four months before the filing of the petition in bankruptcy against such debtor" should be under certain circumstances void.

In the case of *Dutcher* v. *Wright*, 94 U. S. 553, the petition in bankruptcy was filed April 8, 1870; a transfer of property had been made by the bankrupt upon the 8th of December of the preceding year. The principal question in the case was, whether this transfer of property upon the 8th of December was "within four months before the filing of the petition in bankruptcy." The court decided that, in computing the four months before filing the petition in bankruptcy within which time the assignment of his property by an insolvent debtor, with a view to give a preference to a creditor, is void, the day upon which the petition is filed must be excluded. In its opinion the court spoke of the confusion of authorities upon the question of the computation of time, but, referring to the provision of that act relative to such computation said, "the court is unanimously of the opinion that the day the petition in bankruptcy was filed must be excluded in making the computation."

In view of the similarity of the provisions in the two Bankruptcy Acts, we must consider this construction of the provisions in the Act of 1867 by the Supreme Court conclusive upon this question now presented, even if we had not come to the same conclusion irrespective of that decision.

In the case of *Stevenson*, 94 Fed. Rep. 110, the District Court of Delaware held that under the provisions of the present Bankruptcy Act, the four months after the commission of an act of bank-

ruptcy within which a petition in involuntary bankruptcy must be filed, are to be so computed as to exclude the day on which the act of bankruptcy was committed. The court refers to the similar provisions of the two Bankruptcy Acts relative to the computation of time, and holds that there is no difference in the meaning of the two provisions. Reference is also made to the case of *Dutcher* v. *Wright*, supra, and it is said that that decision must have been founded on the ground, "that the specification of a number of months from an event was equivalent to an enumeration of the days contained in those months, as applied to a given case. Whatever force was given to section 5013 in *Dutcher* v. *Wright*, must be accorded to section 31 in the present case."

Moreover, in this case, the 8th of January, 1899, fell upon Sunday, and even if it should be held that under other circumstances the petition must have been filed upon the 8th of January, in order to make the attachment on the 8th of September preceding within the four months, it would not be so here under section 31 of the Bankruptcy Act, above quoted, because of that fact.

The defense strongly relies upon a decision of this court in the case of *Westbrook Manufacturing Company* v. *Grant*, 60 Maine, 88, wherein it was held under the Bankruptcy Act of 1867, that an attachment made March 8, 1867, at seven o'clock in the afternoon, was dissolved by proceedings in bankruptcy commenced July 8, 1867, at two o'clock and fifty minutes in the afternoon. The court saying in its opinion: "We think the computation in this case should commence on the 8th of July 1867, at two o'clock and fifty minutes in the afternoon, that being the precise time when the proceedings in bankruptcy were commenced, and by then reckoning backward four calendar months we shall reach the eighth of March 1867, at the same hour of the day, namely, two o'clock and fifty minutes in the afternoon." The court held that the maxim that in law there are no fractions of a day does not apply to proceedings in bankruptcy, where the exact time when the event occurred is made certain by record.

The argument is, that while the computation in that case, by considering fractions of a day, brought the attachment within four months by a few hours, if the same method should be adopted in

this case, the attachment must be held to have been beyond the four months prior to the filing of the petition, by a few hours. With reference to this case it is sufficient to say that the result was unquestionably correct; and it is unnecessary to consider the reasoning of the opinion because the section of the Bankruptcy Act relative to the computation of time was apparently not called to the attention of the court, nor considered by the court, and the construction of that section by the United States Supreme Court in the case of *Dutcher* v. *Wright*, supra, was some four years later.

It is further suggested by counsel for defendant in argument, that this attachment was not dissolved by the proceedings in bankruptcy, because of the last clause of section 67 subdivision f, which is as follows: "Provided, that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry." The case shows that the goods described in the plaintiff's writ, having been attached as before stated, were seized by the defendant on an execution issued upon a judgment obtained in the suit wherein the goods were attached, and that they were sold by the defendant at public auction on March 2, 1899. So far as the case shows, the purchaser bought the same in good faith for value, without notice, or reasonable cause for inquiry, either of the bankruptcy of Weymouth or of his insolvency at the time of the attachment.

But the answer to this is, that the suit is not against the purchaser, but is against the deputy sheriff who, upon an execution against Weymouth, seized goods as the property of Weymouth which at the time were the property of the plaintiff, as trustee, by virtue of the bankruptcy proceedings, the attachment upon the original writ having been made within four months prior to the filing of the petition in bankruptcy.

We, therefore, hold that the action is maintainable by this plaintiff. In accordance with the stipulation of the parties, the defendant will be defaulted and the case remanded to nisi prius for the assessment of damages.

So ordered.

IN MEMORIAM.

PROCEEDINGS BEFORE THE LAW COURT, HELD IN PORTLAND, SATURDAY, AUGUST 5, 1900, IN RELATION TO THE DEATH OF THE

HONORABLE CHARLES WESLEY WALTON,

WHO WAS AN ASSOCIATE JUSTICE OF THIS COURT, FOR THIRTY-FIVE YEARS, AND DIED AT HIS RESIDENCE IN PORTLAND, JANUARY 24, 1900, IN HIS EIGHTY-FIRST YEAR.

SITTING: WISWELL, C. J., EMERY, HASKELL, WHITEHOUSE, STROUT, SAVAGE, FOGLER, POWERS, JJ.

Hon. Henry B. Cleaves, President of the Cumberland Bar, announced the death of Mr. Justice WALTON and moved the court for a suspension of business in order that members of the bar might address the court in his memory. Hon. Joseph W. Symonds arose and said:

May it please the court:

The announcement of the President of the Bar brings directly to Your Honors' attention the fact, of which the court is only too deeply sensible, that since the last session of our law term here a life has closed, long identified with the jurisprudence of Maine, crowned with usefulness and honor, leaving to the court the tradition of great judicial achievement and fame.

Silently, or with words that have in them all the reverence of silence, would the bar of the State approach Judge WALTON'S grave. Long memories draw us there, and throng upon us while we linger; memories of the intimacies of personal and professional relations, of early manifold kindness, of the inspiration of his influence and example, of his life lived throughout on a high

intellectual plane, of legal learning subtle, delicate and discriminating as it was broad and profound, of reason and judgment luminous by study and thought, of continued, varied, splendid service to the State, not only in the ordinary routine of the courts, but when the stress of extraordinary occasion sounded like a trumpet-call.

Such recollections, swift-winged messengers of the past, press upon us at the present hour, calling us away from the daily task to the things of memory, unreal now, it may be, but noble and inspiring still, bright with clustering associations as the night with stars.

