MAINE REPORTS

95

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

1901 213

CHARLES HAMLIN

REPORTER

PORTLAND, MAINE

WILLIAM W. ROBERTS

1901

JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. ANDREW P. WISWELL, CHIEF JUSTICE,
HON. LUCILIUS A. EMERY.
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.

ASSIGNMENT OF JUSTICES.

JUNE 1 TO DEC. 31, 1901.

LAW TERMS.

MIDDLE DISTRICT, at Augusta, Fourth Tuesday of May.

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

EASTERN DISTRICT, at Bangor, Third Tuesday of June.

SITTING: WISWELL, C. J., STROUT, SAVAGE, FOGLER, POWERS, PEABODY, JJ.

WESTERN DISTRICT, at Portland, Third Tuesday of July.

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

DECEMBER TERM, at Augusta, Second Tuesday of December.

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

PRESS OF THOMAS W. BURR,
BANGOR, MAINE.

TABLE OF CASES REPORTED.

A.

Adams *v.* Waterville, . . 242
American Light & Power Co., Damren, *v.* . . . 278
Andrews *v.* Lincoln, . . 541
Arnold *v.* Conn. M. L. Ins. Co. 331
Augusta (City of), Winslow (Inhab. of) *v.* . . 58

B.

Barron, Jenness *v.* . . . 531
Barton, Munro *v.* . . . 262
Bangor, Orono & Oldtown Ry. Co., Fairbanks *v.* . 78
Bangor, Orono & Oldtown Ry. Co., Warren *v.* 115
Batchelder *v.* Robbins, . 59
Baker, Cobb *v.* 89
Banton *v.* Crosby, . . . 429
Banton *v.* Griswold, . . 445
Bennett, State *v.* . . . 197
Bigelow *v.* Bigelow, . . 17
Biddeford, Hamlin *v.* . . 308
Bickford *v.* Mattocks, . . 547
Bliss, Sidelinger *v.* . . . 316
Black *v.* Mutual Life Asso. 35
Boardman *v.* Creighton, 154
Bolster, Whitehouse *v.* . 458
Bryant, Hussey *v.* . . . 49
Brooks, Richardson Manf. Company *v.* 146
Bradbury *v.* Lewiston, . . 216
Bradbury *v.* Tarbox, . . 519
Burgess *v.* Robinson, . . 120
Burleigh *v.* Mullen, . . 423
Burleigh *v.* Prentiss, . . 192

C.

Chandler, Loggie *v.* . . 220
Cherryfield & Milbridge Electric Railroad Company, Appellants, . . 361
Childs *v.* Cleaves, . . . 498
Clarity, State *v.* 197
Cleaves, Childs *v.* . . . 498
Clement v. L'Institut., . 493
Clifford *v.* Stewart, . . . 38
Cobb *v.* Baker, ... 89
Coffin, Shackford *v.* . . 69
Cole, Healey *v.* 272
Cole *v.* Fickett, ... 265
Comly, Flint *v.* 251
Conley *v.* Railroad Co., . 149
Conn. Mutual Life Insurance Co., Arnold *v.* . 331
Courtenay, Fleming *v.* 128, 135
Creighton, Boardman *v.* . 154
Crosby, Banton *v.* . . . 429
Cushman, Dean *v.* . . . 454
Cushman *v.* Goodwin, . . 353
Cutts, Fidelity & Casualty Co. *v.* 162
Cyr, Readfield Telephone & Telegraph Company *v.* 287

D.

Day, Gardner *v.* . . . 558
Damren *v.* Power Co. . . 278
Dean *v.* Cushman, . . . 454
Delano, Murphy *v.* . . . 229
Dempsey *v.* Sawyer, . . 295
Dennis, Henry *v.* . . . 24
Duncan, Murphy *v.* . . 229

E.

Eacott, Appellant, . . . 522
Electric R. R. Co., Apellants, ... 361
Emerson *v.* Shores, . . . 237

F.

Fairbanks *v.* Railway Co. 78
Fickett, Cole *v.* 265
Fidelity & Casualty Co. *v.* Cutts, ... 162
First Nat'l Bank *v.* Ware, 388
Fisher *v.* Merchts. Ins. Co. 486
Fleming *v.* Courtenay, 128, 135
Flint *v.* Comly, ... 251
Friendship (Inhab. of), South Thomaston (Inhab. of) *v.* 201

G.

Gardner *v.* Day, . . . 558
Gilman *v.* Stock, . . . 359
Glover *v.* Jones, ... 303
Golder *v.* Golder, . . . 259
Goodwin, Cushman *v.* . . 353
Goodwin, Kelley *v.* . . 538
Goodwin, Stickney & Babcock Coal Company *v.* 246
Gratton, State *v.* . . . 364
Griswold, Banton *v.* . . 445

H.

Haggerty *v.* Lewiston, . . 374
Hamlin *v.* Biddeford, . . 308
Hampden (Inhab. of), Monroe (Inhab. of) *v.* 111
Healey *v.* Cole, ... 272
Henry *v.* Dennis, . . . 24
Hussey *v.* Bryant, . . . 49

I.

Intoxicating Liquors, State *v.* 140

J.

Jenness *v.* Barron, . . . 531
Jones, Glover *v.* 303
Jones, Merchants Trust & Banking Co. *v.* . . . 335

K.

Kelley *v.* Goodwin, . . 538
Knight, State *v.* . . . 467

L.

Larrabee *v.* Southard, . . 385
Leader *v.* Plante, . 339, 343
Lessard, State *v.* . . . 197
Lewis, Rowell *v.* . . . 83
Lewiston (City of), Bradbury *v.* 216
Lewiston (City of), Haggerty *v.* 374
Lewiston (City of), Union Water Power Co. *v.* . 171
Lewiston & Auburn Electric Light Co., Natl. Fibre Board Co. *v.* . . 318
Lincoln, Andrews *v.* . . 541
L'Institut Jacques Cartier, Clement *v.* 493
Loggie *v.* Chandler, . . 220
Lovett, Morrill *v.* . . . 165

M.

Mace *v.* Mace, ... 283
Maine Central R. R. Company, Conley *v.* . . . 149

Maine Central R. R. Company, Oakes *v.* . . . 103
Marcus *v.* Rovinsky, . . 106
Martel, Wing *v.* 535
Mattocks, Bickford *v.* . . 547
Meands *v.* Park, . . . 527
Means, State *v.* 364
Merchts. Tr. & Bank Banking Co. *v.* Jones, . . . 335
Merchants' Insurance Co., Fisher *v.* 486
Melanson, State *v.* . . . 197
Millett *v.* Mullen, . . . 400
Mitchell, Wescott *v.* . . 377
Monroe *v.* Hampden, . . 111
Morse *v.* Stafford, . . . 31
Morrill *v.* Lovett, . . . 165
Mullen, Burleigh *v.* . . 423
Mullen, Millett *v.* . . . 400
Munro *v.* Barton, . . . 262
Murphy *v.* Delano, . . . 229
Murphy *v.* Duncan, . . 229

N.

Natl. Fibre Co. *v.* Electric Co. 318
New Bedford Copper Co. *v.* Southard, ... 209
Niles, Roberts *v.* . . . 244

O.

Oakes, State *v.* 369
Oakes *v.* Railroad Co. . . 103

P.

Park, Meands *v.* . . . 527
Pierce *v.* Rodliff, . . . 346
Pinkham *v.* Pinkham, . . 71
Pittsfield (Inhab. of) Winslow *v.* 53
Plante, Leader *v.* . . 339, 343
Prentiss, Burleigh *v.* . . 192

R.

Readfield, etc., Telephone Co. *v.* Cyr, ... 287
Richardson Manf. Co. *v.* Brooks, ... 146
Robinson, Burgess *v.* . . 120
Roberts *v.* Niles, . . . 244
Robbins, Batchelder *v.* . 59
Rodliff, Pierce *v.* . . . 346
Rogers, State *v.* 94
Rovinsky, Marcus *v.* . . 106
Rowell *v.* Lewis, . . . 83
Rumford Falls Power Co. *v.* Paper Co. 186
Rumford Falls Paper Company, Rumford Falls Power Company *v.* . . 186

S.

Salley *v.* Terrill, . . . 553
Sawyer, Dempsey *v.* . . 295
Security Mutual Life Association, Black *v.* . . . 35
Shackford *v.* Coffin, . . 69
Sheriff, Welch *v.* . . . 451
Sheriff, Ware *v.* 451
Shores, Emerson *v.* . . . 237
Sidelinger *v.* Bliss, . . . 316
Soucie's Hotel, State *v.* . 518
Southard, Larrabee *v.* . . 385
Southard, New Bedford Copper Company *v.* . . . 209
Stafford, Morris *v.* . . . 31
State *v.* Bennett, . . . 197
—— *v.* Clarity, ... 197
—— *v.* Gratton, . . . 364
—— *v.* Knight, ... 467
—— *v.* Intox. Liquors, . 140
—— *v.* Lessard, . . . 197
—— *v.* Means, ... 364
—— *v.* Melanson, . . . 197
—— *v.* Oakes, ... 369

State *v.* Rogers, ... 94
—— *v.* Soucie, ... 518
—— *v.* Whitehouse, . . 179
Stewart, Clifford *v.* . . . 38
Stickney & Babcock Coal Co. *v.* Goodwin, . . . 246
Stock, Gilman *v.* . . . 359

T.

Tarbox and Trustees, Bradbury *v.* 519
Terrill, Salley *v.* . . . 553
Thomaston *v.* Friendship, 201

U.

Union Water Power Co. *v.* Lewiston 171

V.

Vermeule *v.* Vermeule, . 138

W.

Ware *v.* Sheriff, ... 451
Ware, First Nat. Bank of Guilford *v.* 388
Warren *v.* Railway Co. . 115
Waterville (City of), Adams *v.* 242
Welch *v.* Sheriff, . . . 451
Wescott *v.* Mitchell, . . 377
Whitehouse *v.* Bolster, . 458
Whitehouse, State *v.* . . 179
Willey *v.* Windham, . . 482
Windham (Inhab. of), Willey *v.* 482
Wing *v.* Martel, ... 535
Winslow *v.* Augusta, . . 58
Winslow *v.* Pittsfield, . . 53

Appendix, Opinions of the Justices, 564
Memorial of Mr. Justice Haskell, 590

TABLE OF CASES CITED BY THE COURT.

Abbot *v.* Wood, 22 Maine, 541–546, 415
Adams *v.* Larrabee, 46 Maine, 518, 420
——— *v.* Lee, 64 N. H. 421, 87
Aldine Manfg. Co. *v.* Barnard, 84 Mich. 632, 289
Allen *v.* Jay, 60 Maine, 124, 138, 139, 574, 576
——— *v.* Polereczky, 31 Maine, 338, 550
Allison *v.* Chandler, 11 Mich. 542, 329
Alter *v.* Shepherd, 27 La. An. 207, 415
Ambrose *v.* Nott, 2 Hare, 649, 136
Amoskeag Manf. Co. *v.* Worcester Co., 60 N. H. 522, 324
Am. Union Telegraph Co. *v.* Middleton, 80 N. Y. 408, 294
Andrews *v.* Andrews, 81 Maine, 339, 269
——— *v.* King, 77 Maine, 224, 586
——— *v.* Marrett, 58 Maine, 539, 338
——— *v.* Portland, 79 Maine, 484, 484
——— *v.* Senter, 32 Maine, 394, 126
Ashmead *v.* Kellogg, 23 Conn. 70, 456
Attorney General *v.* Detroit, 112 Mich. 145, 586
——— ——— *v.* Heelis, 2 Sim. & Stu. 77, 496
Atwood *v.* Bangor, etc., Ry. Co., 91 Maine, 399, 402, 81, 152
——— *v.* Higgins, 76 Maine, 423, 107
Auburn *v.* Water Power Co., 90 Maine, 584, 177–178
Augusta *v.* Kingfield, 36 Maine, 235, 57
——— *v.* Moulton, 75 Maine, 551, 132
Austin *v.* Riley, 55 Fed. Rep. 833, 307
Bailey *v.* Day, 26 Maine, 88, 398
——— *v.* Fillebrown, 9 Maine, 12, 539–40
Baker *v.* People, 40 Mich. 411, 373
Ball *v.* Reese, 58 Kan. 614, 509
Bangor Boom Corp. *v.* Whitney, 29 Maine, 123, 206
Bangor *v.* Masonic Lodge, 73 Maine, 429, 497
Bank *v.* Kimball, 10 Cush. 373, 361
Banton *v.* Shorey, 77 Maine, 48, 239
Barker *v.* People, 3 Cowen, 686, 586
Barnes *v.* Dow, 59 Vt. 530, 233
——— *v.* State, 19 Conn. 398, 102
Barrett *v.* Dolan, 130 Mass. 366, 562
——— *v.* Marsh, 126 Mass. 213, 46
Bates *v.* Leclare, 49 Vt. 230, 342
——— *v.* Westborough, 151 Mass. 174, 315
Baxendale *v.* Bennett, 3 L. R. Q. B., 525
Beecher *v.* Stevens, 43 Conn. 587, 346
Beeman *v.* Lawton, 37 Maine, 543, 540
Belfast Sav. Bank *v.* Ken. L. & L. Co., 73 Maine, 404, 170
Belgard *v.* Morse, 2 Gray, 406, 453
Bell *v.* Farwell, 176 Ill. 489, 509
Berry *v.* Pullen, 69 Maine, 101, 348
Billings *v.* Collins, 44 Maine, 271, 86
Bishop *v.* Agricul. Ins. Co., 130 N. Y. 488, 490
Blagge *v.* Balch, 162 U. S. 439, 276–277
Blake *v.* Dexter, 12 Cush. 559, 45
Blanchard *v.* Baker, 8 Maine, 253, 324
——— *v.* Port. & Rumf. Falls Ry., 87 Maine, 241, 529–30
Blethen *v.* Dwinal, 35 Maine, 556, 32
Blouin *v.* Phaneuf, 81 Maine, 176, 48
Boardman *v.* Creighton, 93 Maine, 17, 156

Bohon *v.* Barrett, 79 Ky. 378, 47
Bolster *v.* Inhabitants of China, 67 Maine, 551, 258
Bolton *v.* Bolton, 73 Maine, 303, 497
Borneman *v.* Sidelinger, 15 Maine, 429, 550
Boston & Fairhaven Iron Works *v.* Montague, 108 Mass. 248, 228
Bowdoinham *v.* Phippsburg, 63 Maine, 501, 208
Bowman *v.* Harding, 56 Maine, 559, 249
Boyd *v.* Heinzelman, Ves. & Bea. 382, 137
Bracken *v.* Martin, 3 Yerg. 55, 137
Bradford *v.* Prescott, 85 Maine, 482, 337–8
Bradley *v.* Merrill, 91 Maine, 340, 140
Bragdon *v.* Harmon, 69 Maine, 29, 131
Branch *v.* Commissioners of Sinking Fund, 80 Va. 427, 556
Brewer *v.* East Machias, 27 Maine, 489, 205
Brockway *v.* Innes, 39 Mich. 47, 530
——— *v.* Patterson, 72 Mich. 122, 563
Brooks *v.* Libby, 89 Maine, 151, 526
Brown *v.* Dodge, 32 Maine, 167, 239
——— *v.* Lamphear, 35 Vt. 252, 270
——— *v.* Russell, 166 Mass. 14, 586
——— *v.* Snell, 46 Maine, 490, 264
Brunswick Gas Light Co. *v.* Brunswick Village Corp. 92 Maine, 493, 311
Brunswick Sav. Inst. *v.* Crossman, 76 Maine, 577, 195
Buck *v.* Paine, 75 Maine, 582, 261
Buckfield Branch R. R. Co. *v.* Benson, 43 Maine, 374, 255
Bucknam *v.* Nash, 12 Maine, 474, 329
Buker *v.* Bowden, 83 Maine, 69, 239
Bulger *v.* Eden, 82 Maine, 352, 311
Burbank *v.* Bethel Steam Mill Co., 75 Maine, 373, 161–162
Burnet *v.* Bisco, 4 Johns. 235, 521
Burson *v.* Huntington, 21 Mich. 415, 555
Burt *v.* McBain, 29 Mich. 260, 109
Bushnell *v.* Avery, 121 Mass. 148, 225
Butterfield *v.* Baker, 5 Pick. 522, 540
Buttrick *v.* King, 7 Met. 20, 45
Calais *v.* Whidden, 64 Maine, 249, 148
Cancemi *v.* The People, 18 N. Y. 128, 373
Cape Elizabeth *v.* Skillin, 79 Maine, 493, 450
Capital Traction Co. *v.* Hof, 174 U. S. 1, 369
Carroll *v.* Girard Fire Ins. Co., 72 Cal. 297, 492
——— *v.* Lee, 3 G. & J. (Md.) 504, 256
Cary *v.* Daniels, 8 Met. 466, 324
Cent. R. R. Co. *v.* N. J. West Line R. R. Co., 32 N. J. Eq. 67, 136, 137
Central National Bank *v.* Conn. M. L. Ins. Company, 104 U. S. 54, 358
Chambers *v.* Barnard, (Ind.) 11 L. R. A. 613, 586
Chandler *v.* Wilson, 77 Maine, 76, 417, 418, 419, 420, 421, 444
Chase *v.* Chase, 2 Allen, 101, 48
Chase *v.* Palmer, 25 Maine, 345, 228
Chicago Ry. & Eq. Co. *v.* Merchant's Bank, 136 U. S. 268, 285, 342
Child *v.* Boston, 4 Allen, 41, 52, 315
Clapp *v.* Glidden, 39 Maine, 448, 227
Clark *v.* Hilton, 75 Maine, 426, 261
Clements' Estate, 160 Pa. St. 391, 276
Cleveland case, 58 Maine, 564, 576, 577
Cline *v.* Guthrie, 42 Ind. 227, 556
Clyne *v.* Helmes, 61 N. J. 358, 159
Codman *v.* Brooks, 167 Mass. 499, 276
Coe *v.* Washington Mills, 149 Mass. 547, 497
Cohens *v.* Virginia, 6 Wheat. 418, 585
Cook *v.* Stearns, 11 Mass. 533, 240
Cooke *v.* United States, 91 U. S. 389, 557
Collins *v.* Holyoke, 146 Mass. 298, 313
Colton *v.* Colton, 127 U. S. 300, 47, 48
Com. *v.* Boynton, 2 Allen, 160, 101
Com. *v.* Farren, 9 Allen, 489, 102
Com. *v.* Gaming Implements, 155 Mass. 165, 518
Com. *v.* Hawkes, 123 Mass. 525, 534, 587, 588
Com. *v.* Hays, 14 Gray, 62, 183
Com. *v.* Hinds, 145 Mass. 182, 200

Com. *v.* Huntley, 156 Mass. 236, 99, 100
Com. *v.* Pratt, 132 Mass. 246, 182
Com. *v.* Raymond, 97 Mass. 567, 102
Com. *v.* Williams, 3 Gray, 461, 183
Conley *v.* Am. Ex. Co., 87 Maine, 352, 164, 298
Connihan *v.* Thompson, 111 Mass. 270, 137
Conway *v.* Horse Railroad Co., 90 Maine, 205, 164
Copeland *v.* Barron, 72 Maine, 206, 357
Cota *v.* Buck, 7 Met. 588, 341, 342
County Attorney case, 85 Maine, 545, 576
Cross *v.* Bean, 81 Maine, 529, 269
Cuff *v.* Railroad Co., 35 N. J. L. 18, 161
Cumberland Natl. Bank *v.* St. Clair, 93 Maine, 35, 148
Cunningham *v.* The Bath Iron Works, 92 Maine, 501, 164
Curran *v.* Rummell, 118 Mass. 482, 398
Curtis *v.* Horn, 58 N. H. 504, 342
Cushing *v.* Perot, 175 Pa. 66, 509, 513
Dacy *v.* People, 116 Ill. 556, 479
Dain *v.* Cowing, 22 Maine, 349, 345
Danforth *v.* Robinson, 80 Maine, 466, 460
Daniels *v.* Hatch, 21 N. J. L. 391, 398, 399
Darling *v.* Bangor, 68 Maine, 108, 313
Davenport *v.* Long Island Ins. Co., 10 Daly, 535, 492
Davis *v.* Boston, 129 Mass. 377, 170
Davis *v.* Davis, 61 Maine, 395, 77
Davis *v.* Gray, 16 Wall. 203, 514
Davis *v.* Justice, 31 Ohio St. 359, 562
Day *v.* Philbrook, 85 Maine, 90, 32
Demare *v.* Scates, (Kan.) 30 L. R. A. 97, 587
Dempsey *v.* The People, 47 Ill. 323, 325, 373
De Riemer *v.* De Cantillion, 4 Johns. Ch. 90, 270
Detroit *v.* Palmyra, 72 Maine, 258, 208
Devol *v.* Dye, 123 Ind. 321, 551
Dingley *v.* Gardiner, 73 Maine, 63, 324, 326
Dinsmore *v.* Savage, 68 Maine, 191, 264
Dist. of Columbia *v.* Cornell, 130 U. S. 655, 556, 557
Dockham *v.* Parker, 9 Maine, 137, 539, 40
Dolan *v.* Court Good Samaritan, 128 Mass. 437, 497
Dole *v.* Lincoln, 31 Maine, 422, 549, 50
Donnell *v.* Wylie, 85 Maine, 143, 549
Dorsey *v.* Wolff, 142 Ill. 589, 342
Douglas *v.* Shumway, 13 Gray, 498, 239, 241
Drake *v.* Wells, 11 Allen, 141, 239, 240
Dresser *v.* Dresser, 46 Maine, 48, 550
Drew *v.* Hagerty, 81 Maine, 231, 549
Dullam *v.* Wilson, 53 Mich. 392, 586
Duly *v.* Hogan, 60 Maine, 351, 195
Dunlap *v.* Newman, 52 Ala. 178, 137
Dunn *v.* Collins, 70 Maine, 230, 398
Dunn *v.* Snell, 74 Maine, 22, 127
East Livermore *v.* Farmington, 74 Maine, 155, 113
Eaton *v.* Europ. & No. Am. Ry. Co., 59 Maine, 520, 161
Edmond v. Caldwell, 15 Maine, 340, 148
Electric Telegraph Co. *v.* Overseers of Salford, 24 L. J. (N. S.) 146, 11 Ex. 181, 294
Elliott *v.* Lawhead, 43 Ohio State, 172, 256
——— *v.* Spinney, 69 Maine, 31, 168
Elwell *v.* Hacker, 86 Maine, 416, 461
Embden *v.* Lisherness, 89 Maine, 578, 280
Emery *v.* Lowell, 104 Mass. 13, 315
Erdman *v.* Moore, 58 N. J. L. 445, 289
Ernst *v.* Stectman, 74 Pa. St. 13, 342
Etna *v.* Brewer, 78 Maine, 377, 208
Farley *v.* Bryant, 32 Maine, 488, 270
Farmington Vill. Corp. *v.* Sandy River Bank, 85 Maine, 46–53, 225
Farrar *v.* Eastman, 10 Maine, 191, 64
Farrell *v.* Bridgeport, 45 Conn. 191, 586
Fennings *v.* Humphrey, 4 Beav. 1, 136
Ferguson *v.* Harris, 39 Am. St. Rep., 745, 383
Field *v.* Cappers, 81 Maine, 36, 133
——— *v.* Gellerson, 80 Maine, 273, 86
Fifield *v.* Farmer's Nat. Bank, 148 Ill. 163, 289

Fifield *v.* Maine Central R. R. Co., 62 Maine, 77, 294, 458
First Nat. Bank *v.* Gustin, 42 Minn. 327, 508
——— *v.* Strang, 72 Ill. 559, 557
Fisher *v.* Taylor, 2 Rawle, 34, 236
Fitzgerald *v.* Conn. Riv. Paper Co., 155 Mass. 155, 302
Fitzjerald, etc. Const. Co. *v.* Fitzjerald. 137 U. S. 98, 256
Flanagan *v.* The People, 52 N. Y. 467, 477
Flanders *v.* Barstow, 18 Maine, 357, 227
Fletcher *v.* Livingston, 153 Mass. 388, 239–240
Flewelling *v.* Lewiston and Auburn Horse R. R. 89 Maine, 593, 81
Fogg *v.* Greene, 16 Maine, 282, 206
——— *v.* Merrill, 74 Maine, 528, 305
Folsom *v.* Moore, 19 Maine, 252, 239
Forbes *v.* Parker, 16 Pick. 462, 456
Ford *v.* Ticknor, 169 Mass. 276, 357
Fowler *v.* True, 76 Maine, 43, 358
Frary *v.* Dakin, 7 Johns. 75, 520
Freeman *v.* Staats, 8 N. J. Eq. 814, 137
——— *v.* Underwood, 66 Maine, 229, 457
French *v.* Conn. River Lumber Co., 145 Mass. 261, 328
Frost *v.* Tibbetts, 30 Maine, 188, 521
Frye *v.* Me. Cent. R. R. Co. 67 Maine, 414, 329
Furbish *v.* Robertson, 67 Maine, 35, 133
Gardiner Savings Inst. *v.* Emerson, 91 Maine, 535, 465
Garland *v.* Hilborn, 23 Maine, 442, 540
Getchell *v.* Wells, 55 Maine, 433, 485
Giles *v.* Simonds, 15 Gray, 441, 239
Gillespie *v.* Moon, 2 Johns, Ch. 585, 270
Gilmore *v.* Newton, 9 Allen, 171, 458
Gilpatrick *v.* Biddeford, 86 Maine, 534, 311, 13
Gilpatrick *v.* Glidden, 81 Maine, 137, 463, 464
Glenn *v.* Liggett, 135 U. S. 533, 509, 513
Goddard *v.* Harpswell, 84 Maine 499, 311
Goodhue *v.* Luce, 82 Maine, 222, 133
Goodwin *v.* Clark, 65 Maine, 280, 206
Gordon *v.* Clapp, 111 Mass. 22, 228
Goulding *v.* Horbury, 85 Maine, 236, 262
Graham *v.* Virgin, 78 Maine, 338, 324
Grant *v.* Bradstreet, 87 Maine, 583, 463, 464
Grant *v.* King, 14 Vt. 367, 456
Great West Tel. Co. *v.* Purdy, 162 U. S. 329, 509
Green *v.* Alden, 92 Maine, 177, 124
——— *v.* Jones, 76 Maine, 563, 23
Greene *v.* Lunt, 58 Maine, 518, 124
Griffin *v.* Creppin, 60 Maine, 270, 412, 417, 419, 420
Grothe's Appeal, 135 Pa. St., 585, 233
Guerney *v.* Moore, 131 Mo. 650, 509
Gunnison *v.* Lane, 45 Maine, 165, 526
Gurney *v.* Rockport, 93 Maine, 360, 219
Hadlock *v.* Bulfinch, 31 Maine, 246, 32
Haggett *v.* Hurley, 91 Maine, 542, 76
Hale, receiver, *v.* Conant, 515
——— *v.* Hardon, 95 Fed. Rep. 747, 510, 514, 515
——— receiver, *v.* Hilliker, 515
——— receiver, *v.* Tyler, 104 Fed. Rep. 516
Hall *v.* Augsbury, 46 N. Y. 622, 324
——— *v.* Benton, 69 Maine, 346, 294
——— *v.* Otis, 71 Maine, 326, 357
——— *v.* West End St. Ry. Co., 168 Mass. 461, 81, 118
——— *v.* Wilson, 16 Barbour, 548, 556
Hamilton *v.* Home Ins. Co., 137 U. S. 370, 490
——— *v.* Liverpool & London & Globe Ins. Co., 136 U. S. 242, 490
Hampden *v.* Levant, 59 Maine, 557, 208
Hancock Nat. Bank *v.* Ellis, 172 Mass. 39, 47, 509, 516
——— *v.* Farnum, 176 U. S. 640, 508
Hancock Bank *v.* Joy, 41 Maine, 568, 554
Hanson *v.* Davison, 73 Minn. 454, 507, 512
Harding *v.* Hagar, 60 Maine, 340, 37
Hare *v.* Dean, 90 Maine, 308, 132
——— *v.* McIntyre, 82 Maine, 240, 307

Harrington *v.* McKillop, 132 Mass. 567, 562
Harris *v.* Social Manf. Co., 8 R. I. 133, 324
Harper *v.* Phelps, 21 Conn. 257, 47
Hatch *v.* Caine, 86 Maine, 282, 357
Hawkins *v.* Glenn, 131 U. S. 329, 508, 513
Hayward *v.* Leeson, 176 Mass. 310, 516
Hazen *v.* Jones, 68 Maine, 343, 526
Heath *v.* Williams, 25 Maine, 209, 324
Herries *v.* Jamieson, 5 Durn. & East, 533, 130
Hewes *v.* Coombs, 84 Maine, 434, 413
Hill *v.* Stevenson, 63 Maine, 364, 550
Hinkley & Egery Iron Co. *v.* Black, 70 Maine, 473, 289
Hodgdon *v.* Wight, 36 Maine, 326, 418, 420
Holden *v.* Lake Co., 53 N. H. 552, 328
Holland *v.* Development Co., 65 Minn. 324, 508
Hood *v.* Hartshorn, 100 Mass. 117, 490, 492
Hopewell Mills *v.* Taunton Savings Bank, 150 Mass. 519, 289
Hopps *v.* People, 31 Ill. 385, 479
Hopt *v.* People of Utah, 110 U. S. 574, 373
Hotchkiss *v.* Hunt, 49 Maine, 213, 457
Hough *v.* Tex. & Pac. Railway Co., 100 U. S. 213, 302
Houghton *v.* Davenport, 74 Maine, 590, 358
Hovey *v.* Dary, 154 Mass. 7, 358
Howard *v.* Kimball, 65 Maine, 308, 280
——— *v.* Shoemaker, 35 Ind. 111, 586
Howarth *v.* Angle, 162 N. Y. 179, 516
——— *v.* Lombard, 175 Mass. 570, 516
Howe *v.* Ward, 4 Maine, 195, 460
Howland *v.* Burlington, 53 Maine, 54, 57
Hubbard *v.* Johnstone, 3 Taunt. 177, 415
——— v. Mosely, 11 Gray, 170, 341
Hudson *v.* Coe, 79 Maine, 83, 421
Hunnewell *v.* Duxbury, 154 Mass. 286, 29
Hurley *v.* Bowdoinham, 88 Maine, 293, 219
Hutchinson *v.* Liverpool & London & Globe Ins. Co., 153 Mass. 143 490
Hutchinson *v.* Murchie, 74 Maine, 187, 86, 148
Ingalls *v.* Auburn, 51 Maine, 352, 485
Ingham *v.* Primrose, 7 C. B. (N. S.) 82, 558
In re Corliss, 11 R. I. 638, 586, 589
——— People's Live Stock Ins. Co 56 Minn. 180, 512
Ins. Co. *v.* Bill, 31 Conn. 534, 538, 342
Insurance Co. *v.* Hodgkins, 66 Maine, 109, 361
Jacobson *v.* Bradley, 49 Hun, 152, 140
Jackson *v.* Cobbin, 8 M. & W., 790, 383
Jefferson *v.* Litchfield, 1 Maine, 196, 57
——— *v.* Washington, 19 Maine, 302, 209
Jellison *v.* Hill, 4 Gray, 316, 341
Jones *v.* Manufg. & Invst. Co., 92 Maine, 565, 298
——— *v.* Stevens, 94 Maine, 582, 248
Jordan *v.* Tate, 19 Ohio St., 586, 342
Kellogg *v.* Curtis, 65 Maine, 59, 555
Kelly *v.* Wakefield St. Ry. 175 Mass. 331, 81, 118
Kelley *v.* Weston, 20 Maine, 232, 540
Keniston *v.* Adams, 80 Maine, 294, 261
Keyser *v.* Mitchell, and Garnishees, 67 Pa. St. 473, 234
Kilbourn *v.* Bradley, 3 Day, 356, 140
Kimball *v.* Crocker, 53 Maine, 263, 545–6, 7
King *v* Duluth M. & N. Ry. Co., 61 Minn. 482, 383
——— v. Railroad Co., 66 N. J. 184, 161
Kirchner *v.* Myers 35 Ohio St. 85, 562
Knatchbull *v.* Hallett, L. R. 13 Chan. Div. 696, 358
Knight *v.* Boughton, 11 Cl. & Fin. 513, 47
——— *v.* Knight, 3 Beav. 148, 48
——— *v.* Loomis, 30 Maine, 204, 45
Ladd *v.* Dickey, 84 Maine, 190, 126
Lambe *v.* Eames, 6 Ch. App. 597, 48
Lane *v.* Com. 59 Pa. St. 371, 373
Larrabee *v.* Hodgkins, 58 Maine, 412, 412
Lawrence *v.* Cooke, 104 N. Y. 632, 47
Leavenworth, &c. R. R. Co. *v.* The United States, 92 U. S. 733, 443

Leavitt *v.* Bangor & A. R. R. Co., 89 Maine, 509, 161
Leighton *v.* Kelsey, 57 Maine, 85, 248-249
Levine *v.* Lancaster Ins. Co., 66 Minn. 138, 491
Lewis *v.* McReavy, 7 Wash. 294, 383
Libby *v.* Mayberry, 80 Maine, 137, 126
Lincoln *v.* Chadbourne, 56 Maine, 197, 324
Little *v.* Megquier, 2 Maine, 176, 421
Littlefield *v.* Brooks, 50 Maine, 475, 113
——— *v.* Webster, 90 Maine, 213, 219
Lord *v.* Bourne, 63 Maine, 368, 261
Loring *v.* Hayes, 86 Maine, 351, 286
Loss *v.* Obrey, 7 C. E. Green, 52, 270
Lovejoy *v.* Foxcroft, 91 Maine, 367, 243
Lunt's case, 6 Maine, 412, 574
Magoon *v.* Davis, 84 Maine, 178, 67
Mahan *v.* Sutherland, 73 Maine, 158, 110, 255
Mahoney *v.* Dore, 155 Mass. 513, 302
Maine Bank *v.* Hervey, 21 Maine, 38, 255
Maine Cent. Inst. *v.* Haskell, 71 Maine, 459, 133
Marchant *v.* Penn. R. R. Co. 153 U. S. 380, 185
Marcly *v.* Shults, 29 N. Y. 622, 324
Marson *v.* Deither, 49 Minn. 423, 508
Marstin *v.* Hall, 9 Gratt. 8, 140
Marston *v.* Marston, 54 Maine, 476, 250
Matthews *v.* Blossom, 15 Maine, 400, 110
Mattison *v.* Marks, 9 Mich. 423, 341
Mattocks *v.* Young, 66 Maine, 459, 361
Mayo *v.* Libby, 12 Mass. 339, 444
Mayo *v.* Stevens, 61 Maine, 562, 398
McCarthy *v* Sec. Par. of Portland, 71 Maine, 318, 161
McCornick *v.* Pratt, (Utah) 17 L. R. A. 243, 586
McFarlan Co. *v.* Potter, 51 N. E. Rep. 737, 302
McKay *v.* N. E. Dredging Co., 92 Maine, 454, 105, 153
McLellan *v.* Wheeler, 70 Maine, 285, 368
McPheters *v.* Moose River Log Driving Co., 78 Maine, 329, 330
McRea *v.* Central Nat. Bank, 66 N. Y. 489, 289
Me. Ben. Assoc. *v.* Hamilton, 80 Maine, 99, 253
Mead *v.* Stratton, 87 N. Y. 493, 563
Meares *v.* Finlayson, 55 S. C. 105, 140
Merrill *v.* Gore, 29 Maine, 348, 173
Merrill *v.* Washburn, 83 Maine, 191, 229, 307
Millar *v.* Allen, 10 R. I. 49, 456
Millay *v.* Wiley, 46 Maine, 230, 526
Miller *v.* Hull, 4 Denio, 104, 139
Mills *v.* Fry, 19 Ves. 277, 137
Milward *v.* Thatcher, 2 T. R. 81, 588
Moor *v.* Veazie, 32 Maine, 341, 360, 575
Morgan *v.* Lewiston, 91 Maine, 566, 376
Morrison *v.* Clark, 89 Maine, 103, 280
Moulton *v.* Egery, 75 Maine, 485, 412
Mundle *v.* Hill Manfg. Co., 86 Maine, 400, 298
Munroe *v.* Dewey, 176 Mass. 184, 233
Munsell *v.* Carew, 2 Cush. 50, 540
Murphy *v.* Carlin, 113 Mo. 112, 47
Narramore *v.* C. C. & St. L. Ry. Co., 96 Fed. Rep. 298, 302
Nash *v.* Minn. Title Ins. & Trust Co., 159 Mass. 29, 437
Nash *v.* Reed, 46 Maine, 168, 526
Nason *v.* West, 78 Maine, 257, 164
Newport Illuminating Co. *v.* Assessors, 19 R. I. 632, 294
North Yarmouth *v.* West Gardiner, 58 Maine, 207, 114, 208, 209
Noyes *v.* Stillman, 24 Conn. 15, 324
Nudd *v* Burrows, Assignee, 91 U. S. 426, 369
Nugent *v.* Boston, C. & M. R. R. 80 Maine, 62, 461
Nutter *v.* Stover, 48 Maine, 166, 555
Nutter *v.* Vickery, 64 Maine, 490, 45
Oakes *v.* Merrifield, 93 Maine, 297, 537
Ogden *v.* Raymond, 22 Conn. 379, 586
Olson *v.* Cook, 57 Minn. 552, 508, 512
Ortwein *v.* Com., 76 Pa. St. 414, 479
Ould *v.* Washington Hospital, 95 U. S. 311, 496
Page *v.* Marston, 94 Maine, 342, 285
Paine *v.* Stewart, 33 Conn. 516, 509
Panton *v.* The People, 114 Ill. 505, 373
Paris *v.* Norway Water Co., 85 Maine, 330, 293
Parker *v.* Middlebrook, 24 Conn. 207, 458
Parker *v.* Parker, 1 Allen, 245, 421

Parks *v.* Libbey, 92 Maine, 133, 115
Parks *v.* Mosher, 71 Maine, 304, 352
Parmenter Mfg. Co. *v.* Hamilton, 172 Mass. 179, 395
Parsons *v.* Copeland, 38 Maine, 537, 289
Parsons *v.* Insurance Co., 31 Fed. Rep. 305, 514
Partington *v.* Att'y Gen'l L. R. 4 H. L. Cas. 122, 415
Patterson *v.* Triumph Ins. Co., 64 Maine, 504, 496
Paul *v.* Frye, 80 Maine, 26, 318
People *v.* Arensberg, 105 N. Y. 130, 99
People *v.* Brooklyn, 77 N. Y. 573, 588
People *v.* Carpenter, 102 N. Y. 238, 478
People *v.* Hoin, 62 Cal. 120, 479
People *v.* McKee, 68 N. C. 429, 586
People *v.* Sanderson, 30 Cal. 160, 586
People *v.* Taylor, 138 N. Y. 398, 478
Penn. & Del. R. R. Co. *v.* Leuffer, 84 Penn St. 168, 530
Pendleton *v.* Northport, 80 Maine 598, 218
Perley *v.* Jewell, 26 Maine, 101, 415
Perkins *v.* Lockwood, 100 Mass. 249, 398
Perine *v.* Van Beek (Iowa) 19 L. R. A. 622, 587
Perry *v.* Perry, 65 Maine, 399, 224
Perteet *v.* The People, 70 Ill. 171, 373
Pettengill *v.* Shoenbar, 84 Maine, 104, 526
Pierce *v.* Drew, 136 Mass. 75, 292
Pierce *v.* Travers, 97 Mass. 306, 324
Pitman *v.* Poor, 38 Maine, 237, 324
Platt *v.* Beach, 2 Benedict, 303, 586
Plumley's case, 156 Mass. 236, 99, 100
Plumley *v.* Massachusetts, 155 U. S. 461, 100
Pooler *v.* Reed, 73 Maine, 129, 588
Pope *v.* Jackson, 65 Maine, 162, 289
Portland, etc., Steamboat Co. *v.* Locke, 73 Maine, 370, 358
Powers *v.* Patten, 71 Maine, 583, 32, 33
Powell *v.* Pennsylvania, 127 U. S. 678, 100
Proprs. Kennebec Purchase *v.* Laboree, 2 Greenl. 275, 64
Pulitzer *v.* Livingston, 89 Maine, 359, 545
Putnam *v.* Putnam, 13 Pick. 129, 264
Putnam *v.* White, 76 Maine, 551, 540
Rafferty *v.* Bucknam, 46 Iowa, 195, 563
Railway Co. *v.* Gebhard, 109 U. S. 531, 512
Ramsdell *v.* Tewksbury, 73 Maine, 199, 228
Rand *v.* Webber, 67 Maine, 191, 133
Randall *v.* Tuell, 89 Maine, 443, 37
Rawson *v.* Knight, 73 Maine, 340, 526
Raymond *v.* Lowell, 6 Cush. 524, 376
Reed *v.* Cutts, 7 Maine, 186, 534
Reed *v.* Washington Fire & Marine Ins. Co., 138 Mass. 572, 490
Reinstein *v.* Watts, 84 Maine, 129, 360
Relfe *v.* Rundle, 103 U. S. 222, 514, 515, 516
Rex *v.* Hughes, 5 B. and C. 886, 588
Roads *v.* Webb, 91 Maine, 410, 340, 341
Rhodes *v.* Com. 48 Pa. 396, 373
Rhodes *v.* Iowa, 170 U. S. 412, 142, 144
Rhode Island *v.* Massachusetts, 12 Pet. 657, 585
Rice *v.* Cook, 71 Maine, 559, 337
Richardson *v.* Palmer, 38 N. H. 218, 178
Richardson *v.* Rich, 66 Maine, 249, 110
Richards *v.* Wardwell, 82 Maine, 343, 539
Ricker *v.* Sprague Mfg. Co., 14 R. I. 402, 342
Ridley *v.* Ridley, 87 Maine, 445, 257
Rife *v.* Geyer, 59 Pa. St. 393, 236
Ripley *v.* Dolbier, 18 Maine, 382, 456
Ripley *v.* Hebron, 60 Maine, 379, 113, 114
Ripley *v.* Hebron, 60 Maine, 388, 203, 208, 209
Robbins *v.* Springfield St. Ry. 165 Mass. 30, 81, 118
Roberts *v.* Stevens, 84 Maine, 325, 233
Robinson *v.* Ring, 72 Maine, 140, 550
Roby *v.* Skinner, 34 Maine, 270, 264
Rockland *v.* Ulmer, 87 Maine, 357, 168
Rodick *v.* Hinckley, 8 Maine, 274, 329
Rogers *v.* Dexter and Piscat. R. R. Co., 85 Maine, 374, 529, 30
——— *v.* Goodwin, 2 Mass. 475, 585

Rogers *v.* Vosburg, 4 Johns. Ch. 84, 136, 137
——— *v.* Whitehouse, 71 Maine, 226, 148
Roose *v.* Perkins, 9 Neb. 304, 563
Roper *v.* Lendon, 1 El. & El. 825, 489
Rounds *v.* Bangor, 46 Maine, 541, 484
Roux *v.* Lumber Co , 85 Mich. 519, 302
Rowe *v.* Hamilton, 3 Maine, 63, 76
Russell *v.* Lathrop, 122 Mass. 300, 307
——— *v.* Richards, 10 Maine, 429, 239
Sage *v.* Valentine, 23 Minn. 102, 398, 399
Saltonstall *v.* Sanders, 11 Allen, 456, 497
Samuelson *v.* Cleveland Iron Min. Co., 49 Mich. 164, 161
Sargent *v.* Simpson, 8 Maine, 148, 444
Saunderson *v.* Stearns, 6 Mass. 37, 45
Sawyer *v.* Mackie, 149 Mass. 269, 169
Schile *v.* Brokhaus, 80 N. Y. 614, 328
Schroeder *v.* Crawford, 94 Ill. 357, 563
Schulenberg *v.* Harriman, 21 Wall. 44, 443
Scott *v.* Avery, 5 H. L. Cas. 811, 489
Sears *v.* Carrier, 4 Allen, 339, 136
Sessions *v.* Moseley, 4 Cush. 87, 551
Shaw *v.* Gilmore, 81 Maine, 396, 540
——— *v.* Glen, 37 N. J. Eq. 32, 87
Sherburne *v.* Jones, 20 Maine, 70, 539
Sherwood *v.* State Board of Canvassers, (N. Y.) 11 L. R. A. 646, 586
Simmons *v.* Brown, 5 R. I. 299, 328
Skowhegan Savings Bank *v.* Parsons, 86 Maine, 514, 412
Slate *v.* Jepherson, 6 Cush. 129, 421
Small *v.* Thompson, 92 Maine, 539, 357
Smith *v.* Baker, 1891, App. Cas. 325, 302
——— *v.* California Ins. Co., 87 Maine, 190, 490
——— *v.* Ferguson, 90 Ind. 229, 551
——— *v.* Johns, 3 Gray, 517, 33
——— *v.* Moor, 90 Ind. 294, 587
Snow *v.* Pressey, 85 Maine, 417, 174
Solon *v.* Embden, 71 Maine, 418, 114
——— *v.* Perry, 54 Maine, 493, 205
Soule *v.* Bruce, 67 Maine, 584, 206
Spaulding's case, 72 Maine, 542, 576, 577
Spring *v.* Russell, 7 Maine, 273, 576
State *v.* Addington, 77 Mo. 110, 99
——— *v.* Bartley, 92 Maine, 422, 199
——— *v.* Brown, 5 R. I. 1, 588
——— *v.* Cleveland, 58 Maine, 564, 372
——— *v.* Day, 79 Maine 120, 368
——— *v.* Dowd, 19 Conn. 388, 373
——— *v.* Dunning, 83 Maine, 178, 198
——— *v.* Erb, 74 Mo. 199, 478
——— *v.* Felter, 25 Iowa, 67, 479
——— *v.* Goss, 69 Maine, 22, 185
——— *v.* Harrison, 36 West Va. 729, 478
——— *v.* Hughes, 16 R. I. 403, 102
——— *v.* Intox. Liquors, 94 Maine, 335, 142, 145
——— *v.* Kirk, 44 Ind. 401, 586
——— *v.* Lawrence, 57 Maine, 574, 474, 475, 476, 481
——— *v.* Learned, 47 Maine, 426, 199
State *v.* Marshall, 64 N. H. 549, 99
——— *v.* Mewherter, 46 Iowa, 88, 479
——— *v* Meyer, 58 Vt. 457, 373
——— *v.* Murray, 28 Wis. 96, 587
——— *v.* Newton, 21 Vroom, 534, 100
——— *v.* Nixon, 32 Kan. 205, 479
——— *v.* Nowlan, 64 Maine, 531, 199
——— *v.* Pagels, 92 Mo. 300, 478
——— *v.* Patten, 49 Maine, 383, 86
——— *v.* Peck, 60 Maine, 498, 134
——— *v.* Rhodes, 90 Iowa, 496, 143
——— *v.* Richards, 85 Maine, 252, 368
——— *v.* Smith, 10 R. I. 258, 102
——— *v.* Stevenson, 91 Maine, 107, 182
——— *v.* Sutton, (Minn.) 31 L. R. A. 630, 589
——— *v.* Swett, 87 Maine, 99, 102
——— *v.* Walton, 62 Maine, 107, 184
——— *v.* Welch, 79 Maine, 99, 199
——— *v.* Wilson, 29 Ohio St. 347, 586
Stephenson *v.* Piscataqua F. & M. Ins. Co., 54 Maine, 55, 489
Stevens *v.* Shaw, 77 Maine, 566, 254
Stewart *v.* Platt, 101 U. S. 731, 87
St. Louis Car Co. *v.* Stillwater St. Ry. Co., 53 Minn. 129, 256
Strickland *v.* Parker, 54 Maine, 263, 294
Stubbs *v.* Lee, 64 Maine, 195, 588
Stults *v.* Silva, 119 Mass. 137, 341
Sumner *v.* Bachelder, 30 Maine, 35, 224
Tarbell *v.* West, 86 N. Y. 280, 346
Tappen *v.* Blaisdell, 5 N. H. 109, 346

Telford *v.* Patton, 144 Ill. 611, 551
Terre Haute *v.* Hudnut, 112 Ind. 542, 329
Thomas *v.* Parsons, 87 Maine, 203, 148
Thomson *v.* Thomson, 19 Maine, 244, 460
Thorndike *v.* Loring, 15 Gray, 391, 547
Thorndike *v.* Wells Memorial Assoc., 146 Mass. 619, 492
Thornton *v.* Leavitt, 63 Maine, 384, 255
Tibbetts *v.* K. & L. R. R. Co., 62 Maine, 437, 161
Tipton *v.* Wright, 7 Bush, (Ky.) 448, 256
Tolles *v.* Winton, 63 Conn. 440, 289
Tolman *v.* Hobbs, 68 Maine, 316, 415
Tomlinson *v.* Ellison, 104 Mo. 105, 551
Tompkins *v.* Blakey, (Atl. Rep. June 12, 1901.) 516
Towle *v.* Blake, 38 Maine, 528, 206
Trask *v.* Trask, 78 Maine, 103, 196
Turner *v.* Bachelder, 17 Maine, 257, 539
Uhrig *v.* Williamsburg City Fire Ins. Co., 101 N. Y. 362, 490
U. S. *v.* Guiteau, 10 Fed. Rep. 195, 479
U. S. *v.* Wigglesworth, 2 Story, 369, 373, 415
Van Amee *v.* Jackson, 35 Vt. 173, 46
Vance *v.* Vance, 21 Maine, 364, 77
Vanderbilt *v.* Schreyer, 91 N. Y. 392, 383
Van Heusen *v.* Radcliff, 17 N. Y. 580, 87
Varney *v.* Stevens, 22 Maine, 331, 127
Wallace *v.* Stevens, 64 Maine, 225, 264
Wakefield *v.* Fargo, 90 N. Y. 213, 530
Walston *v.* Nevin, 128 U. S. 578, 185
Ware *v.* Cong. Soc. 125 Mass. 584, 458
Warner *v.* Bates, 98 Mass. 274, 46
Watuppa Reservoir Co. *v.* Fall River, 147 Mass. 548, 177
Way *v.* Smith, 11 Mass. 523, 341
Webb *v.* Stuart, 59 Maine, 356, 398
Weld *v.* Oliver, 21 Pick. 559, 345
Wells *v.* Collins, 74 Wis. 341, 551
Wentworth *v.* Wentworth, 71 Maine, 72, 262
——— *v.* ———, 69 Maine, 247, 77
Westbrook *v.* Bowdoinham, 7 Maine, 364, 113
Westenhaver *v.* German-American Ins. Co., (Iowa), 84 N. W. 717, 492
West Nat. Bank *v.* Lawrence, 117 Mich. 669, 509
Wheeler *v.* Wheeler, 33 Maine, 347, 345
Whipple *v.* Adams, 1 Met. 444, 46
Whitaker *v.* Smith, 81 N. C. 340, 530
White *v.* Foster, 102 Mass. 375, 239
——— *v.* Jordan, 27 Maine, 270, 398
——— *v.* Phelps, 12 N. H. 382, 456
——— *v.* Moseley, 8 Pick. 356, 328
Whitman *v.* Oxford Nat. Bank, 176 U. S. 559, 509
Whitmore *v.* Pulp Co., 91 Maine, 297, 71, 162
Whittemore *v.* Russell, 80 Maine, 297, 357
Whitney *v.* Lowell, 33 Maine, 318, 456
Willard *v.* Fiske, 2 Pick. 540, 264
Williams *v.* Thurlow, 31 Maine, 392, 32
Williamson *v.* Nealey, 81 Maine, 447, 86
Wilson *v.* Esten, 14 R. I. 621, 87
——— *v.* Reed, 3 Johns. 175, 345
Wimer *v.* Overseers of the Poor of Worth Township, 104 Pa. St. 317, 383
Winchester *v.* Ball, 54 Maine, 558 227, 8
Wing *v.* Ayer, 53 Maine, 138, 264
Winsor *v.* McLellan, 2 Story, 492, 86
Witham *v.* Portland, 72 Maine, 539, 376
Wm. H. Glover Co. *v.* Rollins, 87 Maine, 434, 195
Wood *v.* Kelley, 30 Maine, 57, 324
Woods *v.* Woods, 77 Maine, 434, 77
Woodbridge *v.* Mayor and Aldermen of Cambridge, 114 Mass. 483, 313
Woodman *v.* Boothby, 66 Maine, 389, 337
——— *v.* Chesley, 39 Maine, 45, 540
Woodbury *v.* Gardner, 77 Maine, 68, 23
Worcester County Bank *v.* Dorchester & Milton Bank, 10 Cush. 490, 557
Worthington *v.* Hylyer, 4 Mass. 205, 178
Wright *v.* Atkyns, 19 Vesey Jr. 301, 48
Wright *v.* Wheeler, 1 Camp. 165, 139
Yarmouth *v.* France, 192 Q. B. D. 647, 302
York *v.* Murphy, 91 Maine, 320, 225, 228
Young *v.* Jones, 64 Maine, 563, 398

CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE.

FRANK S. BIGELOW and another,

vs.

LEVI R. BIGELOW, and others.

Somerset. Opinion January 31, 1901.

Contracts. Consideration. Gift. Stat. of Frauds.

In order to constitute a valuable consideration for a promise, neither the benefit to the promisor nor the detriment to the promisee need be actual. It would be a detriment to the promisee, in a legal sense, if he, at the request of the promisor and upon the strength of his promise, performed any act which occasioned him the slightest trouble or inconvenience, and which he was not obliged to perform.

Held; that if a contract existed between the mortgagor and mortgagee, made before the mortgage was given, as claimed, whereby the latter promised to convey a farm to the former upon the performance of certain acts by the mortgagor, the performance by him of these acts which constituted a consideration for the contract followed by his going into possession of the property with the knowledge and consent of the owner, and making expenditures thereon, although not sufficient to entitle him to a conveyance, if the promise was merely a voluntary one to make a gift, under the circumstances of the case, would be sufficient to take the case out of the operation of the statute of frauds, and to authorize a court of equity, in the exercise of its sound discretion, to decree a specific performance of the contract to convey.

Held; that if this was the true state of facts, the mortgage under which the plaintiffs claim was without consideration, and the plaintiffs would not be entitled to either a common law or conditional judgment.

At the trial, the court, following the former decision, ordered a verdict for the plaintiffs, thus taking the question of fact involved from the jury. *Held;* that this was erroneous.

See *Bigelow* v. *Bigelow*, 93 Maine, 439.

On exceptions by defendant. Exceptions sustained.

After all the evidence had been introduced at the second trial of this case, (see first trial 93 Maine, 439), the presiding justice ruled, as a matter of law, that the facts testified to and the evidence introduced on the part of the defendants would constitute no defense to the note and mortgage in suit, and directed the jury to return a verdict for the plaintiffs, to which ruling the defendants seasonably excepted.

The defendants also requested the following instructions: That if the jury find the facts to be, as claimed by the defendants, that Levi R. Bigelow abandoned his employment in the Lockwood mills, where he was receiving wages, and moved his residence from Waterville to Smithfield,—all at the request of John Harlow Bigelow, and in consideration of the promise by the latter that if Levi would do these several acts,—he (Harlow) would buy and deed to him (Levi) the farm in dispute, such acts would constitute a legal consideration for such promise, and if the minds of the two parties thus met, it would constitute an oral contract for the deed of the farm.

This instruction the court declined to give, remarking that the subject matter thereof was already covered.

To this refusal of the court to give the instruction requested the defendants seasonably excepted.

The verdict of the jury was for the plaintiff as instructed by the court.

E. F. Danforth and S. W. Gould, for plaintiffs.

Possession alone is not sufficient to take the case out of the statute of frauds. *Green* v. *Jones*, 76 Maine, 563.

In order to entitle Levi to a deed and compel Harlow to convey, the former would not only be obliged to show that he had made some substantial and permanent improvements on the premises, but that they were made in pursuance of an agreement, and be obliga-

tory, and of such a nature that his failure to receive the deed would cause injury or loss on his part, to such an extent as to be a fraud upon Levi.

The contract must be proved as it has been laid, and the possession and other acts of performance must pursue and substantiate the contract proved. 3 Md. 480; 33 N. H. 32; *Thynne* v. *Glengall*, 2 H. L. Cas. 158; *Phillips* v. *Thompson*, 1 Johns. Chan. 131, 149; *Anthony* v. *Leftwich*, 3 Randolph, 238, 247, 277; *Moore* v. *Small*, 7 Harris, 461; *Cox* v. *Cox*, 2 Casey, 375; 3 Penna. 332; 4 Md. 36; *Haynes* v. *Walker*, 2 Jones, 173; *Colson* v. *Thompson*, 2 Wheat. 336, 341; *Woodbury* v. *Gardner*, 77 Maine, 71; White & Tudor's Lead. Cas. in Equity (3d. Am. Ed.) p. 722; *Tilton* v. *Tilton*, 9 N. H. 386, 390; *McKee* v. *Phillips*, 9 Watts, 85, 86; *Crane* v. *Gough*, 4 Md. 316; *Hawkins* v. *Hunt*, 14 Ill. 42; *Parkhurst* v. *Van Cortland*, 1 Johns. Chan. 274, 284; *Pinkard* v. *Pinkard*, 23 Ala. 649; *Eckert* v. *Eckert*, 3 Penn. 332; *Eckert* v. *Mace*, Ib. 364, note; *Wack* v. *Sorber*, 2 Wharton, 387.

O. D. Baker, for defendants.

The consideration stipulated for was an actual detriment to the defendant. There were three considerations: (1) Surrender of situation in the mill; (2) change of permanent residence; (3) stocking the farm, etc.

Actual benefit or detriment not the true test. *Ballard* v. *Burton*, 64 Vt. 387, pp. 393-4; *Talbot* v. *Stemmer*, 89 Ky. 222, (25 Am. St. Rep). 531; *Hamer* v. *Sidway*, 124 N. Y. 538; 6 Eng. Ruling Cases, 22-3.

True statement of principle: Any act done by the promisee, which he is not under any legal obligation to do, and which he does at the request of the promisor, constitutes in law both a legal detriment to the promisee and a legal benefit to the promisor. *Pillans* v. *Van Mierop*, 3 Burr. 1761; Leake, Cont. 324; 1 Chitty Cont. 28, 31, 32; *Sturlyn* v. *Albany*, 1 Cro. Eliz. 67; 1 H. Bl. 312; *Laythoarp* v. *Bryant*, 3 Scott, 238, 250, S. C. 2 Bing. N. C. 735; 8 Selwyn N. P. 47 (Assumpsit); 2 Wm's Saunders, 137.

Any trouble, risk or inconvenience to the plaintiff, however trifling, is a sufficient consideration. 6 Am. & Eng. Encyl. (2nd.

Ed.) 722, 737, 741, and cases. Illustrations: *Earle* v. *Angell*, 157 Mass. 294; *Dunham* v. *St. Croix Soap Co.*, 33 Can. L. J. 444; *Bretton* v. *Prettimon*, Sir T. Raymond, 153; *Brook* v. *Ball*, 18 Johns. 337; *Amie* v. *Andrew*, 1 Modern, 166; *Wolford* v. *Powers*, 85 Ind. 294, (S. C. 44 Am. Rep. 16); *Diffenderfer* v. *Scott*, 5 Ind. App. 243; *Eaton* v. *Libbey*, 165 Mass. 218; *Babcock* v. *Chase*, 92 Hun, 264; *Adams* v. *Honness*, 62 Barb. 326, and cases; *Peck* v. *Requa*, 13 Gray, 408; *Richardson* v. *Mellish*, 2 Bing. 229; *Worrell* v. *1st. Presb. Church*, 23 N. J. Eq. 96; *Perry* v. *Buckman*, 33 Vt. 7; *Bainbridge* v. *Firmstone*, 8 Ad. & El. 743, 35 E. C. L. 513; *N. E. Marine Ins. Co.* v. *De Wolf*, 8 Pick. 56; *Blodgett* v. *Skinner*, 15 Vt. 716; *Devecmon* v. *Shaw*, 69 Md. 199, (9 Am. St. Rep. 422); *Talbot* v. *Stemmons*, 89 Ky. 222, (25 Am. St. Rep.) 531, 5 L. R. A. 856; *Hamer* v. *Sidway*, 124 N. Y. 538; 21 Am. St. Rep. 693, L. R. A. 463; *Coles* v. *Pilkington*, L. R. 19 Eq. 174; *Rowton* v. *Rowton*, 1 Hen. & Mun. (Va.) 1805; *Lorentz* v. *Lorentz*, 14 W. Va. 775; *Lobdell* v. *Lobdell*, 36 N. Y. 327; *Hunter* v. *Mills*, 29 So. Car. (1888) 6 S. E. Rep. 907.

Statute of Frauds: Pom. Specif. Performance, §§ 96, 101, 104, 107, and cases cited, 108, 114 and cases cited, 115 and cases cited, 130, 134. 1 White & Tudor, L. C. E. pp. 1045–8. Counsel also cited: *Green* v. *Jones*, 76 Maine, 567; *Lindsay* v. *Lynch*, 2 Sch. & Le F. 1; *Pike* v. *Morey*, 32 Vt. 37; *Stark* v. *Wilder*, 36 Ib. 755; *Holmes* v. *Caden*, 57 Vt. 113; *Eaton* v. *Whitaker*, 18 Conn. 229, 230; *Kidder* v. *Barr*, 35 N. H. 255; *Brown* v. *Drew*, 67 N. H. 569; 3 Pomeroy's Equity, § 1409, note 2; *Coggswell* v. *Coggswell*, 40 Atl. Rep. 213, (N. J. Ch. 1898); *Jamison* v. *Dimock*, 95 Pa. St. 52, p. 54; *Coles* v. *Pilkington*, L. R. 19 Eq. 174; *Ungley* v. *Ungley*, L. R. 5 Ch. Div. 887; *Pain* v. *Coombs*, 1 DeG. & J. 32, 1857; *Lacon* v. *Mertins*, 3 Atkyns, 4; 1 Ves. Jr. 312; *Savage* v. *Carol*, 1 Ball & B. 551; *Gunter* v. *Halsey*, Ambler, 586; *Wilson* v. *R. R. Co.*, 2 DeG. & J. & S., 475; *Butcher* v. *Stapely*, 1 Vernon, 363; *Shillibeer* v. *Jarvis*, 8 DeG. McN. & G. 79; *Morphett* v. *Jones*, 1 Swanston, 181, 182; *Felton* v. *Smith*, 84 Ind. 485, 1882; *Pleasanton* v. *Raughley*, 3 Del. Ch. 124, 1867; *Fitzsimmons* v. *Allen's Admr.*, 39 Ill. 440, 1866; *Shirley* v. *Spencer*, 4

Gilman, (Ill.) 583, 1847; *Dugan* v. *Gittings*, 3 Gill, (Md. 138), 1845; *Bechtel* v. *Cone*, 52 Md. 698, 1879; *Tibbs* v. *Barker*, 1 Blackf. (Ind.) 58, 1820.

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

WISWELL, C. J. This is a real action. The plaintiffs rely upon a mortgage given by Levi R. Bigelow, one of the defendants, and under whom the other defendants claim, to John Harlow Bigelow, dated April 27, 1889, acknowledged and recorded, and duly assigned to the plaintiffs. The defense is that the mortgage was without consideration, that the indebtedness which the mortgage purported to secure, never in fact existed. The title to the property was at one time in John Harlow Bigelow, who conveyed it to the defendant, Levi R. Bigelow, and took back from him the mortgage in question. But the claim of the defendants is that this conveyance was in pursuance of a valid and enforceable contract made between John Harlow and Levi R., wherein the former, for a valuable consideration, had agreed to convey the premises to the latter.

After the first trial, which resulted in a verdict for the defendants, the plaintiffs brought the case to the law court upon a motion for a new trial. In the decision of the case at that time, (93 Me. 439) the court inadvertently failed to apply to a state of facts, which, it was said, the jury might have been authorized in finding, principles of law that are quite elementary. The contention of the defendants at that time, quite fully stated in the former opinion, was briefly this: In June, 1888, while Levi R. was employed in a cotton mill in Waterville, two of his sons, being temporarily in Skowhegan met John Harlow Bigelow, an uncle of their father, and had a conversation with him, during which, the latter, after inquiring about their father's health and learning that it was rather poor, sent word by the sons to him that if he would leave his employment in the mill and move onto a particular farm in the vicinity of Skowhegan, he, John, would purchase the farm and make a present of it to Levi; that this message was conveyed to

the latter, who, before acting upon it sent two of his sons back to Skowhegan to make sure there was no misunderstanding; that after receiving assurance that the promise would be carried out, Levi, in pursuance of this request and relying upon the promise, did leave his employment in the mill and move to the farm. When, some months later, the conveyance was made by John to Levi, the latter at the request of the former went to an office in Skowhegan and executed the note and mortgage which had been drafted and left there for this purpose. This is the mortgage in question.

In the former opinion, the court said, that, although these facts were stoutly denied by the plaintiffs, and although the subsequent conduct of the parties to the alleged contract was such as to lead to the belief that they did not consider that a contract had been made between them, and that the conversation between John and the sons of Levi amounted merely to a suggestion, and not a request and promise, that a jury might have been authorized in finding these facts as claimed by the defendants. It was then said in the opinion that this would not constitute a contract, even if the facts were as claimed by the defendants, that a consideration for the alleged promise of John was lacking, that there was neither a benefit to the promisor nor a detriment to the promisee.

But the court neglected to go further and say that neither the benefit to the one nor the detriment to the other need be actual; that it would be a detriment to the promisee, in a legal sense, if he, at the request of the promisor and upon the strength of that promise, had performed any act which occasioned him the slightest trouble or inconvenience, and which he was not obliged to perform. That is, if it is true that the defendant, Levi, did, at the request of his uncle, and relying upon the promise of the latter, give up his former home, and his employment in the mill, and move to the farm, then these acts of the defendant, Levi, performed in compliance with the request and in reliance upon the promise, would constitute a valuable consideration for such promise.

This principle is so universally recognized that the citation of authorities in its support is unnecessary. And the failure to allude to this doctrine in the former opinion was because of the fact that

the court, although it said that the jury might have been authorized in finding the facts as claimed by the defendants, expressed a contrary belief as to these facts. The failure to apply this doctrine led to a result inconsistent with the statement that the finding of facts by the jury might have been authorized.

If, prior to the conveyance from John to Levi, the latter was the equitable owner of the farm and entitled to a conveyance thereof, so that he could have maintained a bill for specific performance of the alleged contract, then the defendants' theory that the mortgage was without consideration, is correct. Whether, at that time, he was such an equitable owner, depends upon the determination of these two questions: first, did John promise, for a valuable consideration, to make a conveyance of this farm to Levi? This is a question of fact to be determined by the jury. Next, was the contract, if one was made, in view of the subsequent performance by Levi, one that should be enforced in equity? If a contract existed, we think that the performance upon the part of Levi of the acts which constituted the consideration for that contract, followed by his going into possession of the property with the knowledge and consent of the person holding the legal title, and making expenditures thereon, although not sufficient to entitle him to a conveyance if the promise was merely a voluntary one to make a gift, would be sufficient to take the case out of the operation of the statute of frauds, and to authorize a court of equity, in the exercise of its sound discretion, to decree specific performance of the contract to convey. *Green* v. *Jones*, 76 Maine, 563; *Woodbury* v. *Gardner*, 77 Maine, 68.

At the last trial, the case was submitted upon the printed record of the testimony taken out at the first trial. Thereupon counsel for defendants requested the court to give an instruction to the effect, that, if the jury should find the facts as claimed by the defendants in relation to the acts performed by Levi, at the request and in reliance upon the promise of John, such acts would constitute a legal consideration for the alleged promise of the latter, and that if the minds of the two parties thus met, it would constitute an oral contract for the conveyance of the farm. The presiding

justice, following the former opinion of the court in this case, declined to give the requested instruction, and ordered a verdict for the plaintiffs, thus taking from the jury the question of fact involved.

We have already seen that that decision was incorrect in this respect, the rulings at nisi prius were consequently erroneous.

Exceptions sustained.

WILLIAM S. HENRY, JR. *vs.* DAVID DENNIS.

SAME, and another *vs.* SAME.

Kennebec. Opinion January 31, 1901.

False Representations. Deceit. Sales.

One who makes a misrepresentation, to render himself liable therefor, must have made it with the intention that it should be acted upon by the person to whom it is made or by one to whom he intended it should be communicated.

A representation made to one person with the intention that it shall reach the ears of another and be acted upon by him, and which does reach him, and is acted upon by him to his injury, gives the person so acting upon it the same right to redress as if it had been made to him directly.

Henry, the plaintiff in one of these suits, and one of the two plaintiffs in the other suit, prior to the formation of the co-partnership with the other plaintiff in the second suit, had been individually engaged in the wool business under the name of W. S. Henry, Jr., & Co. After the formation of the co-partnership, under the name of Henry & Parsons, to carry on the same business, he continued his individual business to the extent of selling from time to time wool which he had on hand at the time of the formation of the co-partnership, and which was not turned over to the latter.

After the formation of the co-partnership between the plaintiffs in the second suit, and while the plaintiff Henry was still selling on his own account this wool, he wrote in the name of W. S. Henry, Jr., & Co. to the Gardiner Woolen Company, making inquiries as to the financial condition of that company. The defendant, to whom this letter was turned over for the purpose, made reply by letter directed to W. S. Henry & Co., and therein made, as was found by the jury, certain false representations as to the financial condition of the Woolen Company, which misrepresentations were acted upon by Henry, both individually and as a member of the firm of Henry & Parsons, by selling and shipping wool to the company upon credit, both upon his own account

and upon that of the firm of Henry & Parsons. The defendant did not know of the existence of the firm of Henry & Parsons, nor did he know that Henry was doing business alone under the firm name of W. S. Henry, Jr., & Co.

Held; that the defendant must have contemplated that the contents of his letter would either be communicated to other members of any firm of which Henry was a partner, in that business, and be acted upon by the firm, or that Henry, acting for a firm, would be induced by his letter to give credit to the Woolen Company; and that the defendant is liable to the firm, the members of which are the plaintiffs in one suit, for such injury as it suffered in consequence of the misrepresentations contained in his letter, whereby the firm was induced to make sales of its goods to the Woolen Company upon credit.

See *Same* v. *Same*, 93 Maine, 106.

On exceptions by defendant. Overruled.

Two actions on the case to recover damages for false and fraudulent representations of the defendant in relation to the Gardiner Woolen Company, as set forth in two writs and two declarations claiming upon two distinct and separate accounts. The cases were tried together by direction of the court.

One writ was in favor of W. S. Henry, Jr., doing business as W. S. Henry, Jr. & Company *vs.* David Dennis, on an account for $618.25, including interest; the other was in favor of W. S. Henry, Jr., and Chas. S. Parsons, co-partners in business under the firm name of Henry & Parsons *vs.* David Dennis for $1,208.18, including interest.

The letter of inquiry in regard to the standing of the Gardiner Woolen Company, the reply to which by Dennis is the basis of the charge of misrepresentation and of the verdict in both these cases, was written by W. S. Henry, Jr., and signed by W. S. Henry & Company, the name under which he was then doing business. The reply of David Dennis as to the standing of the Gardiner Woolen Company, the basis of alleged misrepresentation, was directed to W. S. Henry & Company. The firm of Henry & Parsons was not mentioned by W. S. Henry in his letter of inquiry, nor in any way known to David Dennis at the time of his reply. W. S. Henry, Jr., was at the time the above correspondence passed a member of the said firm of Henry & Parsons.

The claim of W. S. Henry, Jr. and Company, $618.25, was admitted without objection, but the claim of Henry & Parsons

amounting to $1,208,18 as set forth in the second writ was objected to and admitted as appears from the following transcript of the testimony in the case.

Extract from evidence of William S. Henry, Jr.

1. Is exhibit marked "Plff. 40 9-10," the unpaid account of Henry & Parsons?

(Objected to by Mr. Spear, for defendants, on the ground that the alleged representations made by Dennis were made directly to W. S. Henry & Company, Henry being the "Company," and not to Henry & Parsons; that there was no privity of contract whatever between Henry & Parsons; and that Dennis, even if the allegations were true, could not be held to any party except the one to whom he directly sent his letter or made the representations.)

Mr. Cornish, for plaintiff: These representations were made, as the evidence shows, to Henry. Now, I claim that anything Henry did in consequence of these representations—any goods which he shipped, either from his old stock, that of W. S. Henry, Jr., or from Henry & Parsons—in either event was in consequence of this letter, and the results follow naturally in one case as in the other.

The Court: Your objection, Mr. Spear, would go completely to one of these suits. If that be sustained, one suit will go out. (Admitted subject to objection.)

Ans. It is.

Exhibit, "Plff. 40 9-10," offered and read.

Exhibit, "40 9-10," was the account of Henry & Parsons, for $1,208.18.

All the testimony in the case touching the connection between W. S. Henry, Jr. & Company and Henry & Parsons, form a part of the exceptions.

L. C. Cornish, for plaintiff.

Counsel cited among other cases: *Bedford* v. *Bagshaw*, 4 H. & N. 538; *Peek* v. *Gurney*, L. R. 6 H. L. 377; *Eaton, Cole & Burnham Co.* v. *Avery*, 83 N. Y. 31.

A. M. Spear, for defendants.

Counsel argued: There was absolutely no privity of contract or contractual relations between Henry & Parsons as a firm, and Dennis, when Dennis wrote the letter complained of. Nor was the representation made to Henry, as a member of a firm, but to him as an individual, doing an individual business, as Henry's own statements show; it can make no legal difference whether he did his own individual business in the same store with Henry and Parsons or a mile away.

The statute modifying the common law is still in force. *Hearn* v. *Waterhouse*, 39 Maine, 96; *Brown* v. *Kimball*, 84 Maine, 280. Counsel also cited: 2 Addison Torts, p. 402; *Carter* v. *Harden*, 78 Maine, 528; *Winterbottom* v. *Wright*, 10 M. & W. 109; *Baker* v. *Jewell*, 6 Mass. 461; *Mann* v. *Blanchard*, 2 Allen, 386; *Kimball* v. *Cumstock*, 14 Gray, 508; 1 Lindley Partnership, p. 252.

The only class of cases in which fraudulent representation can be extended beyond the person to whom it is made, and whom it is intended to influence, are those cases in which the party making the representation owes a duty to the public, as in the case of *Thomas* v. *Winchester*, 6 N. Y. 397.

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

WISWELL, C. J. For some time prior to May 1,1896, Henry, the plaintiff in one of these suits, had been engaged in the wool business alone, under the name of W. S. Henry, Jr. & Co. On that day he formed a copartnership in the same business with one Charles C. Parsons and the business was subsequently carried on in the firm name of Henry & Parsons. But after the formation of the firm, Mr. Henry continued his individual business, in the name of W. S. Henry, Jr. & Co., to the extent of selling from time to time a quantity of wool which he had on hand at the time of the formation of the copartnership.

On August 15, 1896, after the formation of the firm of Henry & Parsons, but while Mr. Henry was still selling on his own account the wool which he previously had on hand and which had not been

turned over to the firm, Henry wrote a letter to the Gardiner Woolen Company, in which he referrred to an order for wool just received and in which he says: "At Mr. W. D. Eaton's request we sent you the little lot without any knowledge of your financial standing, but if we are to continue to ship you wool on 60 days time, we feel justified in informing ourselves in that respect and we presume that you would prefer to have us inquire directly of you than of outside parties. . . . . Will you kindly favor us with full particulars which we trust will warrant a continuation of our business relations to our mutual benefits." This letter was dictated by Mr. Henry, as shown by the letter, but was signed in the name of W. S. Henry, Jr. & Co.

In reply to this letter of inquiry, the defendant, to whom the letter was turned over for reply, under date of August 24, 1896, wrote a letter directed to W. S. Henry & Co., which, it is claimed, contained false and material representations as to the financial standing and condition of the Gardiner Woolen Company, which were subsequently acted upon by Mr. Henry, both individually and as a member of the firm of Henry & Parsons, by making sales to the Woolen Company on credit, upon his own account and upon that of the firm. The plaintiffs, Henry in one case and Henry & Parsons in the other, being unable to collect of the Woolen Company the amounts due them, because of its insolvency, brought these two actions to recover for the injuries sustained by them by reason of the alleged misrepresentations of the defendant.

The two cases were tried together and the jury found against the defendant in both cases. The only question now presented by the exceptions is, whether or not the representations contained in the defendant's letter directed to W. S. Henry & Co. could have been so acted upon and relied upon by Mr. Henry as a member of the firm of Henry & Parsons, that the defendant would be liable to that firm for any injury sustained by it on account thereof, as well as to Henry individually for any injury sustained by him for the same reason.

It is urged in behalf of the defendant that he should not be and is not liable to the firm of Henry & Parsons for any misrepresenta-

tions contained in that letter, because the letter was not directed to the firm and because there was no privity between it and the defendant. The case shows that the defendant did not know of the existence of Mr. Parsons or of the firm of Henry & Parsons. But Henry was the active member of the firm and the one who made these sales upon credit to the Woolen Company, and the jury must have found that Henry was induced to make these sales upon credit, both for himself and for the firm, by the representations contained in the defendant's letter, and that in making the sales and in extending credit to the company, both individually and as a member of the firm, he relied upon these representations.

No authority exactly in point has been called to our attention, but the general principles relative to the liability of a person for injuries caused by such misrepresentations, are well settled. One who makes a misrepresentation must, to render himself liable, have made it with the intention that it should be acted upon by the person to whom it is made or by one to whom he intended it should be communicated, and he is therefore responsible to such persons only as it was intended for.

It is a general rule that a person cannot complain of false representations, for the purpose of maintaining an action of deceit, unless the representations were either made directly to him, with the intention that they should be acted upon by him, or made to another person with the intention that they should be communicated to him and acted upon by him. A representation made to one person with the intention that it shall reach the ears of another and be acted upon by him, and which does reach him, and is acted upon by him to his injury, gives the person so acting upon it the same right to relief or redress as if it had been made to him directly. Am. & Eng. Encyl. of Law 2d. Ed. Vol. 14, pp. 148 and 149, and cases there cited. See also *Hunnewell* v. *Duxbury*, 154 Mass. 286; *Nash* v. *Minn. Title Ins. & Trust Co.*, 159 Mass. 437.

Applying these general principles to the particular question here involved, we think that the defendant is liable to the firm for such injury as it suffered in consequence of the misrepresentations con-

tained in his letter, whereby the firm was induced to make sales of its goods to the Woolen Company upon credit. The answer of the defendant to the letter of inquiry was directed to a firm, its object was to obtain credit for the Woolen Company from a firm of which Henry was a member. True, the defendant did not know that Parsons was associated in business with Henry, nor did he know, so far as the case shows, that Henry was also doing business alone under a firm name. But he must have contemplated that the contents of this letter would either be communicated to other members of any firm of which Henry was a partner, in that business, and be acted upon by the firm, or that Henry, acting for a firm, would be induced by his letter to give credit to the Woolen Company. The letter was not only intended for Henry, but as well for those associated with him in that business.

It is of no consequence that the letter was directed to W. S. Henry & Co., when it was in fact relied upon by Henry as a member of the firm of Henry & Parsons. It is not necessary, in order for a defendant to be liable for the consequences of his misrepresentations, that he should know the names of the persons to whom the misrepresentations may be communicated, provided he contemplated that they should be communicated to others and be acted upon by them.

Here, as the case shows, Henry, to whom the misrepresentation was directly made, was induced thereby, as a member of the firm of Henry & Parsons, to sell the firm's goods on credit, and thereby the firm suffered. This is precisely what was within the intention of the defendant, he is consequently liable therefor. This result is in accordance with the ruling of the court at the trial.

Exceptions overruled.

GEORGE H. MORSE *vs.* JOHN N. STAFFORD.

Somerset. Opinion January 31, 1901.

Mortgage. Possession. Landlord and Tenant. R. S., c. 90, § 8.

A mortgagee, or the assignee of a mortgage, may maintain a real action against a person in possession of the mortgaged premises and obtain a common law judgment for possession, without the production of the notes referred to in the mortgage, or other evidence of the existence of some portion of the mortgage indebtedness, except the mortgage itself, where there is no evidence to the contrary and no circumstances from which a payment of the indebtedness may be inferred.

It would be otherwise if either party that was entitled to do so should ask for a conditional judgment; in that case the plaintiff would be compelled to introduce evidence showing that something, and how much, was due upon the mortgage debt. Or, if there was evidence tending to show that the debt had been fully satisfied, then it would become a question to be determined; and if the debt should be found to have been paid, the holder of the mortgage would not be entitled to a judgment for possession.

In the absence of all other evidence upon the question of payment, the mortgage itself, without the production of the notes or any evidence accounting for their non-production, is prima facie evidence of the existence of the debt at the time, and is sufficient to entitle the plaintiff to possession of the mortgaged premises and to a common law judgment therefor, when neither party entitled to do so moves for a conditional judgment.

If it is claimed that the relation of landlord and tenant exists between the mortgagee and the mortgagor, or one claiming under the latter, it must be proved, as this relation is not presumed to exist between such parties and does not grow out of the relations of mortgagee and mortgagor.

On report. Judgment for plaintiff.

Writ of entry to recover possession of land situate in Hartland, alleged to be in possession of the defendant. Plea, general issue and brief statement as follows:

And by the way of brief statement under the statute, the said defendant says that long before the date of the plaintiff's writ, and at the time of the commencement of said suit, and ever since, he has been in possession of the demanded premises, and tenant thereof, under and by authority of his wife, Sarah Stafford, and of the plaintiff, Geo. H. Morse, who are the owners of said demanded premises.

The defendant introduced no evidence. The case is stated in the opinion.

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

D. D. Stewart, for defendant.

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

WISWELL, C. J. The only question necessary to a decision of this case is, whether the assignee of a mortgage may maintain a real action against a person in possession of the mortgaged premises and obtain a common law judgment for possession, without the production of the notes referred to in the mortgage, or other evidence, except the mortgage itself, of the existence of some part of the mortgage indebtedness, where there is no evidence to the contrary and no circumstances from which a payment of the indebtedness may be inferred.

We have no doubt that such action may be maintained and such judgment recovered. It would be otherwise if either party that was entitled to do so should ask for a conditional judgment; in that case the plaintiff would be compelled to introduce evidence showing that something, and how much, was due upon the mortgage debt. *Blethen* v. *Dwinal*, 35 Maine, 556. Or, if there was evidence tending to show that the debt had been fully satisfied, then it would become a question to be determined; and if the debt should be found to be paid, the holder of the mortgage would not be entitled to judgment for possession. *Hadlock* v. *Bulfinch*, 31 Maine, 246; *Williams* v. *Thurlow*, 31 Maine, 392; *Day* v. *Philbrook*, 85 Maine, 90. But in all these cases the debt had been paid, as was found by the court, and the question was not involved as to what evidence was necessary to prove either the existence or payment of the debt secured by the mortgage.

Upon the other hand, in *Powers* v. *Patten*, 71 Maine, 583, this court said: "The mortgage itself is a conveyance of the estate, and the recital of the notes in the condition of the mortgage, is an admission of their existence and of the existence of the debt. For

the purpose of establishing the defendant's right of possession, the mortgage alone without the notes is admissible as evidence of title and the mortgage debt." In that case the mortgage was relied upon by the defendant in possession, and the court said, referring to the contention that the mortgage, without the production of the notes, was insufficient for the purpose of proving a right to possession: "If the present defendant were in the position of a demandant, and a conditional judgment was demanded by either side entitled to it, in such case she could not recover without producing the notes, or accounting for their non-production."

In *Smith* v. *Johns*, 3 Gray, 517, cited with approval in *Powers* v. *Patten*, supra, the court held that a mortgage was not merely a conveyance of the estate, but a direct admission of the existence of the notes described in the condition; and that such mortgage, without the production of the notes, was prima facie evidence in support of the defendant's right of possession.

These rules are logically deducible from the rights and obligations of the mortgagor and mortgagee, and are supported by the authorities. A mortgagee, or assignee of a mortgage, is not entitled to a conditional judgment as of mortgage, unless he proves in some way the existence of some part of the mortgage debt. If he does not move for such conditional judgment, but the defendant does, and is entitled to do so under R. S., c. 90, § 8, then the plaintiff must prove that some part of such debt remains unsatisfied. A mortgagee out of possession is not entitled to a common law judgment for possession, if upon the whole evidence it appears that the debt secured by the mortgage has been fully paid. But in the absence of all other evidence upon the question of payment, the mortgage itself, without the production of the notes, or any evidence accounting for their non-production, is prima facie evidence of the existence of the debt at that time, and is sufficient to entitle the plaintiff to possession of the mortgaged premises and to a common law judgment therefor, when neither party entitled to do so moves for a conditional judgment.

Applying these principles to the facts of this case, the plaintiff is entitled to a judgment for possession of the demanded premises.

He introduced in evidence a warranty deed of the premises to one Emery, dated November 20, 1886, a mortgage of the same from Emery, dated October 11, 1893, which mortgage recited an indebtedness of $1200, represented by six promissory notes; an assignment from the mortgagee to the plaintiff of that mortgage, and the debt thereby secured, written upon the back of the mortgage, and dated November 23, 1899. These instruments are all in due form and were all properly executed, acknowledged and recorded. No evidence whatever was introduced tending to show that the mortgage debt had been paid, and there are no circumstances from which an inference of such payment can be drawn. Neither party moved for a conditional judgment, but the case was reported to the law court for that court to order such judgment as the legal rights of the parties required.

The defendant sets up in his brief statement, under the general issue, that he was a tenant of the plaintiff and another alleged to be joint owners of the property, and it is argued that the tenancy had not been terminated as provided by statute. But no evidence was introduced showing that the relation of landlord and tenant existed, nor does it appear by what right or authority the defendant was in possession. The relation of landlord and tenant may exist between mortgagee and mortgagor, or one claiming under the latter; but this relation is not presumed to exist between such parties and does not grow out of the relations of mortgagee and mortgagor. If, between such parties, the relation of landlord and tenant does exist, it must be proved.

The counsel have also argued the question of the validity of the foreclosure of this mortgage, claimed by the plaintiff. But the question does not arise in this case. If the mortgage has been legally foreclosed, the plaintiff is entitled to a judgment for possession. We have already seen that he is entitled to such a judgment if the mortgage has not been foreclosed. We think it better not to decide that question until it arises.

Judgment for plaintiff for possession.

AUSTIN BLACK *vs.* SECURITY MUTUAL LIFE ASSOCIATION.

Knox. Opinion January 31, 1901.

Insurance. Agent. License. R. S., c. 49, § 73; Stat. 1895, c. 95.

A person who acts as agent of an insurance company, in soliciting, receiving and forwarding to the company applications for life insurance, during a period when he does not have the license required by R. S., c. 49, § 73, and amendments, cannot recover of the company the compensation for such services provided in the contract between him and the company.

On motion and exceptions by defendant. Exceptions sustained.

Assumpsit on account annexed to recover commissions due the plaintiff on policies of life insurance, procured by him as the defendants' agent.

The case appears in the opinion.

L. M. Staples, for plaintiff.

R. I. Thompson, for defendant.

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

WISWELL, C. J. Action of assumpsit upon an account annexed to the writ to recover commissions upon premiums paid by various persons to the defendant on policies of life insurance issued by it, the applications for which were solicited, received and forwarded to the defendant by the plaintiff, under a written contract between the plaintiff and the defendant, wherein the plaintiff was appointed an agent of the defendant "for the purpose of procuring and effecting applications for insurance," and which provided for the compensation that was to be received by the plaintiff.

At the trial, the defendant, among other defenses, contended that some or all of the applications of these persons for insurance were solicited, received and forwarded to the defendant at a time when the plaintiff had no license from the insurance commissioner

of this state, as provided by R. S., c. 49, § 73, and subsequent amendments, and that consequently the plaintiff could not recover. The case shows that the plaintiff had no such license between July 1, and October 18, 1897.

Thereupon the defendant's counsel requested the presiding justice to instruct the jury that the plaintiff could not recover any commission upon the premiums paid to the company in cases where the applications for such insurance were solicited by the plaintiff during the period that he was without such a license. The requested instruction was applicable to the state of facts involved, because although the policies may have been in fact issued after October 18, 1897, and during a period when the plaintiff had a license, it is clear that in more or less instances the plaintiff's work in soliciting and receiving applications for the policies was performed during the period that he was without a license.

In order to give progress to the case, the presiding justice declined to give the requested instruction—but did instruct the jury, "that for any policy bearing date subsequent to the 18th of October, the plaintiff is entitled to his commission from the company upon that risk, although he may have solicited the insurance before that time and made himself liable to the penalty." To this refusal to instruct, and to the instruction given, the defendant, the verdict being for the plaintiff, took exception.

The statute above referred to, as last amended by c. 95 Public Laws of 1895, after providing that the commissioner may issue a license to any person to act as an agent of a domestic insurance company, and to any resident of the state to act as agent of any foreign insurance company, which has received a license as provided by another section, and after fixing the fee that shall be received by the commissioner for each license, contains this language, "and if any person solicits, receives or forwards any risk or application for insurance to any company, without first receiving such license, or fraudulently assumes to be an agent and thus procures risks and receives money for premiums, he forfeits not more than fifty dollars for each offense; but any policy issued on such application binds the company if otherwise valid."

Although this statute contains no express provision preventing a recovery for his services by one who acts as an agent of an insurance company without such license, and does not expressly provide that contracts for such services shall be void, it prohibits the performance of such services without the license referred to under the penalty therein provided. In *Harding* v. *Hagar*, 60 Maine, 340, a very similar case in principle, this court said in its opinion: "It is too well settled to require the citation of authorities, that no party can recover for acts or services done in direct contravention of an express statute, or for property so sold and delivered." In *Randall* v. *Tuell*, 89 Maine, 443, where the authorities are fully collected, the principle is thus stated: "It is the general doctrine now settled by the great weight of legal authority, that where a license is required for the protection of the public and to prevent improper persons from engaging in a particular business, and the license is not for revenue merely, a contract made by an unlicensed person in violation of the act is void."

In accordance with these authorities, and many others that might be referred to, it must be held that the plaintiff cannot recover for the services performed by him in direct contravention of the statute. The purpose of the statute is undoubtedly for the protection of the public. It is clearly not for revenue. The license fee required was only the sum of two dollars. True, the statute referred to provides that a policy issued in such a case shall not thereby be void, but the contract of insurance is not the one under consideration here; it is the contract between the company and the plaintiff by virtue of which the latter performs services in obtaining applications for insurance, which the statute prohibits, unless the person performing such service has a license therefor.

The evidence as to when these applications for insurance were solicited and obtained by the plaintiff, is somewhat indefinite, but some of them were unquestionably received when the plaintiff had no license and the burden is upon him to show that he had a license when the services were performed. *Harding* v. *Hager*, *supra*.

Exceptions sustained.

MILTON S. CLIFFORD *vs.* GERTRUDE H. STEWART, and others.

Penobscot. Opinion February 8, 1901.

Will. Debts of Legatees. Trusts.

1. Thomas J. Stewart, husband of the testatrix, and their three sons, C. E. and R. constituted, at one time, the firm of Thomas J. Stewart & Co. After the death of the father, the three sons became indebted to the testatrix. The firm of Thomas J. Stewart & Co., both as originally constituted and as existing after the death of Thomas J. Stewart, were indebted to others besides the testatrix. By her will the testatrix devised the residuum of her estate "to G. M. and C. wives of my sons C. E. and R. and to my son H. D. S. equally share and share alike, and I wish that the indebtedness of Thomas J. Stewart & Co. shall be deducted from the shares and property so given and devised to said wives of my sons C. E. and R." *Held;* that the phrase "indebtedness of Thomas J. Stewart & Co." in the foregoing clause relates only to the indebtedness of that firm to the testatrix and not the indebtedness of that firm to others; and that only the indebtedness of the firm consisting of the three sons C. E. and R. to her is to be deducted from the legacies given to their wives.
2. In making the division, this indebtedness should be regarded as an asset, and if it is not paid before division, this indebtedness should be added to the remainder of the residuum, and of the whole amount thus obtained, one-fourth will go to Harry D. Stewart; the other three-fourths will go to the wives of the other three sons, one-fourth to each, their actual proceeds, of course, being diminished from their mathematical shares by the amount of their husbands' indebtedness as a firm to the estate.
3. The following bequest:—"I give to my grandchildren one thousand to each one, and I wish and direct that this shall be devoted and expended for their education,"—is held to create a trust; and the duty of administering the trust devolves upon the administrator with the will annexed.
4. It is held by the court that the words in item 4 of the will: "I wish that the property so as above given, to said three wives of my three sons, be for the education of their children and the support of their families respectively," created a trust upon the estate bequeathed to the wives to the extent of securing the education of the children of the three sons, thus referred to, of the testatrix, and the support of their families.
5. Each wife may hold her share in trust separately from the others.

On report. Trusts sustained.

Bill in equity by the administrator with the will annexed, and heard on bill and answers, to obtain a construction of the first and

fourth clauses of the will of Mary M. Stewart, late of Bangor, deceased.

The case is stated in the opinion.

M. S. Clifford, for plaintiff.

C. H. Bartlett, for grandchildren.

Formal words of trust are not absolutely necessary. *Cole* v. *Littlefield*, 35 Maine, 439, p. 444; 27 Am. & Eng. Enc. of Law, p. 26. If the words be regarded as precatory, there are numerous authorities to show that a trust was intended. 1 Perry on Trusts, § 117; 27 Am. & Eng. Enc. of Law, Title, Trusts & Trustees, Provisions for Maintenance, p. 36; *Cole* v. *Littlefield*, supra; *Warner* v. *Bates*, 98 Mass. 274.

In considering a will, the intent of the testator is to be gathered from the whole will. *Mann* v. *Jackson*, 84 Maine, 400. This is also the rule with reference to precatory trusts. 2 Bouvier's Law Dict. Title, Precatory Words, p. 718, Rawle's Revision; 2 Redf. Wills, *416, (3rd ed.) The question is whether, taking the will as a whole, it was the intention of the testator to create a trust. *Aldrich* v. *Aldrich*, 172 Mass. 101.

Did the testator intend to control the action of the legatee or only offer a suggestion without creating any obligation that it should be carried out? 1 Perry on Trusts, § 114; Schouler on Wills, (2nd ed.) § 595; *Aldrich* v. *Aldrich*, supra.

It is not the case of a "hope," an "expectation" or a "confidence," the words mentioned in many of the cases of precatory trusts, but it is a command. The word "enjoin" is a command. 11 Am. & Eng. Enc. of Law, Title, Enjoin, p. 37, (2nd ed.)

F. H. Appleton and H. R. Chaplin, for Gertrude H. Stewart and others.

If clause IV means that all the indebtedness of T. J. Stewart & Co. to whomsoever it is owed, is to be paid out of the shares which are given to the wives, then the wives get nothing because the will must be construed as though it read, "I wish all the indebtedness of Thomas J. Stewart & Co. to whomsoever it is owed to be paid to such creditors," and to do that would take practically the whole

estate. The will uses the word "deducted" not the word "paid." The indebtedness of T. J. Stewart & Co. is to be deducted not paid, unless "deducted" means deducted and paid. That would be giving the word "deducted" a forced and unnatural meaning. If the word "indebtednesss" be applied only to the indebtedness of T. J. Stewart & Co. to the testatrix, the interpretation of this portion of the will is plain; the word "deducted" is given its common meaning and nothing is forced about the will or about any words therein. If the testatrix intended to have the general creditors of T. J. Stewart & Co. paid she would have plainly said so, and if she supposed she would leave more than enough to do that, there would then have been no need of giving the remainder to their wives.

Precatory Trust: Pomeroy's Eq. Jur. §§ 1015, 1016, 1017.

Is this a trust for maintenance? Pomeroy's Eq. Jur. § 1012. The precatory words "wish" and "enjoin" raise no presumption of an intention on her part to create such trust. There should be no reasonable doubt about it. *Meredith* v. *Heneage*, 1 Sim. 542, 551.

Clause 1: The fact that under the circumstances she gave the property to the wives is strong proof that she did not intend to create a trust. 1 Perry on Trusts, § 115; *Webb* v. *Wools*, 2 Sim. (N. S.) 267.

There is no question but that the son Harry took a fee, and identically the same words which gave Harry the absolute fee gave also the property to the wives; stopping at that point, the wives certainly took a fee just as much as Harry did. Now if the latter part of clause IV attaches a trust to the wives' part, then the latter part of clause IV, as stated in *Webb* v. *Wools*, contradicts the first part of clause IV. The fact that the persons who are to take are not specified clearly enough, goes to a certain extent towards inducing the court to declare that there is no trust. *Lambe* v. *Eames*, 10 L. R. Eq. 267.

The words "wish" and "enjoin" raise no presumption of a trust. If Pomeroy's rule is the correct one, then the court must be satisfied that Mrs. Stewart's intention to create a trust was full,

complete, settled and sure; unless the court are satisfied to that extent, no trust ought to be declared. All doubt should be in favor of no trust. The situation of the parties and sons' wives and children do not call for a trust. The sons and their wives do not desire it. A decision against a trust makes all parts of the will harmonious and will carry out the real intention of the testatrix.

The words "wish" and "direct" are used in paragraph 1 in this will, and the words "enjoin" and "request" appear in paragraph III, the words "wish and enjoin," we have discussed as they appear in paragraph IV. The frequency with which the words are used in the will seem to warrant the conclusion that no technical meaning was attached to any of them; on the contrary that they were loosely employed to express the mother's solicitude for the welfare of her children and grandchildren.

P. H. Gillin, for Harry D. Stewart.

At the time of the decease of Mary M. Stewart, Thomas J. Stewart & Co., composed of three of her sons, and not our client, were practically insolvent and indebted to general creditors outside of her estate at least in the sum of $80,000, and the mother knew this fact. If the court should have any hesitancy about saying that she meant the indebtedness to her and not to general creditors, we ask the right to have the case come back to show these facts.

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

SAVAGE, J. Bill in equity to construe the will of Mary M. Stewart, late of Bangor. The clauses of the will requiring construction are these:

I. "I give to my grandchildren one thousand ($1000) to each one, and I wish and direct that this shall be devoted and expended for their education."

IV. "All the rest and remainder of my estate of every kind real and personal I give and devise to said Gertrude, Martha and Cara, wives of my sons, Charles, Edward and Rowland, and to my

son Harry D. Stewart equally share and share alike, and I wish that the indebtedness of Thos. J. Stewart & Co. shall be deducted from the shares and property so given and devised to the said wives of my sons Charles, Edward and Rowland, and that the property so as above given to said three wives of my three sons be for the education of their children and the support of their families respectively—and I enjoin upon them so to use and expend it."

This court is called upon to determine:

1. Whether a trust was created by the first item in the will, and, if so, upon whom the trust devolves.

2. Whether in the fourth item any indebtedness of Thomas J. Stewart & Co. is referred to except the indebtedness of that firm to the testatrix, and whether other creditors of that firm have any interest under this item.

3. If other creditors have no interest, what are the respective shares under item IV of Gertrude H., Martha J. and Cara A. Stewart, wives of three of the sons of the testatrix, and the share of Harry D. Stewart, the other son, in case the indebtedness of Thomas J. Stewart & Co. to the testatrix can be collected, and also in case it cannot.

4. Whether a trust is created under item IV for the education of the children and the support of the families of Gertrude H., Martha J. and Cara Stewart, and if so, what is its nature, duration, and how shall it be properly executed.

It appears that the firm of Thomas J. Stewart & Co. was formerly composed of Thomas J. Stewart, the husband of the testatrix, and their three sons, Charles, Edward and Rowland, and that after the death of Thomas J. Stewart the three sons continued in business under the old firm name, and were at the date of the will indebted to the testatrix to the amount of about ten thousand dollars. It further appears that the firm of Thomas J. Stewart & Co., both as originally constituted and as existing since the death of Thomas J. Stewart, were indebted in the aggregate to more than the total assets of the testatrix as shown by the inventory of the estate, and this was in addition to the debt of the later firm to

the testatrix. These facts, being conditions existing when the will was made, may properly be considered in interpreting the language of the testatrix in the will, which might otherwise be of doubtful import.

I. We first consider what was meant by the phrase, "the indebtedness of Thomas J. Stewart & Co.," found in item IV. Was it the intention of the testatrix to require that all the indebtedness of either or both firms of Thomas J. Stewart & Co. to all persons whatsoever be deducted from the legacies to the wives of three of the four sons, or did she intend the indebtedness only of the three sons to herself to be so deducted? We have no doubt it was the latter. The intention was perhaps ambiguously expressed. There may have been a clerical oversight in drafting the will. The insertion of the words "to me" after the word "indebtedness," we think would have clearly expressed her intention. She had four sons. Three of them were indebted to her, and were largely indebted to other parties. The fourth was not. No reason is shown why she wished to discriminate in favor of the one and against the other three, and the will strongly shows that she did not. She gave one-fourth to the son not in debt. She gave three-fourths respectively to the wives of the sons who were in debt, probably to save the legacies from the creditors of the sons, and she enjoined upon the wives to expend the property for the education of the children and the support of the families of the sons; so that, in effect, the sons would receive the direct benefit of it. But she directed an "indebtedness of Thomas J. Stewart & Co." to be deducted from the legacies to the sons' wives. If that meant the indebtedness only of the sons, their husbands, to her, the effect would be that that indebtedness would be regarded as an advancement on account of their shares to be deducted in the final distribution to their wives. And in this way the entire residuum would be divided fairly and evenly, the one not indebted getting one-fourth, and the other sons getting substantially the benefit of the other three-fourths, less their indebtedness to the testatrix. On the other hand, if she intended the entire indebtedness of the firms of Thomas J. Stewart & Co. to be deducted, it would follow that

the son not indebted would get his fourth clear, and the other branches of the family would get nothing. The legacies to the wives of the sons indebted would be charged, not only with the payment of their husbands' debts to the testatrix, but with the payment of all the debts of the firms to all persons, to an amount which would entirely wipe out their shares in the residuum. This result is seemingly so unnatural and inequitable, that, in the absence of controlling language in the will, we cannot believe it was intended by the testatrix. She was under no obligation moral or legal to see that the debts of Thomas J. Stewart & Co. in general were paid, but she might well wish that the debts of the three indebted sons should be deducted from the legacies to their wives, thereby giving to the other his clear fourth in all her residuary estate, including the debt due from the other sons.

We hold, therefore, that only the indebtedness to the testatrix of the firm of Thomas J. Stewart & Co., consisting of the three sons, Charles, Edward and Rowland, is to be deducted from the legacies given to their wives. And in making the division, this indebtedness should be regarded as an asset, and if it is not paid before division, this indebtedness should be added to the remainder of the residuum, and of the whole amount thus obtained, one-fourth will go to Harry D. Stewart; the other three-fourths will go to the wives of the other three sons, one-fourth to each, their actual proceeds, of course, being diminished from their mathematical shares by the amount of their husbands' indebtedness, as a firm, to the estate.

II. The bequest in item I, of one thousand dollars to each of the grandchildren of the testatrix, must, we think, be regarded as creating a trust. The grandchildren are minors, and the legacies are expressly devoted to their education. The language used expresses much more than the mere wish that the legacies be devoted to that purpose. It does not purport to be advisory. It contains an explicit direction. I "direct that this shall be devoted and expended for their education." Nothing more is required for the creation of a trust. And not only the precise language used supports this construction, but the fact that the grandchildren were minors,

not capable in law of receiving and applying the funds for themselves, further tends to support the same conclusion. The testatrix must have contemplated that some person or persons, other than the grandchildren, must hold the fund and cause it to be properly expended. All these considerations lead us to hold that these funds expressly devoted to the education of the grandchildren are trust funds.

Who is to execute the trust? The will names no one. The general rule must apply. Whenever any interest in the nature of a trust, or any person implying a trust, is created by a will, and there is no special designation of the executor or any other person as trustee, it is incumbent upon the executor as such to administer the estate according to the provisions of the will. *Nutter* v. *Vickery*, 64 Maine, 490. But in this case, the executors named in the will declined to accept the trust, and an administrator with the will annexed was appointed. We think the duty of administering this trust now devolves upon the administrator. Such an administrator is clothed with the general functions of an executor. He succeeds to his rights and duties. He is to administer according to the will. He must do the things which the executor as such would have been required to do. And we have no doubt that he succeeds to the trust that would have devolved upon the executor by operation of law. *Knight* v. *Loomis*, 30 Maine, 204; *Saunderson* v. *Stearns*, 6 Mass. 37; *Buttrick* v. *King*, 7 Met. 20; *Blake* v. *Dexter*, 12 Cush. 559; Woerner on American Law of Administration, 392; Schouler on Administrators and Executors, § 122.

III. Is a precatory trust created in item IV of the will by the words, "I wish that the property so as above given to said three wives of my three sons be for the education of their children and the support of their families respectively—and I enjoin upon them so to use and expend it?" It is not necessary for us to consider critically the doctrine of implied or precatory trusts. That words of trust and confidence, expressions of recommendation and desire, as well as words of direction and command, in a will, have many times been deemed to indicate an intention on the part of a testator to clothe a legacy with a trust, requires no citation of authorities

to show. It is likewise true that similar, and even identical expressions in other wills have been held to create no trust. Words seemingly imperative have been held to be advisory merely, and words of advice have had given to them the force of injunctions. The test is one of intention in the testator, and this intention is to be gathered from the whole will,—the context, as well as the particular words of recommendation and confidence. And moreover the will is to be construed in the light of existing conditions, which are rarely the same in any two cases. These considerations will explain much of the seeming diversity of opinion in the decisions of the courts. It is said that the leaning of the courts is against the implication of a trust from words of confidence, that the current of decisions is now changed, and that many expressions formerly held to be indicative of a trust would not now be so held. Pomeroy's Equity Jurisprudence, § 1015. We think this means merely that courts now place less reliance than formerly upon the precise words used, and more upon the meaning of the will or the particular bequest, taken as a whole. The intention of the testator must be found from the whole will.

So it is said that the court must be satisfied from the words themselves, taken in connection with all the other terms of the disposition, that the testator's intention to create an express trust was as full, complete, settled and sure as though he had given the property to hold upon a trust declared in express terms in the ordinary manner. Pomeroy's Equity Jurisprudence, § 1016. This means, as we understand it, that the testator must have intended to create an actual trust. That intention must be found by the court as a fact. It is not to be guessed at. The crucial test after all is whether the testator actually intended his language to be imperative, whether he intended to govern and control the action of the legatee, to impose an obligation or duty upon him in the use of the property, or whether he intended his words to be merely advisory, no matter how urgently expressed, still leaving it to the discretion of the legatee whether that advice should be followed or not. *Warner* v. *Bates*, 98 Mass. 274; *Whipple* v. *Adams*, 1 Met. 444; *Barrett* v. *Marsh*, 126 Mass. 213; *Van Amee* v. *Jackson*, 35

Vt. 173; *Harper* v. *Phelps*, 21 Conn. 257; *Bohon* v. *Barrett*, 79 Ky. 378; *Murphy* v. *Carlin*, 113 Mo. 112; *Colton* v. *Colton*, 127 U. S. 300; *Knight* v. *Boughton*, 11 Clark & Finnelly, 513; 1 Perry on Trusts, 109; 2 Story's Equity Jurisprudence, § 1059; 1 Jarman on Wills, 385.

It is not necessary that the testator should have had in his mind the idea of a trust, eo nomine. It is sufficient if he intended that his will should follow the property after his death and imperatively control or limit its use. Technical language is unnecessary. *Colton* v. *Colton*, supra.

Now let us apply this rule to the case at bar. Referring to what we have already said in the former part of this opinion, it appears that the testatrix left four sons, three of whom were deeply involved financially. To the other son she gave one-fourth of the residuum absolutely, but the other three-fourths she gives, not to the other three sons, but to their wives. If the language so far stood alone, there is no doubt the wives would have taken an absolute estate. But it does not stand alone. Neither does the language contain any expression which necessarily affects any subsequent provisions relating to the estate. See *Colton* v. *Colton*, supra. Though she gave the legacies to the wives of the sons, she wished the sons themselves to have the benefit, in part at least, of the bequest. She said, "I wish . . . . the property so as above given . . . . to be for the education of their children," *the father's duty*, "and the support of their families," *the duty of the husband and father;* and then, as if the expression of a wish were not enough, she laid an injunction upon the wives, "And I enjoin them so to use and expend it." While the use of the word "enjoin," especially if qualified by other expressions in a will, does not necessarily mean that a trust is thereby created, *Lawrence* v. *Cooke*, 104 N. Y. 632, yet here, in just the manner in which and the place where it is used, "enjoin" is both emphatic and significant. It is a mandatory word; in legal parlance, always, Bouvier's Law Dictionary, in common parlance, usually, Webster's Dictionary. We cannot resist the conclusion that the testatrix intended to create a trust upon the estate bequeathed to the

wives to the extent of securing the education of her sons' children and the support of their families, whatever might be the exigencies of life. *Blouin* v. *Phaneuf*, 81 Maine, 176; *Chase* v. *Chase*, 2 Allen, 101; *Colton* v. *Colton*, supra. We do not think it was intended that the wives should be at liberty to withhold the application of the property from the expressed uses to which the testatrix said she wished it to be applied. The bequest then created a trust in the share given to each of the wives.

Nor do we think that the trust can fail by reason of any indefiniteness in the beneficial objects. Certainly not as to the children, for they are a class whose membership is definite and known. And while the individuals who compose a family may vary from time to time, who constitute it at any given time is not uncertain in law. *Knight* v. *Knight*, 3 Beav. 148; *Lambe* v. *Eames*, 6 Ch. App. 597; *Wright* v. *Atkyns*, 19 Vesey Jr. 301; *Chase* v. *Chase*, supra; Pomeroy's Equity Jurisprudence, § 1014, note; Story on Equity Jurisprudence, § 1071.

Further, the use of the word "respectively" indicates that each wife may hold her share of the estate in trust, separately from the others.

The court is asked to declare how the trust shall be properly executed, and what persons have any interest or benefit under the fourth item of the will, and the extent, amount and nature of such interests.

But we think we are not in possession of sufficient information concerning the nature of the trust property, or the composition of the families of the sons of the testatrix to answer further than we have already done.

Should it become necessary, the trustees can apply to the court for specific instructions.

Costs, including reasonable counsel fees, may be allowed to all parties who have appeared, to be paid by the administrator and charged in his account of administration.

Decree accordingly.

SARAH A. HUSSEY *vs.* HENRY A. BRYANT.

Franklin. Opinion February 9, 1901.

Way. Damages. Action. Trespass. R. S., c. 18, §§ 18, 36.

No suitor is allowed to invoke the aid of the courts upon contradictory principles of redress, upon one and the same state of facts.

A land owner who has made complaint to the Supreme Judicial Court, as provided by R. S., c. 18, § 18, and amendments, wherein she alleged that a town way had been laid out over her land and accepted by the inhabitants, that she was damaged thereby, that the damages awarded by the selectmen were inadequate, that she was aggrieved by their award, and that consequently she appealed as provided by the statute above referred to; and who prosecutes her complaint and recovers judgment for damages, and collects the same, cannot afterwards maintain an action of trespass quare clausum upon the ground that her land had not been taken for the purposes of a way, because of irregularities in the proceedings.

She had the right, assuming that the proceedings in the location of the way were insufficient, of election. She could waive the defects in the proceedings and obtain just compensation for her land that had been condemned; or, she might take advantage of the irregularities in the proceedings, regard the land as still her property and maintain trespass for any injury to her possession thereof. She cannot do both; in this case she has elected the former method.

It is considered by the court, that the evidence in the case satisfactorily shows that the proper authorities of the town entered upon the land taken and took possession thereof for the purposes of a way within the time limited by the last clause of R. S., c. 18, § 36. This action of trespass is therefore not maintainable.

On report. Judgment for defendant.

Trespass quare clausum, the trespass alleged being an entry on the plaintiff's land, and the construction of a culvert thereon in August, 1899. The defendant justified his acts on the grounds that whatever was done, was done by him as road commissioner for the town of Jay, in the building of a road legally located and established over the locus in quo.

The case appears in the opinion.

F. W. Butler, for plaintiff.

J. C. Holman, for defendant.

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

WISWELL, C. J. Action of trespass quare clausum, in which the defendant justifies as the road commissioner of the town and says that his acts, alleged by the plaintiff to be trespasses, were authorized, because within the limits of a town way duly located by the selectmen and accepted by the inhabitants of the town. The plaintiff answers that the proceedings of the selectmen and inhabitants in locating and accepting the town way were not in strict compliance with the requirements of the statute; that they were therefore insufficient to constitute a condemnation of the land; and that consequently the justification fails.