We make no vain attempt, by words of ours, to add to the greatness or reputation of Judge WALTON. The court will feel with us how far that is from our thought. His works are his monument. It may well be said of him that he lies at rest within the walls of the Temple of Justice on which the labor of his life was spent; as Wren sleeps under the dome which his genius hung in air; as the crusader lies buried beneath the pavement of his old Temple Church. The foundations of the solemn, shadowy pile are safer, here and there it lifts itself into grander outline, to statelier height, for the work that he did upon it; within its sanctuary, he may well rest in peace.

"Sepulchred in such pomp," if we may use Milton's phrase, as he uses it, of intellectual things, "sepulchred in such pomp," he needs no language of eulogy, nor "the labor of an age in piled stones nor star-y-pointing pyramid, as the weak witness of his name."

His works are his monument. The volumes of opinions which Judge WALTON wrote for the court, many of them in it most important and difficult causes, all adequate to their purpose, some of them master-pieces of juris-prudence and reason, will be the imperishable memorial of the great lawyer and judge, when the voices of all other witnesses have long been hushed in the last silence. To a late posterity, they will tell of a man of heroic mould, trained and disciplined by severe methods, knightly in all intellectual controversy, with lance which no mail could shiver, with burnished armor on which even in old age no rust gathered, the full panoply of professional ability and attainment. Wherever

he sleeps in death it should be as the knight in armor. There was never haughtier, or more fearless champion than he.

In his memoir of Chief Justice MELLEN, written from Cambridge in 1841, Professor Greenleaf refers to the "graceful liberality and good taste exhibited by gentlemen of what we now with melancholy truth denominate 'The Old School.'"

There was something of the old school about the learned and distinguished judge whose memory we would honor to-day. He was a man of simple, almost severe, tastes and manners; his life was from within, of the mind and heart; not servile to external impressions nor fond of vulgar display. He would have liked the spirit of the saying of Demosthenes, speaking to the people with the temples and statues of Athens about them: "Our ancestors were not inspired by the desire of wealth, but by the love of glory. Therefore, they have left us immortal possessions, the memories of illustrious deeds and the beauty of these monuments commemorating them."

Judge WALTON may not always have been disposed to keep pace with the movements of our swiftly changing society. It is doubtful if our wide departure from the simplicity and equality of early times would have appeared to him to be altogether good. How light in the balance, in his estimation, would have seemed what Emerson calls Nevada's "golden crags," in comparison with the truth and the scope of a far-reaching general principle of justice and law!

In his own way he would have liked the good taste and the graceful liberality of earlier times. He was a man to delight in all the fine things of human experience. Intellectual achievement, excellence of attainment or accomplishment, were always the passport to his sympathy and respect.

It is far from our purpose to attempt to state distinguishing excellencies among members of our court, living or dead. The occasion is not suited to such comparison, nor should we take any pleasure in making it. It is enough to say that by right of his work, of what he has done, Judge WALTON takes his place among the best of our New England judges, sustaining the highest tra-

ditions of our courts, realizing, as ideals are realized in this world, the noble ideal of the jurist. In legal learning, reasoning or style, he stands rightfully among the foremost of the members of the bench, and his name shines among the brightest at the bar. At the height on which he dwelt, the judicial atmosphere was transparent and unclouded. The view was not only broad but singularly minute and exact; no detail was unobserved. He was fond of the law, loved to follow the silken thread through the mazes of labyrinthine facts, and the intellectual triumph of methods and results which vindicated themselves was his reward. He lived in the upper regions, where there was neither mist nor exhalation to obscure the view. All the lore of the law was familiar to him. Thought glowed in his brilliant sentences. "While he mused, the fire burned." The last results of analysis were stated simply, in the clearest way.

It was a rash man who attempted to urge upon Judge WALTON an argument in which he did not himself believe. His very glance seemed to pierce to the depths of your own consciousness, and, in whatever costly garb you clothed a fallacy, a single word from him left it naked and ashamed. The great common lawyer, the inflexible, indomitable man, as capable of great action as of profound thought, lifting readily and easily any legal or judicial burden that time or place might lay upon him, what wealth of knowledge, what fertility of resource, what subtlety and clearness of reason, what wise forecast of chances and probabilities, he brought to the discharge of the duties of his high office! His place as a man of intellect and an associate justice is among the loftiest judicial heights in all the range.

I have read that in the paintings of the English artist, Turner, critics observe a change of style at successive periods. In early life, he was a patient student of the works of his predecessors, Wilson, Gainsborough and others, elaborating the details of nature with a sobriety, almost a coldness, of coloring. In this way the cunning of the hand was acquired and great familiarity with the laws of art. His later style shows little trace of the influence of the earlier masters, illustrating rather the originality, perhaps the

audacity, of his own genius, making the canvas glow with marvelous effects of diffused light.

I think we see something like this in the opinions of Judge WALTON. In the earlier stage we observe the wide and diligent reading of the student. An apposite authority or precedent is cited for every sentence that might be controverted. But there came a time when practically his learning had exhausted the authorities; when they could teach him little more of the general principles of law.

Then began his later style, with which the court and bar have in recent years been more familiar. The losing party, plaintiff or defendant, was startled as by an electric shock when a full statement of his case and claim was followed by the words, "We think not;" but the brief, clear, direct and exact statement of the reasons for the conclusions of the court, which succeeded these words, ordinarily reconciled counsel for the defeated suitor to his fate as well as could reasonably be expected. It was the style, no longer of the student, but of the master. It was the voice of one in authority saying, "This is the law;" and with Judge WALTON'S thorough investigation of the case itself and universal knowledge of legal principles, I apprehend no form of opinion could be better. With what force he used these words! They were the key-stone of the arch, deeply laid, solidly built, each stone fitting faultlessly in its place.

At the trial terms, some similar expression occasionally made heavy the pathway of presumption or pretense, or closed it altogether. He was considerate of the honest failures of youth and inexperience--no judge was more kind to young men than he—but he did not like noise and effrontery as substitutes for legal learning, and he could distinguish between the two with the utmost ease and grace. In a case which called for it, a sentence from the court was sometimes like the fabled decapitation by the Damascus blade, painless, but so swiftly fatal!

I hope the time will come when our countrymen will have a truer appreciation and therefore a higher estimate, than now, of the value of the labors of the men who devote their lives to shaping the guid-

ing principles of conduct in human society, to doing this from the vast deposit, like the wealth of quarries or mines, in the learning, thought and experience of the past; and at the same time to applying such rules of action with more and more accurate knowledge and juster discrimination, in the clearer light of modern times, to the problems of advancing civilization, increasing intercourse, wider commerce, larger and more varied business interests, subtler rights of property, multiplied and diversified industries, and to all the relations of a complicated society throbbing with busy life, pursuing its aims restlessly as with fever in a myriad fields.

The opinions of Judge WALTON not only declared justice and right between contending suitors, but they set here and there great landmarks of the law by which all may guide their way. What doubts and difficulties have been removed, what dark places have been enlightened, by his efforts! What noble contributions he made to the symmetry and philosophic soundness of our progressive judicial system, and how admirably he illustrated the genius and learning which should be manifest in the decisions of our courts of last resort. A better and truer system of law prevails in Maine than would have been in force if he had not lived. For more than three decades of our State history, there was never a time when his guiding hand was not felt or when his words of wisdom did not shape decisive action. The state of Maine may well draw near, "of the most sad," at the grave of Judge WALTON. To no man in her whole history can the State ever be more deeply indebted than to the good judge, of ripe learning and experience; of clear judgment, of long and great service.

May it please the Court:

As chairman of the committee of our bar, appointed for this purpose, in its behalf and by its direction, I have the honor to present to the court the following transcript from the proceedings of the bar upon the announcement of Judge WALTON'S death, with the respectful request, if Your Honors please, that the same may be received by the court and may be extended at length upon the judicial records.

The bar desires to present to the court this brief memorial of the late learned and honored judge, CHARLES WESLEY WALTON, who for thirty-five years, by re-appointment for the unprecedented period of five successive terms, laboriously, faithfully and with distinguished honor served the court and his native state, as an associate justice; and during the whole period, from first to last, justly commanded the profound respect of his associates upon the bench, of the members of the legal profession throughout the State and of all its citizens; a profound respect broadly and securely based upon his great intellectual gifts, his high character and his rare professional attainments.

He was a man of great and impressive personality, undaunted in any presence, with whose dignity no one ever ventured to trifle. His intellectual endowment was strong and fine, faultlessly clear in its perceptions, wide and comprehensive, firm in its grasp, dealing with the most delicate discrimination with the details of contested cases. His mind delighted in close and severe reasoning and analysis and his judgment were tremulously sensitive to all considerations until it felt the attraction of the steady poles. His legal learning was the golden harvest of a lifetime of industry and diligence. Of honorable motive and conduct, incorruptible, he had the moral courage which comes from the consciousness of right.

His personal character left its lasting impression upon all who came within its beneficent influence.

He adorned the bench, he honored his profession and enriched the State by his lofty example and pre-eminent public service.

He gave his life to the State. The period which followed his retirement from the bench was but a brief respite from labor, a time for well-won repose. His great work was done. The retrospect of life must have afforded him serene satisfaction. He could look back upon a pre-eminently useful career, rounded and complete, without stain or blemish. It was a noble sunset of life and we may well believe that all philosophic and religious serenity attended him in it. The ripe wealth of the harvest gathered, replete with honor and with all the satisfactions of a well-spent life, the day's work done, the shadows fell slowly, softly as the summer

twilight, and within the shadows the stars appeared. This last service of affection and memory only remains for us, to honor ourselves by our appreciation of his great career, rich and eminent in all judicial achievement, and of the value of the legacy his life and services have left to our profession and State; so that we and those who come after us may be encouraged to emulate his example, and, so far as in us lies, to walk in the same high path, striving for excellence and merit for themselves, not for the reputation which may accompany them, remembering that fame does not "in broad rumour" lie, but rather "follows faithful service as the fruit."

> "As He pronounces lastly on each deed,
> Of so much fame in heav'n expect thy meed."

Eloquent eulogies were then delivered by Hon. Josiah H. Drummond and Hon. David D. Stewart, followed by

Remarks of HON. GEORGE C. WING, who said, in part:

I enjoyed the acquaintance of Judge WALTON from the time I was called to the bar until the day of his death. It was by his direction that I was admitted to the bar at the April term in Androscoggin county, in 1868. I shall never forget the encouragement he then gave me by his kind expressions, and I feel that I have a right to say that I always enjoyed his confidence and received his attention.

He was remarkably kind towards young men, patient, tolerant and indulgent, if mistakes arose from inexperience instead of listless indolence, and if they paid attention to his suggestions they were certain to be benefited. I cannot look back to a time when I did not regard him a most remarkable man.

He was an ideal judge in his looks, in his dignified carriage, and even in the intonation of his voice. He not only impressed the lawyer and advocate by his presence and great mental resource, but men in every condition of life from the highest to the humblest at once regarded him as a great man and a great judge.

He never for an instant lost sight of the fact that it was expected of him to maintain the dignity of the highest court in the State and to make its rulings respected and its elevated position observed;

never haughty or supercilious, but always approachable by every one whose business made it necessary to communicate with him.

He was a close student of human nature, and was rarely mistaken in his estimation of men, and his long and varied experience enabled him to deal rationally and reasonably with men who, from lack of reading, education and experience, were narrow and bigoted.

Judge WALTON was careful to see that all private rights of person and property were kept inviolate. Any encroachment upon these met his prompt disapproval and rebuke.

During the period that Judge WALTON served our State upon the bench, there was a constant development in every sphere of life, mechanical, mercantile and professional, and it can be truthfully said of him that by his industry he kept himself fully informed on all current topics, and was always found familiar with such well considered articles as had formed a basis of the most correct public opinion; and no man who appeared before him was advanced enough in any line to hazard the claim that Judge WALTON was not in every sense fully abreast of the times.

But why address the court in language descriptive of his public life and character, when a moderate and candid statement concerning his public services would seem to one unacquainted with the man as fulsome and excessive?

As has been said of him before, his opinions published in the Maine Reports, extending from the 49th to the 90th volume, both inclusive, and numbering 596, make the record of his life as a jurist ample and secure.

"But Nature waits her guests to greet."

MR. JUSTICE EMERY responded in behalf of the court as follows:

Brethren of the Bar:

The members of the court have listened with sympathetic interest to the tributes of the members of the bar to the character and services of our valued and lamented associate. Little, if anything, can be added to what has been so well said, but we cannot let the occasion pass without some response upon our part to show our

sympathy with the bar in appreciation of the man and the judge. By reason of my longer judicial association with him and of my succession through the flow of time to the seat so long occupied by him, I have been requested by the Chief Justice to attempt that purpose.

Matthew Arnold and Robert Browning, friends as well as poets, after a conversation upon Tennyson's In Memoriam, mutually promised that either's memorial of the other should be without eulogy and not more than ten lines in length. Such was the directness and simplicity of our deceased associate, I am sure he would have approved of such a covenant with his judicial associates and would be well pleased by its observance. He believed with the great poet, that "an honest tale speeds best, being plainly told."

Of the many interesting features of his life and work I will therefore speak of but one,—his distinctive influence upon this court, of which he was an eminent member for thirty-five years, a length of service remarkable in judicial annals.