The plaintiff claims, relying upon various decisions of this court, that the case contains no legal evidence that the selectmen gave "written notice of their intentions," which the statute requires "to be posted for seven days, in two public places in the vicinity of the way, describing it in such notice;" that the return of the selectmen does not show a strict compliance with the statute as to posting the required written notices; and that the return does not show that seven days had elapsed after the posting of the notices at the time of the hearing by the selectmen.

But the answer to these objections is this. The selectmen assessed the damages sustained by Frank Hussey, the husband of the plaintiff, and the supposed owner of a portion of the land over which the way passed, at twenty-five dollars. After the way was accepted by the town at the March meeting, 1897, the warrant for which contained a sufficient article in relation thereto, the plaintiff, who was in fact the owner of the land supposed to belong to her husband, made written complaint to the Supreme Judicial Court, at the June Term, 1897, in that county, as provided by R. S., c. 18, § 18, and amendments, wherein she alleged that the way in question had been laid out over her land and accepted by the inhabitants, that she was damaged thereby, that the damages awarded by the selectmen were inadequate, that she was aggrieved by their award, and that consequently she appealed as provided by

the statute above referred to. Under this complaint damages to the amount of fifty dollars were awarded her, judgment rendered thereon, and the amount of the judgment for such damages and costs paid to her by the town.

Having petitioned for and obtained damages because her land had been taken for the purposes of a way, she now seeks damages in trespass because her land had not been taken. She had the right, assuming that the proceedings in the location of the way were insufficient, of election. She could waive the alleged defects in the proceedings and obtain just compensation for her land that had been condemned, or she might take advantage of the irregularities in the proceedings, regard the land as still her property and maintain trespass for any injury to her possession thereof. But she cannot do both. She has elected the former method. To allow her to adopt first one remedy and then the other would be so grossly inequitable as to be repugnant to all sense of justice.

The principle is thus concisely and well stated in 7 Encyl. of Pleading and Practice, 363: "No suitor is allowed to invoke the aid of the courts upon contradictory principles of redress upon one and the same line of facts." It is also therein said: "It is certainly the established law, in every state that has spoken on the subject, that the definite adoption of one of two or more inconsistent remedies, by a party cognizant of the material facts, is a conclusive and irrevocable bar to his resort to the alternative remedy." See the numerous cases therein cited in support of this proposition.

The plaintiff further relies upon the last clause of R. S., c. 18, § 36, as follows: "When town or private ways are finally located by municipal officers, unless the land is entered upon and possession taken for said purpose within two years after the laying out or alteration, the proceedings are void." It is claimed that in this case there had been no such entry upon or possession taken of the land within the time mentioned in the statute.

It is true that no considerable amount of work had been done in building a road over the way as located, but this is not essential.

What the statute requires is that the way should be taken possession of by the proper authorities within the time mentioned, "for

said purpose," that is, for the purpose of a way. Here the uncontradicted testimony, some of which comes from the plaintiff's witness, is that the next fall after the acceptance of the way in March 1897, that is in the fall of 1897, the highway commissioner built a temporary bridge in the way over a small stream; that he, about the same time, removed the few remaining stones of an old wall that extended across the way; that during the following winter the road was broken out after snow storms and was kept open in the same manner that other roads in the town were; and this was done by the municipal authorities. During that winter the way was used as a road throughout the winter by those having occasion to use it. In the next fall, still within two years, the commissioner caused two apple trees which slightly interfered with travel to be cut down and removed, and that winter the commissioner made arrangements to have the road broken out, but it was not kept open during that winter because the snow came so early, before the frost, that it was unsuitable for use.

We are satisfied that the town did enter upon and take possession of this land within the limits of the location, for the purposes of a way within the time limited by the statute above referred to. This action is therefore not maintainable and the defendant is entitled to a judgment.

Judgment for defendant.

INHABITANTS OF WINSLOW *vs.* INHABITANTS OF PITTSFIELD.

Kennebec. Opinion February 19, 1901.

Pauper. Soldier. R. S., c. 24, §§ 1, 5, 6, cl. VI.

1. A married woman cannot acquire a pauper settlement in this state independent of her husband, in her own right.
2. Under the provision of section 5, of chapter 24, R. S., no inmate of the National Home for Disabled Volunteer Soldiers at Togus, in the county of Kennebec, or persons subject to its rules and regulations, or receiving rations therefrom, can acquire a pauper settlement in this state, so long as his connection with such Home continues, whether he had or had not a pauper settlement in this state when his connection with such Home commenced.

Agreed statement. Judgment for plaintiff.

Action for pauper supplies. The parties submitted the case upon the following agreed statement:

Addie Spaulding is the daughter of Elbridge Patten, and was born in Dexter, Maine, in 1856. Her father moved to Pittsfield when she was a few months old, and lived there continuously about fourteen years without receiving pauper supplies. When she was about fourteen years old, her father with whom she had always made her home moved from Pittsfield, but afterward until the year 1877, he never resided continuously for five years in any town in the state of Maine. In 1877, his daughter Addie, the pauper in question, married one John Higgins, who had no pauper settlement in the state of Maine; John Higgins died in 1882, and had never gained any pauper settlement in Maine. After his death, his widow, the said Addie Spaulding, moved to Augusta, Maine, in 1884, and continuously resided there without receiving pauper supplies until January 8, 1887, when she married Henry Otis Spaulding, who was then and ever since January 8, 1883, has been an inmate of the Home for Disabled Soldiers, at Togus, Maine. He came to the Home from Providence, R. I., where he was a resident. After her marriage with said Spaulding she continued to live in Augusta until 1894. During her residence in Augusta, her husband was an

inmate of said Home for Disabled Soldiers, and from the year 1885 until 1893, he was sergeant of a company there and received pay for such service, but during the time of said service he was an inmate of said Home, and subject to its rules. He contributed to the support of his wife and children while they were in Augusta, (several children were born there), and visited them often. No pauper supplies were furnished said Henry Otis Spaulding or his wife and children during their residence in Augusta, from January 8, 1887, to 1894, and none were furnished the said Addie Spaulding before her marriage with the said Henry Otis Spaulding. And his family resided there continuously during that time. Henry Otis Spaulding had no pauper settlement in Maine at the date of his marriage with the said Addie Spaulding, and no pauper settlement in Maine when he entered said Home. In 1894, Addie Spaulding and her children moved to the town of Winslow, and fell into distress there. Said Henry Otis Spaulding continued to be an inmate of said Soldiers' Home, during all the time of his wife's residence in Winslow. The supplies were legally and properly furnished by the said town of Winslow as described in the account annexed to the plaintiff's writ and to the amount therein claimed. A legal notice was given by the plaintiffs and a legal denial made by the defendant. If judgment is rendered for the plaintiffs it is agreed in addition to other items of costs, they are to be allowed the sum of sixteen dollars and fifty-four cents, as witness fees.

C. F. Johnson, for plaintiff.

J. W. Manson, for defendant.

In this case I seek to establish the fact that the marriage did not change the conditions, the home, or in the language of the statute I ask that "her own settlement be not affected by the marriage."

And I claim that the settlement is in process partially formed, when this woman has been in Augusta three years in an established home.

The intention may cease or become dormant for any reason, insanity or marriage, but as long as no new intention takes its place, as long as there is no change of home, the period of five years once properly commenced continues to run. *Bangor* v.

Frankfort, 85 Maine, 126; *Topsham* v. *Lewiston*, 74 Maine, 236; *Bangor* v. *Wiscasset*, 71 Maine, 535; *Detroit* v. *Pittsfield*, 53 Maine, 442.

The court has decided that a residence may be established without any voluntary act and added these words: "If a residence may be established without any voluntary act of the person in such a manner as to have the effect to give a settlement by dwelling and having a home in a particular town, it is not perceived that it may not upon the same principle be continued in the same manner for five consecutive years." *Augusta* v. *Turner*, 24 Maine, 112.

If this point should be reached, when the court think Spaulding never had a home in the state, and the question arises whether Mrs. Spaulding could acquire one for herself, I ask that the court consider the changes in our legislative enactments, and the modification of judicial opinions in regard to the status and capacities of married women, and consider this peculiar case where she began in good faith to acquire a settlement, married a husband who had none, and could acquire none, continued to live self-supporting and sustaining for seven years in one place, and then give the rule.

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

FOGLER, J. In this action the inhabitants of the town of Winslow sue the inhabitants of the town of Pittsfield to recover for pauper supplies furnished by the overseers of the poor of the plaintiff town to Addie Spaulding, wife of Henry Otis Spaulding, and to their minor children.

The case is submitted upon an agreed statement of facts.

By this statement it appears that Addie Spaulding, the wife, when she became of age had her pauper settlement in the town of Pittsfield by derivation from her father. In 1877 she married one John Higgins, who, at the time of such marriage, had no settlement in this state, and who died in 1882 without having acquired a settlement in this state. The settlement of the wife was not changed by such marriage but remained in Pittsfield, at her husband's death. R. S., ch. 24, § 1, par. I. In 1884 Mrs. Higgins,

now Mrs. Spaulding, moved into the city of Augusta, where, January 7, 1887, she married her present husband, Henry Otis Spaulding, who also had no pauper settlement in this state. Mrs. Spaulding lived continuously, with her children born of said marriage, in Augusta, from the time of her said marriage until 1894, when she and her children removed to the town of Winslow. During all the time of her residence in Augusta after her marriage to Spaulding, her husband was an inmate of the Home for Disabled Soldiers at Togus in this state and subject to the rules and regulations thereof. It also appears that while his wife and children resided in Augusta he contributed to their support and visited them often.

It is claimed by the defense that the home of his wife and children in Augusta was the home of Spaulding, the husband and father, and that, having thus had his home in that city for five successive years without receiving supplies as a pauper, directly or indirectly, Spaulding acquired a settlement in Augusta by virtue of R. S., ch. 24, § 6, par. VI, and that his wife and children took his settlement, thus acquired, and therefore their settlement was in Augusta and not in Pittsfield where the supplies sued for were furnished.

The plaintiffs meet this proposition by invoking R. S., ch. 24, § 5, which reads as follows:

"Inmates of the National Home for Disabled Volunteer Soldiers at Togus in the county of Kennebec, and persons subject to the rules and regulations thereof, or receiving rations therefrom, have their settlement in the respective towns in which they had a legal settlement when their connection with the National Home commenced, so long as such connection continues therewith."

The counsel for the defense argues that the statute above quoted applies only to cases in which the inmate of the Home at the time of his connection therewith had a settlement in this state, and has no application in a case, like that at bar, where such inmate had no settlement in this state.

We cannot so construe the statute. We hold that no inmate of the National Home, or person subject to its rules and regulations,

or receiving rations therefrom, whether when his connection with the Home commenced he had a pauper settlement in this state or not, can acquire a pauper settlement in this state so long as his connection with such home continues. To hold otherwise would make a distinction which we think was not contemplated by the legislature.

We are, therefore, of the opinion that Spaulding did not, and could not, acquire a pauper settlement in Augusta by reason of the residence of his wife and children in that city.

The defense further contends that even if Spaulding himself gained no settlement in Augusta, his wife gained a settlement there by having her home in that city for five successive years without receiving pauper supplies.

It is true, that Mrs. Spaulding had her home in Augusta for some twelve years, two years before and about ten years after her marriage to Spaulding. But it is the law of this state, that a married woman cannot acquire a pauper settlement independent of her husband, in her own right. *Jefferson* v. *Litchfield*, 1 Maine, 196; *Augusta* v. *Kingfield*, 36 Maine, 235; *Howland* v. *Burlington*, 53 Maine, 54.

Mrs. Spaulding did not and could not acquire settlement in Augusta by reason of her residence in that city, but retains her settlement in Pittsfield and that town is liable for the supplies furnished her by the plaintiff town. Her children follow her settlement, their father having no settlement in the state. R. S., ch. 24, § 1, par. II. The defendant town is, therefore, liable for the supplies furnished them.

Judgment must be entered for the plaintiff town for the amount sued for with interest from the date of the writ.

By agreement of parties the plaintiff recovers in additional to other taxable costs, the sum of sixteen dollars and fifty-four cents as witness fees.

So ordered.

INHABITANTS OF WINSLOW *vs.* CITY OF AUGUSTA.

Kennebec. Opinion February 19, 1901.

Agreed statement. Judgment for defendant.

The facts of this case will be found in *Inhabitants of Winslow* vs. *Inhabitants of Pittsfield*, ante, p. 53.

C. F. Johnson, for plaintiff.

E. M. Thompson, city solicitor, for defendant.

Counsel cited: R. S., c. 24, §§ 1, 5.

A married woman has the settlement of her husband if he has any in the state; if he has not, her own settlement is not affected by her marriage. *Hallowell* v. *Augusta*, 52 Maine, 216; *Howland* v. *Burlington*, 53 Maine, 54; *Bucksport* v. *Rockland*, 56 Maine, 22; *Augusta* v. *Kingfield*, 36 Maine, 235; *Eddington* v. *Brewer*, 41 Maine, 462.

In *Eddington* v. *Brewer*, the court said: "A married woman shall always follow and have the settlement of her husband, if he has any within the state; otherwise her own at the time of marriage if she then had any, shall not be lost or suspended by the marriage."

In *Augusta* v. *Kingfield*, 36 Maine, p. 238, Justice HOWARD said: "The settlement of the mother, if she had any, at the time of the marriage, would not be lost or suspended by her marriage with one having no settlement in the state; but she could not gain a settlement in her own right, after marriage, and independent of her husband, while he was living and the marital relations subsisted." Addie Spaulding had a derivative settlement from her father in the town of Pittsfield.

A wife cannot gain a settlement separate from her husband. *Hallowell* v. *Gardiner*, 1 Maine, 93; *Jefferson* v. *Litchfield*, 1 Maine, 196; *Farmington* v. *Jay*, 18 Maine, 376; *Garland* v. *Dover*, 19 Maine, 441; *Gardiner* v. *Farmingdale*, 45 Maine, 540; *Augusta* v. *Kingfield*, 36 Maine, 239.

PER CURIAM. This is an action to recover for pauper supplies furnished to Addie Spaulding, wife of Henry Otis Spaulding, and to their minor children. The supplies are the same sued for in the suit of *Winslow* v. *Pittsfield*, ante, p. 53, and the case was submitted upon the same statement of facts as in that case. In *Winslow* v. *Pittsfield*, the court decided that the settlement of the paupers was in Pittsfield and not in Augusta. The decision in this case must, therefore, be for the defendant city.

Judgment for defendant.

LUCY A. BATCHELDER *vs.* CHESTER ROBBINS, and others.

Penobscot. Opinion February 20, 1901.

Adverse Possession. Evidence.

When title to land is claimed by adverse possession, what facts are sufficient to show open and notorious possession must depend much upon the situation and character of the land, and the uses which are made, or may be made of it. Less proof of a general character is required when it appears that the possession and adverse claim were in fact brought home to the knowledge of the true owner.

Held; that the evidence would warrant a jury in finding that Samuel Pratt, in 1862, entered into actual occupation of the disputed lots, and fenced and cultivated them; that they were contiguous to other lots which he owned; that his occupation of the lots in dispute was an actual ouster, a disseizin of the true owner; that he continued in possession until he died in 1863; that the possession was continued by the representatives of his estate and by his heirs of whom the plaintiff is one, by acts of husbandry, until the fences were destroyed in 1865; that since that time the land has lain fallow, except small patches where trespassers have cultivated gardens; that the plaintiff by her agent has frequently and openly been over the lots to look after them, and has on some occasions gone onto them for business purposes directly connected with the lots; that the plaintiff and her predecessors have paid the taxes on these lots since 1861, claiming to own them; and that the defendants' grantor Swan, who is claimed by them to have been the owner from 1861 to 1894, knew of the plaintiff's possession and claim and acquiesced therein. Assuming these facts to be true, the verdict for the plaintiff may be sustained.

Also, held, that where little patches of ground were used for gardens by trespassers or squatters, it did not work an interruption of plaintiff's adverse possession, under the circumstances of this case.

See *Batchelder* v. *Robbins,* 93 Maine, 579.

On motion by defendant. Motion overruled.

This was the second trial of the action between these parties, the first case being reported in 93 Maine, 579.

The facts appear in the opinion.

P. H. Gillin, E. C. Ryder and C. Scott, for plaintiff.

It is immaterial whether the color of title is given in one instrument covering the entire tract or in several instruments, each purporting to convey a portion thereof. The actual possession of either part so conveyed by separate instruments will give a constructive possession to all, if the several parcels are contiguous and constitute one tract. 1 Am. & Eng. Ency. of Law, (2nd. ed.) p. 865; *Wharton* v. *Bunting,* 73 Ill. 16; *Braxton* v. *Rich,* 47 Fed. Rep. 148; *Webb* v. *Richardson,* 42 Vt. 465.

When a person dies in possession of land and the possession devolves upon and is continued by his heirs, their possession is under color of title. 2 Washburn R. Prop. 493; 1 Am. & Eng. Ency. of Law, (2nd ed.) p. 850, and cases cited.

A deed by a person acting in an official or representative capacity as a public officer, an administrator, executor or guardian gives color of title, even if the grantor had no authority to execute the conveyance. 1 Am. & Eng. Ency. of Law, (2nd ed.) p. 853; *Huls* v. *Buntin,* 47 Ill. 396; *Molton* v. *Henderson,* 62 Ala. 426. It is not necessary that premises should be fenced. *Ewing* v. *Burnett,* 11 Pet. (U. S.) 53.

An entry under color of title together with the color of title itself is generally regarded as an assertion of such claim, and the color of title, it has been said, may be looked to for the purpose of determining the character and extent of the claim. 1 Am. & Eng. Ency. of Law, (2nd ed.) p. 867; *Humbert* v. *Trinity Church,* 24 Wend. (N. Y.) 604; *Costello* v. *Edson,* 44 Minn. 135.

There are certain presumptions which exist in favor of the plaintiff; the intent with which one performs an act must be inferred

from the act itself and from the surrounding circumstances. Occupancy, unless proved, is presumed to continue until the contrary is shown. *Currier* v. *Gale*, 9 Allen, 522; *Webb* v. *Richardson*, 42 Vt. 465.

An interruption by an owner to break the continuity of possession must be some decided, feasible, open act inconsistent with the claim of the party setting up ownership by adverse possession. It is not every entry by an owner that will disturb an adverse possession, but to effect this he must assert his claim to the land by acts of ownership. An entry by stealth, or for other purposes than those connected with the right to enter, will not break the continuity of adverse possession in another. *Burrows* v. *Gallup*, 32 Conn. 493; *Fuller* v. *Fletcher*, 44 Fed. Rep. 34; Wood, Limitations, § 270; *Wing* v. *Hall*, 47 Vt. 182; *Altemas* v. *Campbell*, 9 Watts, 28; *Peabody* v. *Hewett*, 52 Maine, 33; *Society, etc.*, v. *Pawlet*, 4 Pet. 480; *Henderson* v. *Griffin*, 5 Pet. 151–158; *Harvey* v. *Tyler*, 2 Wall. (U. S.) 328–349; *Ewing* v. *Burnett*, 11 Pet. 41–53; *Fletcher* v. *Fuller*, 120 U. S. 534–552.

J. F. Gould, for defendants.

"The essential use and occupation by one claiming adversely must be of such unquestioned character as will reasonably indicate to the true owner visiting the premises during the statute period that instead of suggesting the probable invasion of a mere occasional trespasser, they unmistakably show an asserted and exclusive appropriation and ownership." *Roberts* v. *Richards*, 84 Maine, 1.

An entry on land under a deed recorded and payment of taxes is no evidence of a disseizin of the true owner unless the person who entered has continued openly to occupy and improve it. *Little* v. *Megquier*, 2 Maine, 176; *Ewing* v. *Bernett*, 1 McLain, 266; *Reed* v. *Field*, 15 Vt. 672.

Going on land and claiming to own it and offering to sell it are circumstances at most showing a claim at that time. A claim is no possession. *Thompson* v. *Knight*, 7 Maine, 439.

An open, exclusive and adverse possession of a tract of land by a demandant is not established by proof that no other person than such demandant occupied it for thirty years, and that he had cut

wood upon it and always fenced portions of it. *Frye* v. *Gragg*, 35 Maine, 29.

Without actual occupation of some portion of the premises by the grantee under a recorded deed the real owner is not disseized thereby. *Putnam Free School* v. *Fisher*, 38 Maine, 324.

Mere dilatory and negligent cultivation and occasional acts of working and improving are insufficient. 1 Am. & Eng. Ency. of Law, p. 827. Mere occasional occupancy, though taxes are paid regularly will not give title. *Sorber* v. *Willing*, 10 Watts, (Pa.) 141. The occupation must be so notorious that the owner may be presumed to have knowledge that it is adverse. *Morse* v. *Williams*, 62 Maine, 445. If the demandant in a writ of entry shows no title in himself to the real estate demanded he cannot recover, although it should appear that the defendant also had no title. *Derby* v. *Jones*, 27 Maine, 357.

Pratt had but a tax title to lots 43 to 51. He did not have a good title to part at least of lots 9 to 20. Plaintiff testifies she did not know her father ever claimed these lots 43 to 51 in his lifetime and the deed certainly discloses no intention to convey them, and it is a fair inference that only lots 9 to 20 were intended to be included in the deed.

Is the description sufficient to give color of title? In *Lane* v. *Gould*, 10 Barb. 254, it is held, "that if a deed is devoid of any description and contains no definite and certain boundaries it will not have the effect to extend possession beyond actual occupancy definite, positive, notorious." Where disseizor enters upon and cultivates a part of a tract of land, he does not thereby hold constructive possession of the whole tract unless his entry was by color of title by specific boundaries to the whole tract. *Ege* v. *Medlar* 82 Pa. St. 98.

This case is squarely against plaintiff. In her deed absolutely no boundaries whatever are given. Simply, "Any and all lands and buildings situated on Treat & Webster Island in Old Town, however the same may be described." In *Little* v. *Megquier*, 2 Maine, 179, the court seem to hold boundaries must be given. *Props. Ken. Purchase* v. *Laboree*, 2 Greenl. 275.

If a person enters under color of title and by actually occupying a part claiming the whole obtains constructive possession of the entire tract to which his color of title extends, this possession cannot be defeated by a subsequent entry and occupancy of a portion of the same tract, even though under color of title to the whole, where neither claimant shows himself to be in possession of the true title. 1 Am. & Eng. Ency. of Law, p. 870, and cases cited.

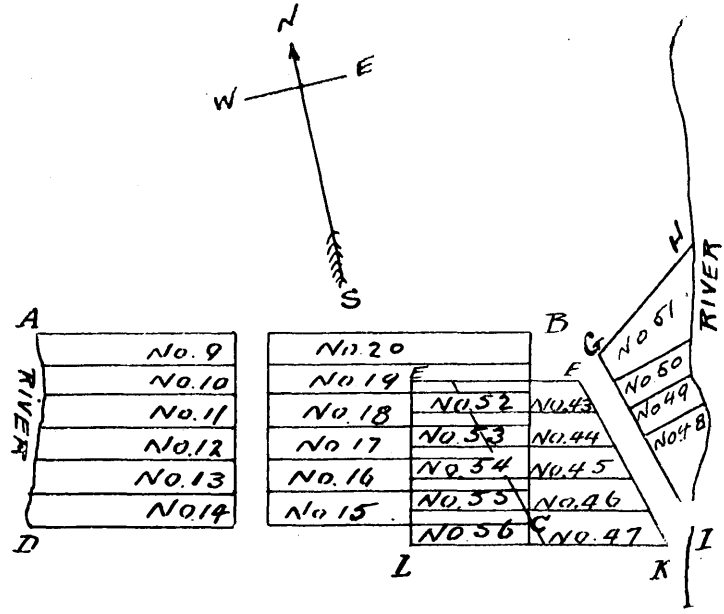
SITTING: WISWELL, C. J., EMERY, WHITEHOUSE, SAVAGE, FOGLER, POWERS, JJ.

SAVAGE, J. Real action for the recovery of lots forty-three to fifty-one inclusive, on Treat and Webster Island in Old Town, according to plan made by A. S. Howard in 1835. The defendants deny the plaintiff's title. The plaintiff claims title to the lots in question, by adverse possession, first by disseizin and open and notorious occupation of the lots themselves under color of title for more than twenty years, by herself and her predecessors in title; and in case of failure of proof of actual occupation, then that she has had constructive possession of these lots by reason of the ownership and actual occupation, during the period of twenty years, of other lots, namely, lots 9 to 20, contiguous to these, all of which forming together, it is claimed, but a single undivided tract of land, the title and right of possession to which descended to her from her father, who was in actual possession of the whole at the time of his death.

The defendants claim that the plaintiff has failed to prove actual occupation in kind or extent sufficient to establish title by adverse possession. They say that neither the plaintiff nor her predecessors had at any time the actual possession of the lots in controversy, and that if they had such possession it was not uninterrupted nor exclusive for any period of twenty years. The defendants also say that the plaintiff cannot in any event have had constructive possession and thereby have gained title to these lots by having been in the possession of any other lots, because no other lots on the island owned or occupied by the plaintiff were contiguous to the ones sued

for, and hence, the lots actually occupied and the lots in controversy being separate parcels, that the doctrine of constructive possession does not apply. *Proprs. Kennebec Purchase* v. *Laboree*, 2 Greenl. 275; *Farrar* v. *Eastman*, 10 Maine, 191.

Although it is not necessary to decide the controversy between the parties on the question of constructive possession based upon the contiguity of the lots sued for and others owned and occupied by plaintiff, we think it is expedient to narrate briefly how this controversy has arisen.



A, B, C, D. Lots 9 to 20 inclusive on Steward plan.

E, F, G, H, I, K, L. Lots 43 to 56 inclusive on Howard plan super-imposed upon Steward plan, so as to bring the easterly ends of lots 43 to 51 inclusive within the actual limits of the island as shown by Steward plan.

No question is made but that in 1832 a plan of Treat and Webster Island was made by Eber Steward, (or Stewart) and some portion of the island was lotted off, notably, so far as this case is concerned, lots 9 to 20 inclusive. The width of the island, on a line passing through the southerly boundary of lots 14 and 15, as shown by this plan, is 83 rods and 10 links, and this is also the width of

the island as shown by recent actual survey. The Steward plan was recorded in the Registry of Deeds, and is referred to in most of the conveyances and other proceedings relating to lots 9 to 20 which appear in the case. In 1835 a plan was made by A. S. Howard. Lots 9 to 20 inclusive as plotted on the Howard plan are practically coincident with the same lots on the Steward plan; and lots 43 to 56 are plotted to lie easterly of lots 15 to 19, and to extend to the easterly shore of the island. On this plan the lots are plotted in five tiers. In the first tier on the westerly side of the island are lots 9 to 14; in the second, lots 15 to 20; in the third, lots 52 to 56; in the fourth, lots 43 to 47; and in the last, on the easterly side of the island, lots 48 to 51. But by the Howard plan, the island is shown to be about ninety-six and one-fourth rods wide on the southerly line of lots 14 and 15, which is nearly thirteen rods wider than the island shown on the Steward plan, and the same distance wider than the island as it actually exists. Lots 9 to 20 being coincident, or practically so, on both plans, if the remaining three tiers of lots as plotted in the Howard plan be applied to the face of the earth, beginning at the easterly line of lots 15 to 20 and proceeding easterly, about two-thirds of lots 43 to 47 and all of lots 48 to 51 will be crowded into the river. On the other hand, if these lots as plotted be applied to the face of the earth, beginning at the easterly shore of the island and proceeding westerly, about one-third of lots 43 to 47 and all of lots 52 to 56 will lie westerly of the easterly line of lots 15 to 20, and be superimposed upon those lots. In short, there is not room enough on the island for lots 43 to 56 as plotted on the Howard plan. The plan is evidently erroneous. In one aspect of the case, it is important to correct the error if it can be done and give proper effect to the plan. For if the Howard plan be applied beginning at the easterly end of the tier of lots 15 to 20 and running thence to the easterly shore, lots 43 to 51 will not be contiguous to lots 9 to 20. The tier of lots 52 to 56 will intervene. But if the application be made beginning at the easterly shore, and running westerly, then lots 43 to 51 will be contiguous to lots 9 to 20, but lots 52 to 56 will be wiped out of existence. It may be said that so far as the

merits of this case are concerned, lots 43 to 56 exist as lots only on paper. They are not marked on the face of the earth. None of the lots have been sold, no roads have been built, although one is marked on the plan, and no third parties have any rights involved. Were this a controversy between different grantees of these various lots, other considerations would arise; but as this case stands, it is only a question as to how the Howard plan should be applied to the face of the earth, thus to determine where lots 43 to 51 are with reference to lots 9 to 20, contiguous or not. And if the verdict were to depend upon the solution of this problem, we cannot say that the jury would not be warranted in finding that the block of land containing lots 43 to 51 is contiguous to the block containing lots 9 to 20. If they are not contiguous, then, as we have shown, lots 48 to 51 are entirely in the water, as are also the larger part of lots 43 to 47. Yet for more than sixty years all of the parties on both sides of this contested title have recognized all of lots 43 to 51 as existent upon the island. Their payments of taxes show it, their conveyances show it. It is not disputed by counsel in this case. The tax deed, in fact, under which the defendants claim that their predecessor received at least a color of title in 1838, affirms the existence then of all these lots. On the other hand, if lots 43 to 51 are contiguous to lots 9 to 20, there is no space left for lots 52 to 56. They exist only on paper, or as other numbers for parts of lots 15 to 20. But since there is an error somewhere, it is not improbable that the error occurred at this point. For while lots 43 to 51 have been recognized by all parties, these lots 52 to 56 seem to have been entirely disregarded by all, so far as the case shows, until 1888, when the plaintiff began paying taxes upon lots so numbered. There is strong reason therefore, derived from the conduct of the parties, for dropping out lots 52 to 56 rather than lots 43 to 51, and regarding lots 43 to 51 as contiguous to lots 9 to 20.

Now there seems to be no question but that the People's Bank of Roxbury acquired title by levy, in 1842, to lots 9 to 20 (except No. 11, and the omission of that lot is immaterial) and to a lot of land on the island "bounded westerly by lots 15, 16, 17 and 18 on

Eber Stewart's plan" . . . . and "easterly by the Penobscot river." This description embraces the disputed territory. The title of the bank in lots 9 to 20 came by mesne conveyances to Samuel Pratt, through two channels, in 1861 and 1862. In the meantime, in 1860, a tax title to lots 43 to 51 had been purchased by the same Pratt. Upon his death, in 1863, his title in all the lots, such as it was, descended to his two daughters. The plaintiff is one of these daughters, and is the grantee of the interest of the other one. Prior to the levy in favor of the People's Bank, however, it is shown that the predecessors in title of one Jeremiah Swan had acquired a tax title to lots 43 to 51, and had taken possession under it, and that Swan continued to hold possession under this title and adversely to all others, at least until 1860 or 1861. Swan afterwards, in 1894, conveyed to defendant Robbins.

The decision of the case, however, does not depend upon any record title. And we have considered the question of the contiguity of lots 9 to 20 and those in controversy in this action only as it may tend to strengthen or weaken the probability that the plaintiff and her father before her claimed and occupied the latter lots adversely. Upon this question it has an obvious bearing. For reasons unnecessary to state, the jury were instructed that the sole issue submitted to them was whether the plaintiff had obtained title to the demanded premises by adverse possession. Upon that issue, the burden was upon the plaintiff. *Magoon* v. *Davis*, 84 Maine, 178. Under instructions to which no exception was taken, the jury have decided that issue favorably to the plaintiff. The burden is now on the defendant to satisfy us that the verdict is clearly wrong.

To make further analysis of the evidence would not be useful. Careful consideration leads us to conclude that the evidence would warrant a jury in finding that Samuel Pratt, in 1862, entered into actual occupation of the disputed lots and fenced and cultivated them, that they were contiguous to other lots which he owned; that his occupation of the lots was an actual ouster, a disseizin of the true owner; that he continued in possession until he died, in 1863; that the possession was continued by the representatives of

his estate and his heirs, by acts of husbandry, until the fences were destroyed in the winter of 1865; that since that time the land has lain fallow, except small patches where trespassers have cultivated gardens; that the plaintiff by her agent has frequently and openly been over the lots to look after them, and has on some occasions gone onto them for business purposes directly connected with the lots; that the plaintiff and her predecessors have paid the taxes on these lots since 1861, claiming to own them; and that the defendants' grantor, Swan, knew of the plaintiff's possession and claim and acquiesced therein. We think the verdict may be supported upon these facts, assuming them to be true. What facts are sufficient to show open and notorious possession must depend much upon the situation and character of the land, and the uses which are made or may be made of it. Besides, less proof of a general character is required when it appears that the possession and claim were in fact brought home to the knoweldge of the true owner.

We do not forget that all these questions of fact to which we have adverted were stoutly contested by the defendants. They deny that the plaintiff or her father has ever been in any kind of possession of these premises, actual or constructive. They deny that all of the taxes have been paid, as the plaintiff claims. They claim that Swan was in actual occupation of the premises from 1849 to 1874. They say that even if plaintiff or her father ever took possession, that possession has been interrupted, and that no twenty year period of possession has elapsed without interruption.

But these are all questions of pure fact. Witnesses testified to the occupation by Pratt and his daughter, the plaintiff, and that no one else was in possession. Other witnesses testified that Swan and no one else was in possession. It was for the jury to say which class were telling the truth. In one instance relied upon to prove an interruption, where a party was in possession as tenant, the plaintiff claims that he was let in by her agent, while the defendant claims that Swan let him in. Which was right was for the jury to say. As to the occupants of the little patches of ground used for gardens, these may well have been found by the jury either to have

been occupiers by permission of the plaintiff, or that they were mere trespassers, squatters, not disseizors. Entries by such persons did not work an interruption. The testimony was conflicting. If the jury believed that which supported the theory of the plaintiff, they were justified in their finding.

On the whole, we cannot say that the jury erred in their conclusion. The verdict must stand.

Motion overruled.

STEPHEN SHACKFORD *vs.* JAMES E. COFFIN.

York. Opinion February 21, 1901.

Negligence. Landlord and Tenant. Repairs.

The plaintiff was injured by a defective stairway to a tenement leased by defendant to him. There was no evidence that the defendant knew of the existence of the defect. All that was visible or known to the defendant was visible to the plaintiff.

Held; that if the landlord had known of a secret defect, not discoverable by the tenant, he was bound to disclose it. His duty extended no further. The rule caveat emptor applies.

An agreement by the landlord to make repairs, if nothing is done toward it, does not change the rule.

On motion by defendant. Motion sustained.

This was an action by a tenant against a landlord for an alleged defective platform at the head of a set of stairs, leading from the street to the building. The jury gave a verdict for the plaintiff. The substantial facts appearing in evidence are as follows:

The tenement in question is located in Springvale village, in the town of Sanford, and was owned by the defendant who lived in Shapleigh about 12 miles distant. The building was two-story with a meat shop on the first floor and a tenement overhead. One James H. Makin, of Springvale, acted as agent for the defendant.

The plaintiff hired the tenement through Makin March 18th, 1899, and before hiring it he took the key and examined the building.

The plaintiff says that Makin agreed to repair the stairs and "make them safe." This Makin denied and says that the repairing of the stairs "was never mentioned." "He did not ask repairs of any kind," and testified that it was understood between them that "if there was any repairs to be made he (tenant) was to make them" and that "he (Makin) did not know that the stairs were unsafe."

Makin exchanged stoves with Shackford and his two men weighing 175 lbs. and 140 lbs. respectively, moved the stove which weighed more than 200 lbs. into the tenement.

The plaintiff received his alleged injuries on the 8th day of July, 1899, while moving out of the building, and his was the only weight on the platform at the time.

The plaintiff moved into the building March 18, 1899. He said that when he moved in he had seen the stairs and "thought they were not safe" and "knew all the time that they were not safe." "They didn't stand very firm."

And as a result of his knowledge of the unsafe condition, before moving out he put props under the stairs. He had to go under the stairs to put up the props, and when asked if there was anything to prevent him from seeing up under the platform answered by saying: "There was nothing, no sir."

The defect claimed by plaintiff was that the brace in the stairway, or planking, upon which the planking rested, where it was mortised in had rotted off and could not have been seen from the outside without taking up the planking and making an examination. The top stair covered it.

The defendant did not visit the place frequently, and it did not appear that he had opportunity for knowing such defect as the plaintiff alleged. The buildings were old and their condition was within the plaintiff's knowledge.

J. S. Derby, for plaintiff.

F. J. Allen, for defendant.

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

STROUT, J. Plaintiff was injured by a defective stairway to a tenement leased by defendant to plaintiff. Whatever the defect was, whether from rotting of the timber or planking or otherwise, there is no evidence that defendant knew of its existence. In such case the rule caveat emptor applies. The plaintiff had as much knowledge in regard to it as the defendant. All that was visible or known to the defendant or his agent was visible to the plaintiff.

If the landlord had known of a secret defect not discoverable by the tenant, he was bound to disclose it.

Notwithstanding plaintiff's agent agreed to repair the stairs, nothing was done toward it. Plaintiff knew this; yet he moved in and accepted the premises. He placed props under the stairs because of that knowledge.

In this state of facts as disclosed by the evidence, defendant is not liable to plaintiff. *Whitmore* v. *Pulp Co.*, 91 Maine, 297.

Motion sustained.

JOHN E. PINKHAM, and another *vs.* FRANCES O. PINKHAM.

Kennebec. Opinion February 23, 1901.

Husband and Wife. Dower. Descent. Contracts. R. S., c. 61, § 6; c. 103, §§ 6, 96; Stat. 1895, c. 157.

A wife cannot bar her right and interest by descent in her husband's real estate by a release to him during coverture.

A release by the husband to the wife, during coverture, of all his right, title and interest in dower, or right and interest by descent, in her real estate, and of all claim he may have in her personal estate at her decease, by allowance or otherwise, is not a "pecuniary provision" for her, within the meaning of R. S. chap. 103, §§ 8 and 9; and her release to him in consideration thereof, of her right and interest by descent in his real estate is invalid.

A widow may waive a "pecuniary provision" made for her after marriage and save her right and interest by descent.

Held; that the defendant took by descent one-third in common of the demanded premises.

On report. Judgment for defendant.

Writ of entry, wherein the plaintiffs demanded certain real estate situated in Augusta.

The case appears in the opinion.

F. J. C. Little, for plaintiffs.

The covenant stands entirely upon precedent of common law, is not prohibited by statute and is enforceable. *Motley* v. *Sawyer*, 34 Maine, 540, and cases; *S. C.*, 38 Maine, 68; *Davis* v. *Herrick*, 37 Maine, 397; *Randall* v. *Lunt*, 51 Maine, 246; *Woods* v. *Woods*, 77 Maine, 434, and cases.

If the case of *Woods* v. *Woods*, supra, is within the statute, surely this case may be, for in the former she takes property without the prospects of further support from her husband during her life; and in this case she lived with him and was supported by him during his life in peace, enjoying the blessings of a home. With such a consideration to support the contract, the cases are similar. Says WALTON, J., in *Woods* v. *Woods*: "In this case, while her husband was alive, the plaintiff received from him one thousand dollars in money, and some other property, in consideration of which she agreed in writing, under her hand and seal, that the property so received should be in full discharge of all claim, right or interest upon him and upon his property, for her support and maintenance, by way of dower or otherwise. Her husband is now dead, and the question is whether this agreement bars her right to dower. We think it does. That her husband intended that the provision so made for her should be in lieu of dower, and that she deliberately and advisedly accepted it as such, there can be no doubt. The express wording of the agreement will admit of no other interpretation. We think she must abide by the agreement she then made."

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

Counsel argued: (1) Release is void at common law; (2) not ante-nuptial; (3) not a jointure; (4) not a pecuniary provision; (5) not within any statute.

Counsel cited: (1) *Rowe* v. *Hamilton*, 3 Maine, 63; *Stephenson* v. *Osborne*, 41 Miss. 119; S. C. 90 Am. Dec. 358, and cases; *Townsend* v. *Townsend*, 2 Sandf. 711; *Croade* v. *Ingraham*, 13 Pick. 33; *Hastings* v. *Dickinson*, 7 Mass. 153; *Gibson* v. *Gibson*, 15 Mass. 106; *Vance* v. *Vance*, 21 Maine, 364; *Chase* v. *Alley*, 82 Maine, 237. All legal contracts between husband and wife must be statutory permissions. *Stephenson* v. *Osborne*, supra; *Jones* v. *Crosthwaite*, 17 Ia. 393; *Leach* v. *Leach*, 65 Wisc. 284; *Wilbur* v. *Wilbur*, 52 Wisc. 298; *Townsend* v. *Townsend*, supra; *Littlefield* v. *Paul*, 69 Maine, 534; *McKee* v. *Reynolds*, 26 Ia. 578; *Allen* v. *Hooper*, 50 Maine, 372; *Blake* v. *Blake*, 64 Maine, 184; *Wentworth* v. *Wentworth*, 69 Maine, 262; *Giles* v. *Moore*, 4 Gray, 600.

Dower cannot be barred in any other way than provided by statutes.

In *Littlefield* v. *Paul*, 69 Maine, 534, after full and exhaustive argument by most able counsel, the precise question, which is the crucial test of this cause, came up necessarily for decision. LIBBEY, J., after citing R. S., ch. 103, §§ 1, 6, 7, 8, 9 and 10, and ch. 61, § 6, said: "We are of the opinion that these statutory provisions cover the whole subject of dower and that the court must look to them, and to them alone, for the extent of the right of the widow to dower, and for the modes and manner in which she may be legally barred of her action therefor."

(2) Not a jointure. *Hastings* v. *Dickinson*, 7 Mass. 153; *Vance* v. *Vance*, 21 Maine, 364; *Bubier* v. *Roberts*, 49 Maine, 465.

(3) Not an ante-nuptial settlement, because not made before marriage, and she duly waived all provisions of the will. *Perkins* v. *Little*, 1 Maine, 151.

(4) Not a pecuniary provision. *Bubier* v. *Roberts*, 49 Maine, 464; *Wentworth* v. *Wentworth*, 69 Maine, 247. In *Woods* v. *Woods*, 77 Maine, 434, the husband and wife entered into a deed of separation and the wife received an adequate pecuniary provision within the meaning of R. S., c. 103, §§ 8 and 9. *Shaw* v. *Boyd*, 5 S. & R. 309, (9 Am. Dec. 369); 1 Wash. R. P. 325.

Redfield on the Law of Wills, citing for authorities *Drury* v. *Drury*, 3 Br. P. C. 492, and *M'Cartell* v. *Tellar*, 2 Paige, 511, says: "But a jointure or marriage settlement, in order to have the effect to bar the widow's claim of dower in her husband's estate, must be adequate to her support, or at all events a fair equivalent to the dower in her husband's estate." By the very terms of the agreement the wife was to receive nothing except the fortuitous assurance that her heirs should take her estate unencumbered by dower. It was the intention of the statute that the surviving wife should be provided with a fair and adequate recompense for the right released. That intention is defeated by such a contract as this, for the "provision" intended for the survivor is made to go to the heirs of the deceased. The consideration for her deed of release was contingent and uncertain during the life of her husband. By his death it wholly failed.

On Feb. 12, 1896, the date of this agreement, Mrs. Pinkham's right in her husband's estate was inchoate; it was not even a chose in action. It could not be assigned to her during the life of her husband. She could maintain no action in respect to it. *Gunnison* v. *Twitchell*, 38 N. H. 62. Nor was her right at law in any sense an interest in real estate, nor property of which value could be predicated. The same was true of her husband's right in her estate. Both were mere possibilities, and not proper subjects of contract. 1 Wash. R. P. 312; *Moore* v. *The Mayor*, 8 N. Y. 110; *McArthur* v. *Franklin*, 16 Ohio St. 193.

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

SAVAGE, J. In this writ of entry the demandants are the two sons of Elisha F. Pinkham, who died seized of the demanded premises, April 24, 1899; the defendant is his widow. The widow claims a one-third interest in the premises by statutory descent under the provisions of section 1 of chapter 157 of the Public Laws of 1895. And it is agreed that if the widow's claim is sustained, the demandants are entitled to judgment for two-thirds undivided of the premises; otherwise, for the whole.

The demandants claim that the defendant is barred of her statutory interest by the following agreement, made while Elisha F. Pinkham and the defendant were intermarried, and presumably, while they were living together as husband and wife:—

"By mutual consent and agreement this day entered into by and between Elisha F. Pinkham and Frances O. Pinkham, both of Augusta, Maine, man and wife, and for a valuable consideration paid by the one unto the other, receipt of which is hereby acknowledged, each does hereby release and discharge, convey and transfer unto the other all of his right, title and interest in dower of his or her real estate of which he or she is now seized or possessed, and of which he or she may die seized or possessed. And likewise do further hereby acknowledge full and complete satisfaction for and of each in the other's personal estate at time of his or her decease, hereby waiving and cancelling and discharging each unto the other all claim and right of claim which each may have at the time of the other's decease in each other's estate, whether by allowance or widow's or widower's thirds, under general laws of the state, excepting this writing shall not cut nor interfere with any provision made in the will of the party who shall first decease, if any such provision shall be made in favor of the other.

In witness whereof we have hereunto interchangeably set our hands and seals this 12th day of February, 1896.

Elisha F. Pinkham (Seal)
Frances O. Pinkham (Seal)"

In this agreement the parties make use of the word "dower." Chapter 157 of the Public Laws of 1895, abolished dower and substituted therefor title and interest by descent, an estate in fee. That statute was not in force as to these parties when this agreement was made, but it was in force when Mr. Pinkham died. But we think it is clear that, in using the word "dower," the parties had in mind such interest as the defendant might have in her husband's real estate at his death, be it "dower" under the old statutes, or "right and interest by descent" under the new. And thus we construe the agreement.

But is the agreement valid? We think not. At common law a wife could not bar her dower by a release to her husband during coverture. *Rowe* v. *Hamilton*, 3 Maine, 63. If such power now exists, it must be by reason of some enabling statute. *Haggett* v. *Hurley*, 91 Maine, 542. If the power be sought in the general statutes extending the powers of wives to contract with their husbands, we think the search will be unavailing. Certainly no such power is expressly given, and we think it is not given by any fair intendment. The principles controlling the construction of these statutes have recently been elaborately expounded in *Haggett* v. *Hurley*, supra, and we need not repeat them. Such statutes, as was said in that case, "must be construed strictly as in derogation of the common law, and as modifying a long approved policy."

Now because the statutes empower a wife to convey her real estate to her husband, a matter of bargain and sale, or gift, it does not follow that she may divest herself of her dower right, or as we now say, her right and interest by descent, by simply contracting mutual releases with her husband. The two matters are different. The right and interest by descent arise by reason of the marital relation and continue, unless barred, as long as that relation exists. It is not barred by a sale to the husband, for if the wife convey her real estate to her husband, her inchoate right by descent springs at once into existence. It is not defeated nor barred.

The law jealously regards the rights of a wife in the estate of her husband. She may not be barred by his deed or his will, unless she joins in the one, or is willing to accept the provisions of the other. She is even protected against her own too-easily persuaded confidence in her husband, her own improvident contracts with him. For if during coverture, jointure or pecuniary provision is made for her, even with her consent, and her dower or right and interest by descent would be thereby barred, she may waive the provision, and save her interest. R. S., chap. 103, § 9; Public Laws 1895, chap. 157, § 4.

Had it been the intention of the legislature to grant to wives a power of so serious a character and of such doubtful utility to them

as the irrevocable power claimed in this case would be, we think that intention would have been more clearly expressed.

The legislature has, however, permitted the barring of dower or the interest by descent in certain specific ways, and with certain safeguards. But none of these statutory methods were adopted in this case. This is not a statutory "marriage settlement," because it is not an ante-nuptial settlement executed in the presence of two witnesses. R. S. chap. 61, § 6; *Wentworth v. Wentworth*, 69 Maine, 247. Nor is it a "jointure." R. S., chap. 103, § 7; *Vance v. Vance*, 21 Maine, 364. Nor is it a joinder in a conveyance made by the husband. R. S., chap. 103, § 6. Nor is it a "pecuniary provision," R. S., chap. 103, § 8, because the provision is not "pecuniary." *Davis v. Davis*, 61 Maine, 395; Bouvier's Law Dictionary, Tit. Pecuniary. In *Woods v. Woods*, 77 Maine, 434, cited and relied upon by the learned counsel for the demandants, the provision was, in part at least, pecuniary, "one thousand dollars in money." And upon this fact the decision of the court was expressly based.

Besides, if the agreement in the case at bar could be held to be a pecuniary provision, the case shows that the widow seasonably elected to waive the provision. Public Laws 1895, chap. 157, § 4. And this she could do, for the provision was made after marriage. R. S., chap. 103, § 9.

The defendant, therefore, took one-third in common and undivided of the demanded premises as her right and interest by descent from her husband, and the demandants are entitled to judgment for the remainder.

Judgment for demandants for two-thirds in common and undivided of the demanded premises.

HELEN F. FAIRBANKS, Admx.

vs.

BANGOR, ORONO & OLDTOWN RAILWAY COMPANY.

Penobscot. Opinion February 25, 1901.

Street Railways. Way. Negligence. Travelers.

There is no absolute rule of law that a person riding along a street must look and listen for an approaching car before entering upon the track of an electric railway. Whether his failure to look or listen amounts to negligence must be determined from all the facts and circumstances proved.

The defendant is the owner and operator of an electric street railway, its track running along Central street in Bangor at a grade of nine feet in the hundred. The plaintiff's intestate was the proprietor of a store on the southerly side of Central street.

On the morning when he met with the accident which caused his death, he was driving down the northerly side of that street seated in an open delivery wagon, his horse at a walk. When nearly opposite his store he turned to cross the defendant's track in front of a car approaching on the down grade. As he turned, he had an unobstructed view of the track, and had he looked he could not have failed to see the approaching car.

He continued to walk his horse across the track until the front end of the car struck his near hind-wheel, by the force of which he was thrown from his seat and fatally injured. The testimony convinces the court that there was no negligence on the part of the defendant's servants and that the intestate met with the injuries which caused his death solely by reason of his own negligence, and that the verdict for the plaintiff was manifestly wrong.

On motion by defendant. Motion sustained.

This was an action at common law by the plaintiff, as administratrix of the estate of Jesse A. Fairbanks, to recover damages for the death of her intestate caused by a collision September 17, 1898, with one of the cars of the defendant company on Central street in the city of Bangor. The accident took place about 6.30 A. M., at the foot of the steep down grade on the street northerly of Norombega Hall and about one hundred feet below the intersection of Harlow and Central streets. The case was tried at the January term, 1900, and a verdict rendered for the plaintiff for $5200.

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

Counsel cited: *Atwood* v. *B. O. & O. Ry. Co.*, 91 Maine, 399; *Kilbane* v. *Winchester Elec. R. R. Co.*, 43 N. Y. Sup. Ct. 278; *Whitehouse* v. *G. T. Ry.* 2 Hask. p. 189; *Calumet Elec. St. Ry. Co.* v. *Christenson*, 170 Ill. 382; *S. C.* 3 Am. Neg. Rep. 537; *Meisch* v. *Rochester Elec. R. R.*, 72 Hun, 604; *Sears* v. *Seattle St. Ry. Co.*, 6 Wash. 277; *S. C.* 33 Pac. Rep. 389, 1081; *White* v. *Worcester St. Ry. Co.*, 167 Mass. 43; *Benjamin* v. *Holyoke St. Ry. Co.*, 160 Mass. 3; *Montgomery* v. *R. R. Co.*, (Mich. Sup. Ct.) 5 Am. Elec. Cases, p. 471; *Thompson* v. *Holyoke St. Ry. Co.*, 170 Mass. 365.

O. D. Baker, L. C. Stearns and E. C. Ryder, with him, for defendant.

Plaintiff guilty of contributory negligence. His attempting to cross when and where he did was a negligent act. Rights of a traveler crossing the track in front of a car approaching behind him are wholly different from those at a regular crossing. *O'Neil* v. *Dry Dock, etc., R. Co.*, 129 N. Y. 125. "A horse car can not be handled like a rapier" per Holmes, J., in *Hamilton* v. *West End St. Ry. Co.*, 163 Mass. 199; *Flewelling* v. *L. & A. H. R. R. Co.*, 89 Maine, 593; *Atwood* v. *B. O. & O. Ry. Co.*, 91 Maine, 402; note to *Western, etc., Co.* v. *Citizens St. R. R. Co.*, 128 Ind. 5215, reported in 25 Am. St. Rep. p. 477, and cases cited; *Driscoll* v. *Ry. Co.*, 97 Cal. 553; *De Lon* v. *Ry. Co.* (Ind. May, 1899) 55 N. E. Rep. 847. Many courts have held such failure to look or listen to be negligence in law after the analogy of steam railroad cases; *Sonnenfeld Co.* v. *Ry. Co.*, 59 Mo. App. 668; *Onslaer* v. *Ry. Co.*, 168 Pa. St. 518; *Smith* v. *Traction Co.*, 187 Pa. St. 110; *Doherty* v. *Ry.* (Mich. 1898) 7 N. W. 377; *Webster* v. *Ry.* (La. 1899) 25 So. Rep. 77; *Smith* v. *Ry.* 29 Ore. 539; *McGee* v. *Ry. Co.*, 102 Mich. 107; *Fritz* v. *Ry. Co.*, 105 Mich. 50. We submit it was negligence in fact. *Hayes* v. *Norcross*, 162 Mass. p. 548, and cases. Such sudden crossing is contributory negligence and defeats the action. *Thomas* v. *Ry.* 132 Pa. St. 504; *Carson* v. *Federal St. Ry. Co.*, 147 Pa. St. 219 (gross negligence);

Ry. Co. v. *Stammers*, (Ky. 1898) 47 S. W. Rep. 341; *Hall* v. *Ry. Co.*, 168 Mass. 461; *Borschall* v. *Ry.* 73 N. W. Rep. 551.

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

FOGLER, J. This is an action on the case, at common law, in which the plaintiff sues to recover damages for personal injuries sustained by her husband and intestate, Jesse A. Fairbanks, causing his death, through the alleged negligence of the servants of the defendant corporation. The jury returned a verdict for the plaintiff in the sum of five thousand, two hundred dollars. The defendant moves for a new trial on the grounds that the verdict is against law, against evidence and the weight of evidence, and that the damages awarded are excessive.

The defendant company is the owner and operator of an electric street railway running from Old Town into the city of Bangor, its tracks running along Central street from its junction with Harlow street, to Hammond street. The plaintiff's intestate was the proprietor of a store on the southerly side of Central street. At about half-past six o'clock on the morning of the seventeenth day of September, 1898, he was traveling along the northerly side of said street from its junction with Harlow street, towards his place of business on the southerly side of Central street. He attempted to cross the railway track in front of one of the defendant's cars, approaching him from Harlow street. The front end of the car struck the near hind-wheel of the wagon, causing it, or the seat, to tip, and the plaintiff's intestate was thereby thrown from the seat, his head striking the pavement and such injuries being thereby inflicted that he died by reason thereof, five days thereafter.

The defendant contends that the verdict should be set aside upon two grounds, namely; first, that the injuries to the plaintiff's intestate were occasioned by his own negligence; and secondly, that the defendant was guilty of no negligence.

We think that the motion should be sustained on both grounds.

Street railway companies have a right to use the streets upon which their tracks are placed. Travelers on foot or with teams

have also the right to use such streets for purposes of travel. In the use of the street each must use ordinary care, and prudence. The rule in this respect is thus stated in *Atwood* v. *Bangor, etc., Ry. Co.*, 91 Maine, 402: "Highways are constructed and maintained for the accommodation of travelers, and not as places of resort for business negotiations or social converse. All travelers with teams have equal rights on the highway, but each must exercise his right in a reasonable manner and use the way with due regard to the rights of others. And since highways have been subjected to a new mode of use by the introduction of street railways, a still higher degree of attention, vigilance and prudence is requisite to fill the measure of ordinary care demanded of the traveler."

And in *Flewelling* v. *Lewiston and Auburn Horse Railroad*, 89 Maine, 593, it is stated: "Electric Street cars have, in a qualified way at least, the right of way as against persons on foot or traveling with carriages and teams in the same manner as ordinary steam railroads have. And all persons passing on foot or traveling by the common methods on the highways, should carefully observe the movements of the street cars and leave them an unobstructed passage as well as they reasonably can."

There is no absolute rule of law requiring a traveler to look and listen before crossing the track of an electric railway in a public highway. *Kelley* v. *Wakefield St. Ry.*, 175 Mass. 331; *Robbins* v. *Springfield St. Ry.*, 165 Mass. 30.

But he must do for his own safety what ordinarily careful persons are accustomed to do under like circumstances. *Hall* v. *West End Ry.*, 168 Mass. 461.

Whether a failure of a traveler about to cross an electric railway track, to look or listen, amounts to negligence must be determined from all the facts and circumstances proved.

Applying the law thus laid down to the case at bar, we think that the testimony introduced by the plaintiff proves gross negligence on the part of her intestate in attempting to cross the defendant's track in front of the approaching car. As his place of business was upon that street, he must have known that cars were

accustomed to run upon the track at a steep grade. The view from the point of collision to the junction of Harlow and Central streets was unobstructed. Without looking to see whether a car was approaching, and without any warning to the motorman of his intention, he turned to cross the track. When he turned, a slight glance up the track would have shown him the car approaching. The distance from the point where he turned to cross is differently stated by the plaintiff's witnesses. One witness testifies that when Mr. Fairbanks commenced to make the turn the car was coming round the curve from Harlow street, which would be a distance of about a hundred feet. Another witness for the plaintiff testifies that the car was eight or ten feet away when the team turned to cross the track. Assuming that the car was moving at the rate of six miles per hour, the maximum speed testified to by any witness, and continued that rate of speed till the moment of collision, and that the team was moving at the rate of three miles per hour, a mathematical calculation demonstrates that when the team started to cross the track, the front end of the car could have been distant from the team not more than thirty or thirty-five feet.

The plaintiff claims that the defendant was guilty of negligence, because, as she contends, the motorman did not sound his gong when he saw her intestate turn to cross the track, and made no effort to stop the car and thus avoid collision. One of her witnesses testified that he heard, or, at least, noticed, no sound of the gong until almost at the moment of collision. Two others testified that they did not hear, or did not notice, the sound of the gong at any time after Mr. Fairbanks made his turn to cross. Three witnesses for the plaintiff testify that they did not see, or did not notice, the motorman apply his brake, or make any effort to stop the car.

On the other hand, the motorman testifies that when he observed Mr. Fairbanks turn to cross the track he sounded his gong and continued to sound it until the collision occurred, and that at the same time, he applied his brake until his wheels ceased to revolve, and that on account of the steep downward grade of nine feet in the hundred and the slippery condition of the track, the

wheels did not take the iron but slid forward on the rails; that he then threw off his brake and reversed his power so that the wheels revolved backward, but the wheels continued to slide forward until the collision occurred.

In this the motorman is fully corroborated by the conductor and several other apparently disinterested eye-witnesses of the affair.

The motorman testified that at the time of the collision he had reduced his speed to three miles an hour.

We think that the weight of testimony on this branch of the case is strongly and convincingly in favor of the defendant.

We are of opinion that the plaintiff's intestate met with the injuries which caused his death solely by reason of his own negligent acts and that the verdict was manifestly wrong and must be set aside.

Motion sustained.

DAVID J. ROWELL, in equity, *vs.* WESTON LEWIS and others.

Kennebec. Opinion February 25, 1901.

Conditional Sales. Record. Assignment. Services and Commissions. R. S., c. 111, § 5; Stat. 1895, c. 32.

1. The assignee, under a common law assignment for the benefit of creditors, of "the property of, or belonging to" his assignor is not within the purview of R. S., ch. 111, § 5, as amended by ch. 32 of Public Laws of 1895, requiring the written instrument of a conditional sale to be recorded in the town in which the purchaser resides. He occupies no better position than his assignor did.

2. When, pending litigation to determine the ownership of logs, the parties agree that the party in possession may use them in his business, and that the proceeds shall be held as the logs themselves to await the decision of the court, but made no provision for compensation for the manufacture and sale, the court, even in equity, cannot add such a provision and decree any compensation therefor.

Bill in equity, heard on report. Bill sustained.

The parties submitted the case upon an agreed statement of facts which will be found in the opinion.

S. & L. Titcomb, for plaintiff.

Statute of assignments has been repealed. *Smith* v. *Sullivan*, 71 Maine, 150; *Pleasant Hill Cemetery* v. *Davis*, 76 Maine, 289. Assignees' rights at common law. Counsel cited: Burrill on Assignments, c. 32, p. 538, § 391, and cases; Jones Chat. Mtges. § 241, and cases; 3 Am. & Eng. Encly. 2d. ed. p. 46, and cases; *Newbert* v. *Fletcher*, 84 Maine, 408, and cases; *Sawyer* v. *Long*, 86 Maine, 541. No record required. R. S., c. 111, and Freeman's Supplement, p. 467.

There must have been an acceptance of the assignment by creditors whose debts are equal at least to the assets. *Carr* v. *Dole*, 17 Maine, 358; *Whitney* v. *Kelley*, 67 Maine, 377; *May* v. *Wannemacher*, 111 Mass. 207.

M. S. Holway, for defendants.

The agreement is an attempt to establish a lien by contract after surrender of possession, and should be construed as a mortgage requiring to be recorded. *Oakes* v. *Moore*, 24 Maine, 214. It is not valid, except between the parties, unless recorded. R. S., c. 111, § 5; Stat. 1895, c. 32. No decisions in Maine or Mass. and courts are disposed to limit the general rule that assignees take subject to liens and equities. Jones, Mtges. § 244; *Clark* v. *Flint*, 22 Pick. 231. The claim of Moses, the principal creditor joining in the assignment, was more than the assets.

SITTING: WISWELL, C, J., EMERY, WHITEHOUSE, STROUT, SAVAGE, FOGLER, J J.

EMERY, J. The plaintiff bargained in writing certain logs of his to the Richards Paper Company and in the writing stipulated to deliver the logs, but to retain the title to them until all the notes of the company given for the price were paid in full. He delivered the logs, but did not record in any town the writing containing the above stipulations. After the Richards Paper Company received the logs into its possession, but before the payment of any of its notes given therefor, it made a common law assignment of all its property to the defendants for the benefit of its creditors. The

question raised is, whether the defendants, as such assignees, have acquired the title to these logs without payment for them, notwithstanding the express stipulation in the contract of sale that the title should remain in the plaintiff until full payment was actually made.

The defendants claim that the plaintiff has lost his title as against them by his neglect to record, in the proper registry, the written instrument of sale, as required by chap. 32 of Public Laws of 1895 (amendatory of R. S., Ch. 111, § 5) which enacts that such a stipulation shall be in writing and "shall not be valid, except as between the original parties thereto, unless it is recorded in the office of the clerk of the town in which the purchaser resides at the time of the purchase."

It should be noted, at the outset, that the defendants' only title is by virtue of a common law assignment unaided by any statutes of insolvency or bankruptcy. Their assignment is also unaided by any provisions in the old statute relating to assignments for the benefit of creditors, since that statute was repealed by the subsequent insolvency statutes. The defendants, therefore, cannot invoke any of the titles or powers conferred by statute upon assignees in bankruptcy, or insolvency, or other statutory assignment. This excludes from our consideration in this case all the decisions of this or other courts as to the statutory titles and powers of assignees.

It should be further noted, that the instrument of assignment does not purport to convey or transfer the logs, nor does it purport to convey or transfer any articles in the possession of the assignor. It purports to convey and transfer only "the real estate and personal property of, or belonging to", the assignor, the Richards Paper company. Whatever articles were not the "property of" the assignor, or did not "belong to" it, are not embraced in the assignment even though they were in the assignor's possession. The defendants, therefore, have no title to these logs as purchasers, or as the agents of creditors taking security upon the logs; hence they cannot successfully invoke the protection afforded by the registry statues to purchasers and creditors.

In fine, these defendants, whose only claim is under this assign-

ment, are not within the protection of the statute of 1895 ch. 32 above quoted. They are not new parties as to these logs. They are not purchasers for value. *State v. Patten*, 49 Maine, 383. They merely represent the Richards Paper Company. They are its representatives, or its agents or trustees, rather than its grantees or assignees. They cannot, as such assignees, hold the unmatured negotiable paper of the assignor free from equities, though it was formally indorsed to them before maturity and without notice. *Billings v. Collins*, 44 Maine, 271. As said by Mr. Justice Story in *Winsor v. McLellan*, 2 Story, 492: "The principle has long been established that the assignee in bankruptcy does not stand in the position of a purchaser, nor even in so favorable a position as an individual creditor may stand. The assignee in bankruptcy takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition as the bankrupt himself held it, and subject to all the equities which exist against the same in the hands of the bankrupt." The same views are expressed as to assignees in insolvency in *Hutchinson* v. *Murchie*, 74 Maine, 187, and *Williamson* v. *Nealey*, 81 Maine 447. Certainly, assignees under a naked common law assignment of only property belonging to the debtor do not occupy any better position. They practically become "original parties" by substitution. We do not find that the statutes requiring such contracts as this to be recorded have ever been considered, even in argument, as affording protection to others than purchasers and attaching creditors. Chief Justice PETERS only voiced the general understanding, when he said, in *Field* v. *Gellerson*, 80 Maine, 273: "The statute R. S., 111, § 5, requires such notes [Holmes notes] to be recorded in order to be effectual against attachers and after-purchasers."

We find no case where this precise question has been decided under similar facts. Analogous cases, however, are those of unrecorded mortgages of chattels. These are usually required to be recorded, and the question has arisen whether the assignee under a common law assignment for the benefit of creditors without notice of the mortgage can hold the mortgaged property against the mortgagee. The Rhode Island statute provided that no mortgage of

personal property should be valid against any other persons than the parties thereto, unless recorded, etc. The court held that an unrecorded mortgage was valid against the mortgagor's assignee for the benefit of creditors without notice. *Wilson v. Esten*, 14 R. I. 621. In New Jersey the statute provided that unrecorded mortgages should "be absolutely void as against the creditors of the mortgagors, and as against subsequent purchasers and mortgagees in good faith," unless recorded, etc. The court held that an unrecorded mortgage was valid against the mortgagor's assignee for the benefit of creditors. *Shaw* v. *Glen*, 37 N. J. Eq. 32. It was held in *Van Heusen v. Radcliff*, 17 N. Y. 580, that an assignee for the benefit of creditors could not impeach for want of record a mortgage given by the assignor, though the statute required the mortgage to be recorded as a protection to creditors. The same was held in *Stewart* v. *Platt*, 101 U. S. 731, though the statute expressly declared that the mortgage should "be absolutely void as against the creditors of the mortgagor" unless recorded, etc. The language of the court in that case, on page 739, seems applicable here: "The assignee can assert in behalf of the general creditors no claim to the proceeds of the sale of the (mortgaged) property which the bankrupts themselves could not have asserted in a contest exclusively between them and their mortgagee." The case of *Adams* v. *Lee*, 64 N. H. 421, may also be cited. In that case it was held that an assignee in insolvency could not impeach a lien reserved on personal property sold conditionally, although it was not recorded as required by statute.

The defendants urge that one or more creditors had become parties to this assignment before the plaintiff undertook to resume possession of the logs. We do not see how that circumstance affects the question. Assenting creditors do not become purchasers or attaching creditors. They acquire no more than the assignees acquire.

The necessary conclusion is manifest, that these defendants cannot hold the logs without paying for them, notwithstanding the vendor's omission to record his stipulation for retaining title.

When the plaintiff, after the assignment, undertook to regain

possession of the logs, the assignees desired to use the logs in the continuation of the business of making pulp-paper stock. Whereupon the parties made a written agreement that the assignees should retain possession and consume the logs in the business, and retain the proceeds in their hands, "said money in their hands to be regarded as the logs themselves and to be disposed of by said assignees in accordance with the decision of the court" in this suit. The defendants now urge that, in case the court finds the logs to belong to the plaintiff, it will allow them out of the proceeds of the logs a reasonable sum for caring for the property, or a commission on the proceeds in their hands. This, however, was a matter for contract between the parties. The plaintiff was entitled to the full agreed price for the logs, or to the logs themselves. The defendant desired to retain the logs and appropriate them in their business without first making payment for them, and in order to obtain that concession, agreed "to keep a true and strict account of all the logs so used," and hold the amount as a separate fund, to await the judgment of the court. They also stipulated that the money value of the logs should "be regarded as the logs themselves." They did not stipulate, however, for any compensation or commission to be paid them by the plaintiff, and the court cannot add such a stipulation to their agreement. It must be presumed that the advantage to the business of having these logs to use at once was sufficient consideration for their undertaking. The plaintiff is entitled to payment of the agreed price in full with interest up to the money value of the logs in the hands of the defendants without deduction for services or commissions of the defendants. He cannot, however, under his contract with the defendants recover of them anything more than has come to their hands. Unless the amount of what has come to their hands under the contract can be agreed upon, a master must be appointed to ascertain that amount.

Bill sustained with costs.

FLORINDA COBB, in equity, *vs.* SHUBAEL A. BAKER and others.

Androscoggin. Opinion February 27, 1901.

Equity. Practice. Chan. Rule IV. Deed. Covenant.

1. Bills in equity must be drawn "succinctly and in paragraphs numbered seriatim" as required by the fourth Chancery Rule (82 Me. 595), else they are liable to dismissal with costs for want of due form.
2. In a bill in equity to procure the cancellation of a written instrument, a copy of the instrument should be made a part of the bill. A mere allegation of the legal effect of the instrument if left uncancelled is not sufficient.
3. If the warrantor of a title executes at the request of the warrantee an instrument which may injure the title, the warrantor is not thereby made liable upon his covenant of warranty, and hence cannot maintain a bill in equity to clear the title from such instrument, without allegation and proof that such warrantee has upon request refused to move in the matter.
4. When it is not clear that the plaintiff may not really have some grounds for relief under additional allegations, the dismissal of the bill may be made without prejudice.

Bill for cancellation. Bill dismissed.

The bill was brought against Shubael A. Baker, Benjamin Spaulding, administrator of Aaron S. Cobb and E. Adron Gammon, to annul the cancellation of a mortgage, and was heard on bill, demurrers, answers and proofs. The justice who heard the case, sustained the demurrers, and made the following findings:

Florinda Cobb, the complainant, was the wife of Aaron S. Cobb, late of Buckfield, who died September 29, 1895. In his lifetime, Aaron S. Cobb owned the real estate described in the bill, and which is the subject matter of this controversy. September 23, 1879, Aaron S. Cobb mortgaged said real estate to Alden Bessey to secure the payment of his note for $1500, payable to the said Bessey's order, on demand with interest. $782.00 were paid on said note, October 1, 1879. Bessey sold and delivered said note, and assigned said mortgage to the complainant, September 23, 1884, but the note was not indorsed by said Bessey, the payee. The complainant continued to be the owner of said note and mort-

gage security, and in the actual possession of said premises from the date of said assignment until June 9, 1899. The mortgage was never foreclosed. June 9, 1899, the complainant and the heirs of Aaron S. Cobb conveyed the premises by warranty deed to the defendant Shubael A. Baker, for the consideration of one thousand dollars, which was the fair market value of the land conveyed. On the same day the complainant executed, under seal, a discharge of said mortgage. The warranty deed and the discharge of the mortgage were duly recorded in the Oxford registry of deeds in the month of July, 1899. The complainant alleges and I find that she executed the discharge of the mortgage "at the request of said Baker, and solely for the purpose of clearing the record title of said property."

I further find that the defendant Benjamin Spaulding is the duly appointed administrator of the estate of Aaron S. Cobb, and that the defendant, E. Adron Gammon, at the date of the said conveyance to Baker, and of the discharge of said mortgage, was and still is a creditor of the estate of said Aaron S. Cobb, the indebtedness consisting of an outstanding judgment against said Aaron S. Cobb, in his lifetime, which still remains unpaid. I find that the said Spaulding, unless restrained, intends to petition the probate court for license to sell said real estate as unincumbered, and upon license being granted, to sell the same, to pay any debts of said estate, including the claim of said Gammon.

I further find that the complainant was fully apprised of the existence of the Gammon claim prior to the date of the conveyance to Baker, and the execution of the discharge of the mortgage, but that she denied the validity thereof. I find that said Spaulding, while the mortgage remained an incumbrance, and afterwards, but before he knew the mortgage had been discharged, expressed his opinion to the complainant and her attorneys that the debt of Gammon was not collectible. Spaulding's statements were made upon the supposition that there was due the complainant upon the debt secured by the mortgage more than the fair value of the property mortgaged.

I do not find that the complainant was deceived or misled by

any statements of said Spaulding, as to the existence of the Gammon debt against her husband's estate, but rather, if anything, she miscalulated the effect in law of discharging the mortgage. Accordingly, I find that the execution of the discharge of the mortgage was not induced by fraud; nor by any mistake of fact on the part of the complainant. The evidence satisfies me that she did just what she intended to do, namely, to clear the record title. I am of opinion that this state of facts does not entitle her to equitable relief as prayed for.

It is therefore ordered, adjudged and decreed that the bill of the complainant be dismissed, and that the defendants, Spaulding and Gammon, recover a single bill of costs against the complainant.

The plaintiff took an appeal.

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

The question for the court is, under the evidence, can the administrator sell for the payment of the debt any more than the interest or equity above the mortgage that Aaron S. Cobb owed at the time of his death. The bill requested the court to pass upon and determine this question, and yet the decree is silent thereon and should contain a decision on this point. It is proper to settle once for all this controversy and not to be obliged to begin in the probate court and come up again to this court when all parties are here and matters can be speedily determined. Can the administrator sell any more than the equity of Aaron S. Cobb which he owned at the time of his death to satisfy a debt of the intestate?

The equities of this case are clearly with the complainant. She relied on the statement of the creditor and his friendly administrator that they could not collect the execution, for she owned the estate. *Kingsley* v. *Davis*, 74 Maine, 498.

E. Foster and O. H. Hersey, for defendants.

No fraud or mistake is alleged in the bill. Plaintiff was not misled or deceived. *Butman* v. *Hussey*, 30 Maine, 266; 1 Sto. Eq. § 146. She did not exercise reasonable diligence. *Parlin* v. *Small*, 68 Maine, 291; *Stover* v. *Poole*, 67 Maine, 217, 218. It must appear upon what ground relief is asked. *Abbott* v. *Treat*,

78 Maine, 121, 125, 126; *Andrews* v. *Andrews*, 81 Maine, 337. The mistake must be of both parties. *Young* v. *McGown*, 62 Maine, 56.

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

EMERY, J. Defenses were made to this bill by answer and by demurrer inserted in the answer, as provided by the fourteenth Chancery rule. The justice hearing the cause in the first instance, sustained the demurrer, but, with the consent of the parties, also heard the evidence and made certain findings of facts thereon. His decree was that the bill be dismissed with one bill of costs for two of the defendants. The plaintiff thereupon appealed. The bill as now drawn is demurrable and must be dismissed, for several reasons:

1. It is not "drawn succinctly and in paragraphs, numbered seriatim"— as required by the fourth Chancery rule, 82 Maine, 598. This rule is not to be disregarded. Its observance is necessary to enable the defendant to frame his answer so as to be "concise and direct in statement and to particularly answer each paragraph of the bill" as required by the tenth Chancery rule. Its observance is also essential to that lucid and orderly statement now required in all chancery pleadings.

2. We gather from the somewhat confused statements in the bill that the plaintiff had conveyed her interest, as mortgagee in certain real estate, to the defendant Baker, and then, at his request, executed another instrument which was recorded and which she says operated to discharge the mortgage instead of assigning it, and which thus let in a creditor of the mortgagor ahead of the mortgage. This instrument she prays to have cancelled, in order that the mortgage may appear to have been assigned, and not discharged. What the actual legal operation of the instrument was, is a question of law, to be determined from the language of the instrument itself read in the light of surrounding circumstances,— yet the words of the instrument are not set out in the bill, nor is

any copy of it annexed. Facts are not stated making it apparent that the instrument did operate to discharge the mortgage. The court cannot act upon her belief, or conclusions, as to the law or the legal effect of the instrument. The court must have facts alleged and proved upon which to form its own conclusion of law.

3. The instrument above referred to is alleged to have been executed at the request of the defendant Baker, who had taken a conveyance of her interest as mortgagee by her warranty deed and by a transfer of the mortgage deed and the notes to him. Having parted with all her title and interest in the mortgage, the debt and the land, she does not seem to have much concern with the effect of the instrument. Mr. Baker, the purchaser, seems to be principally and directly concerned with that question. If the instrument he asked to have executed and recorded does discharge the mortgage and let in the creditors of the mortgagor before him, he will be the one to suffer, and if relief can be had in equity he would seem to be the party who should ask and receive it.

It is suggested that if Mr. Baker should be evicted from the land by the creditors of the mortgagor, he could maintain an action against the plaintiff on her covenant of warranty, and that this contingency entitles her to maintain this bill for relief. It must be borne in mind that the instrument in question was executed and recorded at the request and by the procurement of Mr. Baker himself. If this act of Mr. Baker has given birth to a title superior to his, it would not seem to be a breach of the plaintiff's covenant of warranty. He can hardly recover damages of her for the consequence of acts done at his own request and procurement. A covenantee in a convenant of warranty cannot himself create a superior title and then recover compensation therefor from the covenantor. In any event, Mr. Baker should be given the opportunity to bring a bill in his own name, and only in the event of his refusal, alleged and proved, should her bill be considered. Such request and refusal are not alleged.

Though the bill must be dismissed with costs, as decreed by the justice hearing the cause in the first instance, it may be that upon proper allegations and evidence Mr. Baker, and even this plaintiff,

could show cause for the relief prayed for. Out of abundance of caution, therefore, we think the decree should be modified so that the dismissal shall be without prejudice.

Decree below is ordered to be modified, so as to be a decree of dismissal, with one bill of costs for the two defendants named, with costs of this court, but without prejudice.

STATE *vs.* OSCAR ROGERS.

Androscoggin. Opinion February 26, 1901.

Constitutional Law. Police Power. Oleomargarine. Evidence. U. S. Const. Art. 1, cl. 3, § 8; Const. of Maine, Art. 4, cl. 3, § 1. R. S., c. 128, § 3. Stats. 1885, c. 297; 1895, c. 143.

Upon an indictment against the defendant for selling a quantity of "a certain substance made in imitation of yellow butter, and not made exclusively or wholly of cream or milk," *held;* that the statute upon which the indictment was based does not assume to impose an absolute prohibition on the manufacture or sale of "oleomargarine" or "butterine" in its avowed character as such. It does not seek to interfere with any inherent right or privilege the people may have to engage in the manufacture and sale of any wholesome product or compound designed simply to be used as a substitute for butter, provided it is not made in imitation of yellow butter, and the true character of it is openly designated. It prohibits the sale of a simulated article put upon the market in such form and color as to be calculated to deceive the purchaser.

Where the resemblance between the external appearance of yellow butter and the counterfeit product is so close that it is not practicable by any ordinary inspection for the purchaser to distinguish the one from the other, and the only effective means of protecting the public against the deception are to be found in the entire exclusion of such imitations from the market, the enactment of such a prohibitory statute as the one in question for the prevention of fraud and the promotion of a sound public policy, may well be deemed a reasonable exercise by the legislature of the police powers of the state and not in conflict with any provision of our state constitution.

Nor is it repugnant to the interstate commerce clause of the federal constitution. It is within the power of a state to exclude from its markets any compound manufactured in another state which has been artificially colored or adulterated and the sale of which may cheat the general public into purchasing that which they may not intend to buy. The constitution of the United

States does not secure to any one the privilege of defrauding the public. Such a statute does not abridge any privilege secured to citizens of the United States, nor, in any just sense, interfere with the freedom of commerce among the several states. It is legislation which can be most advantageously exercised by the states themselves.

It is not incumbent on the government to show knowledge on the part of the defendant that the compound sold by him is "not made exclusively of milk or cream," or to prove an intention on his part to deceive the purchaser. By the plain and simple terms of the statute the act of selling such an imitation of yellow butter as therein described is made to constitute the offense. It contains no words indicative of a legislative purpose to make such knowledge or intention an essential element of the offense.

On exceptions by defendant. Overruled.

Indictment for selling oleomargarine. The jury returned a verdict of guilty. The defendant moved in arrest of judgment, which being overruled, he took exceptions. The court was requested by the defendant to charge the jury:

(1.) That the statute, under which this indictment was brought, is unconstitutional and void.

(2.) That, if from the evidence in the case, the jury shall find that the respondent did have oleomargarine in his store and did sell to one Bailey a pound of the same, but that it was so like butter made exclusively from milk or cream, that when he purchased it, or when it came into his possession, and when he sold it, it could not even by an experienced eye have been distinguished from butter made exclusively from milk or cream, and he sold the same, never having known that it was in fact a substance not made exclusively from milk or cream, or that it was oleomargarine, not having any intention to violate the statute, the respondent must be discharged.

(3.) That the state must prove an intention on the part of the respondent in this case to deceive the purchaser, by selling him for pure butter made exclusively from milk or cream, that which resembled or imitated pure butter made as aforesaid, but which was in fact oleomargarine.

All of which instructions, so requested, the justice presiding refused to give to the jury, and the defendant excepted.

Geo. E. McCann, county attorney, for State.

It is for the legislature to judge what reasonable laws ought to be enacted to protect the people against this fraud, and to adapt the protection to the nature of the case. It has seen fit to require that every man who sells yellow butter shall take the risk of selling a pure article.

"It is competent for the legislature to regulate the sale of an article, of which the use would be detrimental to the morals of the people." *State* v. *Gurney*, 37 Maine, 156; *Preston* v. *Drew*, 33 Maine, 558.

This class of legislation has rested and been vindicated, partly upon the ground of promoting the health of the community, but more especially on the ground of protecting the public from fraud. In many states, statutes prohibiting the sale of oleomargarine made in imitation of yellow butter have been upheld by the courts. *State* v. *Marshall*, 64 N. H. 549; *Com.* v. *Huntley*, 156 Mass. 236, and cases cited.

Knowledge or criminal intent need not be alleged nor proved. 3 Greenl. Ev. 15th Ed. § 21; *State* v. *Skolfield*, 86 Maine, 149.

E. M. Briggs, for defendant.

If the law should be held unconstitutional as to its prohibition of the sale of imitation butter in the original package that was imported from another State or foreign country, then it is unconstitutional altogether. It cannot be held unconstitutional as to the sale of oleomargarine or imitation butter coming from one place, sold in the original package, and constitutional as to the sale of it after the original package had been broken. If the law had exempted from its prohibition imitation butter that was imported and sold in the original package, it might be so held. The statute as a whole, either is or is not constitutional. It can not be both. *Leisy* v. *Hardin*, 135 U. S. p. 137. Decisions in other states are based on different statutes.

Counsel cited: *People* v. *Max*, 99 N. Y. 377; *Matter of Jacobs*, 98 N. Y. p. 98; *Com.* v. *Huntley*, Knowlton, J., dissenting, 156 Mass. 236.

Considering the fact that Congress has said in unmistakeable terms that oleomargarine is an article of commerce by making it a subject of interval revenue tax; considering the very slight danger of anybody being deceived into buying this substance for something better than what it purports to be, on account of the very strict regulations against deception being placed around it by the government under its revenue regulations; considering that the law is invoked and is being enforced for an object entirely different from what it specifies the same to be by a class of people who color the products of their own cows with the same coloring matter as manufacturers of oleomargarine color their product; considering that oleomargarine chemically speaking is composed of the same fats as butter,—the stronger reasoning is to the effect that the legislature when it passed this law was not justified in doing so, but overstepped its police power and infringed on the constitution of the United States. See: *State* v. *Swett*, 87 Maine, 110; dissenting opinion of Justice Field, in *Powell* v. *Penn.*, 127 U. S. 257; *Watertown* v. *Mayo*, 109 Mass. 315–319; dictum laid down by Chief Justice Fuller in *Wilkerson* v. *Rahrer*, 140 U. S. p. 575; *McGregor v. Cone*, 104 Iowa, 465, Am. St. Rep. 65–522.

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

WHITEHOUSE, J. This was an indictment against the defendant for selling a quantity "of a certain substance made in imitation of yellow butter, and not made exclusively and wholly of cream or milk, and then and there containing fats, oil and grease not produced from milk or cream." The indictment was based on section three, of chapter 128 of the revised statutes, entitled "Offenses against the Public Health, Safety and Policy," as amended by chapter 297 of the Laws of 1885 and chapter 143 of the Laws of 1895.

That part of the statute involved in a decision of this case is as follows: "Whoever by himself or his agent manufactures, sells, exposes for sale or has in his possession with intent to sell, or takes orders for the future delivery of an article, substance or compound

made in imitation of yellow butter or cheese, and not made exclusively or wholly of cream or milk, or containing any fats, oil or grease not produced from milk or cream, whether said article, substance or compound be named oleomargarine, butterine or otherwise named, forfeits for the first offense one hundred dollars, and for the second and each subsequent offense, two hundred dollars, to be recovered by indictment with costs, one-third to go to the complainant and the balance to the state."

The presiding judge instructed the jury, against the defendant's request for contrary rulings, that the statute was constitutional and valid; and that it was not incumbent on the government to show that the defendant had knowledge that the substance sold by him was oleomargarine or a substance "not made exclusively and wholly of milk or cream," or to prove that there was an intention on his part to deceive the purchaser by selling him, for pure butter, a substance which resembled butter but which in fact was not butter.

The jury returned a verdict of guilty and the case comes to this court on the defendant's exceptions to these instructions.

I. The power of the judicial department of the government to prevent the enforcement of a legislative enactment, by declaring it unconstitutional and void, is attended with responsibilities so grave that its exercise is properly confined to statutes that are clearly and conclusively shown to be in conflict with the organic law. It is the duty of one department to presume that another has acted within its legitimate province until the contrary is made to appear by strong and convincing reasons.

Under the constitution of this state "the legislature shall have full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this State not repugnant to this constitution nor to that of the United States." Art. 4, Part 3, § 1.

It is important, in the first place, to observe the precise scope and purpose of the statute, the construction and validity of which are to be considered in this case. It will be noted that it does not

assume to impose an absolute prohibition on the manufacture or sale of "oleomargarine" or "butterine" in its avowed character as such. It does not seek to interfere with any inherent right or privilege the people may have to engage in the manufacture and sale of any wholesome product or compound designed simply to be used as a substitute for butter, provided it is not made in imitation of yellow butter, and the true character of it is openly designated and published. It only prohibits the manufacture and sale of "any substance or compound made in imitation of yellow butter," and not made "wholly of cream or milk." As stated by the court in *People* v. *Arensberg*, 105 N. Y. 130: "It is aimed at a designed and intentional imitation of dairy butter, in manufacturing the new product, and not at a resemblance in qualities inherent in the articles themselves and common to both." The statute prohibits the sale of a simulated article put upon the market in such form and color as to be calculated to deceive the purchaser. The obvious purpose of it was to prevent the fraud and deception practiced in selling for genuine yellow butter any spurious article or compound made in imitation of it. Where the resemblance between the external appearance of yellow butter and the counterfeit article is so close that it is not practicable by any ordinary inspection for the purchaser to distinguish the one from the other, and the only effective means of protecting the public against the deception are to be found in the absolute suppression of the business and the entire exclusion of such imitations from the market, the enactment of such a prohibitory statute as the one in question, for the prevention of fraud, the protection of public morals and the promotion of a sound public policy, may well be deemed a reasonable exercise by the legislature of the police powers of the state, and not in conflict with any provision of our state constitution.

Statutes in Massachusetts and New York of precisely the same scope and purpose as ours have been declared by the courts of last resort of those states not to be in conflict with any provision of their constitutions. *Commonwealth* v. *Huntley*, (and *Plumley's case*), 156 Mass. 236; *People* v. *Arensberg*, 105 N. Y. 123. See also *State* v. *Marshall*, 64 N. H. 549; *State* v. *Addington*, 77 Mo.

110; *State* v. *Newton*, 21 Vroom, 534; *Powell* v. *Pennsylvania*, 127 U. S. 678.

Indeed, the judicial utterances have been so nearly uniform in upholding the validity of all such statutes for the protection of the people against deception, that it is conceded by the counsel for the defendant in the case at bar that, if our statute could be construed to apply only to products manufactured in the state, it should be held a valid police regulation.

But it is contended that, inasmuch as the statute was manifestly intended to prohibit the sale of all such products although imported from other states and sold in the original packages, it must be held inoperative and void as repugnant to that clause of the federal constitution conferring upon congress the power "to regulate commerce with foreign nations and among the several states." (Art. 1, clause 3, § 8). But the relation of the statute to the federal constitution is not necessarily brought in question by the facts of this case, as there is no evidence that the substance sold by the defendant was imported from another state. But inasmuch as the statute would obviously be shorn of the principal part of its operation unless it effectually prohibits the sale of such counterfeit products imported from another state and sold in the original package, as well as those manufactured in this state, and as both counsel have requested that the question should be considered and determined in this case, the court may properly state that in *Plumley* v. *Massachusetts*, 155 U. S., 461, the decision of the Supreme Court of Massachusetts (*Com.* v. *Huntley* and *Plumley's case*, 156 Mass. supra) holding that the statute of that state of the same effect as ours, was not repugnant to the interstate commerce clause of the federal constitution, was distinctly affirmed in an elaborate opinion by the Supreme Court of the United States, six of the justices concurring in the majority opinion and three dissenting. In the majority opinion the court say: "We are of opinion that it is within the power of a state to exclude from its markets any compound manufactured in another state which has been artificially colored or adulterated so as to cause it to look like an article of food in general use, and the sale of which may, by reason of such

coloration or adulteration, cheat the general public into purchasing that which they may not intend to buy. The constitution of the United States does not secure to any one the privilege of defrauding the public. The deception against which the statute of Massachusetts is aimed is an offense against society, and the states are as competent to protect their people against such offenses or wrongs as they are to protect them against crimes or wrongs of more serious character. And this protection may be given without violating any right secured by the national constitution, and without infringing the authority of the general government. A state enactment forbidding the sale of deceitful imitations of articles of food in general use among the people does not abridge any privilege secured to citizens of the United States, nor, in any just sense, interfere with the freedom of commerce among the several states. It is legislation which 'can be most advantageously exercised by the states themselves.'"

II. The presiding justice also correctly instructed the jury that if the defendant "sold a compound in imitation of yellow butter, not made wholly and exclusively of cream or milk or containing any fats, oils or grease not produced from cream or milk, then he is guilty." It was not incumbent on the government to show knowledge on the part of the defendant that the "article, substance or compound" sold by him was "not made exclusively and wholly of milk or cream" or to prove an intention on his part to deceive the purchaser. By the plain and simple terms of the statute the act of selling such an imitation of yellow butter, as therein described, is made to constitute the offense. It contains no words indicative of a legislative purpose to make such knowledge or intention an essential element of the offense. The words "knowingly," "intentionally" or "with intent to deceive" are not found in the enactment.

Under statutes prohibiting the sale of intoxicating liquors it is uniformly held that knowledge on the part of the defendant of the intoxicating quality of the liquor is not an essential ingredient of the offense. In *Com.* v. *Boynton*, 2 Allen, 160, the court say:

"If the defendant purposely sold the liquor, which was in fact intoxicating, he was bound at his peril to ascertain the nature of the article which he sold. Where the act is expressly prohibited, without reference to the intent or purpose, and the party committing it was under no obligation to act in the premises, unless he could do so lawfully, if he violates the law he incurs the penalty." See also *Barnes* v. *State*, 19 Conn. 398; *State* v. *Hughes*, 16 R. I., 403. So as to conviction under statutes prohibiting the sale of adulterated milk or "milk to which water or any foreign substance has been added." The protection of the community against the extensive and skilful frauds practiced in the adulteration of articles of food is a matter of such general importance, and proof of the defendant's knowledge of the adulteration is in a majority of instances a matter of such extreme difficulty, that it is deemed reasonable as well as competent for the legislature to require the seller of such articles to take upon himself the responsibility of knowing that they are not adulterated. *Com.* v. *Farren*, 9 Allen, 489; *State* v. *Smith*, 10 R. I. 258. And "such is the general rule where acts which are not mala in se are made mala prohibita from motives of public policy, and not because of their moral turpitude or the criminal intent with which they are committed." *Com.* v. *Raymond*, 97 Mass., 567. As stated by PETERS, C. J., in *State* v. *Swett*, 87 Maine, 99: "The principle is applied only in minor offenses upon some ground of public policy for the protection of society against abuses which cannot be prevented under any more liberal rule."

In seeking to determine the proper construction to be given to the statute in question in the case at bar, it is necessary to consider the practical result of the interpretation contended for by the defendant. It would be obviously impossible in a great majority of cases to prove the defendant's knowledge that the substance sold by him was not made exclusively of milk or cream, and hence the requirement of such proof on the part of the state would necessarily defeat the effective operation of the statute, and destroy its usefulness. In view of the object manifestly sought to be accomplished and the mischief designed to be remedied by the enact-

ment, it is not reasonable to presume that the legislature intended at the same time to render the act futile and nugatory by making such knowledge on the part of the defendant an essential element of the offense.

Exceptions overruled.

ALONZO P. OAKES, Admr.,

vs.

MAINE CENTRAL RAILROAD COMPANY.

Penobscot. Opinion February 28, 1901.

Death. Damages. Stat. 1891, c. 124.

In an action under statute of 1891, c. 124, to recover damages for the death of a person "caused by the wrongful act, neglect or default" of another, the earning capacity of the deceased, including not only physical ability to labor, but the probabilities of obtaining profitable employment, is an element to be considered in estimating damages.

The deceased had been by trade a milliner. *Held;* that evidence of the wages received by her when last so employed was properly admitted as tending to show an ability and capacity on her part to obtain continuous profitable employment.

Under this statute the damages cannot be punitive; neither can they be given for the physical pain and suffering of the deceased or the grief and sorrow of the beneficiary. The sum given must be the present worth of the future pecuniary benefits of which the beneficiary has been deprived by the wrongful act, neglect or default of the defendant.

On motion and exceptions by defendant. Motion sustained.

Exceptions overruled.

Action to recover damages for death of the plaintiff's intestate under Stat. of 1891, c. 124, for the exclusive benefit of Roland E. Oakes, son of the deceased mother.

The action was defaulted and the case submitted to the jury for the assessment of damages. The jury returned a verdict for the plaintiff for $3500.

W. B. Peirce and Hugo Clark, for plaintiff.

Exceptions: *Hall* v. *Galveston, etc. R. R. Co.*, 39 Fed. Rep. 18; *Dickenson* v. *Fitchburg*, 13 Gray, 546; *Fowler* v. *Co. Com.* 6 Allen, 92; *Kent* v. *Whitney*, 9 Allen, 62, 63; *Wyman* v. *Lexington, etc. R. R. Co.*, 13 Met. 316, 326.

Damages: *McKay* v. *N. E. Dredging Co.*, 93 Maine, 201; *Chicago* v. *Mayor*, 18 Ill. 349; *Houghkirk* v. *Del. & Hud. Can. Co.*, 92 N. Y. 219–225.

C. F. Woodard, for defendant.

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

POWERS, J. Action under the statute of 1891, c. 124, for the exclusive benefit of Roland E. Oakes the child of plaintiff's intestate.

First. Defendant excepts to the admission of the testimony of Mrs. Clark as to the amount of wages which the deceased was receiving when employed as a milliner some eleven years before her death.

The damages in this class of cases can never be the subject of precise mathematical demonstration or calculation. They are based upon the probabilities of the future which can only be shown by the facts of the past. Evidence is received in regard to many matters which in other actions for personal injuries are irrelevant or immaterial. The age, health, occupation, means, habits, capacity, education, temperament, character and other similar facts relating to the deceased, were admissible as tending to show her probable pecuniary usefulness to the beneficiary. The earning capacity of the deceased was an important consideration, and this necessarily included not only her physical ability to labor, but the probabilities of her being able to obtain profitable employment. She was a milliner, and the spring and fall immediately preceding her marriage worked at her trade for Mrs. Clark. After her marriage from time to time she did some millinery work at her own home, but her labor for Mrs. Clark was her last employment

at weekly wages. Shortly before her death she had had an offer of employment in a millinery shop which she declined, as she did not want to leave her child, and it does not appear that at this time the amount of wages was named. She was in good health, and there was some reason to believe that she might survive her husband. In that event there was a probability, more or less strong, that she might seek by her former trade to gain a livelihood for herself and the beneficiary. Evidence of the wages she received the last time she was employed at that trade was properly admitted as tending to show whether such an effort, if made, would be successful; not as a direct basis for computing her earnings, or the value of her life at so much per week; but as showing an ability and capacity on her part to obtain continuous, profitable employment, should she be deprived of the help of her husband and thrown upon her own resources for the support of herself and her child.

Second. The jury returned a verdict for $3500, and the defendant claims that the damages are excessive.

The principles applicable to the assessment of damages in this class of cases have been so fully and recently set forth by this court in *McKay* v. *New England Dredging Co.*, 92 Maine, 454, that it is unnecessary to repeat them here. The beneficiary was a healthy child five years old at the time of his mother's death. His father, thirty-four years old, is living, but in poor health and only able to work a part of the time. The deceased was thirty-five years of age, in good health, a good milliner, a prudent and industrious woman and affectionate mother, possessing a fair education. The expectancy of life of herself and the beneficiary, the probability of her surviving her husband and being the sole support of her child, the length of time that might reasonably be expected to elapse before the boy would be able to help his mother and care for himself, the possibility that in time she in her turn might become dependent upon him for her support, the loss of a mother's training and good influence which would tend to make him a better man and capable of acquiring more money,—all these are proper considerations in determining the amount of the pecuniary injury resulting to the

beneficiary. The damages, however, under this statute cannot be punitive; neither can they be given for the physical pain and suffering of the deceased or the grief and sorrow of the child and husband who survive. Moreover, the sum given must be the present worth of the future pecuniary benefits of which the beneficiary has been deprived by the wrongful act, neglect, or default of the defendant. Without here stating in detail the probabilities, or going into an analysis of the evidence, we are of the opinion that the verdict in this case is clearly excessive. We appreciate the difficulties attending the assessment of damages in this class of cases, and the respect due to the judgment of the jury. Yet there is a limit more than which would be plainly excessive, and beyond which we think reasonable and unprejudiced men would not go.

Exceptions overruled.

New trial granted unless plaintiff will remit all above $2500 within thirty days after filing of the rescript.

ETTA MARCUS *vs.* DAVID ROVINSKY, and another.

Knox. Opinion February 28, 1901.

Pleadings. Joinder of Parties. Husband and Wife. R. S., c. 61, § 4, R. S. 1871, c. 61, § 4; Stat. 1883, c. 207; 1852, c. 291; 1862, c. 148; 1866, c. 52.

By R. S., c. 61, § 4, a husband may be joined as a nominal party defendant with his wife in an action for a tort of the wife in which he took no part and which is alleged to have been committed by her alone.

In such case the property of the wife alone is subject to attachment, levy and sale on execution, and no execution can issue against the husband or his property.

A defect in the form of a writ which is amendable cannot be taken advantage of by a general demurrer.

Exceptions by plaintiff. Sustained.

Action on the case against husband and wife for slander com-

mitted by the wife alone. The husband demurred for misjoinder and the presiding justice sustained the demurrer.

L. R. Campbell and R. I. Thompson, for plaintiff.

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

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

POWERS, J. This is an action against a husband and wife, for slander alleged to have been committed by the wife alone, the husband taking no part in the alleged tort. The writ is dated February 7th, 1900, and the officer is commanded to attach the goods and estate of both defendants. Plaintiff excepts to the ruling at nisi prius sustaining a general demurrer by the husband.

At common law the husband was liable for the torts of his wife in which he took no part, and a suit could not be maintained against her alone therefor. *Atwood* v. *Higgins*, 76 Maine, 423, an action of slander. This so continued in this State until the enactment of c. 207 laws of 1883. That statute amended R. S., 1871, c. 61, § 4, which already relieved him from liability for her debts, by inserting therein "Neither is he (the husband) liable for her (the wife's) torts committed after April 26, 1883, in which he takes no part," and with other verbal changes in the section necessary to make it applicable to torts as well as debts, making the entire section read as now found in R. S., c. 61, § 4. The plaintiff's contention that the husband is still liable for the wife's torts in which he takes no part cannot be sustained against the explicit terms of the statute.

What, then, is the force of the words found in this section of the statute authorizing a suit to be "maintained against her or against her and her husband therefor?" The first enactment embraced in this section is found in the laws of 1852, c. 291, which exempts the husband's person and property from all liability for the wife's antenuptial debts and contracts, but provides that "an action to recover the same may be maintained against husband and wife and the property of said wife held in her own right, if any, shall alone

be subject to attachment, levy and sale on execution to satisfy all liabilities for such debts and contracts in the same manner as if she were unmarried." Thus far the husband's exemption from liability is clear, and equally clear is the plaintiff's right in such a suit to join the husband as a party defendant, although the wife's property could alone be attached or held to respond to the judgment which might be obtained. Before the act of 1852 the husband was liable for his wife's antenuptial debts and must be joined with her in an action to recover them. After the act he was exempted from all liability, his property could not be attached or his person arrested, but he might be joined as a nominal defendant for conformity only, to assist his wife in defending the suit and protecting her rights and property.

This act was embodied in a condensed form in R. S., 1857, c. 61, § 4. Instead of a provision that a suit may be maintained against the husband and wife and her property alone attached and taken to satisfy the judgment obtained, it is provided that it may be maintained against them to obtain payment from her estate. The purport is the same, and a change of legislative purpose is not to be presumed from a mere condensation of a prior statute in a subsequent revision. Next came the act of 1862, c. 148, making valid certain contracts of a married woman engaged in trade or business on her own account, and later the act of 1866, c. 52, which made valid all her contracts for any lawful purpose. The former act in express terms provides that the husband shall not be liable on such contracts unless a party thereto, and both acts state that her contracts were to be enforced in the same manner as if she were sole. These two acts, together with R. S., 1857, c. 61, § 4, were incorporated in R. S., 1871, c. 61, § 4, and while the exemption of the husband from liability was thereby retained unimpaired the right to maintain a suit against the wife alone, or against her and her husband jointly, was extended to all her debts and contracts. When the exemption of the husband was extended by laws of 1883, c. 207, to torts of the wife in which he took no part, the provision permitting his joinder with his wife as a defendant in such cases was retained, and later re-en-

acted in R. S., c. 61, § 4, in its present form. This review of the origin and growth of that section shows that from the time of the first statute, in 1852, exempting the husband from liability for the antenuptial debts of his wife, down to the present time when that exemption has been extended to all actions upon her contracts and to her torts in which he takes no part, it has always been provided that the husband might be joined with his wife as a defendant in such cases, and that provision has been retained and incorporated in each revision of the statutes. It doubtless had its origin in the old common law rules of pleading, but whatever its origin, in the conditions of modern society it is a harmless and useless form, as under our statute no execution in such cases can issue against the husband or his property. Still it exists by statute, and it is for the legislature in its wisdom to repeal or perpetuate it and not for the court to disregard it while it remains.

It has been argued that it applies only to cases of tort committed before April 26, 1883, but that position is not tenable. It existed for more than thirty years before the statute in regard to torts was enacted; it relates not only to torts but to all debts and contracts of the wife, and from 1852 to 1871 was the only form in which an action could be maintained on the wife's antenuptial debt for which the husband was not liable. The word "therefor" in the existing statute plainly refers to all the different causes of action before enumerated in that section. In *Burt* v. *McBain*, 29 Mich. 260, under a statute which exempted the husband's person and property from responsibility for the wife's torts, in cases where he "has been or shall be joined as a defendant with his wife," it was held that while the husband might not be a necessary party defendant, yet that he was not an improper one, and Judge Cooley who delivered the opinion of the court said: "What reason there can be for joining the husband as defendant in a suit where the judgment though rendered against him in form, can neither be satisfied from his property nor subject his person to imprisonment, it is difficult to conceive, for it would seem that he might disregard the proceedings altogether and suffer the case, as far as he is concerned, to go by default, without improving or prejudicing the case of the plaintiff

against the real defendant. . . . . There is a single liability only; the conduct of the wife and the injurious consequences resulting are alone to be considered, and the joinder of this mere nominal party can lead to no mischief. And, perhaps, this consideration may sufficiently account for the legislative recognition of the old rule in the statutes referred to; if no longer important it was nevertheless harmless, and might therefore be safely permitted to stand."

This writ commands the attachment of the husband's goods and estate, but this illegal order might be stricken out as to him, and as to him it would still remain a writ of original summons and might be legally served upon him. It is therefore amendable. *Matthews* v. *Blossom*, 15 Maine, 400. A defect in the form of a writ which is amendable is matter of abatement and cannot be taken advantage of by general demurrer. *Richardson* v. *Rich*, 66 Maine, 249; *Mahan* v. *Sutherland*, 73 Maine, 158.

It is unnecessary to discuss the numerous authorities cited by the defendant to the effect that if several persons be made defendants jointly, where the tort could not in point of law be joint, they may demur. Those citations are based upon cases in which the tort was charged to have been committed by all the defendants and no statute authorized such a joinder. Here the tort is alleged to have been committed by the wife alone and the husband is joined in conformity with the statute.

Exceptions sustained.

INHABITANTS OF MONROE *vs.* INHABITANTS OF HAMPDEN.

Waldo. Opinion March 1, 1901.

Pauper. Evidence. Voting. New Trial.

1. Voting, and taxation acquiesced in and affirmed by the payment of the tax, are acts of much stronger probative force when relied upon to prevent the gaining of a pauper settlement, than when offered to establish one.
2. A pauper had his original derivative settlement in the defendant town which claimed that he had acquired a new settlement by having his home in the town of S. for a period of five successive years at two different times. There was evidence tending to show that during the first period relied upon he left that town and went into another and there voted, was taxed and paid taxes; that during the second period he left the town of S. and went to another town in search of employment which he obtained, without any intention as to returning, that his intention in that respect was unformed and undetermined. On each occasion he took with him all that he possessed, leaving behind him neither property, family, nor visible sign of a home. *Held;* that this evidence, if believed, would justify a finding by the jury that on each occasion there was an abandonment of the pauper's former place of residence in S.
3. Where the evidence is conflicting and uncertain, a new trial will not be granted when to do so would be to substitute the judgment of the court for that of the jury, as to pure questions of fact about which intelligent and conscientious men might have different views.

On motion by defendant. Overruled.

Assumpsit for pauper supplies. Verdict for plaintiff.

The case is stated in the opinion.

W. P. Thompson; R. F. and J. R. Dunton, for plaintiff.

H. W. Mayo and T. W. Vose, for defendant.

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

POWERS, J. Motion to set aside the verdict which was for the plaintiffs. The pauper had his original derivative settlement in the defendant town, but the defendants claimed that he subsequently gained a settlement in his own right in the town of Swanville, by having his home there for five successive years after he

became of age, without directly or indirectly receiving pauper supplies.

In March, 1875, when the pauper became of age, he had his home with his aunt in the town of Swanville, and continued to have his home with her until the following summer, when he finally left her house and went to work at another place in the same town. From this time until his marriage on August 30, 1891, he had no particular house or place in the town of Swanville or elsewhere to which he had a right to resort as a home, except as he was at work. He was a laboring man with no fixed place of abode. He says: "I had no home only wherever I was at work," that whenever he went out of Swanville it was to work, that the purpose for which he came back to Swanville was to work, and that on such occasions he took with him out of and back again into Swanville all that he possessed. He was taxed with a highway or poll tax, or both, and paid taxes and voted, when present, in that town from 1875 to 1892, both inclusive, with the exception of 1876 when he was involuntarily absent in Wiscasset jail, and the years 1882 and 1883.

The defendants rely, first, upon the period from March, 1875, to April, 1881, during all which time they claim he had his home in Swanville. At some time, however, in or near this period, the pauper left Swanville and went to work in plantation No. One, voted there in March, was taxed there in April following and paid the tax. As to precisely when this was, the evidence was meager and conflicting. The pauper testified that he did not know and could not tell when it was, that it might have been eight years before his marriage, which would bring it in 1883, and that he was taxed the same year in Swanville. The case clearly shows that he was not taxed in Swanville in 1883. According to his written statement, introduced by the defendants and testified by him to be correct as far as he knew, it was the year he worked for Albert Dam, and the second year in which he worked for Cunningham Bros. The same statement shows that the year in which he worked for Dam was in 1879, and the pauper's testimony at the trial shows that this was the first year in which he worked for

Cunningham Bros. One other witness testified that he thought it was in 1883. The reason he assigned for thinking so was that it was the same year the pauper worked for Littlefield. He worked for Littlefield in two different years, and the first one was the same summer that he worked for Dam, 1879, within the five successive years relied upon by the defendant.

Upon this branch of the case the burden was upon the defendants. "The party setting up five years continuous residence is bound to prove it. If while attempting to prove it a break in the actual residence is shown, it is for the party to establish such a state of facts as shows that the legal home remained there notwithstanding the absence." KENT, J., in *Ripley* v. *Hebron*, 60 Maine, 379. Taxation and voting, while important, are not conclusive. The assessment and payment of a poll tax is strong evidence that a person has his home in a town on the first day of April. It applies with much less force to the intervening periods and is not inconsistent with a person having changed, and abandoned his home in such town during the time between April first of two successive years. *Westbrook* v. *Bowdoinham*, 7 Maine, 364; *Littlefield* v. *Brooks*, 50 Maine, 475. The inference to be drawn from voting is much stronger as to the three months immediately preceeding than as to the intervening time. It is simply a fact, with the other facts in the case to be weighed by the jury. *East Livermore* v. *Farmington*, 74 Maine, 155.

Voting, and taxation acquiesced in and affirmed by the payment of the tax, are acts of much stronger probative force when relied upon to prevent the gaining of a pauper settlement than when offered to establish one. The former may be effected in a day, if the requisite intention coincides with the absence from home. The latter must stretch through every day of five successive years. They tend much more strongly to establish the presence at the time when the tax is assessed and the intention at the time the vote is cast, than they do at any subsequent time. While it is possible that the court might have reached a different conclusion, it cannot be said that the jury were not justified in finding that the March meeting, at which the pauper voted in No. One, was in 1879. If

so, the act itself carried with it at the time an affirmation on his part that for three months previous he had had an established residence and home in that plantation. He was away from Swanville; he was present in No. One. He had left nothing behind him in Swanville, neither property, family, nor visible sign of a home; he had taken all that he possessed to No. One and had it with him at the time. Under these circumstances the law makes no presumption as to the pauper's intentions one way or the other. *Ripley* v. *Hebron*, supra. What his intentions were in fact was for the jury to determine under all the circumstances and probabilities. *Solon* v. *Embden*, 71 Maine, 418. If the jury found that he voted in No. One in 1879, the court cannot say that it was manifest error for them to draw the inference that, at the time he so voted, he had no continuing purpose of retaining and returning to Swanville as his home.

The second period relied upon by the defendants is from April 1, 1884, to August 1, 1892, during all which time the pauper was taxed and paid taxes in the town of Swanville. In the fall of 1887, however, he went to Bangor to obtain work. In his written statement, put in by the defendants and made substantive evidence by his testimony that it was true as well as he knew, he says: "I went to Bangor late in the fall of 1887 in search of a job. I think I took everything I had with me. When I went to Bangor I did not know whether I would return to Swanville. It depended on what employment I got." From this language, in connection with all the other evidence in the case, especially his statement that whenever he came back to Swanville it was for work, the jury might well find that when in the fall of 1887 he went to Bangor in search of a job, taking with him all his worldly possessions and leaving behind him no visible sign of a home, it was without any intention as to returning, that his purpose was unformed and indeterminate. If so, it was an abandonment of any home he might have had in Swanville, *North Yarmouth* v. *West Gardiner*, 58 Maine, 207, and would prevent the pauper gaining a settlement there during the second period relied upon by the defendants.

The evidence at the trial was conflicting and uncertain. It was

for the jury, after weighing all the evidence, circumstances, and probabilities, to determine the intention of the pauper at the times of his numerous and long continued absences from Swanville. The case has been twice tried and each time has resulted in a verdict for the plaintiffs. To grant the motion would be to substitute the judgment of the court for that of the jury, as to pure questions of fact about which intelligent and conscientious men might have different views. This the court will not do. *Parks* v. *Libby*, 92 Maine, 133.

Motion overruled.

ARA WARREN

vs.

THE BANGOR, ORONO AND OLD TOWN RAILWAY COMPANY.

Penobscot. Opinion March 1, 1901.

Railroads. Street Railway. Negligence.

The plaintiff recovered a verdict for damages resulting from a collision between his team and a car of the defendant company. Upon motion to have the verdict set aside as against evidence, it appeared that it was not in controversy that the plaintiff drove along to the crossing without slackening his speed, and without stopping to look or listen, and without looking or listening for an approaching car.