Mr. Justice WALTON came upon the bench almost a pure lawyer. He had not been prominent in politics, business or scholarship. He had not become identified with any special interests. His practice had not become specialized, but had been that of the general practitioner covering the whole field of the law. His brief term in congress, he has assured me, was distasteful to him in that the duties were not sufficiently lawyerlike, and he early and gladly left the field of politics and even statesmanship for the more congenial field of judicial labor. Less, therefore, than that of most men at their first coming upon the judicial bench, was his lawyer's vision obscured by opinions derived from abstract studies,—from association with particular interests,—or from experience in other fields of public service. His views of abstract jurisprudence, of what ought to be the law, but little clouded his perception of what the law actually was. Some of my present associates can recall with me instances in the consultation room when he would listen to some elaborate exposition by a junior justice,—commend it as learned, philosophical and even logical, but close with the familiar and characteristic phrase: "Such is not the law." Then in few,

forceful words he would insist on what he deemed to be the actual, authoritative rule.

Indeed, to hold the court to what the law actually was seemed to be his unconscious mission, and we may frankly confess there is scope for such a mission in every modern court. It cannot be denied that personal opinions upon public or private rights and duties,—upon the equities or abstract right and wrong of the particular matter,—often make it difficult for a judge, at least in his first years of service, to see clearly that the positive, governing rule of law may be otherwise settled.

Justice WALTON, however, was not a bigoted adherent to old rules and doctrines, where new rules and doctrines had become established in their stead. He recognized and often applied the maxim "ratione legis cessante, cessat et ipsa lex." When the law was actually changed, even by judicial action only, he freely accepted the change, and was equally observant of the new order. It was once said to him, that as a lawyer he in this respect resembled Lord Thurlow as a theologian,—who declared he was for the established religion because it was established, and that if any sectary could get his religion established, he would be for that too. Justice WALTON did not repel the comparison, as illustrating his attitude toward the law.

A mind, strong and steady, trained almost exclusively in the study and practice of the law as applied to actual life, well fitted him for the mission I have indicated. He was aided greatly, however, by his long tenure of the judicial office. He was called to the bench in the days of TENNEY, RICE, APPLETON, CUTTING, DAVIS and KENT, men able, learned and noble, who had in their turn been associated in judicial labors with SHEPLEY, WHITMAN, WELLS and PARRIS. These names are now perhaps mere memories to most of the bar, but their recorded judgments are impartial and perpetual records of their splendid judicial service. Justice WALTON took over from these great men the sacred fire of judicial learning and duty to transmit all glowing to those coming after him. Besides his association with such seniors, his judicial service spanned the judicial years of DICKERSON, BARROWS, DANFORTH,

VIRGIN, LIBBEY and SYMONDS, many of the years of Chief Justice PETERS, Justices FOSTER, HASKELL, WHITEHOUSE and myself, and even reached on into the years of the present Chief Justice WISWELL and Justice STROUT. His long service touched the services of nineteen different justices. The personnel of the court was more than twice changed during his time. He was thus the long, connecting strand preserving the continuity of the court and holding it secure to its honorable past.

Of course, it is too much to say that the court during his membership has always moved on straight lines and made no confusing deflections, or that Justice WALTON himself did not sometimes nod and stumble. It can be said, however, as he often said with pride, that this court will bear comparison with many other courts, even eminent courts with a much longer tenure of office, for steadfastness of adherence to the settled law. That this is so in spite of the fleeting constitutional tenure of the justices is, in some degree at least, owing to the long service and strong lawyerlike mind of Justice WALTON.

The history of a court is not all told in its published opinions. Around the consultation table are many discussions of great questions in substantive law,—many conferences upon important questions of procedure and practice,—many suggestions as to the powers and duties of the court,—which never appear in print. All such live only in the memories of the individual justices. They become traditions, filling in the lacunae of the recorded judgments, enabling the court to work more smoothly, strongly and steadily. Justice WALTON, more than any other, was the repository of these discussions, suggestions and conclusions. More than any other, was he appealed to for the opinions and practices of this court in the past. His steadying influence upon the court was unquestionably great.

Pursuant to what I have called his unconscious mission to hold the court to the actual law, Justice WALTON in his published opinions usually kept to a plain, brief statement of the rule of law without going into its history or philosophy. He did not pose as a jurist or scholar, though he earned the meed of each. He sympathized with that satirical definition of a jurist as one who knew a

little of every system of law except his own. He believed in the authority of the court to declare the law, and that its declaration would be accepted as authoritative, even without argument or illustration.

Nevertheless, when occasion seemed to require, he could go as deep as any into legal history and philosophy. In *Wyman* v. *Brown*, 50 Maine, he traced fully, clearly and accurately the development of the law of conveyance of estates in freehold, and removed all doubt of the proposition that a freehold could lawfully be conveyed to commence in futuro. In *State* v. *Wright*, 55 Maine, by exhaustive citations and elaborate reasoning, he forever extirpated the heresy that in criminal cases the jurors have the right to determine the law. In *Goddard* v. *Grand Trunk Co.* 60 Maine, with a wealth of historical illustration he showed how his beloved common law glowed with the spirit of liberty and could smite heavily those who exercised power beyond right. His last opinion was in *Auburn* v. *Union Water Power Co.*, 90 Maine, a fitting capstone of a lofty and lasting monument to his judicial fame. In that opinion he established firmly the great principle that our common law, supplemented by colonial ordinances of 1641-7, secures to the people the waters of our thousands of ponds exceeding ten acres in area, notwithstanding the claims of their riparian proprietors.

He was not ambitious of appearing much in the books. He deprecated publishing opinions on questions of fact,—and on questions of law already settled by previously published decisions. Many cases falling to him he thought sufficiently disposed of by rescript alone without burdening the reports. He held that much publishing, like much talking, weakened influence.

His published opinions were not all cast in the same mould. In some he stated first the facts, then the reasoning, and then the conclusion. In others he began with a statement of the law and then showed how that determined the case upon the facts. In the majority of cases, however, he left the facts to the reporter and at once stated the question to be whether the given proposition was the actual rule of law, and followed the question with the familiar answer, "we think it is,"—or "we think not,"—sometimes giving

reasons for the answer, sometimes giving no reasons, but only statements.

He did not build up opinions. He rarely led the reader along step by step from premises to conclusion. He usually announced the conclusion first and showed reasons afterward, if at all. His reasoning, when he thought reasoning necessary, was direct,—an assault in front. He did not approach a position by parallels, nor endeavor to flank it. He went straight at it, in one massed column of reason and authority, to carry it by storm.

He made no pretense to literary style in writing his opinions. They are for the most part devoid of metaphors, tropes, antithises or other rhetorical figures. Quotations, except from law books, are extremely rare. He had no thought of fine writing. He did not seek for striking or graceful expressions. He had no fads about the use of Anglo-Saxon, or classical words. He freely used long words, or short words, words from the Greek, Latin, French, or Anglo-Saxon and even Latin phrases, according as they would best express his meaning. Without regard to its origin or form, he sent the word that would best carry his message. He was not solicitous to turn a phrase according to the rules of rhetoric. Indeed, a rhetorician might find in his opinions many things to amend or polish. Justice WALTON was too intent on the proper purpose of the opinion to mind much about its style. That purpose was to make the statement of the law plain and strong. That purpose he accomplished. When he was through, what he meant was clear,—unmistakable. What was decided was conspicuous, with few or no dicta to mislead or befog.

Sometimes, however, he would, instinctively, I think, use some luminous word or phrase which would reveal the truth of the matter as with a flash;—as when considering, in the case last cited, which was the higher right to the waters of our great ponds he said: "Water for domestic use is a necessity. Water for the use of mills is a convenience only." Also, as when in overruling a motion for a new trial on the ground of newly-discovered evidence, he suggested that the evidence was "newly-invented." He could turn an argument also with crushing effect,—as when in setting

aside a verdict against a railway company for the alleged trespass of its conductor in ejecting an abusive passenger, he was challenged with his own opinion in Goddard v. Grand Trunk Railway Company, where the court had sustained a verdict for large damages for a mere insult to a passenger. He accepted the challenge. "Certainly," he said, "we protected the passenger in that case, and for the same reason we hope to be able to protect the railroad servant in this case. Both decisions are in favor of morality and decency. In that case, the servants of the railroad were taught to treat passengers with civility. In this case, we hope to teach passengers to treat the servants of the railroad with civility." That passengers have the duty as well as the right of civility was thus fairly shot into the consciousness of the plaintiff.

But I have already exceeded the limits the great lawyer and judge would himself have set for me. After many years of great and valuable service he has left us. WALTON, J., a familiar name at the head of strong opinions through nearly fifty volumes of the Maine Reports, will no longer appear in them except in quotation. His strong personality is withdrawn from the consultation room. Those of us who served with him, even for the shortest time, will long and greatly miss him. We shall miss his tall form, his vigorous mind, his trenchant speech, his great learning, his long experience, and his consequent ripe judgment. We shall, perhaps more than all else, miss his conservative steadying influence. His retirement has deprived the court of much of that aid to correct judgment which is afforded by long study and long practice in the work of a court. But he, and the other justices who have left these seats, have bequeathed us a rich legacy in their published opinions and in the traditions they have handed down. Through these we shall still be guided by them, though we do not see their persons nor hear their voices.

They have also bequeathed us a transcendent duty,—which we solemnly recognize, and which, stimulated by their labors, precepts and example, we must strive mightily, though imperfectly, to perform,—the duty to keep this court, through our time as through their time, the enlightened and steadfast conservator of the legal rights and duties of every person within its jurisdiction.

I am directed to say that the court heartily concurs in the appropriate resolutions of the bar and will cause them to be preserved in the archives, that future lawyers and judges may know in what high esteem Justice WALTON was held by his co-temporaries of the bench and bar alike.

As a further mark of respect the court then adjourned.

PROCEEDINGS OF THE ANDROSCOGGIN BAR, FEBRUARY 27, 1900, MR. JUSTICE SAVAGE, PRESIDING.

Hon. Nahum Morrill, president of the bar association announced the death of Mr. Justice WALTON, and Hon. Franklin M. Drew presented the following resolutions:

The relations of the lamented Judge WALTON to the Androscoggin bar were exceptionally intimate. From it he was appointed to the bench. He held more terms of court here than any other justice. For many years before and after his promotion he resided in this county, and his social and professional converse with the members of this bar was most pleasant. It seems just and meet, then, that some testimonial of regard and expression of appreciation of his high character should be placed upon the records of the court in this county, therefore,

RESOLVED: That the members of the Androscoggin bar have heard with deep regret of the death of the Honorable CHARLES W. WALTON, a former distinguished member of this bar and subsequently for a long period an eminent Associate Justice of the Supreme Court of this State. His memory will be long esteemed and cherished.

RESOLVED: That we recall with just pride his membership of our bar and that his name will ever honor our roll.

RESOLVED: That, as a member of the bar, our brother was a master of his profession in all its principles and its details. He was untiring in the preparation of his cases. His full knowledge of the law and perfect familiarity with the rules of the court and practice, his self-reliance, his remarkable quickness of perception and sagacity, his ready and powerful grasp of the material facts and vital points of his case and wonderful skill in marshalling them, his clearness of statement, made him a most successful practitioner and early won him distinction at the bar.

RESOLVED: That, as an Associate Justice, Judge WALTON enjoyed the distinction of the longest service in our judicial history, extending over a period of thirty-five years. At nisi prius he presided with ease and dignity. He sought to hold the scales of justice fairly and strove to help the jury to right conclusions. As a law judge he was pre-eminent and the peer of the great judges who have adorned the law court of our State. His was emphatically a legal mind. It was strong, logical and analytical, enabling him to grasp and hold in judgment the most subtle and abstruse principles of law and conflicting facts, and unerringly determine the law and the truth involved. His style was simple, clear and concise. His opinions were models of judicial structure. Disregarding all extraneous matter they plainly disclose the issue and concisely state the determination of the court. Once incorporated in our reports they ever remained a settled authority, confidently cited by the bench, bar and legal writers throughout the land. His fame safely rests in these opinions and they will be his most lasting and honored monument.

RESOLVED: That these resolutions be presented to the court for its action.

REMARKS OF HON. WALLACE H. WHITE.

May it please the Court:

It is indeed altogether fitting that the members of this bar should forsake their daily duties and assemble here to express their appreciation of the life and judicial career of Judge WALTON. This county was the scene of much of his activity in the practice of his profession and of the most prominent event in his political career, while here in the city of Auburn was his home during the greater part of his service on the bench.

My acquaintance with him began about the time of my admission to the bar in this county in 1872. At that time, and indeed until his removal from Auburn, it was generally his custom to hold two terms of court each year in this county, and he was thus brought into very close and intimate relations with all the attorneys practicing at this bar. During all this time my personal relations with him were most pleasant and cordial. I do not wish to be understood as saying that I never felt his chastening hand, for I

did; but as I look back over those years, I know I have every reason for respecting and revering his memory.

Judge SYMONDS who served upon the bench for seven years, in a recent address speaking of the members of the court with whom he was associated, delivered a most eloquent tribute to the memory of Judge WALTON. It was a tribute so true, so just and so appreciative, I take the liberty to quote it at length.