Held; that while it cannot be declared, as a matter of law, that it is the absolute duty of a traveler to look and listen for an approaching car before crossing the tracks of a street railway, as it is under the settled rule respecting steam railroads, it may still be determined as a matter of fact that, in some situations, the exercise of ordinary care and prudence would require the traveler to look and listen before crossing the tracks of an electric railway.

The plaintiff was driving in a closed carriage on a dark night. He was familiar with the street railway crossing at Broadway and knew of the massive hedges that intercepted his line of vision down Cumberland street. If he had stopped and listened before he reached the point which commanded a view of the approaching car, he could not have failed to hear the hum of the machinery or the rumble of the car. If he had looked, after he reached the line of vision, he must have seen the brilliant headlight and the lighted moni-

tor of the approaching car. In this situation the plaintiff was not relieved by anything in the conduct of the motor-man of the plain duty to use his own senses of sight and hearing when they were so manifestly available to him. He was required to do for his own safety and protection what ordinarily careful persons are accustomed to do under like circumstances.

Held; that his failure to look and listen for the approaching car, before attempting to cross the track, was the result of his own thoughtless inattention and must be regarded as negligence on his part.

Nor does it appear that the consequences of the plaintiff's negligence in this respect could have been avoided by the use of any ordinary care on the part of the motor-man. The plaintiff's own neglect was the proximate cause of the accident.

On motion by defendant. Motion sustained.

Action on the case to recover damages which the plaintiff claims he has sustained in his property on account of a collision between his carriage, in which he was riding, and an electric car of the defendant company at the junction of Broadway and Cumberland streets, in the city of Bangor, caused by the alleged negligence of the defendant company, in the evening of November 21, 1899.

The jury returned a verdict for the plaintiff for $117.00.

M. Laughlin, for plaintiff.

E. C. Ryder, for defendant.

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

WHITEHOUSE, J. The plaintiff recovered a verdict for the damages alleged to have been sustained by reason of injuries to his horse, carriage and harness resulting from a collision between his team and one of the electric cars of the defendant company at the intersection of Broadway and Cumberland streets in Bangor.

The case comes to the law court on the defendant's motion to have the verdict set aside as against the evidence.

The accident happened on the twenty-first day of November, 1899, about twenty minutes before seven o'clock in the evening. The plaintiff was driving into the city down Broadway with his horse harnessed to a "Bangor" top-buggy. The electric car was running up Cumberland street on schedule time on its regular trip

from Bangor to Old Town, leaving West Market square at 6.30. At its intersection with Cumberland street, Broadway is 83 feet wide and Cumberland street 50 feet wide at that point. The defendant's railway is near the centre of Cumberland street and running easterly across Broadway the grade is slightly ascending, but so nearly level that the rise is scarcely perceptible. At the corner of Broadway and Cumberland street, on the west line of Broadway and the north line of Cumberland street, were dense buckthorn hedges six feet in height, which obstructed the plaintiff's view of Cumberland street west of Broadway until within about fifty feet of the place of collision. The plaintiff was a resident of Bangor, was in the habit of driving on Broadway frequently and was familiar with these streets, and the conditions above described. On the evening in question it was dark and foggy and the top of the plaintiff's carriage was up and the sides put on. The electric car was a closed car with vestibules. It was provided with a headlight, and the interior was lighted the entire length in the usual manner. The plaintiff says, in effect, that he failed to see the car until it "suddenly flashed on to" him after the horse was on the track, and that he then applied the whip in the hope of getting across the rails and avoiding a collision; but when the car was about the centre of Broadway, it struck the carriage on the fore-wheel, throwing the horse to the right and the carriage to the left of the track.

The motor-man in charge of the car testifies that he was not aware of the approach of the team until it was within twelve or fifteen feet of the place of collision, and that he then applied the brake and used every exertion to stop the car in season to prevent a collision but was unable to do so.

The plaintiff thereupon contends, as the principal ground of defendant's liability, that the motor-man was guilty of negligence in not exercising greater vigilance to discover an approaching team and in not employing more effective measures to stop the car in season to avoid the accident; and he introduces evidence tending to show that immediately before the collision the motor-man was engaged in frivolous conversation with a passenger, and that others

on the car saw the team before the motor-man discovered it. The defendant insists that no failure of duty on the part of the motor-man in these respects is shown by the evidence, and contends that on the other hand the conclusion is irresistible that the negligence of the plaintiff was the proximate cause of the accident.

The testimony is conflicting in regard to the rate of speed at which the plaintiff was driving. He testifies that he was "jogging along at the rate of four or five miles an hour," while the defendant's witnesses say the horse was coming so rapidly that they thought it was a runaway team. But it was not in controversy that he drove along to the crossing without slackening his speed, whatever it was, and without stopping to look or to listen, and without looking or listening for an approaching car.

True, the established rule respecting steam railroads, that it is negligence per se for a person to cross the track without first looking and listening for a coming train, is not deemed wholly applicable when crossing the tracks of a street railway company in a public street where the cars do not enjoy the exclusive right of way. In other words, it cannot be declared as a matter of law that it is the absolute duty of a traveler to look and listen for an approaching car before crossing the tracks of a street railway. *Kelly* v. *Wakefield and S. St. Railway Co.*, 175 Mass. 331, (S. C. N. East. Rep. 285); *Robbins* v. *Springfield Street Railway*, 165 Mass. 30; *Hall* v. *West End St. Railway Co.*, 168 Mass. 461. But the reasons for the rule applied to steam railways may, under some circumstances, be applicable to the crossing of a street railway. It may be determined, as a matter of fact, that the exercise of ordinary care and prudence would require a traveler in some situations to look and listen before crossing the tracks of a street railway. In the recent decision of *Kelly* v. *Wakefield & S. St. Ry. Co.*, supra, a case presenting striking analogies to the case at bar, it was found by the law court as a matter of fact that the plaintiff, who was approaching a street railroad track obscured by a dense growth of trees for a portion of the distance to the place of crossing, was guilty of contributory negligence in failing to look and listen for cars on reaching the crossing, although he had previously looked from a

point commanding a view of the further end of the growth of trees.

In the case at bar the plaintiff was driving in a closed carriage on a dark night. He was familiar with the street railway crossing at Broadway; he "knew of the car and the track." He must have known that according to the schedule a car would leave West Market Square at 6.30 P. M. on a regular trip to Old Town; and he must have known approximately the rate of speed at which it was usually run over Cumberland street, and about what time it would be likely to cross Broadway. He knew of the massive hedges that intercepted his line of vision down Cumberland street until he arrived "within a few feet" of the northerly line of that street. If he had stopped and listened before he reached the point which commanded a view of the approaching car, he could not have failed to hear the hum of the machinery or the rumble of the car. If he had stopped to look and listen after he reached the line of vision, or had looked without stopping, he must have seen the brilliant headlight and the lighted monitor of the approaching car. His own carriage was not provided with lights, and his team was not likely to be seen or heard by the motor-man until its approach near the track. In this situation the plaintiff was not relieved by anything, in the conduct of the motor-man, of the plain duty to use his own senses of sight and hearing when they were so manifestly available to him. He was required to do for his own safety and protection what ordinarily careful persons are accustomed to do under like circumstances. The exercise of ordinary care and prudence required him to look and listen for the approaching car before attempting to cross the track. His failure to do so was the result of his own thoughtless inattention, and must be regarded as negligence on his part.

Nor does it appear from the evidence that the consequences of the plaintiff's negligence, in this respect, could have been avoided by the use of any ordinary care on the part of the motor-man. The fact that the team may have been discovered by a passenger a second before it was seen by the motor-man by no means proves a failure of duty on the part of the latter. He had just received a signal-bell to stop for a passenger to alight at Broadway and for

the moment was mindful of that duty; and it does not appear from the evidence that his previous conversation with a passenger interfered with his duty respecting the plaintiff. It is shown by a preponderance of the evidence that the gong was sounded in the usual manner when the car reached the Broadway crossing.

The plaintiff's own negligence must, therefore, be deemed the proximate cause of the accident.

Motion sustained.

IDA L. BURGESS *vs.* REUEL ROBINSON.

Waldo. Opinion March 1, 1901.

Taxes. Assessment. Description. Fraudulent Conveyance. R. S., c. 6, §§ 193, 197; Stat. 1844, c. 123; 1895, c. 70.

In a real action to recover possession of real estate by virtue of a tax title, *held;* that in the assessment which establishes the lien on land and forms the basis of all subsequent proceedings, there must be a definite and distinct description of the land upon which the tax is intended to be assessed. This requirement is not obviated, nor the rule modified by the amendatory act of 1895, chap. 70, relating to sales of land for non-payment of taxes.

In the collector's return to the town clerk "with a particular statement of his doings," under the caption "description of property," are found only the words "On Brown road." No attempt whatever is here made to give any description or designation of the land sold. Such an entire omission to describe the land in this return must be deemed fatal to the validity of the sale and of the title which the collector seeks to pass by his deed to the town.

The husband, a judgment debtor, whose land has been sold on execution to his creditor, cannot make a valid title to his wife under a tax deed from the town where he pays for the same with his own money. Such deed must be treated in law as if made to the husband; and if made to him, it would have the effect as against the judgment creditor, to extinguish the tax title in the same manner that a release from the town before the expiration of the two years would have done.

On report. Judgment for defendant.

Writ of entry brought to recover possession of certain real estate situate in Searsmont, Waldo county. Plea, the general issue. The plaintiff claimed title under a tax deed; the defendant claimed

title under a sheriff's deed, dated November 5, 1896, and under which he took possession. The tax was assessed in April, 1895. The tax sale was on December 8, 1896.

R. F. and J. R. Dunton, for plaintiff.

Statutes in force at time of tax sale: R. S., c. 6; § 193 as amended by Stat. 1895, c. 70, § 1; § 194 as amended by Stat. 1895, c. 70, § 3; § 195, as amended by Stat. 1895, c. 70, § 4; § 196, as amended by Stat. 1895, c. 70, § 5; § 197, as amended by Stat. 1895, c. 70, § 7. Stat. of 1895 applies to all taxes assessed on or after April 1, 1895. Stat. 1897, c. 268, amending R. S., c. 6, § 205, being remedial applies to this case. *Berry* v. *Clary*, 77 Maine, 482.

If this statute applies, when the plaintiff had shown the election and qualification of the collector, and introduced the tax deed from the collector to the town of Searsmont, and the deed from the town of Searsmont to her, with the vote of the town, authorizing the selectmen to make the conveyance, she had made out a prima facie case, and was entitled to judgment, unless the defendant introduced evidence to show that the sale was invalid and ineffectual to convey the title. This he did not do. The collector's deed is duly executed and recorded. It contains a sufficient description of the real estate to identify it beyond any question. It shows a strict compliance with the statute in making the sale, and meets the requirements of all the decisions of our court.

The Stat. of 1895 fixed the time and place, when and where, all sales are to be made. It requires the collector to give notice of the sale and make return to the town,—which was all done,—but it also provides that "no irregularity, informality or omission in giving the notices required by this act, or in lodging copy of any of the same with the town clerk, as herein required, shall render such sale invalid, but such sale shall be deemed to be legal and valid, if made at the time and place herein provided, and in all other respects according to law, except as to the matter of notice."

It is clear that the intent of the legislature in making these amendments was to render more effective sales of real estate for non-payment of taxes. The court should so construe the proceed-

ings of town officers in assessing taxes and making sales as to give effect to the purpose and intent of the legislature clearly expressed in these amendments.

Reuel Robinson, for defendant.

Counsel argued that the tax is invalid.

(1.) Because the description of the property upon the assessment list is insufficient. (2.) Because the return of the collector to the town clerk and his certificate to the town treasurer contain no description of the property sold. (3.) Because the return of the collector to the town clerk and his certificate to the town treasurer state that the whole was sold, but do not show, neither does it appear anywhere in evidence, that it was necessary to sell the whole, nor that the collector exposed for sale and sought offers for a fractional part of the premises sufficient to pay the tax and legal charges and could obtain no bid therefor; recitals to that effect in the tax deed not being evidence. (4.) Because the return to the town clerk and the certificate to the town treasurer do not state how or to whom the collector gave the ten days notice to resident owners, while the return upon the back of the general notice shows that no such ten days notice was given. (5.) Because there is no evidence that the municipal officers employed any one to attend the sale and bid therefor a sum sufficient to pay the amount of tax due and charges, in behalf of the town or, if such a person was employed, that the premises were so bid in by the person employed. (6.) Because the collector's deed shows that the collector gave notice that the sale would take place in the wrong year, to wit, the year 189. (7.) Because there is no sufficient description of the premises in the collector's deed to the town. (8.) Because the collector's deed runs to the "Town of Searsmont" instead of to the "Inhabitants of Searsmont", while the quitclaim deed to plaintiff is given by the "Inhabitants of the Town of Searsmont". (9.) Because the premises were bought by Joseph S. Burgess against whom the tax was assessed, although the deed was made to his wife, the plaintiff. (10.) Because a wife may not acquire a title as against her husband to his separate estate by purchasing at a tax sale.

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

WHITEHOUSE, J. This is a writ of entry to recover possession of certain real estate situated in Searsmont, in the county of Waldo, bounded as therein described, and alleged to contain one hundred and eighty-seven acres, more or less.

The plaintiff derives her title to the land by a deed from the inhabitants of the town of Searsmont to whom the land was sold by its collector of taxes December 8, 1896, for non-payment of the tax assessed thereon for the year 1895, as the property of Joseph S. Burgess, the plaintiff's husband. The defendant derives title under a sheriff's deed dated November 5, 1896, given in pursuance of a sale thereof on an execution against Joseph S. Burgess, which passed to the defendant all the interest Burgess had at the date of the attachment on the original writ, June 8, 1895.

It is contended in behalf of the defendant that the plaintiff's attempt to set up a tax title cannot prevail, first, because the requirements of the statutes were not observed by the town officers either in assessing the tax, or in conducting the sale of the land for non-payment of the tax; and second, because he says that if the town did acquire a valid title under its tax deed, the plaintiff acquired no title under her deed from the town, for the reason that the purchase was in fact made by the husband and the consideration furnished by him, and the deed taken in the name of the wife, this plaintiff, for the manifest purpose of defeating the rights of the attaching creditor.

In support of the plaintiff's tax title it is suggested that the amendatory act of 1895, chap. 70, relating to sales of land for non-payment of taxes, (made applicable by chap. 137 to taxes assessed that year) affords relief from a rigid compliance with some of the requirements of the statues to which many of the adjudications of of this court have hitherto related; and it is contended that the proceedings in this case show a strict adherence to the mode prescribed by the statues as amended by the act of 1895.

But a careful examination of the provisions of that act fails to

disclose any attempt or purpose to modify the rule established in *Greene* v. *Lunt*, 58 Maine, 518, and re-affirmed in all the subsequent decisions down to *Green* v. *Alden*, 92 Maine, 177, that in the assessment which establishes the lien on land and forms the basis of all subsequent proceedings, there must be a definite and distinct description of the land upon which the tax is intended to be assessed. Indeed, it may fairly be said that a contrary intention affirmatively appears, for in R. S., c. 6, § 193, as amended by the act of 1895 above cited, is still found the provision authorizing the collector to post notices of the sale, "designating the name of the owner, if known, the right, lot and range, the number of acres as nearly as may be, the amount of tax due, and such other short description as is necessary to render its identification certain and plain."

This identical language is found in the original act of 1844 (ch. 123) and has been retained in all subsequent revisions. It is also cited by the court in *Greene* v. *Lunt*, 58 Maine, supra, in confirmation of the view there taken respecting the necessity for a definite description of the land in the assessment list; for the list of assessments commited to him is the source from which the collector must obtain the information to enable him to give such "short description as necessary to render its identification certain and plain" in the notices of sale to be posted by him, and in the returns which he is required to make to the town clerk and treasurer.

It further appears that sect. 197 of the same chapter, though amended by the act of 1895, still declares that within thirty days after making such sale the collector "shall make a return, with a particular statement of his doings in making such sales, to the clerk of his town, who shall record it in the town records; and said return . . . . shall be evidence of the facts therein set forth in all cases where such collector is not personally interested." The amendment then provides that this return shall be in substance like the form there prescribed; and by this form he is required to "set forth each parcel of the estate so offered for sale" in the schedule outlined, under the caption "description of property." Nor is there any provision in the act of 1895 to relieve

the collector from the duty of making this return to the clerk in accordance with the strict requirements of the statute. True, the amendment to sect. 193 provides that "no irregularity, informality or omission in giving the notices required by this act, or in lodging copy of any of the same with the town clerk as herein required, shall render such sale invalid," but this obviously has no reference to the formal return of his doings which the collector is required by section 197 to make to the town clerk within thirty days after the sale.

The defendant accordingly insists, in the first place, that the assessors' description of the land in their inventory or assessment list, is imperfect, indefinite and insufficient to meet the requirements of the law. The same description is given in the plaintiff's writ as follows: "On Brown road, bounded N. W. by O. E. Robbins & als, N. E. by Brown road, S. E. by Appleton Ridge road and E. Luce and S. W. by S. R. Bennett. 2 Hs. 2 Bs. No. of acres 187."

But the real estate owned by Joseph S. Burgess in the town of Searsmont in 1895 consisted of at least four definite parcels in the locality indicated, and the boundaries named by the assessors do not appear from the evidence to be an accurate description, either of all the land in solido, or of any particular parcel of it. The number of acres is stated to be 187, while the land owned by Burgess consisted of 162 acres. The Brown road, as a northeast boundary is applicable only to that part of the property known as the "Morton Bennett farm," for taken as a whole it is also bounded on the northeast by land of O. E. Robbins. That portion of the land known as "the 22 acre meadow lot" is bounded on the southeast by the "S. R. Bennett farm" and not by "Appleton Ridge road and E. Luce." A portion of the land on the southwest is bounded by land of H. Whitney and not by land of S. R. Bennett. Again, a small lot carved out of one of the parcels known as the "Elijah Luce farm" was in the spring of 1895 owned by John Keene. The figures and letters "2 Hs. 2 Bs." are mystic abbreviations which lend no practical significance or force to the other terms employed. There is no mention of the number

of any of the lots, and the land is not even designated as the Burgess farm. In view of these facts it is extremely doubtful if the person named as the owner of the land, relying upon this description alone, could determine whether it was his property or his neighbor's that was taxed, or if a purchaser could obtain from it sufficient information in regard to the extent of the land to enable him to make an intelligent offer for it.

But, if it be assumed that such a description in the assessment would be a reasonably sufficient foundation for a valid sale of the land for non-payment of the tax, the collector, in making his return to the town clerk "with a particular statement of his doings" as required by § 197, has utterly failed to make use of this description found in the assessment list committed to him; for in the form prescribed by the amendment of 1895 for the schedule in this return, under the caption "description of the property" we find only the words "on Brown road." No attempt whatever is here made to give any description or designation of the land sold. Not even the number of acres is stated. Such an indefinite reference to the land sold is manifestly insufficient to "render its identification certain and plain," and it utterly fails to accomplish the purpose for which such a return to the town clerk is required. By the act of 1844 ch. 123, this return was made legal evidence of the facts therein set forth, while it is settled law that the recitals in a collector's deed are not evidence of the facts recited. *Libby* v. *Mayberry*, 80 Maine, 137; *Ladd* v. *Dickey*, 84 Maine, 190. This return recorded in the town records, is the legal source from which the owner must ascertain what portion of his land, if any, has been sold for taxes, and without a proper description of it he is unable to learn what he is required to redeem.

Such an imperfect description of the land, or rather such an entire omission to describe the land, in this return must be deemed fatal to the validity of the sale and of the title which the collector sought to pass by his deed to the town. *Andrews* v. *Senter*, 32 Maine, 394; *Ladd* v. *Dickey*, 84 Maine, 190.

This conclusion respecting the validity of the deed to the town renders it unnecessary to consider the validity of the title acquired

by this plaintiff by her deed from the town. It is a satisfaction to remark, however, that if the collector's sale to the town had been a valid one, this plaintiff could not be allowed to profit by it under the circumstances of this case, in the manner proposed.

In the spring of 1895 the land stood in the name of Joseph S. Burgess, this plaintiff's husband, and was taxed to him. In June of the same year the attachment was made upon it in the suit which went to judgment and execution and resulted in the sheriff's sale to the defendant November 25, 1896. It was the duty of Joseph S. Burgess to whom the land was taxed, and who owned it subject to the lien of the attaching creditor, to pay the tax assessed upon it for that year. But he suffered the property to be sold for taxes December 8, 1896, and after the expiration of the two years allowed by statute for redemption, he was permitted by the town to purchase the land by paying the amount of the tax and costs and to take a deed of it in the name of his wife. The conclusion from the testimony is irresistible that this was all done in pursuance of a purpose to defeat the rights of the attaching creditor and of this defendant who was the purchaser at the sheriff's sale; and that this plaintiff was cognizant of that purpose and participated in it. But the law will not permit it to prevail. Under such circumstances the purchase from the town will be regarded as made for the benefit of the estate, and not in fraud of the rights of the defendant. The deed from the town is inoperative to give the plaintiff a valid title as against the defendant. It must be treated in law as if made to the husband Joseph S. Burgess; and if it had been made to him it would have had the effect, as against this defendant, to extinguish the tax title in the same manner that a release from the town before the expiration of the two years would have done. *Varney* v. *Stevens*, 22 Maine, 331; *Dunn* v. *Snell*, 74 Maine, 22, and cases cited. The entry must be,

Judgment for defendant.

ALICE E. FLEMING, Executrix,

vs.

WILLIAM COURTENAY, Admr.

Lincoln. Opinion March 1, 1901.

Pleading. Abatement. Amendment. Assignment. Foreign Admr. R. S., c. 82, §§ 10, 23.

When "errors and defects" are by law amendable, the process shall not be abated, and the case will be remanded to the trial court where the plaintiff may have an appropriate amendment allowed by the presiding judge, if deemed by him to be in the furtherance of justice.

Held; that the first and second counts in the writ must be deemed a declaration by the plaintiff in her alleged capacity as executrix. The other three counts appear to be a declaration by the plaintiff in her individual capacity, and if either of them contained an averment of the assignment of the cause of action to her, it would be a sufficient declaration; and inasmuch as a copy of this assignment is annexed to the writ, the declaration was amendable by striking out the first two counts, and inserting in each or either of the remaining counts an appropriate averment of the assignment, so as to become a declaration in the plaintiff's own right.

But since the plaintiff is not executrix and cannot recover on the first two counts, and the remainder of the declaration, without amendment, must be held a nullity, the plea in abatement was properly sustained, as the declaration now stands.

Exceptions by plaintiff. Overruled.

Action of debt. The defendant filed a plea in abatement on the second day of the first term, to which the plaintiff demurred. The court overruled the demurrer and ordered the writ abated; the plaintiff moved to amend, but this motion was denied by the court for the reason that the declaration was not amendable at this stage of the proceedings. The plaintiff took exceptions to both rulings.

The case appears in the opinion.

O. D. Castner, E. Foster, with him, for plaintiff.

J. E. Moore and G. B. Sawyer, for defendant.

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

WHITEHOUSE, J. This is an action of debt on a written agreement under seal between James A. Maynard, late of Somerville, Massachusetts, and George W. Lawrence, late of Damariscotta, Maine, growing out of the construction of the monitor "Wassuc" in 1863. The plaintiff is described in the writ as "sole executrix of the last will and testament of James A. Maynard," and the defendant as "administrator de bonis non of the goods and estate of George W. Lawrence." The defendant seasonably filed a plea in abatement to the writ and declaration, alleging that the plaintiff was not at the date of the writ and never had been executrix of the last will and testament of James A. Maynard "in and for the state of Maine." To this plea the plaintiff demurred, but the presiding judge overruled the demurrer, sustained the plea and ordered the writ to be abated. The case comes to the law court on exceptions to this ruling.

It appears that prior to the commencement of this action the plaintiff, Alice E. Fleming, of Boston, received from the assignee in bankruptcy of James A. Maynard, a written assignment of all of the assets belonging to Maynard's estate. This fact is duly set forth in the second count of the declaration in her writ, and a copy of the assignment annexed to the writ and filed in court. It is accordingly contended, in behalf of the plaintiff, that while the first count must be conceded to be a declaration by the plaintiff in her representative capacity as executrix of James A. Maynard, the second count might reasonably be construed as a declaration on a personal claim in her individual capacity; and that although the plaintiff may thus appear to have sued in a two-fold capacity in separate counts, and the declaration be amenable to the objection of a misjoinder which might be taken advantage of by demurrer, it is insisted that the defendant's plea in abatement must be adjudged bad, because he has pleaded to the whole writ and declaration, and not simply to the defective part.

And such is undoubtedly the common law rule of pleading.

In the early case of *Herries* v. *Jamieson*, 5 Durn. & East, (Term Rep.) 533, the declaration in an action of debt contained two counts, one for the principal of money borrowed and the other for the interest of another sum. The defendant filed a plea in abatement to the whole writ and declaration, and the plaintiff demurred to the plea on the ground that it affected to answer the whole declaration, and yet answered only the first count. Lord Kenyon said: "I think the plea is bad because it goes to the whole declaration, when in truth it gives no answer to the second count." So in 1 Chitty's Plead. (16 Ed.) 475, it is said: "A writ is divisible and may be abated in part and remain good as to the residue. . . . . When the matter goes only to defeat a part of the plaintiff's cause of action, the plea in abatement should be confined to that part, and if the defendant were to plead to the whole, his plea would be defective."

The defendant insists, however, that this rule has no application to the case at bar, because he says the plaintiff has declared in her capacity as executrix in all of the counts in her writ. It is the opinion of the court that this contention of the defendant must be sustained as to the first and second counts, and that the remaining counts are fatally defective unless amended; for in the first and second counts it is represented that the contract was made with the "plaintiff's testator," and that the amount claimed is due to the plaintiff "as executrix," or that "an action hath accrued to the plaintiff as executrix aforesaid." The second count, as well as the first, must therefore be deemed a declaration by the plaintiff in her representative capacity, and the averment in that count of an assignment to her of all of the assets of the testator be regarded as surplusage.

But in each of the remaining counts it is declared that the defendant is indebted to the "plaintiff," and that "an action hath accrued to the plaintiff," and in the writ the plaintiff is represented to be "Alice E. Fleming of Boston. . . . . sole surviving executrix," etc. The specification shows the cause of action to be the same in all the counts. In neither of these last counts is any allusion made to a contract with the plaintiff's testator or to

the right of the plaintiff to recover "as executrix," but the defendant is represented as indebted "to the plaintiff." In this respect the situation is precisely analogous to that in *Bragdon* v. *Harmon*, 69 Maine, 29, where it was held that the words "executor," etc., were only descriptio personae, and that an amendment striking them out did not change the legal status of the parties. "True," say the court in that case, "the plaintiff described himself in his writ as an executor, but the cause of action is described as one accruing to him in his own right. He does not aver that the promise on which the action is brought was made to the testator; nor that it was made to him as executor. . . . . To constitute a suit in his representative capacity, the plaintiff must not only describe himself as an executor, but he must aver that the promise was made to the testator in his life time, or that it was made to the plaintiff as executor."

If, therefore, either of these last named counts contained an averment of the assignment of the cause of action to the plaintiff, it would become a sufficient declaration by the plaintiff in her individual capacity; and inasmuch as a copy of this assignment to the plaintiff is annexed to the writ, it seems clear, upon the authority of *Bragdon* v. *Harmon*, supra, that the declaration was amendable by striking out the first two counts and inserting in each, or either of the remaining counts, an averment of the assignment to the plaintiff above mentioned, so as to become a good declaration in the plaintiff's own right.

But since the plaintiff is not executrix and cannot recover on the first two counts, and the remainder of the declaration without amendment, must be deemed a nullity, the plea in abatement was properly sustained, as the declaration now stands. But as no motion to amend was made by the plaintiff "before exceptions filed and allowed," it is further insisted by the defendant that no amendment can now be made, and that the writ must abate. We are unable to concur in this view. Section 10 of chap. 82 R. S., thus declares: "No process or proceeding in courts of justice shall be abated, arrested, or reversed for want of form only, or for circumstantial errors or mistakes which by law are amendable, when the

person and case can be rightly understood. Such errors and defects may be amended, on motion of either party, on such terms as the court orders." The provision in sect. 23 ch. 82, that the single justice "before exceptions are filed and allowed" has the same power as the full court to allow the plaintiff to amend, etc., is a distinct recognition of the power of the full court over amendments, and in no respect in derogation of its authority. It expressly affirms the inherent common law power of the trial court to grant amendments, and very properly declares that the power must be exercised by the single justice "before exceptions are filed and allowed." There would be a manifest incongruity in authorizing a single justice to allow amendments and impose terms therefor after exceptions are filed and allowed and before they are overruled. There would be no justice or propriety in requiring a party to pay costs for the privilege of amending before it has been determined by the full court that any amendment is necessary. *Hare* v. *Dean*, 90 Maine, 308. Hence there is no imperative reason for compelling a party to file a motion asking for an amendment before filing exceptions when the necessity for it has not been authoritatively declared. Indeed, express provision is made in a subsequent clause of the same section (sect. 23 ch. 82) for the filing of amendments after a decision by the full court upon the demurrer, and no statute exists and no rule or decision of the court can be found requiring a party to file his motion to amend before taking exceptions to the overruling of a demurrer to a plea in abatement, or depriving the court of the power to allow amendments in such a case upon a motion made after exceptions "are filed and allowed," and after the decision of the full court has been certified to the trial court. On the contrary, amendments under such circumstances have often been authorized by the full court and allowed by the justice of the trial court, when deemed to be in furtherance of that justice which seeks to give every man his due and an opportunity to prove it.

In *Augusta* v. *Moulton*, 75 Maine, 551, a re-pleader was awarded after a decision by the full court on a demurrer, the court saying in the opinion: "It cannot be doubted that ample power is left in R. S., ch. 82, § 19 (now 23) to this court, and to a judge at nisi

prius after ruling on a demurrer and before exceptions allowed, to permit the party found in fault to re-plead or amend upon payment of costs, when there is reason to believe that the former pleadings did not properly present the party's case. . . . . The defendant has liberty to re-plead upon payment of costs since the filing of the demurrer, and upon filing his new pleadings within the time required by the statute and rules of court." This case was re-affirmed on precisely the same state of the pleadings in *Field* v. *Cappers*, 81 Maine, 36.

In *Goodhue* v. *Luce*, 82 Maine, 222, as in the case at bar, the question was upon a demurrer to a plea in abatement. The demurrer was overruled by the full court, the plea adjudged good and the declaration bad. At the conclusion of the opinion the court said: "Whether the furtherance of justice will require that the plaintiff, upon proper motion, shall be allowed to amend his declaration, must be determined by the court at nisi prius." See also *Maine Central Institute* v. *Haskell*, 71 Maine, 459. In each of these cases the motion to amend or for leave to plead over, was made after the decision of the law court had been certified to the trial court, although in two of these cases the plaintiff's counsel appear to have claimed in argument before the law court, as in the case at bar, that the alleged "errors and defects" were by law amendable, and invoked the exercise of the discretionary power of that court, if necessary, to remand the case for amendment by the trial court if deemed to be in the furtherance of justice. So in *Rand* v. *Webber*, 67 Maine, 191, the language of the court is: "The plaintiff may at nisi prius have leave to have the writ amended and the pleadings reformed, conformably to an action of tort, by paying costs and receiving none up to the date of the amendment."

In several other cases the statute in question has been expressly recognized as applicable when the question arises on a demurrer to a plea in abatement.

In *Furbish* v. *Robertson*, 67 Maine, 35, the case went to the law court on exceptions to the ruling of the presiding justice sustaining a demurrer to a plea in abatement. There the defendant was met

by the provisions of sect. 52, ch. 77, R. S., that "when a dilatory plea is overruled and exceptions taken, the court shall proceed and close the trial, and the action shall then be continued and marked 'law.'" As, upon such a ruling and, under such a statute, the defendant in that case could not rightfully enter his action in the law court until it was in a condition to be finally disposed of, if his exceptions should be overruled, and as he had not obtained leave to plead double at the beginning, or claimed the right to answer further before taking exceptions, his right to answer further was properly regarded as waived. It is important to observe, however, that in this case the court say in the opinion: "The decision being based on a demurrer, the judgment cannot be entered until the next term after the decision is certified;" citing R. S., ch. 82, sect. 19 (now 23). If one clause in this sentence of the section is held applicable in case of a demurrer to a plea in abatement, the other clause of the same sentence providing for amendment to the declaration after the decision of the full court, must be equally applicable when the demurrer is overruled. In such a case, the declaration being adjudged defective, the court cannot in justice "proceed to close the trial" before the case is marked "law," and the question is rightfully carried to the law court to have the correctness of the nisi prius ruling and the sufficiency of the declaration formally determined before any amendment is offered. *Hare* v. *Dean*, 90 Maine, supra. See also *State* v. *Peck*, 60 Maine, 498, in which the reasoning of the court is to the same effect as in *Furbish* v. *Robertson*, supra, and the statute in question (ch. 82 sect. 23) quoted for the same purpose. But here the defendant lost his right to plead anew by failing to pay the costs and to file his pleadings on the second day of the term, as required by the statute.

In the case at bar the docket entries are: "Demurrer overruled; plea sustained; action abated." The entry "action abated" is simply a statement of the legal effect of overruling the demurrer and sustaining the plea in abatement. It is an appropriate entry to inform the clerk of the legal status of the case in the event that no exceptions are taken, or the exceptions taken are overruled and

no amendment allowed. But section 10 of chap. 82, the statute first cited, declares that "no process . . . . shall be abated . . . . for circumstantial errors or mistakes which by law are amendable."

The conclusion is, that the plea in abatement was properly sustained, but that the "errors and defects" in the plaintiff's declaration are by law amendable, and that the case should be remanded to the trial court, where the plaintiff may have an appropriate amendment allowed by the presiding judge if deemed by him to be in the furtherance of justice.

Exceptions overruled. Case remanded accordingly.

ALICE E. FLEMING, In Equity

vs.

WILLIAM COURTENAY, Admr.

Lincoln. Opinion March 1, 1901.

Equity. Practice. Election of Remedy.

It is a well-settled and familiar rule of procedure in all courts exercising general equity jurisdiction, that when a plaintiff is prosecuting an action at law and a suit in equity against a defendant at the same time for the same cause, he may be compelled by the court upon application of the defendant, to elect whether he will proceed with the action at law or the suit in equity.

The order should allow the plaintiff a reasonable time in which to make his election, and in the absence of special reasons justifying a different time, in the early chancery practice the plaintiff was uniformly required to elect within eight days after service of the order.

Held; that the order made, in this case, was clearly authorized by the usual chancery practice.

See *Same* v. *Same*, ante, p. 128.

Exceptions by plaintiff. Overruled.

Bill in equity under R. S., c. 87, § 19. An action at law, see p. 128, ante, was pending between the same parties. On motion of the defendant, the plaintiff was ordered to elect between the two suits. To this order the plaintiff excepted.

O. D. Castner, for plaintiff.

J. E. Moore and G. B. Sawyer, for defendant.

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

WHITEHOUSE, J. This case comes to the law court on the plaintiff's exceptions to an order of the presiding justice compelling her to elect whether she would proceed with this suit in equity or with an action at law, which the plaintiff was then prosecuting against this defendant in the same jurisdiction, for the same cause set forth in this bill in equity. By the terms of the order, the plaintiff was required to make her election within eight days, and if she elected to proceed at law, or failed to make any election, her bill in equity was to be dismissed with costs. The plaintiff took exceptions to the order and made no election.

The practice of ordering an election between an action at law and a suit in equity does not appear to have been considered in any reported case in this state, but it is a well-settled and familiar rule of procedure in all courts exercising general equity jurisdiction, that where a plaintiff is prosecuting an action at law and a suit in equity against a defendant at the same time for the same cause, he may be compelled by the court, upon application of the defendant, to elect whether he will proceed with the action at law or the suit in equity. *Ambrose* v. *Nott*, 2 Hare, 649; *Fennings* v. *Humphrey*, 4 Beav. 1; *Rogers* v. *Vosburg*, 4 Johns. Ch. 84; *Cent. R. R. Co.* v. *N. J. West Line R. R. Co.*, 32 N. J. Eq. 67; *Sears* v. *Carrier*, 4 Allen, 339. The practice is said to have originated in an order of Lord Bacon, in which it was declared that "double vexation is not to be admitted; but if the party sue for the same cause at common law and in chancery, he is to have a day given to make his election where he will proceed, and in default of such election, to be dismissed." 2 Dan. Ch. § 961.

The suits must be practically for the same cause and brought by the same parties, or in the same right, and must be such that a judgment or decree in one would be a bar to the other. But the

plaintiff will not be compelled to elect unless the remedy in the suit at law is equally complete and adequate with the remedy in equity. Whitehouse Eq. Pr. § 441, and cases there cited. The order should allow the plaintiff a reasonable time in which to make his election, and in the absence of special reasons justifying a different time, in the early chancery practice, the plaintiff was uniformly required to elect within eight days after the service of the order. *Bracken* v. *Martin*, 3 Yerg. (Tenn.) 55; *Cent. R. R. Co.* v. *R. R. Co.* 32 N. J. Eq. supra; *Rogers* v. *Vosburg*, 4 Johns. Ch. 84; *Boyd* v. *Heinzelman*, Ves. & Bea. 382.

When the court cannot satisfactorily determine without an examination of all the pleadings whether the two suits are for the same cause, or whether the action at law is equally complete and adequate with the remedy in equity, it may decline to order the plaintiff to elect until after the defendant in the equity suit has filed his answer. *Dunlap* v. *Newman*, 52 Ala. 178; but when there is no controversy in relation to those matters, or the court can ascertain all the material facts from an inspection of the pleadings in the action at law and the plaintiff's bill in the suit in equity, or otherwise becomes sufficiently informed to determine those questions without reference to the defendant's answer, the plaintiff may be required to make his election at any stage of the proceedings. *Mills* v. *Fry*, 19 Ves. 277; *Freeman* v. *Staats*, 8 N. J. Eq. 814; *Connihan* v. *Thompson*, 111 Mass. 270.

In the case at bar no answer to the plaintiff's bill in equity has been filed by the defendant; but it is sufficiently clear from a comparison of the plaintiff's declaration at law with the bill in the equity suit that the two suits are for the same cause, and no reason is apparent why the remedy at law is not equally complete with that in equity. Indeed, it is expressly conceded by the counsel for the plaintiff that the two suits are for the same cause and that the action at law is an adequate remedy and even more effective than the suit in equity. It is suggested, however, in argument, that if the action at law is maintainable by the plaintiff in her representative capacity only, it would be error to compel her to elect, because the two suits would not be brought by her in the same right or

capacity. But it has been decided in the action at law, *Fleming*, Executrix, v. *Courtenay*, Adm'r, ante, p. 128, that even after an amendment to the declaration, that action is only maintainable as a suit in her personal capacity and not as executrix. In that event it is further conceded by counsel that the suit in equity "will not be necessary to the plaintiff's purpose."

The motion in writing, presented by the defendant, appears to be regular in form and sufficient in substance, and the order made in pursuance of it was undoubtedly authorized by the usual chancery practice.

Exceptions overruled. Bill dismissed.

JOHN D. VERMEULE *vs.* ADRIAN VERMEULE.

York. Opinion March 1, 1901.

Bills and Notes. Usury.

In an action upon a promissory note made in New York, to which the defense of usury by the law of that state was pleaded, it appeared that the note in suit was given in renewal of several prior notes, one of which contained a clause giving the plaintiff an option to take certain stock in addition to six per cent interest on the note. Such an agreement under the laws of New York might have been usurious and fatal to the validity of the prior note; but the note in suit contained no provision for the payment or receipt of anything beyond six per cent interest.

Held; that in such a case it is settled law, that the renewal by a new note, which excludes all usurious taint, renders the new contract valid and binding on the maker. Thus the parties, themselves, do what a court of equity would require them to do.

Exceptions by defendant. Overruled.

Assumpsit upon a promissory note. At the close of the testimony the presiding justice ruled that no defense had been made and directed the jury to return a verdict for the plaintiff for $2946.67, the amount agreed to be due, if anything.

G. C. Yeaton, for plaintiff.

G. F. and Leroy Haley, for defendant.

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

WHITEHOUSE, J. This is a suit upon the defendant's promissory note made in the state of New York, January 24, 1897, for the sum of $2500, with interest at six per cent per annum. It was not in controversy that the note was given in renewal of several other notes previously given for money lent at different times; and evidence was introduced, in behalf of the defendant, tending to show that the earliest one of these prior notes, which formed the consideration of the note in suit, contained a clause which gave the plaintiff the option to take certain stock in a New Jersey corporation, in addition to six per cent interest on the note. It was contended that by the statutes of New York such an agreement to receive something of value in excess of six per cent, is declared to be usurious and fatal to the validity of the note. The presiding judge ordered a verdict for the plaintiff for the amount of the note, and the defendant took exceptions.

It is unnecessary to consider whether, upon the facts disclosed in the report, the stock in the New Jersey corporation named could reasonably be deemed "anything of value," or, if so, whether under all the circumstances connected with the transaction of the earliest note mentioned, the arrangement could be held usurious under the laws of New York; for, as already stated, the prior note which might have been affected with the usurious taint was merged in the new note now in suit, which contains no provision whatever for the payment, or receipt of anything, as interest beyond six per cent per annum, and the amount for which the new note was given was only the balance of the money actually lent. In such a case it is uniformly held that the renewal by a new note, which excludes all usurious taint, renders the new contract valid and binding on the maker. In *Miller* v. *Hull*, 4 Denio, 104, the court say: "The parties to an usurious transaction may, doubtless, reform it, and by cancelling the usurious security and giving a new obligation for the real sum which ought to be paid, excluding all usury, the party will be bound," and cite *Wright* v. *Wheeler*, 1 Camp. 165, note;

Kilbourn v. *Bradley*, 3 Day, 356, (3 Am. Dec. 273), and other authorities in support of the doctrine. In Webb on Usury, §§ 482–484, the author says: "Of course, if no usury has been paid, but merely reserved, it is sufficiently purged by a surrender of the contract, and the giving of a new one with the element of usury excluded," citing among other cases *Marstin* v. *Hall*, 9 Gratt. 8. In that case the court sententiously gave the reason to be that "the parties, themselves, have done what a court of equity would have required them to do." See also *Jacobson* v. *Bradley*, 49 Hun, 152. For analogous doctrine that an express promise to pay compound interest is valid in this state, see *Bradley* v. *Merrill*, 91 Maine, 340.

As it is manifest that the note in suit was entirely purged of any usurious taint with which the earlier note might possibly have been affected, it is also unnecessary to determine whether the defense of usury is available to the defendant in any other jurisdiction than that of the state in which the statute creates it. See *Meares* v. *Finlayson*, 55 S. C. 105.

The verdict for the plaintiff was rightly ordered.

Exceptions overruled.

STATE *vs.* INTOXICATING LIQUORS.

Washington. Opinion March 2, 1901.

Intox. Liquors. Interstate Commerce. Const. Law. R. S., c. 27. Stat. of U. S. Aug. 8, 1900.

Upon a seizure of intoxicating liquors by a sheriff, under R. S., c. 27, and claimed by the common carrier, in whose possession they were found, it appeared that the intoxicating liquors seized, libelled and claimed by the railroad company, were shipped from Boston, Massachusetts, by the Boston & Maine Railroad and connecting lines, to Machias in this state. The liquors were consigned to the shippers. Although the case does not show, there was undoubtedly a continuous way-bill. They arrived at Machias on the morning of the twenty-third of October, at about nine o'clock in the forenoon, and

were transferred to a freight-house used exclusively by the railroad company, where, on the afternoon of the next day, at about four o'clock, they were seized by the officer. There had been no delivery of the liquors and no notice given to any one of their arrival.

Held; that the liquors in question, at the time of their seizure, had arrived within the state so as to be subject to the operation and effect of the laws of this state enacted in the exercise of its police powers, within the meaning of the Act of Congress of August 8, 1890, commonly known as the "Wilson Act," which provides that all intoxicating liquors "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."

Also; that in this case the transportation had been completed at the time of the seizure. The liquors had arrived at their final place of destination; they were not again to be moved by the railroad company, and nothing further remained to be done by the company except that the liquors were to be held by them to await the action of the shippers. And for these reasons the case differs in material respects from the case of *Rhodes* v. *Iowa*, 170 U. S. 412, decided by the Supreme Court of the United States, (recently followed by this court in *State* v. *Intoxicating Liquors*, 94 Maine, 335), and that decision is not an authority for this case.

While we fully recognize that the question as to whether a state statute is in contravention of any provision of the federal constitution is for the final determination of the federal Supreme Court, and that its decision, when the question is presented, is conclusive, we do not consider it obligatory upon this court to hold, against our own judgment, that a statute of our state is in violation of that constitution, until it has been so decided, even if it may be possible, judging from certain remarks in that court's opinion, that our judgment may be overruled by that tribunal.

State v. *Intox. Liquors*, 94 Maine, 335, distinguished.

Rhodes v. *Iowa*, 170 U. S. 412, distinguished.

On report. Judgment for State.

Appeal by the Washington County Railroad, as claimant, from a decree of forfeiture of intoxicating liquors, and from whose possession they were seized. The case appears in the opinion.

Fred I. Campbell, county attorney, for State.

W. R. Pattangall, for claimant.

Counsel cited: *State v. Intox. Liquors*, 83 Maine, 158, and cases; *Rhodes v. Iowa*, 170 U. S. 412; *Vance v. W. A. Vandercook Co.*, *Ib.* 438.

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

WISWELL, C. J. The case comes to the law court upon report. The only question presented is, whether or not the statute of this state, authorizing the seizure of the intoxicating liquors in question, is in violation of that clause of the constitution of the United States which confers upon Congress the power "to regulate commerce with foreign nations and among the several states," in so far as it applies to liquors which are the subject of interstate commerce transportation. If so, the warrant under which the officer acted and his seizure were, of course, illegal and void.

It is contended that the question has been settled by the Supreme Court of the United States in the case of *Rhodes* v. *Iowa*, 170 U. S. 412, which case has been recently followed by this court in *State* v. *Intoxicating Liquors*, 94 Maine, 335. If the question here involved has been decided by the United States Supreme Court, in the case above referred to, we must certainly recognize the authority of that court in passing upon a provision of the federal constitution and upon congressional legislation thereunder, and be governed by the result.

But we do not think that the question here presented has been passed upon by that court.

The facts in this case are as follows: The intoxicating liquors seized, libelled and claimed by the railroad company, were shipped from Boston, Massachusetts, by the Boston & Maine Railroad and connecting lines, to Machias in this state. The liquors were consigned to the shippers. Although the case does not show, there was undoubtedly a continuous way-bill. They arrived at Machias on the morning of the 23d of October, at about 9 o'clock in the forenoon; they were transferred to a freight house used exclusively by the railroad company, where, on the afternoon of the next day, at about four o'clock, they were seized by the officer. There had been no delivery of the liquors and no notice given to any one of their arrival.

The question presented, then, is whether or not these liquors,

at the time of their seizure, had arrived within the state so as to be subject to the operation and effect of the laws of this state enacted in the exercise of its police powers, within the meaning of the Act of Congress of August 8, 1890, commonly known as the Wilson Act, which provides that all intoxicating liquors "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."

In the case of *Rhodes* v. *Iowa*, supra, the package containing the intoxicating liquors had been transported from a point in the state of Illinois to Brighton in the state of Iowa, under a continuous way-bill. It had arrived at the station in the latter place and had been removed by the trainmen from the car to the station platform.

Shortly afterwards, the station agent, in the discharge of his duties, moved the package into a freight warehouse, about six feet from the platform, where it was seized by an officer under a search warrant, after it had been there for about an hour. But the legality of that seizure was not in question in this case. The station agent, Rhodes, was proceeded against for the violation of the statute of the state of Iowa, in knowingly, wilfully and unlawfully receiving, for the purpose of delivering to another, intoxicating liquor that was being unlawfully transported from Burlington, Iowa, to Brighton, Iowa. The liquors were in fact transported from Dallas, Illinois to Brighton, Iowa, under a continuous way-bill and over connecting lines of railroad. Rhodes was convicted before the magistrate and also upon appeal in the District Court, and the conviction was sustained by the Supreme Court of Iowa, upon the ground that the consignment of liquors had arrived in the state, within the meaning of the Wilson Act, as soon as it crossed the state boundary and entered the state, although the contract of carriage was not then completed. *State* v. *Rhodes*, 90 Iowa, 496.

The question actually presented to and decided by the Supreme Court of the United States, in *Rhodes* v. *Iowa*, was whether the liquor had arrived in the state, within the meaning of the Wilson Act, at the time of the act complained of, the station agent, the plaintiff in error, in transporting the package from the station platform to the company's freight house. The court held that this act was a part of the interstate commerce transportation, and was consequently within the exclusive control of Congress under the interstate commerce provision of the constitution, and that the Wilson Act did not apply and was not intended to apply until the act of transportation had been entirely completed.

It is true, that in the opinion of the court this language is used: "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.*"

But it does not seem to us that this was necessarily involved in the question decided. If the act of moving the package from the platform to the freight house was a part of the interstate commerce transportation, as the court held it was, and the transportation was not consummated until the package had been moved to and deposited within the freight house, so that the liquors had not arrived within the state, until that act had been performed, then the Iowa statute could not apply to any part of such transportation, and it was unnecessary to a decision of the point involved, to hold that such transportation was not completed until delivery to the consignee.

We are of the opinion that, in this case, the transportation had been completed. Nothing further remained to be done by the railroad company. The liquors had arrived at their final place of destination. They were not again to be moved by the railroad company. The continuity of transportation from the place of shipment to that of consignment had not been interrupted, and the liquors had been moved to the place provided by the carrier for the purpose, to await the action of the shipper.

It is true, that no notice had been given of their arrival: there

was nobody there to whom notice could have been given. And the question is not, whether or not the liability of the railroad company for a loss continued as a carrier up to the time of the seizure, or had become that of a warehouse man. It is simply whether these liquors, when the actual transportation had been entirely completed, and when they had not only arrived at the place of their destination, but had been moved by the employees of the railroad company from the car to the company's freight house, there to await the order of the shipper, had arrived in the state, within the meaning of the Wilson Act, so as to be subject to our laws.

The language of the Wilson Act is, all intoxicating liquors "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," etc. In this case the liquors in question had been "transported into" this state, to its place of ultimate destination within the state. They were "remaining therein" for the purpose of "storage," within the meaning of this act, we think, even as construed by the majority of the court in *Rhodes* v. *Iowa*. We are of opinion that the transportation had ceased, and that the storage had commenced.

We fully recognize that the question as to whether a state statute is in contravention of any provision of the federal constitution is for the final determination of the federal Supreme Court, and that its decision, when the question is presented, is conclusive; but we do not consider it obligatory upon this court to hold, against our own judgment, that a statute of our state is in violation of that constitution, until it has been so decided, even if it may be possible, judging from certain remarks in that court's opinion, that our judgment may be overruled by that tribunal.

It will be observed that the case recently decided by this court, (*State* v. *Intox. Liquors, Grand Trunk Ry., claimant*, 94 Maine, 335,) above referred to, upon the authority of *Rhodes* v. *Iowa*, was entirely different from this. There the liquors were seized while they were in actual transit. The car in which they were being transported had not even arrived within the limits of the city of its

destination. The facts of that case brought it clearly within the decision of the Supreme Court.

The claim of the railroad company must therefore be disallowed.

The liquors will remain in the custody of the sheriff to be disposed of as provided by our statutes.

So ordered.

THE RICHARDSON MANUFACTURING COMPANY

vs.

ALBERT W. BROOKS.

Kennebec. Opinion March 6, 1901.

Sales. Consignment. Record. Assignment. Stat. 1895, c. 32.

Chapter 32 laws 1895, relative to record of contracts for sale, does not apply to consignments of goods for sale when no title to the goods passes to the consignee.

Kelley & Eastman, the consignees, sold to Kelley & Hanley, on credit, from the consigned articles to amount of $205.25. Before payment, Kelley & Eastman made an assignment to the defendant for the benefit of their creditors. Plaintiff claimed payment of Kelley & Hanley, who subsequently paid the amount to defendant, who knew of plaintiff's claim.

In an action to recover that sum and also forty-six dollars received by defendant as proceeds of other consigned goods of plaintiff, sold by Kelley & Eastman on credit, *held;* that Kelley & Eastman had no title to the consigned goods, and defendant took none as their assignee; and that the goods, and the purchase price for them until paid to the consignees, were the property of the plaintiff.

Agreed statement. Judgment for plaintiff.

Action for money had and received. The case appears in the opinion.

A. M. Spear, for plaintiff.

Money had and received: *Keene* v. *Savage*, 75 Maine, 138.

Title of assignee: *Rogers* v. *Whitehouse*, 71 Maine, 222.

Thos. Leigh, for defendant.

Counsel argued: That the amounts the plaintiff claims to recover in this action, were not, at the time they were paid to A. W. Brooks, the property of the plaintiff, but only a part and parcel of the estate of Kelley & Eastman; that the plaintiff is entitled to receive from said Brooks the same dividend he has paid all the creditors; that the plaintiff is not a preferred creditor under their contract, and if they have any further claim, it is against the firm of Kelley & Eastman and not against Brooks; and that the contract, not having been recorded under R. S., c. 111, § 5, as amended in 1891 and 1895, is void against the defendant.

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

STROUT, J. Plaintiffs consigned certain machines to Kelley & Eastman for sale, under a written contract which provided that "all machines and proceeds of sale, whether in notes, cash or account, shall specifically be and remain the property of the Richardson Manufacturing Company, held in trust in your (Kelley & Eastman) hands until all indebtedness incurred under this arrangement shall have been paid in full." The contract contained no element of sale to Kelley & Eastman, present or prospective. No title to the merchandise passed, or ever was to pass, to them. Kelley & Eastman sold of these consigned articles to the value of $205.25 to Kelley & Hanley. Kelley was a member of both firms. Kelley & Eastman, on December 22, 1897, made an assignment to the defendant for the benefit of their creditors. At that time Kelley & Hanley had not paid for the articles purchased by them. Plaintiffs, by their agent, Hill, notified Kelley & Hanley of its claim, and directed them not to pay the amount to the defendant, as assignee of Kelley & Eastman, but to pay it to plaintiff, and Kelley & Hanley agreed to do so. Subsequently defendant demanded payment of Kelley & Hanley, who informed him of plaintiff's claim. March 17, 1898, Kelley & Hanley paid the amount to defendant, upon his agreement to be responsible therefor, to plaintiff, if the money belonged to it. In this action for money had and re-

ceived plaintiff claims to recover this amount and also $46 collected by defendant for consigned goods of plaintiff, sold by Kelley & Eastman, and not paid to them before their assignment.

A voluntary assignee, like an assignee in insolvency, takes the title of the assignor, and only that, except in the case of prior conveyance by his assignee, in fraud of creditors. In that case he so far represents creditors that he may avoid the fraudulent conveyance. In all other respects he stands in the place of his assignor, and can assert no other or greater rights than his assignor could have done. *Hutchinson* v. *Murchie*, 74 Maine, 187.

The consignment agreement was not recorded, as provided by c. 32 of the laws of 1895. As this contract contains no element of bargain or sale, it is not within that statute. *Thomas v. Parsons*, 87 Maine, 203.

The consigned merchandise, while in the hands of Kelley & Eastman, was the property of plaintiff. The consignees could sell and give good title under the authority given by plaintiff, but such sales in law were sales by plaintiff through its factor, and the proceeds if received by the consignees, belonged to plaintiff, and were trust funds in the consignee's hands. If, as in this case, the purchasers had not paid Kelley & Eastman, upon notice of plaintiff's ownership, they became liable to the plaintiff for the purchase price. *Rogers* v. *Whitehouse*, 71 Maine, 226; *Edmond* v. *Caldwell*, 15 Maine, 340.

The indebtedness of Kelley & Hanley, after notice of plaintiff's claim, became an indebtedness from them to the plaintiff. The defendant having received from Kelley & Hanley the proceeds of sales of plaintiff's consigned property with notice of its title, is liable in this action. His assignors had no title to the fund, and he had none as their assignee. Having in his hands funds belonging to the plaintiff, which he had no right to retain, the law implies a promise to pay. *City of Calais* v. *Whidden*. 64 Maine, 249; *Cumberland National Bank* v. *St. Clair*, 93 Maine, 35.

The same result must follow as to the forty-six dollars collected by the defendant, as the proceeds of plaintiff's goods sold on credit by Kelley & Eastman.

Judgment for plaintiff for the two sums of $205.25 and $46, with interest on the former from March 17, 1898, and upon the latter from date of the writ.

So ordered.

KATHERINE L. CONLEY, Admx.

vs.

THE MAINE CENTRAL RAILROAD COMPANY.

Sagadahoc. Opinion March 16, 1901.

Negligence. Death. Damages. Stat. 1891, c. 124.

The damages recoverable for death by a wrongful act are limited by statute to the amount of "pecuniary injuries" sustained by the persons for whose benefit the action is brought. They must be estimated according to reasonable probabilities, as well those which tend to make the pecuniary injury less, as those which tend to increase it.

Upon a motion for a new trial in which the jury returned a verdict of sixteen hundred dollars for the benefit of a widow and adult children, it appeared that the deceased was seventy-three years old,—a laborer at odd jobs, working only a part of the time,—and whose earnings would not exceed $225 per annum.

Held; that there is no reasonable probability whatever that the beneficiaries, under these conditions, have sustained by the intestate's death a pecuniary injury to the extent of sixteen hundred dollars either by loss of gifts or support during life, or by loss of increased inheritance after death, or both. The verdict for that amount is, therefore, clearly excessive.

While it is not the province of the court to assess damages, or to fix what is "reasonable and just compensation" for the pecuniary injury, in such cases, it may express the extreme limit beyond which a verdict should be deemed clearly wrong. *Held;* that the limit in this case is seven hundred and fifty dollars.

The court considers that the evidence warranted the jury in finding that the death of the plaintiff's intestate was caused by the negligence of the defendant; and even if the deceased was negligent in getting into the path of the defendant's approaching ferry boat, still that such negligence was not the proximate cause of the collision and death.

If the servants of the defendant saw the deceased in the path of the ferry-boat, in a place of danger, though he was there negligently, they were bound to

use due care to prevent a collision; and it is not clear that a jury would not be warranted in finding that by the exercise of ordinary care and prudence the collision might have been averted.

On motion by defendant. Damages reduced.

Action on the case for negligence, wherein the plaintiff sought to recover, under the statute of 1891, c. 124, pecuniary damages sustained by the widow and seven children of Thomas Conley, deceased. The accident was on September 9, 1899, and was due to a collision between a row boat propelled by the deceased and the defendant's ferry-boat Hercules, proceeding from Woolwich to Bath.

The case is stated in the opinion.

F. E. Southard, for plaintiff.

O. D. Baker, for defendant.

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

SAVAGE, J. Action for damages under chapter 124 of the public laws of 1891, for the death of the plaintiff's intestate, said to have been caused by the negligence of the defendant. The action is brought for the benefit of the widow and children of the deceased.

The case is before us on defendant's motion for a new trial, on the grounds that the verdict was against law and evidence, and that the damages were excessive. The exceptions taken are now waived.

We think the testimony introduced by the plaintiff, if believed, would warrant a jury in finding that the deceased, Thomas Conley, on the morning of the accident, was on the Kennebec river at Bath in a row boat; that the steam railroad ferry-boat, Hercules, owned and operated by the defendant, was at the same time making a trip from the easterly or Woolwich side of the river to its slip in Bath; that Conley had rowed his boat from a point on the Bath shore northerly from the ferry slip, out by the northerly pier of the ferry slip; that when Conley was nearly abreast of the end of the pier and from fifty to seventy-five feet easterly from it, and in the path

of the ferry-boat, a warning whistle was sounded by the captain of the Hercules, then one hundred and fifty or more feet from Conley and proceeding directly towards him; that Conley and the servants of the defendant in charge of the ferry-boat were in plain view of each other; and that when the whistle was sounded, Conley turned his boat up the river and began to row hard; that there was a strong ebb tide, and that Conley appeared to be unable to make headway against the tide or get out of the way of the approaching ferry-boat; that the speed of the ferry-boat was not perceptibly slackened until after her bow had entered the slip; that in the meantime the ferry-boat had collided with Conley's boat, and that the starboard paddle-wheel of the ferry-boat still revolving forward had struck Conley's boat and broken it in pieces, whereby Conley was precipitated into the water and drowned.

On the other hand, the evidence introduced by the defendant tended to show that when Conley came into the view of the officers of the Hercules, he was standing in his boat, shoving it out by the end of the north pier of the ferry slip which previous to that moment had hidden him from sight; that the Hercules was then moving forward at full speed and was only about fifty feet from the outer end of the pier and from Conley himself; that as soon as he appeared in sight, the captain of the ferry-boat sounded the alarm whistle, then immediately caused the starboard paddle-wheel to stop, and the port wheel to be reversed; that the effect of these movements taken in connection with the action of the tide, was to swing the ferry-boat away from Conley; and that if Conley had remained in the position he was when last seen by the captain in the pilot-house, the ferry-boat would have cleared him by forty feet; in short, that everything was done which could be done to avert a collision. In reality, the testimony introduced by the defendant seems to exclude the possibility of liability on its part.

It is thus seen, that the accounts of the collision as given by the witnesses for the plaintiff, and by those for the defendant, are diametrically opposed to each other at vital points. The jury, evidently, was more impressed by the former; and although, if we were sitting as jurors, we might come to a different conclusion, we

do not feel authorized to interfere. The credibility of witnesses is a matter peculiarly within the province of the jury, and its conclusions in this respect should not be disturbed, unless manifest error is shown, or it appears that the verdict is the result of passion or prejudice.

It requires no argument to show that the testimony, already outlined, of the three persons introduced by the plaintiff, who claim to have been eye-witnesses, is sufficient, if believed, to sustain a finding that Conley's death was caused by the negligence of the defendant.

But, to this, the defendant answers that Conley, himself, was guilty of negligence in rowing his boat into the path of the ferry-boat at that particular time and place; that he knew, or ought to have known, of the near approach of the ferry-boat; that it was negligence in him to put himself then into a place of extreme danger; and that this negligence contributed to the collision and fatal consequences. Hence the defendant claims that Conley's contributory negligence is a bar to a recovery in this action.

While the plaintiff does not admit that Conley was negligent she replies that, however negligent he may have been in getting into the path of the ferry-boat, still such negligence was not the proximate cause of the injury; that the negligence of Conley preceded, and was independent of the negligence of the defendant; and that notwithstanding Conley's negligence, the collision could have been avoided by the use of ordinary care and caution, at the time, by the defendant; and hence, that Conley's conduct did not contribute to produce the collision.

The principles of law relied upon by the plaintiff are well settled. We need only refer to the recent case of *Atwood* v. *Railway Co.*, 91 Maine, 399, in which they are fully discussed. We think they are applicable to such a state of facts as is presented by the testimony introduced by the plaintiff, and which the jury evidently found to be true. If Conley and the Hercules were respectively where the plaintiff's witnesses say they were, at the time the alarm whistle was sounded, the Hercules approaching Conley, and Conley apparently unable to make headway against the tide and to get

out of the path of the Hercules, the defendant was bound to exercise due care to prevent a collision. And we cannot say that a jury would not be warranted in finding that by the exercise of ordinary care and prudence on the part of the defendant, the collision might have been averted. The verdict as to liability is therefore sustainable.

But the verdict is manifestly too large. The deceased was seventy-three years old. He was a laboring man,—working at odd jobs, without steady employment. One son testified that "he worked mostly in the summer. He could not work in the winter except to shovel snow and fish—catch smelts. In the summer he worked in pleasant weather, good weather, when he could," . . but "not steady all summer." This is probably a fair account of the old man's labor. He earned, it is said, when he worked, from $1.50 to $2.00 a day. There is no reasonable probability that his earnings exceeded $200 or $225 a year. They were probably less. His expectancy of life was only about seven and one-half years.

The plaintiff is entitled to recover the amount of pecuniary benefits which the widow and children have probably lost by his death, and no more. *McKay* v. *Dredging Co.*, 92 Maine, 454. This verdict can be sustained only upon the suppositions that for the full period of his expectancy of life he would have continued to earn $225 a year, and that practically all of his earnings would have come to his beneficiaries either by gifts or support during life, or by way of increased inheritance after death or both. But such suppositions are not based upon reasonable probabilities. There is every probability, on the contrary, that increasing infirmities would accompany increasing years, that as he grew older he would become less able to work, and be compelled to work for lower wages. Not only this. Old age naturally brings illness and weakness, and increasing demands for comforts and nursing and medicines and medical attendance. It is not only probable that Mr. Conley would have earned less as he grew old, but that he would have been obliged to spend more for himself. This is according to the course of nature, and there is nothing in the evidence in this particular case which rebuts this expectation. These proba-

bilities should not be overlooked. Although in this class of cases the pecuniary injury sustained is necessarily indefinite, it is not therefore illimitable. It should be estimated, not guessed at. All reasonable probabilities must be taken into account, as well those which tend to make the pecuniary injury less, as those which tend to increase it. Applying these rules to this case, it is demonstrable that the jury erred in assessing damages. There can be no reasonable probability that these beneficiaries have sustained by Mr. Conley's untimely death a pecuniary injury to the extent of sixteen hundred dollars. In such case, the duty of the court is clear. While it is not our province to assess damages, or to fix what is "reasonable and just compensation" for the pecuniary injury, we may express the extreme limit beyond which a verdict should be deemed clearly wrong. We think that limit in this case is seven hundred and fifty dollars.

Exceptions overruled.

If the plaintiff within 30 days after the filing of the rescript remits all of the verdict in excess of $750, motion for new trial overruled; otherwise, motion sustained, and new trial granted.

ALICE BOARDMAN, Admx.

vs.

JOHN M. CREIGHTON, and another.

Knox. Opinion March 25, 1901.

Pleading. Negligence. Death. Master and Servant. Stat. 1891, c. 124.

1. In an action of tort to recover damages for personal injuries an allegation of duty is insufficient. The facts and circumstances from which the duty arises must be set out in the declaration, and the sufficiency of the pleading must be determined from the facts from which the duty is deduced.

2. *Held;* That upon the material facts alleged in the declaration, the defendants cannot be held liable either upon reason or authority. Upon the general averments in the declaration, and in the absence of other particular allega-

tions, the operations in the quarry from which the injury resulted must be deemed the work of an independent contractor, who represented the will of the owner only as to the result of his work and not as to the manner of conducting it, or the means by which the result is to be accomplished; and in such a case it is settled law that, as the contractor is not the agent or servant of his employer in relation to anything but the specific results which he undertakes to produce, the employer is not responsible for the contractor's negligence, either to his servants or to third persons.

Boardman v. *Creighton*, 93 Maine, 17, affirmed.

Action on the case, heard on demurrer. Demurrer sustained.

This was an action brought by the plaintiff, as administratrix, to recover damages for the killing of her intestate. After the former decision in this case, 93 Maine, 17, the plaintiff amended the declaration in her writ, to which the defendants demurred. The case is stated in the opinion.

L. M. Staples, for plaintiff.

Counsel cited additional authorities: *City of Tiffin* v. *McCormack*, 34 Ohio St. 638; *Bennett* v. *L. & N. R. R. Co.*, 102 U. S. 235; *N. O. M. & C. R. R. Co.* v. *Henning*, 15 Wall. 649, 657; *Pantzar* v. *Tilly Foster Iron, etc. Co.*, 99 N. Y. 376; *Samuelson* v. *Cleveland Iron, etc. Co.*, 49 Mich. 164.

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

Relation of master and servant did not exist. *Leavitt* v. *B. & A. R. R. Co.*, 89 Maine, 517.

Defendants owed no duty to plaintiff's intestate. *Burbank* v. *Bethel Steam Mill Co.*, 75 Maine, 373; *Eaton* v. *E. & N. A. Ry. Co.*, 59 Maine, 531; *King* v. *N. Y. C. & H. R. R. R. Co.*, 66 N. Y. 186; *Humpton* v. *Unterkircher*, 97 Iowa, 509; *Hawver* v. *Whalen*, 14 L. R. A., p. 828, and note; *Clark* v. *Fry*, 8 Ohio St. 358, 72 Am. Dec. 590; *City of Lansford* v. *Dick*, 70 Ind. 79; *Cuff* v. *Newark & N. Y. R. R. Co.*, 35 N. J. L. 22; *Tibbetts* v. *K. & L. R. R. Co.*, 62 Maine, 437; *McCarthy* v. *Second Parish of Portland*, 71 Maine, 318; *Sanford* v. *Pawtucket St. R. Co.*, 19 *R. I.* 650; *Percy* v. *Roland*, 16 Eng. Law & Eq. 442; *Carter* v. *Berlin Mills*, 58 N. H. 57; *Buckner* v. *The Railroad Company*, 72 Miss. 873; *Schip* v. *Pabst Brewing Co.*, 64 Minn. 22; *Fitzpatrick* v. *C. & W. I. R. R. Co.*, 31 Ill. App. 649; *Sweeny* v. *Old*

Colony & Newport R. R. Co., 10 Allen, 372; *Whitmore* v. *Pulp Co.*, 91 Maine, 304.

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

WHITEHOUSE, J. The plaintiff brings this action as administratrix on the estate of her husband, Frank E. Boardman, to recover compensation for the pecuniary injuries resulting from his death while laboring in the defendant's limerock quarry. The case now comes to the law court a second time on a demurrer to the plaintiff's declaration. In the former opinion (93 Maine, 17) the court say: "The degree and kind of care which the owner of premises owes to a workman employed therein vary according to the relation existing between the parties. The care which the owner owes to his servant over whom he exercises control and who acts under the master's directions, differs in degree from that which he owes to a mere licensee and from that which he owes to the servant of an independent contractor"; and it was accordingly held that the declaration as it then stood, being the first count in the declaration now before the court, alleging that the intestate was killed through the negligence of the defendants when he was "legally at work" in the defendants' quarry and when he was "employed and lawfully at work in the defendants' quarry by the license and permission and at the request of the defendants," was bad on demurrer, for the reason that it did not state "in what capacity the plaintiff's intestate was employed in the quarry, whether as servant of the defendants, or the servant of an independent contractor, or as a licensee, or in some other capacity."

In the second count in the present declaration, upon which the plaintiff must now rely, it is alleged that "on the eighteenth day of December, A. D. 1895, the defendants were . . . . the owners and operators of a certain limerock quarry and were then and there engaged in quarrying limerock in which they employed a large number of men, and it was then and there their duty, as owners aforesaid of said quarry, to provide . . . . a suitable place for all persons lawfully at work therein, whether directly em-

ployed by them, or by some other persons with their knowledge or permission.

"And on said eighteenth day of December the defendants had contracted with one Whitney to dig limerock for them by the cask in said quarry; and said Whitney had then employed one Frank E. Boardman . . . . . to dig limerock therein for and to be used by said defendants; and it then and there became the legal duty of the defendants, while said Boardman was at work for said Whitney in said quarry, to see that the walls and bluffs of said quarry were examined from time to time in order to ascertain if any loose rock was likely to fall upon him the said Boardman; . . . . and the plaintiff says the defendants so carelessly and negligently permitted the said Whitney employed as aforesaid, to remove and excavate limerock from the walls of said quarry and from other parts thereof, and carelessly and negligently permit said Whitney to quarry and blast the rock in said quarry, so as to render the walls on the westerly side thereof unsafe for said Boardman to work therein. . . .

"And the plaintiff avers that the death of said Boardman was caused by the wrongful and negligent act of defendants in not providing suitable appliances for the purpose of ascertaining the condition of said quarry as aforesaid, and in permitting the dangerous condition of said quarry to exist while the said Frank E. Boardman was lawfully at work therein as aforesaid, and the plaintiff avers that the said Frank E. Boardman was killed and his death was caused by the negligent acts and defaults of the defendants who were the owners and operators."

The introductory averment in the count, that the defendants were "engaged in quarrying limerock in which they employed a large number of men" must be considered, and obviously was intended to be construed, in connection with the allegations in the succeeding paragraphs that "the defendants had contracted with one Whitney to dig limerock for them by the cask in said quarry," and that the plaintiff's intestate, Frank E. Boardman, was employed by Whitney, the contractor to work for him in the quarry, and at the time of the accident was engaged in digging limerock under

this employment. Thus construed, the declaration alleges in effect that the defendants operated a quarry by means of one Whitney, an independent contractor, and it contains no allegation that they operated the quarry in any other manner or by any other means.

It does not allege that under their contract with Whitney the defendants retained any supervision or control over the quarry, or gave any directions or exercised any authority whatever respecting its operation and management after Whitney took possession.

The relation of master and servant between the defendants and the intestate is not alleged to have existed, and there is no claim in the declaration to recover on that ground. On the contrary, it is distinctly alleged that the intestate was the servant of Whitney who was operating the quarry under his contract with the defendants.

Nor is there any allegation that the condition of any part of the quarry was unsafe at the time Whitney took possession and commenced operations under his contract. On the contrary, it is distinctly alleged, as one of the causes of the accident, that "the defendants so carelessly and negligently permitted the said Whitney . . . to remove and excavate limerock from the walls of said quarry and from other parts thereof and carelessly and negligently permit said Whitney to quarry and blast the rock in said quarry so as to render the walls on the westerly side thereof unsafe for said Boardman to work them." The dangerous conditions complained of are thus alleged to have been created by the operations under Whitney after he took possession of the quarry.

The declaration further alleges, however, that "it then and there became the legal duty of the defendants, while said Boardman was at work for said Whitney in said quarry, to see that the walls and bluffs of said quarry were examined from time to time in order to ascertain if any loose rock was likely to fall upon him the said Boardman." But as fully shown in the opinion of the court in this case in 93 Maine, 17, such a general allegation of duty is simply a statement of a conclusion of law, whereas by the settled rules of pleading the facts from which the duty arises "must be spread upon the record so that the court can see that the duty is

made out." The rule is also clearly stated in *Clyne* v. *Helmes*, 61 N. J. 358, as follows: "In an action of tort to recover damages for personal injuries an allegation of duty is insufficient. The facts and circumstances from which the duty arises must be set out in the declaration, and the sufficiency of the pleading must be determined from the facts from which the duty is deduced."

It is, also, alleged in the declaration to be the duty of the defendants, as owners of the quarry, "to provide suitable tools, machinery and other appliances for the carrying on of said work, as well as a safe and suitable place for all persons, lawfully at work therein." Here, again, there is no statement of any special facts or circumstances from which such a duty could arise; but throughout the declaration all duties alleged to be resting on the defendants are made to depend on the general averment that the quarry was owned by the defendants and operated by the contractor.

It is suggested in behalf of the plaintiff, however, that the defendants are expressly charged with negligence in not providing suitable appliances for the purpose of ascertaining the condition of the quarry, and in permitting the contractor to blast the rock so as to render the walls of the quarry unsafe. But actionable negligence arises from neglect to perform a legal duty. If there was no duty resting on the defendants to furnish such appliances, they are obviously not chargeable with negligence for an omission to provide them. So, if the defendants had no duty to perform in the management or supervision of the contractor's operations in the quarry, and no right to exercise any control over them, they are not chargeable with negligence for omitting to interfere with the rights of the contractor, or for permitting him to perform his work in his own way.

If, therefore, the simple fact that the defendants owned the quarry in question and permitted Whitney to operate it under a contract to furnish limerock by the cask, rendered them liable for an injury to a servant of the contractor resulting from operations entirely under his control, the plaintiff's declaration must be deemed sufficient. Otherwise it sets out no cause of action against the defendants.

It should be further noted, that it is nowhere suggested in the declaration that the work which the contractor had undertaken to perform was in any respect unlawful, or if properly conducted, that it would necessarily result in the injury complained of. On the contrary, it appears to be claimed by clear implication that it was the contractor's careless method of operating the quarry that caused the injury. And it has already been seen that there is no allegation that the quarry was a nuisance per se, or was in a dangerous condition at the time the contractor took possession and entered upon his work.

It is accordingly the opinion of the court, that upon the material facts alleged in the declaration the defendants cannot be held liable either upon reason or authority. Upon the general averments in the declaration and in the absence of the particular allegations hereinbefore specified, the operations in the quarry from which the injury resulted must be deemed the work of an independent contractor, who represented the will of the owner only as to the result of his work and not as to the manner of conducting it, or the means by which the result is to be accomplished; and in such a case it is settled law that, as the contractor is not the agent or servant of his employer in relation to anything but the specific results which he undertakes to produce, the employer is not responsible for the contractor's negligence, either to his servants or to third persons. The rule is thus stated in Cooley on Torts, p. 646: "Where the contract is for something that may lawfully be done and is proper in its terms, and there has been no negligence in selecting a suitable person to contract with in respect to it, and no general control reserved either as respects the manner of doing the work or the agents to be employed in doing it, and the person for whom the work is to be done is interested only in the ultimate result of the work, and not in the several steps as it progresses, the latter is neither liable to third persons for the negligence of the contractor as his master, nor is he master of the persons employed by the contractor so as to be responsible to third persons for their negligence." When the work contracted to be done is in itself lawful, the presumption is that it is to be performed in a lawful

manner; and unless the relation of master and servant exists, the employer is not responsible for the negligent or tortious acts of the contractor. *Eaton* v. *Europ. & No. Am. Ry. Co.*, 59 Maine, 520; *Tibbetts* v. *K. & L. R. R. Co.*, 62 Maine, 437; *McCarthy* v. *Sec. Par. of Portland*, 71 Maine, 318. So, in *Burbank* v. *Bethel Steam Mill Co.*, 75 Maine, 373, an action to recover for property destroyed by the use of a stationary steam engine, it was held that if the engine was in the use of a third person under a contract with the defendants, by which he had the exclusive control of it, and it was not in fact a nuisance when delivered to such person but became a nuisance by his neglect to keep it in proper repair, or if the damage was caused by his negligence, the defendants would not be liable. Again, in *Leavitt* v. *Bangor & A. R. R. Co.*, 89 Maine, 509, it is declared to be settled law in this state that an employer is not liable for the negligent acts of a contractor or his servants, where the contractor carries on an independent business and in doing the work does not act under the direction and control of his employer but determines for himself in what manner it shall be carried on; and that such employment does not create the relation of master and servant. See also *Cuff* v. *Railroad Co.*, 35 N. J. L. 18; and *King* v. *Railroad Co.*, 66 N. J. 184.

In *Samuelson* v. *Cleveland Iron Min. Co.*, 49 Mich. 164, a case presenting some striking analogies to the case at bar, the court say in the opinion by Judge Cooley: "It is not shown that the roof was in a dangerous condition when possession of the mine was delivered under the contract. . . . . It remains to be seen, then, whether a personal duty to guard against dangers to the miners was still incumbent upon the defendant as owner of the mine, and was continuous while the mine was being worked by the contractors. Mere ownership of the mine can certainly impose no such duty. The owner may rent a mine, resigning all charge and control over it, and at the same time put off all responsibility for what may occur in it afterwards. If he transfers no nuisance with it, and provides for nothing by his lease which will expose others to danger, he will from that time have no more concern with the consequences to others than any third person. If instead of leas-

ing he puts contractors in possession, the result must be the same if there is nothing in the contract which is calculated to bring about danger." So, in *Burbank* v. *Steam Mill Co.*, 75 Maine, supra, the relation between the defendant and an independent contractor was deemed to be in effect that of lessor and lessee; and in *Whitmore* v. *Pulp Co.*, 91 Maine, 299, cases involving the relation between owners and independent contractors are cited in support of the conclusion that the owner of private property owes to a prospective lessee, or his servant, no duty to ascertain and apprise him of unknown defects in the property to be leased, where such prospective lessee has equal opportunity to ascertain the defects. In that case the court say: "It is not questioned that, under such circumstances, the lessor owes no more duty to the lessee's servants than he does to the lessee himself.

In the case at bar the declaration fails to state any facts to show that the defendants owed to the contractor any of the duties there specified. If not liable to the contractor, they are not liable to his servants or agents.

Exceptions sustained. Demurrer sustained.

FIDELITY AND CASUALTY CO. *vs.* SAMUEL W. CUTTS.

Kennebec. Opinion March 26, 1901.

Pleading. Negligence.

1. Actionable negligence may spring from the careless performance of a legal duty, or from a total neglect and disregard of such duty ; but it can never be consistently predicated of a purely accidental occurrence.

2. In the discussion of questions of liability for negligence, the term "pure accident" or "simple accident" is uniformly employed to indicate the absence of any legal liability.

3. It is alleged in the plaintiff's writ and argued by counsel that the plate glass for which the plaintiff sought to hold the defendant liable, was broken and destroyed by reason of the negligence of the defendant while engaged in making some repairs for the owners of the store. But the case comes to the court upon an agreed statement of facts, in which it is stipulated "that the breaking of said glass was purely accidental and not intentional."

4. *Held ;* that there is no specification of the facts and circumstances connected with the breaking of the glass, upon which the charge of negligence against the defendant is founded, and there is no evidence in the case tending to show negligence on the part of the defendant.

Agreed statement. Judgment for defendant.

Action on the case for negligence of the defendant in breaking a pane of plate glass in the store window of G. S. & G. L Rogers, city of Gardiner, who upon receiving the insurance on same assigned their claim to the plaintiff. The case was reported to the law court by the presiding justice of the Superior Court, for Kennebec County, upon an agreed statement.

O. B. Clason, for plaintiff.

A. M. Spear, for defendant.

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

WHITEHOUSE, J. The plaintiff company seeks to recover of the defendant the amount paid by it in discharge of its obligation under a policy of insurance on a large pane of plate glass in a store window in Gardiner. It is alleged in the plaintiff's writ, and argued by counsel that the glass was broken and destroyed by reason of the negligence of the defendant while engaged in making some repairs for the owners of the store. The case comes to this court, however, on the following agreed statement of facts:

"It is agreed that G. S. &. G. L. Rogers owned the glass insured in the plaintiff company.

"That the glass was insured for a premium fully paid, before the breaking, by said G. S. &. G. L. Rogers to said plaintiff company.

"That the breaking of said glass was purely accidental and not intentional.

"That the payment in full of the amount of insurance on said glass was made to G. S. & G. L. Rogers on the 22nd day of January, 1897.

"That on the 29th day of May, 1897, without any other consid-

eration than the insurance paid on January 22nd, as above stated, G. S. & G. L. Rogers executed the assignment attached to the writ.

"Upon the foregoing agreed statement of facts the court is to render such decision as the law and facts require."

It will be seen that this statement contains no specification whatever of any facts or circumstances connected with the breaking of the glass upon which the charge of negligence against the defendant is founded. It simply alleges that the breaking of the glass was "purely accidental and not intentional."

It may be inferred from this statement that, while the defendant was engaged in making the repairs in question, the relation of master and servant existed between him and the owners of the store. In that relation, it was the duty of the defendant to perform the service for his employers in a reasonably and ordinarily careful and prudent manner, giving such thoughtful attention to his work as the particular exigencies seemed to require. But, to render the defendant liable for negligence, it was incumbent upon the plaintiff to show that he either performed some act which ordinarily careful and prudent persons in the same relation would not have done, or omitted some duty which ordinarily prudent and careful persons would have performed under like circumstances.

But, in the discussion of questions of liability for negligence, the term "pure accident" or "simple accident" is uniformly employed, in contradistinction to "culpable negligence," to indicate the absence of any legal liability. A "purely accidental" occurrence may cause damage without legal fault on the part of any one. *Conway* v. v. *Horse Railroad Co.*, 90 Maine, 205. "Simple accidents have not yet been eliminated from the facts of human experience." *Conley* v. *American Express* Co., 87 Maine, 352. "Pure accidents will always continue among the inexplicable factors in the problem of life." *Cunningham* v. *The Bath Iron Works*, 92 Maine, 501. "If the plaintiff received an injury as the result of an accident solely, and the defendants were without fault, the action is not maintainable." *Nason* v. *West*, 78 Maine, 257.

Thus, actionable negligence may spring from the careless per-

formance of a legal duty, or from a total neglect and disregard of such duty; but it can never be consistently predicated of a "purely accidental" occurrence.

Upon the agreed statement of the parties, and in the entire absence of any evidence of negligence on the part of the defendant, the entry must be,

Judgment for the defendant.

LEVI MORRILL, In Equity, *vs.* JAMES L. LOVETT.

Cumberland. Opinion March 28, 1901.

Taxes. Assessment. Heirs and Devisees. R. S., c. 6, §§ 24, 27. Stat. 1826, c. 337, § 4.

Harriet J. Morrill, of Boston, the owner in her lifetime of the real estate in question, died in 1889. The real estate had been assessed to her up to the time of her death. Afterwards, in 1890 and 1891, the assessors continued to assess taxes on this real estate to Harriet J. Morrill as a non-resident owner. For non-payment of these taxes the property was sold at tax sale. The defendant is the grantee of the purchaser at the tax sale. The complainant is the devisee of Harriet J. Morrill.

Held; that the taxes assessed to Harriet J. Morrill after her death were utterly void, and that the tax sale and deed and the deed to the defendant constitute a cloud upon the title of the complainant.

Held; further, that, inasmuch as the taxes were entirely void, the owner was under no duty to pay them, and hence that there is no reason in equity for requiring the owner to reimburse the defendant, as a condition to having the cloud upon his title removed.

Held; that the complainant is entitled to a decree below by which the tax deeds and conveyances, under which the defendant claims, shall be declared to be null and void, and the defendant, and all persons claiming by, through or under him shall be perpetually enjoined from asserting any title under such deeds and conveyances, and from making any entry upon the real estate in question, and from in any manner disturbing the title or possession of the complainant.

On report.

Bill to remove cloud on title. Bill sustained.

Wm. M. Payson; F. C. Payson and H. R. Virgin, for plaintiff.

B. D. and H. M. Verrill, for defendant.

SITTING: WISWELL, C. J., WHITEHOUSE, STROUT, SAVAGE, FOGLER, JJ.

SAVAGE, J. Bill in equity to remove a cloud upon the title to certain real estate in that part of Portland which was formerly Deering. Harriet J. Morrill of Boston, Massachusetts, who died in 1889, was seized of the premises at the time of her death. The complainant is her devisee. In 1890 and 1891, the assessors of Deering assessed taxes on the real estate to Harriet J. Morrill, as a non-resident owner. At the tax sale for the non-payment of these taxes, the property was bid in on behalf of the city under the statute, R. S., chap. 6, § 203. Later, in 1894, Deering conveyed its interest in the premises to the defendant, for the amount of the taxes and interest.

Under the allegations of the bill, the only questions open for consideration are (1), whether the assessments to Harriet J. Morrill, then dead, were void; and (2), if so, whether the complainant is equitably bound to reimburse the defendant for the purchase price paid by him and interest, as a condition precedent to having the cloud removed from his title.

I. That a tax assessed to a dead person is void, as a general rule, is not controverted. But prior to her death, this real estate had been assessed to Harriet J. Morrill, and this being so, the defendant contends that the assessors might lawfully continue to assess the property to her, though dead, unless and until notice was given to them of a change in ownership or occupancy. And to support this contention, the defendant relies upon R. S., chap 6, § 27, which provides that, "When assessors continue to assess real estate to the person to whom it was last assessed, such assessment is valid, although the ownership or occupancy has changed, unless previous notice is given of such change and of the name of the person to whom it has been transferred or surrendered. . . . ." The complainant replies that this statute does not apply in cases where the change in ownership arises from the death of the owner, and the estate thereby passes to heirs or devisees. And here issue is joined.

It is unnecessary upon this point to consider the allegations that the death of Mrs. Morrill was "generally well known" in Deering and to "many or all of the officers thereof," or that specific notice was given to the assessors in the spring of 1891, because it is neither alleged nor shown that the assessors had notice of her death previous to the assessment of 1890. "Previous notice," that is, notice previous to the assessment, is the language of the statute. And if the assessment for 1890 was valid, the defendant has obtained a good title.

Under the provisions of the statute cited, can assessors lawfully continue to assess real estate to a former owner, after death? Is the change of ownership limited to transfers, voluntary or involuntary, by living persons, or by prescription, or does it include a change in ownership occasioned by the death of the owner? In answering these questions, it may be observed, in the first place, that the general policy of our legislation relating to taxation seems to be not only to create a lien upon real estate taxed to secure the payment of the tax, but to create a personal liability for the tax in the one to whom it has been assessed, to be enforced by arrest, distraint or suit at law. If the construction claimed by the defendant is correct, this statute is a departure from the general rule, for it is clear that the assessment of a tax to a dead person upon real estate formerly owned by him is purely in rem. We do not doubt, however, that the legislature has power to provide for the assessment of such a tax. The question here is simply whether it has done so.

Again, we shall be aided if we can ascertain the precise purpose of this statute. In the absence of statutory modifications, a tax assessed to one not the owner was void. The law encouraged the free and easy transfers of real estate. Title might, and frequently did, pass from one to another without any change in the indicia of ownership, and conveyances were valid without being recorded, so far as taxation was concerned. To compel the assessors to inquire into the existence of voluntary changes in ownership, at the peril of making void assessments, would be intolerable, and would afford one thus inclined too easy a method of avoiding the payment of a

tax. It was good policy, then, to declare an owner liable to taxation until he had given notice of a transfer. But the reasons for the statute which we have stated, if they exist at all in change of ownership by death, exist only to a slight degree. The distinction is marked. Transfers by living owners are private transactions, not necessarily known to any but the parties themselves. But death, particularly the death of a land proprietor, is ordinarily a matter of local notoriety, at least. And the cases are rare indeed, when the fact of such death, and consequent change of ownership, is not easily ascertainable, or is not, in fact, known by the assessors within the term of their service, and while they may still correct an assessment to a dead person by a supplemental one. *Rockland* v. *Ulmer*, 87 Maine, 357.

Again, provision is made elsewhere for the assessment of real estate which has belonged to a person now deceased. Recognizing the inconvenience, or perhaps impossibility, of ascertaining correctly and seasonably the names of heirs or devisees, the statute provides that the assessment may be made to the heirs or devisees, as the case may be, without designating any of them by name, until notice is given of a division and of the names of the several heirs or devisees. R. S., Chap. 6, § 24. This provision seems to be ample for the convenient and legal assessment of taxes when change of ownership is occasioned by death.

On general principles, the assessment of a tax against a dead man would seem to be something of an anomaly even in tax proceedings,—and, if authorized by statute, much more so. WALTON, J., in *Elliot* v. *Spinney*, 69 Maine, 31, said: "To allow real estate to be taxed to devisees when there are none, or to heirs, when in law and in fact there are none, would be to allow it to be taxed to nonentities, a result which we cannot believe the legislature intended." So, in like manner, an assessment of a tax to a dead man is assessing it to a *nonentity*. We do not think it is authorized. And if the reasons already given are not sufficient, further light can be had by an examination of the language of the statute itself. The assessors may continue to assess the real estate to the "person" to whom it was last assessed. The natural and obvious

signification of the word "person" in a statute is a living being. When the statutes speak of one who is dead, they speak of him as a "deceased person," or a "person deceased." Such is the appropriate definition of the word "person" in *Sawyer* v. *Mackie*, 149 Mass. 269, a case involving the same question which we are now considering. It is to be noted that the statute, in providing for notice of the change of ownership, requires also notice of the name of the person to whom the property had been "transferred or surrendered." We think these words imply a change of ownership by the act of the owner, or by a statute sale, rather than a change by death. An examination of the form in which this statute was first enacted, Public Laws 1826, chap, 337, § 4, also tends to confirm our conclusions in this respect. The language then used respecting the notice was, "unless previous to making the assessment, the owner or occupant to whom the same was assessed in the last preceding assessment, shall give to the assessors, or one of them, notice, stating the time when he ceased to be owner or occupant, of such estate, and the name of the person to whom the same was transferred or surrendered." By condensation, the form of the statute has since been changed, but not the meaning. And we think it clearly shows that the legislative mind contemplated a change in the lifetime of the owner, a notice to be given by the owner himself.

We are of opinion, therefore, that the operation of section 27 is limited to transfers made in the lifetime of the owner; while section 24 prescribes the rule in case of change of ownership by death. The two provisions together cover the whole ground.

Accordingly, it must be held that the assessments complained of were utterly void, and that the tax title under which the defendant claims constitutes a cloud upon the complainant's title.

II. Does equity require the complainant as a condition to relief, to reimburse the defendant to the amount of the taxes and interest paid by him? We think not. When a tax has once been assessed so as to create a lien upon the real estate, or make it the duty of the owner to pay the tax, and when by informality or error in procedure the lien has become lost, or the sale for the non-payment

was invalid, or the owner is not compellable by law to pay, there are the strongest equitable reasons why the owner should be held to pay the tax, or reimburse the one who did pay it, before he can have relief from the cloud created by a tax sale. Notwithstanding the informalities and irregularities in procedure, it is still the duty of the owner to pay the tax. It would be inequitable for him to escape payment, and "he who asks equity must do equity."

But that is not this case. These taxes were utterly void. They never had any effect. They never created any lien or raised any obligation to pay. A void tax is no tax. It is as if there never had been any attempt at assessment. The owner is under no duty either at law or in equity to pay it. Hence, there is no equitable reason for requiring the owner to pay such a tax before a cloud upon his title made by a tax sale shall be removed. In Cooley on Taxation (2nd Ed.) 183, the learned author says: — "It is proper, in vacating a tax, or a sale for taxes, as a cloud upon title to require the party to pay any sum that is either a legal or equitable charge against him, and which will be affected by the decree. If the tax were wholly illegal in its essentials, of course, no such requirement could be made, for no equity would support it." The reasoning of WALTON, J., in *Belfast Savings Bank* v. *Kennebec Land and Lumber Co.*, 73 Maine, 404, supports the same conclusion. See *Davis* v. *Boston*, 129 Mass. 377.

The complainant, therefore, is entitled to relief. By decree below, the tax deeds and conveyances, under which the defendant claims the real estate described in the bill, will be declared to be null and void; and the defendant and all persons claiming by, through or under him should be perpetually enjoined from asserting any title under such deeds and conveyances, and from making any entry upon such real estate, and from in any manner disturbing the title or possession of the complainant in and to such real estate.

Bill sustained with costs.
Decree in accordance with opinion.

UNION WATER POWER CO. *vs.* CITY OF LEWISTON.

Androscoggin. Opinion March 27, 1901.

Lease. Waters. Special Laws 1873, c. 386; 1875, c. 107.

To ascertain the rights of parties which depend upon the construction of a lease, the situation of the parties, the acts to be performed under it, and the time, place and manner of performance may be considered. The intention of the parties is to be ascertained by an examination of the whole instrument, and of its effect upon any proposed construction; and such a construction should be adopted as will carry that intention into effect, although a single clause alone considered would lead to a different construction.

Held; that the lease of the Franklin Company conveyed to the city of Lewiston the right to use six hundred horse-power for pumping and distributing water to its inhabitants; and that this right continues, although the city of Lewiston has elected to take its water from Wilson pond, and not, as formerly, from the Androscoggin river.

The negotiations leading up to the lease, the evident understanding of all parties at the time it was made, the large price paid by the city of Lewiston, most of which would be lost if plaintiff's claim should be sustained, and the evident purpose of the city to obtain a supply of water, either from the river or the pond, as it might elect, with power to pump it, lead irresistibly to this conclusion.

On report. Judgment for defendant.

Case for diverting water. The defense was, that whatever water was drawn, or diverted, was done by right and by authority of the Franklin Company, the plaintiff's predecessor in title, and by mutual agreement between the parties, by lease and other writings, for which it paid the sum of $200,000.

W. H. White and S. M. Carter; J. W. Symonds, D. W. Snow, C. S. Cook and C. L. Hutchinson, for plaintiff.

E. Foster and O. H. Hersey; J. L. Reade, for defendant.

J. B. Cotton, argued elaborately for plaintiff.

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

STROUT, J. The contention between these parties depends upon the construction of the following provision of a lease from the

Franklin Company, predecessors in title to the plaintiff, to the city of Lewiston, on November 5, 1887,—

"Now, therefore, in consideration of the premises and the sum of money hereinafter named, the said Franklin Company hath demised, let and leased, and doth hereby demise, let and lease, to said City of Lewiston and its successors, the right to take so much water every twenty-four (24) hours, for domestic, fire, mechanical, manufacturing, and other purposes, as six hundred (600) horse-power, at a head of twenty-five (25) feet, will pump from the Androscoggin River above the dam, near the Lincoln Mill, so-called, in said Lewiston, to a height of two hundred and twenty (220) feet twelve (12) hours in such twenty-four (24); said City of Lewiston and its successors to have the right to pump said above stipulated quantity of water during any part or all of the twenty-four (24) hours; and for the same consideration, the said Franklin Company hath demised, let and leased, and doth hereby demise, let and lease to said City of Lewiston and its successors, the right to take, in the alternative, said supply of water, for the purposes aforesaid, from Wilson Pond, in Auburn, in the said County of Androscoggin, provided said City of Lewiston, or its successors, shall, by due corporate act, so elect at any time hereafter; and provided, further, that the water so taken shall not exceed in quantity the measure above set forth, nor shall the rights herein conveyed exceed the extent of the present legal rights and privileges of said Franklin Company in the waters of said Wilson Pond; and provided, further, that, in so taking and using said water from Wilson Pond, said City of Lewiston and its successors shall not endanger the safety of any dams, gates, or works whatsoever of said Franklin Company, its successors or assigns, which are now erected and used in connection with the waters of said Wilson Pond, or which shall hereafter be so erected and used by them; and for the same consideration, the said Franklin Company hath demised, let and leased, and doth hereby demise, let and lease to said City of Lewiston, and its successors, as appurtenant to the said land conveyed as aforesaid by said Franklin Company to said City of Lewiston, the right, privilege and easement of drawing from said Androscoggin

River, above the dam, near the Lincoln Mill, so called, in said Lewiston, water to the extent of six hundred (600) horse-power for the purposes of pumping and distributing the water aforesaid from said river; provided, however, that for said six hundred (600) horse-power, the head shall not be less than twenty-five (25) feet, nor exceed thirty (30) feet.

"To have and to hold said water and water power, and the right, privilege and easement to draw and use the same, as above described, to said City of Lewiston and its successors so long as said City of Lewiston and its successors shall continue the use of the same for the purposes aforesaid. And said City of Lewiston covenants and agrees with said Franklin Company and its successors and assigns, in consideration of the premises, to pay said Franklin Company, its successors or assigns upon the execution and delivery of this Indenture, the sum of Two Hundred Thousand Dollars ($200,000)."

After taking water from the Androscoggin River for some years it was found to be so impure as to endanger health, and the city elected to take its supply from Wilson Pond, and has done so since January 20, 1900. The plaintiff claims that the grant of six hundred horse-power for pumping is confined to pumping water from the river, and that the right ceased when the city took its water from the pond. The defendant claims that the grant of power was absolute, and can be exercised by it whether the water pumped comes from the river or the pond. The city has acted upon its construction of the lease; hence this suit.

That the language of the lease is susceptible of either construction is apparent. The understanding and intention of the parties at the time the lease was executed, if not inconsistent with its express terms, must govern. To ascertain that, it is useful to look at the situation of the parties, the objects to be attained, and the acts and negotiations leading up to and culminating in the written contract. As was said by SHEPLEY, J., in *Merrill* v. *Gore*, 29 Maine, 348: "To ascertain the true construction of a written contract, the situation of the parties, the acts to be performed under it, and the time, place and manner of performance may be considered.

"The intention of the parties is to be ascertained by an examination of the whole instrument and of its effect upon any proposed construction, and such a construction should be adopted as will carry that intention into effect, although a single clause alone considered would lead to a different construction." *Snow* v. *Pressey*, 85 Maine, 417.

Prior to 1873, the city of Lewiston was considering the subject of a water supply for domestic use. In that year the Legislature, by c. 386 of the Special Laws, authorized Lewiston and Auburn to take water from Wilson Pond for "domestic purposes, extinguishing fires, and the supply of hotels, livery stables and laundries within said cities," but not "for the purpose of propelling machinery, nor for any manufacturing purposes." In 1875, c. 107 Special Laws, the act was amended by allowing either city to proceed alone, and permitting water to be taken from Wilson Pond "or the Androscoggin River."

In March, 1875, a special committee of the city council reported that they had had the water of Wilson Pond and of the Androscoggin River analyzed, and found but little difference in their purity. In April, 1875, acting under the act of 1873, as amended by the act of 1875, the city elected a board of water commissioners as provided in the act, who were directed to make investigation of the several systems of water supply. February 11, 1876, the Franklin Company, through B. E. Bates and others proposed in writing to the city that if it would give "$200,000 for the right to take from the Androscoggin river at the dam, whatever water she may want from time to time for domestic, fire, mechanical and manufacturing purposes, including the right to use 600 horse-power for the purpose of pumping and distributing the same, and of repairing the water works in case of need," "the corporation would buy the control of the lakes and employ it [the control] for the promotion of the general interests of your city," and expressed the belief that the Franklin Company would sell to the city for $100 the site of the saw mill "with sufficient land for a pumping station." March 7, following, William B. Wood presented to the city council a memorandum as the understanding of the Franklin Company of what

the city was to receive for $200,000. This memorandum described the land to be conveyed, and the water and power to be leased in the language of the lease subsequently made, except that it contained no provision for taking water from Wilson Pond. A meeting of the citizens was called for April 22, 1876, to vote upon the following questions:

"Shall the City Council be authorized to invest six per cent bonds of the city to the amount of two hundred thousand dollars, providing the manufacturing corporations of the city shall buy the control of the lakes at the headwaters of the Androscoggin River for the promotion of the general interests of the city, and shall also secure to the city the following rights:

1. "The right to take from the head of the dam or from Wilson Pond all the water wanted for domestic, fire, mechanical, manufacturing and other purposes, with 600 horse-power in addition for pumping, distributing and repairing purposes.

2. "The saw mill site near the dam with about forty thousand square feet of land and passage ways from Main Street on upper and lower levels with the right to lay pipes across the canals and land of the Franklin Company to Main Street."

The vote was in its favor and gave the city council full authority. This proposition upon which the citizens voted very clearly expressed the idea that the power for pumping was to be granted absolutely, whether the water used by the city was taken from the river or from Wilson Pond. In accordance therewith, on July 23, 1877, the city council authorized a water works loan. At the same time a memorandum of agreement was presented by the Franklin Company, which provided for taking water from the river only. To this agreement the city council made four amendments, the first two of which only are of importance here.

"1. The city shall have the right to take its supply of water from Wilson Pond, should it so elect in the future.

"2. The city shall have the right to pump its supply of water during any part or all the twenty-four hours."

These amendments clearly imply that the city council expected to have and use the pumping power without regard to the source of water supply, for the case shows that water from Wilson Pond could not be taken by gravity, but must be pumped.

The Franklin Company adopted these amendments, and on August 7, 1877, submitted a new memorandum of agreement, or the old one amended, to which was added "the right to take its supply of water from Wilson Pond, if it shall so elect in the future, not exceeding in quantity the measure thereof above set forth."

Then followed on November 5, 1877, a deed from the Franklin Company of the land for the city's works, and the lease in controversy, and a waiver by the other mills of their prior rights to water, giving the city the first and superior right.

This history of the case clearly shows that the citizens of Lewiston when they voted, and the city council in all it did, understood that the city was acquiring the right absolutely to the pumping power, to be exercised whether the water for the city's use was taken from the river or the pond. No objection appears to have been raised at that time to this view by the Franklin Company. On the contrary, the waiver of prior rights to the water by the Franklin Company, and the other mills on the river at Lewiston, executed concurrently with the lease, recites that the city had appropriated $200,000 "for the purchase of the Franklin Company of the old saw mill site, so-called, in Lewiston, for the location of the power, machinery and certain buildings necessary to the water works for said city, also six hundred horse power, and of so much water for domestic, fire and other purposes as said power will pump," etc. Nothing is said about taking water from the river, strongly indicating that, at that time, the Franklin Company did not entertain the idea that the pumping power was limited to taking water for consumption from the river only.

The only phrase in the lease which tends to sustain the construction claimed by plaintiff are the words "pumping and distributing the said water from the said river." These words were in the original draft, when the river only was thought of as the source of supply, and were retained in the final draft, probably from inadver-

tence, because contrary to the express understanding of Lewiston, and the plain implication of the understanding of the Franklin Company. To allow them to be of controlling force would be an illustration of the maxim "qui haerit in litera haerit in cortice."

The effect of adopting the construction claimed by the plaintiff may be looked at to aid in arriving at the intention of the parties in their contract. When the city ceased to take its water for consumption from the river, it left in the dam the quantity it had been entitled to take, to be utilized by the mills for power. The city uses no more power to pump the water from the pond than would be necessary to pump from the river. Plaintiff did not own the water of Wilson Pond. That was a great pond as defined by the Colonial Ordinance of 1641–'47, and was the property of the state, held in trust for its citizens. The state had the right to grant, and did grant to Lewiston, the right to take its water from the pond. The plaintiff was not entitled to damages for such taking. *Auburn* v. *Water Power Co.*, 90 Maine, 584; *Watuppa Reservoir Co.* v. *Fall River*, 147 Mass. 548.

According to plaintiff's contention the city received for its $200,000 the parcel of land which the Franklin Company offered to convey for $100, and the use of the water and the pumping power for the few years it took its water from the river; but since it changed its source of supply, it has lost the pumping power, and takes nothing from the plaintiff which it owned, or had a right to convey. The city expected a perpetual right, and the Franklin Company expected to grant it. The result claimed by plaintiff could not have been in contemplation of either party, when the lease was executed. If it had been supposed that such result would follow the exercise of the right by the city to go to Wilson Pond, it is inconceivable that the city would have paid this large amount, or that the Franklin Company would have asked it. Consequences like these should be avoided, if the contract can fairly be construed to accomplish it. A single phrase, not in harmony with the spirit of the contract and the object to be attained by it, should not be allowed to produce this effect.

Great stress is laid by the counsel upon the convenience of the

plaintiff in taking water from the pond, its outlet being into the Androscoggin river, on account of its proximity to Lewiston, in case of shortage of water. But this convenience must yield to the necessity of pure water for domestic uses, where the legislature deems such necessity to exist. *Auburn* v. *Water Power Co.*, supra.

But the argument of convenience has little force when the facts are considered. The supply of water to Wilson Pond is fifteen million gallons daily. Lewiston can consume not over one million gallons daily, probably much less than that—less than one-fifteenth of the supply. All the remainder is subject to plaintiff's use for manufacturing purposes. The quantity taken by Lewiston is comparatively so small that its withdrawal from the pond cannot perceptibly lessen the size of the stream at its outlet. An equal quantity is left in the river for plaintiff's use, which otherwise would be withdrawn.

To effectuate the intentions of the parties, the contract should be read as "pumping and distributing the said water from the said river or from Wilson Pond." Such transposition of the words of the lease will effectuate the evident intention of both parties, at the time the lease was executed, and is in harmony with the general scope, spirit and purpose of the lease. An opposite construction would defeat the object for which Lewiston paid $200,000, and allow an unconscionable advantage to the plaintiff.

It is unnecessary to invoke the rule, sometimes, though rarely, applied, that where the language of a grant is susceptible of two constructions, that should be adopted which is most favorable to the grantee. *Richardson* v. *Palmer*, 38 N. H. 218; *Worthington* v. *Hylyer*, 4 Mass. 205.

We think the true construction of the lease, taking it altogether, and viewing it in the light of the surrounding circumstances, and the objects to be attained, is, that the Franklin Company granted to the city of Lewiston during the continuance of the lease, the absolute right to use six hundred horse-power for pumping and distributing water in the city, and that the city may take such water from the Androscoggin river, or from Wilson Pond, at its option.

Judgment for defendant.

STATE *vs.* EUGENE W. WHITEHOUSE.

Kennebec. Opinion March 29, 1901.

Pleading. Embezzlement. Larceny. Guardian. 14th Amend. U. S. Const. R. S., c. 67, § 31; c. 120, § 7. Stat. 1893, c. 241.

Chapter 241, Public Laws 1893: "Whoever embezzles, or fraudulently converts to his own use, or secretes with intent to embezzle or fraudulently convert to his own use, money, goods, or property delivered to him, or any part thereof, which may be the subject of larceny, shall be deemed guilty of larceny," does not apply to the case of a guardian who, in violation of his trust, embezzles the property of his ward, of which he has the charge and custody by reason of his guardianship, the penalty for which is fixed by R. S., c. 67, § 31.

In an indictment under that act it is neither necessary nor proper, therefore, for either count in the same to contain any words charging the commission of the crime of larceny, because the crime is not larceny. The fourth count contains no such words, and the allegations in the first count charging larceny may be rejected as surplusage.

Held; that in all other respects the first and fourth counts in the indictment are sufficient; they contain all the necessary averments, stated with sufficient particularity and certainty, to apprise the defendant of the crime with which he was charged, and to enable the court to see, without going out of the record, what crime had been committed, if the facts alleged are true.

Also, held; that it is not necessary for either count to contain an averment that the defendant was "not an apprentice nor less than sixteen years of age." This exception only applies in cases where the indictment is against an officer, agent, clerk, or servant of a person, copartnership or corporation, under R. S., c. 120, § 7.

The allegations of the fourth count that the defendant was a guardian, that while he was guardian and by virtue of his guardianship he had the charge and custody of the property of his ward, which, in violation of his trust, he embezzled and converted to his own use, are sufficient. And the first count, which contains more full and particular averments in relation to the defendant's appointment, acceptance and qualification, is not injured thereby, although these averments were unnecessary.

It is no defense to the indictment that the statute, upon which the first and fourth counts are based, is in violation of the last clause of the Fourteenth Amendment to the Federal Constitution: "Nor shall any state . . . . deny to any person within its jurisdiction the equal protection of the laws,"

on the ground that it imposes a special punishment for a class of offenders, e. g. guardians who embezzle the property of their wards. The statute operates alike upon all persons who commit this offense, and is in no way repugnant to the Fourteenth Amendment to the Federal Constitution.

Exceptions by defendant. Overruled.

Indictment found in the Superior Court for Kennebec County, charging the defendant as a guardian with embezzling the funds of his ward's estate. The defendant filed a general demurrer which was overruled by the court, and he was allowed exceptions.

First count.—The jurors for said State upon their oath present, that Eugene W. Whitehouse of Augusta, in said county of Kennebec, on the fourteenth day of December, in the year of our Lord one thousand eight hundred and ninety-one, at Augusta, in said county of Kennebec, was duly appointed by the judge of probate for said county of Kennebec, guardian of and to Charles A. Prescott, a minor under the age of twenty-one years, then and there being and having estate in said county of Kennebec and residing in the Commonwealth of Massachusetts, and then and there accepted said trust and office, and was then and there duly qualified as guardian of and to said Charles A. Prescott, and afterwards, on the fourth day of February in the year of our Lord one thousand eight hundred and ninety-two, at said Augusta, whilst he, the said Eugene W. Whitehouse, was guardian as aforesaid and in his said capacity of guardian of and to the said Charles A. Prescott, did receive into his charge and custody certain money to the amount and of the value of two thousand one hundred and thirty-one dollars and eighty cents of the money and property of and belonging to the said Charles A. Prescott, a more particular description whereof is to your said jurors unknown, and afterwards, on the thirtieth day of September in the year of our Lord one thousand eight hundred and ninety-five, at said Augusta, being then and there, on the day last aforesaid, the guardian of the said Charles A. Prescott, as aforesaid, and in his said capacity of guardian, as aforesaid, having the charge and custody of the aforesaid money, then and there, on the day last aforesaid, the property and money of and belonging to the said Charles A. Prescott, his said ward, in violation of his said trust,

did unlawfully embezzle and fraudulently convert to his own use the said money, whereby and by force of the statute in such cases made and provided the said Eugene W. Whitehouse is deemed to have committed the crime of larceny.

Fourth Count.— And the jurors for said State, upon their oath, do further present that the said Eugene W. Whitehouse, on the thirtieth day of September in the year of our Lord one thousand eight hundred and ninety-five, at said Augusta, then and there being the guardian lawfully appointed by the judge of probate for said county of Kennebec to and of Charles A. Prescott, a minor under the age of twenty-one years then and there being, did whilst he was guardian as aforesaid and by virtue of his said guardianship have the charge and custody of certain money to the amount and of the value of two thousand one hundred and thirty-one dollars and eighty cents of the money and property of and belonging to the said Charles A. Prescott, and then and there the money aforesaid, in violation of his said trust, did unlawfully embezzle and fraudulently convert to his own use, against the peace of the State and contrary to the form of the statute in such case made and provided.

E. W. Whitehouse, for defendant.

G. W. Heselton, county attorney for state.

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

WISWELL, C. J. The defendant filed a general demurrer to an indictment against him containing ten counts, and, upon the same being overruled by the court below, brings the case to the law court upon exceptions to such ruling.