"Judge WALTON, on whose noble face, calm in death, we have so recently looked, the great common lawyer, the inflexible, indomitable man, lifting readily and easily any legal or judicial burden that time or place might lay upon him, with some impatience of temper which we did not like but which we easily forgot when we saw the new light, clear as the sun on Alpine height, with which he flooded the cause. In his written opinions, too, how remorselessly sometimes he dragged us to his conclusions, by a chain of reasoning in which there were no links that would break. What a beatiful English style he developed, the natural expression of the crystal clearness of his mind! What splendid service he rendered to the State during the longest judicial career in the history of Maine, not only in the ordinary routine of the courts, but in great crises, too; and how little the State did for him! Think of Judge WALTON as counsel for large corporations in our times. What wealth of knowledge, what fertility of resource, what subtlety and clearness of reasoning, what wise forecast of chances and probabilities, he would have brought to their service! The State did little for him. Every day upon the Bench was a sacrifice of his own personal interests. But he did not complain, and his friends need not complain for him. He towers, and will tower as long as our reports remain, among the loftiest judicial heights in all the range."

This indeed is lofty and unstinted praise, and yet Judge WALTON deserves it all.

It is well known to us that Judge WALTON was a man of strong feelings and inflexible courage, and in his long judicial career he frequently came in contact with natures as inflexible as his own. Strong passions were sometimes aroused in the heat and conflict of the trial of causes, but never during the whole course

of his service upon the bench was the finger of suspicion ever pointed at him. He was absolutely incorruptible. No mercenary motive ever swayed or influenced him. The bench, the bar and the people knew that he was above reproach in all his public and private relations in life, and he has left a record in this respect which I believe will shine with increasing splendor as long as his memory is preserved among the great judges who have adorned our bench.

Judge WALTON naturally disliked a dull man. He had little patience with such. But he detested a fraud and an impostor, one who pretended to be something he was not, and with his remarkable insight into human nature, woe to the witness, suitor or attorney who undertook to impose on him. How many times have I seen him sitting upon this bench, taking apparently only a casual interest in what was being said, until his keen instinct detected some false note, when suddenly he became all attention, those dark eyes began to kindle, and with a few sabre-like flashes of speech, the pretender would be unmasked to public view.

He was always strong and steadfast in upholding personal rights and personal liberty. Any act of oppression of the strong toward the weak, any symptom on the part of those in positions of power and responsibility of harsh or oppressive conduct toward those in any degree dependent, always awakened his sympathy and if the case was flagrant aroused his ire.

He was always strenuous in maintaining the dignity of the law and was himself a willing subject of the law. He demanded no allegiance to the law from others that he was not willing to yield himself. He walked fearlessly before his fellow-men panoplied with an impenetrable armor of integrity, sobriety and uprightness in all his relations with mankind.

Your Honor, in moving to second these resolutions, I desire to say that it is my belief that the members of the court should be better than other men. They should be men of honesty, ability and integrity. They should so conduct themselves in their high places as to command the respect and confidence of all good citizens, and above all things else they should be pure in their private as well as in their public lives.

Tried by these high standards, Judge WALTON met every requirement and fulfilled every condition, and it is with the utmost pleasure, happy that the lot has fallen to me to do so, that I second these resolutions.

Remarks of HON. WILLIAM W. BOLSTER, who said, in part:

Judge WALTON and myself were acquaintances sixty-five years ago, and have been intimate, as such, ever since. I was a student in his office at Dixfield in 1845 and '46, and in that relation saw his life as revealed in his untiring devotion to his profession. He was born in Mexico, in 1819, and was the only son of Artemas Walton, who came to that town in its early settlement, and being a shoemaker, he followed that trade, barely making a living, going from house to house, according to the custom of the day, making and mending boots and shoes for the people in Mexico and adjoining towns. He was a prepossessing and gentlemanly man, and a man of integrity and good morals. His wife was talented and respected.

Judge WALTON, as a boy, was highly esteemed for his many good qualities. His good influence was never lacking among his fellows. He attended the public schools but little. His father's home was in a small opening in the forest, a long distance from the school house in his district. His instruction in his books was by his mother till he was about twelve years of age. After, for a year, he studied with a private teacher of the town, and proved to be an exceedingly bright and apt scholar. Soon after, he spent about two years in a printing office in New Hampshire, with a view of learning the printer's trade, but changed his mind and commenced the study of the law at the age of about twenty; and at the expiration of two years' study, was admitted to the Oxford bar well equipped, and commenced practice, and continued the same successfully till May 14, 1862, when he was appointed an Associate Justice of the Supreme Judicial Court of this State, holding the position thirty-five years. When appointed, he was the Member of Congress from this congressional district. He practiced law about twelve years in Dixfield and ten in this city.

During this time he was county attorney in Oxford county three years, and three years in this county.

In Judge WALTON'S early youth his father was the violinist at all the balls in Mexico and surrounding towns. His son being a gifted musician and a lover of the violin, when a mere boy became an expert upon that instrument, and with it earned his first money for a start in life. For some unknown reason, when he commenced the practice of the law, he abandoned the delights of his favorite instrument, not keeping it even for a pastime. That was not the purpose of his life. He was made for the law, and he won success with a bound, although in his boyhood days he had not had the opportunity and means to acquire a liberal education, and to read the books of all nations, and reap the fruits of scholarly investigation in all countries, as the boys of to-day.

The demeanor of Judge Walton was quiet, reserved, gentlemanly and dignified. He liked and enjoyed a merry chat, liked to tell and hear good and witty stories. In his boyhood he was a great lover of games and sports, hunting and fishing. He was a lover of pets, and had them in training more or less at times through life. Upon them he bestowed kindly feeling and affection.

From early life to old age he was not of robust health. He learned the means and methods of living well and wisely, and thereby, notwithstanding the hard work of the profession and his judicial labors and their worriments, lived past eighty years, and accumulated a competency, and left to the State the history of a noble and distinguished citizen and a true man. He early appreciated the need of education with respect to the duties and responsibilities of citizenship, and kept abreast with the times in the social, economic and political questions of the day. He was a true patriot; he loved the highest good of his country, and according to his ability and opportunities worked for its best welfare. He respected in others whatever he would assert for himself. He believed thoroughly in equal and just laws, and their impartial and effective administration.

Judge WALTON possessed unflinching and undaunted persever-

ance and patience in the investigation and study of the law; he never left it unmastered. Stupidity and inexcusable faults and neglects in the management of cases in court had but little claim upon his patience and forbearance. When the business of court was kindly and properly transacted, he was tolerant, considerate and patient in awaiting events. In judging of the acts and opinions of others, he did it with care and prudence, aiming to get at the right. He was always kind and patient with the beginners at the bar; nothing would please him more than to see them advancing in their practice and achieving success; they never lacked his aid and encouragement. Thirty-five years upon the bench by him have given many lifelong and ardent friends as witnesses of these kindnesses.