The prosecuting attorney concedes that the second, third and last six counts are insufficient, thus leaving the first and fourth counts only for consideration. These counts are both under R. S., c. 67, § 31, as follows: "If a guardian, having the charge and custody of property belonging to his ward, embezzles the same in violation of his trust, or fraudulently converts it to his own use, he

shall be punished by fine not exceeding five thousand dollars, or confinement to hard labor not exceeding ten years, or both."

Chapter 241, Public Laws 1893, is as follows: "Whoever embezzles, or fraudulently converts to his own use, or secretes with intent to embezzle or fraudulently convert to his own use, money, goods, or property delivered to him, or any part thereof, which may be the subject of larceny, shall be deemed guilty of larceny."

Both of these counts allege that upon a day and at a place named, the defendant was the guardian of a certain minor, that in such capacity he had the charge and custody of a certain amount of money belonging to his ward, and that upon the day and at the place named, in violation of his trust as such guardian, he embezzled and fraudulently converted the same to his own use. The first count differs from the fourth in alleging with more particularity and detail the appointment of the defendant as guardian, his acceptance of the trust and qualification therefor. The first count also contains this averment, "whereby and by force of the statute in such cases made and provided the said Eugene W. Whitehouse is deemed to have committed the crime of larceny." The count concludes as follows: "And so the jurors aforesaid, upon their oath aforesaid, do say and present that the said Eugene W. Whitehouse, then and there on the day last aforesaid, in manner and form aforesaid, the said money of the property of and belonging to the said Charles A. Prescott, feloniously did steal, take and carry away, against the peace of the state and contrary to the form of the statute in such case made and provided." The fourth count does not contain any allegation charging the defendant with the commission of the crime of larceny.

The first question to be decided is, as to whether the Act of 1893, above quoted, applies to the case of a guardian who, in violation of his trust, embezzles the property of his ward, of which he has the charge and custody by reason of his guardianship. Because, if it does apply, and the offense is thereby made larceny, the fourth count is insufficient, insomuch as it contains no words charging the commission of larceny. *Commonwealth* v. *Pratt*, 132 Mass. 246; *State* v. *Stevenson*, 91 Maine, 107.

The question is not free from difficulty. But we do not think that it was the intention of the legislature to make this act applicable to the case of embezzlement by a guardian, for which a special statute had long before been enacted. At the time of the passage of the Act of 1893, there was already a statute, R. S., c. 120, § 7, making embezzlement under certain circumstances, larceny. By that statute it is provided that an officer, agent, clerk or servant of a person, copartnership or corporation who embezzles any property of another in his possession or under his care by virtue of his employment; or that a public officer, collector of taxes, or an agent, clerk or servant of such public officer who embezzles any money in his possession or under his control by virtue of his office or employment by such officer, shall be guilty of larceny and shall be punished accordingly.

This statute obviously does not apply to many cases that might arise where money or other property had been intrusted to a person upon some trust and confidence, and was embezzled and fraudulently converted by him to his own use, and where such person could not be convicted of larceny because the felonious taking would be wanting. We think that the purpose of the Act of 1893 was to obviate this defect and to make embezzlement by others than those already enumerated in R. S., c. 120, § 7, larceny by additional legislation, rather than to change any existing statute. Under the statute, relating to embezzlement by a guardian, the punishment differs in important respects from that provided by statute for larceny. We, therefore, do not believe that it could have been the intention of the legislature that the Act of 1893 should affect the previous statute, without making some reference to it.

This act is almost identical with one passed in Massachusetts in 1857 which has been in force ever since. Shortly after its passage in the latter state it received judicial construction in the case of *Commonwealth* v. *Hays*, 14 Gray, 62, in which case the court referred to the case of *Commonwealth* v. *Williams*, 3 Gray, 461, in which it was decided that a person, who had converted to his own use money which had been delivered to him by another for safe keeping, was not guilty of embezzlement under the statutes exist-

ing prior to the passage of the statute of 1857, and said: "The statute of 1857, c. 233, was probably enacted to supply the defect which was shown to exist in the criminal law by this decision, and was intended to embrace cases where property had been designedly delivered to a person as a bailee or keeper, and had been fraudulently converted by him." In adopting this statute from Massachusetts our legislature must have intended that it should receive the construction placed upon it by the court of that state.

It was neither necessary nor proper, therefore, for either count to contain any words charging the commission of the crime of larceny, because the crime is not larceny. The fourth count, as we have already seen, contains no such words, and these allegations in the first count charging larceny may be rejected as surplusage. Surplusage is any allegation without which the pleading would be adequate in law. In general, unnecessary averments in an indictment may be treated as mere waste material, to pass unnoticed, having no legal effect whatever. I Bishop on Criminal Procedure, § 478.

In all other respects both counts are sufficient, they contain all the necessary averments, stated with sufficient particularity and certainty, to apprise the defendant of the crime with which he was charged, and to enable the court to see, without going out of the record, what crime had been committed, if the facts alleged are true.

It was not necessary, as urged by the defendant, for either count to contain an averment that the defendant was "not an apprentice nor less than sixteen years of age." This exception only applies in cases where the indictment is against an officer, agent, clerk or servant of a person, copartnership or corporation, under R. S., c. 120, § 7. *State* v. *Walton*, 62 Maine, 107. Nor was it necessary that either count should contain the more full and particular averments of the first count in relation to the defendant's appointment, acceptance and qualification. The allegations of the fourth count that the defendant was guardian, that while he was guardian and by virtue of his guardianship he had the charge and custody of the property of his ward which, in violation of his trust, he embezzled

and converted to his own use, are sufficient. *State* v. *Goss*, 69 Maine, 22. But the first count is not injured by these averments, although they were unnecessary.

Again, it is urged by the defendant that the statute, upon which these counts are based, is in violation of the last clause of the Fourteenth Amendment to the Federal Constitution: "Nor shall any state deny to any person within its jurisdiction the equal protection of the laws," inasmuch as it imposes a special punishment for a class of offenders, that is, guardians who embezzle the property of their wards. There is no merit to this contention and the defendant's objection, upon this account, would be as applicable to nearly every penal statute. This clause, "merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." *Marchant* v. *Penn. R. R. Co.*, 153 U. S. 380. "Whenever the law operates alike upon all persons and property, similarly situated, equal protection can not be said to be denied." *Walston* v. *Nevin*, 128 U. S. 578. This statute operates alike upon all persons who commit this offense, and is in no way repugnant to the Fourteenth Amendment to the Federal Constitution.

As the first and fourth counts in the indictment are considered sufficient in all respects, the defendant's exceptions must be overruled, but as he reserved and was given the right to plead over, the judgment will not be final.

Exceptions overruled.
Defendant to be allowed to plead over.

RUMFORD FALLS POWER COMPANY,

vs.

RUMFORD FALLS PAPER COMPANY.

Cumberland. Opinion March 29, 1901.

Action. Assumpsit. Covenant. Evidence. Damages.

By an indenture between the plaintiff and the defendant, the former conveyed to the latter the perpetual right to take from one of the plaintiff's canals, and use, subject to the conditions named in the indenture, a definite quantity of water per second at an agreed head and fall, during certain days and hours, for the use of which the defendant covenanted to pay a fixed yearly rental. The indenture contained a covenant upon the part of grantee, "that the grantee shall not use at any time more water than is herein granted, or than it is entitled to use according to the terms hereof; and another covenant in which was the following provision, "neither the grantee, its successors or assigns, shall be subject to any damages by reason of any default herein, except from and after written notice of such default from the grantor, its successors or assigns, or from any persons or corporations injured."

In an action of assumpsit to recover compensation for an amount of water claimed to have been taken and used by the defendant in excess of the water specified in the indenture, *held;* that if water was taken and used by the defendant in excess of the quantity that it had a right to use, with the consent of the plaintiff, and under such circumstances as to raise an implied promise upon the part of the defendant to pay what the use of the water was fairly worth, then the action of assumpsit is proper and the only form of action, except that of debt, maintainable. And that this is precisely what was claimed by the plaintiff at the trial as shown by the instruction of the presiding justice to the jury.

Also; that the fact that the plaintiff had conveyed to the defendant the right to take and use a precisely defined quantity of water, did not prevent the parties from subsequently making a new and independent contract as to other water, the use of which had not been conveyed. Such independent subsequent contract might be written or oral, express or implied. Nor was it necessary, before such new and independent contract could be made, in relation to the use of the water remaining undisposed of, that the prior indenture should be in any way modified or rescinded by the parties.

The plaintiff introduced in evidence, subject to the defendant's objection and exception, certain bills rendered from time to time by the plaintiff to the defendant, containing charges for the water claimed to have been used by the

defendant in excess of the amount specified in the indenture. *Held;* that for the purpose of proving the implied contract relied upon by the plaintiff, they were admissible in evidence as having some tendency, in connection with other facts and circumstances, to prove such a contract.

Upon the plaintiff's motion for a new trial upon the ground that the verdict was contrary to the evidence, in that the amount of damages awarded by the jury was too small, the court is not satisfied that the amount of the verdict was so manifestly inadequate as to justify its disturbance.

On motion by plaintiff and exceptions by defendant. Overruled.

Assumpsit on account annexed and the common counts, for use of excess water by the defendant in its mill at Rumford Falls.

The case appears in the opinion.

J. W. Symonds, D. W. Snow, C. S. Cook and C. L. Hutchinson; *H. B. Cleaves*; *G. D. Bisbee*, for plaintiff.

W. H. Clifford, E. C. Verrill, and N. Clifford; Benj. Thompson, for defendant.

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

WISWELL, C. J. This case presents the somewhat novel situation of both parties desiring that the verdict should be set aside, the one upon exceptions, and the other upon a motion based upon the ground that the verdict was against the evidence, while each resists the contention of the other.

Defendant's exceptions. At the time of the execution of the indenture hereinafter referred to, the plaintiff was the owner of land upon both sides of the Androscoggin river at Rumford falls and had erected dams and had built canals for the accumulation of the water of the river for the production of power, and for the purpose of conveying the water to the various manufacturing plants that had been or that might be erected. It also owned a tract of land available for the erection of such manufacturing establishments.

By an indenture dated August 1, 1892, between the plaintiff and the defendant, the former conveyed to the latter the land upon

which its mill has been erected, and also the perpetual right to take from one of the plaintiff's canals and use, subject to the conditions named in the indenture, a definite quantity of water per second at an agreed head and fall, during certain days and hours, for the use of which the grantee covenanted to pay a fixed rental, payable quarterly. The indenture contained a covenant upon the part of the grantee, "that the grantee shall not use at any time more water than is herein granted, or than it is entitled to use according to the terms hereof." And also another covenant as follows: "The grantee agrees with the grantor that the grantee, its successors and assigns, will promptly do, perform and abide by all the things stipulated for, or contemplated to be done, or omitted by the grantee, its successors or assigns, subject nevertheless to the provision that neither the grantee its successors or assigns, shall be subject to any damages by reason of any default herein, except from and after written notice of such default from the grantor, its successors or assigns, or from other persons or corporations injured."

This action is assumpsit upon an account annexed to the writ, wherein the plaintiff seeks to recover compensation for an amount of water taken, and used by the defendant, in excess of the water specified in the indenture. The defendant contends that the plaintiff has misconceived its remedy, that if the defendant had taken and used water in excess of the amount specified in the indenture, it would be liable in damages for a breach of its covenant, but only "from and after written notice of such default from the grantor," in accordance with the terms of the covenants above quoted. Counsel for defendant, in accordance with this contention, requested the court to rule that the action could not be maintained in this form, and excepts to the refusal to so rule, and also to an instruction to the jury, stated as follows in the bill of exceptions: "In the charge to the jury, the court, after stating the elements from which an implied contract may exist, instructed that if, from the evidence before them, they found an implied contract to have existed between the plaintiff and defendant to the effect that defendant was to pay plaintiff a fair price for what, if

any, excess water it used of the plaintiff, then this action could be maintained, and that plaintiff would be entitled to recover what such excess water so used was fairly and reasonably worth."

The position of defendant's counsel would undoubtedly be correct if the action was based upon the indenture or the covenants therein contained. But the fact that the plaintiff had conveyed to the defendant the right to take and use a precisely defined quantity of water, did not prevent the parties from subsequently making a new contract as to other water the right to use which had not been conveyed. Such independent subsequent contract might be written or oral, express or implied.

If water was taken and used by the defendant in excess of the quantity that it had a right to use, with the consent of the plaintiff, and under such circumstances as to raise an implied promise upon the part of the defendant to pay what the use of the water was fairly worth, then the action of assumpsit is proper and the only form of action, except that of debt, maintainable. This is precisely what was claimed by the plaintiff at the trial, as shown by the instruction of the presiding justice to the jury above quoted. And this question of whether or not there was an implied promise upon the part of the defendant to pay for this water in excess was one of the questions submitted to the jury, and decided in favor of the plaintiff.

It is urged that the familiar principle that the law does not imply a contract where an express one has been made, is applicable to this case because of the provisions of the indenture. We do not think so. The indenture conveyed the right to use a definite amount of water; it contained no provision as to the use of the remaining water, except the covenant of the grantee that it would not take more water than the amount specified. But this covenant did not prevent the making of a subsequent contract in relation to the water the use of which had not been disposed of. The plaintiff, having conveyed the right to use a portion of the water running in its canal, and having retained the use of the remaining water, might sell, or make a contract in relation to the use of the remaining water with the defendant or with any one desiring to use

it for the production of power. And in the absence of an express contract in relation thereto, an implied contract might be found to exist from the circumstances attending its use. Nor was it necessary, before such new and independent contract could be made, in relation to the use of the water remaining undisposed of, that the prior indenture should be in any way modified or rescinded by the parties.

We are not asked by the defendant to set aside the verdict upon the ground that the evidence did not show an implied promise of the defendant to pay for the water taken and used by it. In fact, the evidence is not made a part of the exceptions, and the defendant resists the plaintiff's motion to set aside the verdict because of the inadequacy of the amount found by the jury to be due the plaintiff. The refusal, therefore, of the presiding justice to rule that the action was not maintainable, and his instructions to the jury relative to an implied contract, were proper.

Exception was also taken to the introduction in evidence, subject to the defendant's objection, of "certain bills from time to time rendered by plaintiff to defendant, containing among other items, items of excess water alleged to have been used by the defendant before the presentation of said account." It is urged that these were not such notices as are required by the covenant above quoted, and that they were not evidence of any implied contract. These bills were not offered as notices under the covenant contained in the indenture. We have already seen that the action was not based upon the covenant, but upon the implied promise claimed to have been made subsequent to the indenture. For the purpose of proving such an implied contract they were certainly admissible as having some tendency, in connection with the evidence of other facts and circumstances, to prove such a contract. The exceptions must consequently be overruled.

Plaintiff's motion. The items sued in the plaintiff's writ, consisting almost entirely of charges for the use of water in excess of that specified in the indenture, amounted in the aggregate to the sum of $42,437.12, exclusive of interest. After a long hearing

before an auditor, continuing for twenty-two days he allowed the plaintiff the sum of $18,302.84, exclusive of interest. The verdict was for $14,111.20. The plaintiff's counsel now argue that this amount was manifestly inadequate, relying mainly upon the claim that the plaintiff's testimony proved conclusively that the defendant had used the amount of water sued for, in excess of the amount that it had the right to use by virtue of the grant to it, subject at most to the possibility of very slight variation in the accuracy of the measurements.

But, even if this were conceded, the quantity of the water used was not the only question involved. Quite as important a question was as to what would be a fair and reasonable compensation for the amount of water used. The rental, fixed by the indenture for the use of the water sold, does not necessarily determine what would be a fair compensation for the use of more water from the same canal. The plaintiff having granted to the defendant the use of a definite quantity of water for a rental of $20,000 per annum, it is quite conceivable that a fair price for the use of water in addition to the amount specified, taken from the same canal, would be a much lower proportional rate. This would depend upon the demand for the additional water during the period that it was taken and used, as well as upon other circumstances and conditions.

Besides, the jury could only give compensation in this form of action for the use of so much water as was found to have been taken under circumstances from which a promise to pay therefor might be implied. These questions were pure questions of fact and peculiarly within the province of the jury to decide. The evidence does not satisfy us that the verdict should be disturbed.

Defendant's exceptions and plaintiff's motion overruled. Judgment on the verdict.

EDWIN C. BURLEIGH

vs.

ABIGAIL A. PRENTISS, and others, Trustees.

Penobscot. Opinion March 30, 1901.

Practice. Real Action. Death. Abatement. R. S., c. 104, § 16.

The motion of a plaintiff in a real action, under R. S., c. 104, § 16, for the court to order notice upon the children of one of several defendants who had died after the entry of the action in court, can not be granted, if it appears from the plaintiff's allegations and formal admissions upon the hearing of the motion, that the defendants were sued as trustees and that the deceased defendant had no interest whatever in the demanded premises, except for her life. Under such circumstances there is no one interested in her estate, no one claiming under her any interest in the demanded premises, who should be summoned in to enable the court to try and determine the action.

On report. Motion by plaintiff overruled.

Real action against defendants as trustees under the will of Henry E. Prentiss.

Abigail A. Prentiss one of the defendants having died since the action was entered in court, leaving her four children, viz: Henry M. Prentiss, Samuel R. Prentiss, the remaining defendants in said action and Abbie P. Godfrey of Bangor, Maine, and Mary F. Kay of Brookline, Mass., the only parties interested in her estate and in the premises described in the writ, plaintiff moved the court to order such notice to said parties as may be necessary as required by statute, in such case made and provided, in order to enable the court and the plaintiff to proceed to try and determine said action.

The motion being objected to, it was agreed to submit to the full court the following questions:

1. "Whether the motion is legally sustainable and whether or not the parties, named as the parties interested, may be summoned, in order to enable the court and plaintiff to proceed to try and determine said action.

2. "If the motion is not sustainable, can the action be main-

tained and prosecuted against the two surviving trustees so as to determine the question of title existing between the parties, including the four children of said Henry E. Prentiss and wife?

3. "If the motion is legally sustainable, and the parties interested are accordingly summoned, can or not the case be prosecuted to final judgment against the parties thus interested so as to bind them in their individual capacity?

4. "The question of costs under the different contingencies of the case is respectfully submitted."

J. Williamson, Jr., and L. A. Burleigh, for plaintiff.

C. F. Woodard and M. S. Clifford, for defendants.

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

WISWELL, C. J. This is a real action in which the defendants are named and described in the writ as follows: "Mrs. Abigail A. Prentiss, Henry M. Prentiss and Samuel R. Prentiss, trustees under the will of the late Henry E. Prentiss, late of Bangor, deceased." After the entry of the action in court, Abigail E. Prentiss, one of the defendants, died, whereupon her death was suggested to the court and noted upon the docket.

At the January term of the court where the action was pending, the plaintiff by his attorney filed this motion: "In the above entitled action Mrs. Abigail A. Prentiss one of the defendants, having died since the action was entered in court, leaving her four children, viz: Henry M. Prentiss, Samuel R. Prentiss, the remaining defendants in said action, and Abbie P. Godfrey of Bangor, Maine, and Mary F. Kay of Brookline, Massachusetts, the only parties interested in her estate and in the premises described in the writ, plaintiff moves the court to order such notice to said parties as may be necessary as required by statute, in such case made and provided, in order to enable the court and the plaintiff to proceed to try and determine said action."

Objection being made to the granting of this motion, the parties have by an agreed statement of facts submitted to the law court

the question as to whether or not it should be granted, and also these two questions: "If the motion is not sustainable, can the action be maintained and prosecuted against the two surviving trustees so as to determine the question of title existing between the parties, including the four children of said Henry E. Prentiss and wife?" "If the motion is legally sustainable and the parties interested are accordingly summoned, can or not the case be prosecuted to final judgment against the parties thus interested so as to bind them in their individual capacity?"

Henry E. Prentiss, under whose will the defendants claimed title to the demanded premises, as trustees, and under which the persons sought to be summoned in are devisees of a remainder, died testate in 1873. By his will he devised the bulk of his property, including the demanded premises, if he owned them, to the defendants named in the writ, to hold in trust for various purposes, the trust to terminate upon the death of Mrs. Prentiss, his widow, if she should live beyond the first day of January 1890. At the termination of the trust created by the will, the testator devised to his four children, the persons now sought to be summoned in, "all of said property so held in trust after all of said trusts have been provided for."

The plaintiff contends that the motion should be granted in accordance with the provisions of R. S., c. 104, § 16, as follows: "No real action shall be abated by the death or intermarriage of either party after its entry in court; but the court shall proceed to try and determine such action, after such notice as the court orders has been served upon all interested in his estate, personally, or by publication in some newspaper."

We do not think that the section is applicable to the state of facts here existing. At common law, upon the death of either party the action abated; to avoid this result the legislature enacted the statute which is now in the form above quoted, but the object of this legislation was to prevent the abatement of a real action by summoning in, in the event of the death of one of the parties, "all interested in his estate." Here, the persons sought to be summoned in are not interested in the estate of Mrs. Prentiss, so far as

the demanded premises are concerned, because it is admitted in the agreed statement, "that said Abigail A. Prentiss had at her death no interest or title in the premises other than as provided by the will, if any such was so provided." The will, which is printed as a part of the case, gave her no interest whatever in the demanded premises, except for her life. There is consequently no one interested in her estate, no one claiming any interest in the demanded premises under her, who should be summoned in to enable the court to proceed "to try and determine such action."

Again, this action, as brought, was against three persons as trustees. Now the plaintiff seeks to summon in two of the present defendants, in their individual capacities and two new defendants. The effect of this would be an entire substitution of defendants. Having commenced the action against three defendants as trustees under a will, if this motion were allowed, it would become an action against two of the original defendants, but in entirely different capacities, and against two entirely new defendants. Is not the real object of the motion to obtain new defendants, not because of the death of Mrs. Prentiss, but because the termination of the trust makes it desirable to have other defendants, against whom a judgment would be final? This can be accomplished, but it must be done by the commencement of a new action. It cannot be accomplished by a substitution of defendants in the old action even in the case of a suit founded on contract which, by statute, may be amended by inserting additional defendants. *Duly* v. *Hogan*, 60 Maine, 351; *Wm. H. Glover Co.* v. *Rollins*, 87 Maine, 434.

The plaintiff's counsel relies strongly upon the case of *Brunswick Savings Institution* v. *Crossman*, 76 Maine, 577, as decisive of this question in favor of granting the motion. We do not think that the case is applicable. That case decided, as clearly stated in the headnote, that "where, pending a real action the tenant dies and his heirs are summoned in under R. S., c. 104, § 16, the heirs are not restricted in their defense to the title of their ancestor, but may set up any title they have from any other source." The reasoning of the opinion is conclusive upon this proposition; any other doctrine would promote infinite confusion, the correctness of that decision cannot be questioned.

But it is said in argument that inferentially, at least, that case holds that such a motion as this should be granted. We do not think so. In that case the action was originally brought against Mary W. Crossman, the widow, and against three of the children of David Crossman. The demandant claimed under a deed from Mrs. Crossman and it was contended that she obtained title in various ways, under the will of her husband, and also by disseizin. Upon her death it was necessary to make her heirs parties to the action in order to obtain a judgment that would be binding against those claiming under her. But in this case, as we have already seen, it appears that Mrs. Prentiss had no interest whatever in the demanded premises that, upon her death, descended to her heirs, and claimed none. She was made a party only as one of the trustees under the will of her husband. We think that the two cases are very clearly distinguishable.

The court is, therefore, of the opinion that the motion of the plaintiff, upon his allegations and admissions, is not legally sustainable, because the case as made up shows that the persons sought to be summoned in are not interested in the estate of the deceased defendant, so far as the demanded premises are concerned.

We do not think it would be proper at this time to go further and answer the other questions submitted. These questions have not yet arisen, they relate to further proceedings in the case, and it is not impossible that they may subsequently arise and require an authoritative decision. It will then be quite soon enough to consider and decide them.

Motion denied.

Dissenting opinion by EMERY, J.

EMERY, J. I do not concur. I think the court has ample statutory power to summon in the heirs of a deceased defendant in a real action. R. S., ch. 104, § 16. *Brunswick Savings Institution* v. *Crossman*, 76 Maine, 577; *Trask* v. *Trask*, 78 Maine, 103. The heirs are presumably interested in the real estate of which their ancestor died seized. I do not think the court should assume to say they have no interest, until it has given them an opportunity to be heard, whatever the statements of other parties.

STATE *vs.* FRED BENNETT.

SAME *vs.* HENRY J. LESSARD.

SAME *vs.* JOHN A. CLARITY.

SAME *vs.* JOSEPH V. MELANSON.

Cumberland. Opinion March 30, 1901.

Intox. Liquors. Search Warrant. Night Time. Dwelling-House and Inn. R. S., c. 27, §§ 27, 40, 43, 63; c. 132, § 14.

1. A general direction in a warrant to search for intoxicating liquors without any restriction as to time is sufficient authority to make the search in the night time as well as in the day time. There is no requirement in chapter 27, R. S., that a warrant to search in the night time shall contain an express direction for that purpose, and the provisions of chapter 132 are not applicable. In the absence of any statute prohibiting it, any process, civil or criminal, may be served in the night time as well as in the day time.
2. A material averment may sometimes be introduced with as much clearness and certainty by means of a participial clause commenced by the word "being," as in the form of the direct proposition of a declarative sentence.
3. There is no legal objection to the union of the words dwelling-house and inn in the description of the premises in a search warrant. The building may be a dwelling-house, used as an inn and also for purposes of traffic. There is no incongruity in describing it as a dwelling-house and inn.

Exceptions by defendants. Overruled.

Appeals by the defendants from the municipal court of Portland to the Superior court upon complaints and warrants against them under R. S., c. 27, §§ 40 and 43, for having intoxicating liquors in their possession with the intent to sell the same in violation of law.

The defendants in each case demurred to the complaints. The demurrers were overruled by the presiding justice and the defendants excepted.

The facts appear in the opinion.

Geo. Libby, county attorney, for state.

D. A. Meaher, for defendants.

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

WHITEHOUSE, J. These are complaints based on sections 40 and 43 of chap. 27 of the revised statutes, authorizing the process for "search and seizure." The cases come to this court on exceptions to the overruling of the defendants, demurrers to the complaints. The complaint in each case is, that intoxicating liquors were kept and deposited by the defendants "in the dwelling-house and inn being known as the Jefferson Hotel and its appurtenances, situated on the northerly side of Congress street in said Portland and numbered nine hundred and forty-one on said street and occupied by said Lessard and Sullivan, a part of said dwelling-house and inn being used for purposes of traffic by said Lessard and Sullivan, said Lessard and Sullivan not being then and there authorized by law to sell said liquors within said state."

I. In support of the demurrer it is argued, in the first place, that the complaint does not allege "in a direct and affirmative way" that a part of the dwelling-house was used as an inn, or for purposes of traffic, or that the defendants were not authorized by law to sell the liquors in this state. But this objection is clearly unsupported either by reason or authority. In *State* v. *Dunning*, 83 Maine, 178, it was charged in the indictment that the defendant "did catch and have in his possession one hundred and eleven lobsters, each of said lobsters then and there being less than ten and one-half inches in length . . . . which said lobsters when caught being shorter than ten and one-half inches"; and the court held that this was a sufficient allegation that the lobsters were less than the prescribed length when caught, saying: "A material averment may sometimes be introduced with as much clearness and . . . . certainty by means of the participial clause commenced by the word 'being,' as in the form of the direct proposition of a declarative sentence. The practice is too familiar and well established to require the citation of the numerous precedents found on the county attorney's brief." Furthermore, the latter averment objected to in the complaint is precisely the one pre-

scribed in the "form for complaint in case of seizure" found in sect. 63, chapter 27 (p. 317) of the revised statutes. The forms there provided are declared "sufficient in law for all cases to which they purport to be adapted;" and there can be no question that it was competent for the legislature to prescribe the form of such allegation, as no essential ingredient of the crime is omitted and the accused is not deprived of any constitutional rights. *State* v. *Learned*, 47 Maine, 426; *State* v. *Bartley*, 92 Maine, 422.

II. But the defendants interpose the further objection, that although the warrant expressly directs the officers to search a dwelling-house in the night time, it contains no averment showing any statute authority for such search. It is contended that section 14 of chap. 132, R. S., respecting warrants to search for stolen property and for the arrest of the criminal, is applicable to this process to search for intoxicating liquors, and that the complaint should accordingly allege that the magistrate is satisfied that a search in the night time is "necessary to prevent the removal of such person or property."

But this objection is also clearly untenable. The leading provisions of chapter 132 R. S., including section 14, had existed many years prior to the enactment of the statute on which this complaint is founded. They relate to an entirely separate and distinct class of offenses, and it was manifestly the intention of the legislature that proceedings to search for intoxicating liquors should be regulated and controlled by the provisions of chapter 27 and not by the requirements of chapter 132, which are, for the most part, entirely inappropriate to the search for liquors. In *State* v. *Welch*, 79, Maine, 99, the facts were precisely analogous to those at bar. In that case the complaint was based on section 40 of chap. 27, R. S., and it was contended in behalf of the defense that the complaint should allege that the complainant "has probable cause to suspect and does suspect", as required by section 11 of ch. 132, R. S. But the court held that such an allegation was not required, and that it was sufficient to follow the language of the statute on which the complaint was based, citing *State* v. *Nowlan*, 64 Maine, 531.

Furthermore, there is no requirement in chapter 27, that the magistrate who issues a warrant to search for liquors in the night time, shall insert therein an express direction for that purpose; and in the absence of any statute prohibiting it, no reason is apparent why any process, civil or criminal, may not be legally served in the night time as well as in the day time, or why a general direction in a warrant to serve it, without any limitation as to the hour of the day when it shall be served, may not properly be considered authority to serve it in the night time as well as in the day time. In accordance with this view was the decision of the court in *Com.* v. *Hinds*, 145 Mass. 182.

In the cases at bar the direction in the respective warrants to search in the night time is surplusage. A general direction to enter and search for the liquors without any restriction as to time, is sufficient authority to make the search in the night time as well as in the day time.

III. Finally it is said, that the numbers mentioned in the description of the premises are "misleading and unsatisfactory," for the reason that Jefferson Hotel is alleged by counsel to have four numbers on the street, and that different numbers are employed in different complaints. But there is no evidence of these facts before the court in any of these cases.

The description of the premises in each of these complaints is obviously sufficient on demurrer. In each case the entry must be,

Exceptions overruled. Judgment for the State.

INHABITANTS OF SOUTH THOMASTON

vs.

INHABITANTS OF FRIENDSHIP.

Knox. Opinion April 1, 1901.

Paupers. Home. Practice. Amendment. Rule V. R. S., c. 82, § 10.

In an action by one town against another to recover for supplies furnished one Watson and family, a pauper whose settlement was alleged to be in the defendant town, the declaration averred, "that on the first day of February, A. D. 1895, said Watson, and with him his family, had and ever since has had his lawful settlement in the town of Friendship; that on the first day of February aforesaid, the said Watson, so having his settlement in said town of Friendship, was found in said town of South Thomaston destitute and on account of poverty in need of relief, and, being so found, the overseers of the poor of said town of South Thomaston relieved said Watson and his said family, by then and there, and thence to the day of the date of this writ furnishing and providing them with sufficient board, etc., mentioned in the account annexed to the writ; and within three months next after the furnishing the said supplies, to wit on the day of A. D. 1896, the overseers of South Thomaston sent a written notice signed by them to the overseers of the poor of the town of Friendship stating therein the facts."

The presiding justice allowed the plaintiff to amend the declaration by inserting after the words "and on the first day of February aforesaid," the words, "and on sundry days subsequent thereto;" and by inserting after the clause, "and the plaintiff avers that within three months next after the furnishing of supplies aforesaid," the words, "and on the 9th day of April, 1897;" and by striking out at said place the words "on the day of A. D. 1896."

Held; That said amendments were properly allowed in the discretion of the court.

A plaintiff may be allowed, in the discretion of the court, to amend his declaration by striking out any portion of the claim sued.

It is not necessary in order to retain his legal home in a town that a person should at all times have some house or building, or room, to which he has a right to go.

The defendant requested the presiding justice to instruct the jury that a home once established continues until the person departs with an intention to abandon such home. The presiding justice did not give the instruction as

requested, but instructed the jury that to break up the continuity of a home it is not necessary that the departure should be with a fixed intention not to return. It is enough if he departs without a fixed intention to return.

Held; that the instruction given is correct.

In a pauper suit the burden is upon the party alleging it to prove that the pauper has gained a new settlement by having a home five years consecutively in some other town.

It is possible that a man may so wander around as to lose a home within the legal signification of the word "home" under the pauper statutes.

Exceptions by defendant. Overruled.

Action for pauper supplies. The case appears in the opinion.

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

D. N. Mortland and M. A. Johnson; R. I. Thompson, for defendant.

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

FOGLER, J. This is an action of assumpsit to recover for pauper supplies furnished by the plaintiff town to one Albert Watson and his family, whose pauper settlement is averred by the plaintiff to have been in the defendant town. The writ is dated February 28, 1898. The verdict was in favor of the plaintiff town, and the defendants bring the case here upon exceptions to rulings of the presiding justice, allowing certain amendments to the declaration, and to instructions of the presiding justice, and to his refusal to give requested instructions upon points involving the settlement of the pauper.

The declaration, before amendment, averred that on the first day of February, A. D. 1895, said Watson, and with him his family, had and ever since has had his lawful settlement in the town of Friendship; that, on the first day of February, aforesaid, the said Watson, so having his lawful settlement in said town of Friendship, was found in said town of South Thomaston, destitute and on account of poverty in need of relief, and, being so found, the overseers of the poor of said town of South Thomaston relieved the said Watson and his said family by then and there, and from thence to the day of the date of this writ, furnishing and

providing them with sufficient board, etc., mentioned in the account annexed to the writ; and that within three months next after the furnishing the said supplies, to wit, on the day of A. D. 1896, the overseers of South Thomaston sent a written notice signed by them to the overseers of the poor of the town of Friendship stating therein the facts, etc. The account annexed to the writ contained items prior to January 11, 1897, and also items furnished on and after said January 11.

The defendants pleaded the general issue and also pleaded the statute of limitations.

The presiding justice, against the defendants' objections allowed the plaintiff to amend the declaration in the following particulars: 1. By inserting after the words, "and on the first day of February aforesaid," the words, "and on sundry days subsequent thereto." 2. By inserting after the clause, "and the plaintiff avers that within three months next after the furnishing of supplies aforesaid," the words, "and on the 9th day of April, 1897;" and by striking out at said place the words, "on the day of A. D. 1896." 3. By striking out all the items in the account annexed to the writ of date prior to January 11, 1897.

The exception to the allowance of the amendments can only be sustained by establishing the proposition that they are such amendments as could not be legally authorized by the presiding justice; or, in other words, that it was beyond the power of the judge to grant them under any state of facts. *Ripley* v. *Hebron* 60 Maine, 388.

By R. S., ch. 82, sec. 10: "No process or proceedings in courts of justice shall be abated, arrested or reversed for want of form only, or for circumstantial errors or mistakes which by law are amendable, when the person and case can be rightly understood."

Rule of Court V, provides that amendments in matters of substance, may be made, in the discretion of the court, but no new count, or amendment of a declaration, will be allowed unless it be consistent with the original declaration and for the same cause of action.

The statute above cited, being remedial, has been liberally con-

strued and applied in the furtherance of justice. *Solon* v. *Perry*, 54 Maine, 493.

We now proceed to consider the amendments in the order in which they are above stated.

First. The declaration, as originally framed, alleged that the pauper, Watson, on the first day of February, 1895, had, and ever since has had his lawful settlement in the town of Friendship, and that said Watson, being found in South Thomaston destitute and in need of relief on the first day of February, 1895, the overseers of the poor of said South Thomaston then and there, and from thence to the day of the date of this writ supplied him with proper board, etc., mentioned in the account annexed to the writ, the amount remaining unpaid being $125.43. We think this a sufficient allegation that the pauper had his lawful settlement in the defendant town during all the time from the first day of February, 1895, to the day of the date of the writ, and that during all that time he was supplied by the plaintiff town. The amendment inserting, "and on sundry days subsequent thereto," does not enlarge the plaintiff's claim, for the account annexed in which the items sued for are specifically stated, still remains a part of the declaration. Without the amendment the plaintiff could recover, the other necessary facts being proved, all expenses incurred in the relief of the pauper within the statute of limitations. The amendment gives the plaintiff no greater or additional right of recovery.

In *Ripley* v. *Hebron*, 60 Maine, 379, the declaration alleged that the pauper fell into distress in the plaintiff town on December 2, 1868, and that the plaintiffs furnished him with supplies from that time to November 24, 1869, to the amount of $469, an amendment was allowed by substituting 1867 for 1868. This court overruled exceptions to the allowance of the amendment.

In the opinion it is said: "The action is assumpsit on an implied contract. . . . . Time is not essential, provided it is within the statute of limitations applicable to such a case. . . . . If the time is not material within this law, the amendment could be allowed, although not absolutely necessary." Referring to the

objection that the amendment enlarged the claim, as stated originally in the writ, the court say: "The claim, as stated, is for four hundred and nineteen dollars, expended for the relief of the pauper. No account is annexed and no specification of dates or items. The claim is not enlarged by the amendment. It still stands for four hundred and nineteen dollars only. Whether furnished one year or another, all that can be recovered in this suit is the amount furnished within the statute of limitations."

Second. The declaration averred that within three months after the furnishing the supplies, to wit, on the day of A. D. 1896, the overseers of the plaintiff town sent a written notice to the overseers of the defendant town, stating therein the facts and a request to remove the paupers. The plaintiffs were allowed to amend by striking out the words "on the day of A. D. 1896," and inserting in lieu thereof the words, "and on the 9th day of April, 1897."

As the declaration, before amendment, alleged that such notice was sent within three months after the furnishing of the supplies, we think the declaration was sufficient in this respect without the amendment. It would have been competent for the plaintiff to prove the date when the notice was sent without specifically averring the day upon which it was sent. The defendant was not prejudiced by the amendment, but, on the contrary, was apprised thereby of the precise date when the plaintiff claimed that the notice was sent. The amendment is consistent with the original declaration and alleges no new or additional cause of action.

In *Brewer* v. *East Machias*, 27 Maine, 489, a suit to recover for pauper supplies, the declaration contained merely a count in indebitatus assumpsit on an account annexed to the writ for supplies furnished an individual and his family, and an amendment was allowed, stating in a new count such facts as would render the defendants liable to pay the expenses for the support of the paupers. A like amendment was sustained in *Solon* v. *Perry*, 54 Maine, 493. In these cases the original averred no notice to the defendant towns. The new counts inserted by way of amendment must have contained an averment of notice.

We think the amendment as to date of notice in the case at bar was properly allowed.

Third. The defendant excepts to the allowance of an amendment by the plaintiffs, striking out all the items in their account annexed to the writ of date prior to January 11th, 1897.

It has been many times held by this court that a plaintiff may be allowed, in the discretion of the court, to amend his declaration by striking out items contained in his account, or any portion of the claim sued. *Fogg* v. *Greene*, 16 Maine, 282; *Bangor Boom Corp.* v. *Whitney*, 29 Maine, 123; *Towle* v. *Blake*, 38 Maine, 528; *Goodwin* v. *Clark*, 65 Maine, 280; *Soule* v. *Bruce*, 67 Maine, 584.

As to the exceptions to instructions and refusals to instruct: It was admitted that the pauper, when he became of age, had his pauper settlement in the defendant town by derivation from his father.

The defendants set up that after the pauper, Watson, became of age, he acquired a new settlement in his own right, in the town of Thomaston by having his home in that town for five successive years without receiving pauper supplies, directly or indirectly; and that his settlement at the time when the supplies sued for were furnished, was in Thomaston and not in Friendship.

First. The defendant's counsel requested the presiding justice to instruct the jury: "That the statute provides that a person of age, having his home in a town for five successive years, without receiving supplies as a pauper, directly or indirectly, has a settlement therein." This requested instruction was given by the presiding justice, who said to the jury: "The settlement of the pauper is the settlement of his father in Friendship, unless he has acquired a home somewhere else upon his own account, which he might do by having a home five consecutive years in some other town in this state." It is true that the words, "without receiving pauper supplies," etc., were not added to the instruction, but this is not material, as it does not appear in the case that it was claimed that the pauper received pauper supplies during the period in which

the defendants contended that his home was in Thomaston. In any event, the defendants were not prejudiced by the omission, as it excluded an element which if not admitted, the defendants were obliged to prove.

Second. The defendants further requested the presiding justice to instruct the jury that: "A person may have a home and settlement in a town though he may have therein no home to which he may resort or enter of right." The presiding justice instructed the jury upon this point as follows: "It isn't necessary in order to retain his legal home in a town, that he should at all times have some house, or building, or room necessarily to which he has a right to go." This is in substance identical, and in language very similar to the instruction requested.

Third. The defendant's counsel further requested the presiding justice to instruct the jury as follows:

"When a person takes up his abode, or is in a given place without any intention to remove therefrom, such place of abode becomes his place of residence or home, and will continue to be his residence or home notwithstanding temporary personal absences, until he shall depart with an intention to abandon such home.

"Therefore, if you, [the jury] find that as matter of fact, the pauper had his home or domicile in Thomaston, when he became of age, it continued to be there, unless he went to some other town with an intention to break up his home in Thomaston, and establish one somewhere else.

"If, after the pauper was twenty-one years of age, he made his home in Thomaston for five consecutive years, that was his home or settlement, unless during that period, he went to some other town with an intention to change his residence; and if it is claimed that at some time he did so change, the burden is on the party claiming that the pauper so changed his settlement."

The presiding justice did not give such requested instruction in its entirety. He did instruct the jury that, "when a man goes to a place, any place, with the intention of making that his permanent abode, his abode for an indefinite length of time, or when he

goes to a place to abide and has not then an existing intention of removing therefrom, the latter place becomes his abode and his former place, as a home, is lost,"—thus giving the instruction requested as regards the establishment of a home or place of abode.

He did not give the instruction requested, that a home once established continues until the person departs with an intention to abandon such home. On this branch of the cause he instructed the jury, "it is not necessary that the departure should be with a fixed intention not to return. It is enough if he departs without a fixed intention to return. To continue a home while absent from it, there must be at all times an intention to return to it. That is, if at any time during the absence he ceased to intend to return to the place which was formerly his home or place of abode, that is an interruption of the settlement in the former place." There must be a continuing intention for the five years. To this instruction the defendant excepts.

The instruction is in accord with the decisions of this court. *No. Yarmouth* v. *West Gardiner*, 58 Maine, 212; *Hampden* v. *Levant*, 59 Maine, 557; *Ripley* v. *Hebron*, 60 Maine, 379; *Detroit* v. *Palmyra*, 72 Maine, 258.

We are aware that the principles laid down in the cases above cited may appear to be in conflict with earlier decisions of this court; but, as clearly shown in *North Yarmouth* v. *West Gardiner*, supra, by Mr. Justice DANFORTH, whose reasoning we need not here repeat, this conflict is more apparent than real, and on examination disappears.

The presiding justice did not give the instruction requested by the defendant as to the burden of proof, but gave the following instruction to which the defendant excepts: "The burden is upon the defendant town to show that he [the pauper] has gained a settlement somewhere else, by having a home five years consecutively in some other town."

There can be no doubt of the correctness of this instruction. *Bowdoinham* v. *Phippsburg*, 63 Maine, 501; *Ripley* v. *Hebron*, supra; *No. Yarmouth* v. *W. Gardiner*, supra; *Etna* v. *Brewer*, 78 Maine, 377.

In *Ripley* v. *Hebron*, supra, the opinion says: "The party setting up five years continuous residence is bound to prove it. This is undoubted. If, while attempting to prove it, a break in the actual residence is shown, it is for that party to establish such a state of facts as shows that the legal home remained there, notwithstanding the absence. In other words, the party is bound to make out his case, and if obstacles intervene, he is the one to remove them."

The defendant excepts to the following instruction: "It is possible that a man may so wander around as to lose a home, within the legal signification of it, under this statute."

This has been declared to be the law in *Jefferson* v. *Washington*, 19 Maine, 302, and in *North Yarmouth* v. *West Gardiner*, 58 Maine, 214.

Our conclusion is, that none of the defendant's exceptions can be sustained.

Exceptions overruled. Judgment on the verdict.

NEW BEDFORD COPPER COMPANY

vs.

CHARLES H. T. J. SOUTHARD.

Sagadahoc. Opinion April 1, 1901.

Contract. Time of Performance.

In February, 1898, the plaintiff and the defendant made a contract by which the plaintiff agreed to furnish the defendant a suit of metal, to be delivered in New York "about last May or June," for a ship to be due at that port "about April."

Held; that time of performance of a contract, when fixed by the parties, is an essential element of the contract.

Held; further, that by the contract above recited, the plaintiff was required to furnish the metal by the last day of June, unless the ship should be delayed on her voyage, in which case the plaintiff should deliver the metal within a reasonable time after her arrival, though such reasonable time should extend beyond the month of June.

The ship arrived in New York, April 21, 1898, and lay in that port till July 1, 1899. The defendant did not demand or call for the metal until February, 1899, when the price of metal had advanced five cents per pound.

Held; that the metal was not called for within the time provided by the contract, and that the plaintiff was thereby absolved from liability under the contract. The metal, for the price of which this action is brought, was furnished under a new contract made in May, 1899, and the defendant must pay the price stipulated in the new contract.

On report. Judgment for plaintiff.

Assumpsit on account annexed to recover $3,413.86 for yellow metal furnished to sheathe the defendant's ship.

The case appears in the opinion.

A. M. Spear, for plaintiff.

W. T. and W. T. Hall, Jr., for defendant.

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

FOGLER, J. This is an action of assumpsit upon an account annexed to the writ, which, excluding an item of interest, is as follows:

New Bedford, Mass., Sept. 1, 1899.

T. J. Southard & Son, Richmond, Maine.

Bought of New Bedford Copper Co.,

1899		
June 2	4275 Sheets Yellow Metal, 26,906 lbs. at 17c	4574.02
	1 1-8 Sheets Nails 2173 lbs. at 17c	369.41
		4943.43
	5 per cent	247.17
		$4696.26
	Cr.	
	By old metal 13754 lbs., at 10c	1375.40
		$3320.86

Delivered Ship Com. T. H. Allen.

The defendant, surviving partner of the late firm of T. J. Southard & Son, and doing business under said firm name, admits

that the metal and nails charged in the account, were delivered by the plaintiff and accepted by him, but claims that by the terms of the contract relating thereto, between the plaintiff and himself, the price of the metal and nails so delivered and accepted should be eleven cents per pound and not seventeen cents per pound as charged, and that the old metal should be credited at the rate of six cents and not ten cents per pound. These are the only questions at issue between the parties, and are to be determined mainly by the correspondence between them, and statements rendered.

The correspondence reported is quite voluminous, commencing June 12, 1894, and ending November 22, 1899, but the correspondence prior to February 19, 1898, relates to transactions not involved in this case and not material thereto.

February 19, 1898, the defendant inquired of the plaintiff by letter, "What price can you book suit of metal and nails, about 4200 sheets, del'd in New York about last May or June, also 3600 sheets in July or August. These vessels will be due in New York about April or June."

To this the plaintiff replied by letter dated February 21, 1898: "Replying to your favor of the 19th instant, we enclose herewith a bill of metal and nails shipped to-day to Schr. "Edith L. Allen." Regarding price of metal and nails for the two suits you will require later in the season, our price will be twelve cents per pound, delivered, and we will allow you a commission of one cent per pound to be deducted when you settle the account. This offer is for immediate acceptance only, and must be kept confidential. Awaiting your reply,

Yours truly.

P. S. Ingot copper is rising and metal may be higher later on."

In reply the defendant wrote the plaintiff under date of February 23, 1898,

"Yours of 21st inst. received in reply to ours of the 19th and we accept your offer as stated."

February 23, 1898, the plaintiff wrote the defendant, "In

accordance with yours of the 22nd we have booked orders for two suits of yellow metal."

It is beyond question, that the foregoing letters constituted a valid and binding contract between the parties, by the terms of which the plaintiff was to sell and deliver and the defendant to accept and pay for the metal and nails in question.

The price and the place of delivery were stated with certainty. The time of delivery was approximately stated. As to one suit the time is stated "about last May or June"; as to the other, "in July or August."

Time of performance when fixed by the parties, is an essential element of a contract by which the parties are bound. When no time of performance is agreed upon it must be performed within a reasonable time.

By the terms of the contract the metal last named was to be delivered within a fixed time, "in July or August." The plaintiff was not obliged to furnish the suit of metal after the last day of August.

The time in which the suit of metal first named was to be delivered, was not fixed by the parties with certainty. It was to be delivered, "about last May or June." Taking this language in connection with the last paragraph of the defendant's letter of February 19, 1898, "These vessels will be due in New York about April or June," we think a fair construction is, that if the vessel due about April should be delayed in her voyage the plaintiff would be required to furnish the metal within a reasonable time after her arrival, even if such reasonable time should extend beyond the month of June.

The case shows that the metal to be delivered "last May or June" was for the Ship "Com. T. H. Allen." From a memorandum, which is made a part of the case, it appears that the "Allen" arrived in New York April 21, 1898, and lay at that port until July 1, 1899. May 13, 1898, more than three weeks after the arrival of the "Allen", the plaintiff wrote the defendant, "Can you give us a memorandum of the "Com. T. H. Allen" suit and

tell us when it will be asked for? We wish to be fully prepared to deliver promptly."

To this inquiry the defendant replied by letter dated May 30, 1898: "Cannot say when will want metal as have laid the ship up for the present till war scare is over." Oct. 7, 1898, the plaintiff by letter renewed inquiry but the defendant made no reply.

At the date of this last letter the ship had been in New York over five months, more than three months had elapsed after the time fixed by the parties for the delivery of the metal, no demand had been made for the metal and the defendant had refused to state a time when it would be wanted. We are of opinion that the plaintiff could not reasonably be required to perform the contract on its part after the letter of Oct. 7th was written and a reasonable time had elapsed for reply.

Nothing further took place between the parties until February 1899, when the following correspondence commenced, to wit:

Plaintiff to defendant, Feby. 6, 1899:

"Because of the great and continued rise in the price of Ingot Copper and Spelter, we are again compelled to advance the price of Yellow Metal Sheathing, Nails, Bolts &c., this time 2 cents per pound on the new and one cent per pound on old taken in exchange. We enclose herewith a price list corrected to date. Please fully maintain these prices when selling for our account and greatly oblige, Yours truly."

Defendant to plaintiff, Feb. 7, 1899:

"Yours 6th with price list rec'd and noted. Do not forget that we have two suits metal booked at 11c and may want them right away."

Plaintiff to defendant, Feb. 9, 1899:

"Replying to your favor of the 7th inst. on Feb. 19th, 1898, you wrote us as follows, viz: "What price can you book suit of metal and nails, about 4200 sheets, delivered in New York about last May or June, also 3600 sheets in July or August. These vessels will be due in N. Y. about April and June", to which we replied offering to supply the suits for 11 cts. per pound net, and

you accepted our offer. This price according to your own letter was for May, June, July or August delivery. We certainly cannot fill an order now for that price, our price to-day is 17 cents for the new less your usual commission of 5 per cent, and 10 cents per pound for the old metal in exchange. If you wish us to book the business at these prices please advise us promptly, for prices may advance again any hour."

Defendant to plaintiff, April 26, 1899:

"Referring to your letters of Feb. 21-23, '98 and our answers; also yours of Oct. 7, '98 and Feby 6th and 9th '99: We understood we bought two suits of metal if required for two vessels when they wanted them, about 7800 sheets and nails to go with them, one vessel we have gotten clear of furnishing, the other about 4200 sheets the ship will no doubt require us to furnish as we agreed, probably next week. Now will you give us an order on Mr. Slover at New York under our agreement of purchase with you at 11c net or not? If not, why? We intend to do just as we agree. We got clear of furnishing one suit and of course we do not expect that, and we do not want anything but that is right, and we want your metal used. We sold at 12c to these two ships to be delivered when required."

Plaintiff to defendant, April 27th, 1899:

"Replying to your favor of the 26th inst. If you will carefully read over our correspondence you will clearly see why we cannot furnish you with a suit of Yellow Metal at 11 cents per pound. Our agreement to do so expired on Sept. 1st of last year. We are always liberal with our customers but we are certainly not called upon to make any such sacrifice as you ask us to in this case. We will deliver you a first class suit of metal and nails at 17 cents per pound allowing you your usual commission of 5 per cent, the old metal to be turned in at 10 cts. per pound in exchange for the new.

"Shall we send you an order on Mr. Slover for the suit at the above prices? Please advise us promptly for we are very busy and do not wish to disappoint you about the delivery."

Defendant to plaintiff, May 9, 1899:

"Yours of the 27th April received and noted. You will please send us an order on Mr. W. G. F. Slover, New York, to deliver to Ship "Commodore T. H. Allen" on request about 2021 Sheets 20 oz., 1600 Sheets 22 oz., 600 Sheets 24 oz., Yellow metal, 19 Sheets Keel metal and nails for all. May not require the Keel Metal."

Plaintiff to defendant, May 10, 1899:

"Replying to your favor of the 9th inst., we enclose herewith an order on W. G. F. Slover, for all the metal and nails you may require for the "Ship Com. T. H. Allen." Thanking you very much for the order and awaiting your further favors we remain."

Subsequently to the date of this last letter the metal and nails sued for were delivered and accepted.

The plaintiff's letter of April 27, and the defendant's letter of May 9th, created a new contract between the parties. The plaintiff offered to sell and deliver metal at 17 cts. per pound and allow the defendant five per cent commission, and credit old metal at ten cents per pound.

This offer the defendant accepted unconditionally, referring only to the plaintiff's letter making the offer, referring to no previous transaction or correspondence.

The plaintiff has delivered the metal and nails according to contract and the defendant must pay the contract price with interest from July 14, 1899, when payment was demanded.

Judgment for plaintiff for $3,320.86 with interest from July 14, 1899.

RUSSELL S. BRADBURY

vs.

INHABITANTS OF THE CITY OF LEWISTON.

Androscoggin. Opinion April 1, 1901.

Way. Defect. Notice.

The defendant city, in constructing an iron bridge, placed iron plates at intervals transversely across the bridge to provide for the expansion and contraction of the iron, of which the bridge was constructed. To provide for the laying of the tracks of a street railway along the bridge, the plates, before being placed in position, were cut into sections and were thus laid across the bridge. When first placed in position the plates lay flat upon the floor of the bridge, and were not obstacles to public travel. Subsequently, the travel upon the bridge caused the ends or corners of some of the sections of the plates, where they had been cut in twain, to turn or roll up to a height of two or two and a half inches.

The felloe of one of the wheels of the plaintiff's carriage caught under a turned up end of one of the sections of plate, by which he was thrown from his carriage, sustaining injuries for which he claims damages of the defendant city.

Held; that the knowledge which the city had of the condition and position of the sections of plates as originally laid, was not actual notice of the identical defect which caused the plaintiff's injuries, but was notice only of a cause which might produce a defect.

Upon an examination of all the evidence reported, the court is of the opinion that a jury could not reasonably infer a statutory twenty-four hours' notice to the defendant city of the defect alleged.

On report. Plaintiff nonsuit.

Case for damages sustained by plaintiff through a defective highway.

Geo. C. Wing, for plaintiff.

J. L. Reade, city solicitor, for defendant.

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

FOGLER, J. This is an action on the case to recover damages for personal injuries and damages to his wagon and harness, which

the plaintiff alleges that he sustained on the 12th day of May, 1899, by reason of a defect in the bridge spanning the Androscoggin River, connecting the cities of Lewiston and Auburn, on that portion of the bridge which is within the limits of the City of Lewiston, and which that city is bound by law to maintain and keep in repair.

The defect complained of is that "a plate which formed a part of the construction of the bridge was turned up, or rolled up at the end, in such a position that a wheel on the floor of the bridge, crossing the bridge diagonally, would be caught under the plate."

The declaration alleges that, on the day above named, as the plaintiff was riding over said bridge, the felloe of one of the wheels of his wagon caught under the end of a plate so, as aforesaid, turned up, which stopped the progress of his team so suddenly that he was violently thrown from his wagon, and sustained injuries for which he claims to recover damages.

The case comes here upon a report of the evidence bearing upon the question whether the municipal officers or road commissioners of the defendant city had twenty-four hours' actual notice of the defect or want of repair, and upon the stipulation following, to wit:

"If the law court is of the opinion that, upon this evidence a jury could reasonably infer a statutory twenty-four hours' notice to the city of Lewiston, the action is to stand for trial, otherwise the plaintiff to be nonsuit."

The report shows that when the bridge in question was built in 1897, certain iron plates each eleven inches wide and about five-eighths of an inch thick were prepared to be placed at intervals, and secured upon one side, across the entire width of the bridge to provide for the expansion and contraction of the iron of which the bridge was constructed.

When the plans for the bridge were prepared, it was not contemplated that the bridge would be used for street railway purposes, and it was intended that the plates should extend across the bridge unbroken and not in sections.

Subsequently, and before the iron plates referred to were laid, double tracks of street railway were laid over and along the bridge.

In laying the railway tracks it was found necessary to cut each of the said iron plates transversely upon each side of each railway track. It was soon found that by the use of the bridge the ends, or corners of the ends, of the plates where they had been cut were liable to turn or roll up so as to interfere with public travel.

It was under one of the turned up ends of one of the plates so cut that the felloe of the plaintiff's wheel caught, causing him to be thrown from his wagon. It is contended in behalf of the plaintiff that by reason of the cutting of the plates, the way thereby was defective in that respect and so remained defective until this accident occurred, and that as such cutting was done by the city, or at least under its direction, the city had actual notice of the defective condition caused thereby. In other words, to use the language of the plaintiff's counsel, "that the defect was original and was made by the city itself in deforming and mutilating these plates so that they became at once defective."

We do not think that such position is tenable. It is not claimed that the plates were dangerous to travel, so long as they lay flat upon the floor of the bridge, as they were when laid. The defect occurred when the plates turned up and so became an obstacle to travel. If the plates were so laid as to be likely to produce a defect, notice of that fact would not be notice of the identical defect which produced the injury to the plaintiff.

In *Pendleton* v. *Northport*, 80 Maine, 598, the plaintiff's horse was injured while he was attempting to cross a covered culvert which had become out of repair from an overflowing caused by unusually heavy rains. It was established at the trial that the culvert, in its original construction, was not of sufficient size to readily vent, at all times, the quantity of water seeking its way through it. The plaintiff contended that knowledge on the part of the town of the original construction of the culvert, and of its susceptibilities and tendencies for getting out of repair in case of a heavy rainfall, were actual notice of the defect produced by such causes, and that the under-sized culvert was the proximate and responsible cause of the accident.

The court overruled this contention saying, "We do not believe

that the law imposes upon towns such an enlarged liability as that construction would require of them." It is further laid down in that case that, "notice of the cause of the defect, or of some conditions which in some contingency might cause or create a defect, is not sufficient"; and further, "the defect was the broken and not the unbroken culvert, the culvert as it was after, and not before the deluge of rain." See cases there cited and also, *Gurney* v. *Rockport*, 93 Maine, 360; *Littlefield* v. *Webster*, 90 Maine, 213.

Applying the rule thus laid down, it is manifest that the defendant city did not, by reason of its knowledge of the construction of the bridge, have actual knowledge of the identical defect which caused the plaintiff's injury.

It may be true, that the road commissioner may have known that the plates were liable to become bent and thus defective and have been negligent relative thereto, but as the court say in *Hurley* v. *Bowdoinham*, 88 Maine, 293: "Evidence that a highway surveyor negligently disregarded a general complaint . . . . has no tendency to prove that he had notice of a particular defect. . . . . But proof of gross inattention is not proof of actual notice." To the same effect is *Littlefield* v. *Webster*, supra.

Nor are we satisfied from the evidence reported that the city in any way had twenty-four hours' actual notice of the identical defect complained of. A witness testifies that on May 10th a wheel of his wagon was caught by the upturned end of another plate and that he notified the street commissioner of this defect about noon of May 11, but did not give notice of any other defective plate. The road commissioner testifies that such notice was given him by said witness at about four o'clock in the afternoon of the eleventh and that he immediately went to the place complained of and made necessary repairs, but that he did not examine the plate which caused the plaintiff's injury. As the plaintiff's accident occurred in the forenoon of May 12th, the notice, if it had been of the identical defect which caused the accident to the plaintiff, whether it was given at noon or at four o'clock in the afternoon, would not have been twenty-four hours' notice before the plaintiff's accident occurred.

We are therefore of the opinion that, upon the evidence reported, a jury could not reasonably infer a statutory twenty-four hours' notice to the city of Lewiston, and that in accordance with the stipulation, a nonsuit must be ordered.

Plaintiff nonsuit.

ANDREW LOGGIE, and others, In Equity,

vs.

FRED A. CHANDLER, and another.

Washington. Opinion April 6, 1901.

Equity. Practice. Chattel Mortgage. Discharge. R. S., c. 77, § 6, cl. 3; c. 91, § 3.

1. Though a cause in equity has been heard upon the bill, answer and evidence, and reported to the law court without any demurrer filed, yet if the law court finds the allegations in the bill insufficient to sustain the relief asked for, it may suo motu dismiss the bill for that reason without considering the evidence.
2. When there is no prayer for general relief in a bill in equity, the court is confined to the prayer for special relief and can grant no other relief.
3. A bill in equity without a prayer for general relief and only asking for a particular relief, which upon the allegations in the bill cannot be granted, is demurrable for that reason.
4. Bills in equity, however, may be amended upon proper terms conserving the interests of the defendants, by amending, or inserting new prayers for relief even after hearing upon merits, when no demurrer has been interposed.
5. There is in this State no statute or rule of law requiring the mortgagee in a chattel mortgage which has been paid before foreclosure expired, to surrender up or cancel the mortgage instrument, under ordinary circumstances at least.
6. When a mortgagor in a chattel mortgage has seasonably paid or tendered the mortgage debt, even after condition broken, the mortgage is ipso facto discharged, and the property revests at once in the mortgagor without delivery or decree. He then has full, adequate and complete remedies at law for the protection of his property, or for determining questions in relation to it, and hence has no occasion to invoke the equity powers of the court.
7. That the continued existence in the possession of the mortgagee of the instrument of mortgage thus paid and discharged makes it necessary for the

mortgagor to carefully preserve the evidence of such payment, is not sufficient ground for a decree in equity requiring the cancellation or surrender of the instrument.

8. Whether a bill in equity can ever be maintained for the simple purpose of clearing the title to personal property,—*quere.*

9. When a party seeks relief in equity from the legal consequences of his failure to seasonably perform conditions, upon the ground of his inability to perform in season, it is not sufficient for him to allege simply that he was unable to seasonably find out and perform the condition. He must state such primary facts, as will enable the court to see for itself, that under such facts he should be held to be legally excused for the non-performance of the condition.

10. Whether in such case a statement in the bill that the plaintiff is "willing to" perform the condition if allowed to do so, is equivalent to an offer to perform,—*quere.*

11. In this State the foreclosure and redemption of chattel mortgages are wholly regulated by statute, and the statutory modes must be pursued wherever practicable. Under ordinary circumstances, at least, a bill in equity cannot be maintained for the redemption of personal property from a chattel mortgage conditioned for the payment of money at a specified time.

Held; that the allegations in this bill, taking them to be true, do not entitle the plaintiffs to the relief they have prayed for, nor to any relief in equity,—hence their bill is dismissed with costs without regard to the evidence. Evidence without sufficient allegation is futile.

On report. Bill dismissed without prejudice.

Bill in equity praying that the defendants may be restrained from perfecting foreclosure of a chattel mortgage, and claiming, first, that there is nothing due upon it; and, second, praying that if anything be due, then that the plaintiff's may be allowed to redeem.

The case appears in the opinion.

W. R. Pattangall, for plaintiffs.

Was this mortgage, as recorded, sufficient notice to a bona-fide purchaser of any claim which the defendants had by reason of their liability as indorsers on notes at Machias Savings Bank?

Counsel cited: *Jewett* v. *Preston,* 27 Maine, 400; *Sawyer* v. *Pennell,* 19 Maine, 167; *Clark* v. *Hyman,* 39 Am. Rep., 163; *Hall* v. *Cushman,* 16 N. H. 462; 43 Am. Dec. 564; and notes to *Moore* v. *Moore,* 15 Am. Dec. 526; *Partridge* v. *Swazey,* 46 Maine, 414.

Whatever puts a party upon inquiry amounts to notice, provided

inquiry becomes a duty, and would lead to the knowledge of the requisite fact by exercise of ordinary diligence; but this rule has been limited, by many of the courts, to those cases where failure to make inquiry amounts to gross negligence. Ency. of Law, Vol. 16, 792 to 795, and cases there cited.

In this case a party put upon inquiry by the presence of the recorded mortgage would naturally have inquired at Machias Bank, and as Mr. Cary had no knowledge whatever of the mortgage, but simply knew that all the notes signed by the parties which had been in Machias Bank, had been paid, the inquirer would certainly have got no information there of any use to him.

L. B. Deasy and C. Peabody, for defendants.

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

EMERY, J. The story is this. Mr. and Mrs. Leighton on Dec. 16, 1897, mortgaged certain personal property to the respondents, Chandler and Wass, as security for their surety-ship upon certain notes of the Leightons given to a Machias Bank. The property consisted of a building used as a blueberry canning factory, and its various contents of tin, tools, cans, machinery, etc. The mortgage was in the usual form of a chattel mortgage bill of sale, conditioned to become void if the Leightons paid the described notes on or before Dec. 15, 1898, and it was recorded in the town where the Leightons resided.

In April 29, 1899, the mortgagees, Chandler and Wass, began the usual statutory proceedings to foreclose the above mortgage. The notice of such proceedings and the affidavits of service were recorded May 5, 1899.

In the January previous, however, the Leightons conveyed for value all said property to the plaintiff, Pattangall, who had no actual notice of the prior mortgage. Pattangall soon afterward conveyed for value the same property to the Messrs. Loggie, the other complainants, who also had no actual notice of the mortgage.

The right to redeem from the mortgage would have expired in

sixty days from May 5, 1899, when the notice of foreclosure was recorded; but a few days before such expiration, viz. on June 27, Pattangall and the Loggies filed a bill in equity against the mortgagees, Chandler and Wass, in which they substantially stated the matters above recited and then further alleged as follows:

"Fourth.—The complainants further say, that they believe and have reason to believe, that there is nothing due these respondents under said mortgage.

"Fifth.—The complainants further say, that they have no means of ascertaining the amount due on said mortgage to these respondents, if any amount be due, and that they are willing to pay whatever is due."

Their specific prayers were as follows:

"First.—That an injunction issue to prevent the completion of said foreclosure proceedings, and to protect the said Loggies in their possession of the said property, pending a hearing on this bill.

"Second. That the amount due on said mortgage, if anything, be determined and that they be allowed to redeem said property on payment of the same.

"Third. That they be awarded costs."

There was no other prayer, general or special.

I. The ground first taken in the bill is that the mortgage has been paid. At present, however, no relief is asked for upon that ground, nor is there any prayer for general relief under which the court could grant appropriate relief. The only relief we are asked to grant is (1) to stay foreclosure, etc., pendente lite—(2) to determine the amount due, and (3) to award costs.

The prayer for relief is as essential a part of a bill in equity as is the statement of facts. The court cannot go beyond the one any more than the other. The respondent need not anticipate a decree that is not asked for. By the fourth Chancery Rule a statement of the specific relief sought is required, while a prayer for general relief is merely permitted. If the first ground taken in the bill

were the only ground, the bill would be demurrable for want of sufficient statement of the relief desired. Whitehouse's Eq. Pr. 222; *Perry* v. *Perry*, 65 Maine, 399.

The prayer for relief is not a statement of any matter of fact, but rather of the claim made under stated facts. If no demurrer be interposed the court can proceed to ascertain the facts and the resultant law and permit the plaintiff to formulate his claim before decree upon terms and conditions equitable to the respondent, No demurrer was interposed in this case, and hence the court may proceed to consider what equitable relief, if any, the plaintiffs are entitled to upon the first ground stated. If relief is found to be due them, the court can grant permission to formulate the claim therefor upon such terms as shall fully compensate the respondents for any inconveniences suffered from its omission in the first instance.

The only relief that can be given is a decree for the surrender or cancellation of the mortgage bill of sale.

There is, however, no statement of facts in the bill showing that to be necessary. If the condition of the mortgage has been performed, as alleged, then the mortgage is ipso facto void and the paper upon which it is written is waste paper. The property mortgaged has already vested in the plaintiffs "without re-delivery or re-sale, and without any cancellation of the mortgage." *Sumner* v. *Bachelder*, 30 Maine, 35. A chattel mortgage is not a "written contract" which may be ordered cancelled under R. S., c. 77, § 6, ch. III. No statute or rule of law is cited which requires the mortgagee in a chattel mortgage to cancel and deliver up the written instrument upon performance of the condition; and certainly the court will not ordinarily require a party to do more than the law requires him to do.

Though not stated in the bill, it is urged in argument that the respondents may undertake to take possession of the property, or bring some action to recover it, upon the strength of the written instrument. Should they do so, the respondents have a plain, adequate and complete remedy at law, both to defend against the respondents' action and to maintain actions against them. The

alleged performance of the condition is a complete bar to any claim the respondents can make. It is further urged that the evidence of such performance may in time be lost,—to the great inconvenience of the plaintiffs. That fact, however, is no ground for a decree in equity for cancellation. *Farmington Vill. Corp.* v. *Sandy River Bank*, 85 Maine, 46-53. It may be a casus omissus, but the mortgagor in a chattel mortgage seems to be left to preserve the evidence of the performance of the condition, ready to adduce if any action be taken under the defunct bill of sale. If he desires to perpetuate the evidence, he must resort to the usual means for that purpose.

It is again urged in argument that the mortgage is invalid because not sufficient in itself to give notice by record, the plaintiffs having no actual notice,—and also because it does not describe the notes on which the respondents became surety, but other notes which did not exist. The answer is, that these questions can be effectually and readily determined in an action at law. *York* v. *Murphy*, 91 Maine, 320.

So far as appears the plaintiffs can fully protect themselves by available remedies at law, and hence are not entitled to any relief in equity upon the first ground stated. See *Bushnell* v. *Avery*, 121 Mass. 148, an almost parallel case.

II. The second and last ground taken by the plaintiffs in the bill is, that if anything is due they are willing to pay it; and here the prayer is that the court will determine the amount due and allow them to redeem the property on payment of that amount.

Assuming, for the moment, that the court should ordinarily entertain a bill in equity to redeem from a chattel mortgage, it is common learning that such a bill should contain a tender or an offer to pay the amount due. It is certainly not clear that this bill contains such. The allegation is merely that "they are willing to pay." One may be willing to do what he does not, and will not, offer to do. It is not clear that the court should proceed upon a bill which does not contain a distinct, positive offer to pay.

Again, if the court has jurisdiction to decree as redemption from

chattel mortgages as a matter of course, it would seem that the procedure should be analogous to that for redemption from real estate mortgages. In the latter case no bill will be sustained unless a prior tender of performance has been made, or facts are stated showing that such tender could not be made, as that the mortgagee refused to render an account of the amount due, etc. In this bill there is no allegation of a prior tender and no allegation explaining the omission, except that the plaintiffs had "no means of ascertaining the amount due on said mortgage to these respondents." This allegation is insufficient. When a plaintiff in equity asks to be excused for the non-performance of a duty or a condition precedent, it is not enough for him to say he was unable to perform it or had no means of finding out what it was. He must state the particular facts and circumstances fully and explicitly, so that the court can see the whole situation, and see for itself that he could not perform, or ascertain his duty,—that the facts and circumstances themselves excuse him. In this case, so far as appears in the bill, an inquiry of the respondents or at the Machias Banks would have procured definite and sufficient information.

For the foregoing reasons the bill, upon the second ground taken, might also be dismissed for want of sufficient allegations;—but if these deficiencies were supplied in a new bill it would not follow that even then the new bill should be sustained, if no other ground be stated than the desire to redeem from this chattel mortgage.

There is no statute specifically conferring upon the court jurisdiction in equity for redemption from chattel mortgages, as there is for redemption from real estate mortgages. Such jurisdiction, if any, must be found within the general jurisdiction clause which is limited to cases, "where there is not a plain, adequate and complete remedy at law." It is also a general rule of law and equity that when the legislature has created rights, and prescribed the mode of exercising them and afforded ample remedies, not equitable, for their breach those modes and remedies are exclusive of any remedy in equity.

In Maine and Massachusetts, chattel mortgages and the rights,

duties and remedies of the parties to them after breach of condition have been, and are, wholly regulated by statute. At first, there was no right of redemption after breach of condition, unless the mortgagee voluntarily extended the time. *Flanders* v. *Barstow*, 18 Maine, 357. Later, there was given by statute a right of redemption within sixty days after breach of condition, *Clapp* v. *Glidden*, 39 Maine, 448; *Winchester* v. *Ball*, 54 Maine, 558; but by the same statute (condensed in R. S., 1857, ch. 91, § 4) it was enacted that to exercise this new right to redeem "the sum due on the mortgage with all reasonable charges incurred must be paid or tendered" within that sixty days. Up to this time no process of foreclosure was provided and none was necessary. The failure to redeem within the sixty days after breach, ipso facto vested the property absolutely in the mortgagee. In 1861 (ch. 23) a process of foreclosure was provided and the right of redemption was extended to sixty days after the notice of foreclosure was recorded. By the same statute, however, (now R. S. ch. 91, § 3) it was enacted that this enlarged right of redemption should be exercised "by paying or tendering to the mortgagee . . . . the sum due thereon, or by performing, or offering to perform, the conditions thereof, when not for the payment of money, with all reasonable charges incurred."

Under these various statutes, pari passu with the creation and enlargement of the right of redemption after breach of condition went the enactment that the right should be exercised by performance, or tender of performance, of the condition made within the statutory period. If the mortgagor performs or tenders performance of the condition, the property becomes absolutely his, to be recovered and defended by his own hand or by the usual actions at law. If he fails to perform or to tender performance within that time, the property vests absolutely in the mortgagee leaving no scintilla of right in the mortgagor cognizable either at law or in equity. In case of controversy, the question whether performance has been made, or tendered, is one of fact fully cognizable by a court of law with trial by jury.

These specific statutory provisions and the full availability of

ample remedies of the mortgagor, outside of those in equity, exclude the general equity jurisdiction of the court from this field. Jones on Chattel Mortgages, § 686. In *Boston & Fairhaven Iron Works* v. *Montague*, 108 Mass. 248, it was said (page 253): "In the ordinary cases of mortgages of chattels where the debt or duty of the mortgagor is ascertained and fixed and the property mortgaged will pass by delivery, these provisions, [those of the statute similar to ours] furnish an effectual mode of protecting the rights of the mortgagor, and there is no occasion for the intervention of a court of equity." In *Gordon* v. *Clapp*, 111 Mass. 22 it was expressly decided that the court would not entertain a bill in equity to redeem from a chattel mortgage unless facts are stated making it "apparent that the mode specifically provided by the statute will not fully protect the mortgagor's rights." In *Chase* v. *Palmer*, 25 Maine, 345, and in *Ramsdell* v. *Tewksbury*, 73 Maine, 199, it was said that statutory modes of foreclosure excluded foreclosure by bill in equity.

In this State we find no resort to a bill in equity to redeem from a chattel mortgage until the case of *York* v. *Murphy*, 91 Maine, 320. In that case the bill was in the alternative, (1) to have the mortgage declared void, and (2) if valid, to be allowed to redeem from it with an offer to pay the amount due. The bill was adjudged insufficient for either purpose. The court, however, seems to have gathered from the hearing that there were, or might be, some facts not disclosed in the bill, which would entitle the plaintiff to special relief in equity against the mortgage and foreclosure. It was, therefore, suggested that the court would hold the bill to permit such facts, if any, to be alleged. The case is not authority for the proposition that in ordinary cases of failure to perform the condition of a chattel mortgage within sixty days from the time of recording the statutory notice of foreclosure the court will sustain a bill in equity for a redemption. The property in such case vests absolutely in the mortgagee by operation of positive law. *Winchester* v. *Ball*, 54 Maine, 558. For the court to afterwards restore it to the mortgagor, upon any terms, is to violate his plain, absolute vested right of property.

Of course there may be in some case peculiar facts and circumstances in the nature of the property,—the character of the condition,—the conduct of the mortgagee, or perhaps in the accidents or misfortunes of the mortgagor, or in other respects, that would render it necessary for a court of equity to intervene to protect the contractual or statutory rights of the mortgagor or his assigns. Such facts and circumstances might give to the court jurisdiction in equity. It is possible they exist in this case, but they have not been alleged in the bill and there has been no suggestion of them in argument. The bill, therefore, must be dismissed with costs but it may be without prejudice if the plaintiffs think they can allege and prove a case entitling them to equitable relief. We have not considered the evidence for, as often iterated, evidence is of no avail without appropriate and sufficient allegation. *Merrill* v. *Washburn*, 83 Maine, 191.

Bill dismissed with one bill of costs, but without prejudice.

EDWARD J. MURPHY

vs.

SAMUEL E. DELANO, AND HORATIO A. DUNCAN, and another, Trustees.

Sagadahoc. Opinion April 10, 1901.

Will. Spendthrift Trust. Void Deed to Cestui que Trust. R. S., c. 86, § 55.

The law does not permit a will to be defeated by a separate indenture between the trustees and the cestui que trust not in conformity with the will.

Trustees were authorized by the will of a testator to turn over the whole estate to his son after he became thirty years of age, if in their judgment it would be for the best interest of the son and his heirs "for him to have possession and control of the whole of said residue." But it appeared from the terms of a trust deed from the trustees to the son, that in their judgment it was not for his interest to have control of the entire property, for the deed continued in the trustees the control of $25,000 of the estate and attempted to protect

the income payable to the son against either alienation by him or attachment by creditors.

Held; That such a stipulation, whereby the son became absolutely entitled to receive one-fourth of the income quarterly, is not in conformity with the the terms of the trust; and, if held operative, would have the effect to defeat the manifest purpose of the testator by making this income subject to the claims of creditors.

On report. Defendant trustees discharged.

Trustee process by creditors, to enforce their claims against Samuel E. Delano, by an attachment of his interest under his father's will and administered by trustees of the will.

The case is stated in the opinion.

F. E. Southard, for plaintiff.

J. M. Trott, for trustees.

To impeach a deed of trust the proceedings should be by bill in equity, and in which defendant's wife and children should be parties. *Nichols* v. *Eaton*, 91 U. S. 716; *Broadway Nat. Bank* v. *Adams*, 133 Mass. 170.

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

WHITEHOUSE, J. The plaintiff is a creditor of Samuel E. Delano, and seeks by this trustee process to subject to the payment of his debt certain funds in the hands of these trustees, who were appointed by the probate court to execute a trust created by the will of Benjamin Delano, probated in 1875, and who had also been named as trustees in an indenture or deed of trust between themselves and the principal defendant and his wife, Annie T. Delano, executed in 1896.

Whether or not the trustees are chargeable in this proceeding is a question, involving, to some extent, the construction of the will of Benjamin Delano, and an inquiry into the validity and force of this indenture or deed of trust.

The twelfth item of the will, the consideration of which is specially involved in this case, reads as follows, to wit:

"Twelfthly. All the residue of my estate, I leave in the hands

and under the control of my said Executors, to be, by them, held and prudently managed for the benefit of my son, Samuel E. Delano, and his lawful issue, if he should have any, as follows, to wit: If from sickness or any other cause my said son shall at any time, be in need of assistance from my said estate I hereby authorize my said Executors to pay to or for him such sum from said residue as in their judgment the circumstances of the case may require; and furthermore, I hereby authorize and direct my said Executors to, at any time, render to my said son such pecuniary assistance out of said residue of my estate as, in their judgment may be for the benefit of himself and his heirs, for the purpose of establishing himself in some business or in any way benefiting himself pecuniarily; and whenever after he shall have attained the age of thirty years, it will, in their opinion be for the best interest of himself and his heirs, I hereby authorize my said Executors, to pay the whole of said residue to my said son—But in case the time should never come when in the judgment of my said Executors, it would be for the best interests of my said son and his heirs, for him to have possession and control of the whole of said residue, I hereby direct my said Executors to retain the possession and control thereof, giving him from time to time such amounts as in their judgment, his comfort and necessities may require, and to devote such part thereof as in their judgment may be proper to the support and education of his lawful issue, if he have any, until they severally arrive at the age of twenty-one years when, whatever may remain of said residue is to be divided equally among said issue; reserving enough therefrom to provide a comfortable support for the said Samuel E. if he should be living at that time, during his natural life, said reserved sum to be equally divided among his children and their heirs after his decease; and if the said Samuel E. should die without leaving lawful issue and leaving the residue of my estate still in the hands of my executors, it is my will that said residue shall descend to his heirs at law."

In their disclosure the trustees represent that "in July 1896, the said Samuel E. Delano, being then of the age of forty-three, with a wife and family of small children, requested said trustees to

set apart a sum of $25,000 in such manner that it might be secured for the benefit of himself and family; and the trustees being advised and believing that it would be impracticable to carry out the provisions of said will in the precise form in which it is worded . . . . agreed to hold said assets as then invested to the amount of $25,000" provided Samuel would execute an express deed of trust for that purpose, and thereupon the deed of trust above named was duly executed. The trustees further state in the disclosure that "in order to settle our accounts as trustees under said will, receipts were passed between us and said Samuel, but the assets of the estate to the amount of $25,000 were retained in our hands as invested; and at the time of service of process in the above entitled action, we held in our hands as such trustees the principal sum of $23,695," and income to the amount of $179.25.

The deed of trust executed as above stated, makes it the duty of the trustees to hold the fund of $25,000 in trust, and . . . . "to pay over the net income quarterly in each year . . . . in the following manner: One-quarter thereof to the said Samuel E. Delano so long as he may live, upon his personal receipt, but without any power of anticipation or alienation, and free from the interference or claim of any creditors of said Samuel; and the remaining three-quarters to the said Annie T. Delano, to be appropriated and expended by her according to her sound judgment for the benefit and behoof of the family of her and the said Samuel. Such payments to be and operate as a full release and discharge to said trustees."

By the terms of the twelfth item of the will, it is obvious that in the discretion of the executors, or of the trustees subsequently appointed to execute the trust, Samuel E. Delano would have only the life enjoyment of the income of a trust estate, and that his "lawful issue" thus have a contingent interest in the remainder which should give them the right to be heard in determining whether under a proper construction of the will the "residue" of the testator's estate was placed beyond the reach of the creditors of Samuel E. Delano. It is, also, clear that the wife and children of Samuel E. Delano have a right to be heard in determining whether

the execution of the trust deed in 1896 was a legitimate exercise of the powers of the trustees; and if so, whether it could have the legal effect to protect the trust fund against the creditors of Samuel E. Delano. These considerations illustrate the propriety of a resort, in such a case, to the equity jurisdiction of the court where the rights of all parties interested could be determined by a creditor's bill, to which the wife and children of Samuel E. Delano would be necessary parties. But, inasmuch as the questions suggested have been argued by counsel in the case now before the court, it may be advisable, in order to prevent further litigation, to present other reasons which seem conclusive against the right of the plaintiff to have the trustees charged in this proceeding.

The doctrine of "spendthrift trusts" has been distinctly approved in an elaborate opinion by this court in *Roberts* v. *Stevens*, 84 Maine, 325, in which it was held, that a testator may give to his son for life the annual income of a trust estate with such qualifications and restrictions that the life tenant cannot alienate it nor his creditors reach it, and that it is not necessary for this purpose that the will should contain an express declaration that the son's interest in the trust estate shall be beyond the reach of his creditors, provided such appears to be the clear intention of the testator, as gathered from all parts of the will construed together in the light of circumstances. In such case it is the duty of the court to look to the intention disclosed by the whole instrument rather than to the language employed in any particular clause of it. See also *Munroe* v. *Dewey*, 176 Mass. 184, reported since the arguments in this case. "If it appear from the will" said Veazey, J., in *Barnes* v. *Dow*, 59 Vt. 530, "that it was the intent of the testator that the beneficiary should have nothing she could dispose of, it will be as effectual to protect the trust as if there were an express clause against alienation." "In *Grothe's Appeal*, 135 Pa. St. 585, the balance of a certain share of the testator's property was given to a trustee to pay the interest annually accruing thereon to one of his sons, and there was no clause protecting the income from attachment; but the court, construing the will in the light of all the circumstances, held that the income was exempt from the son's

creditors "though such intent was not clearly expressed by the scrivener."

Such immunity of the estate from the claims of creditors may, in like manner, result from provision made by a testator for the maintenance of his son, by which the portion of the income to be applied for his support and the time and manner of furnishing it, are left entirely to the discretion of the trustee. In *Keyser* v. *Mitchell, and Garnishees*, 67 Pa. St. 473, the question was whether the income created for the benefit of a son, by the will of his mother, was attachable in the hands of the trustee for the debts of the son. In that case the will also provided for a contingent disposition of the corpus of the property at the discretion of the trustee. In the opinion the court say: "Here nothing is given to the cestui que trust, excepting at the discretion of the trustee. It was no doubt intended by the testator that a comfortable maintenance should be provided from the trust estate for her son; but that was to be, both in amount and mode, "at the sole and absolute discretion of the trustee." . . . . To subject the income to executions at the suit of a creditor would end all discretion of the trustee over the income, and in effect utterly defeat the intention of the testator in creating it. We cannot but regard this form of trust to be as effectual in guarding a trust and its income against the prodigality of its beneficiary, as would be a positive exclusion of creditors in the will of the donor. Where the amount results from the discretion of the trustee, and that discretion is personal, no sum, eo nomine, exists to be attached. It only belongs to the cestui que trust when it is paid, or in some other way made over or set apart, to him. We think, therefore, the attachment in this case against the trustee was entirely inoperative to bind any interest of the defendant in the trust estate."

By the plain terms of the twelfth item of the will, in the case at bar, it was left entirely to the judgment and discretion of the executors (or of the trustees who succeeded them) to decide whether any part of the residue of the estate left in their custody and control should be applied to the support of Samuel E. Delano, and if so what portion, and when and under what circumstances it should

be paid. This cestui que trust was to receive no part of the estate except at the discretion of the trustees. His interest was not absolute, but contingent upon the exercise of their judgment and discretion. The language of the will discloses a manifest intention on the part of the testator to provide for the support of his son, as in the judgment of the trustees his "comfort and necessities" might require, but to protect the trust estate against the son's improvidence and the claims of creditors by authorizing it to be kept absolutely under the control of the trustees, and applied for the son's benefit entirely at their discretion.

It is obvious that by such a provision, nothing was secured to Samuel E. Delano as a matter of right which could be reached even by a creditor's bill in equity; and it is expressly provided by section 55 of chap. 86, R. S., that at law no person shall be adjudged trustee by reason of anything "due from him to the principal defendant, unless at the time of the service of the writ upon him, it is due absolutely and not on any contingency."

It is suggested, however, that by virtue of the stipulation contained in the deed of trust of 1896 above described, one-fourth part of the income was made payable unconditionally to Samuel E. Delano, and thus became subject to the claims of creditors. For it is not in controversy that, if the deed of trust was one which the trustees were in other respects empowered to make, the provision there found against alienation and the interference of creditors would be inoperative; for while such a qualification of the estate may be attached to a gift by the donor, it cannot be created by private agreement between the trustees and cestui que trust in the manner proposed in this deed of trust.

It is an elementary principle in the law of trusts, that "under the general obligations of carrying the trust into execution, trustees are bound, in the first place, to conform strictly to the directions of the trust. . . . . The trust itself, whatever it be, constitutes the charter of the trustee's powers and duties; from it he derives the rule of his conduct; it prescribes the extent and limits of his authority; it furnishes the measure of his obligation. . . . . A trustee can use the property only for the purpose contemplated

in the trust and must conform to the provisions of the trust in their true spirit, intent and meaning, not merely in their letter." 2 Pomeroy's Eq. Jur. § 1062. In *Rife* v. *Geyer*, 59 Pa. St. 393, a testator gave to his son the income of a trust estate for life, with an express provision against alienation and liability for debts, and the trustee subsequently gave to the son a deed of the estate in fee simple. But this was declared in the opinion of the court to be "inoperative," because "it is not in the power of a trustee to destroy the trust." Quoting the language of the court in *Fisher* v. *Taylor*, 2 Rawle, 33, the opinion further states that "a different construction would make the beneficial interest, which the testator intended to provide for his son, subject to be sold for his debts, when he expressly declared that it should not be so subject, and would thus set up a new will in the place of that which it affected to interpret."

It is obvious that the deed of trust, between the trustees and the cestui que trust, in the case at bar, was not in conformity with the provisions of the will. True, the trustees were authorized by the testator to turn over the whole estate to Samuel E. Delano after he became thirty years of age, if in their judgment it would be for the best interest of Samuel and his heirs "for him to have possession and control of the whole of said residue." But, it appears from the terms of the trust deed that in their judgment it was not for his interest to have control of the entire property, for the deed continues in the trustees the control of $25,000 of the estate and attemps to protect the income payable to Samuel E. against either alienation by him or attachment by creditors. But the stipulation whereby Samuel became absolutely entitled to receive one-fourth of the income quarterly, is not in conformity with the terms of the trust, and, if held operative, would have the effect to defeat the manifest purpose of the testator by making this income subject to the claims of creditors. The trust should have been administered by the trustees in accordance with the directions of the testator. The law will not permit it to be destroyed by a separate indenture between the trustees and the cestui que trust.

Trustees discharged.

STEPHEN EMERSON, and others, *vs.* EMMA C. SHORES.

Kennebec. Opinion April 10, 1901.

Deed. Trees. License. Contract.

Growing timber forms a part of the realty and, like any other part of the estate, may be separated from the rest by express reservation or grant. When so separated it retains its distinctive character as an incident of real property as long as it remains uncut; but when cut and severed from the soil, it becomes personal property to which title may be acquired, as in case of other chattels by simple contracts either oral or written.

It has accordingly become settled law under the decisions of this court, and by the great weight of authority elsewhere, that parol or simple contracts for the sale of growing wood or timber, to be cut and removed from the land by the purchaser, are not to be construed as intended by the parties to convey any interest in land, but as executory contracts for the sale of the timber after it shall have been severed from the soil and converted into chattel property, together with a license to enter upon land for the purpose of cutting and removing it.

It is equally well settled that while the license to enter and cut timber, thus created by parol or simple contracts, is irrevocable as to that part of the timber which has been severed from the land in execution of the contract, yet while it remains executory, as to the wood or timber not yet severed from the land, it is revocable not only at the will of the owner, but by his death or by his conveyance of the land without reservation.

On report. Judgment for plaintiffs.

Assumpsit for breach of contract for the sale of standing trees. The case was reported from the Superior Court for Kennebec county.

C. F. Johnson, for plaintiffs.

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

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

WHITEHOUSE, J. In this action of assumpsit, the plaintiffs seek to recover damages for the breach of a contract for the sale of standing wood and timber. January 9th, 1897, the defendant was

the owner of the wood lot in question and gave the plaintiffs the following memorandum, signed by her, viz:

"This is to certify that I have sold the growth on the fifty-acre lot, known as the Joseph Hurd lot to Stephen Emerson, Ross Paul and James Spaulding, for which I give them five years to get the growth off in."

During the winter of 1897, and the two following winters, the plaintiffs, by virtue of this agreement, cut and removed a part of the trees standing on the lot. But in February, 1899, the defendant without the knowledge or consent of the plaintiffs conveyed her farm including this wood lot, by deed of warranty to Chas. L. Withee, making no reference in the deed to this agreement with the plaintiffs, and no reservation of the standing trees on the wood lot in question. In May following, Withee conveyed the same premises to Stephen A. Nye, also, by deed of warranty without any reservation or exceptions; but Nye made the purchase for Abel Spaulding and gave to Spaulding's wife a bond for a deed upon the payment of $3531. Abel Spaulding, thereupon, entered into possession of the farm. In the fall or early winter of 1899, the plaintiffs entered upon the lot in question for the purpose of cutting and removing the trees then standing, but were forbidden to do so by Abel Spaulding. The evidence also tended to show that, when the defendant conveyed the property to Withee, she informed him of her contract with the plaintiffs, and that Withee took the deed with the understanding that the plaintiffs were to cut and remove the growth according to the terms of their contract. There was also evidence that information of the plaintiffs' contract was communicated to Nye and Abel Spaulding, and that Nye gave Withee to understand that the plaintiffs would have the benefit of their contract with the defendant. But the case fails to show that either Withee, or Nye, or Spaulding, ever made any agreement with the plaintiffs in regard to their right to cut the standing trees after the defendant's conveyance of the lot. The only contract ever made by the plaintiffs with any one, authorizing them to cut and remove the standing trees, was that evidenced by the above memorandum signed by the defendant.

The question, thus presented for determination, is whether the defendant's conveyance of the land by deed of warranty without reservation of the trees standing on the lot, but with an oral notice to her grantee that she had sold the standing growth, operated as a revocation of her license to the plaintiffs to cut off the wood and timber, and as a breach of her contract with the plaintiffs.

It is elementary knowledge, that growing timber forms a part of the realty, and, like any other part of the estate, may be separated from the rest by express reservation or grant; that even when so separated, it retains its distinctive character as an incident of real property so long as it remains uncut; but when cut and severed from the soil, it becomes personal property to which title may be acquired, as in case of other chattels, by simple contracts either oral or written. It has accordingly become settled law under the decisions of this court, and by the great weight of authority elsewhere, that parol or simple contracts for the sale of growing wood or timber, to be cut and removed from the land by the purchaser, are not to be construed as intended by the parties to convey any interest in land, but as executory contracts for the sale of the timber after it shall have been severed from the soil and converted into chattel property, together with a license to enter upon the land for the purpose of cutting and removing it. Hence, an oral agreement for such a purpose is not regarded as within the statute of frauds.

It is equally well settled, that while the license to enter and cut timber, thus created by parol or simple contracts, is irrevocable as to that part of the timber which has been severed from the land in execution of the contract, yet while it remains executory, as to the wood or timber not yet severed from the land, it is revocable not only at the will of the owner, but by his death or by his conveyance of the land without reservation. *Buker* v. *Bowden*, 83 Maine, 69; *Banton* v. *Shorey*, 77 Maine, 48; *Russell* v. *Richards*, 10 Maine, 429; *Folsom* v. *Moore*, 19 Maine, 252; *Brown* v. *Dodge*, 32 Maine, 167; *Drake* v. *Wells*, 11 Allen, 141; *Giles* v. *Simonds*, 15 Gray, 441; *Douglas* v. *Shumway*, 13 Gray, 498; *White* v. *Foster*, 102 Mass. 375; *Fletcher* v. *Livingston*, 153 Mass.

388; *Cook* v. *Stearns*, 11 Mass. 533; 13 Am. & Eng. Enc. of Law (1st Ed.) p. 555.

In *Drake* v. *Wells*, supra, it was held, that if the owner of land for a valuable consideration orally licenses another to cut off within a certain time the trees standing upon it, and afterwards executes an absolute deed of the land to a third person, such deed when made known to the licensee will operate as a revocation of the license, although the grantee had knowledge of it. In the opinion the court say: "The whole rests in contract. A revocation of the license to enter on the land does not defeat any valid title; it does not deprive an owner of chattels of his property in, or possession, of them. The contract being still executory no title has passed to the vender, and the refusal of the vender to permit the vendee to enter on the land, for the purpose of disconnecting from the freehold the property agreed to be sold, is only a breach of contract, the remedy for which is an action for damages."

The distinction sought to be made, in behalf of the defendant, between an oral agreement for the sale of standing trees with a license to cut and remove them within a specified time, and an unsealed written agreement for the same purpose, is not in harmony with elementary principles, and is not supported by the citation of any authorities. At common law, apart from the statute of frauds, there is no distinction between unsealed written and oral contracts. For whether they are written or only spoken, they are in law, if not sealed, equally, and only, parol contracts. A present legal interest in real property can only be granted in this state by an instrument under seal. In two of the cases above cited, the contracts for the sale of the standing trees there in question, as in the case at bar, were evidenced by written bills of sale.

In *Fletcher* v. *Livingston*, 153 Mass. 388, the owner of a tract of woodland agreed in writing for a valuable consideration to sell to the plaintiff all the wood and timber standing on it "with one year's time to get it off," and the court said in the opinion: "It is well settled that a contract, like that relied on by the plaintiff, does not immediately pass a title to property, and is not a sale or a contract for a sale of an interest in land, but an executory agree-

ment for the sale of chattels to take effect when the wood and timber are severed from the land, with a license to enter and cut the trees and remove them. Such a contract if oral, is not within the statute of frauds, and its construction is the same as if it were in writing."

In *Douglas* v. *Shumway*, 13 Gray, 498, a bill of sale of standing wood and timber was given by the owner of the land, as in the case at bar, with a license to remove it within a specified time, and this written, but unsealed instrument was construed by the court as having the same force and effect that an oral agreement for the same purpose would have had.

In the case at bar the plaintiffs had no knowledge of the defendant's conveyance of the land until after it was made, and never waived any rights acquired under their parol contract for the standing growth. They were not parties to any private oral arrangements the defendant may have had with her grantee, or his successors in title, in regard to their recognition of the plaintiff's claim. There was no privity of contract between such grantees and the plaintiffs, and where there is no privity of contract, no action will lie. The defendant's conveyance of the land, without any reservation of the standing growth, operated as a revocation of the plaintiffs' license to enter for the purpose of cutting and removing the trees, and any such entry by them for that purpose against the express prohibition of the owners of the land would have been a trespass. Whether the defendant has any remedy in law or equity against her grantee for his failure to protect the rights of the plaintiffs by a reservation in his deed to his successors in accordance with any oral agreement he may have made with her, is a question not now before the court. The plaintiffs' remedy is an action for damages against the defendant for a breach of her contract with them.

The uncontroverted testimony introduced by the plaintiffs, in relation to damages, shows that the value of the growth now standing on the lot exceeds one hundred dollars, the amount named as the ad damnum in the writ; but the plaintiffs' recovery must be limited to that amount.

Judgment for the plaintiffs for one hundred dollars.

GEORGE G. ADAMS *vs.* CITY OF WATERVILLE.

Kennebec. Opinion April 16, 1901.

Towns. Municipal Debts. Evidence. Const. Law. Amend. Art. XXII.

In an action against a municipality to recover for services performed, where the employment of the plaintiff by proper authority and his performance of the services are admitted, and where the defense set up is that the city could not create this liability under the constitution of this state, because of the fact that its debts and liabilities in the aggregate already exceeded five per centum of the last regular valuation of the city, exclusive of temporary loans to be paid out of money raised by taxation, during the year in which they were made, the burden of proving this fact is upon the defendant.

Held; that the evidence in this case did not show this to be the fact, and that consequently a verdict for the plaintiff was properly ordered.

Exceptions by defendant. Overruled.

Assumpsit for services rendered by plaintiff. The court ordered the jury to return a verdict for the plaintiff.

The case appears in the opinion.

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

D. P. Foster, city solicitor, for defendant.

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

WISWELL, C. J. Action of assumpsit upon an account annexed to the writ, wherein the plaintiff sues to recover a balance due him for services, performed by him as an architect in drawing and submitting plans for a proposed city hall, and for some other services in connection therewith. At the trial, after the evidence upon both sides was closed, the court ordered a verdict for the plaintiff. The case comes here upon the defendant's exception to this ruling.

It was not questioned that the plaintiff was duly employed in behalf of the city by competent authority, or that he performed the services sued for, and no question was raised as to the amount of his bill for such services. The only ground of defense is, that at

the time this liability of the defendant was created by the employment of the plaintiff, or by his performance of the services, the indebtedness of the city of Waterville was already in excess of the five per centum of the city's valuation limited by the constitutional amendment.

It is unnecessary to consider whether or not, if the liability created by the plaintiff's employment and performance was to be paid for as soon as the services were performed, and was thus a cash transaction, it would come within the inhibition of the provision of the constitution, because the case does not show that this liability in the aggregate with previous debts or liabilities exceeded five per centum of the last regular valuation of the city. The burden of proving that this was the case, and that, therefore, the municipality could not create this liability, was clearly upon the defendant, as was decided by this court in *Lovejoy* v. *Foxcroft*, 91 Maine, 367. This defense having been set up by the defendant, it was incumbent upon the defendant to prove by competent testimony that the city could not create this liability because of the fact that its debts or liabilities in the aggregate with this liability, exclusive of debts or temporary loans made in anticipation of the collection of taxes, and "to be paid out of money raised by taxation, during the year in which they were made," amounted to more than five per centum of the last regular valuation of the city.

This the defendant failed to prove. The plaintiff was employed on August 8, 1896. A witness, called by the defendant, testified that the bonded indebtedness of the city in August, 1897, was $205,000, and that the matured and unpaid coupons at that time amounted to $5,500. There was no testimony that, during the year 1897, the city of Waterville had any other indebtedness or liability of any kind. The same witness testified, in answer to a question, that in August, 1896, there were outstanding interest bearing notes of the city amounting to $74,650, but there was no evidence that, in 1896, the city had any other debt or liability than the amount of these outstanding notes. The last regular valuation of the city of Waterville prior to August, 1896, was $4,710,774, five per centum of which is $235,538.70. The valuation of the

city for the year 1897 is not shown in the case. So far as the case shows, therefore, the city's indebtedness in 1896 did not equal five per centum of the valuation of the city for that year by a large amount, while the indebtedness of 1897 did not equal five per centum of the valuation of the preceding year by about $30,000.

If the inquiry in relation to the indebtedness of the city for these two different years, instead of as to the aggregate of such indebtedness at any one time, was accidental, still, so far as the case shows, the outstanding notes of the city in 1896 may have been for money borrowed in anticipation of the payment of taxes, and to be paid out of the taxes collected in that year; so that, in that respect, the defendant did not satisfy the burden of proof resting upon it to show that this liability, in the aggregate with other liabilities, not including money so borrowed for temporary purposes, was in excess of the constitutional limit.

Exceptions overruled.

LEVI W. ROBERTS *vs.* WILLIAM B. NILES.

Somerset. Opinion April 16, 1901.

Real Action. Pleading. Costs. R. S., c. 82, § 23; c. 104, § 2.

The demandant's declaration in a real action, after describing the demanded premises, concluded as follows: "Whereupon the plaintiff says that he was lawfully seized of the demanded premises with the appurtenances in his demesne as of fee within twenty years last past, and ought now to be in quiet possession thereof, but the said defendant hath since unjustly entered and holds the plaintiff out to the damage of," etc. Upon demurrer to this declaration, *held;* that the declaration contains a sufficient allegation of a disseizin.

As the demurrer was not filed at the first term, the judgment for the plaintiff must be final at the next term after this decision has been certified to the clerk, unless at the term when the demurrer was filed leave was obtained to plead anew.

Exceptions by defendant. Overruled.

Demurrer to a real action because the declaration did not sufficiently allege an ouster or disseizin. The case was certified to the Chief Justice by the presiding justice on the ground that the exceptions were frivolous and intended for delay.

W. H. Fisher, for plaintiff.

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

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

WISWELL, C. J. The demandant's declaration in a real action, after describing the demanded premises, concluded as follows: "Whereupon the plaintiff says that he was lawfully seized of the demanded premises with the appurtenances in his demesne as of fee within twenty years last past, and ought now to be in quiet possession thereof, but the said defendant hath since unjustly entered and holds the plaintiff out, to the damage of," etc. To this declaration the defendant filed a general demurrer, which was overruled at nisi prius, and the defendant alleged exceptions to this ruling.

In support of his demurrer the defendant argued that the declaration contains no sufficient allegation of an ouster or a disseizin. Such an allegation is, of course, necessary, R. S., c. 104, § 2; without it the declaration would undoubtedly be demurrable, but it is not necessary that the word "disseized" should be used; it is sufficient if the declaration contains an allegation, to the effect, that before the commencement of the action the defendant had wrongfully deprived the plaintiff of the seizin of the demanded premises, to which he was entitled.

Disseizin is a privation of seizin, the act of wrongfully depriving a person of the seizin of land. Bouvier's Law Dict. Vol. 1, page 484; Rapalje & Lawrence's Law Dict. Vol. 1, page 398. Here, the demandment alleged his seizin of the demanded premises within twenty years next before the commencement of the action, stating the estate he claimed therein; that the defendant "hath since unjustly entered and holds the plaintiff out." The word

"unjustly" in this connection means "without right" or "wrongfully". This is an allegation of a disseizin, a wrongful deprivation of the demandant's seizin. The declaration is therefore sufficient and the exceptions must be overruled. But as the language used by the demandant in his allegation of a disseizin differs from that commonly used for this purpose, we are not disposed to adjudge the exceptions frivolous and thus impose upon the defendant the penalty of treble costs, as provided by R. S., c. 82, § 23.

As this demurrer was not filed at the first term, the judgment for the plaintiff must be final at the next term after this decision has been certified to the clerk, unless at the term when the demurrer was filed leave was obtained to plead anew, as to which the case is silent.

Exceptions overruled.

STICKNEY AND BABCOCK COAL COMPANY

vs.

SHEPARD S. GOODWIN.

Penobscot. Opinion April 16, 1901.

Attachment. Fraudulent Conveyance. Levy. Bankrupt Acts of 1867 and 1898. R. S., c. 76, § 14; c. 81, § 56.

An attachment of real estate made more than four months prior to the time of the filing of a petition in bankruptcy, by or against the defendant, is not dissolved by the filing of such petition and the subsequent proceedings in bankruptcy.

Where a special attachment is directed and made of real estate, of which the defendant once had the legal title but which in the writ is alleged to have been conveyed by him prior to the attachment, in fraud of the plaintiff, a creditor, and where the defendant has, more than four months after the attachment filed his petition in bankruptcy, been adjudged a bankrupt and received his discharge, the cause of action being one provable against him in bankruptcy, the plaintiff, if in other respects entitled to judgment, is entitled to a special judgment against the property attached or claimed to have been attached.

Under such circumstances, the court in the original action cannot determine

whether or not there was an attachment in fact, or inquire into the alleged fraudulent conveyance. These questions must be subsequently determined in proper proceedings, when all the persons legally interested are before the court as parties. In this case the court only decides that the attachment, if one exists, has not been dissolved by the proceedings in bankruptcy, and that the plaintiff is entitled to a special judgment against the property claimed to have been attached.

But the enforcement of the execution issued upon the judgment, thus rendered, will give the creditor a momentary seizin of the land levied upon sufficient to enable it to maintain a real action for its recovery in its own name. R. S., c. 76, § 14. In such action, the rights of the parties interested can be determined.

On report. Judgment for plaintiff.

Assumpsit upon account annexed and a promissory note. The defendant duly pleaded a discharge in bankruptcy, under the act of 1898, upon his petition filed September 23, 1899. The plaintiff, admitting that the discharge was a bar to a personal judgment and claiming an attachment was made by him more than four months prior to the proceedings in bankruptcy, moved for a special judgment against the property so attached. The defendant denied that an attachment had been made.

C. H. Bartlett, for plaintiff.

B. C. Additon and D. W. Nason, for defendant.

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

WISWELL, C. J. On May 16, 1899, the plaintiff commenced suit against the defendant upon a promissory note. In the writ there was a direction to attach the goods and estate of the defendant and especially to attach two parcels of real estate, particularly described, alleged to belong to the defendant, but to have been conveyed by him, one parcel to his wife and the other to his son, by deeds dated October 31, 1898, in fraud of the plaintiff, a creditor at the time of the conveyances. Upon the same day an attachment was made of all the defendant's real estate and interest in real estate in Penobscot county, and at the same time a special attachment was made, as directed, of the two parcels described in the writ and alleged to have been fraudulently conveyed.

The defendant filed his voluntary petition in bankruptcy in the clerk's office of the U. S. District Court in this District on September 23, 1899, and was duly adjudged a bankrupt and subsequently received his discharge in accordance with the provisions of the Bankruptcy Act of 1898.

It is, of course, conceded that the cause of action sued was provable against the defendant in bankruptcy, and that consequently the defendant's discharge is a bar to this action against him. But the plaintiff does not seek for a judgment against the defendant. It asks for a special judgment against the property attached, or claimed to have been attached, upon the original writ. We see no reason why the plaintiff is not entitled to such judgment.

By section 67, subdivision f. of the Bankruptcy Act of 1898, "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." This section applies to a case where a voluntary petition is filed by the bankrupt, as well as to a case where the petition is filed against him. *Jones* v. *Stevens*, 94 Maine, 582.

But this attachment was not made within four months prior to the time of the filing of the petition in bankruptcy. It was made several days more than four months prior to the filing of the petition. The language of the act, above quoted, to the effect that all attachments made within four months prior to the filing of the petition in bankruptcy shall be dissolved, is equivalent to an express provision for the preservation of attachments made more than that time before the filing of the petition, as decided by this court in considering a similar provision of the Bankruptcy Act of 1867 in *Leighton* v. *Kelsey*, 57 Maine, 85.

The attachment not being dissolved by the bankruptcy proceed-

ings, if the plaintiff could not have a judgment against the property claimed to have been attached, it would be entirely without remedy, although, as we have seen, the attachment was not dissolved and although the property attached, even if fraudulently conveyed more than four months prior to the filing of the petition, would not pass to the defendant's trustee in bankruptcy.

That, under such circumstances, a plaintiff might have judgment and execution against the property attached was twice decided by this court while the Bankruptcy Act of 1867 was in force. *Bowman* v. *Harding*, 56 Maine, 559; *Leighton* v. *Kelsey*, supra. There is nothing in the present act which would cause a different conclusion.

It is argued that the plaintiff should not have judgment against the property claimed to have been attached, it being conceded that the plaintiff obtained by the attachment no lien upon any real estate except the two parcels especially attached, because the record owners of these parcels are not parties to this proceeding, and have had no opportunity to make their defense; and that under the constitution of this state these record owners should have an opportunity to defend and should have a right to a trial by jury. But it is not necessary that they should be parties to this suit, or should have an opportunity to make any defense before judgment in this suit is ordered, because we cannot at this time, upon the plaintiff's motion for a judgment against the property, pass upon the question of the alleged fraudulent conveyance, or determine whether the plaintiff has an attachment in fact.

These questions must be subsequently adjudicated in other proceedings, when the record owners will have ample opportunity to contest the claim of the plaintiff that this property was conveyed by the defendant in fraud of his creditors. We do not decide at this time that the property formerly owned by the defendant was conveyed by him in fraud of his creditors; that involves a question of fact to be subsequently decided when all persons interested are parties,—but only that the plaintiff has an attachment, if the real estate was, in fact, the property of the defendant so far as creditors are concerned at the time of the attachment, and that such attach-

ment, if one exists in fact, has not been dissolved by the proceedings in bankruptcy. The judgment, followed by the enforcement of an execution issued thereon, only permits the plaintiff to proceed further, and have the question as to the alleged fraudulent conveyances determined later in proper proceedings.

By R. S., c. 76, § 14: "A levy may be made on land fraudulently conveyed by a debtor. . . . . In such case, the tenant in possession shall not be ousted, but the officer shall deliver to the creditor a momentary seizin sufficient to enable him to maintain an action for its recovery in his own name." And by R. S., c. 81, § 56, all real estate liable to be thus taken on execution may be attached on mesne process. If a conveyance is fraudulent and void as to creditors, the title is regarded as remaining in the fraudulent grantor, and the judgment creditor by a levy acquires such seizin as enables him to maintain a real action against the fraudulent grantee. *Marston* v. *Marston*, 54 Maine, 476.

Here, the legal title of the property attached was once in the debtor: if the conveyances or either of them, were fraudulent as to this creditor, the plaintiff has by its attachment acquired a lien which may be perfected by enforcement of the execution issued on this judgment; but before the tenants can be ousted the question must be determined in proper proceedings.

The plaintiff is, therefore, entitled to judgment against the property claimed to have been attached in the original writ. The case is remanded to nisi prius for a determination of the amount for which the plaintiff is entitled to such judgment.

So ordered.

LUCY M. FLINT, Admx. in Equity,

vs.

ROBERT COMLY and others.

Cumberland. Opinion April 16, 1901.

Jurisdiction. Attorney. Law and Equity Act, 1893. Practice. Chancery Rules, VIII, XIV. R. S., c. 77, §§ 22, 25; c. 82, § 10.

A non-resident defendant, upon whom service has not been made in this state, by causing a general and unconditional appearance to be made for him by his attorney, submits himself to the jurisdiction of the court, if the court has jurisdiction of the subject matter, although independently of this voluntary action by the defendant, the court might have had no jurisdiction over him. This is as true in causes in equity as in actions at law.

In the absence of anything to the contrary, the presumption is that an attorney has full right, power and authority to make such appearance. The court will not require, in addition to such an appearance and an answer signed by counsel, an answer personally signed by a non-resident defendant, before assuming jurisdiction over the person of such defendant.

A defendant who thus voluntarily submits himself to the jurisdiction of the court, must be held to have done so subject to the method of procedure in this state and to all statutory provisions in relation to procedure, including, among other things, the power of the court under chap. 217 Public Laws of 1893, in an equity proceeding, to strike out the pleadings in equity and require the parties to plead at law in the same cause, whenever it appears that the remedy at law is plain, adequate and complete and that the rights of the parties can be fully determined and enforced by a judgment and execution at law, and to then hear and determine the case at law. If a non-resident defendant has voluntarily submitted himself to the jurisdiction of the court, the procedure must in all respects be the same as if the defendant was a resident of the state.

The procedure provided by chap. 217, Public Laws of 1893, may be ordered by the court without any motion or request therefor by either party, if it appears to the court during the progress of the hearing that the conditions named in the act exist. Consequently, the form of a written motion by one of the parties that such an order be made is immaterial.

Although the act provides that this order may be made "upon reasonable terms," this does not make it obligatory upon the court to impose terms. Any terms might be unreasonable in a particular case. The matter of imposing terms is left to the discretion of the court.

The sitting justice did not use the language of the statute in his order, but caused this entry to be made upon the docket: "Motion to convert cause into an action at law granted." *Held;* that it must be assumed that, before the justice made the order to convert the cause in equity into an action at law, it was made to appear to him that the remedy at law was plain, adequate and complete and that the rights of the parties could be fully determined and enforced by a judgment and execution at law. And that, although the court in terms did not order that the pleadings in equity be stricken out and that the parties should plead at law in the same cause, this was the precise effect of the order to convert the cause in equity into an action at law, and was in substance and effect what was authorized by the statute.

Exceptions by defendants. Overruled.

Bill in equity by Lucy M. Flint of Cornish, in the county of York, administratrix of the goods and estate of Fred T. Flint, late of said Cornish, deceased, against Robert Comly of Philadelphia, and William Flanigen of Woodbury, New Jersey, co-partners in business under the firm name and style of Comly and Flanigen, and against Charles E. Perkins of Portland. The bill asserts a lien or interest in certain mortgages and pledges of real estate and personal property held by the non-resident defendants, and against the estate of the said Fred T. Flint.

After several hearings the plaintiff moved to convert the cause into an action at law. This motion having been granted the defendants excepted.

Edward Woodman and Robert T. Whitehouse, for plaintiff.

J. W. Symonds, D. W. Snow, C. S. Cook, C. L. Hutchinson; W. P. Perkins, with them, for defendants.

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

WISWELL, C. J. The plaintiff commenced a bill in equity against three defendants, one a resident of the state, the other two non-residents, which was duly entered and filed in the office of the clerk of this court for Cumberland county, on July 7, 1899. Thereupon a subpœna issued against the resident defendant, who subsequently entered his appearance, and an order issued as to the non-resident defendants to appear and answer within one month

from the first Tuesday of August, 1899. There was no service of this order in this state, but upon November 8, 1899, counsel for the non-resident defendants entered upon the docket a general and unconditional appearance in the manner provided by Chancery Rule VIII, and on January 23, 1900, the joint answer of these non-resident defendants was filed, signed in their names by their solicitors.

Prior to this, on July 7, 1899, a preliminary injunction had been issued against the resident defendant, without a hearing, but upon the filing of the statutory bond. Later, he filed a motion to dissolve this injunction, upon which motion a hearing was had, but before a decision had been rendered, on January 24, 1900, the plaintiff moved to discontinue as to the resident defendant and three days later this motion was granted with costs for him. On January 24, 1900, the plaintiff also filed this motion: "Now comes the plaintiff in the above entitled cause and shows unto your Honors that the matter in controversy may be adequately and completely determined in a suit at law, and that the issues presented may be more conveniently described according to the course of the common law, than in equity. Wherefore, she prays leave of the court to convert her said action into an action at law upon such reasonable terms as the court may be pleased to order, etc." The docket shows this entry under date of January 27, 1900: "Motion to convert cause into an action at law granted."

To this order the defendants took exception and, without any thing further being done in the case, entered the same at the next law court. It might be questioned as to whether this bill of exceptions was not prematurely brought forward, as the exception was to an interlocutory order and perhaps should not have been entered until the completion of the case, when it might have become unnecessary to prosecute the exceptions. R. S., c. 77, §§ 22 and 25; *Maine Benefit Association* v. *Hamilton*, 80 Maine, 99. But, as the procedure under the Act of 1893 is somewhat anomalous, and as there has already been considerable delay in the case, we think it more in the interests of justice that the questions involved should now be determined, which course is not without

precedent in this state, even if it were clear that the exceptions were prematurely brought forward. *Stevens* v. *Shaw*, 77 Maine, 566.

It is argued that this court had no jurisdiction over the non-resident defendants, that no service of the bill was ever made upon them in Maine, and no fact set up in the bill which would subject them to the jurisdiction of this court, except the alleged fact that their co-defendant had in his possession certain property or evidences of indebtedness belonging to the non-resident defendants not open to attachment; that when the bill was discontinued as to the resident defendant, the court then had no jurisdiction whatever over these defendants; and that this discontinuance as to the other defendant, by leave of court and upon the plaintiff's motion, was equivalent to an admission by the plaintiff and a decision by the court that the court had no further jurisdiction over these defendants.

The answer to all this is, that the defendants by their duly authorized counsel entered a general and unconditional appearance, thereby voluntarily submitting themselves to the jurisdiction of the court, although independently of this voluntary action upon their part the court may have had no jurisdiction over them. It is said in Daniell's Chancery Pleading and Practice, p. 536: "Appearance is the process by which a person, against whom a suit has been commenced, submits himself to the jurisdiction of the court."

And in the Encyl. of Pleading and Practice, Vol. 2, page 639, "It is a universal rule, which admits of no exception, that, if the court has jurisdiction of the subject matter, a general appearance gives jurisdiction over the person. The principle that a general appearance confers personal jurisdiction is of great importance when a non-resident is sued. In a personal action brought against a citizen of another state, the court does not acquire jurisdiction over him by virtue of notice served on him in such other state. While process can not extend beyond the limits of the state, yet a non-resident becomes subject to the jurisdiction of the court by a general appearance." In support of these propositions authorities are cited from nearly every state in the Union; they are too numer-

ous, and the matter is too well settled to require a citation of these authorities here.

This principle has been several times recognized by this court in actions at law. *Maine Bank* v. *Hervey*, 21 Maine, 38; *Buckfield Branch R. R. Co.* v. *Benson*, 43 Maine, 374; *Thornton* v. *Leavitt*, 63 Maine, 384; *Mahan* v. *Sutherland*, 73 Maine, 158. That the principle is equally applicable to causes in equity will be seen by an examination of the cases above referred to as cited in the Encyl. of Pleading and Practice.

It is suggested in the argument, by defendant's counsel, that in accordance with the equity practice in this state, the court will not assume jurisdiction over a non-resident defendant merely upon the general appearance of counsel and upon an answer signed by counsel, but will require in addition to the general appearance of counsel an answer personally signed by such non-resident defendant, unless service has been made upon him in the state. We are not aware of any such practice, and no authority to that effect has been called to our attention. Upon the other hand, the rule is that, in the absence of anything to the contrary, the presumption is that an attorney has full right, power and authority to make such appearance. In support of this proposition the authorities are unanimous. Here, there is no suggestion of any want of authority upon the part of the counsel for these defendants to enter a general appearance for them. If these non-resident defendants had desired to object to the jurisdiction of the court, they should have entered a special or conditional appearance. Such an appearance, made for the purpose of urging jurisdictional objections, is clearly recognized by all courts and works upon practice.

It is argued that by Chancery Rule XIV defenses by demurrer or plea may be inserted in an answer, and that an appearance followed by an answer, in which is contained a plea to the jurisdiction, should not have the effect of giving the court jurisdiction over the person of a non-resident defendant, when jurisdiction is acquired in no other way. But, in this case, the defendants' answer does not contain any plea to the jurisdiction of the court over these defendants, nor is objection to the jurisdiction of the court

raised in any way; it merely, in one paragraph, denies that the resident defendant had in his possession, or under his control, any property belonging to them. But, even if the defendants in their answer, in which they make answer to the merits of the cause, had also objected to the jurisdiction of the court as to them, it seems, in accordance with the authorities, that even this course would have subjected them to the jurisdiction of the court. The rule is, that when a defendant appears solely for the purpose of objecting to the jurisdiction of the court over his person, such motion is not a voluntary appearance of defendant which is equivalent to service. Where, however, the motion involves the merits of the case, the rule is otherwise. *Elliott* v. *Lawhead*, 43 Ohio State, 172. See also *St. Louis Car Co.* v. *Stillwater St. Ry. Co.*, 53 Minn. 129; *Carroll* v. *Lee*, 3 G. & J. (Md.) 504; *Fitzgerald, etc. Construction Company* v. *Fitzgerald*, 137 U. S. 98; *Tipton* v. *Wright*, 7 Bush, (Ky.) 448.

These defendants having, as we have seen, voluntarily submitted themselves to the jurisdiction of the court, must be held to have done so subject to the method of procedure in this state and to all statutory provisions in relation to procedure, including, among other things, the power of the court, under chap. 217 Public Laws of 1893, in an equity proceeding, to strike out the pleadings in equity and require the parties to plead at law in the same cause, whenever it appears that the remedy at law is plain, adequate and complete and that the rights of the parties can be fully determined and enforced by a judgment and execution at law, and to then hear and determine the case at law. This provision of the statute applies to all cases pending in equity, and this order may be made by the court, under the conditions named, whenever the court has jurisdiction of the subject matter of the cause and over the persons of the defendants. That this court has jurisdiction of the subject matter of the cause is not denied, and that it acquired jurisdiction over the persons of the defendants, we have already decided. The important thing is that the court has jurisdiction; it matters not how that jurisdiction was acquired over the person of a defendant. If a non-resident defendant has voluntarily submitted himself to the

jurisdiction of the court, the procedure must in all respects be the same as if the defendant was a resident of the state.

We have no question, therefore, of the power of the court in this cause, under the conditions named in the act, to order that the pleadings in equity be stricken out and to require the parties to plead at law in the same cause, which may then be heard and determined by the court upon the law side of the court. The cause is the same notwithstanding it has been converted from a cause in equity to an action at law. The section of the act refers to it as "the same cause" and provides that the court may hear and determine "the cause" at law, while by another section of the act it is provided that no attachment shall be affected by this procedure.

It is further contended, by the counsel for the defendants, that although the court attempted to proceed under this Act of 1893, it did not in fact accomplish this intention because of various informalities, and our attention is called to the insufficiency of the plaintiff's motion; the fact that no terms were imposed; and the further fact that in making the order the court did not use the language of the act. It is true that the plaintiff's motion did not contain an averment, "that the remedy at law is plain, adequate and complete, and that the rights of the parties can be fully determined and enforced by a judgment and execution at law." It simply said "that the matter in controversy may be adequately and completely determined in a suit at law, and that the issues presented may be more conveniently tried according to the course of the common law than in equity." It would have been better practice if the motion had followed the language of the act, but we do not think that any written motion was necessary, or even that this order of the court need be made at the instance or request of either party. It may be made by the court without the motion of either party during the progress of the hearing, if it appears to the court that the conditions named in the act exist. See *Ridley* v. *Ridley*, 87 Maine, 445. Whatever the form of the motion in any case, or if there is no motion, these facts must be made to appear to the court before an order of this kind is made.

Again, the act provides that the order may be made "upon

reasonable terms." Here no terms were imposed, and it is claimed that upon this account that the order was not properly made. But we do not think that the statute makes it obligatory upon the court to impose terms: any terms might be unreasonable in a given case. The language of the act is similar to the provision of R. S., c. 82, § 10, "such errors and defects may be amended on motion of either party, on such terms as the court orders." Under this statute it has been held by this court that the matter of imposing any terms was discretionary upon the court. *Bolster* v. *Inhabitants of China*, 67 Maine, 551. Both of these statutes differ from the one allowing an amendment after demurrer, which can only be done, by express provision of the statute, upon the payment of costs.

Lastly, it is argued that the order of the court was not in the language of the act, that the court did not strike out the pleadings in equity and require the parties to plead at law in the same cause, and that it does not appear that the justice who made the order found that the statutory conditions existed. But this finding by the sitting justice was a condition precedent to making the order. We must assume that, before making the order to convert the cause in equity into an action at law, it was made to appear to him that, in the language of the act, "the remedy at law is plain, adequate and complete and that the rights of the parties can be fully determined and enforced by a judgment and execution at law."

The court in the order did not strike out the pleadings in equity and require the parties to plead at law in the same cause. This, however, was the precise effect of the order to convert the cause in equity into an action at law, and was in substance and effect what was authorized by the statute. It was a brief and concise form of order, by which the court exercised the authority given by this statute.

Exceptions overruled. Case remanded to nisi prius for further proceedings.

MARIA E. GOLDER *vs.* CARRIE E. GOLDER.

Androscoggin. Opinion April 16, 1901.

Mortgage. Foreclosure. Pleadings. Parties. Evidence. Widow. Heirs. R. S., c. 82, § 98; c. 90, § 13. Stat. 1895, c. 157.

In a writ of entry by a mortgagee to recover possession, for the purpose of foreclosure for condition broken, of premises mortgaged by a deceased mortgagor to secure an obligation given by him conditioned for the mortgagee's support during life, the administrator of the deceased mortgagor cannot be made a party defendant.

In such an action against the widow of the deceased mortgagor, in possession and claiming title, the mortgagee (the plaintiff) is a competent witness in her own behalf.

Chapter 157, Public Laws of 1895, provides that the real estate of a person deceased, intestate, shall descend, so far as his widow is concerned, as follows: "If he leaves a widow and issue, one-third to the widow, if no issue, one-half to the widow," does not constitute the widow an heir of her deceased husband. Since the passage of that act, as before, she takes as widow and not as heir.

Exceptions by defendant. Overruled.

Real action to foreclose a mortgage. The tenant in possession is the widow of the mortgagor and claimed that the action should be against the administrator of the mortgagor.

The case appears in the opinion.

E. M. Briggs, for plaintiff.

D. J. McGillicuddy and E. J. Morey, for defendant.

SITTING: WISWELL, C. J., WHITEHOUSE, STROUT, FOGLER, POWERS, JJ.

FOGLER, J. Writ of entry to recover possession of a certain parcel of real estate described in the declaration, formerly the homestead farm of the demandant's husband, now deceased.

The verdict was for the demandant and the defendant brings the case here upon exceptions to the rulings of the presiding justice. The demandant is the mother and the defendant is the widow of

Edgar J. Golder, who died May 15, 1899. The writ is dated Jan. 2, 1900.

April 28, 1886, Edgar J. Golder executed and delivered to his mother, the demandant, an obligation binding himself to well and suitably support her on said homestead farm during her natural life in acccordance with certain stipulations therein contained, and also on the same day, executed and delivered to her a mortgage deed of the premises demanded in this suit, as security for the performance of said obligation.

At the date of the writ the defendant was in possession of the demanded premises. The demandant claimed and the jury found by the verdict, that there was a breach of the condition in the mortgage and brought this suit to obtain possession of the mortgaged premises. The defendant pleaded the general issue, and also set up by brief statement certain matters of special defense.

The demandant offered in evidence the mortgage and bond. The admissibility of each was seasonably objected to. The grounds of such objection, as stated by the exceptions, are, that for any breach of the bond before or after the death of Edgar J. Golder the action should be against his administrator; and further, that, inasmuch as the bond and mortgage were the personal contracts of Edgar J. Golder, and inasmuch as there can be no foreclosure of the mortgage without a breach of the bond, the suit should be against the administrator.

The presiding justice overruled the objection and admitted the testimony, and the defendant excepts.

If this were an action upon the bond to recover damages for its breach, the administrator would be the proper party defendant; but this is a suit by a mortgagee to obtain possession of the mortgaged premises for breach of condition.

The mortgagor's administrator is not in possession of, nor has he any title to or interest in the demanded premises. No action for possession is maintainable against him. On the other hand, the defendant by her plea admits that she holds possession claiming title. It is a question of title. Section 13, ch. 90, R. S., provides that, "an action on a mortgage deed may be brought against a

person in possession of the mortgaged premises." The action is therefore properly brought against the defendant, and the mortgage and bond are clearly admissible on the question of title.

The demandant offered herself as a witness in her behalf on the question of breach of the bond and mortgage. The defendant's counsel seasonably objected to the competency of the demandant to testify as to any facts occurring before the death of Edgar J. Golder, the obligor and mortgagor, on the ground that the defendant is an heir of her deceased husband and party defendant to the suit. The presiding justice overruled the objection and permitted the demandant to testify to facts occurring as well before as after the death of the defendant's husband, to which ruling the defendant excepts.

This exception must be overruled upon two grounds, namely:

First: A widow is not an heir of her deceased husband. This was so held in *Lord* v. *Bourne*, 63 Maine, 368, in which the question is quite thoroughly discussed; and in the later cases of *Clark* v. *Hilton*, 75 Maine, 426, and *Buck* v. *Paine*, Id. 582; *Keniston* v. *Adams*, 80 Maine, 294.

In *Clark* v. *Hilton*, supra, it is said, "husband and wife, though they may be entitled under our statutes to certain interests in the estate of each other, are not, properly speaking, heirs of each other. The rights which the statutes give them, respectively, they do not take as heirs."

The defense contends that by the terms of Public Laws, 1895, ch. 157, passed since the decisions were made in the cases above cited, a wife is made an heir of her deceased husband. Prior to the passage of the act above referred to a widow took a life estate in one-third, or one-half in case of no issue, in the real estate of her deceased husband. The act of 1895 provides that the real estate of a person deceased intestate shall descend, so far as his widow is concerned, according to the following rule:

"If he leaves a widow and issue, one-third to the widow. If no issue, one-half to the widow. And if no kindred the whole to the widow."

The statute does not change the status of the widow with reference to her deceased husband's estate. It enlarges her interest by giving her an estate in fee instead of an estate for life. She still takes not as heir, but as widow.

Secondly: Even if the defendant could be regarded as an heir of her deceased husband, the demandant would not be precluded from testifying. The statutes of this state permitting a party to testify, "do not apply except in certain instances, to cases where, at the time of taking testimony, or at the time of the trial, the party prosecuting or the party defending, or any one of them, is an executor or an administrator, or is made a party as heir of a deceased party." R. S., ch. 82, § 98.

The defendant here is not an executor or administrator nor is she "made a party as heir of her deceased husband." The action is against her personally. The issue is between her in her individual capacity and the demandant.

That the testimony of the demandant was admissible is well settled by this court. *Wentworth* v. *Wentworth*, 71 Maine, 72; *Goulding* v. *Horbury*, 85 Maine, 236.

Exceptions overruled.

JENNIE A. MUNRO, In Equity,

vs.

SOPHIA M. BARTON.

Knox. Opinion April 19, 1901.

Mortgage. Redemption. Equity. Practice. R. S., c. 90, §§ 14-17. Stat. 1821, c. 85; Stat. 1837, c. 286, § 1.

To sustain a bill in equity to redeem from a mortgage of real estate, unless the mortgagee or person claiming under him resides without the State, or his residence is unknown, or the mortgage is alleged and proved to be fraudulent in whole or in part, the plaintiff must allege and prove either a prior tender or payment, or such facts as show that the defendant, upon demand, has

unreasonably refused to render in writing a true account of the sum due upon the mortgage, or has in some other way by his default prevented the plaintiff from performing, or tendering performance, of the condition of the mortgage.

The provision in R. S., c. 90, § 14, that the plaintiff in his bill may offer to pay or perform and that "such offer shall have the same force as a tender of payment, or performance, before the commencement of the suit and the bill shall be sustained without such tender," is not absolute, but conditional, and dependent upon the preceding portion of the same section.

The offer in the bill to pay or perform is to have such force, and the bill be maintained only, if the defendant by his unreasonable refusal or neglect to account upon demand, or in some other way by his default, has prevented the plaintiff from performing or tendering performance.

On report. Bill retained for amendment.

Bill to redeem a mortgage claimed by the defendant to be foreclosed and action barred by adverse possession.

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

J. E. Moore, for defendant.

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

POWERS, J. This bill is brought to redeem from a mortgage given in 1835. A foreclosure was attempted in 1846, and the defendants, and their predecessors in title, have been in possession under recorded deeds since 1853. It is not, however, necessary to determine at this time the validity of the foreclosure proceedings or the character of the defendant's possession, as the bill in its present form is not maintainable for want of sufficient allegations.

The plaintiff, in her bill, offers to pay what shall be found to be due upon the mortgage, but there is neither allegation nor proof of any prior tender of payment or performance, nor of any demand upon the mortgagee, or persons claiming under him, for a true account of the sum due upon the mortgage and a neglect or refusal, on his or their part, to render such an account. No facts are stated showing that such tender could not be made, or that the defendants have in any way by their default prevented the plaintiff from performing, or tendering performance, of the condition of the mortgage. Under such circumstances the bill cannot be maintained.

To support a bill in equity to redeem from a mortgage of real estate, unless the mortgagee or person claiming under him resides without the State or his residence is unknown, (R. S., c. 90, § 17,) or the mortgage is alleged and proved to be fraudulent in whole or in part, (§ 16,) the plaintiff must allege and prove either a prior tender or payment, (§ 15,) or such facts as show that the defendant upon demand has unreasonably refused or neglected to render in writing a true account of the sum due upon the mortgage, or has in some other way by his default prevented the plaintiff from performing, or tendering performance of, the condition of the mortgage.

It is true, that section 14 provides that the offer in the bill to pay or perform "shall have the same force as a tender of payment or performance before the commencement of the suit; and the bill shall be sustained without such tender," but this cannot be separated from the language which precedes it. The whole section taken together shows plainly, that the offer is to have such force, and the bill be maintained only, if the defendant by his unreasonable refusal and neglect to account upon demand or in some other way by his default, has prevented the plaintiff from performing or tendering performance. Section 14 was first enacted in 1837, c. 286, § 1, and was evidently taken from the precisely similar statute of Massachusetts, 1821, c. 85, the construction of which had already been settled in *Willard* v. *Fiske*, 2 Pick. 540, and *Putnam* v. *Putnam*, 13 Pick. 129, a construction which has been uniformly followed by this court ever since the enactment of the statute in this State. *Roby* v. *Skinner*, 34 Maine, 270; *Brown* v. *Snell*, 46 Maine, 490; *Wing* v. *Ayer*, 53 Maine, 138; *Wallace* v. *Stevens*, 64 Maine, 225; *Dinsmore* v. *Savage*, 68 Maine, 191. And this court will not entertain a bill to redeem from a mortgage of real estate unless the statutory prerequisites have been complied with. *Brown* v. *Snell*, supra. Whitehouse Eq. Practice, § 71.

The bill in this case was filed March, 1894. It is admitted that, since August 13, 1875, the possession of the defendants and those under whom they claim has been adverse. Should the bill be dismissed without prejudice, it would be too late to bring a new bill, even though the plaintiff was able to prove a tender on her

part, or demand and unreasonable refusal to account, or other default on the part of the defendant, prior to the commencement of this suit. If the facts are such as to support such an allegation, considering that the plaintiff is without remedy unless this bill can be sustained, the plaintiff should be permitted to amend by inserting the necessary allegations.

Bill retained for amendment.

ORRISON W. COLE, In Equity, *vs.* PEREZ FICKETT, and others.

Penobscot. Opinion April 19, 1901.

Deed. Mistake. Reformation. Equity. Trusts.

A deed, as a muniment of title, can be shaken only by the most plenary and convincing evidence.

A mistake in a deed, if proved by plenary evidence, may be reformed, in a suit in equity between the parties to it.

Held; that it cannot be reformed, in this case, because the suit is not between the parties to the deed.

Where a person through fraud or mistake obtains the legal title and apparent ownership of property which in justice and good conscience belongs to another, such property is impressed with a trust in favor of the equitable owner.

The plaintiff's grantor, Fred E. Hall, in 1891, bought and paid for the "Kittredge Friend lot," which comprised lot 21 and a part of lot 148, as delineated on the plan of Etna, but by mutual mistake, the deed did not include lot 21. The plaintiff since his deed, and his grantor from the date of his deed until he conveyed to complainant, occupied the premises as the real and ostensible owners.

In 1893, Anna Fickett and F. Willis Fickett bought and paid for "the Otis L. Carter farm," which comprised lots 20, 29 and part of lot 149, and nothing more. For many years prior this farm had been known as the "Otis L. Carter farm." By mutual mistake the deed of this farm from Emily H. Phelps included lot 21, which was never known as part of that farm, but had long been known as "the Kittredge Friend lot." The mistake in including lot 21 appears from full and plenary evidence as the mutual mistake of both parties to the deed. F. Willis Fickett, one of the defendants, was one of the grantees in the deed in which the mistake occurred. Ulysses G. Fickett,

Louisa Downes and Perez Fickett, three other defendants, claim by descent from Anna Fickett, an original grantee.

Held; that the plaintiff is entitled to a conveyance and release from the above defendants of all the right, title and interest in and to lot 21, which was conveyed by Emily H. Phelps to Anna Fickett and F. Willis Fickett, by her deed dated May 9, 1893; and that they together with William H. Hall and Emily H. Moore, two other defendants, through whom the legal title has passed, be perpetually enjoined from asserting any claim to said lot 21, on the plan of Etna, known as "the Kittredge Friend lot," or from conveying or attempting to convey the same except to the complainant, in accordance with the decree to be entered in this case.

The defendant Frederick A. Simpson is assignee of a mortgage of the Otis L. Carter farm in which is erroneously included lot 21. When the mortgage was given the mortgagor was seized of the legal title to lot 21, but did not hold the equitable title. Simpson is a holder without notice of the mistake.

Held; that his mortgage must be primarily charged upon the "Otis L. Carter farm" in exoneration of lot 21. If the plaintiff pays the mortgage, or if lot 21 shall be subjected to its payment, he is to be subrogated to the mortgage rights of Simpson.

On report. Bill sustained.

Bill in equity alleging a constructive trust, growing out of a mistake in certain deeds under which the defendants claim title; and praying that the trust be executed for the plaintiff's relief and benefit.

The facts are stated in the opinion.

C. A. Bailey, for plaintiff.

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

The plaintiff asks that lot 21 be eliminated from the Fickett deed. In other words, that the Ficketts be held as holding the title to lot 21 as constructive trustees—that they be decreed to release it, or in other words to lose it and its value. The Ficketts paid $3,500 for lot 20, 21 and 29 and the heater piece, and the complainant asks the court to deprive the Ficketts of lot 21 without any compensation whatever therefor, and to decree that Mrs. Phelps who herself created the mistake, if mistake there was, retain the full amount of the purchase money. Such a doctrine will never be entertained by any court of equity. In case of mistake or alleged mistake, assuming the mutuality of such mistake to have been proven and assuming the alleged mistake to have been

proven beyond a reasonable doubt, courts of equity will not grant relief unless the parties can be placed in statu quo. *Grymes* v. *Sanders*, 93 U. S. 55.

In order that a mistake may come within the cognizance of a court of equity it must be shown to be first, material, second, mutual, third, unintentional, fourth, free from negligence.

A complainant in a court of equity in order to entitle himself to a decree in his favor, granting relief on the ground of an alleged mistake, must first show that he was not himself guilty of negligence. In this case, there is a series of deeds, all of which are asked to be reformed on the ground of an alleged mistake, and that mistake occurring in conveyances between parties who lived upon the very land which they say was falsely described in the several deeds, which passed between them, and that the same mistake was perpetuated in the deed from Mrs. Phelps to these grantees. The mistake in the deeds to and from Emily H. Phelps occurs no less than six times. If ever a doctrine of negligence could be invoked in the case of a mistake in a deed, assuming all the facts and conditions and conclusions to be drawn therefrom as the complainant contends, it would seem as if this was such a case. *Parlin* v. *Small*, 68 Maine, 291: *Western R. R. Corp.* v. *Babcock*, 6 Met. 352; 1 Story's Eq. § 146; 2 Pomeroy Eq. § 856.

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

STROUT, J. The evidence clearly establishes the following facts.

March 19, 1887, Emily H. Carter, who subsequently became Emily H. Phelps, and is now Emily H. Moore, owned lots 20, 29 and a part of lot 149, as delineated upon a plan of the town of Etna. These lots were all in one range, and adjoined each other in a north and south direction. They had been known for many years as the Otis L. Carter farm, or homestead. She also owned a small part of lot 148, and all of lot 21, containing about eighty acres, in the range next easterly from the Otis L. Carter

lots, which for many years had been known as the Kittredge Friend lot. All of these lots she conveyed on that day to William H. Hall.

On the tenth day of January, 1891, William H. Hall sold to his brother, Frederick E. Hall, the Kittredge Friend lot, being lot 21 and the gore in 148, excepting from the latter the orchard, for eight hundred dollars, which was the full value of the Kittredge Friend lot and the gore. By mistake of the scrivener, who drew the deed to Fred E. Hall and whom the parties supposed to be familiar with the premises, the boundaries given included only the small gore in 148, but to this description was added, "known as the Kittredge Friend lot." Both parties to the deed intended that it should, and believed that it did, convey not only the gore but lot 21, the Kittredge Friend lot. Neither party knew the numbers of the lots on the plan of the town, and there is internal evidence in the deed that the scrivener thought 21 was south of the Kittredge Friend lot. Immediately after delivery of the deed to Fred E. Hall, he went into possession of the gore and lot 21, occupied and treated the property as his, and so continued the ostensible owner without interruption or objection from any one, till October 12, 1895, when he sold and conveyed the same to the complainant as the "Kittredge Friend lot;" but his deed to complainant gave the same boundaries as those in his deed from William H. Hall, thus repeating the original mistake. Thereafterward, complainant took and retained possession of lot 21 and the gore, as owner, without objection by any of the respondents, until discovery of the mistake in the deed in 1896.

February 11, 1891, William H. Hall conveyed back to Emily H. Carter, and by like mistake included in his deed lot 21 which he had previously sold to Fred E. Hall, and which he believed he had conveyed to him. He also was ignorant as to the true numbers of the lots on the plan. He intended to convey to Mrs. Carter, and she expected to receive, only the Otis L. Carter farm, which was composed of lots 29, 20 and a part of lot 149, all in the same range, and not in the range with 21.

May 9, 1893, Emily H. Carter, whose name was then Emily H.

Phelps, sold to Anna Fickett and F. Willis Fickett the Otis L. Carter farm. Nothing more was understood or contemplated by either party. But the deed again, by mistake, included lot 21. The Ficketts understood that the land they bought was all in one range, and that the lots adjoined each other in a north and south direction. Fred E. Hall was then occupying lot 21, in the next range easterly. His title was not disputed by the Ficketts, nor any claim made by them, till 1896, when the mistake was discovered. In the meantime, the Ficketts leased of Fred E. Hall, for two years, the Kittredge Friend lot (21), paid rent therefor to him, and Perez Fickett, husband of Anna, negotiated with him for its purchase. Until 1896, the Ficketts were satisfied with the land they got as the Carter farm, and in fact obtained the land which they had bought. When the mistake in the deeds was discovered, they then claimed 21, because named in their deed. Anna Fickett having deceased, her title descended to the four respondents Perez Fickett, F. Willis Fickett, Ulysses G. Fickett and Louisa Downs.

The result of this succession of errors in the description of lands conveyed, is, that the Ficketts and Downs hold the legal title to the Kittredge Friend lot, which they never bought or paid for, and to which they never made any claim till discovery of the mistake in 1896, and which Mrs. Phelps never intended to convey to her grantees, Anna and F. Willis Fickett, and did not know that she had conveyed; and Fred E. Hall has not received the legal title to that lot which he bought and paid for, and which his grantor intended to convey and supposed he had conveyed to him. The complainant, who bought of Fred E. Hall lot 21 and the gore, finds himself in the same predicament.

Can equity afford relief to the complainant? It is well settled that in case of mutual mistake in a deed or contract, the error may be corrected, in a suit between the parties to it, unless innocent parties, without notice of the mistake, may be injuriously affected. *Andrews* v. *Andrews*, 81 Maine, 339; *Cross* v. *Bean*, 81 Maine, 529. As this suit is not between the parties to the deed to Fred E. Hall, nor the deed to the Ficketts, reformation of those deeds cannot be specifically granted.

But there is another principle recognized in equity, that when one person, through mistake or fraud, obtains the legal title and apparent ownership of property which in justice and good conscience belongs to another, such property is impressed with a use in favor of the equitable owner. Pomeroy's Equity, § 981; *De Riemer* v. *De Cantillon*, 4 Johns. Ch. 90; Perry on Trusts, § 186; *Gillespie* v. *Moon*, 2 Johns. Ch. 585; *Brown* v. *Lamphear*, 35 Vt. 252; *Loss* v. *Obrey*, 7 C. E. Green, 52; *Farley* v. *Bryant*, 32 Maine, 488.

It is very clear, that the Ficketts' and Downs' legal title to lot 21, the Kittredge Friend lot, was derived through a mistake in the description in Mrs. Phelps' deed, that this mistake was mutual between Mrs. Phelps and her grantees, and that in equity the plaintiff, as grantee of Fred E. Hall, is entitled to it. It is, therefore, charged with a constructive trust or use in his favor. Being so charged, a court of equity will protect and perfect his equitable, by compelling a conveyance of the legal, title.

If it was necessary to the result to show that the Ficketts, the original grantees, had notice of the equitable title of Fred E. Hall, such notice might well be inferred from the possession of Fred E. Hall, and his use of lot 21, and the recognition of his title by the Ficketts, in leasing the lot from him, admitted by their answer, and in negotiation for its purchase from him by Perez.

In this case, however, the question of notice is not involved. It is not the case of a supposed purchase of lot 21. The Ficketts never negotiated for that lot from Mrs. Phelps. They proposed to buy, and did buy, the Otis L. Carter farm, which was in another range, and all they proposed to buy or pay for was that farm. No thought of the Kittredge Friend lot was in their minds or that of their grantor. No equity in their favor arises from the mistaken inclusion of lot 21 in their deed.

But it is said, that Mrs. Phelps represented to the Ficketts, her grantees, that she was selling them three eighty-acre lots, as the Otis L. Carter farm, and as that farm contained only two eighty-acre lots and a part of another lot, they should hold lot 21. Mrs. Phelps denies that she made any such representation. The

Ficketts admit that they did not understand they were buying the Friend lot, or any lot easterly of the Otis L. Carter farm. They say they thought 21 was south of 20, and not as it is, east of it. If they have suffered from any misrepresentations by Mrs. Phelps in the quantity of the land purchased, they must look to her for satisfaction. They have no equity to be compensated by the land equitably owned by Fred E. Hall, and now by his grantee, the complainant.

Mrs. Phelps, while holding the legal but not equitable title to lot 21, and also owning absolutely the Otis L. Carter farm, mortgaged the Carter farm and lot 21 to William H. Hall. This mortgage was assigned to Frederick A. Simpson, who now holds it. There is no evidence that Simpson had any knowledge of the mistake as to lot 21, and consequently his mortgage is unaffected by it. To do full equity between all parties, that mortgage should be charged primarily upon the Otis L. Carter farm. If, to effect its payment, any part of lot 21 is required, on its payment by complainant he will be subrogated to the rights of the assignee of that mortgage.

In coming to this conclusion, we have given full force to the rule that a deed is a muniment of title, to be shaken only by the most plenary and convincing evidence that it does not represent the real title. In this case the proof seems to us clearly of that character.

Bill sustained. Perez Fickett, F. Willis Fickett, Ulysses G. Fickett, Louisa Downs, William H. Hall and Emily H. Moore to be perpetually enjoined from asserting any claim to lot 21 on the plan of Etna, known as the Kittredge Friend lot, or from conveying or attempting to convey the same, except to the complainant, in accordance with the decree to be made in this case. Perez Fickett, F. Willis Fickett, Ulysses G. Fickett and Louisa Downs to release and convey to the complainant all the right, title and interest in and to said lot 21, which was conveyed by Emily H. Phelps to Anna Fickett and F. Willis Fickett, by her deed dated May 9, 1893. Complainant to recover one bill of costs against Perez Fickett, F. Willis Fickett, Ulysses G. Fickett and Louisa Downs. Bill dismissed as to Fred E. Hall and Frederick A. Simpson.

Decree accordingly.

ANNIE S. HEALEY, Applt. *vs.* J. ALBERT COLE, Admr.

York. Opinion April 22, 1901.

French Spoliation Claims. Title by Descent. Next of Kin. R. S., c. 75, §§ 1, 8; Acts of Congress, 1891, Mar. 3, 1891; Mar. 3, 1899.

The appropriation of money for the payment of so-called French Spoliation claims by the Act of Congress approved March 3, 1899, was a mere gratuity and payments made from such appropriation were payments as of grace, and not of right, and Congress had the right to make the gift upon its own terms.

Money paid by the United States in payment of any such claim does not form a a part of the estate of the original sufferer from the French depredations, but inures to the benefit of, and is to be distributed among, the next of kin of the original sufferer living at the date of the passage of that act of Congress.

As Congress prescribed no method for the distribution of money so paid, it is to be distributed by the proper court and in accordance with the statute of distribution of the state of the domicile of the original sufferer at the time of his decease.

In this case, John Storer, the orginal sufferer, at the time of his death had his domicile in Wells, in the county of York in this State, and the money was paid by the United States to his administrator de bonis non, who was legally appointed as such by the probate court of the county of York. The judge of probate of that county had, therefore, jurisdiction in the distribution of the fund in the hands of the administrator de bonis non.

There were living at the date of the approval of the act of Congress as next of kin of said Storer, five grandchildren and the descendants of eleven deceased grandchildren. The judge of probate by his decree of distribution, from which this appeal is taken, divided the fund to be distributed into sixteen equal parts, decreeing one-sixteenth to each of the living grandchilden, and one-sixteenth to the descendants of each of the deceased grandchildren.

Held; that such distribution is in accordance with the laws of the United States and of this state.

Held; further, that the appellee, the administrator de bonis non, should be reimbursed from said fund the expenses incurred by him in this suit, including reasonable counsel fees.

Agreed statement. Appeal dismissed. Decree of distribution by probate court sustained.

Appeal from the York county probate court ordering the distribution of a fund in the hands of the defendant as administrator of the estate of John Storer, deceased, arising from the French Spoliation upon American commerce, prior to 1800.

J. M. Stone, for plaintiff.

The 75th chapter of the statute of distribution as amended in 1889 and 1895, § 1, rule 6, is in these words: "If no issue, father, mother, brother or sister, it descends to his next of kin in equal degree. This is the only rule in our statutes providing for the descent of property to the next of kin. The act of Congress itself, evidently specified the rule which is to determine the case. It is evident that rule 2nd of this section is not to determine it, for this rule applies to property of which one dies seized; and to all one's lineal descendants; and where one has a vested interest, and for descent by right of representation; and cannot apply to this case, because all the children of Storer were living at the time of his death. Rule 6 of this statute is to be used and understood in distinction from the cases provided for in Rule 2, and as providing for the case only of those specifically named in it. It is therefore to be literally understood and taken as it reads, and does not provide for the case of all the lineal descendants of John Storer. To read and treat its language in that way would be to render the words next of kin in equal degree meaningless, and in effect obliterate them from the statute. They would then become of no effect. Such a construction in this case would be a complete perversion of the terms of the Act of Congress in making the gift, and would give to one set of heirs what was expressly given to another; they are therefore to be literally understood. We have then only to inquire who the next of kin were under our statutes, and to understand next to mean next or nearest in blood, for the gift in express terms is to them. It took effect on March 3, 1899, and vested in them. The case finds that there were five grandchildren and eleven great grandchildren, and the settled law of Maine covers the case in the plainest and most express terms, giving it to next of kin or grandchildren. In chapter 75 of the statutes, the several rules are distinct and each of them is to be construed separately, and the right of representation does not apply to this rule. "A grand-niece is not related to the deceased in equal degree with nephews and nieces, and unless she is she cannot claim under this rule." *Davis* v. *Stimson*, 53 Maine, 493; *Quimby* v. *Higgins*, 14

Maine, 309; *Cables* v. *Prescott*, 67 Maine, 582; 4 Kent, 412. "A maternal grandmother being of the second degree of kindred, and uncles and aunts of the third, the grandmother must take the property as the rule directs." *Decoster* v. *Wing*, 76 Maine, 456; *Bourne* v. *Lord*, 63 Maine, 386.

Codman v. *Brooks*, 167 Mass. 499, appears to us as forced and unreasonable. It requires us in this case to suppose that John Storer, who died January 9th, 1826, was living upon March 3d, 1899, and that all his issue living or dead, or their descendants took, or were entitled to take, under the Act passed at the latter date.

W. L. Dane, for defendant.

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

FOGLER, J. This is an appeal from the decree of the judge of probate for the county of York ordering distribution of a fund in the hands of J. Albert Cole, administrator de bonis non of the estate of John Storer, late of Wells in said county, deceased.

The fund in question was paid to the administrator of said deceased in payment of a so-called French spoliation claim under an award made by the United States Court of Claims, and in accordance with the provisions of an act of Congress approved March 3, 1899.

The French spoliation claims arose from the depredations of French cruisers upon our commerce prior to 1800. By the terms of a treaty between the United States and the French Republic concluded September 30, 1800, and ratified on the 31st of July following, our government yielded to the French government all right of the sufferers, from such depredations, to indemnity from that government in consideration that the French government yielded certain claims, asserted by the French Republic, against the United States for failure to perform certain treaty obligations. Although the original sufferers from such French spoliations constantly contended that by such treaty an obligation to indemnify

them rested upon our government, no action was taken by the government towards making indemnity until January 20, 1885, when an act of Congress was approved which provided that claimants for indemnity for French captures and confiscations might apply to the Court of Claims, and that that court should examine and determine the validity and amount of such claims and report to Congress all such conclusions of fact and law as in their judgment might affect the liability of the United States therefor.

The representative of John Storer, the appellee's intestate, presented to the Court of Claims, a claim for indemnity for losses sustained by said Storer, and the court in its report to Congress reported favorably upon the claim.

The advisory report of the Court of Claims having been presented to Congress, that body by an Act approved March 3, 1891, provided for the payment of certain of such claims therein enumerated, and by an Act approved March 3, 1899, provided for the payment of certain other of such claims therein enumerated, among which was the following:

"On the Brig Venus, John Harmon, master, namely John S. Cole, administrator of the estate of John Storer, deceased, ten thousand five hundred and sixty-eight dollars."

That amount was paid by the United States to the present administrator, J. Albert Cole, the former administrator having deceased, and constitutes the fund, the distribution of which is here in controversy.

The two acts of Congress, that of March 3, 1891, and that of March 3, 1899, are identical in terms except as to the enumeration of claims, and each contained the following proviso, namely:

"Provided, that in all cases where the original sufferers were adjudicated bankrupts, the award shall be made on behalf the next of kin instead of to assignees in bankruptcy; and the awards in the cases of individual claimants shall not be paid until the Court of Claims shall certify to the secretary of the treasury that the personal representatives, on whose behalf the award is made, represents the next of kin and the court which granted the administration respectively have certified that the legal representatives

have given adequate security for the legal disbursements of the awards."

The Supreme Court of the United States in *Blagge* v. *Balch*, 162 U. S. 439, in an opinion by Chief Justice Fuller, settled the principal questions arising under the act of 1891, and consequently those arising under the act of 1899.

It is there held that payments under the act of 1891 (and so under the act of 1899) are in the category of payments by way of gratuity, payments as of grace, and not of right.

Congress, therefore, in making the gift, was free to make it to whomsoever it chose and upon whatsoever terms it saw fit. It was there further decided and declared, that the payments authorized by the Act of Congress do not form a part of the estates of the original sufferers to be distributed as such, but are to be distributed as gifts or gratuities among their next of kin who were living at the date of the passage of the Act, and that, as Congress did not provide any method of distribution, the beneficiaries in each case and the amounts payable to each must be determined by the proper court and under the statutes of distribution of the state of the decedent's domicile.

The court in the case cited says: "And we are of opinion that Congress, in order to reach the next of kin of the originial sufferers, capable of taking at the time of distribution, on principles universely accepted as most just and reasonable, intended next of kin according to the statutes of distribution of the respective States of the domcile of the original sufferers. . . . . The object of Congress was that the blood of the original sufferers should take at the passage of the Act. . . . . So that in ascertaining who are to take, the fund, though not part of the estates of the original sufferers, may be treated as if it were, for the purposes of identification merely."

The court of Massachusetts in *Codman* v. *Brooks*, 167 Mass. 499, and of Pennsylvania in *Clements' Estate*, 160 Pa. St. 391, have reviewed at length the case of *Blagge* v. *Balch*, supra, and have adopted and followed the principles there laid down. We must do the same.

In the case at bar the probate court for the county of York has jurisdiction, and it is its duty to make distribution of the fund in the hands of the administrator de bonis non among the beneficiaries, or statutory next of kin of the decedent, John Storer, who were living March 3, 1899, and this is to be done in accordance with the laws of this state governing the distribution of personal estate.

The statutes of this state in accordance with which the fund must be distributed are, R. S., ch. 75, § 1, Par. 1.

"The real estate of a person deceased intestate, being subject to the payment of debts, descends according to the following rules:

1. "In equal shares to his children, and to the lawful issue of a deceased child by right of representation. If no child is living at the time of his death, to all his lineal descendants; equally, if all are of the same degree of kindred; if not, according to the right of representation."

Section 8 of the same chapter provides, that personal estate shall be distributed, or shall escheat, by the rules provided for the distribution of real estate.

R. S., Ch. 1, § 6, Par. IX. "The word "issue", applied to the descent of estates, includes all lawful lineal descendants of the ancestor."

There were living on March 3, 1899, five grandchildren and lineal descendants of eleven grandchildren of the decedent, John Storer. The probate court by its decree of distribution, from which this appeal is taken, divided the fund into sixteen equal shares, decreeing one share to each of said living grandchildren, per capita, and one share to the lineal descendants of each deceased grandchild who take per stirpes.

We are of opinion that the distribution so decreed is in accordance with the intention of Congress, as construed in *Blagge* v. *Balch*, supra, and with the statutes of distribution of this state, above quoted, and the appeal must be dismissed with costs.

The administrator de bonis non should be allowed his expenses incurred in this suit, including reasonable counsel fees, the amount

to be determined by the judge of probate, and the case is remanded to the probate court for the allowance of such expenses, and for a distribution of the residue of the fund, after the allowance of such expenses in accordance with this opinion.

So ordered.

SAMUEL G. DAMREN

vs.

THE AMERICAN LIGHT AND POWER CO.

Androscoggin. Opinion April 22, 1901.

Judgment. Res Judicata. Lease. Assignment. R. S., c. 82, § 130.

The essential elements of the doctrine of res judicata are the identity of the parties to the suit and the identity of the issue necessarily involved. Hence to ascertain whether a judgment is a bar in a given case, it is necessary to inquire whether the matters in controversy were put directly in issue and determined in the former judgment.

Held; that the former judgment between these parties (93 Maine, 334) did not involve an adjudication upon the merits of the claim now presented, and hence is not a bar to the maintenance of this action.

Under R. S., c. 82, § 130, an assignee of choses in action, not negotiable, may sue in his own name to recover the same, but "shall file with his writ the assignment or a copy thereof." After referring to the failure of the plaintiff to file the assignment with his writ, in the former action the court said: "The claim sued in the first count cannot therefore, be recovered in this action."

After a careful re-examination of the evidence then reported in connection with the new evidence now presented, it is the opinion of the court that the conclusion then announced was warranted by the evidence and that the additional testimony will not justify any modification of it. *Held;* that under the terms of the lease there should accordingly be an abatement of the rent for power after May 1, 1895; and that the plaintiff recover rent for the six months preceding, etc.

See *Damren v. Am. L & P. Co.* 91 Maine, 334.

On report. Judgment for plaintiff.

Action for assumpsit to recover rent under a written lease. The facts will be found reported in 91 Maine, 334.

H. W. Oakes, J. A. Pulsifer, and F. E. Ludden, for plaintiff.

J. A. Morrill, for defendant.

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

WHITEHOUSE, J. This is an action of assumpsit in which the plaintiff seeks to recover $1307.50 for rent alleged to be due him for the use of a certain water power and buildings, in Auburn, occupied by the defendant corporation as an electric light station, from November 20, 1894, to August 8, 1895.

May 7th, 1888, Charles Gay being then the owner of the property executed a lease of it to the defendant company, with a stipulation for the payment of rent by the defendant at $200 per annum for the building, and rent for the power to be determined at the rate of $500 for each 50 light dynamo.

Gay was adjudged an insolvent debtor on a petition filed November 20, 1894, and on the 8th day of August, 1895, his assignees conveyed to the plaintiff all his interest in the premises including the lease in question under which the stipulated rent, from the date of his petition in insolvency to the date of the conveyance, remained unpaid. January 17th, 1896, the assignees made an assignment of such rent to the plaintiff.

The specification of the plaintiff's claim in this case shows it to be identical with that set out in the first count of the declaration in the former suit between the same parties, reported in 91 Maine, 334. But, inasmuch as the plaintiff omitted to file with his writ in that case a copy of the assignment of the claim to him, it was held that the claim for $1307.50 sued for in the first count was not recoverable in that action.

In determining the amount due the plaintiff under the second count in the former suit, it became necessary to consider the defendant's claim for an abatement of rent for power from August 8th to November 20, 1895, on account of plaintiff's failure to make

the necessary repairs on the premises after the freshet in April, 1895.

It is provided in the lease that the lessor shall "maintain the dam, sluices, gates, water wheel, shafting, gearing and pulleys in good and efficient repair, saving only for such damages and injury as shall come to the same by reason of the negligence" of the defendant; that there should be a just abatement of rent while the defendant was deprived of the use of the power by reason of injury caused by an accident which could not be avoided by reasonable care and foresight, but not if caused by the defendant's own negligence.

Upon the evidence introduced in that case, the court was not satisfied that the injury to the power on the occasion of the freshet in April, 1895, was caused by the negligence of the defendant and accordingly held that under the express terms of the lease there should be an abatement of the rent for power from August 8th, to November, 20th, 1895. Judgment was, therefore, rendered for the plaintiff upon the second count for rent of the building alone during the three months following the conveyance to the plaintiff.

In the case now before the court the defendant invokes the principle of res judicata, and contends that the judgment in the former suit is a complete bar to the maintenance of this action, and, if not, that with a just abatement of rent according to the terms of the lease, the account will fail to show any balance due the plaintiff.

The essential elements of the doctrine of res judicata are the identity of the parties to the suit and the identity of the issue necessarily involved. Hence, to ascertain whether a judgment is a bar in a given case, it is necessary to inquire whether the matters in controversy were put directly in issue and determined in the former judgment. *Morrison* v. *Clark*, 89 Maine, 103; *Howard* v. *Kimball*, 65 Maine, 308. In *Embden* v. *Lisherness*, 89 Maine, 578, it was held that, in order to make the former judgment conclusive as an estoppel, it must appear to have been rendered upon the merits of the case as well as upon the same subject matter; and as the record in that case failed to disclose upon what issue the judgment was rendered, it was deemed competent to show that fact by parol evidence.

The former case, like the present, was presented to the law court on a report of the evidence and it distinctly appears from the opinion in 91 Maine, 338, that there was no adjudication upon the merits of the claim presented under the first count. After referring to the failure of the plaintiff to file the assignment with his writ, the court said: "The claim sued in the first count cannot, therefore, be recovered in this action."

It is accordingly the opinion of the court that the judgment in the former suit, which did not in fact involve a decision upon the merits of the claim now presented, is not a bar to the maintenance of this action.

Notwithstanding the opinion of the court in the former suit, the plaintiff strenuously insists that upon the evidence now presented, he is entitled to recover the full amount sued for, without any abatement of rent for power on account of the injury resulting from the freshet of April, 1895.

With respect to this claim on the part of the defendant for an abatement of the rent for power, the court said in the former opinion: "In April a freshet is said to have injured the racks and penstock so that the power could not be used, and each party claims that the same were suffered to remain out of repair by the fault of the other. . . . . The defendant did not very much need the active use of the station, and the assignees do not seem to have cared to incur the expense of repair. We cannot say that the premises were injured or suffered to remain out of repair by the fault of the defendant. It seems as if the injury was occasioned by a freshet over which the defendant had no control, and the non-repair was suffered to continue by common consent and that meantime, under the terms of the lease, rent for power should abate."

After a careful re-examination of the evidence then reported in connection with the new evidence now presented, it is the opinion of the court that the conclusion then announced was warranted by the evidence and that the additional testimony will not justify any modification of it. Under the terms of the lease there should accordingly be an abatement of the rent for power after May 1, 1895.

It is still insisted, however, that the plaintiff is entitled to recover rent for both building and power, at the rate of $150 per month for the six months from November 20, 1894 to May 1st, 1895, and $50 for rent of the building falling due the first days of June, July and August, 1895.

It has been seen that the lease stipulated for the payment of rent at $200 per annum for the building and $500 for each dynamo of fifty arc lights. But it appears from the testimony that an incandescent machine not then contemplated by the parties was subsequently added, and it was agreed that the rent for that machine should be $600 per annum. For two dynamos of fifty arc lights each, one incandescent machine and the use of the building, the rent would accordingly be $1800 per year, or $150 a month. It is not in controversy between the parties that rent was in fact paid at that rate for a considerable period of time, and that the receipt of February 17th, 1894, for $300 "for rent of power to February 1st," was for two month's rent.

It is contended, in behalf of the plaintiff, that after the agreement fixing the total rent at $150 a month, no different arrangement was ever agreed upon, and that thereafter all payments of rent were made upon that basis.

It is not in dispute that the lessor had possession of the premises during the months of April and May, 1894, for the purpose of repair, and that the rent for both building and power should be abated during that time. Deducting those two months and there remained seven months for which rent was payable between February 1 and Nov. 1, 1894. The payments conceded to have been made by cash and notes on account of rent between those dates amount to precisely $1050 or $150 per month. The receipt of June 2, for $82.50 shows it to have been "borrowed and received," and its appropriation to the payment of rent is disputed. It is earnestly contended that during this period there was only one machine in use for which the defendant was liable to pay rent, and that payments by note and cash were advanced for the accommodation of the lessor. But the lessor's financial embarrassment must have been known to the defendant and it seems improbable

that large overpayments of rent would have been made by the treasurer of the defendant corporation under such circumstances. The defendant had a provable claim against the insolvent estate of the lessor for the loan of $82.50, and other loans, if any, made under like circumstances,

The conclusion is, that the plaintiff is entitled to recover rent for one machine for the six months from Nov. 20, 1894, to May 1, 1895, and rent for the building for nine months including that falling due December 1, 1894, amounting to $400.

But the defendant is entitled to have deducted from this amount the sum of $117.97 expended for the main driving-pulley purchased and affixed to the jack shaft, under an agreement claimed to have been made with the lessor that the defendant should be allowed for it. It is true, several payments of rent were afterwards made and this sum was not deducted, but the pulley became a part of the equipment necessary to make the power available, and has inured to the benefit of the realty. It seems just that it should be allowed to the defendant.

Judgment for the plaintiff for $282.03 with interest from March 13th, 1896.

ALBERT E. MACE, Executor, In Equity,

vs.

GEORGE H. MACE, and others.

Hancock. Opinion May 22, 1901.

Will. Fee. Life Estate. Residue.

1. A testator made the following devise: "I give, devise and bequeath to my beloved wife M. M., so long as she is my widow, and my son G. H. M., who is to live on said homestead, my homestead situated in A. with the buildings thereon containing about eighty acres. Also all my farming tools and utensils, carts, carriages, sleds, sleighs, farm stock, horses, harnesses, carriage and sleigh robes, household furniture and household goods. Also one thousand dollars."

Held; that the devisees named took the testator's entire interest in the homestead, the widow an estate for life in the whole homestead determinable upon her re-marrying, and the son the remainder; and that they each took an absolute title to one-half of the personal property.

2. The residuary clause was as follows: "I give and bequeath to my daughters H. C. R., and M. S., equally whatever there may be at my death of whatever kind that may be found and disposed of by my executor hereinafter named, the residue, remainder not otherwise disposed of."

Held; that this clause is not void for uncertainty; but that the testator's intention is plainly expressed to give to his daughters therein named the residue and remainder of his estate.

On report. Will construed and sustained.

Bill of interpleader by the executor of the will of Isaac Mace of Aurora, deceased, against his son George H. Mace and all said Isaac's heirs to obtain a judicial interpretation of said will, and heard on bill, answers and testimony by the presiding justice of the first instance, who reported the case to this court.

The case is stated in the opinion.

A. W. King, for plaintiff.

H. E. Hamlin, J. A. Peters, Jr., and F. C. Burrill, for defendants.

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

POWERS, J. This bill is brought to determine the construction of the following clauses of the will of Isaac Mace:

"Thirteenth. I give, devise and bequeath to my beloved wife Melinda Mace, so long as she is my widow, and my son George H. Mace, who is to live on said homestead, my homestead situate in Aurora, with the buildings thereon, containing about eighty acres. Also all my farming tools and utensils, carts, carriages, sleds, sleighs, farm stock, horses, harnesses, carriage and sleigh robes—household furniture and household goods. Also one thousand dollars.

"Fourteenth. I give and bequeath to my daughters Helen C. Rowe and Maria Stover equally whatever there may be found and disposed of by my executor hereinafter named, the residue, remainder, not otherwise disposed of."

In regard to the devise of the homestead two theories are advanced, first, that Melinda Mace took an estate during widowhood and not extending beyond her life in one-half, and George H. Mace a fee simple in the other half, leaving the remainder in the first half to pass to the residuary devisees under the fourteenth clause; and second, that the widow took a life estate, determinable upon her re-marrying, in the whole homestead, with remainder over to George. The intention of the testator expressed by the will is to govern.

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. *Page* v. *Marston*, 94 Maine, 342. The whole will is to be examined and every clause and word taken into consideration. In the preceding clauses of his will the testator had made bequests to all his heirs, including one of five dollars to George and two of three hundred dollars each to his daughters Helen C. Rowe and Maria Stover. He had made no disposition of his homestead farm and no provision for his widow. The only mention made of these is in the thirteenth clause. In that clause he devises the homestead to his widow during widowhood and to George who is to live upon it. The language used lacks technical precision, but we think the testator's intention is manifest to give his entire interest in the farm to these two devisees, to the widow an estate for life in the whole homestead determinable upon her re-marrying, and to George the remainder. George was to "live on said homestead," the whole homestead, not on one-half of it. If George took a fee simple in one-half only, these words would be unnecessary to confer such a right before, and ineffectual after, partition. They were used by the testator not to create an estate upon condition or to give a right, but as expressive of his understanding and intention, and that intention thus expressed in the will must prevail. This conclusion is strengthened by the fact that to the same devisees were given all those articles of personalty which would naturally and properly go with the homestead, the testator's farming tools and utensils, carts, carriages, sleds, sleighs, farm stock, harnesses, carriage and sleigh robes, household furniture and household goods.

As to the personal property named in clause thirteen, Melinda Mace and George H. Mace each took an absolute title to one-half. Such is the common meaning of the common words there employed. The paragraphs relating to the personalty are distinct and independent introducing new matter, and there is nothing to show that the qualification as to the wife's interest in the real estate was to be carried forward and applied to the personalty. The word "also" has here one of its most ordinary and usual meanings, that of "in addition thereto" as in *Loring* v. *Hayes*, 86 Maine, 351, where a testator made a bequest and devise of real and personal estate for life to his wife followed, in the same clause, by a bequest of money introduced by the words "I also give," and it was held that the gift of the money to the wife was absolute.

It is suggested by counsel, for some of the respondents, that the fourteenth clause is void for uncertainty. This view we cannot adopt. The title to the personal property of the testator vests in the executor. He has the legal power to dispose of any and all of such personal property at his discretion, with the exception of articles specifically bequeathed not required for the payment of debts or charges of administration. It is his duty to settle and wind up the estate and reduce the assets to cash and transfer it to others in pursuance of the trust reposed in him. Schouler's Exors. & Admrs. § 322. It is in this sense that the words "disposed of" are used in the phrase "found and disposed of by my executor" in the fourteenth clause, while the same words in the last part of the same clause mean disposed of by the testator in his will. The testator's intention is plainly expressed in this clause to give to his daughters Helen C. Rowe and Maria Stover, the residue and remainder of his estate not otherwise disposed of by him in his will and, or more properly including, whatever may be found and disposed of by his executor, and that intention must control and be carried into effect.

The costs of these proceedings should be decreed a charge upon the estate in controversy.

Decree accordingly.

READFIELD TELEPHONE AND TELEGRAPH COMPANY

vs.

FRANK B. CYR, and another.

Kennebec. Opinion May 22, 1901.

Telephone Companies. Fixtures. License. R. S., c. 6, § 9. Stat. 1885, c. 378. R. S., Mass. c. 109.

In determining the question of whether a chattel has become so affixed to the realty as to become accessory to it and form a part and parcel of it, the modern and most approved rule is to give special prominence to the intention of the party making the annexation, not his hidden, secret intention, but the intention which the law deduces from such external facts as the structure and mode of attachment, the purpose and the use for which the annexation has been made, and the relation and situation of the party making it.

A telephone company which by permission of the municipal officers erects its posts and lines along the highway, under the provisions of chapter 378, P. L. 1885, thereby acquires no interest in the soil except a right to occupy it by the permission of the municipal officers, a mere license revocable at their will, so far as any particular portion of the highway or any particular highway is concerned, and not a permanent vested interest in the land itself.

As between debtor and creditor, such posts, with the wires and insulators thereon, continue to retain their character as chattels and may be seized and sold on execution as personal property.

Agreed statement. Judgment for plaintiff.

Trespass for tearing down and removing telephone lines, brackets and insulators put up in the highway by the plaintiff, and claimed to have been bought by it as personal property at sale on execution against the Dirigo Telephone Co.

The case was reported to this court from the Superior Court for Kennebec county.

L. C. Cornish, E. O. and F. E. Beane, with him, for plaintiff.

W. C. Eaton, for defendants.

Fixtures becoming real property: 8 Am. & Eng. Enc. p. 43; 1 Rice on Real Property, p. 52; 1 Kerr on Real Property, p. 111; *Ashmun* v. *Williams*, 8 Pick. 402; *Marcy* v. *Darling*, 8 Pick. 282;

Aldrich v. *Parsons & Latham*, 6 N. H. 555; *Binney's case*, 2 Bland's Ch. Rep. 145; *Boston Water Power Company* v. *Boston*, 9 Met. 202; *Drybutter* v. *Bartholomew*, 2 Peere Williams, 127; *Buckeridge* v. *Ingram*, 2 Vesey Jr. 652; *Queen* v. *Cambridge Gas Co.*, 35 E. C. L. 333; *Regina* v. *North Staffordshire Ry. Co.*, 3 El. & El. 392; *West. Union Tel. Co.* v. *Tennessee*, 9 Baxt. 509; *West. Union Tel. Co.* v. *Burlington & S. W. Ry. Co.*, 3 McCrary, 130; 11 Fed. Rep. 1; *Boston Safe Deposit and Trust Co.* v. *Bankers and Merchants Tel. Co.*, 36 Fed. Rep. 288; *Am. Union Tel. Co.* v. *Middleton*, 80 N. Y. 408; *Hudson Telephone Co.* v. *Jersey City*, 49 N. J. L. 303; *City* v. *Telegraph & Telephone Co.*, 40 La. Ann. 41; *Williams* v. *N. Y. Central Railroad Co.*, 16 N. Y. 97, *S. C.* 69 Am. Dec. 651; *People ex. rel. Dunkirk and Fredonia Railroad Co.* v. *Cassidy*, 46 N. Y. 46; *Providence Gas Co.* v. *Thurber*, 2 R. I. 15; *Newport Illuminating Co.* v. *Tax Assessors*, 19 R. I. 632.

The poles and wires of electric light and power companies have repeatedly been held to be real property. *Fechet* v. *Drake*, 12 Pac. Rep. 694; *Hughes* v. *Power Co.*, 53 N. J. Eq. 435; *Keating Imp. Co.* v. *Marshall Power Co.*, 74 Tex. 605; *Badger Co.* v *Marion Power Co.*, 48 Kan. 187; *Forbes* v. *Willimatic Falls Co.*, 19 Oreg. 61.

Analagous cases: *Strickland* v. *Parker*, 54 Maine, 263; *Fifield* v. *M. C. R. R. Co.*, 62 Maine, 77; *Paris* v. *The Norway Water Co.*, 85 Maine 330; *Rollins* v. *Clay*, 33 Maine, 132; *Hall* v. *Benton*, 69 Maine, 346.

Taxed as real estate,—additional cases: *Com.* v. *Boston*, 97 Mass. 555; *Hannibal* v. *M. & K. Tel. Co.*, 31 Mo. App. 23; *Chicago Cen. Ry. Co.* v. *Chicago City Ry. Co.*, 62 Ill. App. 502; *Africa* v. *Knoxville*, 70. Fed. Rep. 729; *Rutland El. Light Co.* v. *Marble City El. Light Co.*, 65 Vt. 377; *Denver Tramway Co.* v. *Londoner*, 20. Colo. 150; *St. Louis* v. *Western Union Tel. Co.*, 63 Fed. Rep. 68; *Levis* v. *City of Newton and Electric Co.*, 75 Fed. Rep. 984; *Suburban Light & Power Co.* v. *East Orange*, (N. J. Eq.) 41 Atl. Rep. 865; *North Jersey St. Ry. Co.* v. *South Orange*, (N. J. Eq.) 43 Atl. Rep. 53; *Citizens St. Ry. Co.* v. *City Ry. Co.*, 56 Fed. Rep. 746, affirmed 166 U. S. 55; *State* v. *Blake*, 35 N. J. L. 208; *State* v. *Jersey City*, 49 N. J. L. 303.

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

POWERS, J. On November 4, 1898, the telephone line of the Dirigo Telephone Co., located in the public highway and running from Mt. Vernon village in Mt. Vernon to Chandler's Mills in Belgrade, with the poles, wires, and insulators on the same, was sold as personal property on an execution against said company and afterwards conveyed by the purchaser to the plaintiff corporation, which then strung a second wire upon said poles. The defendants acting as the agents of the Dirigo Co., in October, 1899, tore down a part of the line, insulators, and brackets put up by the plaintiff, and for the injury so done, this action of trespass de bonis is brought. The only question involved is whether the telephone line of the Dirigo Co., as between debtor and creditor, was personal property at the time of its seizure and sale on execution.

There is no universal test by which it can be determined whether a chattel has become so affixed to the realty as to become accessory to it and form a part and parcel of it. The manner and extent of physical annexation has been declared an uncertain and unsatisfactory criterion, and while it would be impossible to reconcile all the cases upon this subject, yet the modern and most approved rule appears to be to give special prominence to the intention of the party making the annexation. *Hinkley & Egery Iron Co.* v. *Black*, 70 Maine, 473; *Parsons* v. *Copeland*, 38 Maine, 537; *Tolles* v. *Winton*, 63 Conn. 440; *Fifield* v. *Farmer's Nat. Bank*, 148 Ill. 163; *Pope* v. *Jackson*, 65 Maine, 162; *Hopewell Mills* v. *Taunton Savings Bank*, 150 Mass, 519; *Aldine Manfg. Co.* v. *Barnard*, 84 Mich. 632; *Erdman* v. *Moore*, 58 N. J. L. 445; *McRea* v. *Central Nat. Bank*, 66 N. Y. 489. This rule does not apply to cases in which a party makes improvements and permanent erections without right as between him and the owner of the soil. In such case the intention to preserve the same as property separate and apart from the freehold cannot avail, no matter how plainly that intention may be manifested. Many other apparent exceptions will be found to involve no real conflict with the rule

above stated, when we remember that the intention, which is material, is not the hidden, secret intention of the party making the annexation, but the intention which the law deduces from such external facts, as the structure and mode of attachment, the purpose and use for which the annexation has been made and the relation and situation of the party making it.

In the case before us, the poles were imbedded in the soil, but could be easily removed without any particular injury to the realty or impairment of its value for any of the uses to which it was suited. The whole line was adapted to the use of that part of the realty with which it was connected, but the poles, wires and insulators could be easily removed and used in the same business elsewhere. Under these circumstances, it is especially important to ascertain what right or interest the Dirigo Co., the owner of these chattels, had in the realty to which it annexed them, in order to determine whether the intention existed thereby to make them permanently a part of the freehold. A different intention may well be inferred from annexations made by a tenant, or mere licensee, than when the same acts are done by the owner of the freehold. Cooley on Torts, 2nd. Ed. 501.

The beneficial use of the soil in our highways has been appropriated by the public for public purposes, but the property in the soil still remains in the owner of the adjoining land, who may use it for any purpose, above or below the surface, which does not injuriously interfere with public uses. A telephone is a public use, and the legislature, by virtue of its power of control over the public roads and highways of the State, may grant to a telephone company the authority to erect its lines along or upon such roads and highways, or it may delegate that power to the municipal officers of the several municipalities, as has been done in this State by statute of 1885, c. 378. A telephone company, however, cannot construct its line along the highway at its own pleasure. It is forbidden to do so without first obtaining a written permit from the municipal officers "specifying where the posts may be located, the kind of posts, and the height at which and the places where the lines may be run." Laws of 1885, c. 378, § 2. Nor is this permission, when

once obtained, final and irrevocable and the use so granted subject to be determined only by the will of the company or the discontinuance of the highway. The same section further provides that "after the erection of the lines, having first given such company, persons, associations, or their agents, opportunity to be heard, the municipal officers may direct any alteration in the location or erection of said posts." These are comprehensive terms. Telephone lines, though affected with a public use, are operated for private gain. Nothing is paid for the valuable privilege of occupying and using the soil of the public roads and highways. The authority to fix the location of the posts, in the first instance, has been wisely given to the municipal officers, and if wisely exercised, the location will be made with a view to existing and probable future conditions. Yet conditions are constantly changing and, in the growth and improvement of our municipalities, the time may come when it may be desirable to alter the location of one or all of the posts of the line from one side of the street to the other, or from one street to another. What at one time was a suitable location may become unsightly, inconvenient, out of harmony with the surroundings, and the public interest be best served by a change of location. We believe that the legislative intention was to confer upon the municipal officers full authority to meet such requirements by directing "any alteration in the location or erection of such posts" to the extent above indicated. The telephone company then has no interest in the soil which supports its posts and lines except a right to occupy it by the permission of the municipal officers, a mere license revocable at their will.

This conclusion is strengthened by the provisions of section 7 of the act of 1885, above cited, that "no enjoyment by any company, persons, or association for any length of time, of the privilege of having or maintaining posts, wires or apparatus in, upon, over or attached to any building or land of other persons shall give a legal right to the continued use of such enjoyment, or raise any presumption of a grant thereof." No legal right to the continued use of the enjoyment of the privilege can be acquired by prescription in the face of this statute. No right to such continued use is granted,

for the only privilege granted in any particular spot, parcel, or portion of land is temporary and not permanent, a mere license revocable at the will of the municipal officers so far as any particular portion of the highway or any particular highway is concerned, and not a permanent vested interest in the land itself. The provisions of section 2 of the act of 1885 are taken from R. S. of Mass. c. 109, § 2 and 3, and section 7 of the same act is an exact copy of R. S. of Mass. c. 109, § 15. In reference to the right in the highway acquired under that chapter, Mr. Justice Devens in *Pierce* v *Drew*, 136 Mass. 75, says: "No right is given these companies to use the highways at their own pleasure, or to compel in all cases, as the plaintiff suggests, a location therein to be given them by the municipal authorities. The second section of the statute is to be construed with the third section, and shows an intention that a legally constituted board shall determine not only where, but whether there can be a location which shall not incommode the ordinary public ways, with full power to revise its own doings and correct any errors which the practical workings of the arrangement may reveal. . . . . No right to take the private property of the owner of the fee in the highway is conferred by this act; all that is given is the right to use land by permission of the municipal authorities, the whole beneficial use of which had been previously taken from the owner and appropriated to the public. It is a temporary privilege only which is conferred; no right is acquired as against the owner of the fee by its enjoyment, nor is any legal right acquired to the continued enjoyment of the privilege or any presumption of a grant raised thereby."

In determining the intention a most important consideration is the relation of the party making the annexation to the property in question. 1 Wash. Real Prop. 5 Ed. page 22.

Tried by this test, no intention can be inferred to make the posts, wires, and insulators in this case a permanent accession to the freehold. The owner of the chattels was not the owner of the soil. It had no right to the continued enjoyment of its use, simply a revocable license, a temporary privilege which might be determined at any time by the municipal officers. There is nothing from

which it can be inferred that it intended to deprive itself of its property. It is the temporary character of the privilege, obtained under the act of 1885, which distinguishes it from the rights and interests of railroad and other quasi public corporations in lands taken under the right of eminent domain, or in public roads and highways, the use of which has been directly granted to them by the legislature without any such limitations as are imposed by that act. Under such circumstances, the rights and interests acquired are not subject to be determined at the will of third parties and are permanent and vested.

Cases involving the construction in other states of statutes, widely different from our own, afford little analogy to the case at bar and throw little light upon the question here involved. Whether the posts and wires of a telegraph or telephone line are fixtures under the mechanic's lien-law, or real estate under the tax law of a particular State, must necessarily be determined by other considerations than those which apply as between debtor and creditor. Under R. S., c. 6, § 9, which authorizes real estate to be taxed to the owner or person in possession thereof, this court held in *Paris* v. *Norway, Water Co.*, 85 Maine, 330, that water pipes, hydrants and conduits of a water company, laid through the streets of a city or town, were real estate for the purpose of taxation, but the charter of the defendant company, private and special laws of 1885, c. 369, § 6, authorized it to lay down and maintain them in the streets, and they were not removable at the order of the municipal officers. HASKELL, J., in delivering the opinion of the court says: "In using the street or road they place their pipes or rails in, or upon, the ground, there permanently to remain. They occupy land with appliances which become valuable for the revenue they yield. These appliances are fixed, permanent, used in connection with the soil that supports and sustains them. When considered as the property of their respective companies, they are not land within the common law rule. But when considered as if owned by the same person, who has title to the soil, they may properly enough be so considered." So a marine railway, built by the owners of the soil upon which it rested, was held to pass by a levy upon the real estate

upon which it was built, *Strickland* v. *Parker*, 54 Maine, 263, while side-tracks used by the contractors for building a railroad and laid upon land in which they had no interest were held to be personal property. *Fifield* v. *Maine Central R. R. Co.*, 62 Maine, 77. In *Hall* v. *Benton*, 69 Maine, 346, a boom over land taken by a boom company, under its charter and for its chartered purposes, was real estate for purposes of taxation. The right to maintain the boom was without limitation. In *Am. Union Telegraph Co.* v. *Middleton*, 80 N. Y. 408, cited by defendant's counsel, it is stated in the opinion that the telegraph poles with the wires and attachments thereto, which it was alleged were cut down by the defendant, were affixed to the soil of a highway and constituted a part of the freehold. The report of that case does not show the nature and extent of the plaintiff's right to locate and maintain its poles in the highway. *The Electric Telegraph Co.* v. *Overseers of Salford*, 24 L. J. (N. S.) 146, 11 Ex. 181, the only case cited to support the statement that they form part of the freehold, held that under the English statute, for purposes of taxation, there was a ratable occupation by the appellants of the soil supporting their posts, and is not in conflict with the decision we have reached. On the other hand, in *Newport Illuminating Co.* v. *Assessors*, 19 R. I. 632, where the poles were located in the streets by permission of the city council and the city reserved the right to remove them at any time, it was held that the corporation had acquired no vested right in the streets, and that the poles and wires were simply articles of personal property, although in all probability perhaps they would be permitted to remain substantially as they were for an indefinite period.

Our conclusion is, that from the facts of this case no legal inference can be deduced of an intention on the part of the Dirigo Co. to annex permanently its posts and the insulators which they supported to the freehold and make them a part and parcel thereof, that they continued, as between debtor and creditor, to retain their original character as chattels, and according to the agreement of the parties the entry must be,

Judgment for the plaintiffs.
Damages assessed at $50.00.

MICHAEL DEMPSEY *vs.* JOHN G. SAWYER.

Penobscot. Announced March 26, 1901. Opinion May 29, 1901.

Negligence. Defective Machinery. Assuming Risk. Master and Servant.

1. The risk of injury to a servant from defective machinery is primarily upon the master, and remains upon him unless the servant voluntarily assumes it.

2. The servant may voluntarily assume such risk and relieve the master from it, but such assumption is his voluntary act, not his legal duty.

3. Whether the servant has voluntarily assumed such risk is a question of fact to be determined by the jury.

4. When, however, the servant knows and appreciates the danger of injury from defective machinery and yet enters or continues in the dangerous service without protest, the necessary inference is that he has voluntarily assumed the risk.

5. Although the servant may have once taken such risk upon himself, he may throw it back upon the master by a notification that he will no longer carry it. Whether the risk once assumed has been thus thrown off is a question of fact for the jury.

6. When a servant has thrown off the risk once assumed he may voluntarily re-assume it, and whether he has re-assumed it is also a question of fact for the jury.

7. When a servant has notified the master that he will no longer carry a risk once assumed, and is requested by the master to continue in the service, with the assurance that the defects shall be speedily remedied, and the servant thereupon does continue in the service, it is a question of fact for the jury whether the servant has thereby re-assumed the risk, pending the removal of the defects, or whether it remains upon the master. There is no necessary inference either way.

8. In this case, the jury has found for the plaintiff upon all these questions of fact, and the court is not convinced that the jury was unmistakably wrong in so doing.

On motion by defendant. Motion overruled.

Case for personal injuries. Verdict for plaintiff for $950.

The facts appear in the opinion.

W. H. Powell and L. C. Stearns, for plaintiff.

C. A. Bailey, for defendant.

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

EMERY, J. After studying the evidence, with the valuable aid of the full analysis made by the counsel, our conclusion is that we cannot hold the jury to have been unmistakably wrong in believing, and basing their verdict upon, the plaintiff's version of the events, and in drawing inferences therefrom favorable to the plaintiff. The counsel for the defendant has argued strenuously upon the facts and inferences, but the verdict of the jury outweighs even his weighty argument. The version thus sustained is substantially as follows: The plaintiff was thirty years old, and was accustomed to the work of running mill saws of various kinds including lath saws. He was in the employ of the defendant as a workman in his mill, and was running there a circular-saw machine like a lath machine and with it sawing birch-bolts into spool-wood bars. There were several saws pertaining to this machine, and as the one in use became worn, it would be taken out to be filed or re-cut, and another and freshly filed or re-cut saw would be substituted. This filing or re-cutting of the saws was done by the defendant, and the plaintiff had nothing to do with it.

Some of these saws were so filed or cut that the teeth were too long and slim to endure the contact with the hard wood without danger of breaking and flying out, or of bending in the wood and throwing out splinters. This was found by the jury to be a defect in the saws, fraught with danger of personal injury to the workman running it carefully, and a defect known to the defendant. The plaintiff, however, before he was injured, also knew of the defect and fully appreciated its nature and the danger of personal injury from it.

After he had been working at this machine for seventeen days, and while running it in the course of his employment with due care upon his own part, a saw tooth was broken off and thrown out into his face to his injury, or a splinter was thrown out by a bent tooth with the same result. This event was the direct result of the above described defective method of filing or cutting the

saws for that kind of work. The plaintiff knew that this particular saw was defective as stated, and knew that the injury suffered was to be apprehended from that defect, however carefully he might work.

If the above were all the material facts, there would be only one defense to this action, as all the other necessary elements of a right of action are established by the verdict, viz:—the defendant's negligence or breach of duty, the resulting injury to the plaintiff, and the absence of any contributory negligence upon his part. That one defense is this, viz: that the plaintiff had assumed the risk of the injury as his own risk. The danger of such an injury was a danger directly attendant upon even the careful use of a saw with such teeth in such work. The plaintiff knew of the defect, and appreciated the attendant danger.

Other facts, however, do appear in the plaintiff's version, which the jury have found to be true, viz: After seeing the defect in the saws and the consequent danger, but before the injury, the plaintiff told the defendant that the teeth of the saw he was then using were too slim to stand the hard wood. The defendant shut down the machine and substituted another saw. This and the other saws after awhile showed the same defect. Finally, on the morning of the injury, the plaintiff noticed that three teeth were gone from the saw then in the machine. He started the saw and went to work with it, and in a few minutes a tooth bent over and tore through the wood. He then went to the defendant and had with him the following conversation: "I told Mr. Sawyer I was not going to work any longer with teeth bent in the saw, unless he would go up and fix it. He wanted to know what the matter was. I told him there was a tooth bent over in the saw. I told him I would not work unless he would go up and fix it. He said he would go up and fix it sometime in the forenoon, and for me to go back and go to work and work it as easy as I could." The plaintiff thereupon went back to his work, and while running the saw as easily and carefully as he could, was injured from a tooth breaking or bending as above described.

Did these additional facts authorize the jury to find that, at the

time of the injury the plaintiff had thrown off the risk, he had at first assumed?

There is an essential difference between the defense of contributory negligence and the defense of assumption of risk, a difference often obscured, but which should be kept clear in the mind, for a correct understanding of the relative rights and duties of master and servant, as to the dangers arising from the use of defective machinery or appliances. Contributory negligence is a breach of the legal duty of due care imposed by law upon the servant however unwilling or protesting he may be. Assumption of risk is not a duty, but is purely voluntary upon the part of the servant. The risk from the master's breach of duty never rests upon the protesting or even unwilling servant. Volens, not sciens, is the test. *Mundle* v. *Hill Manfg. Co.*, 86 Maine, 400; *Conley* v. *Am. Ex. Co.*, 87 Maine, 352; *Jones* v. *Manufg. & Invst. Co.*, 92 Maine, 565 at page 569. The risk of injury to a servant from known defects in machinery, or appliances, is primarily upon the master, imposed upon him by law even against his protest, as the legal consequence of his breach of his legal duty to at once remedy such known defects. The risk attends the duty. The servant, however, may, if he will, agree to bear such risk himself and thus relieve the master from that risk, but until he does in fact so agree, the risk remains upon him who has the duty. Also, when the servant effectually throws off the risk he had once voluntarily assumed, it falls back where the law first placed it, *i. e.*, upon the master.

There is rarely any such stipulation expressed in any contract of employment, but it is usually implied like many other stipulations. Nothing appearing to the contrary, in such a contract the servant is understood to agree to take upon himself the risk of injury from dangers visible and appreciated, even when impending from known and understood defects in the machinery, or appliances, furnished by the master. If such defects and dangers first appear after the servant has entered upon his work, and he makes no complaint nor request to have the defects remedied, he is still understood to accept the risk of them. Indeed, under such circumstances, the presumption that he has assumed the risk is practically conclusive. Never-

theless, it is competent for the parties in their contract of employment to negative such an understanding, and have it expressed or understood that the risk shall remain, with the duty, upon the master. It is, also, competent for them afterward to cancel such an agreement, actual or presumed, once made, and thereby let the risk fall back upon the master. Indeed, the servant can himself terminate such an implied presumed, or even expressed, agreement by giving notice to the master that he will no longer bear the risk. The law does not require the servant to bear such a risk, *i. e.*, a risk from defects, a moment longer than he is willing to, whatever may have been his original contract. When the servant does terminate his agreement to bear the risk, it at once reverts "nolens volens" upon the master whose breach of legal duty occasions the risk. Of course, however, after the servant has once thus terminated his agreement to bear the risk, he may renew it, and such renewal may be implied from circumstances as well as expressed in words. If renewed, the risk is again assumed by the servant until he again terminates the agreement of assumption.

Whether and when such an agreement once made, either by express words or by implication, is cancelled or terminated, is a question of fact for the jury. Such cancellation or termination, like the agreement itself, may be inferred from circumstances as well as established by express words. If it appear from any competent evidence that the agreement was cancelled or terminated, then the risk for the future by operation of law falls back, where the law primarily placed it, upon the master; and there it remains until there is shown a new agreement, or a renewal of the original agreement, by the servant to assume the risk. Whether and when such a renewal or new agreement is made, is also a question of fact for the jury.

Recurring now to the facts of this case: the plaintiff, in substance, distinctly notified the defendant of the dangerous defects in the saw, and that he would not continue working with it in that defective condition. Surely, the jury could properly find from this, as they did, that the plaintiff's original agreement to assume the risk of injury from that defect was then effectually terminated, and

that the defendant must have so understood. The risk was then upon the defendant, imposed upon him by law. It was then his duty to guard against that danger. He was in control of the situation. He could remove the defect, or stop the work. He did neither. He preferred to have the work go on with the perilous defect still existing. The future risk from that defect was plainly upon him, unless, indeed, the plaintiff agreed anew to assume it. Whether the plaintiff did so agree anew, is a question of fact, and is the final and perhaps pivotal question in this case.

Upon this question the facts found are these: After the termination of the plaintiff's original agreement to assume the risk, the defendant promised to remove the defect from the saw later that forenoon, presumably at a time more convenient for him, but directed the plaintiff to return at once to the saw and to run it in the meantime as easily and carefully as he could in its defective condition. The plaintiff making no reply, or other protest, at once went back to work with the saw as directed, and was soon injured thereby as above stated.

When more than one inference of fact is reasonably deducible from proven facts, the question which is the correct or more reasonable inference is for the jury. Whether or not these facts show an agreement by the plaintiff to re-assume the risk, which he had just before thrown back on the defendant, was primarily a question for the jury which they have answered in the negative. We cannot render a contrary judgment merely because the facts seem to us to show such an agreement. The question for us is, whether such an agreement is so evident that no other conclusion is reasonable, bearing in mind all the time that twelve men of affairs have held the contrary.

There are published cases in which it has been properly held that, under the circumstances of the particular case, the return to work by the servant after he had notified the master of the defects and danger was conclusive evidence that he re-assumed the risk. There are other published cases in which it has been held, as matter of law, that under the circumstances of the particular case, the servant though going back to work after such notification did not

re-assume the risk. The reasoning of all those cases must be confined to the facts of each case, and cannot control us here. In this case we think there are some facts which preclude us from holding either way as a conclusive presumption or matter of law.

The risk was not one attendant upon the general nature of the master's business, or the servant's employment. It arose solely from a dangerous defect in the machinery known to the master, and which it was his duty to instantly remedy. The servant had no special department in which he was to exercise his own judgment. The nature of the business and of his employment was such that he was, in a measure, subject to the master's varying directions in the varying exigencies of the business. As such servant his natural impulse was to obey such directions. He had done his duty in notifying the master of the defects in the machinery, and of his unwillingness to bear the risk from them. The master made no suggestion of increased compensation for such risk, nor of any other inducement for the servant to re-assume the risk. There was no parleying whatever. He promised to soon remedy the defects, but practically told the servant to go back to work at the defective saw until he should have time to do so. This might seem to men of affairs to savor as much of an order to be obeyed without question, as of a proposal to be considered, or as of an inquiry as to his willingness. The servant did not question the order, but at once did as he was bid.

Again, it might seem to men of affairs that under all the circumstances such a direction by the master, accompanied by an express assurance that the defect would soon be remedied, contained an implied assurance to the servant that in the meantime he would be working at the master's risk,—or at least that the servant assumed, and was justified in assuming, that pending the promised repairs, the master carried the risk of the want of repair. The defect was brought to the master's notice. The risk was thrown back upon him. He acknowledged the defect and the risk. For his own profit, he directed the work to go on until he could more conveniently repair. Might not the servant reasonably understand from this that the master chose to bear the risk for a time, rather than

stop the work at once? At least might not a jury reasonably so find?

Under these, and all the other circumstances of the case, it does not seem to us beyond question that the servant's return to the saw and the peril were in pursuance of an agreement, or even willingness to re-assume the risk, rather than in unwilling, or at least unreflecting, obedience to an order to return, or with an understanding by him that the risk was on the master. With what mind he returned was a question for the jury, and, whatever our own views, our judgment must follow their verdict.

Since every case of this nature must be determined upon its own peculiar facts, we have abstained from quoting from decided cases. The legal propositions stated are supported by numerous judicial opinions. Among these may be cited, *Yarmouth* v. *France*, 192 Q. B. D. 647; *Smith* v. *Baker*, 1891 App. Cas. 325; *Hough* v. *Tex. & Pac. Railway Co.*, 100 U. S. 213; *Fitzgerald* v. *Conn. Riv. Paper Co.*, 155 Mass. 155; *Mahoney* v. *Dore*, 155 Mass. 513; *Narramore* v. *C. C. & St. L. Ry. Co.*, 96 Fed. Rep. 298; *Roux* v. *Lumber Co.*, 85 Mich. 519; *McFarlan Co.* v. *Potter*, 51 N. E. Rep. 737 (Indiana.) These last three cases cited contain many quotations from numerous other opinions. The reader is also referred to exhaustive notes in 40 L. R. A. 781, 47 L. R. A. 161, and in 49 L. R. A. 33.

It should be borne in mind that our reasoning and statements in this opinion are limited to the specific facts of this case. A different verdict might have required a different judgment. Even a small variation in the material facts might require different reasoning or a different conclusion.

Our decision is merely (1) that the disputed questions in this case were for the jury, and (2) that upon these questions their findings are not unmistakably wrong.

Motion overruled. Judgment on the verdict.

WILLIAM H. GLOVER, and another, In Equity,

vs.

EVERETT A. JONES.

Knox. Opinion May 28, 1901.

Review. Equity. Practice. Master. R. S., c. 77, §§ 14, 15. Chancery Rules 28, 36.

1. In framing a bill of review in equity it is necessary to state the former bill and the proceedings therein, the decree and the point in which the party exhibiting the bill of review conceives himself aggrieved by it, and the ground of law upon which he seeks to impeach it.

2. There is no imperative rule of chancery practice which requires the appointment of a master to state the account in all cases. The court unquestionably has the power to pass upon the account without the intervention of a master.

3. Where a bill in equity is made returnable at a regular term of court and is taken pro confesso for want of appearance, the defendant, who has made no motion to open the decree within ten days after it is made, has lost his standing in court and is not entitled to notice of its further proceedings.

4. Whether or not the decree filed in the original cause was in accordance with the allegations in the bill and authorized by the evidence admissible thereunder, it is unnecessary to determine. It is a sufficient answer to this objection that, in the case at bar, it is not one of the complaints specified in the bill of review as a cause for reversing the decree.

5. Furthermore, there is no allegation in this bill that substantial justice has not already been done by the decree in question, and it nowhere appears either from allegations or evidence that the review prayed for, if granted, would result in any material alteration of that decree.

On report. Bill in equity for review. Bill dismissed.

Bill of review brought for error of law in an original bill against William H. Glover, Edward K. Glover, Charles L. Smith and Ambrose Mills, copartners under the firm name of W. H. Glover & Company, to settle and adjust the partnership after dissolution. Smith and Mills were not made parties to this bill.

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

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

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

WHITEHOUSE, J. This is a bill of review brought for error of law alleged to be apparent upon the face of the record. The defendant in this bill of review was the plaintiff in the original bill, and these plaintiffs together with Charles L. Smith and Ambrose Mills were defendants; but although service of the original bill was duly made on the defendants therein named, they filed no answer to the bill and made no appearance in the cause. The bill was accordingly taken pro confesso pursuant to the rule of practice prescribed by the statute, and the cause was duly heard by the presiding justice and a decree filed. The original bill, the docket entries and the decree, therefore, constitute the record for the inspection of the court.

The parties to the original bill were members of a partnership which had been dissolved by mutual consent, and the bill was brought by the plaintiff Everett A. Jones, who is defendant in this bill of review, to obtain an adjustment of the partnership affairs and accounts and a decree for any balance due him.

In framing a bill of review "it is necessary to state the former bill and the proceedings therein; the decree and the point, in which the party exhibiting the bill of review conceives himself aggrieved by it; and the ground of law, or matter discovered, upon which he seeks to impeach it." Story's Eq. Pl. § 420. See also authorities cited in Whitehouse's Equity Prac. § 255.

An examination of the plaintiffs' bill of review in this case discloses three grounds of law on which they seek to impeach the decree filed in the original cause, viz:

1. That no master in chancery was appointed to hear the evidence, state the partnership accounts and make a report to the court.

2. That no notice was given to the plaintiffs, or either of them, of the hearing before the court.

3. That the plaintiffs had no notice and no knowledge of the filing of the decree.

The first ground of objection is clearly untenable. There is no imperative rule of chancery practice which requires the appointment of a master to state the account in all cases. The court unquestionably has the power to pass upon the account without the intervention of a master. "The account may be taken either by the court itself, if it sees fit, or by a master in chancery." Whitehouse Equity Prac. § 559, and cases cited. "It is wholly within the discretion of the court to call to its aid the services of a master, and if it sees proper to hear witnesses instead of having their testimony taken by a master, or to undertake the labor of stating an account without the aid of a master, it may do so." 17 Enc. of Pl. & Prac. p. 986. See also *Fogg* v. *Merrill*, 74 Maine, 528.

With respect to the second and third objections, it must be remembered that the original bill was made returnable at a regular term of court, and was taken pro confesso for want of appearance by the defendants.

Section 14 of c. 77 R. S., provides that "when process is made returnable at any regular term, the respondent shall appear within the first three days thereof; otherwise on the return day of such process; and in default thereof, on motion of the complainant in writing, the bill shall be taken pro confesso, as matter of course, at the expiration of ten days after the filing of such motion, but such decree for good cause shown, on motion of the respondent, may be opened within ten days after it is made, and in such case the court shall fix the time for making a defense." It will be perceived that there is here no provision requiring the motion to be served on the respondent when he has failed to appear at all, and there is no rule of equity practice requiring notice of such a motion to be given to the defendant under such circumstances. In this respect section 14 above quoted is to be distinguished from section 15, which does require service of such a motion on a defendant who has appeared but made no defense by "answer, plea or demurrer within thirty days."

In this case it appears, from the docket entries, that the motion to have the original bill taken pro confesso was filed January 30, 1900, and that the decree was not filed until February 20. The

plaintiffs also state, in the fourth paragraph of this bill of review, with reference to the original bill, "that whereas the allegations were in the main true, the complainants deeming it unnecessary to answer the same . . . . and supposing that each of them would be given due notice of the time and place of such hearing thereon, allowed the same to be taken pro confesso as per motion filed January 30, 1900." It may fairly be inferred from this that these plaintiffs had notice of the motion that the bill be taken pro confesso in the original cause. The docket entries show that the decree was filed February 20, 1900, and that the "statutory notices bearing the same date, were mailed by the clerk to each of the defendants the next day." These entries are supplemented by the admission that the clerk of courts would testify, that each of these notices of the decree was enclosed in a separate envelope directed to W. H. Glover, E. K. Glover, Ambrose Mills, and Charles Smith, respectively, the defendants in that cause, and all deposited in the post office together; that each of these envelopes "contained the request to return to the clerk of courts, if not delivered" and that no one of them was returned. It is also admitted that Mills and Smith would testify that they received the notices directed to them, and that they "think they received them at the office of the W. H. Glover Company." Yet, these plaintiffs made no motion to have the decree "opened within ten days" after it was made, but filed this bill of review on the sixteenth day of April, 1900. The bill, it is true, contains the allegation "that if any notices were mailed to them, or either of them, as stated in the record aforesaid, that they never received any such." But, this allegation is traversed by the defendant in his answer, and hence is not evidence for the plaintffs and cannot be read by them in support of their own case. Story's Eq. § 849 a. Whitehouse on Eq. Prac. § 446. The docket entries and the testimony of the clerk are, therefore, the only evidence in the case respecting the notices of the filing of the decree, and this evidence is sufficient to show that the notices were duly mailed as stated, and to raise a presumption that they were duly received by each of these plaintiffs.

But, neither were the plaintiffs in review entitled to notice of

the final decree, under the rules of chancery practice. Rule 28 requires the party entitled to a decree to "draw the same and file it and give notice;" but Rule 36 provides that "notices required by these rules will be served in writing and signed by counsel, and delivered to the opposing counsel, or left at his office." There is no rule requiring the plaintiff to serve notice on a defendant who has wholly failed to appear either by himself or counsel. In *Russell* v. *Lathrop*, 122 Mass. 300, the court say: "An order that a bill be taken pro confesso is interlocutory and intended to prepare the case for a final decree. Its effect is similar to that of a default in an action at common law, by which the defendant is deemed to have admitted all that is well pleaded in the declaration. The defendant has lost his standing in court and is not entitled to notice of its further proceedings, but the matters set forth in the bill do not pass in rem judicatam until the final decree." See also *Austin* v. *Riley*, 55 Fed. Rep. 833.

In the case at bar, the decree that the bill be taken pro confesso was not entered upon the docket, or separately filed as an interlocutory decree. After the lapse of twenty days from the filing of the motion, the final decree was filed, embracing in the introductory part of it the decree that the bill be taken pro confesso. But this slight irregularity is not specified in this bill of review as one of the grounds for impeaching the decree; and as the plaintiffs in review wholly failed to appear or to move for the opening of the decree, it is obvious that they were not prejudiced by the omission to have the interlocutory decree entered upon the docket or separately drawn and filed.

Finally, the plaintiffs contend in argument that the proceedings in the original cause were not in accordance with the allegations in the bill, and that the decree was not warranted by the prayer.

It is undoubtedly true that a decree in equity can grant only such relief as is justified by the allegations and the evidence, and that a general prayer in the bill does not authorize a decree based upon facts proved but not alleged, any more than on facts alleged but not proved. *Hare* v. *McIntyre*, 82 Maine, 240; *Merrill* v. *Washburn*, 83 Maine, 189; Whitehouse on Eq. Prac. §§ 244 and 518.

But, in the case at bar, it should be a sufficient answer to an objection presented only in argument, that it is not one of the complaints specified in the bill of review as a cause for reversing the decree. It is, therefore, unnecessary to determine whether or not the decree filed in the cause was fully authorized by the evidence admissible under the allegations of the bill.

Furthermore, Mills and Smith, two of the members of the partnership in question, who were parties defendant in the original cause, are not made parties to this bill of review. There is no averment in this bill that the plaintiffs in review have a meritorious defense to the original bill, and no specification of the matters which they desire to set up in their answer. There is no allegation in this bill that substantial justice has not already been done by the decree in question, and it nowhere appears, either from allegations or evidence, that the review prayed for, if granted, would result in any material alteration of that decree.

It is, therefore, the opinion of the court that the entry must be,

Bill dismissed.

JOHN B. HAMLIN *vs.* CITY OF BIDDEFORD.

York. Opinion June 4, 1901.

Drains and Sewers. R. S., c. 1, § 5; c. 16, §§ 2-10. Stat. 1901, c. 268.

The records of the city council, of the city of Biddeford, clearly establish the fact that the common council originally opposed the construction of the sewer in question, while the mayor and aldermen insisted upon the proposition to build it, and through a committee of conference finally succeeded in procuring the assent of the common council. The oral evidence satisfactorily shows that it was constructed by the street commissioner, at the expense of the city, under the immediate direction of the mayor and aldermen. *Held;* that this action of the mayor and aldermen was not invalidated by the superfluous assent of the common council.

Held; that while the sewer complained of continued to be used for the flow of the drainage designed to pass through it, it was the duty of the city to maintain and keep it in repair; and although no action lies for a defect, or want of

sufficiency in the plan or system of drainage adopted in the exercise of a quasi judicial discretion, under powers specially conferred by statute, the duty of keeping the common sewers in repair and free from obstruction after they have been constructed and have become the property of the city under such authority, is a ministerial duty, for neglect of which the city is liable to any person injured. The same is true of the duty actually to construct them with reasonable care and skill. And there is no difference in these duties whether the city has acquired the right to maintain the sewer by prescription, or has laid it under the statute.

Held; that the plaintiff had no private drain connected with the sewer in question and was not entitled to drainage through it according to the provision of the statute; but he sustained damage by reason of the injury to the foundation of his stable and the land across which the sewer was laid, caused by the neglect of the city to keep the sewer in proper repair; and this upon obvious principles of justice, as well as upon authority, he is entitled to recover in this action.

This case is not affected by chap. 268 of the public laws of 1901.

On report. Judgment for plaintiff.

Case for default and negligence of the city of Biddeford to keep in proper repair and maintain a sewer running through the plaintiff's premises.

F. W. Hovey, for plaintiff.

J. F. Burnham, for defendant.

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

WHITEHOUSE, J. This is an action on the case, to recover damages alleged to have been sustained by the plaintiff through the failure of the defendant city to maintain and keep in repair a plank sewer, laid across the plaintiff's premises, situated on the westerly side of Granite street and between Granite street and Hill street in the city of Biddeford.

It is contended, in behalf of the city, that the sewer in question is not one for which the city had any legal responsibility, either with respect to its original construction, or its subsequent maintenance and repair.

The statute law of the state regulating the construction and maintenance of "drains and common sewers" is found in chapter sixteen of the revised statutes.

Sections two and three of this chapter are as follows:

Sec. 2. "The municipal officers of a town may at the expense of the town, construct public drains or sewers along or across any public way therein, and through any lands of persons or corporations, when they deem it necessary for public convenience or health, and they shall be under their control."

Sec. 3. "Before the land is so taken, notice shall be given and damages assessed and paid therefor as is provided for the location of town ways."

Section four authorizes abutters upon the line of a public drain and the owners of contiguous private drains to enter and connect with it, on application to the municipal officers, and paying therefor what they determine. It further provides that the written permits given to the applicants so to enter the drain, shall run with the land without further payment.

Section nine provides "that after a public drain has been constructed and any person has paid for connecting with it, it shall be constantly maintained, and kept in repair by the town, so as to afford sufficient and suitable flow for all drainage entitled to pass through it. . . . . If such town does not so maintain and keep it in repair, any person entitled to drainage through it may have an action against the town for his damages thereby sustained."

Section ten requires that "all proceedings of municipal officers aforesaid shall be at their legal meetings," and that "a suitable record shall be made of all such permits, exhibiting the persons and lands to which they apply."

By virtue of these provisions of the statute "the authority to lay out and construct public drains and sewers, as well as the subsequent control over them, is clearly vested, not in the city or town as a corporation, but in the "municipal officers" as representatives of the general government. There is no statute in this state conferring such authority upon the city or town, or upon any officials as agents of the city or town. Nor is such authority necessarily

incident to the exercise of its corporate powers or the discharge of its corporate duties. True, the work must be done "at the expense of the town." A proper system of drainage so directly concerns the public health, that the legislature has deemed it just and right to equalize the burden of constructing sewers by requiring payment to be made from the municipal treasury. But, in exercising the authority conferred upon them by the statute, the municipal officers act, not as agents of the town, but as public officers intrusted with a large discretion and appointed by law to exercise absolute control over the subject matter." *Gilpatrick* v. *Biddeford*, 86 Maine, 534, and cases cited. In this respect "they act upon their own responsibility and are not subject either to the control or the direction of the inhabitants of the town." *Bulger* v. *Eden*, 82 Maine, 352; *Goddard* v. *Harpswell*, 84 Maine, 499; *Brunswick Gas Light Co.* v. *Brunswick Village Corp.*, 92 Maine, 493.

If the plaintiff would recover by virtue of the provisions of this statute, it is, therefore, incumbent upon him to show that the sewer in question was constructed by the municipal officers of Biddeford, acting not as agents of the corporation, but as public officers in obedience to general law; that the city thereby became bound to maintain and keep it in repair "so as to afford suitable flow for all drainage entitled to pass through it;" and that by reason of its failure to keep it in repair, it became liable in this action for the damages sustained by the plaintiff.

It is not in controversy that the sewer was constructed in 1878 at the expense of the city, and the evidence shows that it was built under the direction of the mayor and aldermen and the joint standing committee on streets, composed of members of both branches of the city council. It is not in controversy that it has been deemed and treated by the city, as a part of its system of sewers, from the time of its construction to the commencement of this action. The records of the city council of Biddeford composed of the mayor and aldermen and common council, disclose certain proceedings by the concurrent action of both branches, purporting to be an approval of a proposition to have this drain constructed,

and the final report of the committee of conference appointed by the two branches to consider the matter, appears to have been a recommendation that the drain should be built; and this report of the committee was accepted by both branches of the city council. The subject matter undoubtedly received the attention of both branches, but the action taken by them never assumed the form of a direct vote instructing the street commissioner to build the drain or giving any directions in regard to the manner of building it. In this respect the situation was analogous to that described in *Gilpatrick* v. *Biddeford*, 86 Maine, 534. In that case the court said: "The ordinance of the city of Biddeford, making it the duty of the street commissioner to superintend the building and repair of sewers and make contracts therefor, ... obviously was not designed as an attempt to usurp the powers vested in the mayor and aldermen by the general statute. It was doubtless primarily intended to apply to the construction of sewers in the public streets, for the safe condition of which the city was responsible. Its peculiar terms were probably the result of a misapprehension in regard to the law. So far as it would have the effect to take away the authority and discretion of the municipal officers respecting the building of sewers, wholly outside the limits of the street, the ordinance, being unauthorized either by the city charter or by general law, is manifestly void. . . . .

"The concurrent action of the city council in referring the matter to a committee and recommending the construction of this drain, may further indicate a failure to distinguish between the municipal officers and the city council, or a misconception of the duties of the two branches. But, it was not a vote to build the sewer, nor an instruction to any agent to build it. It was rather an approval of a general proposition for the completion of several sewers, and it was naturally incident to their joint action in appropriating, and raising a large sum of money, to be expended on the work as required by general law."

It is true, that there is no record of any formal vote by the mayor and aldermen in the case at bar authorizing the construction of the drain, apart from such concurrent action as a co-ordinate branch of

the city council. But the records clearly establish the fact that the common council originally opposed the construction of the drain, while the mayor and aldermen insisted upon the proposition to build it, and through a committee of conference finally succeeded in procuring the assent of the common council. The oral evidence satisfactorily shows that it was constructed by the street commissioner, at the expense of the city, under the immediate direction of the "mayor and aldermen," acting, however, to some extent in conjunction with the committee on streets.

A similar question arose in *Woodbridge* v. *Mayor and Aldermen of Cambridge*, 114 Mass. 483, and the court held that the order of the mayor and aldermen for the construction of a common sewer was within the power conferred upon them by their statute "and was not invalidated by the superfluous assent of the common council."

In *Collins* v. *Holyoke*, 146 Mass. 298, it was objected that the sewer was "built under the supervision and direction of a committee, composed of four members of the common council and three aldermen," but the court held that the statute, which gave the mayor and aldermen authority to make the sewer, "did not preclude them from employing agents to supervise and direct the work," and that the validity of their assessment was "not affected by the fact that they called in another person to assist them in making it."

It is true, that in *Darling* v. *Bangor*, 68 Maine, 108, our court used the following language touching this question: "To act as a distinct and separate body is one thing; for the same persons to act in connection with and as a part of another body, is another and a very different thing. A drain cannot have the sanction of the statute, unless it is built by the authority and under the sole responsibility of the body therein provided and in pursuance of the provisions therein prescribed." But, that was an action to enforce the common law liability of the defendants, and the observation above quoted was obiter dictum, not necessary to the decision of the case. It is, therefore, not a precedent requiring the court to observe the rule of stare decisis.

"The primary and fundamental idea of a municipal corporation" says Judge Dillon, "is an institution to regulate and administer the

internal concerns of the inhabitants of a defined locality in matters peculiar to the place incorporated, or at all events not common to the state or people at large; but it is the constant practice of the states, in this country, to make use of the incorporated instrumentality or of its officers, to exercise powers, perform duties and execute functions that are not strictly or properly local or municipal in their nature, but which are in fact, state powers, exercised by local officers within defined territorial limits. . . . . In theory the two classes of powers are distinct, but the line which separates the one from the other is often difficult to trace." 1 Dillon Mun. Corp. § 21.

In view of this composite character and diversified authority of a municipal corporation, it might be anticipated that ordinary municipal officers would sometimes fail to observe the distinction between their functions as agents of the corporation, and their powers and duties as representatives of the public law of the state. By virtue of the statute, the authority to lay out and construct public drains is vested in the municipal officers, and the exercise of their authority does not require the assent of the other branch of the city government, but the work must be done at the expense of the city, and the act of appropriating and raising the money required to defray this expense does involve the co-operation of both branches of the city council. In making their adjudication upon the necessity of a given sewer, the mayor and aldermen are not subject to the direction or control of the city council, but in performing such judicial functions it would not be illegal, but often highly proper and necessary, to confer with the other branch of the council respecting the amount of the appropriation reasonably available for that purpose.

In the case at bar, the mayor and aldermen doubtless undertook in good faith to discharge a duty imposed upon them by law for the public use and benefit. They may not have had a very clear apprehension in regard to the precise nature and limitation of their authority, but they evidently intended to have the sewer in question laid out and constructed at the expense of the city, and in such a manner, as to render the city chargeable for its subsequent

maintenance and repair; and under all the circumstances the work may not unreasonably be held to have been done under the direction of the municipal officers acting, not as agents of the city, but as public officers in the exercise of power conferred by general law.

It is, accordingly, the opinion of the court that while the sewer complained of continued to be used for the flow of the drainage designed to pass through it, it was the duty of the city to maintain and keep it in repair; and although "no action lies for a defect or want of sufficiency in the plan or system of drainage adopted in the exercise of a quasi judicial discretion under powers specially conferred by statute, the duty of keeping the common sewers in repair and free from obstructions after they have been constructed and have become the property of the city under such authority is a ministerial duty, for neglect of which the city is liable to any person injured. The same is true of the duty actually to construct them with reasonable care and skill. And there is no difference in these duties, whether the city has acquired the right to maintain the sewer by prescription, or has laid it under the statute." *Bates* v. *Westborough*, 151 Mass. 174; *Emery* v. *Lowell*, 104 Mass. 13; *Child* v. *Boston*, 4 Allen, 41, 52.

Attention may here be called to chapter 268 of the public laws of 1901, amendatory of section two of chapter 16 of the revised statutes, declaring that the municipal officers shall not construct any public sewer until it shall be authorized by a vote of the town, and an appropriation made for the purpose; but since "actions pending at the time of the passage or repeal of an act are not affected thereby" (R. S., Ch. 1, § 5) no further consideration need be given to this amendment.

In the case at bar, the plaintiff had no private drain connected with the sewer in question and was not entitled to drainage through it according to the provision of the statute; but he sustained damage by reason of the injury to the foundation of his stable and the land across which the sewer was laid, caused by the neglect of the city to keep the sewer in proper repair; and this upon obvious principles of justice, as well as upon the authorities cited, he is entitled to recover in this action.

After a careful examination of the testimony relating to the nature and extent of the injury, it is the opinion of the court that just compensation therefor will require,

Judgment for the plaintiff for seventy-five dollars.

JAMES SIDELINGER, In Equity, *vs.* GEORGE BLISS, Admr.

Lincoln. Opinion June 12, 1901.

Deed. Record. Notice. R. S., c. 73, § 8.

A prior unrecorded deed, by R. S., c. 73, § 8, is not effectual against other persons, claiming title by a subsequently recorded deed, without actual notice of such prior deed.

Held; that the burden of proof to show such actual notice rests upon the party seeking to establish title by an unrecorded deed, as against the holder of a subsequent deed having an earlier record.

The decision of a single justice upon matters of fact, in an equity hearing in the first instance, should not be reversed unless it clearly appears that such decision is erroneous.

The burden is upon the appellant to show that the decree appealed from is clearly wrong; otherwise it must be affirmed.

Held; that in this case the plaintiff has failed to show that the decree is erroneous.

In equity. On appeal. Appealed dismissed.

Bill in equity, heard on bill, answer and testimony, praying to have a cloud on the plaintiff's title removed.

The Chief Justice, who heard the case, in the first instance, made the following findings and entered his decree accordingly.

This case came on for hearing on bill, answer, and written and oral evidence, before me at the last October term in said county, and was fully heard, and argued by the parties, and then the papers were taken by me for examination and consideration before final decision; and now I do make my decree in the premises, and determine and decree as follows, namely: That the bill is not sustained by the proof, and that the same be dismissed with costs for the respondent.

It was contended by the complainant that the bill might be considered as a bill for redemption of a mortgage, by taking the bill as it is, or as it might be by amendment, but I overruled that proposition.

I consider the case on the question of notice of complainant's mortgage as a very close one, and my opinion has vacillated on the question considerably during my examination of the evidence. But as the burden of proof is upon the complainant and testimony as to the declarations of the respondent's intestate is susceptible of error or mistake, upon the whole I determine the question of fact in favor of the respondent.

O. D. Castner, for plaintiff.

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

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

FOGLER, J. This is an appeal by the complainant from a decree below dismissing the bill with costs for the respondent.

The case is thus: On the 12th day of March, 1895, one Hopkins conveyed to the complainant, in mortgage, certain real estate described in the bill, situate in Waldoboro in the county of Lincoln. This mortgage was not entered for record in the registry of deeds for Lincoln county until March 23, 1897.