How readily, forcibly and plainly he could give light and words to the unseen thought that was in him. He not only had a good reputation, but a true character. "He was not unmindful that reputation is what one is thought to be, character what one is." He was not an idle man. Industry was a distinctive feature of his life. He was an active, busy and diligent student, not only while reading law, but in the practice of his profession and during his judgeship. His efficiency and his useful work for the State as judge is evidenced by his able and well doing. It is evident by his written opinions that he knew the intricacies of the law and how to disentangle them. He possessed a keen, discriminating mind. He was a strong and independent thinker, and at the same time always showing due respect to the opinions and judgments of others. He was ever able to give intelligent reasons for his opinions, and forecast their consequences as authority and law.

The Supreme Judgeship of Maine is one of the highest and most responsible offices of the State and the judges are appointed for their ability, good reputation, weight of character and their standing before the people, and Judge WALTON early demonstrated that his appointment to the bench was a tower of strength, and fully justified. He had but few imperfections and faults, which we cordially pass by to be forgotten, while his name will grow brighter as time marches on.

Judge WALTON had a kind and sympathetic heart for the homes of the poor. He was most heartily loyal to his family and friends. In his breast was one of the tenderest hearts. It is now still in death, and we sorrow, and the State mourns for a great and noble man. He did his life work well, and passed from us to his reward and final rest, leaving his noble life indelible in our memories.

REMARKS OF HON. GEORGE C. WING.

May it please the Court:

Occasionally in every part of the world there dawns upon the horizon of humanity an intellect that by its quality and volume at once compels attention and admiration, and regardless of surroundings or environment, demands and receives public recognition, and thereafter exerts an influence upon the times that nothing can successfully oppose or prevent. As we turn the page of history, we find recorded upon it inscriptions concerning such intellectual forces, preserving authentic evidence that for all time civilization has been effected and the policy of governments modified and changed in all departments as a result of the influence of such masterful minds.

Now when in our very midst one of the brightest, strongest and steadiest mental lights has been by death extinguished, I believe that we do well to pause in our work and to discuss in just review the personality, characteristics and resources of him to whom belonged the gifts of nature so unusual and so rare.

Judge WALTON possessed among his God-given attributes sturdy common sense, a wonderfully tenacious memory, great keenness of of perception, an analytical, logical and discriminating mind, a forceful and almost unbending will, and a grasp upon the principles of the common law that seemed almost intuitive, apparent from the time when in early life his attention was first called to the elementary principles of jurisprudence, and continuing until the day of his death.

The charmed attention of the State of Maine has been for many years attracted to the bright flash of his intellect, his powers of discernment, comparison and determination, and her citizens have

regarded with great satisfaction his interpretation of the law concerning the ever-changing business conditions of the state, and the protection of her citizens in their personal and property rights. His reputation as a judge has not been confined by territorial boundaries, for jurists of sister states have looked upon his judicial opinions with confidence and admiration, and the reports of their highest courts show extended citations therefrom with increasing frequency.

His origin was humble, his early opportunities few and most meager in character. In early life he was obliged to encounter obstacles that would have discouraged a less forcible and self-reliant man, but from the beginning of his career, his advancement was positive, steady, and continually in the ascendant.

His opinions published in the Maine Reports extend from the 49th to the 90th volume, both inclusive, and number 596, and there his record as a lawyer and a judge is absolutely safe and secure.

While his earlier opinions show great care in method of expression and in the selection of language to best express his meaning, those furnished in later years are drawn with a style and polished diction that are at once the delight and admiration of the English scholar. Simple in statement, their strength of expression is most convincing and remarkable, and it is safe to say that not one can be found that is wanting either in logic or reason.

He was an ideal lawyer, and as a judge the peer of any. We who have stood so near to him, accustomed to hear his voice, so impressive, and to watch the varied expression of his face, indicating the movement of his mind, I fear have never fully realized the greatness of the man as developed in his particular vocation. He certainly was an original and independent thinker, a close and logical reasoner. Free from bigotry and severity of judgment as to the opinions of others, he was not wanting in courage, and reached his conclusions not with wearisome circumlocution or sophistry, but by direct, systematic and profound reasoning.

His long life, so useful to the state he loved so much and served so well, and to the members of the legal profession, in whose

society so large a portion of it was spent, is now over—his work is ended—his brain is still.

No one can add to nor detract from the reputation that is made perpetual on the records of the courts of this state and in the reports of its highest legal tribunal.

Great lawyers, most able, talented, scholarly and learned judges have preceded Judge WALTON, and like him have adorned our bench. Others will come after him, whom we all shall honor and respect. Good and great men will come who will bring to the administration of the law their store of legal knowledge and experience, as well as their personality and strength of mind; the future is an open book upon whose unwritten page they will make the record of their lives, but Judge WALTON we have looked upon for the last time. We all greatly deplore his loss; we are all mourners most sincere. The great lawyer, the great judge is no more.

"He was a man, take him for all in all,
I shall not look upon his like again."

Mr. Justice SAVAGE responded as follows:

It is to me a sad, but satisfactory pleasure to join with the members of this bar in the feeling and eloquent tribute, which has been paid to the memory of Judge WALTON. In the vigor of earlier manhood he came here, from the adjoining county of Oxford, and here with most pronounced success, he continued the practice of his chosen profession, and laid broad and deep the foundations on which he afterwards built his very eminent judicial career. By this congressional district he was elected to congress; here he lived when appointed to the bench, and among us he remained for many years afterwards. His relations with the lawyers of Androscoggin county were more intimate and personal, I think, than with those of any other county; and as has been said already, he held a much larger number of the terms of our court than any other justice. By the people of this community, for nearly half a century, he was held in the very highest esteem as citizen, lawyer and judge. It is therefore peculiarly fitting that in this room, at this bar, the scene of so many of his profes-

sional triumphs, and at this bench, so long adorned by his presence and elevated by his wisdom, should be given this first public expression of his worth since his lamented death.

Judge WALTON, both at the bar and on the bench, was pre-eminently a lawyer. In my judgment no greater or deeper lawyer has ever lived within our state. He was an old-fashioned lawyer, well fitted for logical contests of the days of special pleading. He was also a new-fashioned lawyer, abreast with the spirit of modern jurisprudence. He grew with the growth of the times. He was a master of the principles of the common law, and he delighted in discussions pertaining to it to the day of his death. His mind was keen, analytical and penetrating. He easily sounded a subject to the very depths. His mind was also comprehensive and far-seeing. The most complicated topics of law or questions of fact seemed to be playthings to his master intellect. Difficulties dissolved before the sunlight of his thought and the magic of his expression, as the snows of winter disappear before the sun of springtime. His power of expressing, or I may say illuminating, abstruse questions of law to the comprehension of the common mind was almost marvellous. His charges to juries, unstudied as they seemed to be, were masterpieces of simplicity, orderliness, clearness and force. No juror ever failed to grasp his meaning. A novice could follow him through the mazes of legal statement. No lawyer, worried or doubtful about the proper application of the rules of law to the case in hand, has ever listened to a charge by Judge WALTON, without appreciating, with wonder, how simple an intricate proposition seemed as it came forth from the alembic of his mind. One might not always agree with his conclusions, for no judge is infallible, but no one ever had occasion to misunderstand what he meant.