October 9, 1896, the same mortgagor conveyed the same premises in mortgage, to Hiram Bliss Jr., the defendant's intestate, which last named mortgage was entered for record in said registry on the 10th day of October, 1896.

The complainant alleges in his bill that when the mortgage of October 9, 1896, was given, Hiram Bliss Jr., the mortgagee, had actual notice of the mortgage given to the complainant March 12, 1895.

The bill prays that the priority of the complainant's right and title under his mortgage, over the right and title of the defendant under his mortgage, be established and declared by an appropriate decree.

The case was heard by Chief Justice PETERS at the October term, 1899, in Lincoln county. The Chief Justice, after maturely considering the case, filed his decree dismissing the bill with costs November 24, 1899, from which decree the complainant appeals.

The issue was purely of fact.

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. *Paul* v. *Frye*, 80 Maine, 26.

The burden is upon the appellant to show that the decree appealed from is clearly wrong, otherwise it must be affirmed. This burden the appellant has not sustained. A careful examination and consideration of the testimony, and of the arguments of counsel, fail to convince the court that the decree should be disturbed.

Appeal dismissed.

Decree below affirmed with additional costs.

NATIONAL FIBRE BOARD COMPANY

vs.

THE LEWISTON & AUBURN ELECTRIC LIGHT COMPANY.

Androscoggin. Opinion June 26, 1901.

Waters. Dams. Flowage. Damages. R. S., c. 92.

1. Under the mill act (R. S., ch. 92) and subject to its provisions, the owner of a mill and dam can at any time appropriate, for raising and maintaining a head of water for working his mill, so much of the space in the river valley as has not already been appropriated by some other mill owner for his own mill.

2. Such an apppopriation, however, cannot be made effectual by mere proclamation, nor by merely marking limits, nor by mere casual, intermittent and irregular flowage. It must be by an actual occupation of the space by a head or pond of water raised by dams and their appliances, actually constructed or fitted, of the requisite height and efficiency to raise such head.

3. Such occupation need not be of uniform height throughout the year, but may vary with the seasons and the amount of flow in the river. So the movable

parts of the dam, such as flashboards, gates, etc., may be alternately set in place or removed to meet the variations in the flow of the river, without losing the right to the space acquired for flowage.

4. Movable flashboards placed on top of the dam to preserve the head of water in the seasons of low water, and removed to keep down the head of water in seasons of high water, become part of the dam and effectual to rightfully appropriate space in the river valley for flowage.

5. The use of such flashboards, however, to operate as a part of the dam and effectual to made such rightful appropriation of flowage space, must be of definite height and be set in place and removed with approximate regularity so as to preserve the uniformity of the head of water, rather than occasionally increase or diminish it.

6. Whatever has been the height and the regular use of flashboards upon a dam before the erection of a mill on the river above, the height cannot be increased, nor the time of their use be lengthened after the erection of such upper mill, to its injury.

7. In this case, the flashboards put upon the lower mill after the erection of the upper mill were of greater height, and kept on for a longer time than before the erection of the upper mill, and so increased the flowage as to injure the upper mill, by lessening its efficiency.

8. In estimating the damages suffered by the owner of the upper mill from lessening its efficiency by the unlawful increased flowage from below, there should be included the loss of the profits he was reasonably certain to have made but for the decrease in the efficiency of his mill caused by the unlawful flowage,—but speculative profits cannot be included.

9. In this case, the owner of the upper mill had built up an established manufacturing business in connection with the mill and the plant, which business at the time of the injury appeared to be regular and permanent, with a fair and regular demand for the product at prices affording a definite profit. Such profits were not speculative but, so far as appears, were reasonably certain to have been earned but for unlawful flowage, and hence should be included in the damages awarded.

10. So much of the interruption of the operation of the plaintiffs' mill as was caused by the lawful height or use of flashboards, or by other causes than the unlawful extra use of the flashboards, cannot be considered in awarding damages. The damages must be limited to those shown to have resulted exclusively from so much of the height and use of the flashboards as are shown to have been unlawful.

On report. Judgment for plaintiff.

Action on the case to recover of the defendant the damages for flowage of the plaintiff's wheels and machinery, in its mill at Minot Corner, by flashboards, 24 inches high, erected upon and across the

defendant's dam, located about five miles below the plaintiff's mill, on the Little Androscoggin River, in Auburn. The flowage complained of occurred between July 10, 1898, and the date of the writ, March 14, 1899.

The case is stated in the opinion.

J. A. Morrill, for plaintiff.

H. W. Oakes, J. A. Pulsifer and F. E. Ludden, for defendant.

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

EMERY, J. In the latter part of January, 1895, the plaintiff corporation began the erection of a water mill upon its own land and across a non-navigable stream, the Little Androscoggin River, at Minot Corner. At that time, some three miles down the river, there were in existence another water mill and dam across the same river, which had been built in 1888, and were, in January, 1895, and thereafter, leased and operated by the defendant corporation. The plaintiff admits that the defendant thus had the prior and superior right to use the flow and fall of the river to the extent that the solid part of the lower dam in good repair would flow, and it claims that it set the wheels of its own mill above that flow. The plaintiff's mill was finished and put in regular operation in July, 1895.

Some three years afterward, in July, 1898, the defendant put on top of the solid part of its dam along its whole length, flashboards twenty-four inches high and maintained them there up to the date of the writ, March 14, 1899, to increase its head of water. The plaintiff complains that these flashboards have caused the water to flow beyond its former flow, and upon the plaintiff's wheels, and have thereby materially lessened their efficiency. This action on the case is brought to recover damages for this increased flow caused by the flashboards, the plaintiff claiming that such increased flow is beyond the defendant's right.

The first question raised is purely one of fact, viz: Whether the flashboards, added to the height of the dam, did set back the water upon the plaintiff's wheels and materially lessen their

efficiency. That water did flow up on the plaintiff's wheels is not denied, but the defendant claims such flowage was not shown to be caused by the flashboards. There was much evidence and argument upon this question, but it is enough for us to say that, after careful consideration, we are satisfied that the plaintiff's contention is so far sustained. We should not incumber the reports with reasons for decisions of questions of fact. Such reasons are of no service in the exposition of legal principles.

The next question raised is one of law as well as of fact, viz: Whether during the time named, from July, 1898 to March, 1899, the defendant had a legal right to maintain upon its dam flashboards twenty-four inches high flowing water, as they did, back upon the plaintiff's wheels.

At common law no person could maintain a dam, even upon his own land, and thereby flow water back upon the lands of riparian owners above. By our Mill Act, R. S., ch. 92, any person may build upon his own land across a non-navigable stream a water-mill and dams to raise a head of water for working it, and may thereby flow back the water of the stream upon the lands above as high and as far as he deems necessary for the profitable working of his mill, subject only to the conditions and restrictions named in the act itself. The land owners must submit to the flowage, and content themselves with the pecuniary compensation to be obtained through proceedings provided by the statute. Such mill owner can also in the same way increase the height of his dam and the extent of the flowage from time to time as the exigencies of his business may seem to him to require, he making increased compensation for the increased flowage.

But there is one important and absolute exception to the above named statutory right to retard the natural flow of a stream. "No such dam shall be erected (or canal constructed) to the injury of any mill (or canal) lawfully existing on the same stream." Section 2, of Mill Act, R. S., ch. 92. It follows, as a corollary, that when a second mill has been built above the flowage of the first and older mill and dam, such flowage cannot be increased by raising the dam or by other appliances, so as to lessen the original

efficiency of the mill above. Whatever the greater age of his mill, the right of a mill owner to increase his head of water ceases when the flowage begins to injure the operation of a mill, however new, if already lawfully erected before the injurious flowage began. So long, however, as the additional flowage does not reach up so far as to injuriously affect some mill by that time lawfully erected, the right to increase the flowage is unlimited except as limited by the statute itself. This increase can be effected by raising the height of the solid dam, by the use of flashboards, or by other appliances. The owners of unoccupied water powers, or mill sites, must submit to have them flowed out and made useless, and must content themselves with the statutory compensation. When, however, a mill is once lawfully erected above him, the lower mill owner is then limited to such flowage as he had made or appropriated before the upper mill was built.

In other words, a mill owner can at any time appropriate for raising and maintaining a head of water for working his mill so much space in the river valley as has not already been appropriated by some other mill owner for his own mill. This appropriation, however, must be actual to become a right. It cannot be by mere proclamation, nor even by merely marking limits. There must be an actual occupation of the space by a head or pond of water raised by dams actually constructed of the requisite height and efficiency to raise such head.

But there is a great variation in the volume of water flowing in our main rivers at different seasons and times of the year, and even in different years. Sometimes the volume is large and much more than can be used for power. At other times it is much smaller, and almost without power. With an unchanging dam the head of water will be much higher and the flowage will reach much farther back in seasons of rain than in seasons of drought. The appropriation will be correspondingly much less during some months, than during other months. Should an upper riparian mill owner set his newer mill at the upper edge of the flowage as it is in time of drought, he would have no cause of complaint if flowed out in times of high water, the lower dam remaining the same. He could

only complain of the increase of the flowage power of the lower dam by artificial means.

The profitable working of water mills on our rivers requires a comparatively uniform head of water the year round;— less than that normally caused by the dam in times of freshet, and more than that normally raised by the dam in times of drought. Mill owners accordingly seek to obtain an approximation to uniformity in various ways;— sometimes by building the solid dam sufficiently high to raise enough head in times of drought and providing sluice gates and waste gates to be removed to let the floods through in times of freshet;—sometimes by building the solid dam less high so as to let the floods pass over when they come, and by supplementing the dam in dry times by flashboards, placed upon the top to be removed when the drought is over. This latter practice is as lawful as the former, and by it the head of water and the appropriation of space above for flowage can be continued through the dry seasons and be made approximately uniform the year round.

Movable gates and planks in the sluice ways and waste ways in a dam, regularly put in place at appropriate seasons, are practically a part of the dam, and flowage by means of them will be an effectual appropriation of the river. So flashboards on the top of a dam, regularly put in place at appropriate seasons become practically a part of the dam, and flowage by means of them will be equally an appropriation. But to effect such an appropriation, by movable planks or boards in or on the dam, the use of them must be with some uniformity and regularity, so that the riparian owner above can see that they are regular appurtenances of the dam. They should be of practically uniform width, and generally removed and replaced at uniform times or stages of water so that the amount of the appropriation of the river, both as to extent and time, can be ascertained by persons proposing to build other mills. No series of years of use is essential. Indeed, the appropriation can be made in one season, if made so definite as to size, and time and length of use, that the upper riparian owner above can see what space is actually appropriated and for what length of time. Again, an appropriation once made is not necessarily lost

by an occasional omission to use the boards, or by occasionally and temporarily reducing their size or the length of time of their use, any more than an omission to flow while repairing or rebuilding a dam will destroy the right. Still, the boards and their use, like the dam itself, must in general be visibly uniform, regular and definite. The hap hazard, the indefinite, will not suffice.

The foregoing legal propositions we think are fairly deducible from the language of the statute, and are supported by authority. *Blanchard* v. *Baker*, 8 Maine, 253; *Heath* v. *Williams*, 25 Maine, 209; *Wood* v. *Kelley*, 30 Maine, 57; *Pitman* v. *Poor*, 38 Maine, 237; *Lincoln* v. *Chadbourne*, 56 Maine, 197; *Dingley* v. *Gardiner*, 73 Maine, 63; *Graham* v. *Virgin*, 78 Maine, 338; *Cary* v. *Daniels*, 8 Met. 466; *Pierce* v. *Travers*, 97 Mass. 306; *Amoskeag Manf. Co.* v. *Worcester Co.*, 60 N. H. 522; *Harris* v. *Social Manf. Co.*, 8 R. I. 133; *Noyes* v. *Stillman*, 24 Conn. 14; *Marcly* v. *Shults*, 29 N. Y. 622; *Hall* v. *Augsbury*, 46 N. Y. 622.

In this case the plaintiff admits that all the flowage caused by the solid or immovable part of the defendant's dam is rightful. Its complaint is solely against that extra flowage, extra both in extent and duration, caused by the twenty-four inch flashboards placed on top of the dam in July, 1898, and kept there up to the date of the writ, March 14, 1899. The question, therefore, is whether before the spring of 1895, when the plaintiff's mill was built, the defendant or its predecessors in title to the lower dam had begun to use twenty-four inch flashboards upon the dam in such manner, under the principles above stated, as to effect an additional appropriation of the river to the increased extent and time named. This is a question of fact upon which the defendant has the burden of proof. *Noyes* v. *Stillman*, 24 Conn. 15.

Here, again, no analysis or discussion of the evidence should be given. Our findings only should be stated. Those findings made after due consideration are these:—The lower dam was built in 1888. From that time up to 1893, flashboards of widths varying from eight to fourteen inches, and very rarely up to eighteen inches, were annually put on the dam at some time during the season of low water, and were usually carried away down stream by

the fall freshets, sometimes in the first rains, and sometimes though rarely by the spring ice. It does not appear that they were put on at regular dates or at specific stages of the water. They were not taken off at all, but were left to the operation of the elements, new boards being used each time. The wishes or remonstrances of the farmers above were generally heeded, and the use of the flashboards postponed, or abridged, or even given up at times, to avoid their objections. In 1893, Mr. Gay, the then owner of the lower mill, desired to increase the head of water by making more use of flashboards and of wider ones. He explored the river above while no flashboards were upon the dam, to ascertain the extent of the flowage with the dam in that state. He then put flashboards twenty-four inches wide upon the dam, and again explored the river above to ascertain the extent of the flowage with such flashboards on. He also about this time purchased of one riparian owner, Mr. Frank, the right to flow his land to the full extent caused by the twenty-four inch flashboards, but does not appear to have made any other purchases of rights for the proposed increased flowage. Almost immediately after his return from the second exploration, he took off the upper part of the flashboards, reducing the width to fourteen inches. These remaining boards went off down stream with the fall rains. Owing to business difficulties the lower mill was not operated during the years 1894 and 1895 and no flashboards whatever were placed on the dam during any part of those years. The plaintiff's mill was erected, as already stated, in the Spring of 1895, when no flashboards had been on the dam since the fall of 1893.

Here we have only one instance of the use of flashboards twenty-four inches wide, and that for a very short time in the summer of 1893. Indeed, these flashboards seem to have been put on as an experiment to see how much they would increase the flowage, rather than as and for a positive appropriation of so much more head of water. The owner apparently met with objections and difficulties which convinced him of the inexpediency of carrying out his project, since if he actually made such appropriation he would be answerable in damages under the mill act, as was held in *Dingley* v. *Gardiner*,

73 Maine, 63. Instead of leaving on the flashboards of the increased width, he almost immediately reduced them to the former maximum width of fourteen inches. He practically forbore to make the desired and, perhaps, intended extra appropriation.

The defendant rests some argument on two circumstances,—(1) that Mr. Gay, the owner of the lower dam in 1893, then formed and proclaimed the intention to appropriate an extra head of water to the full extent of flashboards, twenty-four inches wide,—and (2) that the lessor of the defendant corporation expressly leased the right to raise the head of water to that extent in fact, though not in terms. As to the first, as already stated, the forming and proclaiming an intention to appropriate a head of water will not suffice. There must be an actual, consummated appropriation. As to the second, the describing in the lease the extent of the right of flowage, merely indicates the lessor's opinion as to the extent of that right. It is not evidence against the plaintiff of the actual extent.

We think it evident that under the law, as above stated, the defendant has not shown a right to maintain on its dam flashboards so wide as twenty-four inches during the months from July to March. The plaintiff is therefore entitled to judgment for some amount.

What damages the plaintiff is entitled to recover is the remaining question and one of some importance.

The only machinery in the plaintiff's mill at Minot Corner, the wheels of which were impeded by the flashboards above, was machinery for the generation of electricity which was transmitted by wires to another mill of the plaintiff, on the same river nearly a mile above. This latter mill was fitted for the manufacture of leather board and then contained the equivalent of seventeen engines, called beating engines, by which the stock was made into the board. The electric power transmitted from the mill at Minot was directly applied to these machines, except a small part used for lighting purposes. This power, thus transmitted from the mill at Minot Corner, was necessary to the efficient operation of the machinery of this mill, and, with the mill's own water power, was sufficient. During the time covered by the writ, from July to

March, the extra backwater flowed upon the wheels at Minot Corner by the defendant's flashboards, as already stated, reduced the power of those wheels to such an extent that the amount or force of the electricity generated, and transmitted to the leather board mill, was thereby sensibly diminished by several horse power,— enough to compel the shutting off three of the beating engines, or to reduce the efficiency of them all to that extent. So far as appears, had it not been for the defendant's flashboards the whole number of engines in the leather board mill could have been efficiently run on full time, twenty-three hours a day from July to March, with the aid of the electric power generated at the Minot Corner mill.

The plaintiff claims compensation for the loss of the net earnings of the three beating engines thus made idle, or on the equivalent loss of efficiency of the whole plant. The defendant contends that all injury to the operation of the leather board mill is too remote and separate from the defendant's acts to be an element of legal damage. We think not. The connection between the machinery in the leather board mill and the water wheels at Minot's Corner is as immediate and direct as if that machinery were placed directly over the wheels, and connected with them by short belts or shafts. It is immaterial how far distant the wheels are from the machines, provided the one propels the other. Power is transmitted from wheels to machinery at a distance as directly by electric currents through wires, as by belts, or shafts or other appliances. When water wheels propel electric generators and the electricity thus generated flows over wires and propels machines even at a distance, the water wheels directly propel the machines.

The defendant again contends that the net earnings or profits alleged to be lost are not recoverable because too uncertain and speculative, and that the plaintiff is limited to the decrease in the rental value of its mill at Minot's Corner. If such profits are uncertain or speculative, they cannot be included in the assessment of damages. When, however, one has erected or acquired a valuable plant with an established business connected therewith yielding regular profits, and his plant is impeded in its efficient opera-

ation by the tortious act of another so that his regular profits are thereby lessened, he cannot be made whole unless he is reimbursed for the lost earnings of his plant. His whole plant and his business combined may earn far more income under his management, than the mere market rental value of some part, or even all of the plant. His actual loss from the diminished efficiency of his plant and the consequent diminished product, may be far more than the decrease in the market rental value. He is justly entitled to the profits which his sagacity, skill and industry would bring him in the business if not interfered with. If he cannot recover from the wrong-doer this actual loss over and above the decrease in the rental value he suffers a wrong, to the great reproach of the law.

The law, however, is not open to that reproach. In *White* v. *Moseley*, 8 Pick. 356, the defendant tore away part of the plaintiff's dam upon which was a mill, thereby lessening the efficiency of the mill. The plaintiff claimed and recovered not only the cost of restoring the dam, but also for the loss of profits through the interruption of his business. In *French* v. *Connecticut River Lumber Co.*, 145 Mass. 261, the defendant wrongfully caused sand and logs to accumulate in the river in front of the plaintiff's hotel. The plaintiff claimed and recovered the expense of removing the obstructions, and also the loss suffered from the consequent diminution of the business and profits of his hotel. In *Schile* v. *Brokhaus*, 80 N. Y. 614, the defendant tore down a party wall, thereby exposing the plaintiff's shop to the weather. The plaintiff was not confined to loss of rental value of his shop, but recovered the loss of profits from diminution of his business there. In *Holden* v. *Lake Co.*, 53 N. H. 552, the defendant tortiously lessened the water power of the plaintiff's cotton mill, thereby diminishing the efficiency of his machinery. It was adjudged that the plaintiff could recover for the consequent diminution of the net earnings or profits of his mill. In *Simmons* v. *Brown*, 5 R. I. 299, the defendant, by raising his dam tortiously, caused the water to flow back upon the plaintiff's wheels in his cotton mill above. The defendant contended, there as here, that he was liable only

for a fair and reasonable rent of the water power of which the plaintiff was deprived. The court held, however, that the plaintiff could recover for the loss of such profits as he might have made upon the goods he would have manufactured but for the defendant's act. In *Allison* v. *Chandler*, 11 Mich. 542, the plaintiff was tortiously ejected and kept out of a store which he had leased of the defendant, and in which he was doing a watch and jewelry business. The defendant contended, there as here, that he was liable only for the value of the plaintiff's lease of the store,—but it was held that he was liable for the whole injury to the plaintiff's business, including loss of profits for the interruption of his business during the time necessary to obtain a new store and resume business. In *Terre Haute* v. *Hudnut*, 112 Ind. 542, the city tortiously caused water to flow in and upon Hudnut's premises, compelling repairs and a cessation of the business of his grist mill for sixty days. The point was made that the city was only liable for the cost of the repairs and the fair rent of the mill during the time. The court thereupon went over the whole question, citing many cases, and held that Hudnut was entitled to recover the loss of the profits he would probably have made in his business had it not been interrupted.

We find no decisions of our own court in conflict with the above. In the cases in which a claim to recover for lost profits is denied, it will be found that the profits claimed were not reasonably certain to accrue, but were speculative, contingent or otherwise uncertain or merely probable. On the other hand in *Rodick* v. *Hinckley*, 8 Maine, 274, it was held, against the contention of the defendant, that the proper rule of damages for the detention of a vessel was what it could have earned by being chartered for that time. In *Bucknam* v. *Nash*, 12 Maine, 474, a mill owner was deprived of logs he had acquired to saw in his mill. It was held he could recover the loss of the profit of sawing the logs in his mill, (i. e. the earnings of the mill) and also the profit he would have received from the rise in the market price of the logs. In *Frye* v. *Maine Central R. R. Co.*, 67 Maine, 414, the plaintiff had a contract with the defendant by which he was to have the exclusive right to carry the

defendant's passengers between the Dexter railroad station and Kineo for $2.50 each passenger thus carried on through-tickets. The defendant wrongfully terminated the contract, but contended that the damages were limited to the difference between the $2.50 and the actual cost of carrying a passenger. It appeared, however, that the plaintiff's stage line between Dexter and Greenville, established under the contract, brought him other profits from way passengers, express service, etc., but not enough to keep up the line after the defendant terminated its contract. It was held that these additional profits, being reasonably certain during the remainder of the contract term, were to be included in the damages. In *McPheters* v. *Moose River Log Driving Co.*, 78 Maine, 329, the defendant wrongfully delayed the plaintiff in his performance of a contract to drive logs for another party, so that the plaintiff was delayed in receiving his pay. It was held that the defendant was liable to to pay the increased cost of driving and also the loss of interest on the contract price, which interest, of course, was only the reasonably certain earnings or profit of the money during the delay.

Recurring now to the evidence in the case, we find that the plaintiff had acquired its plant and was doing a business in connection with it, viz:—the manufacture of leather boards. The business appears to have become established, regular and permanent. Its volume was such that the factory or mill was running on full time, twenty-three hours a day. There is no suggestion of any falling off in the demand for or price of the manufactured product. No breakage of machinery, no interruption of any kind, is shown except that caused by the flowage. The regular daily product of three beating engines, running for twenty-three hours each day, was one ton of manufactured leather board. There was a regular definite profit upon each ton manufactured. It seems reasonably certain that such production and consequent earnings or profits would have continued during the time covered by the writ. At least, no reason is shown for apprehending the contrary. So far, therefore, as the defendant crippled the engines, and reduced their profit-making power, it should itself make up that profit.

The application of the principle of recovery for lost profits is

much more difficult than the exposition of the principle itself. Numerous circumstances must be considered. The factory did not run every day. The defendant apparently had the right to maintain flashboards of some width during some part of the time. Much of the time also, the ice, the natural high stage of the water, and other obstructions, may have more or less flowed out the plaintiff's wheels. It was for the plaintiff to show us how much of the flowage in amount, time and injury resulted directly from the defendant's use of flashboards in excess of right. We wish as was suggested by the justice presiding at the trial, the amount of damages might be assessed by a commission of experts, who could obtain full data and make the proper discrimination between the rightful and wrongful flowage. The task, however, has been imposed upon us, and after careful consideration of the limited data laid before us, our minds rest upon the sum of eight hundred dollars as the most that is justified by the evidence in this case.

Judgment for the plaintiff for eight hundred dollars.

JOHN F. ARNOLD, Administrator,

vs.

CONNECTICUT MUTUAL LIFE INSURANCE CO.

Piscataquis. Opinion June 26, 1901.

Life Insurance. Suicide. Insanity.

In an action upon a policy of life insurance, it appeared that the insured committed suicide.

The policy stipulated, among other things, that the defendant company should not be liable in the event of the self-destruction of the insured in any form except upon proof that the same should be the direct result of disease or of accident occurring without the voluntary act of the insured; nor in case the death of the insured resulted from any disease produced by, or resulting from the occasional or habitual use of, alcoholic or narcotic stimulants.

The defendant pleaded, by brief statement, that the death of the insured was the direct result of self-destruction by him and not of disease or accident occur-

ring without his voluntary act, and that, if the self-destruction of the plaintiff's intestate was the direct result of disease occurring without his voluntary act, such disease was procured by, or resulted from the occasional or habitual use of, alcoholic stimulants.

Held; that the only questions for the jury are those arising under the foregoing stipulations and plea, all other facts necessary for the maintenance of the action being admitted; *also,* that the verdict for the plaintiff is not manifestly wrong and should, therefore, be sustained.

The defendant company also claimed that the fact of insanity was not proved by the testimony in behalf of the plaintiff, and contended that the fact, which appeared in testimony, that during the period above named the deceased attended to his business as usual and had an active interest in public affairs, established his sanity.

Held; whether the insured was insane and whether his self-destruction was the direct result of such insanity were questions for the jury. After a careful examination of the testimony, we cannot say that the jury erred in deciding these questions in favor of the plaintiff. The case does not show that he ever drank to excess or ever became intoxicated.

On motion by defendant. Motion overruled.

Action of assumpsit brought for the recovery of the amount of a life insurance policy, issued by the defendant corporation on the life of Eugene A. Arnold, the plaintiff's intestate, in 1886. The verdict was for the plaintiff, and the defendant moved for a new trial, on the ground that the verdict was against law, evidence and the weight of evidence.

H. Hudson and *C. W. Hayes*, for plaintiff.

C. F. Woodard, for defendant.

SITTING: WISWELL, C. J., WHITEHOUSE, STROUT, FOGLER, PEABODY, JJ.

FOGLER, J. Assumpsit upon a policy of insurance, dated February 27, 1886, issued by the defendant company upon the life of the plaintiff's intestate, Eugene A. Arnold, who committed suicide on the 16th day of March, 1899.

The verdict was for the plaintiff and the defendant brings the case here upon a motion for new trial.

The policy stipulated, among other things, that the defendant company should not be liable in the event of the self-destruction of

the insured in any form except upon proof that the same should be the direct result of disease, or of accident occurring without the voluntary act of the insured; nor in case the death of the insured resulted from any disease produced by, or resulting from the occasional or habitual use of, alcoholic or narcotic stimulants.

The defendant pleaded, by brief statement, that the death of the insured was the direct result of self-destruction by him and not of disease or accident occurring without his voluntary act, and that, if the self-destruction of the plaintiff's intestate was the direct result of disease occurring without his voluntary act, such disease was produced by, or resulted from the occasional or habitual use of, alcoholic stimulants.

The only questions for the jury were those arising under the foregoing stipulations and plea, all other facts necessary for the maintenance of the action being admitted.

The plaintiff contended that, at the time of his death, the insured was suffering from that form of insanity known at melancholia and that his self-destruction was the direct result of that disease. The defense denied the existence of such disease.

The presiding justice, among other instructions, to none of which exceptions are taken, instructed the jury that the burden of proving insanity, by a preponderance of testimony, was upon the plaintiff; and, further, that suicide of itself is no evidence of insanity, and that the fact that the insured took his own life should not be taken or treated as evidence that he was at the time insane.

As tending to prove insanity, the plaintiff introduced testimony to the effect that the insured had a wife and two children of tender years; that his relations with his family had always been pleasant and that he had no business or financial troubles; and also testimony tending to prove that for some few weeks next preceding his death, the insured was melancholy, restless, nervous, was troubled with loss of sleep and loss of appetite, had the habit of starting up suddenly, of biting his finger nails, was accustomed to immoderate laughter without known cause, and, in conversation, of going from one subject to another without apparent meaning. The plaintiff also introduced expert physicians, who testified that in their opinion

the symptoms above stated indicated insanity. There was also testimony that the grand-father and two other relatives of the insured had been insane, and from these facts it was argued that the insured had an hereditary tendency to insanity.

The defense claimed that the fact of insanity was not proved by the testimony in behalf of the plaintiff, and contended that the fact, which appeared in testimony, that during the period above named the deceased attended to his business as usual and had an active interest in public affairs, established his sanity.

Whether the insured was insane and whether his self-destruction was the direct result of such insanity were questions for the jury. After a careful examination of the testimony, we cannot say that the jury erred in deciding these questions in favor of the plaintiff.

The defense contends that, even if the insured should be proved to have been insane at the time of his death, such insane condition resulted from his occasional or habitual use of alcoholic stimulants. The testimony relied upon, in support of this position, comes from the widow of the insured upon cross-examination. She testified that she was married to her husband in 1890; that she first discovered that her husband was accustomed to drink liquors about two years after their marriage; that "he didn't drink a great deal—once in a while, when he used to go off fishing and gunning—never did around home very much."

About three years before he died, he was treated for about four weeks at the "Keely Cure" and after such treatment abstained from the use of alcoholic liquors until about six months before his death, when he resumed the habit to some extent. The case does not show that he ever drank to excess or ever became intoxicated.

The defense offered the testimony of no witness tending to prove that the insured ever drank alcoholic stimulants at any time or on any occasion. We are of opinion that the jury were justified in finding for the plaintiff upon this branch of the case.

Motion overruled.

MERCHANTS TRUST & BANKING COMPANY,

vs.

NATHANIEL M. JONES.

Penobscot. Opinion June 27, 1901.

Bills & Notes. Promisor. Indorser. Payment.

It is the settled doctrine of this state, that one not appearing to be a party to a negotiable promissory note, either as payee or indorsee, who puts his name on the back of it in blank, at its inception and before its negotiation, is presumed to be a joint and several promisor.

This presumption will prevail in favor of an innocent indorsee who receives the note for value, before maturity and in the ordinary course of business; and his rights can not be infringed by proof of any extrinsic facts which might affect the original parties to the contract, or those occupying their position and having their rights only.

Action upon a negotiable promissory note signed upon its face by one E. L. Houghton and upon its back by the defendant, payable to the Houghton Hardware Company, and indorsed by it. The defendant signed the note at its inception before its negotiation by the payee, and his signature is above the indorsement of the payee. This note was discounted by the plaintiff in the regular course of business for its customer, the payee, and without knowledge that the true facts and relations of the parties were otherwise than as disclosed by the note itself. This note was a second renewal of a note of like tenor with the same parties and in the same order. At the maturity of the note in suit, the Houghton Hardware Company sent to the plaintiff a new note similar in all respects to the note in suit, except that it did not bear the name thereon of the defendant, and in a letter accompanying this new note, said that it could not get the other name on the note, as the party was away from home, and suggested that if the plaintiff did not want to take this note, that it hold both notes. Accordingly, the plaintiff took the new note, but held the one in suit as collateral security therefor, and continued to hold the note in suit as collateral during the period covered by a number of renewals of the note thus taken without the defendant's signature, none of which notes so taken in renewal bore his signature. As a matter of fact, the defendant signed the note in suit for the accommodation and at the request of the Houghton Hardware Company, but the case discloses no facts or circumstances from which it might be fairly inferred that the plaintiff had knowledge that the defendant was merely an accommodation maker.

Held; that the plaintiff, having no knowledge to the contrary, had a right to rely upon the note itself and upon the presumptions of law that arose there-

from as to the liability of the various persons whose names appeared upon the note; that this note, signed by the defendant as one of two joint and several makers, was not paid by the new note taken at its maturity under these circumstances, and that the plaintiff had the right to hold the note in suit, thus acquired as collateral, for the new note taken under these circumstances without the defendant's signature, and that thereby the defendant was not released from liability.

On report. Judgment for plaintiff.

Action against defendant as one of the original makers of a promissory note. The facts appear in the opinion.

G. H. Smith and H. T. Powers, for plaintiff.

L. C. Stearns and E. A. Holmes, for defendant.

SITTING: WISWELL, C. J., STROUT, SAVAGE, FOGLER, POWERS, JJ.

WISWELL, C. J. Action upon a promissory note of the following tenor:

"$600.00 Presque Isle, Me., Aug. 9, 1897.

Four months after date, I promise to pay to the order of the Houghton Hardware Company, six hundred dollars at the Merchants Trust and Banking Company. Value received.

E. L. Houghton."

The note was indorsed upon the back, first by the defendant, next by the payee, the Houghton Hardware Company, and last by G. A. Houghton. Over each indorsement were the words: "Waiving demand and notice."

The action is against the defendant as one of the original makers of the above note. The case shows that this note was the second renewal of a note of like tenor, signed by the same parties and in the same order; that at the maturity of the note in suit, December 9, 1897, the Houghton Hardware Company, for whom the plaintiff had discounted the original note and its renewals, sent to the Trust Company a new note similar in all respects to the note in suit, except that it did not bear the name thereon of the defendant; this note was dated December 9, 1897, and was on four months time. Accompanying this note, the treasurer of the Hardware Company

wrote to the treasurer of the banking company as follows: "Enclosed find renewal note as per enclosed notice. We could not get the other names on the note as the party was away from home. If you don't want to take it this way, please pin it to the old one and hold both. Check for discount $16."

Accordingly, on December 11, two days after the maturity of the note in suit, the Trust Company, without the knowledge of the defendant, took the note of December 9, but did not surrender the note in suit, holding it as collateral for the last named note. This last note was renewed from time to time by other notes, without the signature of the defendant, but similar in other respects and with the same names. On May 16, 1899, a note of the same kind was taken, but larger in amount, in renewal of the previous $600 note and of two other small notes, and this latter note was again renewed, the last one being dated January 16, 1900, on four months time, and had not become due at the commencement of this suit. The Trust Company continued to hold the note in suit as collateral for these various renewals.

Under these circumstances, is the defendant liable as one of the makers of the note in suit? That he was one of the original promisors, with E. L. Houghton, so far as appeared from the note, is not disputed, notwithstanding that his name was upon the back of the note. He signed the note at its inception, before the same was indorsed by the payee. He was consequently one of the original makers of the note and liable as such. *Woodman* v. *Boothby*, 66 Maine, 389; *Rice* v. *Cook*, 71 Maine, 559; *Bradford* v. *Prescott*, 85 Maine, 482.

"It is the settled doctrine of these states, (Maine and Massachusetts) that one not appearing to be a party, either as payee or indorsee, to a note payable to a payee therein named or his order, who puts his name on the back of it in blank at its inception and before negotiated, is a joint and several promisor. The legal presumption, in such case, is that it was done for the same consideration with the contract on the face of the note. And when there is no date as to such indorsement, the presumption is that it was made at the time when the note had its inception. This presumption will

prevail in favor of an innocent indorsee for value before due, and in the regular course of business; and his rights can not be infringed by proof of any extrinsic facts which might affect the original parties to the contract, or those occupying their position and having their rights only." *Bradford* v. *Prescott*, supra, and cases there cited. Nor does the use of the words "waiving demand and notice" in the least weaken or affect this presumption. *Bradford* v. *Prescott*, supra, and cases cited to that point.

But it is urged, in defense, that the defendant was in fact a surety, or an accommodation maker; and of this there is no question; he signed the note, in the manner that he did, for the accommodation and at the request of the Houghton Hardware Company, as he says, and before it was negotiated. Had this fact been known by the plaintiff, we have no doubt that the effect of taking the new note, without the knowledge of the defendant, would have been to release the defendant from liability, as was decided by this court in *Andrews* v. *Marrett*, 58 Maine, 539. But in that case the court said: "That the defendant was a mere surety on the note in suit, and that the plaintiff knew such to be the fact when he took it, is satisfactorily proved."

Here, while as a matter of fact, the defendant signed the note for the accommodation of the Hardware Company, the Trust Company had no knowledge of that fact, and there were no circumstances which should have placed the officers of that institution upon their inquiry. Having no knowledge to the contrary, the officers of the plaintiff corporation had a right to rely upon the note itself, and upon the presumptions of law that arose therefrom as to the liability of the various persons whose names appeared upon the note. They had a right to rely upon the settled doctrine of this state, that a person, not a party to the note, who signs his name upon the back of a note before its negotiation and before the indorsement of the payee, is, as to the indorsee, an original promisor.

This note, which the Trust Company took in good faith, for a valuable consideration, before maturity and without knowledge that the facts and relations of the parties were different from those disclosed by the note itself, has never been paid. True, shortly

after its maturity the other parties to the note gave a new note, but that was not in payment of the old one that the plaintiff held at the request of the Hardware Company, its customer, because it had not been paid.

The condition of affairs then was this: the plaintiff held this note of which the defendant was one of the makers, it was payable to the Hardware Company, and had been discounted by the plaintiff for that Company, the payee. The note was not paid at maturity, and the payee, being unable to obtain the signature of the defendant at that time for the purpose of making a renewal note, requested the Trust Company to continue to hold the note, which it already had, and which it had taken in the regular course of business, as collateral security for the new note. We think that the plaintiff could do this without thereby releasing the defendant from the liability, which he had assumed, as indicated by the note.

The plaintiff is accordingly entitled to judgment for the amount of the note in suit and interest thereon, less the amount of a payment of $25 which, it is admitted, should be allowed.

Judgment accordingly.

WILLIAM LEADER *vs.* TELESPHORE PLANTE.

Androscoggin. Opinion July 3, 1901.

Bills and Notes. Time of Payment.

A writing of the following tenor, viz:

"Auburn, Maine, August 30th, 1892.

Within one year after date I promise to pay to the order of Richard F. Leader four hundred and six dollars at with interest. Value received.

Telesphore Plante."

Is a negotiable promissory note, payable in one year after its date, with an option in the maker to pay before maturity.

On report. Judgment for plaintiff.

Action on promissory note. The case is stated in the opinion.

H. W. Oakes, *J. A. Pulsifer*, *F. E. Ludden; E. Foster* with them, for plaintiff.

J. A. Morrill, for defendant.

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

FOGLER, J. This is an action of assumpsit by the indorsee against the maker of a written instrument, declared upon as a promissory note of the following tenor, namely:

"$406. Auburn, Maine, August 30th, 1892.

Within one year after date I promise to pay to the order of Richard F. Leader Four Hundred and six Dollars at with interest. Value received.

Telesphore Plante.

Witness: P. H. Kelleher.

Indorsed: Richard F. Leader."

The writing was indorsed and delivered by the payee to the plaintiff January 2, 1893.

It is claimed in defense, that the instrument is not a valid negotiable promissory note, for the reason that the time of payment named therein is not stated with sufficient certainty. In other words, it is contended that, "within twelve months" is too uncertain and indefinite as to time of payment to give the instrument the character of a negotiable promissory note. It is familiar law, that to constitute a negotiable promissory note, the time of payment must be stated with certainty. It is also a familiar maxim that that is certain which can be made certain.

"A valid promissory note is not necessarily negotiable. To make it such by the law merchant it must run to order or bearer, be payable in money for a certain definite sum, on demand, at sight, or in a certain time, or upon the happening of an event which must occur, and payable absolutely and not upon a contingency." *Roads* v. *Webb*, 91 Maine, 410.

It is well settled that a note payable at the death of the maker is a valid negotiable promissory note, as death will inevitably occur,

and the time of payment can thus be made certain. *Martin* v. *Stone*, 67 N. H. 367.

"Within" a certain period, "on or before" a day named and "at or before" a certain day, are equivalent terms and the rules of construction apply to each alike. As stated by Mr. Justice STROUT in *Roads* v. *Webb*, supra, the question whether a note made payable "on or before" a day certain states the time of payment with sufficient certainty to constitute a negotiable note, has not been decided in this state.

In *Cota* v. *Buck*, 7 Met. 588, a note "to be paid in the course of the season now coming" was held to be negotiable for the reason that the "season now coming" must come by mere lapse of time.

But in *Hubbard* v. *Moseley*, 11 Gray, 170, the court of Massachusetts held that a promissory note payable ninety days after date, containing a stipulation that the note shall be given up to the maker as soon as the amount of it is received by the payee, is not negotiable, thus practically overruling the case of *Cota* v. *Buck*.

The late Massachusetts decisions upon this point follow the doctrine of *Hubbard* v. *Mosely; Way* v. *Smith*, 111 Mass. 523; *Stults* v. *Silva*, 119 Mass. 137.

Mr. Justice Cooley in *Mattison* v. *Marks*, 9 Mich. 423, referring to *Hubbard* v. *Mosely*, remarks: "It is to be regretted, perhaps, that the learned judge who delivered the opinion did not deem it important to present more fully the reasons that led him to his conclusions, instead of contenting himself with a simple reference to the general doctrine that a promissory note must be payable at a time certain."

In *Jellison* v. *Hill*, 4 Gray, 316, it was held that a note payable "on demand with interest within six months" was a promise to pay within six months in any event, and sooner if demanded.

We think that the great weight of authority and of reason is opposed to the present Massachusetts doctrine.

Mattison v. *Marks*, supra, was a suit upon a written instrument containing a promise to pay a sum certain "on or before" a day named. It was contended in defense that it was not a promise to pay on a day certain, and consequently was not a negotiable prom-

issory note. The court held that the instrument was a negotiable promissory note. Mr. Justice Cooley in delivering the opinion of the court says: "The legal rights of the holder are clear and certain; the note is due at a time fixed, and it is not due before. True, the maker may pay sooner if he shall choose, but this option, if exercised, would be a payment in advance of the legal liability to pay, and no more. Notes like this are common in commercial transactions and we are not aware that their negotiable quality is ever questioned in business dealings."

It is held in *Curtis* v. *Horn*, 58 N. H. 504, that a promissory note, payable "on or before the first day of May next," is negotiable. The court say in the opinion: "It is now the common law that where payment is made to depend upon an event that is certain to come, and uncertain only in regard to the time when it will take place, the note or bill is negotiable." The court say further, "the recent Massachusetts cases, cited by the defendant, place the conclusions arrived at upon common law grounds, yet they fail to state the reasons for overruling *Cota* v. *Buck*, and the law as held in other jurisdictions, and we are unable to see any."

The doctrine thus laid down by the Courts of Michigan and New Hampshire, is fully sustained by numerous authorities, of which we cite, *Bates* v. *Leclare*, 49 Vt. 230; *Ricker* v. *Sprague Mfg. Co.*, 14 R. I. 402; *Ins. Co.* v. *Bill*, 31 Conn. 534-538; *Jordan* v. *Tate*, 19 Ohio St. 586; *Dorsey* v. *Wolff*, 142 Ill. 589; *Chicago Ry. & Eq. Co.* v. *Merchants Bank*, 136 U. S. 268-285; *Ernst* v. *Stectman*, 74 Pa. St. 13.

Our conclusion is that the instrument here in suit is a valid negotiable promissory note.

The defendant further contends, that even if the note is to be regarded as negotiable, the plaintiff ought not to maintain this action thereon because, he says, there are unsettled partnership transactions between the maker and payee in the settlement of which the note should be taken into consideration. We cannot so hold. The note has no connection with partnership business. It was given by the maker in his individual capacity to the payee individually and not as a copartner. At the date of the note the

parties to it were not partners. The note came into the hands of an indorsee for value before maturity. Judgment must be for the plaintiff. According to the stipulation of the parties, the case is remanded to the court at nisi prius for assessment of damages by the court, in accordance with this opinion.

So ordered.

WILLIAM LEADER *vs.* TELESPHORE PLANTE.

Androscoggin. Opinion July 3, 1901.

Co-tenant. Conversion. Trover. Partners. Equity.

A sale by one person of the goods of another is a conversion. If one co-tenant of a chattel sells the whole of it as his, his co-tenant may maintain trover against him for his share of the value.

A sale, or mortgage, by a copartner of his interest in the partnership assets passes to the purchaser, or mortgagee, only his share of what remains after the payment of the partnership debts and the adjustment of the equities of the partners.

In such case the share of the purchaser, or mortgagee, cannot be determined or recovered in an action at law, but only in a suit in equity.

On report. Judgment for plaintiff.

Trover for the conversion of property claimed by the plaintiff under two chattel mortgages. The facts are stated in the opinion.

H. W. Oakes, J. A. Pulsifer, F. E. Ludden; E. Foster, with them, for plaintiff.

J. A. Morrill, for defendant.

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

FOGLER, J. This is an action of trover which comes to this court on report.

August 30, 1892, Richard F. Leader, son of the plaintiff, being then engaged in the soda beer business, and owning the stock and appliances used in that business, conveyed to the defendant by written bill of sale one-undivided half part of all the stock, tools,

implements, and machinery then used by him in that business. Certain articles enumerated in the bill of sale were sold and conveyed subject to a claim in favor of A. D. Puffer & Sons, amounting to about six hundred dollars.

The defendant paid a portion of the purchase price in money, and on the same day gave to said Leader his note for four hundred and six dollars, payable within one year after date, with interest, and secured said note by a mortgage of the same property conveyed to him by the bill of sale above referred to. The above named conveyances having been made and delivered, said Leader and the defendant on the same day entered into articles of copartnership and said business was subsequently carried on by them for a time as copartners.

January 2, 1893, Leader indorsed and transferred said note and assigned said mortgage to William Leader, the plaintiff. In November, 1893, the plaintiff foreclosed said mortgage for condition broken.

October 17, 1892, Richard F. Leader gave the plaintiff a mortgage of one-undivided half part of all the goods, wares and merchandise hitherto used by the defendant and himself in the soda beer business, subject to the claim of A. D. Puffer & Sons, upon the articles above mentioned, the amount of which was stated to be about two hundred and fifty dollars.

The claim of A. D. Puffer & Sons was never fully paid, and that firm took possession of and sold the articles upon which they had a claim.

The partnership does not seem to have ever been formally dissolved. After the business of the firm had ceased to be operated and after the foreclosure of the mortgage first named, the defendant sold and delivered some of the goods and chattels of which one-undivided half part was conveyed by Richard F. Leader to the defendant, and mortgaged by the defendant to Richard F. Leader.

The plaintiff claims in this suit to recover the value of such chattels, claiming one-half under the foreclosed mortgage of the defendant to Richard F. Leader, and the remaining half under the mortgage of Richard F. Leader to himself.

The defendant claims that the transactions were in relation to partnership property and that the rights of the parties can be settled only in equity.

The sale to the defendant by Richard F. Leader and the mortgage back were not conveyances of partnership property. Richard F. Leader was the sole owner of the property. He, in his individual capacity, conveyed one-half, undivided, to the defendant in his individual capacity. The defendant conveyed back to Leader in mortgage the same property. No partnership had then been formed.

The articles of copartnership recite that Leader had sold to Plante one-undivided half of the property used in the business, and that Plante had given Leader a mortgage of the same.

At the time when the bill of sale and mortgage were given no partnership existed between the parties. The mortgage after foreclosure vested in the plaintiff, assignee of the mortgage, an absolute title to the mortgaged property. The fact that the parties to the mortgage entered into partnership and used the mortgaged property in their joint business cannot defeat the plaintiff's title. A sale by one person of the goods of another is a conversion. So if one co-tenant of a chattel sells the whole of it as his, his co-tenant may maintain trover against him for his share of the value. *Dain* v. *Cowing*, 22 Maine, 349; *Wheeler* v. *Wheeler*, 33 Maine, 347; *Weld* v. *Oliver*, 21 Pick. 559; *Wilson* v. *Reed*, 3 Johns. 175.

We are of the opinion that the plaintiff is entitled to recover in this action the value of one-half of all the property of which one-undivided half part was conveyed in mortgage by the defendant to Richard F. Leader, which has been sold or otherwise converted by the defendant.

We do not think that the plaintiff can recover in this action for the one-undivided half part of the partnership property mortgaged to him by Richard F. Leader. That was a mortgage by one partner of his interest in the partnership property. The mortgagee in such case takes the interest of the mortgaging partner subject to the liabilities of the firm and subject to the equitable rights of the other partner. He stands in the place of the mortgagor.

The sale, or mortgage, by a partner of his interest in the partnership assets passes to the purchaser only his share of what may remain after the payment of the partnership debts and the adjustment of the equities of the partners. *Beecher* v. *Stevens*, 43 Conn. 587; *Tappen* v. *Blaisdell*, 5 N. H. 190; *Tarbell* v. *West*, 86 N. Y. 280.

The share of the purchaser, or mortgagee, cannot be determined or recovered in an action at law, but only in a suit in equity. Judgment for plaintiff.

According to the stipulation of the parties the case is remanded to the court at nisi prius for assessment of damages by the court in accordance with this opinion.

So ordered.

THOMAS H. B. PIERCE *vs.* ALVIN RODLIFF.

Penobscot. Opinion July 18, 1901.

Libel. Exceptions. Practice. Judgment. Evidence. R. S., c. 82, § 29.

It is provided by statute in this State, R. S., c. 82, § 29, that "in a suit for writing and publishing a libel, evidence shall be received to establish the truth of the matter charged as libellous. If its truth is established, it is a justification, unless the publication is found to have originated in corrupt or malicious motives." *Held;* that instructions to the jury that the truth of the publication of a libel is now a defense accompanied with other instructions, by which the plaintiff may be denied the right to have the jury pass upon the the question whether the libel originated from corrupt or malicious motives, would be erroneous, even although nominal damages only are recoverable.

Instructions to the jury claimed to be erroneous should be brought to the law court for examination by bill of exceptions, rather than by motion for a new trial.

While the practice of raising questions of law upon a motion is not to be encouraged, yet in cases where manifest error in law has occurred and injustice would otherwise inevitably result, the law of the case may be examined upon a motion, and, if required, the verdict will be set aside as against law.

In an action of money had and received that had been "defaulted by consent, damages to be heard by the court," the case after hearing on damages went

to judgment, and the plaintiff recovered the sum of twenty-five dollars out of his ad damnum of one hundred dollars. *Held;* that the defendant may afterwards show the facts and circumstances of the judgment, and that the sum sued for was paid and received by him with the understanding that it was for his services and costs in a prior case conducted by him as counsel and attorney for his client in such case.

On motion and exceptions by plaintiff. Sustained.

Action for libel, in which the jury gave a verdict for the defendant. The case appears in the opinion.

T. H. B. Pierce and H. Hudson, for plaintiff.

L. B. Waldron and L. C. Stearns, for defendant.

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

WHITEHOUSE, J. This was a suit for publishing in the Eastern Gazette, at Dexter, August 24, 1899, and twice in September, 1899, the following advertisement alleged to be a libel upon the plaintiff, viz:

"Wanted.

All persons that have put bills for collection in hands of Thos. H. B. Pierce of Dexter from the year 1885 to August 1899, and received unsatisfactory returns are requested to communicate with X. Y. Z. Post-Office, Dexter, Me.," meaning, according to the innuendo in the declaration, that "the plaintiff had since 1885 been conducting his business as an attorney dishonestly and unsatisfactorily to his clients, and had not paid over moneys collected as his duty required". The defendant contended in justification that the language of the advertisement was true.

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

"I instruct you, as a matter of law, that the advertisement is susceptible of the meaning that is put upon it by the plaintiff in his writ. It is susceptible of that meaning, but you will determine whether or not it is so understood, whether or not that is the real meaning to be put to it, and if you find that it is, then, gentlemen, it is libellous, and the law imputes some damage that the plaintiff

has received from the publication of that article, unless the defendant on his part shows to the jury some legal excuse or justification. . . . . So, gentlemen, the burden falls upon him to satisfy the jury, if he will defend against the libel, or against this publication, that it is true. So, gentlemen, although you may think that a publication of this sort, even if true, maliciously done would be unjustifiable, be the subject of a cause of action upon which damages might be recovered, yet the law is otherwise. . . . . The law in its growth, has found it expedient to declare that although a publication may seem to be vexatious and unjustifiable, yet if the publication be true, the person libelled shall recover no damages. That is, the truth of the publication of a libel is now a defense."

But, section 29 of chapter 82 R. S., declares that "in a suit for writing and publishing a libel, evidence shall be received to establish the truth of the matter charged as libellous. If its truth is established, it is a justification, unless the publication is found to have originated in corrupt or malicious motives." It is evident that this provision of our statute was inadvertently overlooked by the presiding justice. It is evident that it was also overlooked by the plaintiff at the trial term, for after a verdict against him, he filed a motion to have the verdict set aside as against law and evidence, and also took exceptions to certain rulings and instructions of the presiding judge, but took no exceptions to the instruction above quoted.

In argument, however, the plaintiff contends that upon the uncontroverted testimony the publication unquestionably appears to have "originated from corrupt and malicious motives," and insists that upon the motion the verdict should be set aside as against law. This question would have been more appropriately presented in the plaintiff's bill of exceptions; but while the practice of raising questions of law upon a motion is not to be encouraged, in cases where manifest error in law has occurred, and injustice would otherwise inevitably result, the law of the case may be examined upon a motion, and if required, the verdict be set aside as against law. *Berry* v. *Pullen*, 69 Maine, 101, is a case exactly in point. At the

trial the presiding judge instructed the jury that an oral agreement between the payee and principal maker of a promissory note to extend the time of payment, as long as the latter would pay eight per cent interest, would be a valid agreement and discharge the surety. No exceptions were taken, but on the motion for a new trial the court corrected the error and set aside the verdict as against law. The same course was pursued in *Bigelow* v. *Bigelow*, 93 Maine, 439, the court observing that the questions might have been more concisely raised upon exceptions, but as the verdict was not warranted by the facts, the questions of law were still open to them on motion.

In the case at bar the defendant claims that in publishing this advertisement and in all that he did in the premises, he was acting in behalf of his father-in-law, S. M. Ingalls, who claimed to have acquired title, by a parol assignment, to a certain due-bill for $725, against Orrin Fitzgerald, Jr., dated at Boston Oct. 5, 1876, upon which a partial payment of $25 was made June 17, 1879. After the death of Fitzgerald, to wit, May 25, 1898, Ingalls intrusted this due-bill to the plaintiff "for collection at the discretion of said Pierce," and "if collected said Ingalls is to have $300 out of same."

Unable to realize anything from the estate of Fitzgerald, Jr., the plaintiff brought "suit in favor of Ingalls and another in favor of one Crockett against Orrin Fitzgerald, senior, the debtor's father, based upon the statute, for aiding his son to make a fraudulent transfer of certain property to him. It appears, however, that June 8, 1897, the real estate of Fitzgerald, senior, had been sold on execution in favor of a third party, to one Small, that Small conveyed the property to Tilson, and Tilson conveyed to the plaintiff's wife after Fitzgerald's right to redeem had expired. It appears, however, that no advantage was taken by the plaintiff of this forfeiture; for the attorney for Fitzgerald, senior, testifies that while he denied the validity of the Ingalls' claim on the Caffrey due-bill, as well as the liability of Fitzgerald, senior, he was anxious to relieve the property from attachments in order to make a conveyance of it, and accordingly paid $209 in settlement of the Crockett suit, and paid to the plaintiff $100 for his "trouble and

costs" in the Ingalls suit, in consideration that the suit should be entered "neither party." In answer to a letter from Mr. Ingalls, under date of September 8, 1899, demanding that the plaintiff "settle for the $100 collected on the Caffrey note," and $50 more for his expenses, the plaintiff replied that he had collected nothing for him and did not owe him anything. January 21, 1899, the plaintiff returned the due-bill to Mr. Ingalls. The plaintiff claimed that he was obliged to make extensive research, in both law and fact, in regard to the validity of the plaintiff's title and the statute of limitations, as well as respecting the liability of the defendant Fitzgerald, senior. He earnestly contends that the $100 received did not amount to reasonable compensation for his services and expenses, and denies that there was any bad faith whatever on his part in accepting this sum of $100.

But September 11, 1899, Ingalls brought suit against the plaintiff to recover the $100 so received by him and by arrangement, it was "defaulted, damages to be assessed by the court," at October term, 1899. After a full hearing the court awarded Ingalls the sum of $25, which was subsequently paid by this plaintiff.

It is not contended, by the defendant here, that the plaintiff acted in bad faith in consenting to abandon the suit against Fitzgerald, but in claiming to hold the whole amount received for his compensation; and it is evident from the judgment of the court in awarding Ingalls $25, that the plaintiff's services were not adjudged to be tainted with bad faith, for, if it had been, the award must have been for the entire $100. The court simply decided the dispute between the parties as to a just compensation for the plaintiff's services.

Thus, although this civil action was amply sufficient to settle the rights of the parties, Ingalls and the defendant appear to have been unwilling to rely upon it. In August preceding, with the aid of another attorney, they made two or three applications to the judge of the municipal court at Dexter, and one to the municipal judge at Newport to obtain a warrant against the plaintiff for "embezzlement or champerty". Failing in this, the defendant began the publication of the advertisement in question concerning

the plaintiff, calculated "to deprive him of the benefit of public confidence," and about the time of the third publication wrote the letter of September 8, signed by Ingalls, demanding the $100 and $50 additional for expenses claimed to have been incurred, although there is no evidence of expense other than that of publishing the libel. In ordering that published, the defendant stipulated that it should occupy from two and a third to three inches of space.

The plaintiff insists that this extraordinary conduct of the defendant affords abundant evidence that he and his father-in-law were actuated by strong feelings of resentment and a purpose to obtain money to which Ingalls was not entitled, by means of libel and intimidation, and that the jury would unquestionably have found that the libel originated in unworthy and malicious motives, if they had been permitted by the instructions to pass upon that question. It was undoubtedly an error of judgment and a failure of duty, on the part of the plaintiff, not to make a prompt report to Ingalls of the result of the suit against Fitzgerald with a statement of his account; and this fact together with his statement to his client that he had not collected anything for him, and his failure to make a full report to Crockett respecting the amount received on account of his claim, was doubtless calculated to give the jury an unfavorable impression of his methods. But there is a long stride between a generous estimate of the value of his services and positive dishonesty and bad faith towards his client. If the plaintiff had not recovered payment for his services in the manner he did, there was no source from which he could recover any compensation at all. Ingalls was under no obligation to pay him.

But, assuming that the verdict of the jury might not be disturbed upon the question of the plaintiff's good faith to his clients, he was still entitled to have the question whether the libel originated from corrupt or malicious motives determined upon correct rules of law, although only nominal damages were recoverable.

It is the opinion of the court that the plaintiff's contention upon this point is well taken, and that the verdict should be set aside on the motion as against law.

But there is another error in the instructions to the jury to which exceptions were duly taken and allowed.

It has been seen that the action *Ingalls* v. *Pierce*, brought to recover the $100 collected, was "defaulted, damages to be heard by the court."

In relation to the judgment in that case the instruction was as follows: "Now, gentlemen, there is some evidence which is conclusive upon the plaintiff here. . . . . The record of that judgment is conclusive upon the plaintiff, and it cannot be argued or contended here that he did not receive that note as an attorney, that he did not collect it, and that the one hundred dollars was not received in payment of the claim." But, as bearing upon the plaintiff's good faith in abandoning the suit for $100, the jury should have been allowed to consider all of the evidence tending to support the plaintiff's contention that the money was paid and received with the distinct understanding that it was for the plaintiff's services and costs, and all the circumstances under which the settlement was made. This principle was clearly explained in *Parks* v. *Mosher*, 71 Maine, 304.

The instructions given, considered in connection with the rulings upon the evidence, were designed to give the jury the impression that they were not permitted to consider anything on this point outside of the record of the judgment.

Motion and exceptions sustained.

ELLA R. CUSHMAN and others, In Equity,

vs.

JOHN M. GOODWIN, Executor.

York. Opinion July 19, 1901.

Will. Life Estate. Power of Disposal. Remainder. Equity. Parties. Trust Funds. Identity.

Upon a bill in equity by the heirs of Benjamin G. Clifford seeking to follow the funds received by his sister Achsah, a life tenant with power of sale under his will from sales of real estate and now in the possession of her executor, the defendant; also, to obtain a decree directing the executor to turn over the same to them, the court holds the following to be the legal interpretation and construction of the will in question.

The testator unquestionably intended that his sisters, Achsah and Mary Ann, should take a life estate in the real estate devised to them either solely or jointly, with a remainder to the survivor of the two, for her life, subject only to the contingency of the marriage of either of them, and that after the death of the survivor, the remainder should go to his heirs at law then living; but each sister was given the power to dispose of any portion of the real estate devised to her, and to convert the same into money, to be held and invested by each and to take the place of the real estate sold. More than this, each was given the right to use any part of the principal of the fund received from such sales for her necessities, comfort and convenience, and each was made the judge of the necessity of using for this purpose any part of such principal. But this right to use any portion of the principal by either of these devisees for her necessities, is one that must be exercised during the enjoyment of the life estate.

Held; that any real estate which remained undisposed of upon the death of the survivor of these two sisters, and the proceeds of the sale of the real estate which remained unexpended at that time, as if it were the real estate sold and of which it took the place, went to the testator's heirs at law living at the time of the death of the survivor.

Held; that the sums of money, therefore, which the sister, Achsah, received from sales of real estate constituted a trust fund, the income of which belonged to her during her life and after her death to her sister for her life, and then went, if unexpended by either during the enjoyment of the life estate by either, to the heirs under the terms of the will; *also*, that the heirs being thus entitled to the unexpended portion of this trust fund are the proper persons to maintain this bill in equity, rather than the personal representative of the testator, because of the provision in the will that the consideration

received for real estate sold is to be held in the same manner and subject to the same limitations as provided in reference to the real estate.

Such bill cannot be maintained unless the plaintiffs are able to identify the trust fund in the executor's possession. Upon the death of a person holding a trust fund, if the identity of the fund is lost and cannot be distinguished from the mass of the trustee's property, the cestui que trust stands in the position of a general creditor, and cannot maintain a bill in equity to require the personal representatives of the deceased trustee to pay over to him any sum held by the deceased in trust.

But the mere act by a trustee of mingling trust money with his own by depositing the different moneys in a bank in his individual name, with nothing done by the banker to distinguish the trust money from the individual money, does not necessarily prevent an identification of the trust money. Equity will undertake to disentangle the accounts and give to the cestui que trust the portion that belongs to him.

The plaintiffs have failed in the reported evidence, in this case, to identify this fund in the possession of the defendant executor, although it seems not improbable that they may be able to do so upon a further hearing.

It is therefore considered by the court advisable that the bill be retained and remanded for further proceedings before a single justice, when the proper course to pursue, in order to protect the interests of the parties, can be better determined after hearing them. It may then be decided to be best to order a further hearing upon the questions of facts before a master or otherwise, or to convert the cause into an action at law, or to adopt such other course as will best subserve the interests of justice.

On report. Case remanded for further hearing.

Bill in equity heard on bill, answer and testimony, seeking to establish a trust and follow its proceeds under the will of Benjamin G. Clifford, late of Biddeford, deceased.

The case appears in the opinion.

G. F. and Leroy Haley, for plaintiffs.

J. M. Goodwin, for defendant.

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

WISWELL, C. J. One Benjamin G. Clifford, of Biddeford, at the time of his decease, died testate in September, 1899. By his will, which was duly admitted to probate, he devised to his sister, Achsah Clifford, various parcels of real estate, upon this limitation, "to have and to hold so long as she shall remain single and unmar-

ried and during her natural life, but on her marriage or decease then to my sister, Mary Ann Clifford, if she shall remain single and unmarried, to have and to hold to her during her natural life."

Other parcels of real estate he devised to his two sisters, Achsah and Mary Ann Clifford, in equal shares, upon a similar limitation, as follows, "to have and to hold the same during their natural lives or during the time they shall remain single and unmarried, but on the decease or marriage of either of them, I devise and give said real estate to the sister remaining single and unmarried and during her natural life." He also devised to his sister, Mary Ann Clifford, a life estate in certain other real estate, subject to her marriage, and after making some small bequests, gave to his two sisters, Achsah and Mary Ann, the income of all the rest and residue of his estate, in equal shares, so long as they should remain unmarried and during their natural lives, and upon the death or marriage of either to the survivor or one remaining unmarried for her life.

The will also contained this provision: "Provided however always, that sister, Achsah or Mary Ann has the full right and authority to sell absolutely in fee any and all the real estate devised to her separately and to convey the same in fee simple giving a good and perfect title thereto; and where said real estate is conveyed to them jointly, or the income thereof jointly, then either may sell and convey one-undivided half in fee simple, giving a good and perfect title thereof, or they may join and convey and thereby sell and convey a good and perfect title thereof of the same as though said property had been devised to them or either of them and their heirs; and they or either of them shall hold the consideration received for said real estate in the same manner and subject to the same limitations as above provided as to the real estate, and it is hereby provided that each may use the income of said estate so devised to her, according to her discretion, and shall have the right and authority to use any part of the principal of said property devised to each as her necessities, and comfort and convenience may require, each for herself to determine as to said necessity, comfort and convenience for herself, as to the part devised and bequeathed to her. . . . . The consideration received on the

sale of any part of said real estate may be put in some savings bank or otherwise invested according to the best discretion of my said sisters."

By another clause of the will he devised, upon the decease of the survivor of his sisters, Achsah and Mary Ann, all of his estate, "and all the money received on sales thereof and unused and unexpended," to his heirs then living, to descend and be distributed according to the statutes of this state.

The sister, Achsah, died on Nov. 27, 1897, and the sister, Mary Ann, died on Oct. 8, 1898, neither of them having married. During their lifetimes they jointly, and Achsah solely, conveyed various portions of the real estate devised to them for their lives, and Achsah received the consideration for the real estate conveyed by her and her share of the consideration received by them jointly. But it does not appear that she ever specifically and separately made any investments of such sums received by her, nor did she deposit any of these sums in a savings bank in a separate account. At the time of her death Achsah had deposits to her credit in different savings banks aggregating the sum of $10,087.50, and it is claimed that the money received by her from these sales of real estate was deposited by her in one or more of these banks, in her own name, with other money belonging to her. None of the funds standing to her credit in these banks were transferred, after the death of Achsah, to Mary Ann during her life, nor to the estate of Mary Ann since her death. But all of the deposits standing to the credit of Achsah in these banks, upon her death, went into the possession and control of the defendant as her executor. In this bill in equity the heirs of Benjamin G. Clifford seek to follow the funds received by Achsah from these sales of real estate in the possession of her executor, and to obtain a decree directing the executor to turn the same over to them.

There can be no controversy as to the meaning or effect of the will of Benjamin G. Clifford. He unquestionably intended that his sisters, Achsah and Mary Ann, should take a life estate in the real estate devised to them either solely or jointly, with a remainder to the survivor of the two, for her life, subject only to the con-

tingency of the marriage of either of them, and that after the death of the survivor the remainder should go to his heirs at law then living, but each sister was given the power to dispose of any portion of the real estate devised to her, and to convert the same into money, to be held and invested by each and to take the place of the real estate sold. More than this, each was given the right to use any part of the principal of the fund received from such sales for her necessities, comfort and convenience, and each was made the judge of the necessity of using for this purpose any part of such principal. And the language of the will was sufficient and appropriate to carry such intention into effect.

Consequently, each of these devisees took a life estate only, subject to the marriage of each, with a remainder to the survivor for her life, and the heirs at law of the testator, upon the death of the survivor took the remainder in fee, subject to the power given to each of the two sisters to convert any portion of the real estate into money, and to use for her comfort and convenience so much of the principal of the money thus obtained as she might deem necessary for this purpose. Consequently, any real estate that remained undisposed of upon the death of the survivor of these two sisters, and the proceeds of the sale of real estate which remained unexpended at that time, as if it were the real estate sold and of which it took the place, went to the testator's heirs at law living at the time of the death of the survivor. *Hall* v. *Otis*, 71 Maine, 326; *Copeland* v. *Barron*, 72 Maine, 206; *Whittemore* v. *Russell*, 80 Maine, 297; *Hatch* v. *Caine*, 86 Maine, 282. But this right to use any portion of the principal by either of these devisees for her necessities, was one that must be exercised during the enjoyment of the life estate. *Ford* v. *Ticknor*, 169 Mass. 276; *Small* v. *Thompson*, 92 Maine, 539.

The sums of money, therefore, which the sister, Achsah, received from sales of real estate constituted a trust fund, the income of which belonged to her during her life and after her death to her sister for her life, and then went, if unexpended by either during the enjoyment of the life estate by either, to the heirs under the terms of the will. And the heirs being thus entitled to the unex-

pended portion of this trust fund, are the proper persons to maintain this bill in equity, rather than the personal representative of the testator, because of the provision in the will that the consideration received for real estate sold should be held in the same manner and subject to the same limitations as provided in reference to the real estate. *Hovey* v. *Dary*, 154 Mass. 7.

This bill against the defendant as executor of the will of Achsah, however, cannot be maintained unless the plaintiffs are able to identify the trust fund in the possession of the executor. Upon the death of a person holding a trust fund, if the identity of the fund is lost and cannot be distinguished from the mass of the trustee's property, the cestui que trust stands in the position of a general creditor of the estate, and can not maintain a bill in equity to require the personal representative of the deceased trustee to pay over to him any sum held by the deceased in trust. *Portland, etc., Steamboat Co.* v. *Locke*, 73 Maine, 370; *Fowler* v. *True*, 76 Maine, 43.

But, the mere act by a trustee of mingling trust money with his own by depositing the different moneys in a bank in his individual name, with nothing done by the banker to distinguish the trust money from the individual money, does not necessarily prevent an identification of the trust fund. Equity will undertake to disentangle the accounts, and give to the cestui que trust the portion that belongs to him. *Houghton* v. *Davenport*, 74 Maine, 590, citing 2 Perry on Trusts, § 837; *Knatchbull* v. *Hallett*, L. R. 13 Chan. Div. 696; *Central National Bank* v. *Conn. M. L. Ins. Company*, 104 U. S. 54.

In the present case, then, the proceeds of the sales of real estate received by the defendant's testatrix constituted a trust fund to be held by her as above indicated, and this fund or any unexpended portion thereof, upon her death, went into the control of the defendant charged with the same trust, if its identity can be established.

From the evidence reported, showing the very frugal mode of life of the defendant's testatrix, the fact that she had the use of an income of the property devised to her by her brother, and of other property

owned by her, as well, and the large amount of deposits made by her in savings banks, it is at least probable that no considerable amount of the principal had been expended by her for her support. But the plaintiffs have failed, in the reported evidence, to identify this fund in the possession of the executor, although it seems not improbable that they may be able to do so upon a further hearing.

It is therefore considered advisable that the bill be retained and remanded for further proceedings before a single justice, when the proper course to pursue, in order to protect the interest of the parties, can be better determined after hearing them. It may then be decided to be best to order a further hearing upon these questions of fact before a master or otherwise, or to convert the cause into an action at law, or to adopt such other course as will best subserve the interests of justice.

So ordered.

AUGUSTUS W. GILMAN, and others, *vs.* FRED W. STOCK.

Piscataquis. Opinion July 19, 1901.

Sales. Agents. Memorandum. Subject to Confirmation.

1. Though a salesman may have special authority to make a particular sale of goods unconditional, yet if in making the contract of sale he inserts a condition that it shall be "subject to confirmation," no action can be maintained for the non-delivery of the goods without showing a confirmation of the sale by the principal.

2. Where such contract was evidenced by a written memorandum signed by the salesman and the purchaser, which memorandum contained the stipulation "all orders subject to confirmation," the stipulation in the absence of fraud is binding on the purchaser though he did not notice it and was not aware of it.

On exceptions by plaintiffs. Overruled.

Assumpsit for the recovery of two hundred and fifty dollars for the non-delivery of 250 barrels of flour. At the close of the testimony the justice presiding instructed the jury as follows:

Gentlemen of the jury:—Upon this evidence the plaintiff is not entitled to recover, and it will be your duty to return a verdict for the defendant. The plaintiffs thereupon excepted.

H. Hudson and C. W. Hayes, for plaintiffs.

G. C. Wing, for defendant.

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

EMERY, J. This is an action of assumpsit for the non-delivery of goods, of more than thirty dollars in value, alleged to have been bargained and sold by the defendant to the plaintiffs. The defendant was a dealer in flour, and Mr. Potter was his salesman authorized to take orders of customers for flour. After some negotiations between Mr. Potter and the plaintiffs as to quality, quantity and price of flour, Mr. Potter wired his principal for the lowest price for which he might offer flour. He communicated the reply to the plaintiffs and thereupon the latter concluded to buy the flour. A written memorandum of sale was drawn up in duplicate by the salesman, Mr. Potter, on blanks furnished by the defendant, which memorandum was signed by the plaintiffs and also by the salesman for and in behalf of his principal the defendant. This memorandum contained an express stipulation of the following tenor: "All orders subject to confirmation." The salesman, Mr. Potter, sent his copy of the memorandum to the defendant who at once telegraphed the plaintiffs that the flour ordered was withdrawn from the market, and he could not supply it.

It must be evident the order was not confirmed, and hence the plaintiffs cannot recover damages for the refusal to fill it.

The plaintiffs urge, however, that they did not notice the stipulation that "all orders were subject to confirmation" and that, if they had noticed it, they would not have signed the memorandum. They complain that their attention was not called to this stipulation by the salesman. This does not change the effect of the stipulation. *Reinstein* v. *Watts*, 84 Maine, 129. No fraud is suggested, and in the absence of fraud, a party himself signing a written

contract is conclusively presumed to know the contents, at least when seeking to enforce it in an action at law. *Mattocks* v. *Young*, 66 Maine, 459; *Insurance Co.* v. *Hodgkins*, 66 Maine, 109; *Bank* v. *Kimball*, 10 Cush. 373.

The plaintiffs again contend that the salesman, Potter, was authorized by the defendant to make an unconditional contract of sale without being subject to confirmation. But the plaintiffs must go further and show that the salesman did make such an unconditional contract of sale. The question is not what contract the salesman was authorized to make, but what contract he did make. As already appears, the contract he did make, and the one offered in evidence by the plaintiffs, expressly provided that it was subject to confirmation. An agent with full authority to bind his principal absolutely may yet properly stipulate that the contract shall not be binding until confirmed by his principal. The cases cited by the plaintiffs as to how far third parties may rely upon the general powers of salesmen to act for and bind their principals, are not applicable. The plaintiffs in this case were limited by the contract they saw fit to make with the salesman, however far short of his actual powers. Their action at law is based on this contract and cannot be sustained for want of the confirmation stipulated for therein.

Exceptions overruled.

THE CHERRYFIELD & MILBRIDGE ELECTRIC RAILROAD COMPANY, Appellants.

Washington. Opinion July 23, 1901.

Street Railroads. Location. Appeal. Stat. 1899, c. 119, § 6.

An electric railroad company in accordance with the provisions of Public Laws of 1899, ch. 119, § 6, applied to the municipal officers of a town for their approval of a proposed route and location. The municipal officers neglected and refused to approve and the company appealed to the Supreme Judicial Court. While that appeal was pending in court, the company made a second

application to the municipal officers, identical with the first, except that a portion of the proposed route in the first application described as "thence over and along said Big Bridge and Draw Bridge to Bridge Street," was omitted from the second. Upon the second application the municipal officers neglected and refused to give their approval, and the company again appealed, the former appeal still pending.

Held; that the pendency of the former appeal is not cause for the abatement of the latter.

A route or a location of a street railroad presented to the municipal officers for their approval cannot be considered with reference to particular streets one by one, but must be viewed as a whole. The municipal officers are vested with a judicial discretion. They may consider the width and other conditions of the streets, the convenience and safety of the public, and in case where it is proposed to cross a bridge, they may also consider whether the bridge has the requisite strength to support a street railroad and moving cars.

The omission in the latter application of a single street or a bridge may put an entirely different phase upon the questions presented, and action of the municipal officers, or their refusal to act, might thus be put upon new and different grounds; in short, the location as a whole, as presented to the municipal officers for their action, is not the same.

On exceptions by appellees. Overruled.

Plea in abatement by the municipal officers of the town of Milbridge alleging the pendency of a prior appeal in the same matter.

F. I. Campbell, for street railroad.

H. H. Gray, for Milbridge.

SITTING: WISWELL, C. J., STROUT, SAVAGE, FOGLER, PEABODY, JJ.

SAVAGE, J. The case shows that the appellant company on the fifteenth day of June, 1900, in accordance with the provisions of the Public Laws of 1899, ch. 119, § 6, applied by written petition to the municipal officers of Milbridge for their written approval of a proposed route and location of a street railroad, as to streets, roads and ways in the town of Milbridge, which route and location were specifically described in the petition. For more than thirty days thereafter, the municipal officers of Milbridge neglected and refused to approve said proposed route and location. Thereupon the company appealed to this court, praying for the appoint-

ment of a committee, as provided in the same section six in the Act referred to. The appeal was entered at the October term, 1900, of this court in Washington county, and was continued from term to term, until it was finally dismissed on the first day of the April term, 1901.

In the meantime, on the twenty-fifth day of January, 1901, the company presented a new application in writing to the municipal officers of Milbridge for their written approval of a proposed route and location for their railroad as before. Again, for thirty days, the municipal officers neglected and refused to give their approval. Another appeal was taken to this court, which was entered at the April term, 1901, and which is the pending proceeding. The two applications are identical in form, except that in the first a portion of the proposed route is described as, "thence over and along said Big Bridge and Draw Bridge to Bridge Street." This portion of the proposed route was omitted from the second application, the company having, so it is claimed in argument, obtained authority to build a bridge of its own at the point in question.

The respondents seasonably asked for the abatement of these proceedings on appeal, on the ground that "at the time the written application in said action was presented to said municipal officers for approval, January 25, 1901, and at the time this appeal was taken, there was pending in this court an appeal by the said company from said municipal officers for the same cause."

It may be doubted whether the rule in civil actions at law, that the pendency of a prior suit for the same cause is ground for the abatement of subsequent suit, should be applied in all strictness to proceedings of this character. But, be that as it may, we are of opinion that the route and location proposed in the first application are not identically the same as that proposed in the second, although the first application embraces all the streets and ways embraced in the second. It embraces one more, and herein lies the important difference. A route or location of a street railroad presented to the municipal officers for their approval, cannot be considered merely with reference to particular streets, one by one. It must be viewed as a whole. The municipal officers are to act in a judi-

cial capacity. They are vested with a judicial discretion. Application is made to that discretion. They may consider the width and other condition of the streets, the convenience and safety of the public, and in case where it is proposed to cross a bridge, in addition to the matters already spoken of, they may consider whether the bridge has the requisite strength to support a street railroad and moving cars. And it may well be that, taken as a whole, a proposed location, including a bridge, would be manifestly unsuitable, while the same location, without the bridge, would be proper. The reasons which might properly lead the municipal officers to refuse approval of the first location might be entirely wanting in the second. Even so simple a change might put an entirely different phase upon the questions presented for the consideration of the municipal officers, and their action, or refusal to act, might thus be placed upon new and entirely different grounds. In short, the location as a whole, as presented to the municipal officers for their action, is not the same.

The presiding justice below ruled that these proceedings were not abatable on the ground stated, and his ruling was correct.

Exceptions overruled.

STATE OF MAINE

vs.

FREDERICK L. MEANS and FRANK L. GRATTON.

York. Opinion July 20, 1901.

Jury. Charging on Facts. Evidence. Practice. R. S., c. 82, § 83.

The presiding justice, in addition to his duty of instructing the jury upon the law, should aid them by re-calling and collating the details of testimony and resolving complicated evidence into its simplest elements.

It is not in violation of the statute, R. S., c. 82, § 83, prohibiting the presiding justice during a jury trial, including the charge, from expressing an opinion upon issues of fact arising in the case, for the justice to state in his charge to the

jury that there is no evidence impeaching the character of a certain witness for virtue or integrity.

It is settled law that the witness' character for truth and veracity only can be impeached. The justice has the right to assume in reference to the character of a witness for virtue and integrity what the law assumes; and his statement is also warranted by the testimony of one of the respondents in the case.

Nor will exceptions lie to remarks of the justice made in the charge, which consist of an analysis of the testimony of a respondent to an indictment, and directing attention to the dubious incidents of his narrative. He can properly instruct the jury to apply to the testimony of witnesses the tests of consistency and probability and aid them in arriving at the truth,—the fact in issue,—by stating both affirmatively and interrogatively the various propositions and incidental questions to be considered and determined by them.

Held; that although it is possible that an inference unfavorable to the respondents' testimony could be drawn from the language used in the charge, it is not an expression of opinion within the provision of the statute.

When instructions, bearing upon the issues at the trial, are accompanied with the statement to the jury, "That is for you to judge," "these are considerations for you, I express no opinion," *held;* that this is a disclaimer, by the presiding justice, of any purpose of assuming to determine the facts in issue.

Comments of the presiding justice which are deductions only of truth based upon general experience are not subject to exceptions; nor will a statement of a rule of conduct, so uniform among men as to be proverbial, be regarded as an expression of the individual opinion of the presiding justice.

On exceptions by defendants. Overruled.

Indictment against the defendants for abortion, found at the May term, 1899, York county. The jury returned a verdict of guilty, and the defendants took exceptions to portions of the charge to the jury, which are recited fully in the opinion.

W. S. Mathews, county attorney, for state.

B. F. Hamilton and Geo. F. & Leroy Haley, for defendants.

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

PEABODY, J. The exceptions are to the instructions of the presiding justice contained in eight paragraphs of his charge to the jury, viz:

(1) I am not aware that any insinuation has been thrown out, certainly no evidence introduced impeaching her character for vir-

tue or integrity, or that she has had any improper relations with anybody excepting with Mr. Means, under such circumstances as that occurred.

(2) Mr. Means says that it was understood between him and Mrs. Marcotte that when he went to Stone's office that he would make the admissions for some purpose or other, and that the fact was not so; but in the presence of Mr. Stone he was to make such admissions and did make them. Is that a reasonable explanation? Does a man voluntarily confess himself guilty of a serious crime like this, to please anybody, to a third party as in this case?

(3) It is said that Mrs. Marcotte afterwards wanted the warrant destroyed, and there is evidence of that. I don't recollect whether she spoke of it or not. I do not think she denied it. When was that? Was that at a time when the parties had harmonized, and when, as she says, she expected to be married, and after the agreement at Mr. Stone's office, or not? If so, it might be pretty apparent, perhaps, why both parties would like to have any evidence of that sort out of the way, if they could, because there was a little scandal connected with it.

(4) If he was the father of the child, which is the most probable, that she would suggest to go there at the time the criminal court sat, or that he would suggest it?

(5) He does not explain why it was necessary to deceive Mr. Stone, or why any such transaction, round-about transaction, was reasonable or proper to be done, but he says that was the way.

(6) Now, the question should arise, if that was the arrangement, and if they felt it was desirable to make such a round-about arrangement as that to give a note and take it up for his mother to sign, and pay money, and then go out on the street and pay it all back again, whether it was necessary for Mr. Means to take it up and get his mother's signature, or all that formality, and why it was necessary, if that was the fact, to have another note made and stamped? Is that a reasonable and truthful story? You will judge of that.

(7) You come to the January term, 1899, and you find Mrs. Marcotte up to Haverhill. Mr. Means seems to know about it, according to his testimony all through; and that visit happens to be, according to the testimony, at a time when the Grand Jury was in session.

(8) Innocent men, men conscious of innocency, do not have much occasion to fear a Grand Jury: and it is rather unusual, I think you will say in your own experience, that men who are conscious of having committed no offense either to fear an indictment, or to undertake to get out of the jurisdiction when a Grand Jury is sitting.

It is claimed by the respondents, that these instructions are in violation of the statute R. S., c. 82, § 83, prohibiting the presiding justice during a jury trial, including the charge, from expressing an opinion upon issues of fact arising in the case.

The first exception is to the language of the presiding justice indicating that there is no evidence impeaching the character of Mrs. Marcotte for virtue or integrity; and the complaint is that this language assumes that her character could not be impeached. Cases are cited which sustain the rule that, as she was simply a witness in the case, her character for truth and veracity only could be impeached.

The justice had the right to assume in reference to her character what the law assumed, and his statement was warranted also by the testimony of the respondent Means himself.

All that the respondents could require was, that the jury should consider her interest and her feeling as detracting from the credibility of her testimony, and as the instruction on that point was explicit, they were not prejudiced.

We can discover no grounds of exception in the third specification.

The fourth, fifth and sixth exceptions are to the remarks of the justice in his analysis of the testimony of Means and directing attention to the dubious incidents of his narrative.

He could properly instruct the jury to apply to the testimony of witnesses the tests of consistency and probability and aid them in

arriving at the truth,—the fact in issue,—by stating both affirmatively and interrogatively the various propositions and incidental questions to be considered and determined by them.

It is possible that an inference unfavorable to the testimony of Means could be drawn from the language used, but it is not an expression of opinion within the provision of the statute. *McLellan* v. *Wheeler*, 70 Maine, 285; *State* v. *Day*, 79 Maine, 120.

The instructions complained of in the second, seventh and eighth exceptions, if limited to the words quoted, bear upon the issue between the State and the respondent Means, but the justice disclaimed any purpose of assuming to determine the facts by stating to the jury in the same connection, "That is for you to judge." "These are considerations for you, I express no opinion."

No allusion to the admitted confession of Means to Mr. Stone, the subject of the second exception, could be made by the presiding justice without involving a possible inference of his opinion as to the guilt of that respondent. But his comments were deductions of truth based upon general experience.

And the same construction applies to the seventh and eighth paragraphs excepted to, which together constitute one ground of exception. The language complained of is the statement of a rule of conduct so uniform among men as to be proverbial, and was not an expression of the individual opinion of the justice. *McLellan* v. *Wheeler*, supra; *State* v *Richards*, 85 Maine, 252.

It would be impossible for the presiding justice to rule or charge the jury upon matters of law independently of the environment of fact.

When the constitution of Maine was adopted, trial by jury was preserved, and is substantially what it was by the common law. The common-law jury trial and our constitutional jury trial imply the presence and participation of the judge and the jury. The questions of law which are to be determined by the court, and the questions of fact which are to be determined by the jury, shade into each other, and the line of separation may sometimes be obscure.

The presiding justice in addition to his duty of instructing the

jury upon the law, should aid them by re-calling and collating the details of testimony and resolving complicated evidence into its simplest elements. He is empowered to instruct them on the law and to advise them on the facts. *Capital Traction Co.* v. *Hof*, 174 U. S. 1; *Nudd* v. *Burrows, Assignee*, 91 U. S. 426.

Lord Hale in his History of the Common Law says relative to trial by jury: "It has the advantage of the judge's observation, attention and assistance in point of law by way of deciding, and in point of fact by way of direction to the jury." 2 Hale His. Com. Law, (5th Ed.) 147, 156.

Exceptions overruled.

STATE OF MAINE *vs.* ELECTUS OAKES.

Aroostook. Opinion July 24, 1901.

Indictment for Murder. Verdict. Degree of Crime. R. S., c. 118, § 4.

A person on trial for murder must be considered as standing upon all his legal rights, and waiving nothing.

In the trial of a person upon an indictment charging him with murder, an instruction to the jury by the presiding justice, that their verdict should be not guilty, or guilty of murder in the first degree, is repugnant to § 4, of chapter 118, R. S. which provides that: "The jury, finding a person guilty of murder, shall find whether he is guilty of murder, in the first or second degree," and is, therefore, erroneous.

On motion and exceptions by defendant. Exceptions sustained.

Indictment for murder on which the defendant was convicted.

Wm. T. Haines, Attorney General, for state.

Don A. H. Powers, for defendant.

SITTING: WISWELL, C. J., WHITEHOUSE, STROUT, FOGLER, PEABODY, JJ.

FOGLER, J. The respondent, Electus Oakes, was indicted and tried for the murder of his son, Oliver Oakes.

The jury returned a verdict of guilty of murder in the first degree.

The case comes to this court upon appeal, and also upon exceptions to instructions given to the jury by the presiding justice.

The respondent, a man eighty years of age, admitted that he shot and killed his son, but contended that the killing was done in defense of his own life and that of his wife. He testified that on the morning when the shooting occurred, before he had risen from his bed, he heard loud words between his son and his wife who had risen before him; that he heard his son threaten to take the life of his, the defendant's wife; that he heard the sound of rocks thrown against his house; that he heard the discharge of a gun and heard his wife scream; that, having arisen and partly dressed himself, he went to the door of his house and saw his son on the opposite side of the road, in front of his son's house, loading a gun which he then held, at the same time threatening to have their hearts' blood; and thereupon he got his own gun and shot and killed his son, as he says, to protect his own life and that of his wife. The respondent's wife in her testimony substantially corroborated the testimony of her husband.

Witnesses for the State gave a different version of the affair, so far as the language and conduct of the son are concerned, testifying that the son made no such threats as are attributed to him by the respondent and his wife, and that he had no gun at the time.

The presiding justice, in the course of his charge, gave to the jury correct definitions of the crimes of murder and manslaughter, and correctly instructed them as to the distinction between murder in the first degree, and murder in the second degree, and instructed them properly in regard to the law of self-defense.

The instructions of the presiding justice to which the respondent excepts are as follows:

"It is the unlawful killing of a human being which is declared to be murder, and the unlawful killing, as I have already indicated to you from the statute, may be murder in one degree or the other, or it may be manslaughter; manslaughter being the unlawful killing where there is no malice either expressed or implied, and where

the act is done upon sudden provocation before a man has time to cool or deliberate, or form an intelligent intention. In this case the state, by its learned Attorney General, has taken the position, as I understand him, that this was a deliberate, wilful, and express act of the defendant, that he meant to do what he did do, and that there was no excuse in law for what he did do.

"If it was the deliberate, sedate intent of the prisoner to kill the deceased, and there was no justification for it, no legal excuse for it, then, gentlemen, that would be evidence from which you would be authorized to find express malice aforethought, and the defendant should be found in such a case as that guilty of murder in the first degree.

"I do not remember any evidence in the case, gentlemen, which calls upon me to instruct you in regard to implied malice, because that is not the position, as I understand it, presented by the state, or presented by the evidence; and it is claimed by the learned counsel for the respondent that there is no evidence in this case which will warrant you in finding a verdict of manslaughter.

"There is no evidence that it was done in such heat of passion or upon such sudden provocation, and with such absence of malice as to reduce the crime to the degree of manslaughter.

"Gentlemen, so far as I remember the case, there is no evidence which I think calls upon me to submit the question of manslaughter to you. The defendant says there is a perfect and absolute defense. I do not understand him to claim it was an unlawful killing done in heat or excitement under such provocation as would show absence of malice to reduce it to manslaughter. As I understand it, gentlemen, the question practically is whether the respondent is guilty of murder or whether he is not guilty at all."

In closing his charge the court says:

"Now, in this solemn case you take these witnesses, search them, weigh them, remove from their testimony that which you do not believe on both sides; and then, taking all the evidence in the case, on both sides, everything, then say whether you find beyond a reasonable doubt that the respondent at the bar is guilty or not guilty of murder in the first degree.

"If you find him guilty of murder in the first degree, you will say so. If you find not guilty, you will say so with equal readiness and independence."

We think the instructions to which exceptions are taken are erroneous so far as they relate to the degree of criminality. It was the province of the jury to determine the guilt or innocence of the respondent, and if they found him guilty of murder, to determine the nature of the crime of which he was found guilty, whether manslaughter or murder, and, if murder, whether in the first or second degree.

Revised Statutes chapter 118, § 4, is as follows:—

"The jury, finding a person guilty of murder, shall find whether he is guilty of murder in the first or second degree. When a person is found guilty of murder by confession in open court, the court, from testimony, shall determine the degree of murder, and sentence accordingly."

In the opinion given to the executive council in the case of *State* v. *Cleveland*, Mr. Justice DANFORTH and Mr. Justice WALTON, referring to the foregoing section of the statute say, (58 Maine, 564):

"By that section it is provided that the jury, if the case goes to them, or upon confession of the accused the court, upon testimony, are to determine the degree of the murder. This provision is peremptory and unqualified in its terms, leaving nothing to inference, but comprehending all cases, whatever may be the form of the indictment. The provision is thus express, that it may be certain that the jury have not only had their attention called to the matter, but that they have considered and decided this important question of fact. And why should there be any hesitation in giving full force, to a provision of law so explicit? It is not a matter of mere form, but a question of fact vital to the issue and one to be settled by the testimony."

Though this may not be regarded as authority, yet, coming from two so eminent jurists, and being so in accord with our own views, we feel constrained to adopt the language as a true exposition of the important and peremptory terms of the statute.

The instruction that the jury should determine whether the

respondent was not guilty or guilty of murder in the first degree, took from the jury the important question of fact as to the degree of criminality and was clearly repugnant to the imperative terms of the statute above recited.

In *Rhodes* v. *Com.* 48 Pa. 396, the respondent was indicted and tried upon the charge of murder. The statute provided there, as here, that the jury, if they found the person accused guilty of murder, should "ascertain in their verdict whether it be murder in the first or second degree." The presiding justice instructed the jury as follows: "If you find the defendant guilty, your verdict must state guilty of murder in the first degree in manner and form as he stands indicted." This was held to be error. The court says, p. 398, "the statute created a distinction, unknown to the common law, between murder in the first and second degrees, and by very precise words, made it the exclusive right and duty of the jury to ascertain the degree when the conviction resulted from a trial." . . . . "It is vain to argue that the judge was more competent to fix the degree than the jury, or that the circumstance proved the crime to be murder in the first degree, if murder at all; for the statute is imperative that commits the degree to the jury."

To the same effect are *Lane* v. *Com.*, 59 Pa. St. 371; *State* v. *Dowd*, 19 Conn. 388; *Hopt* v. *People of Utah*, 110 U. S. 574.

See also *State* v. *Meyer*, 58 Vt. 457; *Baker* v. *People*, 40 Mich. 411; *Panton* v. *The People*, 114 Ill. 505.

In the case at bar it appears from the charge that the counsel for the respondent, in his argument, contended that his client was guilty of no offense and did not contend in the progress of the case, or in the argument, that if the respondent should be found guilty, it should be of a less degree than murder in the first degree. Conceding this, we do not think it can be regarded as a waiver by the respondent of any rights guaranteed to him by law.

A person on trial for murder must be considered as standing upon all his legal rights, and waiving nothing. *Hopt* v. *Utah*, supra; *Cancemi* v. *The People*, 18 N. Y. 128; *Perteet* v. *The People*, 70 Ill. 171; *Dempsey* v. *The People*, 47 Ill. 323, 325.

Our conclusion is that the exceptions must be sustained. This

conclusion renders it unnecessary for us to examine the questions raised on appeal.

Exceptions sustained.

CASSIE HAGGERTY, by next friend *vs.* CITY OF LEWISTON.

Androscoggin. Opinion July 24, 1901.

Way. Defect. R. S., c. 18.

At the point in the sidewalk, where the plaintiff tripped and fell, a broad and shallow gutter had been constructed across the walk to carry off the water from the conductor on the front of the building, and there was testimony which might have authorized the jury to find that the row of bricks, on one side of the gutter, was from three-fourths of an inch to an inch higher than the corresponding course on the other side. The bricks constituting the walk, on one side of the gutter, had been re-laid a few weeks before the accident by skilled workmen of large experience in laying brick and building sidewalks, and the condition alleged to constitute the defect was thus a structural one.

Held; that such a slight inequality in the surface of the brick sidewalk in question, cannot consistently be declared a defect, but that it should be held to be reasonably safe and convenient, and that the plaintiff's injury was the result of a simple and most unfortunate accident.

On motion by defendant. Motion sustained.

Action for damages sustained by an alleged defective way in the city of Lewiston.

The case is stated in the opinion.

Joel Bean, Jr., for plaintiff.

J. L. Reade, city solicitor, for defendant.

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

WHITEHOUSE, J. About seven o'clock, on the evening of October 15, 1899, the plaintiff, a girl fourteen years of age, who had previously suffered amputation of one leg, was walking on crutches

on the sidewalk of Lisbon street, and sustained a fracture of the other leg by tripping against a course of bricks alleged to have been so laid as to constitute a defect in the walk. In the action brought to recover damages for this injury, she recovered a verdict of $600, and the case comes to this court on a motion to set aside the verdict as against the evidence.

It appears from the evidence that, at the point where the plaintiff tripped and fell, a broad and shallow gutter had been constructed across the sidewalk to carry off the water from the conductor on the front of the building, and there was testimony which might have authorized the jury to find that the row of bricks, on one side of the gutter, was from three-fourths of an inch to an inch higher than the corresponding course on the other side. The condition may be illustrated by a transverse section of the gutter with the bricks elevated at "A" three-fourths of an inch or an inch, thus:

It is contended, in behalf of the plaintiff, that while this might be deemed a reasonably safe, and convenient sidewalk for a cross-street in a small country village, it should be held defective and unsafe for the sidewalk of the principal business street of a populous city.

It was in evidence that the gutter formation in question, consisting of brick laid in cement, had existed for a long time prior to the accident, but that the bricks constituting the walk, on one side of the gutter, had been re-laid three or four weeks before the accident without disturbing the gutter itself, and that the row of new bricks laid on that side of the gutter were designedly left elevated about half an inch above the edge of the gutter, in the expectation that they would settle to a level with it. As already stated, there was also evidence tending to show that this row of newly-laid bricks was three-fourths of an inch or an inch higher than the old bricks on the other side of the gutter.

Thus, the condition of the walk alleged to constitute the defect was a structural one, and if it was a defect, it was the result of an error of judgment, and not of neglect to repair. This work of

re-laying the bricks, immediately before the accident, appears to have been done by skilled workmen of large experience in laying brick and building sidewalks; and they testified that the gutter was in the usual condition for such a walk, and the bricks on either side of it laid in the usual manner.

It is earnestly contended, in behalf of the defendant, that such a condition of the sidewalk was reasonably safe and convenient for any street, and that it cannot consistently be held defective within the meaning of our statute.

In *Witham* v. *Portland*, 72 Maine, 539, it was held by this court that a depression in the sidewalk six and one-half inches below the surface of the walk and eight and one-half inches in width from a basement window, about one-half of which was within the limits of the walk, was not a defect.

In *Morgan* v. *Lewiston*, 91 Maine, 566, the sidewalks at the junction of Main and Park streets were not on the same level. The Main street walk was of brick with a plank at the outside of the walk at the junction, and set upon edge with the top of the plank flush with the surface of the walk. The Park street sidewalk upon one side, and in the middle, was from one to two inches lower than the Main street walk, and upon the extreme outside the Park street walk was five and one-half inches lower than the top of the plank. Two feet in from this extreme outside the difference in level was but two and three-fourths inches. It was held, that the condition of the walks thus described did not constitute a defect within the meaning of the highway statute. The decision in this case was doubtless influenced somewhat by the fact that the alleged defect was at the junction of two streets.

In *Raymond* v. *Lowell*, 6 Cush. 524, the plaintiff had been injured by stumbling over a grate raised one or two inches above the sidewalk, but it was held that the sidewalk was not defective. The observations of the court in the opinion are pertinent here: "There is probably not a single street in any city in the commonwealth, where there are not substances against which persons would be quite as likely to stumble, as against this inch or two of grate, upon the side of the sidewalk. There is an abundance of

such stumbling blocks all along the streets and sidewalks in Boston. Where there are brick sidewalks, it may be seen by anyone passing along, that the bricks have frequently settled, so that the edgestones, for a large part of the length of the streets, rise quite as much above the traveled part of the sidewalks, as did the grate in this case, and are quite as dangerous. Besides, it may be seen all along our streets, directly in the midst of the traveled part of the sidewalk, that the stone gutters, and the stones around the wood and coal-holes and other objects, rise above the level of the sidewalk full as high, and endanger persons passing quite as much, and probably much more, than was done by this grate. If towns and cities are bound to remove all such things, then they are exposed to indictments for the existence of them. But it can hardly be believed that there ever was, or ever will be an indictment, in such a case, and for such a thing. There would be no end to prosecutions if such a thing should be regarded as furnishing sufficient ground for an indictment."

It is accordingly the opinion of the court, in the case at bar, that the sidewalk in question cannot consistently be declared defective, but that it should be held to be reasonably safe and convenient, and that the plaintiff's injury was the result of a simple and most unfortunate accident.

Motion sustained.

GEORGE P. WESCOTT *vs.* JAMES MITCHELL.

Cumberland. Opinion July 25, 1901.

Contracts. Consideration. New Promise. Sales.

The mere agreement to perform an existing contract obligation, by one party to a contract, is not a valid consideration for a new promise by the other party.

The plaintiff and defendant by a contract, prior in time to the one in suit, agreed that the defendant should have an option to purchase the plaintiff's interest in the shares of a certain railroad corporation. Subsequently, by a contract which is described by recitals as being explanatory of and supplemental to the former one, and intended to make that contract conform more clearly to

the "original understanding" of the parties, the defendant agreed to purchase and pay for the same stock. In an action for breach of this agreeement, the defense to which was a want of consideration, *held;* that the second contract must be regarded as supplemental to the first one, rather than explanatory of it, so far as the defendant's agreement to purchase is concerned.

Also; no consideration is shown for the defendant's promise, for breach of which the suit is brought, beyond the agreement of the plaintiff to perform obligations existing under the first contract.

On report. Judgment for defendant.

Action to recover $7657 and interest for 522 shares of stock of the St. Croix & Penob. R. R. Co., which the plaintiff averred that the defendant agreed to purchase of him, and pay for, at that price.

J. W. Symonds, D. W. Snow, C. S. Cook, and C. L. Hutchinson; *H. B. Cleaves*, for plaintiff.

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

SITTING: WISWELL, C. J., STROUT, SAVAGE, FOGLER, POWERS, JJ.

SAVAGE, J. Action for breach of contract to purchase and pay for the rights and interest of the plaintiff in five hundred and twenty-two shares of the capital stock of the St. Croix & Penobscot Railroad Company.

The plaintiff and defendant had the contract for building the Washington County Railroad, and for reasons satisfactory to themselves, they deemed it to be for their interest to secure a controlling interest in the capital stock of the St. Croix & Penobscot Railroad Company. Accordingly, on August 17, 1894, they made a contract with one C. A. Boardman, Trustee, for the purchase of five hundred and twenty-two shares of the stock of that company, at $23 per share, and paid for the same. The sale by Boardman was on condition that the purchasers should construct an extension of the St. Croix & Penobscot Railroad from its then terminus to the Maine Central Railroad, the extension to be commenced before July 1, 1895, and completed before December 31, 1896; and it was provided that if the construction of the extension should not be commenced before July 1, 1895, the agreement for the sale of stock should be null and void, and the stock, if

demanded within four months after July 1, should be re-transferred to Boardman, on his paying the purchase price and interest. The stock itself was transferred to a trustee to hold for the benefit of the plaintiff and defendant. The extension not having been commenced within the time limited, Boardman elected to cancel the contract and tendered back the money due under it. Whereupon a new contract was entered into between Boardman and the plaintiff Wescott, September 21, 1895, by which Boardman agreed that the stock should be assigned and delivered to Wescott, and Wescott agreed to pay the purchase price of $23 per share, and make certain other payments to Boardman. It was agreed that Wescott should hold the stock for the joint account of Boardman and himself, and that no sale of the stock should be made within three years, except by mutual agreement. The profits arising from the holding or sale of the stock were to be divided equally between the plaintiff and Boardman. Afterwards, on October 25, 1895, the plaintiff and defendant entered into a written agreement between themselves concerning the use of this stock, and in that agreement the later Boardman contract was referred to and some of its particulars specified. In this agreement it was recited that the defendant had paid one-half of the price of the stock; that the Boardman contract, though made in the name of the plaintiff, was and stood for the joint benefit of the plaintiff and defendant; that the defendant had an equal interest with the plaintiff in the stock and all rights thereunder; that the defendant was entitled to an equal share with the plaintiff in all profits derived from the stock, or from the Boardman contract; and that the defendant, on the date of the Boardman contract, September 21, 1895, had ordered the trustee to transfer his half of the stock to the plaintiff, who paid no consideration therefor. These recitals establish the fact that the defendant then owned one-half interest in the stock, but subject to the Boardman contract.

On March 2, 1896, the plaintiff withdrew from the contract for building the Washington County Railroad, and assigned his interests under the contract to the defendant, and in the agreement of settlement between themselves, of that date, is found the following:

"And said Wescott agrees to hold said St. Croix & Penobscot R. R. Co. stock as it now stands in accordance with the provisions of the agreement between himself and C. A. Boardman, Trustee, dated Sept. 21, 1895, and the agreement between said Mitchell and himself dated Oct. 28, 1895, and not to make any re-pledge of said stock for any purpose at any time during the time limited in said Boardman's agreement; that he will transfer to said Mitchell at said Mitchell's option, with the consent of said Boardman, Trustee, all his rights in and to and all his interests under said agreement dated Sept. 21, 1895, upon said Mitchell paying to him all sums that he may have advanced on account thereof, with interest thereon, and assuming all his obligations thereunder and guaranteeing him against all loss, cost, damage or expense on account thereof."

Still later the plaintiff and defendant made a further agreement concerning this stock, which we incorporate herein in full, as follows:

"Memorandum of a supplementary agreement between George P. Wescott of Portland, Me. and James Mitchell of Portland, Me. made this fourth day of December, 1897, supplementary to and explanatory of an agreement entered into between the same parties dated the second day of March, 1896, Witnesseth, that in order to make said contract of March 2nd, 1896, clearly conform to the original understanding of the parties thereto, the said James Mitchell hereby agrees to and with the said George P. Wescott to purchase and pay for the said Wescott's interest in the St. Croix & Penobscot Railroad stock therein referred to, and pay said Wescott therefor the sum of seven thousand six hundred and fifty-seven dollars with interest thereon from September twenty-first, 1895, on or before September 21st, 1898, and upon such purchase and payment while said Mitchell is not to have an actual transfer of said stock except by the consent of said Boardman during the time limited as subject to said Boardman's consent, he is upon said purchase and payment to succeed to and have all of said Wescott's rights in said stock subject to said agreement between said Westcott and Boardman dated September twenty-first, 1895." It is for a breach of

this latter contract, on the part of the defendant, that this action is brought.

The defense is twofold. First, that by the terms of the contract the time of its performance is made essential, and that the plaintiff on his part failed and refused to perform within the time limited, namely, September 21, 1898, and that, therefore, the plaintiff is not now in position to compel performance on the part of the defendant, or to recover damages for non-performance; secondly, that there was no consideration for defendant's promise.

Without assenting to or discussing the correctness, as a matter of law, of the first position taken by the defendant, we need only say that we think the evidence is plenary that for many days, even weeks, after September 21, 1898, the defendant and his attorneys were treating the contract of December 4, 1897, as still subsisting. Although the correspondence was voluminous, it gives no hint of any purpose on the part of the defendant to claim that the contract was at an end. We think this defense, if it otherwise had any merit, must be regarded as waived.

But the second and real defense presents a serious difficulty. It is undoubtedly true that the contract of March 2, 1896, so far as relates to the purchase of the plaintiff's stock was unilateral. It gave to the defendant an option on the stock, without any expressed limit of time for the exercise of the option, but he was under no obligation whatever to buy. On the other hand, the plaintiff expressly bound himself to transfer his interest in the stock to the defendant, at the defendant's option, with the consent of Boardman, and further agreed not to re-pledge the stock for any purpose at any time during the time limited in the Boardman agreement. The transfer was to be made to the defendant upon his payment of all sums which the plaintiff might have advanced on account of the stock, with interest thereon, and upon the defendant's assuming all of the plaintiff's obligations under the Boardman contract, and guaranteeing him against all loss, cost, damage or expense on account of the same. Such were the rights and obligations of the parties under the contract of March 2. Now the contract of December 4, which is the basis of this suit,

purports to be "supplementary to and explanatory of" the contract of March 2. Its expressed purpose is to make the contract of March 2 "clearly conform to the original understanding of the parties." By this contract the defendant agreed to purchase and pay for the plaintiff's interest in the stock, on or before September 21, 1898, the purchase price being seven thousand six hundred and fifty-seven dollars, with interest thereon from September 25, 1895. The contract, as we construe it, further provided that the defendant was to succeed to the plaintiff's rights in the stock upon purchase and payment at any time, but was not to have an actual transfer of the stock during the time limited in the Boardman agreement, without Boardman's consent. Now it is evident that by this new contract, the defendant ceased to have an option merely on the stock, but he agreed to become the absolute purchaser, and he is now bound by his contract, if there was any consideration for his agreement.

Upon careful analysis of this contract, and of the other evidence in the case, we fail to find any consideration to support the contract. The rights and obligations of the plaintiff were not in any degree changed to his detriment. The purchase price, as shown by computation, appears to be the same. The new contract does not purport to release the defendant from assuming plaintiff's obligations under the Boardman contract or from guaranteeing the plaintiff against loss under it. In fact, the case shows no obligation or liability to loss which is not covered by the provision in the new contract that the defendant was to have the plaintiff's rights in the stock, "subject to the agreement between Wescott and Boardman." The change from the unlimited time of the option to the fixed limit of time in the new contract, "on or before September 21, 1898," was rather advantageous than otherwise to the plaintiff. The provisions in the new contract relating to transfer are couched in somewhat different language from those in the old one, but the effect is substantially the same. At least, there is no change to the disadvantage of the plaintiff. The plaintiff made no new contract. He did by implication agree to convey his interest in the stock upon purchase and payment

by the defendant, but this he was already legally bound to do by the former contract, and for this reason no new consideration arose.

We think the law is settled by the great weight of authority, that the mere agreement to perform an existing contract obligation by one party to a contract is not a valid consideration for a new promise by the other party. *Wimer* v. *Overseers of the Poor of Worth Township*, 104 Pa. St. 317; *King* v. *Duluth M. & N. Ry. Co.*, 61 Minn. 482; *Lewis* v. *McReavy*, 7 Wash. 294; *Vanderbilt* v. *Schreyer*, 91 N. Y. 392; *Jackson* v. *Cobbin*, 8 M. & W. 790. See note to *Ferguson* v. *Harris*, 39 Am. St. Rep., at p. 745.

We are not called upon to consider the large class of cases concerning promises made to induce an unwilling party to complete his contract, nor those where the new promise is made by a stranger to the contract, in which classes of cases there seems to be much contrariety of opinion. Nor is this a case where the parties have mutually abandoned an old contract, or waived its terms, and have made a new contract in consideration of new and mutual promises. Nor is it a case, so far as appears, where the parties have corrected an earlier contract erroneously expressed. Parties, no doubt, have a right to abandon a contract, and make a new one to suit themselves for new considerations. They have a right to modify a contract, for new considerations. And it may well be that errors may be corrected and omissions supplied, by explanatory writings, without new consideration.

In this case the contract declares itself to be "supplementary," a term which well comports with the idea of new provisions in a contract. It is said, indeed, that it is "explanatory," and that it is to make the original contract "clearly conform to the original understanding of the parties." But what it explains, or in what way it makes the old contract "conform," does not appear. No light is thrown upon the question by any testimony from the parties themselves. Nor do sufficient extraneous circumstances appear from the contracts and other documentary evidence to give us any aid. Some things appear to be more carefully and exactly expressed, in the new contract, as, for instance, the amount of the purchase price, and the conditions attending the transfer of the

stock. But the vital thing in the new contract does not seem to be "explanatory," and that is the engagement of the defendant to purchase and pay for the stock. A liability on his part is created where none existed before. This is rather "supplementary" than "explanatory."

If it be said that the new contract was made to correct an error or supply an omission, the question arises at once, what error, what omission? The only apparent change in the contract was from an "option" on the part of the defendant to an express engagement, to buy and pay for. Was the granting to the defendant of an "option" in the first contract, an error? It can hardly be believed. When two competent business men engage in a negotiation for the sale of stock, and it is understood that the would be purchaser is to become absolutely bound to purchase, it is hardly to be supposed that they will express their understanding by giving the purchaser merely, but expressly, an option. It is difficult to believe that two gentlemen of recognized great business capacity, such as these parties are, in preparing a contract of great consequence to themselves, should have fallen into the error, so-called, of calling an absolute purchase a mere option. At least, we think so improbable a theory should be supported by proof rather than guesswork before we adopt it.

If it be supposed that the new contract was made to supply an omission in the old one, a slight examination will disclose how baseless the supposition is. The use of the word "option" negatives the claim that an agreement to purchase was omitted. This was expression, not omission. The use of the word "option" necessarily and affirmatively excludes any absolute agreement to purchase. By its use the parties assert a fact entirely inconsistent with the existence of an agreement to purchase. We think they did not *omit* to express a contract of purchase, for they did express an option.

But it is suggested that this new contract was entered into to make the old contract "conform to the original understanding," and, indeed, the new contract itself says so. But what "original understanding" is meant? Does it mean the understanding at the

time the old contract was made, or some antecedent understanding? Even the old contract refers to an "original understanding" relating to the St. Croix & Penobscot R. R. Co.

The real question is, was the old contract, the contract of March 2, made according to the understanding of the parties at the time. If so, it was not subject to correction of errors. It embodied the real agreement. If so, it was not competent for the parties afterward to embody some antecedent original undertaking in the form of a new contract, and thereby bind the defendant to an additional engagement on his part, unless there was a new consideration. The contract of March 2 appears to have been carefully and deliberately drawn, and for reasons already stated, we think it expressed the meaning of the parties at the time it was made, without error or omission, so far as relates to the purchase of the stock.

Accordingly, we think the contract sued upon must be deemed a new contract, and if that be so, we have already shown that there was no consideration for the defendant's promise.

Judgment for the defendant.

SETH L. LARRABEE, and others, Admrs.

vs.

CHARLES H. T. J. SOUTHARD.

Kennebec. Opinion July 25, 1901.

Bills and Notes. Interest. Demand. Action. R. S., c. 32, § 10; c. 72, § 10; c. 81, § 95.

In suit on a promissory note of the following tenor:

"$4,932.02. Richmond, Maine, Feb. 27th, 1892.

For value received we promise to pay Jane J. Southard, forty-nine hundred thirty-two 02-100 dollars, on demand after April 27th, 1892, and interest at four per cent per annum thereafter at our office in said Richmond, Maine.

T. J. Southard & Son."

Held; that the note bore interest from April 27th, 1892, although demand was not made until November 21st, 1898.

When a writ was made with the intention of service, declaring on such a note October 25th, 1898, and before demand had been made, but was not served or used, and on November 21st, 1898, after demand had been made, the same writ was altered by changing the date from October 25, to November 21st, and then served, *held;* that the writ as served must be regarded as a new writ dated November 21st, 1898.

Held; accordingly, that this action was not prematurely brought.

Motion and exceptions by defendant. Overruled.

Action on promissory note against the defendant as surviving partner of the firm T. J. Southard & Son. After the testimony had been adduced, the presiding justice ordered the jury to return a verdict for the plaintiffs, with four per cent interest after maturity of the note.

L. C. Cornish, S. L. Larrabee, and O. D. Baker, for plaintiffs.

Enoch Foster and Wm. T. Hall, Jr., for defendant.

SITTING: WISWELL, C. J., EMERY, SAVAGE, FOGLER, PEABODY, JJ.

SAVAGE, J. Assumpsit upon a promissory note of the following tenor:

"$4,932.02. Richmond, Maine, Feb'y 27, 1892.

For value received we promise to pay Jane J. Southard, forty-nine hundred thirty-two 02-100 dollars, on demand after April 27th, 1892, and interest at four per cent per annum thereafter at our office in said Richmond, Maine.

T. J. Southard & Son."

I. The first controversy arises as to the date from which interest is to be computed. The plaintiff claims that the note bore interest from April 27, 1892. The defendant contends that the note bore no interest until a "demand after April 27, 1892." The presiding justice ruled in favor of the plaintiff's contention, and we think his ruling was right.

As we construe this note, it was due, in a commercial sense, immediately "after" April 27, that is, April 28, and but for the statute, R. S., chap. 32, § 10, it might then have been sued without demand made. The statute referred to does not in any way

affect the interpretation of the note; but it does provide that when a promissory note is made payable on demand after a time specified, the plaintiff shall not recover in an action upon it unless he proves a demand made at the place of payment prior to the commencement of the suit. This note matured, then, on April 28, 1892, but being made payable on demand after a time, and at a place, specified, no action could be maintained without proof of demand before suit was brought.

Bearing in mind that the note matured April 28, when did interest begin to accrue? Without the use of the word "thereafter" interest would have run from the date of the note. The word "thereafter" therefore limits the interest period. "Thereafter" what? After "demand?" or after maturity? Which is it? We think the latter. The date April 27, is fixed, definite. It marks a line. Before it the principal of the note was not due, and its payment could not be enforced. After it the principal was due and payment could be immediately enforced, upon demand at the place where payable. This date therefore becomes the prominent feature of the note so far as time is concerned. What was more natural than for the parties to express the limitation of the interest period by reference to that expressed date? The definite date then marks the line between interest and no interest. This interpretation seems to us to be natural and reasonable, and consonant with the character of the instrument. It also comports with a common rule of grammatical construction, whereby, in case of doubt, a relative term is rather to be considered as relating to the nearer of two antecedents. While this rule does not hold universally, it is of assistance when the construction would otherwise be doubtful.

II. The defendant also contends that the suit was prematurely brought; that the action was commenced before demand was made; and he relies upon R. S., chap. 81, § 95, which provides that a "suit is commenced when the writ is actually made, with the intention of service." It appears that on October 25, 1898, one of the attorneys for the plaintiff made a writ declaring upon this note, and the action was then docketed in the attorney's office docket. But

the writ remained in his possession; it was not delivered to an officer; and, of course, no attachment was made upon it. For the purposes of this case, we assume that the writ was made "with the intention of service." November 21, 1898, plaintiffs made the demand on which they rely as giving them the right to maintain their action, under R. S., chap. 72, § 10. Afterwards, on the same day, the attorney who had made the writ went to his office, caused the date October 25 to be changed to November 21. The writ was then served.

Under these circumstances we think the writ as served must be regarded as a new writ. It was precisely the same as if the old writ had been thrown away, and an entirely new one made. For obvious reasons the old writ with its old date was abandoned. It was then immaterial whether the old writ was re-written, amended, or a new one filled out. The writ now under consideration is the writ dated November 21, 1898, and must be regarded as made on that date. So the presiding justice below ruled.

Under a motion for a new trial the defendant has argued the same questions as are presented by the exceptions. For reasons already given, the motion must be overruled.

Motion and exceptions overruled.

FIRST NATIONAL BANK OF GUILFORD *vs.* EDWARD WARE.

Piscataquis. Opinion July 25, 1901.

Bankruptcy. Insolvency. Assignment. Composition. Discharge. R. S., c. 82, § 45. Stat. 1897, c. 325, § 16.

1. The present United States Bankruptcy Act became operative July 1, 1898, and upon that day deprived the courts of insolvency in this State of all power and jurisdiction to administer insolvent estates and grant discharges from debts, except in those cases in which insolvency proceedings had been begun before that day.

2. Insolvency proceedings, under the insolvent law of the State, are not begun until the power and jurisdiction of the court are invoked by filing with the court the papers drafted for that purpose. Hence, where no papers were filed

in the court of insolvency until July 8th, 1898, that court has no power or jurisdiction in the matter, and can give no discharge, though the debtor had made an assignment for the benefit of creditors on May 25th, previous.

3. Where a debtor made an assignment for the benefit of creditors, but afterward abandoned proceedings under it and proposed instead thereof a composition agreement by which his creditors were to accept a fixed percentage of their debts in full discharge, creditors assenting to such composition agreement do not thereby become parties to the prior assignment, and their claims are not discharged until the percentage is paid according to the terms of the agreement, even though the interest upon their claims is reckoned up to the date of the first assignment.

4. The promise of a creditor to accept a percentage of his admitted claim in full discharge is not binding upon him unless supported by a new consideration,—some new advantage to the creditor, or some new disadvantage to the debtor.

5. When a debtor has proposed to his creditors that they accept in full discharge of their admitted claims a percentage in two installments, the mere acceptance by a creditor of the first installment with notice that it is paid under that proposition does not bind the creditor to discharge his claim upon payment of the last installment. Revised Statutes, ch. 82, § 45, applies only to cases where the final payment is received in full present discharge.

6. To make a composition agreement not under seal signed by several creditors binding upon such creditors when no other consideration is shown, it must appear that the creditors joined together in such agreement so that the promise of one was the inducement, or consideration, for the promise of the others.

7. After such composition agreement has been concluded between a debtor and several of his creditors, a subsequent payment by him thereunder to another creditor, who had never signed nor agreed to sign the agreement and whose claim was unknown to the signing creditors, does not make him a party to the agreement between the creditors.

On report. Judgment for plaintiff.

Assumpsit on two promissory notes to which the defendant, as maker, pleaded a composition agreement under insolvency proceedings as a bar.

The case appears in the opinion.

H. Hudson, for plaintiff.

C. F. Johnson, for defendant.

The plaintiff cannot recover because it assented to the composition agreement by accepting the first payment under it.

The recent decision of this court in *Anderson* v. *Standard Granite Company*, 92 Maine, 429, is directly in point. "If an offer of money is made to anyone upon certain terms and conditions and the party to whom it is offered takes the money, though without words of assent, the acceptance is an assent de facto and he is bound by it. The acceptance of the money involves the acceptance of the condition. Under such circumstances the assent of the creditor to the terms proposed by the debtor will be implied and no words of protest even can affect this result."

In *Fuller* v. *Kemp*, 138 N. Y., 231, (20 L. R. A. 785,) the court held that accepting a check for less than the amount claimed on an unliquidated bill for a physician's services constituted an accord and satisfaction, where the check was sent with the express statement that it was in full satisfaction.

In this case the claim was an unliquidated one, but by our statute c. 82, § 45, it makes no difference whether the claim is liquidated or unliquidated which has been settled by the acceptance of a less sum than its face, and therefore an agreement to settle a liquidated claim for a sum less than its face is equally as binding as an agreement to settle an unliquidated one.

Even in those states where the rigor of the old common law rule has not been relaxed by statutory enactments and it is held that there is no consideration for the promise of a creditor to receive a sum less than the face of his claim in full settlement thereof provided the claim is a liquidated one, an exception is made in case of composition papers and also where payment is made by a third party.

In *Kitchin* v. *Hawkins*, 12 Jur. N. S. 928, the facts were very similar to those in this case. There a debtor executed a deed of composition securing to all his creditors ten shillings on a pound. The plaintiffs withheld their consent to the deed. The composition under the deed was paid to the complainants, who kept the money without stating on what account it was received or without giving any acknowledgment for it. They afterwards claimed to have received it on account of their original debt. Held, that the plaintiffs were precluded from saying that they had received it on

account of the original debt and that it must be taken to have been paid as a composition under the deed.

In *Chafee* v. *Fourth National Bank of New York*, 71 Maine, p. 527, where the defendants received payment under an assignment and afterwards attacked the assignment as void, the court said: "And knowingly receiving payments or dividends thereby secured to them is conclusive evidence of assent."

In *Mellen* v. *Goldsmith*, 47 Wis. 573, (32 Am. Rep. 781,) the appellants had verbally agreed with the respondent to compromise their claims against him and sign a deed of composition for sixty cents on a dollar and in consideration and upon the condition that the other creditors would do so. The other creditors did so compromise and sign such deed. The appellants refused so to do and refused to accept such per cent, in satisfaction of their claim tendered for such purpose by the respondent, and the court there held that they could only recover the rate fixed in the agreement.

In that case it was objected that there was no satisfaction and that the agreement was entirely executory, but the court quoted approvingly Lord Ellenborough in *Bradley* v. *Gregory*, 2 Campbell, 383, where he says: "I think the agreement in the present case operates as a satisfaction; but it is said the agreement is executory and therefore can be no bar. I think it is executed. Everything on the defendant's part was performed and, as far as depends upon him, there has been satisfaction as well as accord. It is the plaintiff's own fault that he has not enjoyed the full benefit of all that he stipulated for,—and I am of the opinion that in point of law, the action is not maintainable."

Counsel also cited: *Good* v. *Cheesman*, 2 B. & A. 328; *Steinman* v. *Magnus*, 11 East, 390; *Pierce* v. *Jones*, 28 Am. Rep. 288; *Perkins* v. *Lockwood*, 100 Mass. 249; *Eaton* v. *Lincoln*, 13 Mass. 424; *Farrington* v. *Hodgdon*, 119 Mass. 453; *Sage* v. *Valentine*, 23 Minn. 102; *Williams* v. *Carrington*, 1 Hilt. (N. Y.) 514; *Blair* v. *Wait*, 69 N. Y. 113; *Fellows* v. *Stevens*, 24 Wend. (N. Y.) 294; *Paddleford* v. *Thacher*, 48 Vermont, 574; *Pfleger* v. *Brown*, 28 Beav. 391; *Gillfillan* v. *Farrington*, 12 Ill. App. 101; *Way* v. *Langley*, 15 Ohio St. 392.

It is not necessary that an agreement to make a composition with a debtor be in writing. *Chemical National Bank* v. *Kohner*, 85 N. Y. 189; *Byron* v. *Mount*, 24 Beav. 642; *Cork* v. *Saunders*, 1 B. & A. 46; *May* v. *Wannemacher*, 111 Mass. 202; *Pierce* v. *O'Brien*, 129 Mass. 314; *Jones* v. *Tilton*, 139 Mass. 418.

Consideration: It is true that the defendant had made an assignment for the benefit of all of his creditors, but in order to obtain the debtor's assistance and to avail themselves of his acquaintance with his business, they were willing to enter into the composition which was made and to substitute their rights under this for the rights secured to them by an assignment. This furnished the consideration for the agreement of each of the creditors to settle his claim for less than its face value, as also the mutual promises of each of the creditors,—for each has the undertaking of the rest as a consideration for his undertaking.

The plaintiff is estopped to recover the balance of its claim in full. Equitable estoppel is now available as a defense in actions at law as well as in equity. *Tracy* v. *Roberts*, 88 Maine, 310; *Brant* v. *Virginia Coal & Iron Co.*, 93 U. S. 326.

Equitable estoppel in the modern sense arises from the conduct of the parties, using that word in its broadest meaning, as including his spoken or written words, his positive acts, and his silence or negative omission to do anything. Pomeroy's Equity, § 802.

In *Caswell* v. *Fuller*, 77 Maine, 105, the court uses the following language, "That a man should be allowed by his own speech and conduct to lead another astray and thereby take substantial benefit from the error of which he was the cause, is subversive of natural justice." This language is cited approvingly in the *American Gas and Ventilating Machine Company* v. *Wood*, 90 Maine, 516, and in an earlier case in our state, *Copeland* v. *Copeland*, 28 Maine, 525, this doctrine of equitable estoppel or estoppel in pais is fully recognized.

The payment received by the plaintiff should have been returned. The fund upon which the assignee drew his check was one created for the benefit of the creditors who had agreed to the composition with the defendant. If the defendant had succeeded in realizing

less than thirty per cent from his assets, the amount to be distributed among the creditors who had assented in good faith to the composition would have been diminished by the amount paid by the plaintiff, and it would be a gross fraud upon them and the defendant for the plaintiff to retain the payment which was made to it after the statements made by the cashier of the bank, and then to repudiate the terms of the agreement under which it was made and bring a suit to recover the balance in full of its claim.

In *Fuller* v. *Kemp*, 138 N. Y. 231, 20 L. R. A. 785, the court says that it is of no significance in this case that the remittance was by check. Both parties treated it as money and upon the receipt of this letter the plaintiff had but a single alternative presented for his action,—the prompt restoration of the money to his debtor or the complete extinction of the debt by its retention. The tender and its condition could not be dissevered. The one could not be taken and the other rejected. The acceptance of the money involved the acceptance of the condition. If the plaintiff did not wish to assent to the terms of payment, it should have returned the check. *Anderson* v. *Standard Granite Co.*, 92 Maine, 429; *Bisbee* v. *Ham*, 47 Maine, 543; *Percival* v. *Hichborn*, 56 Maine, 575; *Staples* v. *Wellington*, 62 Maine, 9; *Burrill* v. *Parsons*, 73 Maine, 286.

In a similar case, *Eaton* v. *Lincoln*, 13 Mass. 424, the court held that the person acting in a similar capacity to that in which the assignee acted in this case, was the agent of the creditor and that receipt by him would sustain a plea of accord and satisfaction. The defendant had performed fully his part of the composition agreement when he had paid the whole of the last dividend to the assignee.

SITTING: EMERY, WHITEHOUSE, SAVAGE, FOGLER, POWERS, JJ.

EMERY, J. This is an action of assumpsit on two promissory notes given by the defendant for value and discounted by the plaintiff bank for value. The defendant claims one or more

defenses to be afforded by certain transactions briefly stated as follows:—

On May 25, 1898, after giving the notes, the defendant made a common law assignment under seal for the benefit of his creditors in the usual form, with the usual provision for the immediate release of claims, to Chas. F. Johnson. Several of his creditors, including the plaintiff bank, did not, at the time at least, become parties to this assignment. Indeed, the plaintiff bank did not then know of it. The defendant afterward, on July 8, 1898, filed this assignment and also his petition in insolvency in the Insolvency Court for Kennebec county, under sec. 16, ch. 325 of Laws of 1897, additional to and amendatory of the prior insolvency laws of the State. The usual proceedings were then had until Sept. 25, 1898, when the usual composition paper was prepared in the terms following:

"September 25, 1898.

We, the undersigned, creditors of Edward Ware of Waterville, in the county of Kennebec, hereby agree to accept thirty per cent of our actual net claims against him, the amounts of which are correctly stated against our respective names, in full discharge thereof; fifteen per cent in four months after September first, 1898, and fifteen per cent in eight months after said date.

"We have not, directly or indirectly, received any compensation or promise of future payment beyond the per cent herein named."

This composition was afterward found by the Insolvency Court to have been signed by the number and amounts of creditors required by the insolvent law, and the defendant was thereupon, November 27, 1898, granted a certificate of discharge from his debts according to the provisions of the insolvency law. The plaintiff did not sign this composition paper and at first positively refused to do so, but later its cashier gave the assignee, Mr. Johnson, some encouragement that the bank would sign it. At any rate, Mr. Johnson on December 31, 1898, sent to the bank his check for the first fifteen per cent enclosed in a letter stating that the enclosed check was for the dividend of fifteen per cent due January 1, 1899, under the composition agreement of September 25, 1898,

reciting the substance of it, and also reciting May 25, 1898, as the date of the assignment. The plaintiff bank credited the check on the notes, but made no reply to the letter. Again, on April 24, 1899, Mr. Johnson sent another check for fifteen per cent more enclosed in a letter stating that it was in full of the balance of the note according to the composition agreement of September 25, 1898. This check the plaintiff returned with word that it could not be received in full payment but only on account, as the bank had never agreed to accept thirty per cent in full.

In the meantime there was an arrangement entered into between the defendant, Mr. Johnson and some of the creditors, by which the title to the defendant's property was to be placed or remain in Mr. Johnson as security for the payment of the thirty per cent. It does not appear, however, that the plaintiff bank was any party to this arrangement or was ever informed of it.

Under the foregoing circumstances the defendant sets up defenses as follows:

I. He contends he was effectually discharged from these notes by the decree of discharge dated November 27, 1898, in the insolvency proceedings recited. But his insolvency proceedings were not begun till July 8, 1898, when his previous assignment and his petition were filed, and when the insolvency court had been deprived of all power and jurisdiction in the matter by the United States Bankruptcy Act enacted and put in force July 1, 1898. *Parmenter Mfg. Co.* v. *Hamilton*, 172 Mass. 179, and cases there cited. The defendant urges in reply that his insolvency proceedings were really begun May 25, 1898, when he made his common law assignment for the benefit of creditors and hence were saved by the clause in the U. S. Bankruptcy Act saving all proceedings begun before the passage of the Act July 1, 1898. His common law assignment, however, was no part of the insolvency proceedings, until, at least, it was filed in the insolvency court with his petition to be declared an insolvent. It gave the court no jurisdiction over him or his property or his debts. The insolvency proceedings were not begun until the power of the insolvency court was invoked.

II. He next contends that if all the insolvency proceedings were rendered nugatory by the prior interposition of the U. S. Bankruptcy Act, his assignment for the benefit of creditors remained good. But, to constitute that a defense, he must go further and show that the plaintiff bank became a party to that assignment. It was an instrument under seal and it is not pretended that the plaintiff bank or any of its officers ever sealed it, signed it, or saw it. It does not appear that they ever knew of it unless the recital in the letter of December 31, 1898, that the claims were made up to the 25th day of May, 1898, the date of his assignment, is such knowledge. That letter, however, explicitly stated, "This payment [the first dividend of 15 per cent] is made in accordance with the terms of the composition settlement entered into between Mr. Ware and the requisite number of his creditors by which 15 per cent of all claims was to be paid within four months after September 1, 1898 and 15 per cent within eight months after said Sept. 1."

The acceptance of the check contained in that letter, thus reciting the agreement of September 25, 1898, clearly did not make the bank a party to an entirely different agreement not recited nor stated to be one in accordance with which the check was sent.

But the defendant argues that the assignment of May 25, 1898, was a part of his insolvency proceedings all through, and hence a part of the composition settlement of September 25, 1898. To this argument there are two answers. (1) The supposed insolvency proceedings, as already stated, were of no force, and no other connection could be made through them than was made without them. (2) If the supposed insolvency proceedings had been valid, the assignment of May 25, 1898, was practically eliminated. Under § 16, ch. 325, Laws of 1897 above cited (had that law continued in force) the defendant could have obtained his discharge upon the assignment alone, could he have shown that it was executed in good faith by himself "and the required majority of his creditors;" but he abandoned that ground for discharge and sought his discharge upon a composition settlement of an entirely different nature and effect, and not tendered creditors till September 25,

1898. It was explicitly under this latter instrument that the check of December 31, 1898, was sent and accepted. The defendant did not then claim that it was under the prior and different assignment.

III. The defendant again contends that, in any event, the plaintiff bank by accepting the check of December 31, 1898, for the first fifteen per cent with the explicit notice that it was sent under the composition settlement of September 25, 1898, thereby became a party to that settlement, and hence can only recover the remaining fifteen per cent provided in that settlement. Passing the question whether by accepting the check the plaintiff bank in effect signed the composition settlement, we proceed to inquire whether the agreement therein contained, even if assented to, was upon such consideration as made the agreement binding on the plaintiff bank. We find no such consideration disclosed in the evidence, however the fact may really have been.

The composition agreement must be construed without reference to the former insolvent law as that had been repealed before the beginning of the proceedings. It was a unilateral agreement being by the creditors only. It was purely executory. The creditor did not then accept thirty per cent in full, but nakedly agreed to accept it in the future. Mr. Ware did not agree to pay it. He bound himself to nothing. He gave up nothing, at least to the knowledge of the plaintiff bank. No advantage to the creditors nor detriment to the debtor is shown.

Nor did the acceptance of the partial payment constitute such a consideration. That payment was not accepted nor tendered in full. It was explicitly tendered as part payment only. Here, again, appears no advantage to the creditor nor detriment to the debtor. It was the defendant's duty to pay the whole debt, and hence in paying part he only did part of his duty. The duty to pay the balance still remained upon him. He deprived himself of no right, and incurred no additional obligation. The plaintiff bank received nothing it was not before fully entitled to receive. It acquired no new right. It had only its prior right.

The statute R. S., ch. 82, § 45, does not apply to this case. That

statute only applies where payment of part is tendered and accepted in full discharge at the time. Where the payment is not tendered and accepted in full, but only on account, it constitutes no consideration for any agreement for an abridgement of the creditor's prior rights. *Bailey* v. *Day*, 26 Maine, 88; *White* v. *Jordan*, 27 Maine, 270; *Webb* v. *Stuart*, 59 Maine, 356; *Mayo* v. *Stevens*, 61 Maine, 562; *Young* v. *Jones*, 64 Maine, 563; *Dunn* v. *Collins*, 70 Maine, 230.

It does not appear from the evidence that the defendant proposed or would have been obliged to take any particular course in case the plaintiff did not accept the thirty per cent in full. There was no suggestion that bankruptcy proceedings were the alternative. Non constat that the defendant could have obtained a discharge in bankruptcy, or would have resorted to the bankrupt court to administer his estate.

Nor does the evidence show a case within the principle of those cases holding that, where creditors mutually agree with the debtor and with one another, to accept a percentage of their debts in full discharge, the mutual promises of the creditors to one another constitute a sufficient consideration for the promise of each. In such cases the engagement of the creditors to accept a percentage for their debts is the consideration for the giving up by each of his claim for the residue. Such a mutual engagement to reduce the aggregate amount of the liabilities of the common debtor increases his ability to pay the agreed percentage and the chances of their receiving it. But there must be a mutuality among the creditors. The creditors must join together; must stipulate with one another. It must appear that the creditor seeking to recover his full claim had so stipulated, not only with the debtor, but with the other creditors. *Perkins* v. *Lockwood*, 100 Mass. 249; *Curran* v. *Rummell*, 118 Mass. 482; *Saye* v. *Valentine*, 23 Minn. 102; *Daniels* v. *Hatch*, 21 N. J. L. 391.

In this case the composition agreement did not bear the signature of the plaintiff, nor was the plaintiff's name upon the list of creditors submitted by Mr. Ware, the debtor. It does not appear that the other creditors when signing had any knowledge that the

plaintiff was also a creditor. Mr. Ware and the signing creditors seem to have gone on and completed their arrangement, and Mr. Ware, and his attorney or assignee, to have begun making payments under it without obtaining or insisting on the plaintiff's assent. As said in *Daniels* v. *Hatch*, supra: "Nor is it pretended that any creditor was induced to accept the compromise in consequence of the promise made by the plaintiff to sign the deed. On the contrary it seems highly probable, if not certain from the evidence, that both the composition deed and the assignment were fully executed before the alleged promise was made by the plaintiff." Again, as said in *Sage* v. *Valentine*, supra: "There is no evidence tending to show that there was any communication between the plaintiff and the other creditors, either directly or indirectly, or that the plaintiff and the other creditors joined together, or stipulated one with the other, in any agreement for a composition. As respects the plaintiff then, the agreement with the defendant lacked the element of mutuality between creditors, and was therefore without valid consideration."

In this case the plaintiff's first and only act was in receiving a partial payment voluntarily made after the composition agreement had been completed and assumed to be in force. As to the plaintiff, the attempted composition was res inter alios. Neither the reception nor the return of this payment would have made the slightest difference to the other creditors.

No other defenses are set up, and the mandate must be,

Judgment for the plaintiff.

MILDRED F. MILLETT *vs.* CHARLES W. MULLEN and others.

Penobscot. Opinion July 26, 1901.

Taxation. Forfeiture to State. Redemption. Sale. Advertisement. Deed. Description. Writ of Entry. Equitable Defenses. Evidence. R. S., 1883, c. 6, §§ 71-76; 1841, c. 14, §§ 1-9; Stat. 1842, c. 11; 1845, c. 135; 1848, c. 272; 1852, c. 272.

1. Statutes providing for forfeitures of property for non-payment of taxes are to be construed strictly against the State and its grantees. Statutes providing for relief from forfeitures are to be construed liberally to effect such relief.

2. The statute of 1848, ch. 65, approved August 10, 1848, explicitly vested in the former owner of lands in unincorporated places forfeited to the State under R. S., 1841, ch. 14, §§ 1-9, "a right to redeem the same" from the State, or its grantee, by paying the taxes, etc., "at any time within one year from the time of sale" by the State.

3. The above statute of 1848 applied to those lands which had already been wholly forfeited and the forfeiture had become complete before the date of the statute, August 10, 1848, as well as to lands not then wholly forfeited.

4. This "right to redeem" thus vested by the statute of 1848 in the former owners of lands thus wholly forfeited was more than a mere right to purchase, vesting no present interest. It was explicitly "a right to redeem," that is, a right to unloose from an incumbrance. The statute reduced the State's former title to a lien, and vested in the former owners a present heritable and conveyable title, good in them, and their heirs and assigns, against all parties but the State and its lawful grantees.

5. An advertisement for sale by the State of "all the right, title and interest which the State of Maine has by virtue of such forfeiture (viz. a completed forfeiture under R. S., 1841, ch. 14, §§ 1-9) in and to six thousand five hundred acres of land in Township No. Three, Indian Purchase," and a deed from the State with the same description and no more, do not identify any specific parcel, or even any specific acres, and hence do not pass the State's title thereto, nor bar the former owner's right to redeem his land from the forfeiture.

6. The heirs and assigns of the former owner of land forfeited for non-payment of State taxes have sufficient title to maintain a writ of entry against a party whose only claim of title is under the sale and deed described in the last foregoing paragraph.

7. The argument that such a construction of the statute of 1848, ch. 65, will deprive the State of its revenues from taxes upon wild lands in unincorpora-

ted places by encouraging land owners to neglect payment of taxes, cannot prevail against the evident meaning and purpose of the statute. It is for the legislature to remedy the evil, if any.

8. The fact that the parties, supposing they had acquired the State's title, have paid the State taxes upon any tract of wild land for a long series of years, does not create any title in them. The payment of taxes by the actual occupant of land is evidence of the adverse character of the occupancy, but is not evidence that the tax-payer is in fact occupying the land.

9. The mere cutting and removing timber or wood from wild land from time to time for sale or manufacture, without any purpose of clearing the land, do not constitute an occupation sufficient to bar the record owner, though it be carried on for more than twenty years.

10. No equities can be considered in this case, since the only question raised by the pleadings or the evidence is as to the strict legal rule of legal title to property.

Hodgdon v. *Wight*, 36 Maine, 326, overruled.

Chandler v. *Robbins*, 79 Maine, 76, affirmed.

On report. Judgment for plaintiff.

Real action against Charles W. Mullen, James Rice, Millard E. Mudgett, Clarence S. Lunt and Joseph P. Bass to recover lots 4 and 16 of wild land, each containing two hundred acres, in Township No. 3, Indian Purchase, Penobscot County.

The case appears in the opinion.

H. M. Heath, C. L. Andrews; J. Williamson, Jr., and L. A. Burleigh, for plaintiff.

Defendants' claim that title is in the State:

1. It must be proven that the land to be forfeited was "not taxable by the assessors of any town or organized plantation." R. S., 1840, c. 14, §§ 1–10.

2. The statute requires a legal assessment. Tax 1844 was assessed upon the valuation of that year. While the tax act reads, "No. 3, Indian Purchase," it is plain that the tax was in fact assessed upon that portion of No. 3 referred to in the valuation as "Part No. 3, Indian Purchase." Constitutionally, the tax must follow the valuation. Figures from the state treasurer's books reinforce the proposition that the entire township, less the public lots, was not assessed under the description.

The State is bound by the same rules of certainty of description, if it would rely upon a forfeiture, as towns. *Griffin* v. *Creppin*, 60 Maine, 270; *Greene* v. *Lunt*, 58 Maine, 518; *Orono* v. *Veazie*, 61 Maine, 431; *Larrabee* v. *Hodgkins*, 58 Maine, 412; *Libby* v. *Mayberry*, 80 Maine, 137. The legal principle that required this court to declare the tax deeds void in *Moulton* v. *Egery*, 75 Maine, 485, and *Skowhegan Savings Bank* v. *Parsons*, 86 Maine, 514, requires an adjudication that an assessment reading "Part No 3, Indian Purchase, 23,040 acres," is equally void. An assessment in solido, upon a township, surveyed by the state into 127 lots of 200 acres each, five owned by the State as public lots, and 122 owned by various parties in severalty, is void. The State is bound by the same principles of justice, independently of statutory rules, that govern towns. *Wallingford* v. *Fiske*, 24 Maine, 386, decided that each lot should be separately taxed. In *Greene* v. *Lunt*, supra, it was held that if there is no definite parcel taxed there can be no lien. *Nason* v. *Ricker*, 63 Maine, 381, held that a valuation and assessment in gross upon two distinct parcels is void. Under any statutory system, then or now in use, lands divided by the State itself into lots should be taxed as lots. R. S., 1840, c. 14, § 1, contemplated such separate assessment: "State tax. . . . on any township or tract of land." Each lot was a tract, with an independent value. It is not impracticable for the State to ascertain from the records the subdivision of separate ownerships. Towns are required so to do. Surely in Indian Three it was easy so to have done in 1844, for the State made the full subdivision and deeded accordingly. A tax assessed for public purposes cannot constitutionally be imposed upon a portion only of the real estate of a town, leaving the remainder exempt. *Dyar* v. *Farmington*, 70 Maine, 515. The State has no more authority to tax a township owned in severalty, subdivided into lots, as a unit, than it would have to tax in solido all the "wild lands in Penobscot."

It would assist the future collection of State taxes to have this court hold that wild lands owned in severalty must be separately assessed and separately described, and that this point should not be

dismissed as unnecessary to the decision of this cause. Such a decision would put the State where its tax sales would be valid. There would be an end of the acreage system of payments, and no more deeds like that in *Moulton* v. *Egery*. With the fear of valid tax sales before their eyes, all taxes on wild lands would be promptly paid. The State assessors could easily make the assessment follow the separate ownerships to the extent of subdivisions in severalty. The registries of deeds contain the evidence. There is a crying need of such a revolution in the present system, whereby the State is annually a heavy loser. Good public policy demands this construction of the law and its decision. The State has suffered long enough by clinging to the antiquated methods of the State Treasurer's office that defy every principle of law and business. There is no proof that the public lots were exonerated. If so, the lots doomed as unpaid were unequally taxed.

In *Hodgdon* v. *Wight*, 36 Maine, 326, no question was raised as to the sufficiency of the description in the tax deed. It was assumed to be good, although clearly void. No question was raised as to the validity of the assessment. The entire township was owned in common and therefore properly taxed in solido. The validity of the assessment was assumed. None of the points as to the validity of assessment now raised were there argued, because not involved under the facts. The effect of the law of 1848 upon the point of forfeiture, aside from the receipt of taxes for subsequent years, was neither raised, argued nor decided. It was admitted by counsel that forfeiture was complete unless the two points he raised were sustained. The court decided only the points argued. The case, therefore, decides only these two points: (1) That under the act of 1848, extending the time of redemption, the fact that the State after 1842 assessed the land and received taxes for subsequent years was not a waiver of a forfeiture in 1842; that the waiver did not extend beyond the terms of the act of 1848, and the full effect of that act was not passed upon by reason of the admissions of counsel. (2) If the State acquired title by forfeiture, the title of the purchaser is good under the law of 1852. This case is distinguished by *Chandler* v. *Wilson*, 77 Maine, 76,—a

stronger case than we need. It presents the issue of admitted forfeiture to the State, no title in defendant, record title in plaintiff. Plaintiff's title identical with ours, from the State through a Revolutionary Soldiers' resolve, and quitclaim deeds to plaintiff. As in *Chandler* v. *Wilson*, the defendant has no degree of title, and we have a good record title. Properly understood it amounts to this, that a demandant, in order to prevail, must show that he has the title—or a better or higher evidence of title than the tenant.

No legal sale took place. The sale was of "6500 acres of land in Township No. 3, Indian Purchase, in the county of Penobscot." That alone is fatal.

The sale also included the county taxes of Penobscot county for 1841–2–3–4. It was the duty of the State Treasurer, as a condition precedent to forfeiture, to cause such county assessments to be published in the same manner as State taxes. No advertisements were published.

There is no proof that anything was legally done to enable the owners of the lots in controversy to avail themselves of their extended right of redemption. The reasons given by HASKELL, J., in his concurring note to *Chandler* v. *Wilson*, to show non-forfeiture, all apply. But the decision itself goes further than the concurring note of Judge Haskell. The plaintiff admitted a forfeiture to the State, sufficient to authorize a sale. The defendant admitted that he took nothing under the sale. The case decided that where the law gives a right of redemption, the owner's title is not divested until there is a legal sale. That is precisely the case at bar. Admitting a forfeiture, for the purpose of argument only, the sale was invalid for many reasons, and no title passed to McCrillis. By the act of August 10, 1848, the owner had a right of redemption good until a legal sale. Plaintiffs, therefore, have a better title than the defendants.

Counsel also cited: *Hodgdon* v. *Burleigh*, 4 Fed. Rep. 111, affirming *Clarke* v. *Strickland*, 2 Curtis, 493, holding that if a tax was legal and the land forfeited for non-payment, a subsequent act of the legislature, giving further time for the payment of the tax was a waiver of the forfeiture. We submit that a new and con-

tinued taxation of this land from 1844 to 1899 (see tax acts for each year) is a waiver of forfeiture, in spite of the decision in *Hodgdon* v. *Wight*, to the contrary. After the State has received its taxes, even though an illegal sale, the purchaser well understanding that under the law he cannot recover the amount from the State, the lien is discharged. The State so construes it by subsequently assessing the land for fifty years. The authority of the cases relied on is best shown by the language of the act of 1848, plainly waiving forfeiture, giving further time to redeem, and accepting title in State only to extent of lien, fee to remain in owner until divested by legal sale. Plaintiffs having made by their deeds a good show of title are entitled to judgment. Defendant's right rests wholly on showing full compliance with the Constitution, the tax act of 1844 and the act of 1848, a legal sale and a legal deed. The deed is void upon its face. Where the deed alone shows an illegal sale, the defense utterly fails. *Allen* v. *Morse*, 72 Maine, 502.

C. F. Woodard; *P. H. Gillin; J. D. Rice;* for defendants.

Demandant never acquired any interest whatever in the lots in Indian Township, Number Three, lots 4 and 16, for the reason that their predecessors in title under whom they claim, absolutely lost said lots and all interest therein through the non-payment of the State tax assessed thereon for the year 1844, during the term of four years from the time of the assessment of said tax. By said forfeiture the title vested in the State, free and quit from all claims by any former owners, and the same was held and owned by the State by a title declared by statute law to be perfect and indefeasible. The tax was assessed by the Legislature, chap. 179 of the Private and Special Laws 1844. Said tax was published in the State paper three weeks successively, and the last publication was within three months from the day on which the State assessment was made by the Legislature. This State tax of 1844 was never paid.

Validity of the assessment: It is precisely such an assessment as was sustained by this court in the case of *Hodgdon* v. *Wight*, 36 Maine, 326, and in *Adams* v. *Larrabee*, 46 Maine, 516. In the

latter case the court said: "If the assessment had been upon the whole township in solido, designating the number and range, it would have been good. In such case each owner could have computed the amount due from him for his part." *Hodgdon* v. *Burleigh*, 4 Fed. Rep. 111, wherein the same questions were involved as in *Hodgdon* v. *Wight*, but in which the opposite conclusion was reached, shows also that the Circuit Court held that the State acquired a perfect and indefeasible title. "The law declares that lands shall be forfeited to the State for non-payment of taxes after the assessment has been advertised for a given period. . . . . It seems to be admitted by the plaintiff that the proceedings were legal enough to create a forfeiture to the State." *Chandler* v. *Wilson*, 77 Maine, 76, 82. "After the State had acquired a title by forfeiture, nothing but its own act, or that of some authorized agent, could deprive it of that title. It is further insisted that the Land Agent had no authority to sell and that his proceedings were not in conformity to law. The respondents in such case would fail to exhibit any title to the land claimed by the petitioner, and to prove the allegations made in their brief statement." *Hodgdon* v. *Wight*, 36 Maine, 326.

At the time of the assessment of this tax of 1844, and upon the expiration of four years thereafter, the time when the title of the plaintiffs' predecessors in title had been absolutely forfeited and wholly lost, and the State had acquired a perfect and indefeasible title to the lots, there was no existing provision of law authorizing any further redemption of the lost title or providing for a sale of the forfeited property by the State. As the court said in *Hodgdon* v. *Wight*: "After the State had acquired a title by forfeiture, nothing but its own act, or that of some authorized agent, could deprive it of that title." The State could dispose of the lots in any manner that it saw fit. Nobody except the State had any interest whatever in the lots. The State was not bound to sell the lots at all in order to protect its title, that title being already absolute and indefeasible. It could have given the lots away for educational or charitable purposes, or any other purpose that it saw fit, and nobody could have questioned the title of the recipient.

When the State, therefore, came to sell under the provisions of chapter 65 of the Public Laws of 1848, it was not a sale for the payment of taxes, but a sale of property to which the State had an absolute and indefeasible title and in which nobody else had any interest whatever. *Watkins* v. *Eaton*, 30 Maine, 529, 535. The same distinction appears in the case of *Chandler* v. *Wilson*, 77 Maine, 76. When the State in passing the act contained in chap. 65 of the Public Laws of 1848 gave a further right of redemption, it was not to a person already having an existing right to redeem, but was simply an act of grace, and in order to avail himself of such right to redeem, the party to whom the right was given was bound to exercise it within the time of redemption specified in the act and strictly in accordance with the terms of the act. Neglect to avail himself of the right of redemption offered did not lead to a forfeiture of any right which the party previously had, but was simply the rejection of the act of grace tendered. *Staats* v. *Board*, 10 Gratt. (Va.) 400; *Usher* v. *Pride*, 15 Gratt. (Va.) 190; *Smith* v. *Thorp*, 17 W. Va. 221. *Hodgdon* v. *Burleigh* cannot be regarded as an authority. Whatever may have been the views of the court, it was its duty in such case involving the construction of statutes of the State of Maine, to have followed the decisions of the highest court of this State in construing such statutes and in declaring the rules affecting the title of real property within the limits of this State. *Douglass* v. *Pike*, 101 U. S. 677. In the case of *Hodgdon* v. *Burleigh* throughout there is no mention of the case of *Hodgdon* v. *Wight*, and it is to be presumed that it was not brought to the attention of the court, as otherwise it would have been followed. Therefore, while the case of *Hodgdon* v. *Wight* is authoritative, the case of *Hodgdon* v. *Burleigh* can not be so regarded. *Clarke* v. *Strickland*, 2 Curt. 439, S. C. 5 Fed. Cas. 984, is open to the same objection which has been urged to the case of *Hodgdon* v. *Burleigh*, and cannot be regarded as an authority. In *Clarke* v. *Strickland* the judge ignored the decision made in *Hodgdon* v. *Wight*, and the result of that decision, which was judgment for the petitioner. Necessarily involved in this was the decision that the title was in the petitioner. This title he derived

by virtue of a deed from the State, and the State had acquired its title through the forfeiture; so that the court must necessarily have decided that the State had acquired title to the premises through the forfeiture, that this forfeiture had not been waived, that it continued to be held by the State up to the time of its conveyance, and that it passed by the conveyance from the State to the petitioner. I, therefore, do not see how it could have been understood that the case of *Hodgdon* v. *Wight* was not an authority binding upon the Federal court announcing this decision, and I respectfully submit that it was so binding, and *Hodgdon* v. *Wight* should be followed here and that the case of *Clarke* v. *Strickland* cannot be regarded as an authority here.

Deed to McCrillis from Samuel Cony, Land Agent, is made in compliance with the law under which that deed was given: Pub. Laws 1852, c. 272; *Hodgdon* v. *Wight*, supra. "If the State had acquired a title, that of the purchaser from it has been admitted, and all defects in the proceedings cured by the act approved on April 23, 1852, which provides that any deeds given by the land agent, for lands sold for alleged forfeitures to the State, shall vest in the grantee all the interest of the State, notwithstanding any irregularities in the notices or failure to comply with the provisions of the acts under which said sales were made." Lands which had been forfeited to the State through the non-payment of State taxes assessed thereon from the year 1836 down, were after the passage of the law contained in chap. 65 of the Public Laws of 1848 doubtless sold under the provisions of that law, and it is extremely probable that the Land Agent in making such sales had not fully complied with all the provisions of that law, and it is further extremely probable that parties who had purchased such lands under such sales had discovered, through the advice of counsel or otherwise, that the Land Agent in making such sales had not fully complied with all the provisions of the law. Then it is probable that such parties came to the legislature for relief, either through the presentation of claims for reimbursement, or that the State should make the titles good. The result of all this appears to have been the passage of this act contained in chapter 272 of the Public Laws of 1852.

We do not regard any small difference of acreage as material or important, or that the description in the deed is insufficient. So, too, the description in the deed, the sale being from a vendor to a purchaser, the vendor having been the absolute owner of the property, is entirely sufficient. As between vendors and purchasers, a deed in order to be good need not definitely describe the exact land or amount of land which the vendor had previously owned. If the description covers more than the vendor had owned, the deed will convey what he owned. If the vendor owned the whole of a parcel of land and conveyed only half of it, not describing which half, the deed would undoubtedly convey an undivided half of the land, and so, too, in the case of any other fraction. *Greene* v. *Lunt*, supra, p. 534, by the clearest implication shows that, as between vendor and purchaser, such a description as is herein involved is perfectly good where it says, "Such a description, however it may be in a deed when the grantor makes his own bargain and can enter into such a contract as he pleases, etc." These were questions in which the State, having a perfect and indefeasible title to the lands, and being the grantor in the deed, could be alone interested. That it did not insist upon any such questions, was willing to waive the same, and intended that McCrillis the purchaser should have all the title that the State had had, is shown by the passage of the act of 1852. The demandants have not succeeded to any interest which the State might have retained; they do not claim under the State; and occupy no position enabling them to raise any such question.

If these lots were forfeited to the State and the State acquired a perfect and indefeasible title to them through the non-payment of any State tax, it is immaterial whether or not any county tax was assessed upon these lots, or whether any county tax if assessed upon the lots, was paid. R. S., 1841, c. 14, § 9. If the State tax was assessed, advertised and remained unpaid, the forfeiture by the former owner and the acquisition of title by the State followed from these alone, and there can be no necessity or occasion for considering or discussing the matter of county taxes at all. And this same consideration in itself distinguishes the case, under

this report, from the case of *Chandler* v. *Wilson*, 77 Maine, 76, and shows that the suggestions contained in the added note of Judge HASKELL to be found on page 83, has no application in this case. In that case Judge HASKELL states that the land was sold by the state for the non-payment of a legal state tax and an illegal county tax. In this case the lots were not sold by the state for the non-payment of any tax, but had been forfeited to the state and were held by the state by a perfect and indefeasible title for the non-payment of a state tax alone. When the lots were sold by the state they were sold, not for the non-payment of taxes, but by the state, sole owner of the premises, in which nobody else had any interest, so that the state had the right to dispose of them in any manner and upon any terms that it saw fit. I respectfully submit that this case should be governed by the case of *Hodgdon* v. *Wight*. It is precisely the case that was there decided and the two cases are in every respect upon all-fours with each other. That case has since 1853 constituted a rule of property in this state which everybody must be held bound to know and recognize. Upon the faith of it numberless conveyances must have been taken and accepted in the carrying out of purchases of land made upon full consideration and covering the whole value of the property purchased. The extent to which such conveyances have been accepted is illustrated and shown by the long chain of title through which the defendants acquired the premises herein involved. An examination of these conveyances, or of the records thereof, will show that the purchasers in many, if not all the cases, paid a full consideration covering the whole value of the lands conveyed. The very defendants herein paid more than $1.50 per acre for every acre of these lots. It is the duty of this court to respect and follow the rule of property so long established and so extensively relied upon. The question may not be whether this court would now, were the question an entirely new one, reach the same conclusion, though I have already tried to show that the conclusion is right, and founded upon correct and just premises. But even if wrong, it should be regarded as settled. Much less harm will result from the following of an established rule, even if the

rule be incorrect, than would be done by disturbing the settlement of this rule with the consequent confusion in titles that would necessarily be produced. The decision of this court in *Hodgdon* v. *Wight* has stood since 1853 without being overruled or questioned. "The law in regard to titles to real estate especially requires stability. As injurious as are frequent changes in the law, no decisions as to personal property or damages require such permanency as those relating to realty. Even the decisions in the latter case will be scrupulously guarded and preserved, for titles are for all time and should stand as passed upon if possible. Courts are always reluctant to overrule or reverse any decision unless it is manifestly unjust and inaccurate. Titles may be largely or wholly dependent upon previous decisions, and landed interests would be jeopardized by sudden or frequent changes in interpretation or construction of legal principles." 23 Am. & Eng. Enc. of Law, 28, and cases in notes. All the equities of these cases, it is respectfully submitted, appear to be with the defendants. The testimony in the cases shows that the several demandants are speculators in titles, who have picked up for comparatively nothing the claims of parties who, until they were told by these demandants, or those acting in their interest, never knew of the existence of such claims, claims based upon titles which had been absolutely lost and forfeited more than fifty years ago, and not only lost and forfeited, but entirely abandoned during their whole lives by all parties who may at any time have possessed the titles. The case shows an express admission that all taxes upon this property from 1845 down to the present time have been paid by the defendants and their predecessors in title, the plaintiffs and their predecessors in title having not only abandoned the property, but avoided bearing all burdens placed upon it. It is upon such claims, so acquired, that these demandants seek to take from these defendants property for which they had paid full value, relying upon a rule of property so clearly established by this court and so long maintained without question, and upon which they have borne all the burdens in the way of taxation by law placed upon the property. Under these circumstances, it is respectfully submitted, that while the demand-

ants should be declared entitled to and have all they are by law entitled to, they should have nothing more.

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

EMERY, J. The demanded land is two specific parcels of two hundred acres, each outside of any organized municipality of any kind, but within a definite, surveyed and recognized sub-division of the territory of the state officially designated as "Township No. Three, Indian Purchase, Penobscot county." The action was begun December 21, 1897. The defendant deraigns title solely from a deed from the State land agent to William H. McCrillis, dated April 30, 1849, and purporting to effectuate a sale made according to the statute 1848, ch. 65, of land in that township forfeited to the State for the non-payment of certain State taxes theretofore assessed and remaining unpaid. In the recitals of the proceedings under that statute, and in the deed itself, the only description of the subject matter thus sold and to be conveyed is, "all the right, title and interest which the State of Maine has by virtue of such forfeiture in and to six thousand five hundred acres of land in Township Three, Indian Purchase in the County of Penobscot." There were at that time, and now are, over twenty-three thousand acres in the township.

It has been repeatedly and uniformly held that such a sale or deed with such a description is utterly ineffectual to designate, or to pass any title to, any specific tract or acre in the township. *Larrabee* v. *Hodgkins*, 58 Maine, 412; *Griffin* v. *Creppin*, 60 Maine, 270; *Moulton* v. *Egery*, 75 Maine, 485; *Skowhegan Savings Bank* v. *Parsons*, 86 Maine, 514. The act of 1852, ch. 272, providing that the deed should "vest in the grantee all the interest of the state in the lands therein described and no more," does not help the matter, for no lands are described in the deed or the notice of sale. It is still impossible to determine that the demanded lot is part of the 6500 acres said to have been sold, rather than of the 16,500 acres which were not sold. The defend-

ant, therefore, has no title with which to resist even the least title which the plaintiff may prove.

The defendant contends, however, that the plaintiff has not even the least title, since all the title under which he claims passed from his predecessors in title to the state more than twenty years before the date of his writ for non-payment of state taxes. This contention should be next considered, since, if it be sustained, the plaintiff fails even though the defendant has no title. *Hewes* v. *Coombs*, 84 Maine, 434.

It is claimed that the title was wholly forfeited to the State for the non-payment of the State tax of 1844 assessed March 21, 1844. The statute then in force is contained in R. S., 1841, ch. 14, §§ 1-9. It provided,—(1) that when a state tax was assessed by the legislature upon any township or tract of land not taxable by the assessors of any municipality, the state treasurer should cause the assessment to be published in the State paper three weeks successively, the last publication to be within three months from the day the assessment was laid,—(2) that the land so taxed should be held liable to the State for the payment of the tax,—(3) that the owner might at any time within four years from the time of publishing the assessment redeem the land by paying into the treasury of the State the amount of the tax, etc. —and (4) that if the State tax so assessed and advertised was not so paid within the time named, then in such case, "the said township or tract shall be wholly forfeited and the title thereof shall vest in the State free and quit from all claims by any former owner, and the same shall be held and owned by the State by a title which is hereby declared to be perfect and indefeasible."

A state tax was assessed upon this township by the legislature by Act dated March 21, 1844. Notice of this assessment was published by the state treasurer in accordance with the statute. The plaintiff and his predecessors in title have never paid any of that tax, nor have any persons for them. A large amount of the entire tax remained unpaid at the end of the four years from the time of the publishing. The land was then "wholly forfeited" to the State.

But on August 10, 1848, the legislature passed an act (ch. 65) providing:—(1) that the State Treasurer should within thirty days from that date publish a list of all tracts of land then forfeited to the State, and should thereafter annually on the first Monday of September publish a similar list of all tracts of land which may at that date have become forfeited,—(2) that any person having a legal interest in such tract so forfeited might discharge his interest from the tax and forfeiture by paying his proportion of the tax, interest and costs at any time before such list is published, or on or before the first day of March next after such publication,—(3) that immediately after said first day of March (viz, the March next after the publication) the Land Agent should advertise and sell the lands upon which taxes had not by that time been paid,—(4) that the Land Agent at any time before the land was thus sold should accept all taxes, interest and costs due on the land so advertised,—(5) in terms that "the owner or owners of any township or tract of land sold under the provisions of this act shall have a right to redeem the same by paying the purchaser or his assigns the amount for which said township or tract was sold, with interest thereon at the rate of twenty per cent per annum, and the cost of reconveying the same at any time within one year from the time of sale,"—and (6) that the owner could collect of the State his share of the surplus proceeds of the sale, within three years after the sale. In 1852 was passed the Act already noted (ch. 272) providing that the State's title in land described in the deed should pass to the grantee "notwithstanding any irregularities in the notices, or failure to comply with the provision of the Act under which the sales were made."

The contention of the defendant is, that the title at the end of the four years from the notice of the assessment of 1844, viz., in May, 1848, some months before the passage of the Act of 1848, was by operation of the statute completely transferred from the plaintiff's predecessors to the State and became vested in the State by a "perfect and indefeasible title," "free and quit from all claims of the former owners;" or if their entire title was not extinguished by the lapse of time under the statute of 1841, it was,

nevertheless, extinguished even under the Act of 1848, by the action of the State in undertaking to sell and convey its title, whether effectually or not. The plaintiff contends that the Act of 1848, ch. 65, amended the Act of 1841, and expressly covered lands already forfeited under that Act, and conferred upon the original owners a further right to redeem until the lapse of one year after a sale of the land had been effectually made under the amending statute,—that is, within one year after the State parted with its title. His argument is, that this right of redemption with which the former owner was thus endowed is a title to the land good against all the world except the State and its grantees, and that such title continues heritable and conveyable until the State cuts it off by such a sale and conveyance as will vest the State's title in a purchaser.

It is a familiar principle that when a statute imposing or enforcing a tax or other burden on the citizen even in behalf of the State is fairly susceptible of more than one interpretation, the court will incline to the interpretation most favorable to the citizen. *Partington* v. *Att'y Genl.* L. R. 4 H. L. Cas. 122; *United States* v. *Wigglesworth*, 2 Story 369, 373; *Tolman* v. *Hobbs*, 68 Maine, 316. If the statute imposes a penalty it is, to that extent, a penal statute to be construed strictly against the party claiming the penalty. *Hubbard* v. *Johnstone*, 3 Taunt. 177; Dwarris on St. 641. If a statute is penal even though it is also remedial it must be strictly construed, *Abbott* v. *Wood*, 22 Maine, 541–546; and a statute providing for the total forfeiture of property for the non-payment of one tax is certainly highly penal. On the other hand, statutes enacted to relieve the citizen from a forfeiture incurred should be construed liberally. *Alter* v. *Shepherd*, 27 La. An. 207; *Perley* v. *Jewell*, 26 Maine, 101. Applying these principles to the question here raised, assuming it to be an open question, the court can hardly doubt that it was the intention of the legislature in the Act of 1848 to recede from the drastic legislation of 1841 absolutely appropriating the land of the citizen without even the usual inquest of office,—and to remit to him some interest in the land of which he should be wholly

deprived only when the State, upon due proceedings, sold and conveyed its interest to some grantee. This intention is made more evident by some intermediate legislation. In 1842 (ch. 11) the legislature opened all forfeitures then incurred, and conferred a right to redeem for one year thereafter. In 1845 (ch. 135) was another opening of forfeitures and an extension of the time of redemption till May 1, 1846. In 1848 (ch. 65 above cited) the legislature again opened all forfeitures, but this time, instead of fixing a particular day when the forfeiture should again become absolute by mere lapse of time, it provided that the forfeiture should not again become absolute until one year after the land had been advertised, sold and conveyed by the State officials as prescribed in the act. This later act must prevail over any inconsistent provisions in the earlier act of 1841, even though such provisions are not in terms repealed.

The defendants, however, claim that there is a distinction between those cases in which the land had been already wholly forfeited as in this case, and those in which the owner had an existing right of redemption at the time of the passage of the act of 1848, August 10,—that in the latter cases the right of redemption was continued, leaving a title in the former owner until he failed to pay after one year from sale, while in the former cases in which the former owner's title had been wholly divested, such owner had no title and could only acquire a title by making the payment. The argument is,—that the State by the act of 1848, while it continued a title not then wholly divested, did not ex vi termini restore a title which had then been wholly divested, but only offered to do so on condition the former owner should pay the taxes, etc.,—and that no such payment having been made in this case, the predecessors of the plaintiff never obtained even the least title under that act.

We cannot find any such distinction expressed or implied in the statute of 1848. It expressly names lands "forfeited" and also lands that "may become forfeited" as those to be affected by its provisions. Both classes were to be treated alike,—both to be listed, advertised and sold. Both could be redeemed from the Land Agent before sale. The "right to redeem the same" from the

purchaser was extended to both. This was not a mere right to purchase, giving no present title. It was expressly "a right to redeem." That phrase in law implies more than a right to acquire. It implies a right to disencumber, to liberate from a lien or claim. Cent. Dict. We are convinced that the legislature in the Act of 1848, intended to, and did, reduce its once absolute title to a lien to again become absolute only in the State's grantee after one year of sale,—intended to and did take off the forfeiture already accrued, and as to such lands recognized a title still existing in the former owners, subject only to the superior title of the State. This legislative action and intent were sufficient to revive in the former owners, the plaintiff's predecessors, a title as good as before against all parties but the State and its grantees. This title, until extinguished by proper proceedings under the statute, is as heritable and conveyable as that of the owner of any equity of redemption.

But we think the question is not now an open one. In *Griffin* v. *Creppin*, 60 Maine, 270, (1872) the defendant claimed that the land had been forfeited to the State. The court said, "assuming there had been such forfeiture, the evidence fails to show any title in the defendants by which they can justify as against the plaintiff,"– and rendered judgment for the plaintiff. The clear import of the decision is that, since the statute of 1848 at least, the forfeiture to the State is not so complete and absolute as to deprive the the former owners of rights of action against strangers. Later the question was again expressly raised, considered and decided in a real action, *Chandler* v. *Wilson*, 77 Maine, 76. The defendant in that case deraigned from a tax sale and deed with the same want of description as in this case, as appears by the papers in the case though not in the published report. The defendant conceded, as the court adjudged, that he had no title, but he set up the same defense as here,—that the plaintiff's predecessors in title had utterly lost title through absolute and complete forfeiture to the State for non-payment of State taxes, so that the State had the absolute title and the plaintiff's predecessors had no title or interest whatever. The plaintiff admitted that the tax proceedings

were regular enough to create a forfeiture to the State, but contended that there remained such a right to redeem from forfeiture as gave his predecessors and himself a title good against all persons except the State and its grantees under effectual conveyances. In rendering judgment for the plaintiff the court necessarily sustained this contention, and overruled that of the defendant. In the opinion the court said (PETERS, C. J.): "In such case, the State has the land, not to keep,—not to use,—but to sell for the taxes. The State, in view of all the statutory requirements, has but a lien upon the land." The tax proceedings in that case were for the tax of 1866, but there has been no legislation since 1848 impairing the effect of that statute upon the question here involved. The same provisions are practically embodied in R. S., ch. 6, §§ 71 to 76.

The defendant, however, invokes the case of *Hodgdon* v. *Wight*, 36 Maine, 326 (1853) as equally decisive the other way, and claims that it has so long remained a rule of property unquestioned in this State, and so many investments have been made and obligations incurred upon the credit properly given it as an authoritative exposition of the law, it should now be upheld even against the later decisions (1872–1885), and even though erroneous in principle. We fully recognize the principle of stare decisis, but we do not understand the case of *Hodgdon* v. *Wight*, as explicitly and necessarily involving a decision of the question contrary to the decision in *Chandler* v. *Wilson*, whatever the language of the court may indicate were its views upon the question. It is the necessary decision, not the reasoning nor the assumptions, that should be taken as the rule established. *Hodgdon* v. *Wight* was a proceeding by petition for partition originally against persons unknown, the plaintiff claiming 2593 acres in the township. The defendants Wight and Brown came in and by brief statement alleged title in themselves to 6244 acres in common and undivided with others in the same township. The plaintiff by counter brief statement alleged that out of the 6244 acres claimed by the defendants, he was entitled to his 2593 under a sale and conveyance to one Stanley by the State for non-payment of the State Tax of 1842. The only question considered was whether the State had acquired

any title to the land from the failure of the owners to pay the State tax of 1842. The contentions of the defendants in that case were, (1) that the tax had been paid,—(2) that the state had waived its title by afterward assessing the land as owned by their predecessors,—(3) that the state was bound by the statement of its treasurer or his clerk to their predecessors that the tax had been paid. These contentions were overruled, and it was decided by the court that the state had acquired a title for the non-payment of the tax.

The defendants also made the point that the land agent had no authority to sell, and that his proceedings were not in conformity to law. The court turned this point aside by saying that it was destructive of the defendant's own right to appear and contest. The question whether the former owner or his successors in title had a right to redeem the land from the State's title was not considered, and does not appear to have been presented, or even mooted. The court, after disposing of the various objections to the State's title, concluded its opinion as follows: — "If the State had acquired a title, that of the purchaser from it has been admitted, and all defects in the proceedings cured by the Act approved on April 23, 1852, which provides, that any deeds given by the land agent, for lands sold for alleged forfeitures to the State, shall vest in the grantee all the interest of the State, notwithstanding any irregularities in the notices or failure to comply with the provisions of the Acts under which said sales were made."

For some reason, perhaps because necessary to their own title to these and the remaining acres, the defendants admitted that the plaintiffs were grantees of whatever title the state had acquired, and thus prevented a decision of the question whether there remained to the defendants a right to redeem which would have been a title good against strangers to the State's title.

We think it clear the cases are widely different. *Griffin* v. *Creppin*, *Chandler* v. *Wilson*, and the case at bar are all cases where one party represented the original title, and without denying the state's superior title, did deny that the other party had acquired that title, and insisted that there still remained to him enough of

the original title to maintain the action against strangers. In *Hodgdon* v. *Wight* there were no such contentions. There was no decision against them. There was no occasion for such a decision since, so far as the report of the case shows, the defendants did not invoke as a title a right to redeem under the statute of 1848. They contested the original forfeiture only. But, whatever be the view now taken of that case, it is now declared after full and deliberate re-consideration, that the decisions in *Griffin* v. *Creppin*, 60 Maine, 270, and in *Chandler* v. *Wilson*, 77 Maine, 76, are affirmed, and that so far as the opinion in *Hodgdon* v. *Wight*, 36 Maine, 326, and the dicta in *Adams* v. *Larrabee*, 46 Maine, on page 518, also cited by the defendants, conflict with those decisions and the one now made, they are overruled.

We may add that we think the defendants must be mistaken in their belief that in reliance upon *Hodgdon* v. *Wight* many and large investments have been made in tax titles based upon sales and deeds like those in this case. We do not see how the case of *Hodgdon* v. *Wight* should lead such investors to believe that it was not necessary for them to take care that the sale and deed from the State to themselves and their predecessors were effectual to convey to them the State's title. It is a familiar and long-known legal principle that if the description in a conveyance be so uncertain that it cannot be known what land was intended to be conveyed, the conveyance is void. If such investors did not acquire even the State's title, they are not injured in the least by any decision of this court holding that the original owner, notwithstanding his default, still had a heritable and conveyable interest in the land which continues in him, and his successors, until the State sees fit to effectually convey its own title. What claims such investors may have upon the State by reason of the inefficacy of the sales and conveyances to pass its title, are matters solely between them and the State. However much we may regret the losses sustained by reliance upon such sales and deeds we cannot consider them here. This court has never decided that such sales and deeds were effectual to pass the State's title in any case where the question was raised.

An argument ab inconvenienti is also urged,—viz., that such a construction of the statutes will cripple the State's revenues by encouraging the owners of wild land in unincorporated places to allow the taxes upon their land to remain unpaid. We have given this argument full consideration and have scanned the statutes the more carefully by reason of it, but we think it is overborne by the language of the statutes as interpreted by previous decisions. The inconvenience must be left to the legislature to remedy.

Some comment was made, in argument, upon the fact that since the State deed to McCrillis in 1849, he and his successors have paid the successive annual taxes upon the demanded land. The defendant, however, does not, and could not successfully, claim that under the law of this State such payment of taxes gives him any title against the record owner. The land is wild land and the evidence does not show such an actual, visible, exclusive and continuous occupation as is necessary to work a disseizin of the record owner. *Slater* v. *Jepherson*, 6 Cush. 129; *Parker* v. *Parker*, 1 Allen, 245; *Chandler* v. *Wilson*, 77 Maine, 76; *Hudson* v. *Coe*, 79 Maine, 83. The payment of taxes under such circumstances is no evidence of disseizin and gives no color of title. *Little* v. *Megquier*, 2 Maine, 176. It was also suggested in some cases, argued at the same time, that the equities of the case are with the defendants, since they and their predecessors have paid the taxes for so many years, and the plaintiff and his predecessors have paid no taxes since 1844, and that the court should find a way to give effect to those equities. On the other hand, it was suggested that the defendants and their predecessors have probably taken from the land far more in value than all the sums paid out by them. Of course, all such suggestions are unavailing. Whatever our sympathies, we must ascertain and declare the law as we find it to be, however harshly it may seem to operate. The questions raised in this case are not questions of equity, but purely questions of what is the fixed legal rule of property, established by positive enactment and by apposite judicial decisions, as to the rights of a land owner to redeem land forfeited for non-payment of taxes.

We have stated and discussed at some length the contentions

and arguments advanced, in the hope of making an exposition of the law that will solve some of the questions mooted. In doing so we may have written more or less dicta, but our decision so far is only this:—that under the cited statutes of 1841 and 1848 the original owner of land in an unincorporated place, forfeited to the State for non-payment of state taxes, still has a heritable and conveyable interest in such land, good against strangers and continuing as against strangers until the State cuts it off by an effectual sale and conveyance of its own title;—and that the alleged sale and conveyance set up in this case, as made by the State, are not effectual and do not extinguish such interest of the original owner. What rights in the demanded land the State may still have, or how it may, under present or future legislative enactments, enforce those rights,—or how the defendants can acquire those rights, or what other relief they can obtain,—are not decided nor considered.

The only remaining question is, what of the title of the former owners the plaintiff deraigns from them. The two parcels demanded are Lots Four and Sixteen in the Township named. The evidence shows a complete chain of title, prima facie at least, from the State to the plaintiff of one-undivided half of each lot and no more. That the evidence does show so much is not seriously denied.

According to the terms of the report, the mandate must be,

Judgment for the plaintiff for one-undivided half of each of the demanded lots. Damages to be assessed at nisi prius by the presiding justice.

EDWIN C. BURLEIGH *vs.* CHARLES W. MULLEN, and others.

Penobscot. Opinion July 26, 1901.

Revolutionary Soldiers' Lands. Distribution by Draft. Death. Evidence. Resolves 1835, c. 39; 1836, c. 49.

1. The Resolve of 1836, ch. 49, appropriating lands for the satisfaction of claims under a prior Resolve of 1835, ch. 39, in favor of soldiers of the Revolutionary War and their widows, provided that the distribution of the lots "shall be made by draft in such manner as the Governor and Council may direct." A drawing was had in January, 1837, by all persons who had then proved their claims. Subsequently other persons proved their claims and were allowed to select undrawn, unsold lots in the order of proving their claims. *Held;* that it was not necessary to order a new draft each time a claim was proved, and that a deed from the State of a lot thus selected passed title.

2. A person who was a sea-faring man went to sea nine years before the execution of a deed by a guardian of his heir, and had never been heard from during that time, and was supposed to be dead. This was testified to, not by the wife or children, but only by a relative of the family who saw them during that time. A petition was then addressed to the proper probate court reciting the death of the person and asking for the appointment of a guardian for his minor child. The usual public notice was given, and the probate judge found the fact of the death and appointed a guardian. *Held;* that in the absence of any evidence that the person was alive, the foregoing is sufficient evidence that he was dead.

See *Millett* v. *Mullen*, ante, p. 400.

On report. Judgment for plaintiff.

Real action against Charles W. Mullen, James Rice, Millard E. Mudgett, Clarence S. Lunt and Joseph P. Bass, to recover lot 5, in Township Three, and lot 82, in Township Four, Indian Purchase, Penobscot county, and the mesne profits.

The case appears in the opinion.

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

C. F. Woodard; P. H. Gillin; and J. D. Rice, for defendants.

The only authority to convey Lot 82 was expressly limited to lots to be distributed by draft in such manner as the Governor and

Council might direct. As this Resolve expressly provided for the distribution of the lots by draft, neither the Land Agent nor the Governor and Council, nor both combined, could distribute the lots in any other manner than by draft. The Governor and Council were authorized by the Resolve to direct the manner of distribution by draft, but no other authority was conferred upon them. The Legislature alone could pass the law, and neither the Governor and Council, nor the Land Agent nor both combined, could amend it or pursue any course except in accordance with the authority expressly conferred upon them by the law, which was expressly to distribute the lots by drafts. This provision of the law that the distribution should be made by draft cannot be regarded as directory simply. In the first place the language is peremptory. It is not that the distribution may be made by draft, but that the distribution shall be made by draft. Potter's Dwarris on Statutes, p. 223. Third parties, the owners of like certificates, were interested in the mode of distribution and had a right to insist that the distribution should be made in the manner prescribed by the law. The Surveyor General was directed to cause said two townships to be surveyed into lots of 200 acres each, which lots were to be distributed by the Land Agent to persons entitled to land under the Resolve of 1835 to whom certificates had not then been granted. Every holder of such a claim had an interest in the manner of distribution of the lots, and under the terms of this Resolve a right that the distribution should be fair and equitable and without discrimination. "Though the language of the statute is simply enabling, yet if it confers a power which concerns the public as well as individuals, it is not merely permissible, but it is mandatory." *Veazie* v. *China*, 50 Maine, 518. "The word 'may' in a statute is not to be construed 'must' or 'shall,' where the public interests or rights are concerned, and the public or third persons have a claim de jure that the power should be exercised." *Low* v. *Dunham*, 61 Maine, 566, 569. The State has not since acquiesced in the claim of ownership and possession of this lot by the party to whom said deed of John Hodgdon as Agent was given, or of those claiming under her. The case shows nothing from which any such acquiescence can be

inferred. It does not show that she or anybody under her, has ever been in possession of the lot, or has claimed it or in any way assumed to act as its owner. On the contrary, the case expressly shows the possession of the lot to be in other parties; that it has been conveyed repeatedly in the chain of defendants' title, and it is expressly admitted that, for the purpose of this case, the defendants and their predecessors in title have paid the taxes upon this lot to the State since 1845, a period of more than fifty years. If acquiescence can show anything, it shows that the plaintiff's predecessors in title never claimed said lot, or assumed to act as its owner. Death of Loten L. Brown is not proved. 1 Greenl. Ev. §§ 103, 104; *Stevens* v. *McNamara*, 36 Maine, 176; *Stinchfield* v. *Emerson*, 52 Maine, 465. There is no evidence that Loten L. Brown, Jr. ever lived in Phippsburg or any where else, and there is no evidence that he had been absent from his home or place of residence for nine years. The case only shows that at the time the deposition of the witness was taken, the wife and family were living at Phippsburg.

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

EMERY, J. The published opinion in *Millett* v. *Mullen*, ante p. 400, governs this case to the extent of determining that the defendants have no title, and that the plaintiff's predecessors in title notwithstanding their delinquency in not paying state taxes have had revived in them by the state an heritable and conveyable title good against strangers to the state's title. The only remaining question is what of that original title the plaintiff deraigns from those predecessors.

The demanded premises are Lot No. Five in Township No. Three, and Lot Eighty-two Township No. Four, Indian Purchase. As to the former lot the defendants do not question that the plaintiff deraigns title to one undivided-half of the lot. As to the latter the defendants interpose two objections.

I. The plaintiff's deraignment is under conveyances from the State Land Agent under Resolves granting land to soldiers of the Revolutionary war and their widows. The Resolve of 1835, ch. 39, appropriated two townships for that object,—provided for their division into 200 acre lots,—for the selection of these lots by the beneficiaries,—and for a conveyance to each of the lot selected by him, according to priority of selection. The next year 1836, by chap. 49, the legislature further appropriated Townships Three and Four of the Indian Purchase, to satisfy the claims under the former resolve of the preceding year. It provided, however, that the distribution of the lots "shall be made by draft in such manner as the Governor and Council may direct." The Governor and Council under this resolve directed that a drawing be had on the first Saturday in January, 1837, by all persons who had then obtained certificates of service entitling them to the benefits of the Resolve. Such draft was made accordingly. Lot 82 does not appear to have been drawn. Subsequently, February 8, 1837, the Governor and Council voted that the new claimants obtaining their certificates after the date of the draft might select from the then vacant lots. Mary Brainerd, a soldier's widow, established her claim and obtained her certificate January 27, 1837, after the draft. She selected Lot 82 in Township Four, and the Land Agent conveyed the same to her.

The defendants contend that the provision in the Resolve of 1836 for a distribution by drawing was peremptory, and that the Land Agent and Governor and Council could not distribute in any other way, and that a conveyance of a particular lot selected by the beneficiary was void even though it was a lot not drawn or claimed by any one else. While such a conveyance might be voidable at the suit of the State, or some grantee of the State, we do not think it is void. The whole township, with certain immaterial exceptions, was "appropriated to satisfy the claims for service in the Revolutionary War under the Resolve passed March 17, 1835 (ch. 39)." The claims had been recgonized by the previous Resolve. Many of them had been established and certificates issued. The two townships appropriated in the former resolve had

evidently proved insufficient to satisfy the claims established. Two more townships were appropriated by the latter Resolve. A sufficient number of lots in those townships were distributed by draft among the beneficiaries who had received certificates at the time of the draft. That drawing satisfied all certificates then obtained. Did the statute so peremptorily require a new draft whenever a new certificate was issued, before the holder could obtain his land, that a stranger may invoke the omission against the beneficiary? We think not. At the time of the passage of the Resolve many unsatisfied certificates were outstanding for lack of land appropriated. To avoid competition, or chance of favoritism, among these certificate holders, the legislature provided for the distribution of the lots among them by draft. After this had been done the purpose of that provision was satisfied. The few new claimants obtaining certificates after the drawing would not be in competition with one another and there was no chance for favoritism, if each was allowed to select a vacant lot in the order of establishing his claim and receiving his certificate. Whatever the State or its grantees may be able to do in the matter, we think the beneficiary who has proved his claim, received his certificate, and then surrendered it as satisfied by the conveyance of a lot out of the very land appropriated for that purpose, has a title good against strangers.

Though the deed of the Land Agent to Mrs. Brainerd was January 27, 1837, and the direction by the Governor and Council to so convey was given February 8th following, the vote is a sufficient ratification of the previous conveyance if their action was necessary.

II. The plaintiff deraigns title to an undivided fraction of Lot Eighty-two from one Loten L. Brown, through a conveyance from the guardian of his four minor children, duly appointed and authorized by the proper probate court. The defendants contend, however, there is no proper and sufficient proof that Loten L. Brown was deceased at the time. Moses King, Jr., was appointed guardian for these children in 1896 and executed and delivered his

deed as guardian, October 17, 1896. He was brother to Brown's mother and testified, substantially,—that Mr. Loten L. Brown was a sea-faring man and went to sea more than nine years before the execution of the deed, and had not been heard from for all that time, and was supposed to be dead,—that the witness had seen the mother and children during that time and that Mrs. Brown had never heard from her husband. In addition, we have the decree of the probate court appointing the guardian and authorizing the sale of this land as the land of the children of Loten L. Brown.

These decrees are not copied in the case, but "the execution, delivery and authority of the guardian to execute said deed are admitted." In the absence of words of limitation, we think this admission is broad enough to cover the fact and regularity of the guardian's appointment by the probate court upon the petition containing the usual allegations of jurisdictional facts, and after the usual public notice to all concerned. These proceedings indicate that the mother and the children and the public and the judge of the probate court of the county of Mr. Brown's domicil had not heard from him for at least seven years and believed him dead. In the absence of any evidence tending to show that he was alive, we think all the evidence proves that he was dead.

These objections being overruled, the defendants do not further deny that the plaintiff has deraigned title to twenty-three undivided sixtieth parts of Lot Eighty-two.

According to the terms of the report the mandate must be,

Judgment for the plaintiffs for one-undivided half part of Lot five in Township Three, and for twenty-three undivided sixtieth parts of Lot eighty-two in Township Four, Indian purchase. Damages to be assessed at nisi prius by the presiding justice.

ROSE J. BANTON *vs.* WILSON CROSBY, and others.

Penobscot. Opinion July 26, 1901.

Revolutionary Soldiers' Lands. Resolve. Deed. Heirs and Assigns. Mass. Resolves, Mar. 5, 1801; June 19, 1801; Feby. 19, 1813; June 17, 1820; Mar. 4, 1828.

1. A legislative resolve, "that there be and hereby is granted to each [revolutionary] soldier etc., two hundred acres of land" in a particular township is a grant in praesenti, though the fact that the claimant thereunder was such a soldier was to be afterward proved, and the particular lot of land was to be afterward located.
2. A subsequent deed under authority of such resolve from the land agent to "the heirs and assigns" of Jonathan Bartlett whose claims as a revolutionary soldier had then been established, does not create the title, but merely identifies the beneficiary and the land, and confirms the title granted by the resolve.
3. A deed from the heirs of Jonathan Bartlett of all their interest in the lands granted by the resolve given after the claim of Bartlett had been presented, but before the deed from the land agent, passed their interest and the land agent's deed inured to the benefit of the grantees.

See *Millett* v. *Mullen*, ante, p. 400.

On report. Judgment for plaintiff.

Real action against Wilson Crosby and others, devisees of William C. Crosby, deceased, and Clara W. Gibson and others, devisees of Thomas N. Egery, deceased, to recover lot 29, Township 2, range 7, West from the East line of the State, Penobscot county, and containing 200 acres.

C. A. and T. D. Bailey; *and M. Laughlin*, for plaintiff.

Plaintiffs' predecessors in title bring themselves within the provisions of the resolve of March 5, 1801, and the State issued a certificate to the heirs of Jonathan Bartlett and afterwards a deed. *Cary* v. *Whitney*, 48 Maine, 527; *Sargent* v. *Sampson*, 8 Maine, 148; *Mayo* v. *Libbey*, 12 Mass. 339; *St. Joseph & D. C. R. R. Co.* v. *Baldwin*, 103 U. S. 427; *Southern Pac. R. R. Co.* v. *Poole*, 32 Fed. Rep. 451; *U. S.* v. *Brooks*, 10 How. (U. S.) 422; *Lessieur* v. *Price*, 12 How. (U. S.) 59; *Shulenberger* v. *Harriman*,

21 Wall. 44; *Johnson* v. *McIntosh*, 8 Wheat. 681; *Mitchell* v. *Peters*, 9 Peters, 711; *Mann* v. *Wilson*, 23 How. 457. The resolve of February 28, 1828, released the soldiers, their heirs or assigns from their settling duties, and confirms them in their title. We have a construction of this very resolve in *Chandler* v. *Wilson*, 77 Maine, 76. In that case PETERS, C. J., nowhere says that the resolve did not vest a fee in some one. The question at issue was not whether this resolve vested a fee, but in whom it vested. He held that it did not vest or confirm title in the old soldier exclusively, but, if the soldier had assigned his claim previous to the passage of the resolve, it vested in the assigns. The old soldier or his heirs had from 1801 to 1828 in which to convey their claims or certificates to land if they saw fit, and the resolve of 1828 vested the fee absolutely in whomsoever was entitled to receive it at the date of its passage. It must necessarily confirm a fee in some one, —the old soldier if alive, to his children or heirs if he is dead, or in his assignees if he had assigned his claim. There were so many applicants entitled to land that all the lots in Mars Hill Township were drawn and more land was needed; so on February 28, 1829, a resolve was passed appropriating two more townships, 2 R. 7, W. E. L. S. and 2 R. 4, N. B. K. P. A deed from the land agent was not necessary, any manner of notifying the owner of the floating 200 acres that his land had been located would have been sufficient. The certificate of the lot drawn or assigned was just as effectual as a deed. The Commonwealth had made a floating grant of two hundred acres by a resolve which contained no provision for a deed. In order that the beneficiaries of the resolves, their heirs or assigns, might know when their land was located, the land agent made a deed. Even if these resolves of 1801 and 1828 did not pass a fee, yet the demandant is entitled to recover because Osmyn Baker, from whom she claims title, had title if we look at another phase of the case. On August 10, 1835, Samuel Bartlett and Caleb Hubbard conveyed lot 29 to Osmyn Baker by warranty deed. On February 10, 1830, the Commonwealth conveyed this lot twenty-nine to the heirs of Jonathan Bartlett. The deed from the heirs of Jonathan Bartlett to their brother Samuel

Bartlett was dated April 10, 1828, but not acknowledged until August 10, 1838. The court will uphold deeds if they can rather than render them nugatory, according to the maxim ut res magis valeat quam pereat. *Loomis* v. *Pingree*, 43 Maine, 308. *Poor* v. *Larrabee*, 58 Maine, 543–561.

M. Laughlin, for plaintiff also argued.

The time of redemption has not yet expired under the plain provision of ch. 65 of Public Laws of 1848. Under it time begins to run only by taking the advertisement as a starting point; not from any act of the legislature as in ch. 14 of R. S., of 1841. The legislature assumed that there would be a proper advertisement. So that if an advertisement in strict compliance with the act of 1848, ch. 65, is not shown, then redemption is still open, and there has been no forfeiture to the state. There is no evidence of the advertisement. *Hodgdon* v. *Burleigh*, 4 Fed. Rep. 111, 122–3. The case is wholly barren of evidence to show a single step by either the treasurer or the land agent in an attempted compliance with provisions of § 3 and § 4 of ch. 65 of Public Laws of 1848. *Tolman* v. *Hobbs*, 68 Maine, 316.

The attempted conveyance being of a certain number of acres out of a larger number, no parol evidence is admissible to show what particular acres passed, or were intended to pass, by the deed. 1 Jones R. P. on Conveyancing, § 337; *Hodgdon* v. *Burleigh*, 4 Fed. Rep. 111; *Green* v. *Alden*, 92 Maine, 177; *Moulton* v. *Egery*, 75 Maine, 485; *Skowhegan Sav. Bank* v. *Parsons*, 86 Maine, 514; *Smith* v. *Furbish*, (N. H.) 47 L. R. A. pp. 233–4. Official and unofficial deeds: *Simpson* v. *Blaisdell*, 85 Maine, 199; *Ball* v. *Busch*, 64 Mich. 336.

Chandler v. *Wilson*, 77 Maine, 76, overrules *Hodgdon* v. *Wight*, 36 Maine, 326, although not referring to it. And see *Van Wyck* v. *Knevals*, 106 U. S. 368; *Putnam* v. *Farrington*, 90 Maine, 405, as to the State taking advantage of a forfeiture. If the owners of the land at the time of the passage of the act of 1852, ch. 272, had title by reason of defects in the tax proceedings, then the act attempting to divest the owners of their title and vest it in defendants, was unconstitutional and void. *Hodgdon* v. *Burleigh*, supra.

That act was intended to cure only defects in the attempted transfer from the state to the purchaser; the act expressly providing that only the interest of the state should pass; therefore, if the state had no interest, there was no attempt to cure anything; and its provisions that "irregularities in the notices or failure to comply with the provisions of the acts under which the sales were made" are strictly limited to defects in procedure for sale, and do not apply at all to defects in assessment or to any defect prior to attempted sale.

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

Although the title to only one lot of land of 200 acres is involved, the effect of the decision of this court in this case is sure to be far reaching, and of great importance, because this action, together with other actions involving the same principle to be argued to this court, is, in our opinion, an important step in a carefully conceived, deliberate and bold attempt to acquire the title to many thousands of acres of land in this State, and for a nominal sum. Outline of the history of this town: When Maine became a state this town was, by the commissioners duly appointed for that purpose, set off to Mass. which in 1829 caused the town to be lotted by one Kelsey, and his plan of that lotting is known as "Kelsey's Plan." Massachusetts by various resolves provided for the giving of the various lots to Revolutionary soldiers and by deed dated February 10, 1830, recorded February 11, 1840, conveyed this lot 29 to the heirs and assigns of one Jonathan Bartlett. From that time until June 10, 1898, nothing was done with that title. On June 10, 1898, Elizabeth O. Baker executed a deed of this lot for one dollar as shown by the deed to Herbert J. Banton the husband of the plaintiff. On August 31st, 1898, Banton executed a deed to his wife, which included this lot 29, and seven other lots in this town. Under the agreement of separation between Mass. and Maine, so long as the title to any land in Maine remained in Mass. such land was not taxable by Maine. After Mass. had parted with the title to any of its lands in Maine, such land then became taxable by Maine. Massachusetts did part with the title to this lot, in 1830, and, therefore, thereafter Maine could legally tax it. Maine did

tax the whole town in which this lot was situated; but the taxes of 1844 and 1846, will only be considered, because we were unable to find, after a most thorough search, the state papers for any other years. The defendants claim that for the non-payment of the taxes of those years, this lot became and was forfeited to the state, and the state thereafter sold this and other lots in this town to Amos M. Roberts in 1849 and to Wm. H. McCrillis in 1851. The title of those two gentlemen became and from that time has been the merchantable title to this lot and practically the whole town, and by many mesne conveyances, that title came one-half to William C. Crosby in 1871, and as shown by the deed to him, he paid therefor $19,000. The other half came to T. N. Egery. Under their respective wills, these defendants acquired their title to the lot in question. The defendants claim that plaintiff has not title to any part of this lot. The title which the nine Bartlett heirs obtained under the Mass. deed, could only pass to Samuel by having their deed operate the same as if their deed had been a warranty. *Bennett* v. *Davis*, 90 Maine, 457, and the conclusions of the court are there stated as follows: "Thus we find the law settled in this state as to three classes of deeds (1) those of full warrantee against all the world, (2) those with covenant of non-claim, and (3) those which purport in terms to convey only the grantor's existing right, title or interest. Under deeds of the first class, an after-acquired title inures to the grantee. Under deeds of the second and third classes an after acquired-title does not pass to the grantee." Samuel Bartlett under the deed to him from the nine heirs may have been entitled to a deed to himself of the whole lot. What he may have been entitled to, and what he really obtained, are two different things. He really, under that deed, obtained title to one-tenth in common and undivided of that lot and every other heir obtained a tenth. Their previous deed, as we have shown, did not convey to him those nine-tenths and nothing else having been done, no deed from them to him since having been executed, the title to those nine-tenths must still be in them or their heirs. Who those heirs may be, nothing in the case shows. It is admitted that every lot in this town with the exception of five public lots

and lots 37, 49, 61 and 86 and the north part of lot 12 and of lot 24 were subject to taxation by the State of Maine in 1840, and thereafter, because before 1840 Mass. had conveyed all except those lots. R. S., 1841, c. 14, §§ 1-10. Up to August 10, 1848, there was no provision for the sale of lands thus forfeited, nor any provision for the sale of land for state taxes. By the assessment of a tax, the due publication of notice thereon and the failure for four years next following the act of assessment to pay the tax, the title of the land so taxed became wholly forfeited and the title thereof vested in the state free and quit from all claims of any former owner, and the same was held and owned by the state by a title which was declared by statute to be "perfect and indefeasible." The tax of 1844 on this town or any portion of it was not paid. Next in order was an act which went into effect August 10, 1848, (and the court will here take notice that this was after the lots as specified above had become the property of the State by a title perfect and indefeasible) namely, chapter 65 of the Acts of 1848. Pursuant to that Act, the Land Agent conveyed to Amos M. Roberts by deed dated April 30, 1849, all the right, title and interest which the State had by virtue of forfeiture in and to 17,798 acres of land in township 2 R. 7. Next in order is the Act of 1852, c. 272. "Purchasers of lands sold for alleged forfeiture to the state, for non-payment of taxes, shall have no claim against the state for any defect of title to lands hereafter sold, or under any pretext whatever; but the deed which have or may be given by the land agent shall vest in the grantee all the interest of the state in the lands therein described and no more; notwithstanding any irregularities in the notices, or failure to comply with the provisions of the acts under which said sales were made." The State, by the Act of 1852, admitted that the purchaser from it acquired its title, and the Act of 1852 cured all defects in the proceedings under the Act of 1848. *Hodgdon* v. *Wight*, 32 Maine, 326, affirmed in *Adams* v. *Larrabee*, 46 Maine, 516. This latter case was a writ of entry, and the defendant Larrabee claimed through just such a tax deed. In the opinion, the court say, "if the tax was legally assessed, the whole tract became forfeited, and the state acquired a

title thereto perfect and indefeasible. If that was so, whether the sale to the tenant was valid or invalid, the demandant cannot recover." Then the court considered the question, whether the assessment was valid, and they decide that the assessment was not valid, owing to a misdescription. Then follows this language: "If the assessment had been upon the whole township in solido designating the number and range, it would have been good. In such case, each owner could have computed the amount due from him for his part." After the decision in *Hodgdon* v. *Wight* and the decision in *Adams* v. *Larrabee*, if a client had asked his attorney whether or not, under the circumstances of this present case, the original owners of the lots in T. 2 range 7 on which the taxes had not been paid, had lost their title as between them and the state, we confidently assert that any lawyer would have been warranted in advising his client that the original owners and their grantees had lost title and that the title was either in the state or the grantee of the state. It is a strange thing that the Maine case of *Hodgdon* v. *Wight* is nowhere referred to in the United States case of *Hodgdon* v. *Burleigh*. So far as influencing the decision of Judge Fox, it seems that the case of *Hodgdon* v. *Wight* might as well have never been decided. He utterly ignores it. Although it was an opinion by the Supreme Court of Maine drawn by ETHER SHEPLEY, he does not even give it the cold respect of a passing glance.

It was the duty of the United States court to have followed the decision of the Maine court right or wrong, and had the Maine decision been followed, the decision in *Hodgdon* v. *Burleigh* in the United States court would have been exactly opposite to what it was. The Supreme Court of the United States follows the construction of the state by the highest court of the state which is the rule of property in that state. *Bacon* v. *Northwestern Mutual Life Ins. Co.*, 131 U. S. 258; *Kaukauna Water Power Co.* v. *Green Bay & M. Canal Co.*, 142 U. S. 254; and follows the decision of the highest court of the state in regard to the title to real estate, and the construction of deeds and statutes in respect thereto. *Halstead* v. *Buster*, 140 U. S. 273; *Hanrick* v. *Patrick*, 119 U. S. 156; *Ridings* v. *Johnson*, 128 U. S. 212; *Clement* v. *Packer*, 125

U. S. 309; *Gormley* v. *Clark*, 134 U. S. 338; *Morley* v. *Lake Shore and M. S. R. Co.*, 146 U. S. 162; *Duncan* v. *McCall*, 139 U. S. 449; *Bardon* v. *Land & R. Improvement Co.*, 157 U. S. 327; *1st Nat'l Bank* v. *Chehalis County*, 166 U. S. 440; *Fallbrook Irrigating Co.* v. *Bradley*, 164 U. S. 112. But the question here goes deeper than that. The Supreme Court had rendered a decision in 1853, which settled property rights,—rights as to the title to real estate,—a decision from which there was no appeal. That decision settled beyond question, that by the operation of the laws which we have been considering, the original owners lost their title. The decision has stood unquestioned by any court in Maine from that time to this. It had been approved in *Adams* v. *Larrabee*. The original owners of the lots have never questioned it. They acquiesced in it. Their silence for this long term of years proves it. They abandoned the lands. They have never paid a tax on them, they have never, from that day till within a very few years, exercised an act of ownership over them. Take this lot 29, the one in suit here. The record does not show a single year's taxes paid by Baker since 1840. The first and only thing which the record shows the owners of the original title to have done since 1840 is the giving of the right, title and interest deed by Elizabeth O. Baker for the consideration of one dollar in 1898. The case of *Hodgdon* v. *Burleigh* was decided by Judge Fox in 1880, but nine years before that William C. Crosby and Mr. Egery had bought this town. They bought not a tax title. They bought a title which the Supreme Court of this state had twice declared the state had owned by a perfect title, and which that court had said the state had conveyed, and by many and innumerable conveyances that title came to the grantors of Mr. Crosby and Mr. Egery. Mr. Crosby, as the court knows, was a prominent member of this bar, engaged in the active practice of the law, a man conversant with the decisions of the court. He relied on those decisions. He showed and proved that he relied upon them by paying $19,000 for his half of this town. He did not buy a tax title. He bought a title which had the best foundation in the world, a deliberate decision of the Supreme Court of this state. Under these circum-

stances, a decision of Judge Fox rendered nine years after Mr. Crosby had parted with his money, rendered under the circumstances which we have stated, rendered contrary to law, should and can have no weight whatever. The decision in *Hodgdon* v. *Burleigh* should have followed the Maine decision whether that decision was right or wrong. If that decision can have any weight under these circumstances the right of property, about which we delight to boast, is a myth. The court in *Clarke* v. *Strickland* did not pass upon the question whether the tax was legally assessed or not, but we say a fair construction of the language of the opinion is proof that Judge Ware must have had in mind his duty to follow the Maine opinion, but strange to say, he did not follow the case of *Hodgdon* v. *Wight*, the Maine case. Clarke claimed that by the passage of the Act of 1848, the forfeiture which had already taken place and which had placed the title to the land absolutely in the state, was fully opened or waived. Strickland cited *Hodgdon* v. *Wight*, to meet that contention and claimed that that case absolutely held that the forfeiture was not opened or waived. The court said that it did not so understand the opinion in *Hodgdon* v. *Wight*, then follows this language, and this ipse dixit settled that case: "The Act appears to me to be a complete waiver of all prior forfeitures." If then, *Hodgdon* v. *Wight* does hold that the Act of 1848 is not a full waiver, Judge Ware admits, in this very opinion, that he should have followed that decision, and he then should have held that the Act of 1848 did not waive the forfeiture.

Contrast the two cases of *Hodgdon* v. *Wight*, where SHEPLEY, C. J., drew the opinion, TENNEY, HOWARD, RICE and APPLETON concurring, and *Adams* v. *Larrabee*, where TENNEY, C. J., drew the opinion, APPLETON, CUTTING, MAY and KENT concurring, with the two cases of *Clarke* v. *Strickland*, and *Hodgdon* v. *Burleigh*. We simply say that we believe the weight of legal knowledge and legal ability is in favor of the Maine court in at least the same proportion as they exceed in numbers, eight to two. But we strenuously contend that the decision in *Hodgdon* v. *Wight* was right. Both cases, *Hodgdon* v. *Wight* and *Hodgdon* v. *Burleigh*, hold that at the expiration of the four years, after the taxes of

1841, 1842, 1843 and 1844 as the case may be, were assessed, the land on which the taxes were not paid became the property of the state by a perfect title. The state having a perfect title could do with the land as it saw fit. Grant it for charitable or educational purposes, sell it in any manner it saw fit, and apply the proceeds as it saw fit. A perfect title carries with it those rights. One cannot exist without the other. The perfect title cannot exist without the right. Those rights are a part of, they make up, a perfect title. The Act of 1848 was a matter of grace to the former owners of the land. The state received no consideration for the passage of that Act. It was not compelled to pass it. It was like a grant made to any private person, or corporation. That Act did not take away any rights which anybody had. It did not curtail any privilege which any former owner had. It did profess to give those former owners new privileges. Whatever new privileges were bestowed upon those former owners, was a matter of gift to them. That statute then, we submit, must have a strict construction. *Dubuque & Pacific R. R. Co.* v. *Litchfield*, 23 How. 88. These defendants who deraign title under the state are entitled to the same construction of that statute. One of these three conditions is true of that statute. Either, first, it shows a plain and manifest intention on the part of the legislature to completely open and waive the forfeiture; or, second, it just as plainly shows that such was not the intention; or, third, the intention in that respect is doubtful.

If the intention to open the forfeiture in the manner claimed by the United States cases is plain and palpable, then the members of the Maine court which decided *Hodgdon* v. *Wight* were surely blind. Remembering that the opinion was drawn by SHEPLEY, C. J., and concurred in by the members of the Supreme Judicial Court, we must be forced to the conclusion that at least the intention to open the forfeiture was not plain. Had it been plain they would have seen it. If the intention not to open the forfeiture is plain, or if the intention was doubtful, then the decision of the Maine court was right. Again, it was the contemporaneous exposition of that statute. We submit that its decision was correct, and founded upon

plain legal principles. *Staats* v. *Board*, 10 Gratt. 405; *Wild* v. *Seerpell*, 10 Gratt. 405; *Hale* v. *Branscum*, 10 Gratt. 418; *Usher* v. *Pride*, 15 Gratt. 190; *Smith* v. *Thorp*, 17 W. Va. 221.

This court should fully uphold the decision in the Maine cases, *Hodgdon* v. *Wight* and *Adams* v. *Larrabee*, under the doctrine of stare decisis. Am. & Eng. Ency. of Law and authorities there cited under Stare Decisis. *Evansville* v. *Senhenn*, 41 L. R. A. 726; *Rockhill* v. *Nelson*, 24 Ind. 424; *Poulson* v. *Portland*, 1 L. R. A. 673; *Strowbridge* v. *Portland*, 8 Ore. 67. "But if the rule, says WELLS, J., in *Pike* v. *Galvin*, 30 Maine, 539, laid down in *Fairbanks* v. *Williamson*, were clearly incorrect, in my judgment it would be unwise to change it without the action of the legislature. It has now remained for nineteen years, many decisions have been made in conformity to it, and many titles have been acquired under it. The overruling it will not only be introducing a new rule, in relation to future conveyancing, but produce a retrospective action, upon deeds already made. A judicial decision by the power of construction, looks to the past as well as to the future, and embraces all cases that are in existence, or that may arise hereafter. The stability of legal decisions affords a security which ought not to be impaired, unless upon the most pressing necessity." When, therefore, a decision is a rule of property it should not be overruled, unless there be absolute necessity for it. A decision is a rule of property when it settles legal principles, governing the devolution and ownership of property. *Louisville, &c. R. Co.* v. *Davidson County Ct.* 1 Sneed, (Tenn.) 695; *Lucas* v. *Tippecanoe County*, 44 Ind. 541; *Houston* v. *Williams*, 13 Cal. 27. A decision of a court is its judgment, the opinion is the reasons given for that judgment. Freeman Judg. 2nd Ed. § 2. What then was the judgment, the decision in *Hodgdon* v. *Wight*, having in mind the doctrine of stare decisis? A decision must necessarily include the judgment of the court, and everything which must necessarily exist, in order that such a judgment may be rendered. In *Hodgdon* v. *Wight*, the judgment of the court was that partition be granted as prayed for. In order to grant partition, the court must have found that Hodgdon had title. In

order to find that Hodgdon had title, the court must have found that by the assessment and non-payment of the state tax of 1842, and by force of the Act of 1848, and by the deed after the forfeiture from the land agent, and by the passage of the Act of 1852, and by the conveyance from the grantee of the State to Hodgdon, Hodgdon had title. It must have settled the question that the passage of the Act of 1848, did not open the previous forfeiture to the state unless the former owners took advantage of its provisions. It must have settled the question that if all the provisions of the Act of 1848 were not complied with, all such deficiencies were healed by the Act of 1852. If they had decided any one of these questions the other way, they could not have reached the conclusion which they did, and ordered partition. That judgment, that decision we confidently submit settled the principles governing the devolution and ownership of property held by a title the same as Hodgdon's title. Our title in this case is exactly the same as Hodgdon's. Therefore we say, under the doctrine of stare decisis, which, so far as this case is concerned, is clean cut and clear,—that decision should not be overruled. The only effect which the overruling of *Hodgdon* v. *Wight* and *Adams* v. *Larrabee* can have will be retroactive, and that will be to demolish the foundations upon which titles to much property has stood for quite half a century. Titles, too, to land bought and paid for at its market value in reliance upon the law as laid down in those cases. Confusion will be sure to follow and litigation will be rife. To overrule those decisions can produce no good to the law. The sure and inevitable result will be harm and perhaps ruin to innocent parties who put their reliance upon the Supreme Court of Maine. The stability of titles, everybody must admit, is of the utmost importance. If this court overrules the decisions in *Hodgdon* v. *White* and *Adams* v. *Larrabee* now, what assurance can anybody have that some time in the future, the then court may not overrule the decision which this court may render, and reestablish *Hodgdon* v. *Wight*? Where, then, are the people to look for stability in the titles to their property, if the courts fail them? *Douglass* v. *Pike County*, 11 Otto, 677. The State of Maine

made a contract with its grantee Amos M. Roberts. The Maine court decided that under that contract, under the deed, Mr. Roberts obtained the title to the land. Upon the strength of that exposition of the law, these defendants bought the land. Although a contract has been fully performed, there still remains an obligation to that executed contract, protected by the contract clause of the constitution. Ency. of Law, 2nd Ed. p. 1033, and cases cited.

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

EMERY, J. The published opinion in *Millett* v. *Mullen*, ante, p. 400, governs this case to the extent of determining that the defendants have no title, and that the plaintiff's predecessors in title, notwithstanding their delinquency in not paying state taxes, have had revived in them by the state an heritable and conveyable title good against strangers to the state's title. The only remaining question is what of that original title the plaintiffs deraign from those predecessors. The demanded land is Lot No. twenty-nine in Township Two, Range Seven, W. E. L. S.

The plaintiff deraigns title from Jonathan Bartlett a revolutionary soldier and a beneficiary under sundry resolves of Massachusetts granting lands to revolutionary soldiers. The other heirs of Jonathan Bartlett for a consideration released and quitclaimed their interest in such land as such heirs and of their brother, Samuel Bartlett, April 10th 1828. The title to Samuel Bartlett has admittedly come to the plaintiff. Nearly two years afterward, on February 10, 1830, the Land Agent of Massachusetts, acting under the above named Resolves, executed a deed of Lot twenty-nine to "the heirs and assigns of Jonathan Bartlett," which deed appears to have come to the possession of Samuel Bartlett. The defendants now contend that the quitclaim deed to Samuel Bartlett from the other heirs of Jonathan Bartlett did not pass the title afterward conveyed to them as heirs of Jonathan Bartlett by the subsequent deed of 1830, and hence that at the most the plaintiff shows title to only Samuel Bartlett's share as such heir in one-tenth.

We do not think this contention can be sustained. The deed of February 10, 1830, is not the origin nor foundation of the Bartlett title. By its own terms it suggests a prior title. The granting clause is "give, grant, convey and confirm." The prior legislative resolves are referred to as the authority for executing the deed. The Jonathan Bartlett whose "heirs and assigns" are eo nomine grantees, is described as a revolutionary soldier within the purview of the resolves. The deed does not fairly purport to be itself a grant of the land, but rather evidence of such a grant, an identification or confirmation of a title, rather than a creation of a title.

Referring to the Resolves themselves, the language of the first Resolve, that of March 5, 1801, is, "Resolved: that there be, and hereby is granted to each non-commissioned officer and soldier, etc., two hundred acres of land, etc." And again in the same Resolve, it was "further Resolved: that where any such non-commissioned officer or soldier has deceased or shall decease before he shall get possession of the land *hereby granted* to him, his children or widow aforesaid shall be entitled to the same." The Resolve of June 19, 1801, provided for surveying the necessary lands into two-hundred acre lots, and that the lots thus surveyed should "be assigned to the several persons claiming and being entitled to the same as aforesaid." By the Resolves of February 19, 1813, and June 17, 1820, further time and further facilities were granted for proving the claims of persons claiming under the former Resolves. The Resolve of March 4, 1828, was in the words following:

"Resolved: That there be, and hereby is granted to each non-commissioned officer and soldier, who enlisted into the American Army to serve during the revolutionary war with Great Britain, and who were returned as a part of this state's quota of said army, and who did actually serve in said army the full term of three years, and who was honorably discharged, and to their heirs and assigns, two hundred acres of land to be held in fee simple from the date hereof, those who have heretofore drawn lots to retain the lots they have severally drawn, and those who have not yet drawn lots, are hereby permitted to draw the same from the undrawn lots remaining in said Mars Hill township any time within five

years from the date hereof, any provisions or conditions in the former resolves on this subject to the contrary notwithstanding."

It is not questioned that Jonathan Bartlett was a revolutionary soldier and shown to be completely within the provisions of the foregoing resolves;—nor is it questioned that Massachusetts owned the land granted.

The deed of the other heirs of Jonathan Bartlett to Samuel Bartlett was given after the Resolve of March 4, 1828, had gone into effect. We think it evident from the language of the Resolves that the heirs of Jonathan Bartlett then had (Jonathan Bartlett having deceased) a vested grant, or title, or interest which they could convey or assign. The particular lot of two hundred acres which might be assigned to them was perhaps not then designated, or ascertained, but the right, the title, was already created and granted to them by the Resolves. The designation of the lot would inure to whomsoever they should assign or convey their title.

In *Leavenworth, &c. R. R. Co.* v. *The United States*, 92 U. S. 733, an Act of Congress had declared, "That there be, and is hereby granted to the State of Kansas for the purpose of aiding in the construction [of two proposed railroads with branches of which the general route was described] every alternate section of land, designated by odd numbers for ten sections in width on each side of said road and each of its branches." Of course, where the granted sections would finally be located could not be ascertained until the lands were surveyed and the railroads and branches were located. The court said: "There be and is hereby granted," are words of absolute donation and import a grant in praesenti. . . They vest a present title in the State of Kansas, though a survey of the lands and a location of the roads are necessary to give precision to it, and attach it to any particular tract. The grant then becomes certain, and by relation has the same effect upon the selected parcels as if it had specifically described them." In *Schulenberg* v. *Harriman*, 21 Wall. 44, it was held that a similar act in favor of Wisconsin passed a present interest in the lands though the sections were to be afterward located. In *Mayo* v.

Libby, 12 Mass. 339, the language of the Resolve of June 19, 1795 was: "Resolved that there be and is hereby released to each of the inhabitants of the town [of Hampden] who settled . . . one hundred acres of land to be held in severalty and to be laid out, etc." The committee for the sale of Eastern lands afterward in 1805, the 100 acres having been then run out, gave a deed of the same in the name of the Commonwealth. It was held that the grant was by the Resolve and not by the deed. In *Sargent* v. *Simpson*, 8 Maine, 148, by a Resolve of Massachusetts a certain quantity of land in Sullivan was "confirmed and granted" to each of the persons named in a report of a commissioner, and the selectmen were authorized and directed to give deed accordingly. It was held that the title was created by the resolve and not by the deed, and where the original beneficiary had disposed of his title by will, a subsequent deed from the selectmen to his "heirs" by that designation gave them no title as against the prior grantee of the beneficiary.

It is to be further noted that the deed in the case at bar was made "unto the heirs and assigns of Jonathan Bartlett." The insertion of the word "assigns" indicates that the purpose of the deed was to confirm a prior title to whomsoever the owners of that title might have assigned it.

It was not decided in *Chandler* v. *Wilson*, 76 Maine, 77, that the Resolve of 1828 did not make a grant in praesenti. The question there was not whether the Resolve vested a fee, but in whom the fee vested, whether in the soldier himself only, or in his assignee by lawful conveyance. The soldier had assigned his right and title and the Land Agent thereupon made the deed to the assignee. The grant, however, had been made by the Resolve, and the deed was merely confirmatory of the previous grant, by indicating its proper recipient.

In any view of the case we think the whole title, whether under the Resolves alone, or under them and the deed combined, vested in Samuel Bartlett. That his title has come to the plaintiff is not questioned.

According to the terms of the report the mandate must be,

Judgment for the plaintiff.
Damages assessed at one dollar.

ROSE J. BANTON, and another *vs.* HARRIET S. GRISWOLD.

Penobscot. Opinion July 26, 1901.

Execution. Levy or Sale by State. Stat. 1821, c. 60, §§ 27, 33.

1. The word "person" in a statute does not necessarily include the State itself.
2. When the same statute in one section gives a "person" power to levy his execution by extent, and in another section gives the State power to levy its execution by sale at public vendue, there is some presumption that the intent was to confine the State to a levy by sale, since it is not a state function to acquire, hold and manage lands as a private owner.
3. When the provisions in such statute for redemption from a levy by extent are not available against the state as a levying creditor in possession, but are available against a purchaser under levy by sale, it is sufficiently clear that the intent of the legislature was to confine the State to a levy by sale.

See *Millett* v. *Mullen*, ante, p. 400.

Assumpsit by plaintiffs as co-tenants in common and undivided against the defendant co-tenant, Harriet Griswold, devisee of Wm. H. McCrillis, deceased, to recover their share of stumpage money collected by the defendant from the common land. The premises are wild land, being the North half of T. 2, P. 8, W. E. L. S. in Penobscot county.

T. D. Bailey, for plaintiffs.

Action is at common law. *Richardson* v. *Richardson*, 73 Maine, 405; *Hudson* v. *Coe*, 79 Maine, 83. Levy by State against Redington. Counsel cited: Stat. 1821, c. 60, in force at time of levy. "Person" does not include "State." *Blair* v. *Worley*, 2 Ill. 177; *Matter of Fox Will*, 52 N. Y. 535, affirmed in *U. S.* v. *Fox*, 4 Otto, 315. "May" and "shall:" *Isham* v. *Iron Co.*, 19 Vt. 248; Endl. Stat. § 399, p. 216. Levy by metes and bounds defective, because land was held in common and undivided. Tax of 1845, void because it includes the public lots, the fee of 480 acres being in Massachusetts. *Dillingham* v. *Smith*, 30 Maine, 370; *Hammond* v. *Morrill*, 33 Maine, 300. No one should be held to thus pay another's tax.

Counsel also argued: That defendant's tax deeds are not admissible in evidence, because they are void on their face. Creating no cloud upon the title and not being color of title, they are not admissible in evidence to substantiate or prove title.

That they are not admissible in evidence because there is no evidence of the statute requirements, leading up to the issuance of a deed, being complied with.

That the act of the legislature, in 1852, c. 272, seeking to remedy or cure the defects in these proceedings is unconstitutional and void, interfering with vested rights and depriving a man of his property without due process of law.

C. F. Woodard, for defendant.

Levy against Redington is valid. Stat. 1821, c. 60. "Any person" includes bodies politic and corporate. R. S., 1841, c. 1. § 3, cl. 13.

The general rule is, that where there is a pre-existing right and the statute gives a new remedy, the remedy is cumulative. The right of a judgment creditor to levy on the lands of a judgment debtor existed long prior to the creation of this State, and when in the outset the Legislature gave to the State the right to seize and sell at auction the lands of its judgment debtors, it did not thereby take from the State the right which it had in common with everybody else. The statute was evidently intended to confer an additional privilege upon the State, not to take from it rights which everybody had.

The same statutory provision allowing debtors' real estate to be taken and sold at auction on an execution in favor of the State still exists in § 50, c. 76, R. S.

So, too, since the passage of chapter 80 of the Public laws of 1881, all real estate attachable may be seized and sold on any execution, but lands of the judgment debtors may also be levied upon since 1881 as well as before, and the Act of 1881 simply gave cumulative remedy. Is it possible that anybody except the State may have the choice of either remedy, while the State alone is confined to a single remedy? In regard to equities of redemption of lands mortgaged, there have long been in the statutes provisions providing either for a levy subject to the mortgage, or a right of

seizing and selling the equity. All these provisions have stood side by side upon the statute book and so stand now. The case of *Millet* v. *Blake*, 81 Maine, 531, 536, expressly says that in case of mortgaged lands, the right to redeem the debtor's lands from the mortgage could be acquired by the creditor either by levy of his execution, or by seizure and sale of the equity of redemption.

If the two rights co-exist in one case, why would they not co-exist in all cases? Counsel further argued: *Hodgdon* v. *Wight*, 32 Maine, 326, is an authority completely covering this case; that since its decision in 1853 it has constituted a rule of property which all persons were bound to know and recognize, and that having stood for a period of nearly fifty years without being overruled or questioned, the doctrine settled by it should not now be disturbed.

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

EMERY, J. This is an action by one co-tenant against another co-tenant in common and undivided of the north half of Township Numbered Two, Range Eight, W. E. L. S. to recover the plaintiff's share of stumpage money collected by the defendant from the common land. It is admitted that the plaintiff shows a prima facie title to sixty-one one hundred and ninety-second parts (61-192) of the land, except as the title may have been lost to predecessors of the plaintiff (1) by a forfeiture of the whole for the non-payment of State taxes, and (2) by the loss of twenty-seven one hundred and ninety seconds (27-192) by a levy of execution against William Redington in 1840.

The published opinion in *Millett* v. *Mullen*, ante p. 400, overrules the first objection to the plaintiff's title, since as to that question the material facts are substantially the same in the two cases. The only remaining question, therefore, is the validity of the levy of execution above referred to.

In June, 1840, the State of Maine recovered in the Supreme Judicial Court, for Kennebec county, a money judgment against William Redington and Alfred Redington. Execution was issued upon this judgment and the State sought to levy it by extent upon

the interest of the judgment debtors in the north half of the township in question, and to cause their interest to be set out to the State by metes and bounds. The plaintiff contends that such mode of levying execution upon real estate was not open to the State, but only to persons or corporations created by the State,—and that the State could only levy by sale upon execution.