His was a marked personality. He deeply impressed all, with whom he came in contact, with a sense of his virility and masterfulness. It is not easy to measure accurately the men of one's own generation. There is a want of proper perspective. The little and effusive man near by may, for a time, hide the larger man who stands farther away, just as the traveler in the valley, the foothills

of the mountains obscure or shut from view entirely the monarch of the range, as it towers aloft towards heaven. But even his own generation justly valued the worth of Judge WALTON: we have known him for what he was. We have not been misled by want of perspective. He stands out in clear personal outline, like himself, and not like any other.

He was in appearance an ideal picture of the dignified judge. He never forgot, nor allowed others to forget, the respect which is due to a court. He loved to magnify the judicial office, not out of pride of place or position, but because he keenly appreciated that a high regard for the dignity of that office, and an abiding confidence in the integrity and independence of the judges, lie at the foundation of good order and well being in a free government. At all times affable, and approachable to a marked degree, Judge WALTON, when occasion demanded, could become severe, or even seemingly harsh. He was not always patient with mediocrity, with men of dull minds and slow perception. His mind flashed from mountain peak to mountain peak while they were plodding along below. He could hardly bear to wait. He was actively impatient with men who were shallow or insincere. He hated the sloven in law; he abominated sham and pretense. He had no place for the lawyer who was trying a case on a run for luck, with no definite conception of the law, or appreciation of the facts. He loved candor in an attorney or a witness, and woe to the one who aroused his suspicion. He loved preparedness on the part of counsel, and a clear expression of definite ideas. The lawyer who had studied his case well, who had convictions concerning his positions, and who stood up like a man and presented them to Judge WALTON, never had any reason to find fault with the manner of his reception. If the judge did not agree, he would vigorously, almost enthusiastically, combat, for he loved an intellectual wrestle; but he respected vigor and intelligence in others.

I think it may be truly said that few men in public life have ever more entirely possessed the confidence of the common people than Judge WALTON. With them his word was law, without question. From them he had come, and with them he was in sym-

pathy. He never forgot that the sturdy people are the pillars of the state.

But the qualities of the man, Judge WALTON, of which I have spoken, while very real, are likewise evanescent, and the memory of them after a little, will survive only in tradition. The Judge WALTON, whom we have particularly known, is no more. The Judge WALTON who will live, and living, will exert an enduring influence upon the jurisprudence of our own commonwealth, and of other states, must be sought in his nearly six hundred opinions published in forty-two volumes of the Maine Reports, beginning with *Winslow* v. *Gilbreth*, in the 49th Maine, and ending with the case of the *City of Auburn* v. *The Union Water Power Company*, in the 90th Maine. I do not think there can be found in the annals of juridical learning such another number of opinions, at the same time so comprehensive and so brief. They are models of Anglo-Saxon expression, as well as of judicial learning. Terse, sententious, clear, not a word was wasted, not a word but seemed fitted to its place, like the stones in a diadem. His "Not so's" and "We think not's" contained volumes of judicial inference. He stated reasons with logical and severe simplicity, and it was very seldom that he supported the statement of his reasons by a lengthy argument. He delighted to ground his opinions on elementary principles. His opinions were absolutely clear and intelligible. He cited other cases with comparative infrequency, and seldom cited cases from other courts. Hundreds of his opinions contain no citations whatever. His opinions were uttered ex cathedra; he declared the law. He spoke like a strong judge, and he spoke like a judge who was conscious of his own strength. These opinions are his perpetual monument.

It was Judge WALTON'S good fortune that his career on the bench covered that last third of this century, which has proven to be a golden age of scientific, commercial and industrial development. The science and art of medicine and the investigation and conservation of theological truths have felt the quickening impulse of this era. But above all, the law, "whose seat is the bosom of God," has shown an infinite capacity of growth, of applicability to

the new and infinitely varying conditions of business and of life. The law book is the barometer of the age. In a set of state reports is found better than anywhere else the true history of the growth of the people. Judge WALTON'S learning in the lore of the law, his knowledge of men and his intuitive business judgment, made him eminently qualified to meet these changing conditions, to apply old principles to new facts, to revolutionize law practice without altering the law or rendering it less stable. To fully appreciate the change, one only needs to compare the contents of Judge WALTON'S first volume with the contents of his last one. Such has been his great work, and that of his associates; and I think it is safe to say that in no state has the court kept up with the times better than in this.

He was almost the last one living of the eminent judges who adorned our bench, when I came to this bar a quarter of a century ago. APPLETON, DICKERSON, BARROWS, DANFORTH, VIRGIN and LIBBEY passed into rest before him. And Judge PETERS, crowned with honors, has recently retired to private life in the fulness of years. The bench has entirely changed. It is not invidious to say that the name of no one of the judges I have named will be more missed by the seeker after legal truth than will be that of him whose memory we revere today, and upon whose grave we lay the flowery chaplet of affection and esteem,

CHARLES WESLEY WALTON.

The motion presented by the bar is granted.

And as a mark of respect to the memory of Judge WALTON, it is ordered that the resolutions of the bar be recorded at length in the records of the court.

And it is ordered as a further mark of respect to Judge WALTON that this court now adjourn without day.

MEMORANDUM.

Honorable THOMAS HAWES HASKELL, Associate Justice, died at his home in Portland, Monday, September 24, 1900, in his fifty-ninth year. His sudden death was a great loss to the state. He died at a time when his abilities, training and experience at the bar and on the bench had made him one of the most useful and valuable members of the court, in which he presided more than sixteen years. He was noted for his proficiency in pleading, admiralty, corporation, bankruptcy, criminal, equity and commercial law, but was well informed in other things outside his profession. Some of his opinions upon favorite topics take high rank. He was industrious, methodical and self-reliant.

Possessed of the confidence of his associates on the bench for his sterling good qualities, and respected by the state for the zeal he manifested towards an elevated and incorruptible discharge of the duties of his judicial office, he will be remembered with grateful affection.

C. H.

On the twenty-ninth day of November, 1900, the Honorable HENRY CLAY PEABODY was appointed a Justice of the Court and took his seat upon the bench at Machias, on the second Tuesday of January, A. D. 1901, being the eighth day of the month.

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