The statute governing the matter is that of 1821, ch. 60, "An act respecting the attachment of property on mesne process, and directing the issuing, extending and serving of executions." By § 27, it was enacted, "That when any person shall obtain judgment in any court within this State for any sum of money, and shall think proper to levy his execution upon the debtor's real estate then"—he shall cause it to be done by appraisal and extent. By section 33 of the same chapter it was enacted, "That upon any judgment in any court of law in this State, in the name or for the benefit of this State, for any sum of money, a writ of execution in common form shall issue, and be directed to the proper officer, and the lands of such judgment debtor may be taken on such execution and sold at public vendue to the highest bidder." The plaintiff contends that the State was confined to this latter mode of levying. The defendant contends that the State could use this mode or could use the mode provided for a "person" in section 27, at its option.

Arguments may be made upon both sides of the question whether the word "person" in section 27, fairly includes the State itself. "The decisions upon this question are not easily reconciled, but the better opinion seems to be that the word 'person' does not in its ordinary or legal signification, embrace the state or government." 18 Am. & Eng. Ency. of Law, 404, note 2.

Argument may also be made either way as to the force of the word "may" in § 33. Is it wholly permissive in the sense that the state may use the mode there described, or may use the other mode provided for persons in § 27 at its option? Or is it permissive in the more limited sense that the state may or may not levy at all, but mandatory as to the mode, if it elects to levy? It is familiar learning that the use of the word "may" for "shall" is common, and that the word "may" is sometimes to be construed as mandatory.

The right of a judgment creditor to levy his execution upon the land of his debtor is purely statutory and hence is limited to the words, or necessary import, of the statute.

Upon reading the whole of chapter 60 (Laws of 1821) and considering that it was enacted as a whole at the same time, we are clear that the legislature did not intend that the state, on becoming a judgment creditor, should levy upon the lands of its debtor by extent.

The State was not then, no more than now, a business corporation except incidentally as necessary to further its political purposes. It was not in its organization or machinery adapted to acquire, own, cultivate, manage or make a profit out of lands, except for public use. It needed its revenues and debts due it to be paid in money. Lands set out to it upon appraisal and extent, when not needed for public use, were of no value to the State except to sell. Indeed, it had never been the policy of preceding governments to acquire and hold land as a private owner. The policy had always been to have the lands not needed for public use parcelled out among individuals, as fast as they could be surveyed and sold.

Again, the statute (chap. 60) made careful provision for a redemption from the levy by the debtor as a matter of right. It required (§ 30) an accounting by the execution creditor for the rents, profits and improvements accrued or made since the levy. It then provided for an adjudication by three justices of the peace, as to the amount which should be paid or tendered for redemption. Upon such payment or tender, the execution creditor was required to execute a good and lawful deed of release to the debtor of the land so taken in execution. If such execution creditor refused to execute such a deed, the debtor was given the right to bring his action of ejectment against the creditor and recover the title and possession of the land. This procedure for redemption clearly was not applicable against the State. It will not be contended that by § 30, the State was compelled to render an account,—that it was compelled to submit its claims to three justices of the peace,—that it was compelled to execute a deed of release,—and finally

that it could be sued in an action of ejectment and evicted by a sheriff. Certainly, in the absence of express words most explicitly requiring it, the court cannot hold that the legislature intended to subject the sovereign state to such liabilities. Legislative acts do not bind the State unless the State be expressly named as to be bound. *Cape Elizabeth* v. *Skillin*, 79 Maine, 493.

On the other hand, the legislature in the same act, in § 33, provided a mode for a levy of execution in behalf of the State which did not subject it to the requirements of § 30 for redemption. The State was authorized to levy by seizure and sale at public vendue to the highest bidder. The officer thus levying the execution was required to execute to the purchaser a good deed of any lands so sold by him. The State was thus relieved of all duties and liabilities to the debtor. He could not proceed against the State, but could proceed against the purchaser with the same rights and in the same way as against any individual creditor, for such right was expressly saved to him by the § 33.

Upon consideration of the whole statute it must be evident that a judgment debtor of the State would be seriously handicapped in the exercise of his right of redemption, if not entirely cut off from it, should the State assume to have the land itself set out by metes and bounds or by assignment, and itself take the rents and profits. The provision for a levy by sale when the State was the execution creditor relieved the debtor of that difficulty, and left him for to deal with the purchaser on an equal footing. It follows, we think, that the legislature intended the State to follow that course and not the course which was followed, viz, that of levying by extent. The levy was therefore void as unauthorized, and did not affect the title of William Redington.

No other objections are made to the plaintiff's prima facie title to 61-192; hence the mandate must be,

Judgment for the plaintiff for sixty-one one hundred and ninety-seconds (61-192) of the sums collected by the defendant from the land described in the writ.

The amount to be determined at nisi prius.

CHARLES A. WELCH, Petr. for Habeas Corpus

vs.

SHERIFF OF FRANKLIN COUNTY.

MAYNARD H. WARE, Petr. *vs.* SAME.

R. S., c. 99, §§ 5, 17; c. 132, § 5; c. 133, § 16; Stat. 1821, c. 76, § 1; 1893, c. 222, § 2; 1897, c. 264.

Franklin. Opinion July 26, 1901.

Habeas Corpus. Warrant to Commit. Bail.

In April, 1901, the petitioners who were charged with a felony, after hearing before a trial justice in Franklin county were ordered to furnish bail for their appearance at the next September term of this court for that county and were committed for their failure to comply with said order. They have never made any application to be admitted to bail, but petition for the writ of habeas corpus that they may be discharged. *Held;* in each case:

1. That the next June term might have had cognizance of the offense with which the petitioner was charged, and the order was therefore invalid.

2. That as the petitioner may at any time be admitted to bail by a bail commissioner for the county and should not be discharged for a mere informality in the warrant of commitment, there is no necessity for the writ to issue and that the petition should be dismissed.

On report. Judgment for State.

Petitions for habeas corpus and certified by the presiding justice to the chief justice for immediate decision.

E. O. Greenleaf, for petitioners.

H. S. Wing, county attorney, for sheriff.

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

POWERS, J. The petitioners were brought before a trial justice in Franklin county in April, 1901, charged with the crime of cheating by false pretenses. After hearing, the trial justice found

probable cause to charge the accused and ordered each of them to recognize in the sum of $300, for his appearence at the September term 1901, of the Supreme Judicial Court of Franklin county. This they refused to do and they were thereupon committed to jail, from which commitment they now seek to be discharged on the ground that the magistrate could not order them to recognize for the September term, but only for the June term.

The act establishing the June term, Laws of 1893 ch. 222 § 2, enacted that it should be held for the transaction of civil business only, except for the trial of indictments found by a grand jury in attendance, and should be held without a grand jury unless a justice of this court should otherwise specially order. The limitation to civil business, and to the trial of indictments found at the same term, was stricken out by the Laws of 1897 c. 264, leaving simply the limitation that the term should be held without a grand jury unless otherwise specially ordered as above, and the same act further provided that when no grand jury should be in attendance all recognizances to the June term should be continued to the next term.

The result of this legislation is that criminal as well as civil business may be transacted at the June term, but that no grand jury is present unless specially ordered, and in case no such special order is made, all recognizances to the June term are continued. If such an order were made, the June term would have cognizance of the offense with which the petitioners were charged, and if not made, the September term next following would have cognizance of it. The petitioners, therefore, should have been ordered to recognize for their appearence at the June term and the order made was invalid. Revised Statutes, ch. 132, § 5, is but a condensation of R. S., 1821, ch. 76, § 1, which in express terms confined the power of the magistrate in ordering bail to "require of the offender to find sureties to appear and answer for his offense at the Supreme Judicial Court, or Circuit Court of Common Pleas, next to be held within or for the same county."

Should the prayer of the petitioners be granted? They are in confinement, charged with the commission of a felony, and are not

entitled to the writ of habeas corpus as a matter of right. R. S., ch. 99, § 5, par. 1. No grand jury was ordered for the June term and the first term, at which the charge can be investigated by the grand jury, is the September term. They refused to enter into the illegal recognizance ordered by the magistrate, but the case does not show that they have made any application to any justice of this court, or bail commissioner for the county to be bailed, any one of whom has full authority to admit them to bail. R. S., ch. 99, § 5, and ch. 133, § 16. Upon such application the justice or commissioner has full power to fix the amount and terms of the recognizance, and the irregularity of which the petitioners complain would have been avoided. In *Belgard* v. *Morse*, 2 Gray, 406, a case very similar to those at bar, the petitioner was committed to jail for failure to comply with the order of the justice to recognize in the sum of ———— dollars for his appearance at the next term of court. The court held that in view of the provisions of the Massachusetts statute allowing any justice of the court of common pleas, or any two justices of the peace and quorum, to admit to bail, there was no occasion for the writ to issue, and dismissed the petition saying, "it is very clear that if the petitioner were here on habeas corpus, the court would only fix the amount of the bail."

In the cases before us the petitioners have made no application to be bailed, and if the writs should issue, the court upon habeas corpus would order the petitioners remanded with an order fixing the sum in which each should be held, and the court at which he should be bound to appear, and a justice of the peace might then bail them pursuant to such order. R. S., ch. 99, § 17.

The petitions should be dismissed. Such a result works no hardship to the petitioners who can be admitted to bail by any bail commissioner for the county. Their claim that they might have been able to furnish sureties for the shorter time, and then at the June term could perhaps have furnished sureties again, has little merit when we consider that they have made no application to be admitted to bail, and little probability, in view of the fact that sureties for whatever length of time furnished may at any time

surrender their principal and exonerate themselves from all liability.

By agreement this case was certified to the Chief Justice for immediate action, and the certificate states that if the order of recognizance is valid, and the mittimus valid, the petitions are to be dismissed and the petitioners remanded to the custody of the sheriff, otherwise each prisoner is to be discharged. These petitions are addressed to the discretion of the court. Such an agreement cannot limit its powers or control its action. The sheriff is but a nominal party; the public have an interest in all criminal prosecutions, to protect innocence and punish crime. In such cases it has always been discretionary with the court to admit to bail upon the return of the habeas corpus, and mere informality of the warrant of commitment is not of itself a sufficient ground for the discharge of the petitioners. In each case the mandate must be,

Petition dismissed.

CHARLES I. DEAN *vs.* LINWOOD H. CUSHMAN.

Penobscot. Opinion July 29, 1901.

Trover. Conversion. Demand. Action. Chattel Mortgage.

One who purchases in good faith, without actual notice, mortgaged chattels of the mortgagor in possession, if he has merely received the goods into his own possession, and has exercised no other dominion or control over them to the exclusion of the mortgagee or in defiance of his rights, is not liable for a conversion, without demand or refusal.

A mortgagor of chattels, having the right of possession until condition broken, may sell his right to redeem them, and if he sell that, and only that, he may lawfully deliver possession of the property to the purchaser.

But if such mortgagor sell the entire property, the mortgagee's interest as well as his own, the sale is unlawful as against the mortgagee; and when accompanied by the removal and delivery of the property by the mortgagor, it constitutes a conversion on his part.

Such conversion puts an end to the mortgagor's right of possession, and immediately revests that right in the mortgagee.

It does not follow, however, that the purchaser is likewise guilty of conversion.

Agreed statement. Judgment for defendant.

Trover for 3010 lbs. of hay, valued at $12.04; action brought in Bangor Municipal Court and reported to the law court by the presiding justice on an agreed statement of facts.

The material portions of the agreed statement are as follows:

The plaintiff claimed title to the hay in question by virtue of a chattel mortgage given to him by Frank W. Oakes of Brewer, on August 18, 1898, for a valuable consideration, duly executed and properly recorded on that day. The property mortgaged was in the possession of the mortgagor at the time of sale to defendant. The defendant purchased the hay in question of said Frank W. Oakes at Ellsworth, on the 16th day of September, 1898, and the same was then and there placed by said Oakes in the defendant's barn in Ellsworth, and sometime thereafterwards the defendant paid Oakes the sum of ten dollars and twenty-five cents for said hay. It did not appear that, at the time of the purchase of said hay by defendant, he had any actual knowledge of the existence of the plaintiff's mortgage. The hay was actually included in and covered by the chattel mortgage above referred to, said mortgage being unsatisfied and valid at the date of the writ. No demand for the hay was made on the defendant before the commencement of the action. No other evidence of the conversion was offered. Defendant claimed that there being no demand prior to the commencement of the action, and no evidence of the destruction or sale of the property by the defendant, that the court should find that there was no conversion, and that the action could not be maintained, as a matter of law.

The court ruled otherwise and gave judgment for the plaintiff for ten dollars and twenty-five cents, finding the facts above set forth to be true, to which ruling the defendant excepted.

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

J. A. Peters, Jr., for defendant.

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

SAVAGE, J. Trover for the conversion of a small quantity of hay.

The plaintiff is mortgagee, under a mortgage which provided that the mortgagor might continue in possession of the hay until the conditions of payment were broken. The defendant was a purchaser from the mortgagor before condition broken. At the time of the purchase, the defendant had no actual knowledge of the existence of the plaintiff's mortgage. The agreed statement shows that the hay, at the time of the sale, was in the possession of one Oakes, the mortgagor, that upon the sale being made, the hay "was then and there placed by Oakes in the defendant's barn," and was afterwards paid for by the defendant. No demand for the hay was made before the commencement of the action, and no evidence of conversion was offered other than is contained in the foregoing statement of facts. The judge below ruled, as matter of law, that the action was maintainable without proof of demand and refusal, and to this ruling the defendant excepted.

Under the mortgage, the mortgagor had the right of possession. He also had the right to redeem the hay from the mortgage. This right to redeem he could sell; and if he sold that, and only that, he might lawfully deliver possession of the property to the purchaser. *White* v. *Phelps*, 12 N. H. 382. But if he sold the entire property, the mortgagee's interest as well as his own, such a sale would be unlawful as against the mortgagee, and accompanied by the removal and delivery of the hay by the mortgagor it would constitute a conversion on his part. *Millar* v. *Allen*, 10 R. I. 49; *White* v. *Phelps*, 12 N. H. 382; *Ashmead* v. *Kellogg*, 23 Conn. 70. Such a sale and consequent conversion would put an end to his right of possession and immediately revest that right in the mortgagee. *Ripley* v. *Dolbier*, 18 Maine, 382; *Grant* v. *King*, 14 Vt. 367; *Forbes* v. *Parker*, 16 Pick. 462; *Whitney* v. *Lowell*, 33 Maine, 318.

But although the mortgagor was clearly guilty of a conversion by the sale and removal of the hay, it does not necessarily follow that the purchaser would be likewise guilty. Taking all inferences as strongly as possible against the defendant, it appears that, besides the purchase and payment, the only other act for which the purchaser could in any way be responsible was the delivery

of the hay into his barn by the mortgagor. It may be inferrible that this delivery was made in pursuance of the contract of sale, to which the defendant was a party. But the defendant had not sold, used or abused the hay. He had resisted no claim of the plaintiff. He had exercised no actual dominion over the hay as against the plaintiff, or in denial of his right. The plaintiff was not in possession, therefore his possession was not interrupted.

There is a class of cases, like *Hotchkiss* v. *Hunt*, 49 Maine, 213, in which it is held that if a bailee of property for a special purpose sell it without right, the owner may maintain trover against the purchaser without demand. In such case the purchaser has obtained no right whatever. By his purchase he has bought nothing, he has gained no title whatever, and no right of possession. He cannot compel the owner to part with his right to possession. He is a stranger. Under such circumstances the sale itself, in which the purchaser participated, was evidence of a conversion. So in *Freeman* v. *Underwood*, 66 Maine, 229, the vendor was a trespasser. He could convey no interest in the property, and the purchaser received none.

It should be borne in mind, however, that a purchaser from a mortgagor, in a case like the one at bar, really does obtain something. This defendant by his purchase did obtain a right of property in the hay, a right to redeem it, and this notwithstanding the mortgagor exceeded his power in attempting to sell it. The defendant, by the purchase, obtained the right of possession even, against all the world except the mortgagee. Although without the right to retain possession as against the mortgagee, he has the right to pay or tender the mortgage debt, whether the mortgagee wills or not, and thereby divest the mortgagee of any right to possession. He does not stand like a naked stranger.

We hold that one who purchases in good faith, without actual notice, mortgaged chattels of the mortgagor in possession, if he has merely received the goods into his own possession, and has exercised no other dominion or control over them to the exclusion of the mortgagee or in defiance of his rights, is not liable for a conversion, without demand or refusal. 2 Green. Ev. § 642; *Gil-*

more v. *Newton*, 9 Allen, 171; *Ware* v. *Congregational Society*, 125 Mass. 584; *Fifield* v. *Maine Central R. R. Co.*, 62 Maine, 77. See also *Parker* v. *Middlebrook*, 24 Conn. 207.

Exceptions sustained.

SETH C. WHITEHOUSE *vs.* DAVID P. BOLSTER, Trustee, and FAUSTINA M. BOLSTER, Claimant.

Kennebec. Opinion August 7, 1901.

Parol Trust. Fraudulent Conveyance. Exceptions. Surety.

In legal contemplation, a surety on a bond becomes the creditor of his co-surety at the time he signs the bond.

Exceptions to an instruction which removes a material question of fact from the consideration of the jury will be sustained, if there was any evidence, or legitimate inferences from the evidence, that tends to support the contention of the excepting party. On the other hand, if there is no evidence from which a jury would be warranted in finding the fact in question, the instruction will be regarded as immaterial and harmless.

Although the evidence is undisputed, yet if different legitimate inferences may be drawn from it, it presents a question of fact for the jury.

When a testator or ancestor makes known to his devisee or heir his desire that his property shall be disposed of in a particular manner, and that he relies upon the latter to carry his desire into effect, and the devisee or heir uses words or does acts calculated to cause, and which he knows do in fact cause the testator or ancestor to believe that he fully assents thereto, and when in consequence thereof the testator or ancestor makes or omits to make a will or such particular disposition of his property in his lifetime as will carry out his desire, a parol trust is created.

When it is sought to uphold such a trust, it must appear that the decedent relied upon the promise of the heir or devisee as an effective arrangement for the future disposition of his property.

The court is of opinion that the only inference that can properly be drawn from the testimony in this case, the only inference which a jury would be warranted in drawing, is that the decedent intended in her lifetime to make some disposition of her estate for her mother's benefit, and that she was prevented, not by her father's assent to her proposed disposition and her reliance upon that assent, but by her own sudden illness and death and consequent inability to carry out her purpose. The presiding justice was warranted, therefore,

in withholding the question of the existence of a trust from the consideration of the jury.

The definition of fraud is a legal question, its existence is a question of fact.

To invalidate a voluntary conveyance, a fraudulent intent must be shown, and it is shown when it appears that a debtor makes a gift of such an amount, or under such circumstances, taking into account all existing conditions, as must necessarily hinder, delay or defraud his creditors. In such case, the donor intends to defraud, in legal contemplation, because he deliberately, intentionally does an act which does hinder, delay or defraud his creditors and which, as things are at the time, he must see, if he stops to think, will have that effect.

If at the time a voluntary conveyance is made, taking into consideration the value of the property transferred, the amount of the debtor's property left with which to satisfy his indebtedness in comparison with the amount of his indebtedness, the transfer must necessarily operate so as to hinder, delay or defraud creditors, then the conveyance is fraudulent and avoidable.

Whether a fraudulent conveyance as thus defined has been proved is a question of fact for the jury.

Held; that that question was not withdrawn from the consideration of the jury by the instructions complained of.

On motion and exceptions by claimant. Overruled.

Action by surety on a probate bond against a co-surety for contribution, begun by trustee process. The issue was between the plaintiff and the claimant, wife of the defendant.

The case appears in the opinion.

L. C. Cornish and N. L. Bassett, for plaintiff.

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

SITTING: WISWELL, C. J., SAVAGE, FOGLER, POWERS, PEABODY, JJ.

SAVAGE, J. Action by surety on a probate bond against a co-surety for contribution. The action was commenced by trustee process.

The issue here is between the plaintiff and the wife of the defendant, who is the claimant of the funds in the hands of the several trustees. The funds sought to be held by the trustee process are, in part, certain deposits in bank made by the defendant in the name of his wife, and in part, one-half of the estate of Jennie M. Bolster, daughter of the defendant and claimant, who died intes-

tate and unmarried, leaving her father and her mother as her only heirs. As to the deposits in bank, it is conceded that they were gifts from the defendant to his wife, made after he had signed the probate bond in question. As to the half of the daughter's estate, there is no controversy but that the defendant, who was the administrator of the estate, as well as heir at law of one-half of the same, soon after his appointment as administrator, and several years after the signing of the bond, transferred to his wife, who was the other heir, not only her distributive share of the estate, but likewise his own. The plaintiff claims that this transfer by the defendant of his own share was a voluntary conveyance, a gift. The claimant, on the other hand, maintains that her husband took no beneficial interest in the daughter's estate, as heir or distributee, but that what would otherwise have been his share descended to him charged with a parol trust for the benefit of the claimant, a trust created by the daughter in her lifetime; and hence that in transferring the share in the daughter's estate to the claimant, the defendant was making no gift, but was simply executing a valid trust, and that the defendant had no interest whatever in his daughter's estate which was available for creditors.

The plaintiff, in legal contemplation, became the creditor of the defendant at the time he signed the bond as co-surety with the latter. *Howe* v. *Ward*, 4 Maine, 195; *Thomson* v. *Thomson*, 19 Maine, 244; *Danforth* v. *Robinson*, 80 Maine, 466. And, as such creditor, he now seeks to avoid the foregoing gifts and transfers made by the defendant to his wife as being fraudulent as to creditors.

The jury under instructions to which exceptions were taken, and which we must consider, rendered special verdicts to the effect that all of these gifts and transfers were made with the intent on the part of the defendant to hinder, delay or defraud his creditors. The claimant filed a motion to set aside these verdicts, but that motion is not pressed. In fact, we understand the learned counsel for the claimant, in argument, to concede that if the instructions to the jury were correct, there was sufficient evidence to warrant the verdict.

There is, however, a preliminary exception to be discussed and determined before we come to a consideration of the instructions excepted to relating to the fraudulent character, or otherwise, of the gifts and transfers. The claimant, insisting that the defendant's share in the daughter's estate came to him charged with a trust, and that thereby the entire beneficial interest belonged to the claimant, complains that the instructions given to the jury entirely removed from their consideration the question whether there was in fact a trust, or no. We think that this complaint is well grounded, and that the exceptions upon this point must be sustained, if there was any evidence, or legitimate inferences from the evidence, that tended to support the claimant's contention as to the fact of a trust. *Nugent* v. *Boston, Concord & Montreal R. R.* 80 Maine, 62. This contention was material, for if there was a valid trust, and the defendant took no beneficial interest in his daughter's estate, it needs no argument to show that the transfer of the naked interest held in trust for his wife violated no rights of his creditors and was not fraudulent as against them. On the other hand, if there was no evidence from which a jury would be warranted in finding that a trust had been created, then the instructions complained of on this point become immaterial, and it will be unnecessary to discuss their correctness as abstract propositions of law.

It is urged by the learned counsel for the plaintiff, that inasmuch as the evidence was undisputed whether a trust had been created was a question of legal construction for the court. This is not so, necessarily. Although the evidence was undisputed, yet if different legitimate inferences might be drawn from the evidence, it presented a question of fact for the jury. If there were any warrantable inferences to be drawn from the evidence, tending to support the contention of the claimant, the question should have been submitted to the jury. *Elwell* v. *Hacker*, 86 Maine, 416. With these rules in mind, we will now consider this question.

The daughter died October 1, 1895. Less than ten days before her death, the talk occurred which it is claimed created a parol trust. The daughter had previously received an invitation from a

lady friend to accompany her across the ocean, the latter part of January, 1896. The father and mother testified that they were in apprehension of the dangers attending such a trip, owing to the inclement season of the year when she proposed to go, and the countries she was intending to visit, and that they cautioned her to consider the question seriously before she accepted the invitation. The testimony is to the effect that after considering the matter further two or three days, the daughter informed her parents that she had concluded to accept the invitation and go. Thereupon ensued the following conversation, as given in the version of the defendant, her father: "After she had said that, her mother says, 'Jennie, what do you want done with your things in case you do not return?' Her reply was, 'Mother, if you outlive me, everything I possess I give to you, and will so state it in writing before I go away.'"

Ques. "Did she say anything to you (the defendant) in regard to carrying out her wishes?"

Ans. "She remarked to me that she wanted me to see that her wishes were complied with."

Ques. "What reply, if any, did you make to her at this time?"

Ans. "I told her everything should be done as she wished it."

The claimant's version, more particular than her husband's, but we think not essentially different, is as follows: "She finally did decide to go, and I told her I thought there was so many uncertainties, a great many vessels I had read of had been detained; and in case anything like that happened to her, what would she want done. She said that in case anything like that happened, she says, 'more than half of it is already yours, *and before I leave, I will give you the whole*, and I will have it done in writing.' She said she would have plenty of time; she wasn't going until January, and she would attend to it. But she was taken sick within, well, in less than two weeks, and she didn't have any consciousness; she was taken unconscious, *so there was nothing done about it.*"

Ques. "Was there anything said to your husband by her at that time?"

Ans. "Yes; she told him to see to it that it was done as she wished. She didn't think it worth while for girls to try to help men, as she called it; she expressed it that way to him; she wanted him to see to it that I had it, that it was given to me."

Ques. "What answer, if any, did he make?"

Ans. "He said he would do it; he would see that it was done."

At the time that conversation was had, the daughter was in her usual good health, and was at work in her usual employment. Two or three days before her death, she was taken suddenly ill and was unconscious all of the time until her death. The claimant strongly urges that by the agreement testified to on the part of the defendant, a parol trust was created in his share by inheritance in his daughter's estate, in the event of her death. This the plaintiff denies.

The subject of parol trusts of this character has recently been carefully and exhaustively considered by this court in *Gilpatrick* v. *Glidden*, 81 Maine, 137, and *Grant* v. *Bradstreet*, 87 Maine, 583, and neither the principles upon which they are based, nor the essentials requisite to establish them, need much further analysis at this time. Such trusts, if established by clear and indubitable evidence, will be enforced by this court.

In the opinion in *Gilpatrick* v. *Glidden*, VIRGIN, J., seems to hold that it is essential to the upholding of such a trust that the testator or ancestor make known to the devisee or heir his desire that the property shall be disposed of in a particular manner, and that he relies upon the latter to carry his desire into effect, that the latter uses words or does acts calculated to cause, and which he knows do in fact cause, the testator or ancestor to believe that he fully assents thereto, and that in consequence thereof the testator or ancestor makes or omits to make a will, or such particular disposition of his property in his lifetime as will carry out his desire. It is urged, however, by the learned counsel for the claimant that the case of *Grant* v. *Bradstreet*, supra, is authority for a modification, to some extent, of the essentials as laid down in *Gilpatrick* v. *Glidden*, and that a trust may be supported where the heir expressly assented to wish of the decedent, even though it did not appear that thereby

the latter was led to omit making a will or other disposition of his property to carry out his purpose. We think there is no essential distinction between the rule stated in *Gilpatrick* v. *Glidden*, and the one applied in *Grant* v. *Bradstreet*, for although in the latter case the testimony made no express reference to a will, it was clearly inferrible, under the particular circumstances of that case, that the decedent, then upon his death bed, and solemnly attempting to make provision for certain persons, in the event of his expected decease, relied upon the promise of the heir, and so omitted to make other disposition of his property. In fact, the inference was almost irresistible.

But without further discussion of this question, there is one principle which runs through all the cases, and which, in our view of this case, must be decisive here. It must always appear that the decedent *relied upon* the promise of the heir or devisee as an effective arrangement for the future disposition of his property. This principle is fundamental and universal. Such a trust as this is claimed to be has its origin in fraud. It is forced, if necessary, upon the conscience of the party to prevent the accomplishment of a fraudulent result. It is constructed to compel the disponee to do with the estate coming to him as he has induced his ancestor or testator to believe that he will do. It is upheld when and only when it would be unconscientious for the disponee to retain the estate to his own benefit. It exists only because the decedent relied upon the promise of the heir. If the decedent did not rely upon the promise, there is no fraud, and the trust fails. It is not a fraud not to keep a promise that was not relied upon.

Now, considering the testimony, it seems clear to us, not only that the daughter did not rely upon her father's promise as an effective disposition of her estate, but that the only inference that can properly be drawn, and which a jury would be warranted in drawing, from the testimony of the claimant herself is that the daughter intended, before leaving for Europe, to make some disposition of her estate for her mother's benefit, perhaps by will, and that she was prevented, not by the assent of her father to the proposition, and her reliance upon it, but by her own sudden illness,

and consequent inability to carry out her purpose. Such it seems to us is clearly the only inference to be drawn from the claimant's own testimony; and such seems to have been the inference in the claimant's mind when she testified "she was taken unconscious, *so* there was nothing done about it." All else is mere guess-work, and that cannot be substituted for evidence or inference. An inference is the conclusion drawn by reason from premises established by proof. In a sense, it is the thing proved. Guess-work is not. We conclude then, that as the evidence, properly considered, does not have a tendency to establish a trust, the exception upon this branch of the cause should be overruled.

We now recur to the instructions upon the subject of fraudulent voluntary conveyances. Upon examination, we think they were correct in principle and appropriate in application. They follow the doctrine laid down in *Gardiner Savings Institution* v. *Emerson*, 91 Maine, 535, the latest decision on the subject in this state. To that doctrine we adhere. The ruling in substance was that if the defendant heedless and unmindful of his creditors, gave away property "under such circumstances and to such an amount, that *looking at it at the time as the thing then was*," it must have been apparent that his creditors would be hindered, delayed or defrauded, the transaction would be void. And this on the ground that a man is always presumed to intend the necessary results of what he does. This maxim as applied to this case is criticised by counsel, but no other rule would be safe or could be tenable. It cannot be disregarded. If the necessary results of the gift were fraudulent, considered in the light of circumstances as they existed at the time of the gift, then in law the giver's intent was fraudulent. Nor does this statement of the doctrine impugn in any degree the doctrine that fraud is always a fact to be proved, and not a result to be assumed. The definition of fraud is a legal question. Its existence is a question of fact. To invalidate a voluntary conveyance, a fraudulent intent must be shown, and we hold that it is shown when it appears that a debtor makes a gift of such an amount or under such circumstances, taking into account all existing conditions, as must necessarily hinder, delay or defraud his creditors. In such

case, the donor intends to defraud, in legal contemplation, because he deliberately, intentionally does an act which does hinder, delay or defraud his creditors, and which, as things are at the time, he must see, if he stops to think, will have that effect.

It should be observed that by this rule, not every voluntary conveyance, or gift by a debtor, is fraudulent as to pre-existing creditors, even if subsequently, by reason of a change of conditions, it does, in fact, operate to hinder, delay or defraud creditors. The question is one of fact, depending upon the existing circumstances and conditions at the time of the alleged fraudulent conveyance. If at that time, taking into consideration the value of the property transferred, the amount of the debtor's property left with which to satisfy his indebtedness in comparison with the amount of that indebtedness, the transfer must necessarily operate so as to hinder, delay or defraud creditors, then the conveyance is fraudulent, and avoidable. Whether a fraudulent conveyance as thus defined has been proved is for the jury, and that question was not withdrawn from the consideration of the jury by the instructions complained of.

The rule was appropriately applied in this case. The defendant, having no regard to the rights or even existence of his creditors, was apparently in the habit for years of giving all of his net income to his wife, the claimant. He must have known while he was doing this, if he gave the matter any consideration, that he was hindering, delaying, or defrauding his creditors. It was his duty to give them some thought.

Motion and exceptions overruled.

STATE *vs.* BRADFORD KNIGHT.

Kennebec. Opinion August 13, 1901.

Murder. Insanity.

It is still held by an overwhelming weight of judicial authority, that when the insanity of the accused is pleaded in defense, the test of his responsibility for crime afforded by his capacity to understand the nature and quality of the act he was doing, and his mental power to distinguish between right and wrong with respect to that particular act at the time he committed it, is the only proper legal criterion; and that when fully developed and explained to the jury in its application to the special facts and circumstances of different cases, it will always be found adequate to meet the demands of justice and humanity toward the accused, as well as to insure the protection and safety of the public.

It is evident that much of the diversity of opinion, or the difference in modes of expression upon this subject, arises from a failure to discriminate between that irresistible impulse produced by an insane delusion or mental disease, which has progressed to the extent of dethroning the reason and judgment and destroying the power of the accused to distinguish between right and wrong as to the act committed, and that uncontrollable impulse which is alleged to arise from mental disease, and to co-exist with the capacity to comprehend the nature and wrongfulness of the act, but which may with equal reason and consistency be attributable to moral depravity and criminal perversity.

The defendant was convicted of murder in the first degree. His counsel contended that an uncontrollable insane impulse to commit a criminal act may co-exist with full knowledge of the wrongfulness of the act, and that the legal test of responsibility for crime afforded by the knowledge of right and wrong respecting the act committed, has proved to be insufficient and unsatisfactory. And counsel for the defendant requested instructions accordingly to the jury.

But, as it is not in controversy that the instructions actually given to the jury were in harmony with the intellectual test of responsibility, approved by this court, in 1870, in *State* v. *Lawrence*, 57 Maine, 574, *held*; that the refusal to give the requested instructions was fully justified.

Held; that the defendant's requests do not assume the existence of an insane delusion or any mental disease sufficient to override his reason and judgment, obliterate his sense of right and wrong, and deprive him of the power to choose between them. On the contrary, they presuppose "sufficient mental capacity and reason to enable him to distinguish between right and wrong as

to the particular act," and still declare him irresponsible if, by reason of mental disease, he did not have sufficient will-power to refrain from committing the act.

Also; that if such a state of mind as that contemplated by the requests may in reality exist, and the rule contended for be abstractly correct, there is nothing in the evidence presented in the careful recapitulation of the presiding justice which has any tendency to prove that the accused, at the time he committed the act, was impelled by any insane delusion respecting it, or by any uncontrollable impulse caused by mental disease. The requested instructions would not have been relevant to any proposition which the facts in evidence necessarily tended to establish. The requested instructions were, therefore, properly refused.

State v. *Lawrence*, 57 Maine, 574, re-affirmed

On exceptions by defendant. Overruled.

The defendant was indicted and tried in this court, in Kennebec county, for the murder of Mamie Small. The only issue raised in defense was the defendant's insanity. In support of this defense, certain instructions to the jury were requested. They are found in the opinion of the court. Exceptions were also taken to instructions actually given.

The case appears in the opinion.

G. W. Heselton, county attorney, for State.

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

The issues are raised upon the refusal of the court to give one, or all, of the four requests. They involve substantially the same rule of law. The second request differs from the first only in adding the element of consciousness that the act was wrong and punishable. The third request combines the first and second. The fourth combines all three with some preliminary definitions. The substance of the contention is the position that a diseased will should excuse from guilt as fully as a diseased intellect. As framed and built up, the requests require the jury to find, first, that the mind of the respondent at the time of the killing was diseased; next, that by reason of such mental disease his will-power was then impaired; next, that such impairment of his will-power was caused by such mental disease and that he did not then have sufficient will-power to refrain from committing the act, and finally, that the act itself was the product of such mental disease.

Philosophically, it means a recognition of the well-known scientific fact and principle that from disease of the mind will flow a disease of the will, and that when the killing is the result or product of such a disease there can be no criminal intent. They rest upon the opening definition of the fourth request that criminal intent involves a sound will as a part of the requirement of a sound mind, not a weak will, not a will enfeebled by passion or by prejudice, but a diseased will. That a man may reason, may know his act to be wrong, that he may be conscious that the act is punishable, should not make him responsible, if knowing the wrong, his diseased will will not suffer him to do the right.

The development of the judge-made rule upon insanity has been slow and wrested from the courts by the progress of scientific truth. We need cite no cases to call the attention of the court to the early rule that no man should be declared irresponsible unless shown to occupy the level of the brute. Next followed the infant test. The self-evident inhumanity of these rules, and the progress of scientific truth pushed the courts a step higher and forced them to recognize the intellectual test. Here they hang stubbornly. The answers of the judges to the questions put by the House of Lords have received a wider recognition than they deserve. Without argument and without contention between parties, these answers have dominated the courts of the common law. We submit that the time must come when courts must cease to shut their eyes to scientific truth.

Of case law to support this contention there is but little. In *State* v. *Felter*, 25 Iowa, 67, the principle is recognized that where the want of power of control arises from the insane condition of the mind of the accused, he is not responsible, and *State* v. *McWherter*, 46 Iowa, 88, shows a recognition of the principle that a mental disease may overpower the will.

In *Bradley* v. *State*, 31 Ind. 422, it is suggested by the court that the intellectual test assumes the existence of one faculty, the understanding, and that only the understanding (or intellect) is liable to disease; that it is true that the hospitals are full of patients with healthy intellects and diseased wills; that insanity

must be recognized as a disease that may impair or totally destroy either the understanding, or the will, or both.

In *Green* v. *State*, 64 Ark. 523, we find a case specifically holding that a person who kills another, knowing at the time that he is committing a wrong act is not legally responsible for the act if, at the time of the killing, he is so affected with a disease of the mind as thereby to have lost the power of choosing between right and wrong, and to avoid doing the act, provided that at the same time the crime is so connected with such mental disease in the relation of cause and effect as to have been the product of it solely.

I am asked by a member of the court, in argument, what test the court would give to the jury for the application of the rule contended for. I answer, insanity is a fact. It is the province of the jury and not of the court to determine the facts. The inhumanity and want of logic in the present rule comes from the position of the court that to-day takes away from the jury its full constitutional power of deciding the entire fact. The State contends that there was no evidence tending to establish such issues. The respondent bases his contention largely upon the memorandum written by the prisoner within an hour before the killing of the girl. No sane man could have written it. This man was insane ten years ago, confessedly insane at the trial, insane to-day; remanded to the insane hospital as soon as the verdict was rendered upon the motion of the government itself. No man conscious that his act was wrong, and master of his own actions, could have written such a memorandum. It may not be sufficient evidence to satisfy the court that his will was diseased and not his own; it may not be sufficient to satisfy a jury. It was evidence tending to support the contention and, because it tended to support it, we had a right to have the rule given.

SITTING: WISWELL, C. J., WHITEHOUSE, STROUT, SAVAGE, FOGLER, PEABODY, JJ.

WHITEHOUSE, J. In this case the respondent was indicted and tried for the murder of Mamie Small. It was not in controversy

that the accused, if responsible for his act, was guilty of murder in the first degree; and the only issue raised in defense was the insanity of the defendant. The jury returned a verdict of "guilty of murder in the first degree," and the case comes to this court on exceptions taken by the defendant to the refusal of the presiding justice to give certain instructions, and to the instructions actually given, in the charge, as follows:

First. If the jury find that the mind of the respondent at the time of killing Mamie Small was diseased, that by reason of such mental disease his will-power was then impaired, that by reason of such impairment of his will-power so caused he did not then have sufficient will-power to refrain from committing the act, and that the act was the product of such mental disease, he was not responsible for the act, although he then had sufficient mental capacity and reason to enable him to distinguish between right and wrong as to the particular act he was doing.

Second. If the jury find that the mind of the respondent at the time of killing Mamie Small was diseased, that by reason of such mental disease his will-power was then impaired, that by reason of such impairment so caused he did not then have sufficient will-power to refrain from committing the act, and that the act was the product of such mental disease, he was not responsible for the act, although then conscious that the act was wrong and punishable.

Third. If the jury find that the prisoner at the time of killing Mamie Small had a diseased mind, that such mental disease caused him to determine to kill her, that by reason of such mental disease he did not then have sufficient will-power to refrain from committing the act, and that the act was the product of such mental disease, he was not responsible for the act, although then conscious that the act was wrong and punishable.

Fourth. Criminal intent involves a sound will as a part of the requirement of a sound mind. That a person is shown to have had, at the time of the act, capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he was then doing, does not necessarily make him responsible. If

the jury find that the mind of the prisoner at the time of killing Mamie Small was diseased, that by reason of such mental disease his will-power was then impaired, that by reason of such impairment of his will-power so caused he did not then have sufficient will-power to refrain from committing the act, and that the act was the product of such mental disease, he was not responsible for the act, although he then had capacity and reason sufficient to enable him to distinguish between right and wrong as to the act.

Fifth. To the following instruction in the charge: "To establish the proposition that he was insane in the legal sense, and therefore not criminally responsible, the respondent must prove that, at the time of doing the act, he was afflicted with mental disease of such character or extent that he had not then the mental capacity sufficient to distinguish between right and wrong as to the particular act he was doing; or, in other words, that he had not knowledge, consciousness or conscience enough to know that the act he was doing was wrong and criminal, and one for which he would be liable to punishment; or, in still other words, that he was so afflicted by mental disease as not to know the nature and quality of the act he was doing; or if he did know that much, he yet did not know that the act was unlawful and wrong. If he does prove that much, it establishes the proposition that he was legally unsound; insane in the legal sense."

Sixth. To the following instruction in the charge: "Again, whatever was the character or extent of his mental disease, if any he had, if he yet had sufficient mental capacity to understand and know the situation, to understand and remember the nature and quality of the act he was doing, that it was unlawful and wrong, he was not then insane in the legal sense of that term."

Seventh. To the following instruction: "He must show then, first: the existence at that time of some mental disease; secondly, that the disease was of such character or extent that it deprived him at that time of the usual mental capacity necessary to understand the nature and quality of the act he was doing, its character and consequences; in other words, the mental capacity to distin-

guish between right and wrong as to that particular act. He must show the connection between a mental disease, if there was one, and this unhappy result by the reduction of his mental capacity to the state which I have described. If both are shown, namely, the existence of the mental disease and its extent to the point I have described, then he was insane in the legal sense and the killing was simply the unfortunate result of mental disease; otherwise, the killing must be held to be the result of the man's vicious acts for which he is responsible."

It is expressly admitted in the bill of exceptions that "the case and the contentions, both of the state and of the respondent, were fully and accurately stated in the charge, so far as necessary to explain and illustrate the instructions given, and that "the respondent adopts, as a part of these exceptions, all statements of facts and of contentions in the charge." The relevancy of the requested instructions to any propositions of fact which the evidence necessarily tended to establish, and the soundness of the instructions given to which exceptions were taken, must therefore be considered and determined, so far as necessary to a decision of the question presented by the exceptions, upon an examination of the recitals of evidence and statements of fact contained in the charge to the jury.

The relations between the respondent and the deceased, and the circumstances attending the commission of the homicide, are thus stated in the charge: "To prove the presentment, in the first instance, the State has introduced evidence tending to show that, upon the seventeenth day of February last, Bradford Knight was acquainted with Mamie Small; had married her sister; had been intimate with her, probably to an undue degree. I think there is no question but that he was, as we say, criminally intimate with her; had sexual relations with her, forbidden by law and amounting to the crime of adultery; that he had known her many years; that on the afternoon of February seventeenth, shortly after or about dinner time, he was on the other side of the river, in the town of Randolph, inquiring for the residence of the man with whom Mamie Small at that time was boarding; that he went up to the residence and then came back. He is afterwards seen going to

Augusta, then going back to Gardiner, and is seen in the evening upon the common in Gardiner, as you have heard described by a witness, walking back and forth alone in the walks of that common. Then it appears by another witness that Mamie Small, in the evening, left her boarding place upon the Randolph side with a young boy, came across the bridge into Gardiner, and passed up by this common where he was walking back and forth; that he came out and addressed her and inquired what the trouble was about, and that she replied to him sharply, that if he did not let her alone, she would make trouble for him; that she thereupon started to run ahead and turned into a walk, past a house, into the back door of a house; that he followed on after her, if I remember correctly, cutting across the sidewalk, not following around the turn, but cutting across, reached her, seized her with his left hand, and fired three shots at that close range into her body; that she screamed and fell; that he started and ran back, meeting some one and telling him that the shots were from another direction, and went on down to his old home in Richmond."

The facts disclosed by the state's evidence, as well as those adduced in behalf of the respondent, were then carefully grouped and critically reviewed by the presiding justice, special attention being called to the following memorandum found on the respondent's person after the homicide, and relied upon as an important evidence in his behalf, to wit:

"Feb. 17, 1899.

"I am in Gardiner to night for the purpose of shooting Mamie Small. I have been to Augusta to see my wife to get her go to Gardiner to see Mamie I have told my wife that I wanted to see Mamie and talk with her and see if she cant fix up the trouble between Mamie and I"

It is not in controversy that the instructions actually given to the jury were in entire harmony with the intellectual test of criminal responsibility approved in *State* v. *Lawrence*, 57 Maine, 574, and cases there cited, and that the refusal to give the requested instructions was fully justified by the doctrine of that case. But, it is earnestly contended, by the learned counsel for

the defendant, that an uncontrollable insane impulse to commit a criminal act may co-exist with full knowledge of the wrongfulness of the act, and that the legal test of responsibility for crime afforded by the knowledge of right and wrong, respecting the act committed, has proved to be insufficient and unsatisfactory. It is accordingly insisted that the time has now arrived, when this criterion of responsibility can be safely modified by incorporating into the rule the element of irresistible impulse presented in the defendant's requests.

It is undoubtedly true, that in the progressive development of the medical jurisprudence of insanity more enlightened views have gradually prevailed respecting the functional activity of the mind, and the course of symptoms indicating mental disease, and that just conclusions have more frequently been reached by courts and juries in recent years in regard to the relation of insanity to criminal responsibility. But since the announcement of the decision by this court in *State* v. *Lawrence*, supra, in the year 1870, this abstruse and difficult question has been the subject of exhaustive re-examination and renewed study, in the light of all modern discoveries of scientific truth bearing upon it by the most eminent medical and legal jurists in this country and England, and by courts of the highest authority in both countries; and it is still held by an overwhelming weight of judicial authority that when the insanity of the accused is pleaded in defense, the test of his responsibility for crime afforded by his capacity to understand the nature and quality of the act he was doing, and his mental power to distinguish between right aud wrong with respect to that particular act at the time he committed it, is the only proper legal criterion; and that when fully developed and explained to the jury, in its application to the special facts and circumstances of different cases, it will always be found adequate to meet the demands of justice and humanity towards the accused, as well as to insure the protection and safety of the public.

In Browne's "Medical Jurisprudence of Insanity," published in England in 1875 and re-published in this country, the author critically analyzes the famous answers given by the English judges to

the questions proposed to them by the House of Lords after the trial of MacNaughton in 1843 (§§ 10-14), which have formed the basis of the prevailing rule since that time, and the one approved in *State* v. *Lawrence*, supra, and then proceeds as follows (§ 15): "After the fullest examination of the medical opinions on the other side, we are constrained to hold that the answers of the judges are a most satisfactory statement of the law, and that no better test of responsibility could, at the present time, be devised than that which makes knowledge of right and wrong at the time of the commission of the act, the means of judging of the punishability of the person who has committed a criminal offense. 'Although not a test of insanity,' says Dr. Hammond, 'the knowledge of right and wrong is a test of responsibility. . . . . Any individual having the capacity to know that an act which he contemplates is contrary to law, should be deemed legally responsible and should suffer punishment. He possesses what is called by Bain punishability. . . . . The only forms of insanity which, in my opinion, should absolve from responsibility. . . . . are such a degree of idiocy, dementia or mania as prevents the individual from understanding the consequences of his act, and the existence of a delusion in regard to a matter of fact which if true would justify his act.'"

In the elaborate work on Medical Jurisprudence by Witthaus and Becker, published in New York in 1896, is a treatise on the "Medical Aspects of Insanity in its Relations to Medical Jurisprudence" by Dr. Fisher of New York. In that portion of the treatise devoted to "Impulsive Insanity" the author says (Vol. 3, p. 273): "The practice of the courts in England and in this country, following the trial of MacNaughton in 1843, has been that every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his acts, unless it can be clearly proved that, at the time of committing the act, the accused was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or if he did, that he did not know he was doing wrong. Under these rules which may be taken as outlining the law on this subject in a large

number of the United States, the defense of irresistible impulse to do what is known to be morally wrong and what is legally a crime cannot be set up; for if the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, it is punishable. . . . . All forms of crime may be committed under the influence of irresistible impulse—homicide, suicide, arson, theft and various acts indicative of sexual perversion. We may also have melancholia or mania associated with this condition, and more rarely delusions and hallucinations. It is not, however, in these latter conditions that we should consider this disease as an entity. In fact, the only safe course is to follow the dictum of the law in this respect, which virtually says that irresistible impulse is no defense unless a symptom of insanity."

Again, in the treatise on "Mental Unsoundness in its Legal Relations," in the same volume, by Mr. Becker, the author says, on page 421–2: "But evidence of the loss of control of the will, or of morbid impulse, does not constitute a defense, except when it demonstrates mental unsoundness of such a character as to destroy the power of distinguishing right and wrong as to the particular act. . . . . This rule is the legal essence of the whole matter, and it avoids much of the confusion which the German jurists and metaphysicians have infused into this subject. The New York Court of Appeals in the case of *Flanagan* v. *The People*, 52 N. Y. 467 (1873), said: 'We are asked in this case to introduce a new element into the rule of criminal responsibility in cases of alleged insanity, and to hold that the power of choosing right from wrong is as essential to legal responsibility as the capacity of distinguishing between them; and that the absence of the former is consistent with the presence of the latter. The argument proceeds upon the theory that there is a form of insanity in which the faculties are so deranged that a man, though he perceives the moral quality of his acts, is unable to control them, and is urged by some mysterious pressure to the commission of acts, the consequences of which he anticipates but cannot avoid. Whatever medical or scientific authority there may be for this view, it has not been accepted by

courts of law. The vagueness and uncertainty of the inquiry which would be opened, and the manifest danger of introducing the limitation claimed into the rule of responsibility, in cases of crime, may well cause courts to pause before assenting to it. Indulgence in evil passions weakens the restraining power of the will and conscience; and the rule suggested would be the cover for the commission of crime and its justification. The doctrine that a criminal act may be excused upon the notion of an irresistible impulse to commit it, where the offender has the ability to discover his legal and moral duty in respect to it, has no place in the law.'"

This rule was subsequently incorporated into the Penal Code of New York, and re-affirmed in *People* v. *Carpenter*, 102 N. Y. 238 (1886), and in *People* v. *Taylor*, 138 N. Y. 398 (1893.)

In the "Medical Jurisprudence of Insanity or Forensic Psychiatry" by Dr. S. V. Clevenger of Chicago, published in 1898, the author concedes that the test of right and wrong as to the particular act charged is generally accepted in the United States in determining the question of responsibility for crime (Vol. 2, p. 18,) and abundantly justifies the concession by a vast array of "Legal Adjudications in Criminal Cases" cited in chapter 7 of the same volume.

In *State* v. *Erb*, 74 Mo. 199 (1881), a requested instruction that if the accused "was incapable of distinguishing right from wrong, or of exercising control or will-power over his actions, or was unconscious at times of the nature of the crime he was about to commit," he should be acquitted, was held to have been properly refused, and this decision was re-affirmed in *State* v. *Pagels*, 92 Mo. 300 (1887), the court saying in the opinion in the latter case, "It will be a sad day for this state when uncontrollable impulse shall dictate a rule of action to our courts."

In a very elaborate discussion of the subject by the Supreme Court of Appeals in *State* v. *Harrison*, 36 West Va. 729 (1892), the authorities are critically examined and compared and the doctrine of "irresistible impulse" emphatically repudiated. In the opinion it is said: "For myself, I cannot see how a person who rationally comprehends the nature and quality of an act, and

knows that it is wrong and criminal, can act through irresistible innocent impulse. Knowing the nature of the act well enough to make him otherwise liable for it under the law, can we say that he acts from irresistible impulse and not criminal design and guilt?

. . . .

"I admit the existence of irresistible impulse, and its efficacy to exonerate from responsibility, but not as consistent with an adequate realization of the wrong of the act. It is that uncontrollable impulse produced by the disease of the mind, when that disease is sufficient to override the reason and judgment and obliterate the sense of right as to the act done, and deprive the accused of the power to choose between them. This impulse is born of the disease, and when it exists, capacity to know the nature of the act is gone. This is the sense in which 'irresistible impulse' was defined in *Hopps* v. *People*, 31 Ill. 385, and *Dacy* v. *People*, 116 Ill. 556." See also *State* v. *Felter*, 25 Iowa, 67; *State* v. *Mewherter*, 46 Iowa, 88; *State* v. *Nixon*, 32 Kan. 205; *Ortwein* v. *Com.*, 76 Pa. St. 414; *People* v. *Hoin*, 62 Cal. 120; *U. S.* v. *Guiteau*, 10 Fed. Rep. 195.

In the "History of the Criminal Law of England," by Mr. Justice James Fitz-James Stephen, published in 1883, after a searching examination of the latest and most authoritative medical works upon insanity, and a critical review of the English law upon the question of responsibility for crime, the distinguished author says (Vol. 2, pages 170–171): "The man who controls himself refers to distant motives and general principles of conduct and directs his conduct accordingly. The man who does not control himself is guided by the motives which immediately press upon his attention. If this is so, the power of self-control must mean a power to attend to distant motives and general principles of conduct, and to connect them rationally with the particular act under consideration; and a disease of the brain which so weakens the sufferer's powers as to prevent him from attending or referring to such considerations; or from connecting the general theory with the particular fact, deprives him of the power of self-control.

"Can it be said that a person so situated knows that his act is

wrong? I think not, for how does any one know that any act is wrong except by comparing it with general rules of conduct which forbid it, and if he is unable to appreciate such rules, or to apply them to the particular case, how is he to know that what he proposes to do is wrong? . . . . If the words 'know' and 'wrong' are construed as I should construe them, I think this is a matter of no importance, as the absence of the power of self-control would involve an incapacity of knowing right from wrong. . . . . All that I have said is reducible to this short form:— Knowledge and power are the constituent elements of all voluntary action, and if either is seriously impaired the other is disabled. It is as true that a man who cannot control himself does not know the nature of his acts as that a man who does not know the nature of his acts is incapable of self-control."

It is evident that much of the diversity of opinion, or difference in modes of expression upon this subject, arises from a failure to discriminate between that "irresistible impulse" produced by an insane delusion or mental disease which has progressed to the extent of dethroning the reason and judgment and destroying the power of the accused to distinguish between right and wrong as to the act he is committing, and that uncontrollable impulse which is alleged to arise from mental disease and to co-exist with the capacity to comprehend the nature and wrongfulness of the act, but which may with equal reason and consistency be attributable to moral depravity and criminal perversity.

In the case at bar, it has been seen that the defendant's requests do not assume the existence of an insane delusion or any mental disease sufficient to override his reason and judgment, obliterate his sense of right and wrong, and deprive him of the power to choose between them. On the contrary, they presuppose "sufficient mental capacity and reason to enable him to distinguish between right and wrong as to the particular act," and still declare him irresponsible if by reason of mental disease he did not have "sufficient will-power to refrain from committing the act."

It is contended, in behalf of the state, that the requests present a contradictory and impossible state of mind in thus assuming that

the accused may have no insane delusions as to the act he is committing, and have full capacity and mental power to comprehend the nature and consequences of the act, to know that it was unlawful and wrong and would subject him to punishment, and yet have no power to refrain from committing it. But, whatever may eventually be declared by the great body of medical jurists to be the psychological truth in regard to the co-existence of uncontrollable impulse and such full capacity to distinguish right from wrong in regard to the act in question, at present, without clear and conclusive proof that such a state of mind may exist and in the absence of any satisfactory test for the discovery of its existence that would be universally applicable in the practicable administration of the criminal law, this court must adhere to the rule approved in *State* v. *Lawrence*, supra, which, as construed and applied in this state, has proved to be an adequate and satisfactory criterion for determining the punishability of the accused when a plea of insanity is interposed in defense.

Furthermore, in the case at bar, if such a state of mind as that contemplated by the requests may in reality exist, and the rule contended for be abstractly correct, there is nothing in the evidence presented in the careful and accurate recapitulation of the presiding justice which has any necessary tendency to prove that the accused, at the time he committed the act, was impelled by any insane delusion respecting it, or by any uncontrollable impulse caused by mental disease. The requested instructions would not have been relevant to any proposition which the facts in evidence necessarily tended to establish. The requested instructions were therefore properly refused.

As already shown, the instructions actually given were in strict conformity with the rule which has hitherto prevailed in this state, and their application to the facts in evidence was made plain by the full and apt explanations given in the luminous charge of the presiding justice.

Exceptions overruled.
Judgment for the state.

GEORGE W. WILLEY *vs.* INHABITANTS OF WINDHAM.

Cumberland. Opinion August 31, 1901.

Towns. Road Commissioner. Bond. Officer de facto and de jure. Stat. 1897, c. 329, § 4.

1. One who has been duly elected by a town to the office of road commissioner and has taken the oath of office, but has failed to file the bond required by § 4 of c. 329, Public Laws of 1897, is road commissioner de facto and not commissioner de jure.
2. A road commissioner de facto may, by authority, express or implied, of the selectmen of his town, purchase materials or employ labor of men or teams for the repair of ways upon the credit of the town; but he cannot recover of his town for money paid out by him for materials furnished or labor employed in the repair of ways.
3. He may recover of the town for the labor or services of his own team employed by him in the repair of ways, by the direction or consent, express or implied, of the selectmen of the town.
4. As the plaintiff has been paid the full amount voted by the town as compensation for the services of road commissioner, the question of his right or title to such compensation is not considered.

On exceptions by plaintiff. Exceptions sustained.

Assumpsit on account annexed to recover for plaintiff's services as road commissioner, for use of his horse, harness, wagon and sleigh, also for other items furnished by him.

The case was tried in the Superior Court, for Cumberland county, and brought to this court on the plaintiff's exceptions to a non-suit ordered there.

J. C. and F. H. Cobb, for plaintiff.

I. L. Elder and F. H. Haskell, for defendant.

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

FOGLER, J. This is an action of assumpsit which comes to this court from the Superior Court, for the county of Cumberland, upon exceptions to an order of non-suit by the judge of that court.

The plaintiff declares upon an account annexed to the writ, in which he charges for services as road commissioner of the defendant town from March, 1898, to March, 1899, 103¾ days at two dollars per day, $207.50; for the use of his horse, harness, wagon and sleigh during the same time, in prosecuting the work of repair of highways and bridges in said town, 87 days at one dollar per day; and for use of tools and other minor items amounting to $15.28. The declaration also contains a quantum meruit count.

The testimony shows that the plaintiff has been paid as road commissioner upon orders issued in his favor by the selectmen of the town, the sum of $251.60, leaving a balance due the plaintiff, as claimed by him, of $56.18. Each of said orders states that it is issued "for service in part as road commissioner for the year 1898."

The defendants plead the general issue, and, by brief statement, that the plaintiff, at the time declared on, was not and never had been the duly elected and qualified road commissioner of the defendant town.

After the plaintiff had introduced his testimony and rested his case, the defendants moved for a non-suit upon the ground that the plaintiff had failed to file with the selectmen of the defendant town any bond as such road commissioner, and that the plaintiff had never been a road commissioner de jure of the defendant town, but had been merely a de facto commissioner. The presiding judge sustained the defendant's motion and ordered a non-suit, to which order the plaintiff excepts.

The testimony introduced by the plaintiff is to the following effect: at the annual town meeting of the defendant town held in March, 1898, the plaintiff was legally elected road commissioner of the town for the year then next ensuing and was duly sworn to the faithful discharge of his duty. By vote of the town his compensation was fixed at two dollars per day. Section 4 of chapter 329, Public Laws of 1897, provides that a person elected to the office of road commissioner, "shall give bond to the satisfaction of the selectmen and be responsible to them for the expenditure of money and discharge of his duties generally." The plaintiff did

not give such bond for the reason, as he testifies, that the selectmen told him there was no need of his giving bond as he would handle no money.

The plaintiff acted as road commissioner and performed all the duties and services incident to said office during the entire municipal year for which he was elected. He testified that he served as road commissioner the number of days charged in his account, that his horse was used in prosecuting the work of repairs on the highway the days charged, and that the other items were furnished by him as road commissioner.

No other person was elected or appointed road commissioner of the town for that year, or made any claim of title to the office or its emoluments, nor does it appear that the plaintiff's title to the office or its emoluments was questioned for the term for which he was elected. He was recognized as road commissioner by the selectmen of the town who approved and drew orders for the payment of bills, contracted by him in that capacity, in behalf of the town. The town, after suit brought, voted that the town agent tender to the plaintiff the amount unpaid on his bill.

By his failure to give bond as prescribed by statute, the plaintiff was not road commissioner de jure. *Rounds* v. *Bangor*, 46 Maine, 541.

But, having performed the duties and exercised the functions of the office, exclusively, during its term under color of election and title, he must be regarded as an officer de facto.

Upon the question whether an officer de facto is entitled to the salary or emoluments of the office, the courts of this country are not in accord. The weight of authority is undoubtedly that, as a general rule, an officer de facto is not entitled to the compensation or emoluments of the office. This is so held in this state in *Andrews* v. *Portland*, 79 Maine, 484.

But the question of the right to recover compensation or emoluments is not involved in this suit. The plaintiff has been paid by the town upon orders issued to him by the selectmen the amount, and in excess of the amount of compensation, voted by the town and charged by the plaintiff. The town has not disavowed such

payments, but, on the contrary, has voted to tender the plaintiff the amount unpaid on his bill.

The question to be decided is, therefore, how much, if anything, is due to the plaintiff for the items, other than for his services, charged by him after deducting the overplus paid him on account of compensation.

A road commissioner has authority, by virtue of the statute before referred to, to employ men and teams and to purchase materials, upon the credit of his town, for the repair of ways and bridges. A road commissioner de facto has no such authority except by the direction or consent of the selectmen of the town. His position, in this respect, is somewhat analogous to that of highway surveyors elected or appointed under former statutes.

It has been held by this court that a highway surveyor cannot maintain an action against a town for re-imbursement for money paid by him for labor employed or material purchased for the repair of ways. *Ingalls* v. *Auburn*, 51 Maine, 352; *Getchell* v. *Wells*, 55 Maine, 433.

The plaintiff in this suit cannot, therefore, recover for charges for money paid out by him.

We are of opinion that he may recover for such other items of the account sued, barring his charge for compensation which has been fully paid, as were incurred by him under the authority, express or implied, of the selectmen of the town.

This question should have been submitted to the jury upon all the evidence in the case, and the order of non-suit was erroneous.

Exceptions sustained.

JOSEPH H. FISHER *vs.* MERCHANTS INSURANCE CO.

Androscoggin. Opinion August 9, 1901.

Insurance. Arbitration. Pleading. Condition.

A stipulation in a contract providing for the settlement by arbitration of all controversies and disputes that might subsequently arise between the parties is invalid, because its effect would be to oust the courts of their jurisdiction; but if the arbitration ageeement relates only to the determination of some preliminary matter, such as the amount of damages to be recovered and does not apply to the whole question of liability, such provision, when a reasonable and definite method is provided for choosing the arbitrators, is valid and enforceable.

A provision of this kind in a contract may make such determination by arbitration a condition precedent to the maintenance of an action upon the contract, or it may be simply a collateral and independent agreement which will not prevent the maintenance of a suit upon the principal contract, but which would be the basis of a separate action in case of its breach. This depends upon the construction of the arbitration provision. When the contract provides that no action upon it shall be maintained until after such an award, then the award is a condition precedent to the right of action.

A policy of fire insurance contained this provision:—"In case of loss under this policy and the failure of the parties to agree as to the amount of loss, it is mutually agreed that the amount of such loss shall be referred to three disinterested men, the company and the insured each choosing one out of three persons to be named by the other and the third to be selected by the two so chosen; the award in writing by a majority of the referees shall be conclusive and final upon the parties as to the amount of loss or damage, and such reference, unless waived by the parties, shall be a condition precedent to any right of action in law or equity to recover for such loss; but no person shall be chosen to act as referee, against the objection of either party, who has acted in a like capacity within four months."

The property covered by the insurance policy having been destroyed by fire, the plaintiff and the defendant company selected arbitrators in the manner provided in the arbitration clause above quoted. These arbitrators fixed a time and place for hearing, gave notice to the parties, heard them together with their counsel and witnesses, and made an award in writing, fixing the amount of damage sustained by the insured by reason of the destruction by fire of the property covered in the policy.

In this action upon the policy, the plaintiff sought to recover damages irrespective of the amount awarded by the arbitrators upon the ground that the award was invalid and void by reason of the misconduct of the referees dur-

ing and prior to the hearing before them. The declaration contained no averment to the effect that the alleged failure of the arbitration was through any fault of the defendant.

Held; that the determination by arbitration of the amount of loss having been specially made by the parties a condition precedent to any right of action, it was incumbent upon the plaintiff to prove performance or a valid excuse for non-performance. That if the award of the arbitrators was invalid as claimed by the plaintiff, for reasons set out in the declaration, it was the duty of the plaintiff to seek a new determination of the amount of his loss in the manner provided by the contract. That the action can only be maintained to recover the amount determined upon by the arbitrators; or, if their determination and award were invalid, then the plaintiff must allege and prove, either, that the amount of the plaintiff's loss has been determined by other arbitrators chosen in the manner stipulated by the parties, or some sufficient reason why such a determination has become unnecessary or impossible.

On exceptions by defendant. Sustained.

Action on policy of fire insurance. The case is stated in the opinion.

E. Foster and R. W. Crockett, for plaintiff.

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

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

WISWELL, C. J. Action upon a policy of fire insurance which contained this provision: "In case of loss under this policy and the failure of the parties to agree as to the amount of loss, it is mutually agreed that the amount of such loss shall be referred to three disinterested men, the company and the insured each choosing one out of three persons to be named by the other, and the third to be selected by the two so chosen; the award in writing by a majority of the referees shall be conclusive and final upon the parties as to the amount of loss or damage, and such reference, unless waived by the parties, shall be a condition precedent to any right of action in law or equity to recover for such loss; but no person shall be chosen or act as referee, against the objection of either party, who has acted in a like capacity within four months."

The property covered by the insurance policy having been

destroyed by fire, the plaintiff and the various insurance companies that had policies covering the risk, including the defendant company, selected arbitrators in the manner provided in the arbitration clause above quoted. These arbitrators fixed a time and a place for a hearing, gave notice to the parties, heard them together with their counsel and witnesses, and made an award in writing fixing the amount of damage sustained by the insured by reason of the destruction by fire of the property covered by the policies.

Subsequently this action was commenced. The original declaration contained no reference to the arbitration clause or to the award of the arbitrators. But before the trial it was amended by the insertion of averments setting out this clause, the fact that arbitrators had been chosen, that they had a hearing and made an award, and that this award was invalid and void by reason of the misconduct of the referees during and prior to the hearing before them, for the reasons specifically set out in the amendment. The declaration as amended contained no averment to the effect that the alleged failure of the arbitration was through any fault upon the part of the defendant.

The plaintiff sought to recover damages irrespective of the amount ascertained and awarded by the arbitrators. The defendant requested the following instruction: "The stipulation for arbitration contained in the policy sued on in this case being a condition precedent to the maintenance of an action thereon, if the jury shall find that the arbitration undertaken by the parties in this case failed without fault or misconduct of the defendant company, it would then be the duty of the assured to take steps to procure a new reference in order to comply with the requirements of said condition, and in absence of proof that the assured did all in his power to secure such complete performance of said condition precedent, this action is not maintainable."

This instruction the presiding justice declined to give, and the case proceeded to the jury upon the issues as to whether the award of the arbitrators was invalid by reason of their alleged misconduct, and if so, as to the amount of damages sustained by the plaintiff. The trial resulted in a verdict for the plaintiff for an amount in

excess of the defendant's proportional part of the amount awarded by the arbitrators.

While it has long been settled in this country and in England that a stipulation in a contract providing for the settlement by arbitration of all controversies and disputes that might subsequently arise between the parties, is invalid because its effect would be to oust the courts of their jurisdiction, it is equally well settled that if the arbitration agreement relates only to the determination of some preliminary matter, such as the amount of damages to be recovered, and does not apply to the whole question of liability, such provision, when a reasonable and definite method is provided for choosing the arbitrators, is valid and enforceable. The leading case wherein this distinction was established is *Scott* v. *Avery*, 5 H. L. Cas. 811. In our own State, in *Stephenson* v. *Piscataqua F. & M. Insurance Company*, 54 Maine, 55, the distinction between a valid and invalid arbitration agreement in a contract is thus stated: "While parties may impose, as a condition precedent to application to the courts, that they shall first have settled the amount to be recovered by an agreed mode, they can not entirely close the access to the courts of law." This doctrine has become so universally recognized by the courts that it is unnecessary to refer to further authorities in its support.

A provision in a contract for the determination by arbitration of such preliminary matters about which there may arise a difference or dispute between the parties, may make such determination a condition precedent to the maintenance of an action upon the contract, or it may be simply a collateral and independent agreement which will not prevent the maintenance of a suit upon the principal contract, but which would be the basis of a separate action in case of its breach. This depends upon the construction of the arbitration provision. The general principle is, as decided in *Roper* v. *Lendon*, 1 El. & El. 825, that such a condition in a contract to refer any question which may arise out of the contract will be, if so stated, a condition precedent to the right to sue on the contract; but unless the condition expressly stipulates that until arbitration had no action shall be brought, its performance is not precedent to

the right to sue on the contract. See also *Hamilton* v. *Home Insurance Company*, 137 U. S. 370. And it is settled beyond controversy that when the contract provides that no action upon it shall be maintained until after such an award, then the award is a condition precedent to the right of action. *Hamilton* v. *Home Insurance Company*, supra; *Hamilton* v. *Liverpool & London & Globe Insurance Company*, 136 U. S. 242; *Hood* v. *Hartshorn*, 100 Mass. 117; *Reed* v. *Washington Fire & Marine Insurance Company*, 138 Mass. 572; *Hutchinson* v. *Liverpool & London & Globe Insurance Company*, 153 Mass. 143; *Smith* v. *California Insurance Company*, 87 Maine, 190. Many other cases to the same effect might be cited.

In the contract here involved the parties have stipulated in the plainest possible terms, that "such reference, unless waived by the parties, shall be a condition precedent to any right of action in law or equity to recover for such loss."

The parties, then, having made a perfectly valid agreement that in case of loss no action upon the policy should be maintained until the amount of the loss had been first determined in the manner provided, the question arises whether an attempted performance of the condition, which has failed without the fault of the defendant, is such a compliance as will satisfy the condition of the contract and allow the plaintiff to maintain this action to recover, not the amount determined upon by the arbitrators, but damages irrespective of their award. We think that it is not, either upon reason or authority.

If the arbitration had failed by reason of the defendant's fault, the result, upon principles of natural justice, would be different. Under such a clause in a policy of insurance it is the duty of the parties to the contract to act in good faith, and if either act in bad faith, so as to defeat the real object of the clause, the other is absolved from compliance therewith and is not bound to enter into a new arbitration agreement. *Uhrig* v. *Williamsburg City Fire Insurance Company*, 101 N. Y. 362; *Bishop v. Agricultural Insurance Company*, 130 N. Y. 488.

But, that is not this case as presented by the exceptions. Here,

there is no allegation that the arbitration failed by reason of the defendant's fault, nor any averment that the performance of the condition was impossible. And the request for an instruction, to the effect, that the action could not be maintained until performance of the condition precedent, was based upon the contingency that the jury find "that the arbitration undertaken by the parties in this case failed without fault or misconduct of the defendant company."

A determination by arbitration of the amount of loss having been especially made by the parties a condition precedent to any right of action for recovery of damages for the loss, it was incumbent upon the plaintiff to prove performance or a valid excuse for non-performance. An ineffectual attempt to perform is not a compliance with such a condition in a contract, when no reason is shown why there should not have been full performance. If the award of the arbitrators was invalid, as claimed by the plaintiff, for the reasons set out in the amended declaration, it was the duty of the plaintiff to seek a new determination of the amount of his loss in the manner provided by the contract. The action in such a case is upon the policy, but the damages recoverable are such as have been previously ascertained and determined by the arbitrators, unless the plaintiff shows some sufficient reason why such a determination could not have been obtained. Consequently, there can be no action until performance of the condition or excuse shown for non-performance. And it is not sufficient to show an award which the plaintiff repudiates and is not willing to be bound by.

This result, which seems to be the only logical one possible, is in accordance with the authorities. The precise question was decided in *Levine* v. *Lancaster Insurance Company*, 66 Minn. 138, wherein it is said by the court: "The law also undoubtedly is, that under such a provision, if an award be set aside for misconduct of the arbitrators, not participated in or caused by the insurer, the agreement for an appraisement still remains in force, and a new appraisement, unless it had become impossible, would still be a condition precedent to a right of action on the policy, unless waived.

The same question was decided in the recent case of *Westenhaver* v. *German-American Insurance Company*, (Iowa), 84 N. W. 717, in which it was said: "Ascertainment of the amount of loss by appraisement was a condition precedent to a right of action, and, if the appraisers selected failed to agree upon a third, this does not in itself justify a suit for the amount of the loss. In the absence of bad faith or acts intended to defeat arbitration on the part of the insurer, the plaintiff must propose the selection of other arbitrators, to the end that an award may be agreed upon and the basis for action determined." To the same effect are *Carroll* v. *Girard Fire Insurance Company*, 72 Cal. 297; *Hood* v. *Hartshorn*, 100 Mass. 117; *Thorndike* v. *Wells Memorial Association*, 146 Mass. 619; *Davenport* v. *Long Island Insurance Company*, 10 Daly, 535.

The requested instruction should consequently have been given. The action can only be maintained to recover the amount determined upon by the arbitrators, or, if their determination and award were invalid, then the plaintiff must allege and prove, either, that the amount of the plaintiff's loss has been determined by other arbitrators chosen in the manner stipulated by the parties, or some sufficient reason why such a determination has become unnecessary or impossible. This result makes it unnecessary to consider the defendant's motion for a new trial.

Exceptions sustained.

JOSEPH ST. CLEMENT *vs.* L'INSTITUT JACQUES CARTIER.

Androscoggin. Opinion October 15, 1901.

Mut. Relief Association. Insurance. Action. Waiver. R. S., c. 55, § 5.

Corporations organized under R. S., c. 55, § 5, for the purpose of mutual insurance are not exempt from suit by its members. They are neither charitable nor benevolent societies which are exempt from such suits.

Held; that the defendant's obligations to its members are contractual and are essentially contracts of insurance; *also*, that for breach of its contracts the defendant is liable to an action at law.

Where the conditions precedent to the plaintiff's right to recover benefits for the period of his sickness were substantially, though not literally, complied with, *held*; that any failure in this respect is waived by the defendant's president, who with full knowledge of the facts, resisted payment on the grounds that the plaintiff had not been sick and made no objection on account of the non-performance of the conditions by the plaintiff.

On exceptions by plaintiff. Sustained.

Assumpsit to recover thirteen weeks sick benefits, from January 4, to April 5, 1898, at four dollars per week. The declaration contained two counts, one on account annexed to the writ, and second a special count in assumpsit.

The case was first tried in the Municipal Court for the City of Lewiston. It was then appealed by the plaintiff to this court, for Androscoggin county, and was there tried by jury at the January term, 1900. After the evidence for the plaintiff was in, the court directed a non-suit, to which exceptions were taken by the plaintiff. It was then ordered that the case be reported to the law court, and the parties agreed that if the ruling was wrong, the non-suit should be set aside and judgment entered for the plaintiff for such sum as the law court determines he is entitled to recover under the evidence, admissions and by-laws; otherwise non-suit to be confirmed. The case then came to the law court in 1900, after being argued in writing.

H. W. Oakes, J. A. Pulsifer and F. E. Ludden, for plaintiff.

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

SITTING: WISWELL, C. J., WHITEHOUSE, STROUT, FOGLER, POWERS, PEABODY, JJ.

STROUT, J. This is a suit to recover fifty-two dollars for sick benefits. As a member in regular standing, the plaintiff became entitled to this amount under the constitution and by-laws of defendant, if he had complied with the requirements as to notice and claim.

The defense is non-compliance with the by-laws in this regard, and also that no action lies for benefits, because by sec. 5 of chap. 55 of the revised statutes a corporation "organized for benevolent or charitable purposes" is not subject to suit by any member "for any benefit or sum due him," and it is claimed that defendant is a corporation of this class.

The by-laws, article 19, § 3, provide that "in case of sickness, a member absent from the city, must, if he would receive his benefits, inform the society of it in writing, after seven days of sickness," and if it continues, send a certificate of the attending physician, stating his sickness, and countersigned by the priest or a justice of the peace.

Another by-law, article 19, § 5, provides that "an absent member cannot receive benefits without making application to the society as above mentioned, and his application will not have effect for more than eight days preceding the date of the postmark from which the demand came."

Another by-law, article 2, § 26, provides that no benefit shall be paid, unless the member is sick more than one week.

Under these by-laws, it is made a condition precedent that notice of sickness shall be given, and a claim made for benefits, together with the physician's and priest's certificate as to the fact, kind and extent of sickness. It can hardly be supposed that in case of continued sickness, the absent member was required to repeat his notice and claim each succeeding week, notwithstanding the provision in article 26, § 3, that "the demand will not have effect for more than seven days preceding the date of its receipt by the president." This article seems to apply to resident members

only, for there is a prior by-law, article 19, § 5, regulating demand for benefits by an absent member, which is inconsistent with article 26.

Early notice of sickness is required by the provision that the benefit shall not be paid beyond eight days prior to his notice, no matter how long he had been sick. The provision for notice "after seven days of sickness," being the time for which no benefit was payable, does not render ineffective a prior notice, if the sickness continues more than seven days. The purpose of the by-law is subserved, if the sick member gives notice after he is taken sick, and claims benefits, and at recovery or at the end of thirteen weeks, which is the extreme limit for payment of benefits, furnishes the required certificate of physician and priest, and claims the benefits then due. A form of claim is given in the by-laws, but if not followed literally, it is sufficient if the claim is substantially set out.

In this case the plaintiff was residing at St. Christophe, Canada. On December 28, 1897, he notified defendant in writing of his sickness, and on April 5, 1898, furnished it with the written certificate of his physician that he had been sick and unable to work from December 28, 1897, to April 5, 1898, which stated the sickness with which he was afflicted, and was countersigned by a priest. On the same day plaintiff in writing claimed benefits for thirteen weeks, amounting to fifty-two dollars. Article 26, § 9, of defendant's by-laws provides that "if the society refuses benefits demanded of it, for cause of suspension, or any other cause provided for by the by-laws, the sick member shall be notified by a visitor, if he is in the city, or by the corresponding secretary, if he is absent, in the week which follows the meeting, to what date and for what reason he is deprived of his benefits."

No notice was ever given plaintiff by the society or its secretary, as provided in the above by-law.

The notice of sickness and claim by plaintiff were not in strict accordance with the provisions of the by-laws, but they afforded the defendant all the information contemplated by them, and substantially complied with their requirements.

A few days before the suit was brought, the plaintiff's attorney called upon the defendant's president to obtain payment, and was told by him that defendant had decided not to pay, upon the ground that plaintiff had not been sick. No objection was made to the sufficiency of the notice and claim, nor to its amount. It does not appear to have been then questioned that the plaintiff was entitled to a benefit for thirteen weeks, at four dollars a week, if he had been sick fourteen weeks. The defendant and its president at that time had full knowledge of what had been done by plaintiff in regard to notice and claim. It is now admitted that the plaintiff's sickness continued fourteen weeks.

It is too late to raise technical objections to notice and claim. Such objections must be regarded as waived. They were evidently not relied on when the attorney had the interview with the president, and cannot now be set up to defeat a claim previously recognized as valid, if the sickness existed. *Patterson* v. *Triumph Ins. Co.*, 64 Maine, 504. So, also the failure of defendant to notify the plaintiff of the cause of refusal of payment and "to what date and for what reason he is deprived of his benefits," as required to be done by it, by its by-law, article 26, § 9, preclude the defendant from setting up this defense to a suit brought several months after the sickness, notice and claim.

The other ground of defense is untenable. Defendant corporation is in no sense a benevolent or charitable institution. Charity in its legal sense has its origin in gift and bounty. It has been well defined as "whatever is given for the love of God, or the love of your neighbor, in the catholic and universal sense; given from these motives and to these ends, free from the stain or taint of every consideration that is personal, private or selfish." *Ould* v. *Washington Hospital*, 95 U. S. 311. "It is the source whence the funds are derived, and not the purpose to which they are dedicated, which constitutes the use charitable." If derived from the gift of the Government or a private gift for improving a town, they are charitable. But where a fund is wholly derived from rates and assessments, being in no respect derived from bounty or charity, it is not charitable. *Attorney General* v. *Heelis*, 2 Sim. & Stu.

77; *Bolton* v. *Bolton*, 73 Maine, 303; *Bangor* v. *Masonic Lodge*, 73 Maine, 429; *Saltonstall* v. *Sanders*, 11 Allen, 456; *Coe* v. *Washington Mills*, 149 Mass. 547.

Here, for a definite amount paid by a member at regular recurring periods, the corporation undertook to pay its members, if sick and unable to work, a definite sum per week for a period not exceeding thirteen weeks in a year, excluding the first week of sickness. Whatever it may be called, the scheme and the contract is that of insurance. The relation of the corporation to its members is contractual, rather than charitable.

Nor is it a benevolent institution. No aid is furnished from generosity or liberality. None such is pretended. On the contrary, for a pecuniary consideration, it agrees to pay a definite sum in the cases specified. If it fails to perform its contracts with its members, they may be enforced in the courts by suit. *Dolan* v. *Court Good Samaritan*, 128 Mass. 437; *Coe* v. *Washington Mills*, supra. The exemption from suit provided in R. S., c. 55, § 5, does not apply to this corporation.

It is admitted that plaintiff was sick and unable to labor from December 28, 1897, to April 5, 1898. His benefits for that period, excluding the first week, amount to fifty-two dollars, to which he was entitled by contract of defendant, if he complied with the requirements of the by-laws as to notice and claim. As we have seen, his notice and claim were treated by defendant as sufficient, their refusal of payment being placed upon other grounds. By its acts and failure to act, it has waived all objections to a strict compliance, and is bound to pay plaintiff his benefits. Failing to do so, this suit may be maintained therefor.

According to the stipulation in the report, the non-suit is set aside. Judgment for plaintiff for fifty-two dollars and interest from date of writ.

So ordered.

CLARENCE H. CHILDS, Receiver,

vs.

HENRY B. CLEAVES.

Cumberland. Opinion October 30, 1901.

Corporations. Stockholders' Double Liability. Receiver. Jurisdiction. Foreign Judgment. Minn. Const. Art. IX, § 13; Minn Gen. Stat. 1894, c. 76, §§ 5905-5911; Minn. Stat. c. 33, § 21.

In an action brought by a receiver of a foreign corporation in this State to enforce the double liability of the defendant, who was a non-resident stockholder in a Minnesota banking corporation, and which was heard on demurrer to plaintiff's declaration setting out all the facts, *it is held:*

1. That the defendant, a non-resident stockholder, is bound by the decrees of the Minnesota court in which the parent suit was instituted under the statutes of that state and whereby, the assets of the corporation having been sequestered, the plaintiff was appointed receiver for creditors.
2. That it is not essential that non-resident stockholders who were not in reach of the process of the court and against whom it could not render a personal judgment, should be made parties to such a suit, and that for the purpose of ascertaining the assets and liabilities of the corporation they were represented by the corporation, or by its general receiver appointed prior to the institution of the suit, and as to such matters they are bound by the adjudication though not personally made parties.
3. Such non-resident stockholders, however, are not concluded by the finding upon the ultimate question of their individual liability, nor as to the measure of such liability, which is not an asset of the corporation, and in which neither the corporation nor its receiver has any legal interest to render them representatives of the stockholders.
4. That for the purpose of enforcing the liability of stockholders, under the Minnesota statute, the plaintiff in his capacity of creditor's receiver may maintain an action in a state jurisdiction other than that of his appointment.
5. It is not necessary to hold that the plaintiff's receiver succeeded to the rights of either the corporation or of the creditors. His authority emanates directly from the statute under which he was appointed. It appears from the declaration in the writ that he was expressly authorized, and directed by a decree of the Minnesota court, to institute in his own name as receiver all auxiliary actions necessary to enforce the liability of non-resident stockholders.

6. The principle of comity between states is broad enough to extend recognition to the plaintiff in the courts of this state.
7. It concerns the due administration of justice that all stockholders, wherever they reside, should be compelled by proceedings somewhere to perform the statutory obligations towards creditors of the corporation, which they have assumed by becoming stockholders.
8. An increasing tendency has been observable, in both state and federal jurisdictions during the last decade, to sanction the enforcement of these obligations extraterritorially in any court of competent jurisdiction, except where the rights of a citizen in the state of the forum are thereby prejudiced, or the public policy of such state is contravened.
9. It is apparent that no rights of domestic creditors can intervene, since the law creating the stockholders' liability declares that it shall be enforced for the benefit of all creditors of the corporation.
10. The Minnesota statute authorizing the collection from stockholders of only so much as may be necessary to satisfy the debts of the corporation and requiring a pro rata distribution of it among all the creditors, is seen to be free from the less equitable features of those statutes which authorize a single creditor, without a pro rata assessment, to maintain an action against a single stockholder for his own benefit and not for the benefit of all the creditors.

On exceptions by defendant. Overruled.

Action to enforce the statutory or double liability of the defendant, as a non-resident stockholder in the Bank of New England, a corporation organized under the laws of Minnesota. The case, argued on demurrer, is stated in the opinion.

E. M. Rand, for plaintiff.

J. W. Symonds, *D. W. Snow*, *C. S. Cook and C. L. Hutchinson*, for defendant.

Counsel argued: The fundamental objection to maintaining this action is, that it would discriminate in favor of resident stockholders and against non-resident stockholders to such a degree that no rule of comity should permit of its recognition. It would hold the non-resident stockholder is not a necessary party, and that the ascertainment of the amount of his liability in such a suit is binding upon him in his absence. It gives to the resident stockholder, who must be made a party, the right of contribution from other stockholders. It denies any such right to the non-resident stockholder, unless he chooses to appear in the original action.

It would hold that the resident stockholder, under the Minnesota

law, contracted as to one kind of remedy, and the non-resident stockholder as to another kind of remedy. Its effect "would subject stockholders residing out of the State to a greater burden than domestic stockholders," as stated by the Supreme Court in *Bank* v. *Francklyn*, 120 U. S. 747. In substance and effect, though not in form, it would render judgment against a non-resident stockholder for his personal liability in his absence and without a hearing.

The corporation is not made a defendant in the principal action as a representative of the stockholders in any sense. It is joined of necessity only where there are corporate assets which ought to be applied to the payment of the debts. Otherwise, it is a proper party, but only for the purpose of establishing against it as a finality the amount of the indebtedness for which the stockholders are liable. The primary right to be adjudicated in such an action is the stockholder's liability. As an incident thereto, where there are corporate assets which should be applied to the payment of the indebtedness, the corporation must be brought in for the purpose of sequestrating and reaching such assets. If there are no such assets the corporation need not be made a party at all. *Booth* v. *Dear;* 96 Wis. 516; *Sleeper* v. *Goodwin*, 67 Wis. 577; *In re Insurance Co.* 56 Minn. 180; *Minneapolis Baseball Co.* v. *City Bank*, 66 Minn. 441.

A liberal course in the enforcement of the laws of other States in proper cases should be the rule, but the paramount duty of our judicial system is to safeguard our own State policy and prevent injustice to our own people within reasonable limits. *Gilman* v. *Ketcham*, 84 Wis. 60; *Emery* v. *Burbank*, 163 Mass. 326; *Seamans* v. *Temple Co.*, 105 Mich. 400; *Bank* v. *Ellis*, 172 Mass. 39; *Dearing* v. *Hardware Co.*, 33 App. Div. 31, 53 N. Y. Supp. 513. *Eau Claire Nat. Bk.* v. *Benson*, 82 N. W. Rep. 604.

Receiver not vested with any of the rights or assets of the corporation and therefore cannot maintain a suit against a stockholder in another jurisdiction. *Hale* v. *Hardon*, 89 Fed. Rep. 283-288; *Wigton* v. *Bosler*, 102 Fed. Rep. 70. The receiver was a general receiver in *Howarth* v. *Angle*, 162 N. Y. 179; *Howarth* v. *Lombard*, 175 Mass. 570; and *Howarth* v. *Ellwanger*, 86 Fed. Rep. 54,

and these cases are not applicable to the decree appointing the receiver, nor the Minnesota statute. In *Hayward* v. *Leeson*, 176 Mass. 310, the court says: "The last objection made by the defendants is that the plaintiff as receiver, cannot bring the suit in his own name; and we think that this objection is well taken. The final order directing the receiver to prosecute these suits is as follows: 'Said John K. Hayward, receiver, be, and is hereby, directed to proceed with said causes in the courts of Massachusetts, either in his own name as receiver, or in the name of the East Tennessee Land Company, or jointly in his name as receiver and in the name of the East Tennessee Land Company, as he may be advised by counsel to be proper, and in accordance with the rules of practice in the courts in which such cases are being prosecuted.' This order does not operate as an assignment to the receiver of these choses in action. Neither did the previous orders, under which this receiver was acting, operate as an assignment of them. The plaintiff was appointed a receiver by order dated April 20, 1897, providing that he should 'possess the power and authority conferred by former orders' on the receivers. The original order appointing receivers under the general creditors' bill provided that the receiver should 'collect, take possession of, preserve, and care for all of the property, real, personal, and mixed, bonds, notes, bills, drafts, and other choses in action of the defendant wherever found, as well as of the accounts, books, and papers of the defendant, and . . . hold and dispose of the same under the order of this court.' There is nothing in the original order under which the bills in equity in the cases at bar were filed which in any way affects this question. The plaintiff, as receiver, by virtue of these orders, has the powers usually conferred by a court of equity upon a receiver to preserve property pending litigation, and nothing more. Mr. Justice Gray, speaking for the Supreme Court of the United States of the powers of a receiver under a similar order, said: 'The utmost effect of his appointment is to put the property from that time into his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title, or even the right of possession in the property.' *Union Bank of Chicago*

v. *Kansas City Bank*, 136 U. S. 223, 236, 10 Sup. Ct. 1013, 34 L. Ed. 341. That such a receiver cannot sue in his own name to enforce a right of action of the corporation is settled. *Wilson* v. *Welch*, 157 Mass. 77." See *Hale* v. *Tyler*, U. S. Cir. Court, Maine District, opinion by Mr. Justice Putnam, July 25, 1900. *Whitman* v. *Oxford National Bank*, 176 U. S., 558, and *Hancock National Bank* v. *Farnum*, 176 U. S. 640, cases which arose under the Kansas statutes, are not applicable to the case at bar. The Kansas statutes do not attempt in any way to discriminate between residents and non-residents. The Minnesota statutes do discriminate.

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

WHITEHOUSE, J. This is an action at law in which the defendant is summoned to answer to the plaintiff, Clarence H. Childs of Minneapolis, "as receiver for the collection and enforcement of the liability of stockholders of the Bank of New England," a corporation organized under the laws of the State of Minnesota. The action is brought to enforce the double liability of the defendant who was a non-resident stockholder in the corporation.

In 1893, the bank in question, upon complaint filed by the State of Minnesota, one of its creditors, was adjudged insolvent by a district court in Minnesota, and a general receiver was appointed, by whom all of the existing assets of the bank were received and distributed. The administration of the estate by this receiver was completed in July, 1897.

In the meantime, in 1895, it having become apparent that the existing assets were insufficient to discharge the entire indebtedness of the bank, an order was issued by the court, upon petition of another creditor, to have all of the resident stockholders impleaded in the original complaint upon which the adjudication of insolvency was made, for the purpose of enforcing their statutory liability to the creditors of the bank who might thereafter intervene. Thereupon all of the resident stockholders became parties to that proceeding, an order was entered by the court limit-

ing the time within which creditors might intervene and present their complaints, and on the ninth day of July, 1897, a final decree was entered in favor of the intervening creditors as follows, to wit:

"First: That the several sums due and owing to the several creditors who had intervened in said action by the defendant Bank of New England, which said indebtedness was therein adjudged and decreed, aggregated the sum of ninety-three thousand, three hundred fifteen dollars and thirty cents.

"Second: That the total capital stock of said Bank of New England was one hundred thousand dollars, all of which was issued and outstanding at the time of the contracting of said indebtedness and the date of the assignment of said bank, as aforesaid.

"Third: The names of the several resident stockholders and the amount of stock held by each.

"Fourth: That each of said stockholders was liable upon said stock to the creditors therein ascertained for an amount equal to double the par value of stock held by him.

"Fifth: That said other intervening plaintiffs and said intervening creditors so ascertained, recover from each of the several stockholder defendants within the State of Minnesota a sum equal to double the par value of the stock held by each stockholder.

"Sixth: That this plaintiff be appointed receiver therein for the purpose of collecting the judgment so rendered against each of the defendants therein and for the further purpose of instituting all necessary actions and proceedings for the purpose of collecting from the non-resident stockholders of said corporation, to the end that any and all sums so collected by him be divided ratably among the creditors of said corporation so enumerated in said judgment and in proportion to the amount of their respective claims.

"Seventh: That the court retain jurisdiction of said cause for the furtherance of justice and equity."

The plaintiff duly qualified as receiver and gave his bond to the

court in the sum of fifty thousand dollars for the faithful performance of his duties; and on the fifteenth day of August, 1898, a further order of the court was made authorizing and directing him to institute, in his own name as receiver, all auxiliary actions necessary to enforce the liability of non-resident stockholders. The corporate assets had proved sufficient to pay only the preferred claim of the State of Minnesota, so that at the time of the entry of judgment against the stockholders there was due to the intervening creditors the sum of $93,315; and at the time of the commencement of this action the receiver, in discharge of his duty under the decree, had been able to collect no more than $35,000.

This defendant was never served with process, and never in any manner entered his appearance in the proceeding in the district court of Minnesota.

I. The case comes to the law court on a general demurrer interposed by the defendant to the plaintiff's declaration which duly set out the facts above stated. The presiding justice overruled the demurrer and adjudged the declaration good. Two questions are thus presented to the court:

First, to what extent, if at all, is this defendant, a non-resident stockholder, bound by the decrees of the Minnesota court in which the parent suit was instituted? And, second, whether the plaintiff, in his capacity as receiver for the creditors, appointed by the Minnesota court, for the purpose of enforcing the liability of stockholders, is entitled to maintain this action in a state jurisdiction other than that of his appointment, either on grounds of comity or otherwise?

Article IX, Section 13, of the Constitution of Minnesota provides as follows:

"Third. The stockholders in any corporation and joint association for banking purposes, issuing bank notes, shall be individually liable in an amount equal to double the amount of stock owned by them for all the debts of said corporation or association; and such individual liability shall continue for one year after any transfer or sale by any stockholder or stockholders."

And in Chapter 33, Section 21, of the statutes of Minnesota is found this provision:

"And the stockholders in each bank shall be individually liable in an amount equal to double the amount of stock owned by them for all the debts of such bank, and such individual liability shall continue for one year after any transfer or sale of stock by any stockholder or stockholders."

The only provisions found in the statutes of Minnesota for enforcing this liability are contained in Gen. St. 1894, chap. 76, §§ 5905–5911, which are as follows:

"Sec. 5905. Whenever any creditor of a corporation seeks to charge the directors, trustees, or other superintending officers of such corporation, or the stockholders thereof, on account of any liability created by law, he may file his complaint for that purpose in any district court which possesses jurisdiction to enforce such liability.

"Sec. 5906. The court shall proceed thereon as in other cases, and, when necessary, shall cause an account to be taken of the property and debts due to and from such corporation, and shall appoint one or more receivers.

"Sec. 5907. If, on the coming in of the answer, or upon the taking of any such account, it appears that such corporation is insolvent, and that it has no property or effects to satisfy such creditors, the court may proceed, without appointing any receiver, to ascertain the respective liabilities of such directors and stockholders, and enforce the same by its judgment, as in other cases.

"Sec. 5908. Upon a final judgment in any such action to restrain a corporation, or against directors or stockholders, the court shall cause a just and fair distribution of the property of such corporation, and of the proceeds thereof, to be made among its creditors.

"Sec. 5909. In all cases in which the directors or other officers of a corporation, or the stockholders thereof, are made parties to an action in which a judgment is rendered, if the property of such corporation is insufficient to discharge its debts, the court shall proceed to compel each stockholder to pay in the amount due and

remaining unpaid on the shares of stock held by him, or so much thereof as is necessary to satisfy the debts of the company.

"Sec. 5910. If the debts of the company remain unsatisfied the court shall proceed to ascertain the respective liabilities of the directors or other officers, and of the stockholders, and to adjudge the amount payable by each, and enforce the judgment, as in other cases.

"Sec. 5911. Whenever any action is brought against any corporation, its directors or other superintending officers, or stockholders, according to the provisions of this chapter, the court, whenever it appears necessary or proper, may order notice to be published, in such a manner as it shall direct, requiring all the creditors of such corporation to exhibit their claims and become parties to the action, within a reasonable time, not less than six months from the first publication of such order, and in default thereof, to be precluded from all benefit of the judgment which shall be rendered in such action, and from any distribution which shall be made under such judgment."

It thus appears that the several orders and decrees made by the court of Minnesota, in the course of its proceedings, requiring an account to be taken of the corporate property and debts, and ascertainments to be made respecting the names of the several stockholders and the amount of stock held by each, were in harmony with the provisions of the constitution and laws of Minnesota above quoted. It will be observed, however, that while the court rendered personal judgment only against the Minnesota stockholders, it expressly authorized the receiver to institute all necessary actions for the purpose of collecting from the non-resident stockholders. The defendant claims that the proceedings under the Minnesota statute instituted by the creditors, and which form the basis of this action, were essentially an action against the stockholders to enforce their individual liability, and not an action against the corporation, and therefore res inter alios and of no effect against this defendant, a non-resident stockholder who did not become a party to the action.

This question has been the subject of frequent examination in

recent years in both the federal and state courts, and the great weight of authority in both jurisdictions is undoubtedly against the defendant's contention.

In considering the scope and purpose of a statute, regard is properly had, in the first instance, to the construction placed upon it by the courts of the state in which it was enacted, this being deemed a part of the law itself.

In *Hanson* v. *Davison*, 73 Minn. 454, the court say: "Equitable considerations and the statute require that an action of the character prescribed by chapter 76 be brought by and on behalf of all the creditors, and against the corporation and all of the stockholders of whom the court has jurisdiction, to determine the amount remaining due to such creditors, respectively, after the assets of the corporation have been exhausted; thereby providing a basis for determining the extent of the liability of the respective stockholders. The judgment in such original action, determining the amount of the corporate debts remaining unpaid, is binding on all of the stockholders, whether parties to the action or not, unless impeached for fraud. A judgment against the corporation is, in effect, a judgment against the stockholders in their corporate capacity. They are represented by the corporation in the action.

"In principle, there can be no difference in this respect between an action to enforce an unpaid subscription and one to enforce a stockholder's liability. The action required to be brought by chapter 76 is the original action for the sequestration and distribution of the fund to be derived from the stockholder's liability, and the decree entered therein is a final and conclusive determination of the amount (unless impeached for fraud) for which the stockholders are liable, not exceeding the maximum limit of liabilities as fixed by law. As the amount and par value of the stock issued and outstanding is a matter of record and readily proven in any action, there is nothing to prevent the prosecution, after such decree is entered, of an ancillary action in another jurisdiction by the receiver appointed to collect and distribute its funds arising from stockholders' liability in the original action, or by any other party or person who may be appointed by the court for that

purpose, against any stockholder who was not made a party to the original action, to collect from him the amount of his liability on account of the debts of the corporation, for the benefit of all the creditors." See also *Holland* v. *Development Co.*, 65 Minn. 324; *Marson* v. *Deither*, 49 Minn. 423; *Olson* v. *Cook*, 57 Minn. 552; *First Nat. Bank* v. *Gustin*, 42 Minn, 327.

But the principle that stockholders represent the corporation and that a judgment against the corporation is conclusive against the stockholders with respect to corporate matters, may properly be termed familiar and well-settled. It is established beyond question by both state and federal authority. In *Hawkins* v. *Glenn*, 131 U. S. p. 329, the chief justice says: "Sued after such an order of court, the defendant does not deny the existence of any one of the facts upon which the order was made, but contends that there has been no call as to him, because he was not a party to the cause between creditors and corporation. We understand the rule to be otherwise, and that the stockholder is bound by a decree of a court of equity against the corporation in enforcement of a corporate duty, although not a party as an individual, but only through representation by the company. A stockholder is so far an integral part of the corporation that, in the view of the law, he is privy to the proceedings touching the body of which he is a member."

But a more recent case to this effect is *Hancock National Bank* v. *Farnum*, 176 U. S. 640, in which it is said: "Now, as the judgment rendered in the Kansas court is in that State not only conclusive against the corporation, but also binding upon the stockholder, it must, in order to have the same force and effect in other States of the Union, be adjudged in their courts to be binding upon him, and the only defenses which he can make against it are those which he could make in the courts of Kansas. The question to be determined in this case was not what credit and effect are given in an action against a stockholder in the courts of Rhode Island to a judgment in those courts against the corporation of which he is a stockholder, but what credit and effect are given in the courts of Kansas in a like action to a similar judgment there rendered. Thus, and thus only, can the full faith and credit pre-

scribed by the constitution of the United States and the act of Congress be secured. . . . .

"The law and usage in Kansas, prescribed by its legislature and enforced in its courts, make such a judgment not only conclusive as to the liability of the corporation, but also an adjudication binding each stockholder therein. We do not mean that it is conclusive as against any individual sued as a stockholder, that he is one, or if one, that he has not already discharged by payment to some other creditor of the corporation the full measure of his liability, or that he has not claims against the corporation, or judgments against it, which he may, in law or equity, as any debtor, whether by judgment or otherwise, set off against a claim or judgment, but in other respects it is an adjudication binding him. He is so far a part of the corporation that he is represented by it in the action against it." See also *Glenn* v. *Liggett*, 135 U. S. 533; *Great West. Tel. Co.* v. *Purdy*, 162 U. S. 329; *Ball* v. *Reese*, 58 Kan. 614.

In the recent case of *Whitman* v. *Oxford Nat. Bank*, 176 U. S. 559, an action brought by an individual creditor to enforce a non-resident stockholder's liability, the court say: "The liability which by the constitution and statutes is thus declared to rest upon the stockholder, though statutory in its origin, is contractual in its nature. . . . . While the statute of Kansas permitted the forming of the corporation under certain conditions, the action of these parties was purely voluntary. In other words, they entered into a contract authorized by statute. . . . . And as this liability is one which is contractual in its nature, it is also clear that an action therefor can be maintained in any court of competent jurisdiction." See also *Hancock Nat. Bank* v. *Ellis*, 172 Mass. 39; *Bell* v. *Farwell*, 176 Ill. 489; *West Nat. Bank* v. *Lawrence*, 117 Mich. 669; *Paine* v. *Stewart*, 33 Conn. 516; *Cushing* v. *Perot*, 175 Pa. 66; and *Guerney* v. *Moore*, 131 Mo. 650, in which the court say, "The ordinary statutory liability of a stockholder is a contractual liability. . . . . "It does not follow that, because people in this commonwealth have restricted the liability of stockholders in corporations created

by virtue of our own laws to the amount of their stock, they will refuse to enforce in their courts the contracts of its own citizens who voluntarily go into other states and become stockholders in corporations under their laws, which impose upon stockholders a personal liability in excess of the amount of stock taken. Such a contract is not against public policy. It contravenes no principle of good morals and has no mischievous tendency. It is not in any sense repugnant to our ideas of honesty or justice."

But one of the most valuable of all the recent contributions to the discussion of this subject is found in *Hale* v. *Hardon*, 95 Fed. Rep. 747. This, like the case at bar, was an ancillary suit brought in the U. S. Circuit Court for the district of Massachusetts by a receiver appointed in Minnesota to enforce the liability of a non-resident stockholder to the creditors; and it was held in an elaborate opinion by Judge Aldrich that for the purpose of ascertaining the assets and liabilities of the corporation, non-resident stockholders were represented by the corporation, or by its general receiver, and as to such matters they were bound by the adjudication though not personally made parties; but as the individual liability is directly to the creditors and not an asset of the corporation, it was considered that the non-resident stockholder was not concluded by a finding upon the ultimate question of his individual liability, nor as to the measure of such liability. In the opinion it is said: "As our conclusion is that the proceedings in Minnesota were sufficiently comprehensive as to domiciliary adjudications and ascertainments, and such as the constitution and statutes of Minnesota contemplated, and such as the statutes required, it follows that the defendant's liability results by force of the constitutional provision and the statutes in respect to which he by implication contracted by becoming a stockholder, and that the plaintiff is entitled to recover, provided he is entitled to maintain his action in this jurisdiction as a receiver, or representative of the creditor interests, in and of the parent proceedings in Minnesota."

In like manner, as it appears from the declaration in the case at bar that the decree of the court in the corporate domicile respecting the indebtedness of the corporation, and the ascertainments to

be made in regard to the stockholders, were such as were authorized and required by the statute of Minnesota, it is clear that upon the first question presented the demurrer was properly overruled.

II. But it is insisted, in behalf of the defendant, that as the plaintiff receiver is not vested with any of the rights or assets of the corporation, he is not entitled to maintain a suit against a stockholder in another jurisdiction. It is contended that his official character is not essentially different from that of an ordinary master in chancery, appointed as the hand of the court to render incidental aid in the litigation.

It has been seen that, under the provisions of chapter 76 of the Minnesota statutes, above quoted, authorizing proceedings by creditors to enforce the statutory liability of officers, directors and stockholders, "the court shall proceed thereon as in other cases, and, when necessary, shall cause an account to be taken of the property and debts due to and from such corporation, and shall appoint one or more receivers"; that if it appears that the corporation is insolvent, the court may proceed without appointing any receiver to ascertain the liabilities of stockholders "and enforce the same by its judgment as in other cases"; that upon final judgment the court shall cause a just and fair distribution of the proceeds of the property of the corporation to be made among its creditors; that if the property of the corporation is insufficient to satisfy its debts, the court shall enforce the payment of anything unpaid on the shares of stock, and if the debts still remain unsatisfied,—the court shall proceed to ascertain the liabilities of the stockholders and adjudge the amount payable by each and enforce the judgment "as in other cases."

Here, again, we should look to the decisions of the Minnesota courts for some declaration of the true purpose and policy of the legislature in enacting this statute. In the first place, as has already appeared, it has been held repeatedly in that state that this constitutional, or statutory liability of the stockholders, is a liability to the creditors. It forms no part of the assets of the corporation, and it cannot be enforced by the corporation. Hence, it

is obvious, that the receiver originally appointed in this case to receive and distribute the existing assets of the bank, unless expressly authorized by the statute, would have no authority to enforce the individual liability of stockholders for the purpose of paying the debts of the corporation. *In re People's Live Stock Ins. Co.*, 56 Minn. 180; *Olson* v. *Cook*, 57 Minn. 552, supra. And inasmuch as the general scheme of liquidation devised by the Minnesota statute requires an accounting and a pro rata distribution among all the creditors, it follows that individual creditors could not maintain an action under this statute against an individual stockholder either in Minnesota or elsewhere. The practical result would be that unless the plaintiff receiver, appointed by the court under authority of the statute for the express purpose of "instituting all necessary actions and proceedings for the purpose of collecting from the non-resident stockholders" any sums due for the benefit of all the creditors, can be permitted to maintain a suit for that purpose in extraterritorial jurisdictions upon the principle of comity or otherwise, the remedy provided by the statute would be a barren and inoperative one except as against the stockholders in Minnesota; and while non-resident stockholders would thus have the right to share in all the profits of a successful enterprise, they could not be compelled to fulfil their promises to creditors in the case of a losing one.

Again, it has already been seen that *Hanson* v. *Davison*, 73 Minn., supra, contains an express recognition of the right of such a receiver as this plaintiff to maintain an action in another jurisdiction to enforce the liability of a non-resident stockholder; and in *Railway Co.* v. *Gebhard*, 109 U. S. p. 531, it is said: "A corporation must dwell in the place of its creation and cannot migrate to another sovereignty. . . . . Whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere. . . . . Such being the law, it follows that every person, who deals with a corporation, impliedly subjects himself to such laws of the foreign government, affecting the affairs and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes."

In Volume 3 of Thompson on Corporations, § 3492, referring to the "two courses open to creditors," the author says: "The other course . . . . is to bring the suit on behalf of the creditors, to procure the appointment of a receiver, to have an account taken and stated, and an assessment upon all the shareholders ordered, and to enforce that assessment by supplementary actions brought by the receiver wherever the shareholders may be found. Where the latter course is taken, no objection is perceived to mingling the two kinds of procedure so far as to make such stockholders as may be found within the jurisdiction parties defendant, and to rendering decrees against them in personam, without requiring the receiver to bring separate actions at law against them,—which practice is sanctioned by the decision first above cited. This would leave him free to bring actions at law against such stockholders as might reside in other jurisdictions, as was done in the Glenn cases." See *Hawkins* v. *Glenn*, 131 U. S. 319; *Glenn* v. *Liggett*, 135 U. S. 533.

In Volume 2 of Morawetz on Corporations, § 902, the author says: "When the liability of the shareholders is imposed for the purpose of providing a general fund for the security of creditors, in addition to the company's capital, the proper method of proceeding seems to be to have a receiver appointed to take charge of the fund belonging to the creditors, and distribute it ratably among them." See also *Gluck & Becker* on Receivers of Corp., § 58, p. 188.

In *Cushing* v. *Perot*, 175 Pa. St. 66, it was held that a single foreign creditor of an insolvent trust company in Kansas could not maintain an action in Pennsylvania to enforce the statutory liability of a stockholder residing in that state after a receiver had been appointed by the Kansas court having jurisdiction over the corporation; but that the right to sue for that purpose was in the receiver. In the opinion the court say: "A receiver represents not only the corporation, but all its creditors, and as to the latter it is his duty to secure all the assets available for their payment. For this purpose he succeeds to their rights and has all the powers to enforce such rights that the creditors before his appointment had in their own behalf, even though such powers be beyond those

which he has as the representative of the corporation alone. As each creditor may sue, the right is equal in all and common to all, and hence the receiver who represents all alike is the proper party to assert the common right and pursue the common remedy for the common benefit. . . . . In this manner the rights of all will be protected and justice done in a single proceeding in which every one will get what is his due, no one will be called upon to pay more than his fair proportion, and the expense, delay, inconvenience and inevitable occasional injustice of separate actions by different creditors against different stockholders with their attendant legion of resulting actions for contribution, will be avoided."

In *Relfe* v. *Rundle*, 103 U. S. 222, the statute provided that the Superintendent of Insurance should become trustee of the funds of any insolvent life insurance corporation of Missouri. In the opinion the court say: "The law which clothed him with this trust was in legal effect part of the charter of the corporation. . . . . His authority does not come from a decree of the court, but from the statute. . . . . The appellees, when they contracted with the Missouri corporation, impliedly agreed that if the contract was dissolved under the Missouri laws, the superintendent of the insurance department of the state should represent the company in all suits instituted by them affecting the winding up of its affairs." See also *Parsons* v. *Insurance Co.*, 31 Fed. Rep. 305.

In *Davis* v. *Gray*, 16 Wall. 203, we are reminded that in the progressive development of equity the functions of receivers are continually broadening, and with reference to the statutes as the source of their powers, the court say: "We see no reason why a court of equity, in the exercise of its undoubted jurisdiction, may not accomplish all the best results intended to be secured by such legislation without its aid."

But the case of *Hale* v. *Hardon*, 95 Fed. Rep., supra, is also a leading case in the First U. S. Circuit upon this question of the capacity of a receiver, appointed by authority of the Minnesota statute under consideration, to maintain an action in a foreign jurisdiction. The opinion contains a critical analysis of the statute and an exhaustive discussion of the whole subject in the light of both

reason and authority. On page 771 it is said: "The plaintiff is not a common law receiver representing the interests of all the parties; he is not a statutory receiver by express personal or official designation, as in *Relfe* v. *Rundle*, supra; he is not a receiver who has leave to sue; but he is a receiver appointed by the court, under an express statutory provision, and an imperative requirement that the court shall appoint, and is exercising the functions which the law-making power intended he should exercise, and is exercising such power under the authority of the statute conferred by the court, not by law, as in the other class of cases, but by express authority and direction, which charge him with the specific duty. It being the statutory intent to have the separate and distinct interests of the creditors against stockholders represented by a separate and distinct statutory agency, an express provision 'that the court shall appoint one or more receivers for the interests of the corporation, and a separate receiver for such interests of the creditors,' would have meant no more than the provision actually employed that 'the court . . . . shall appoint one or more receivers' means under fair and reasonable intendment." And on page 775: "Whether a receiver shall or shall not maintain an action extraterritorially is not a question of absolute right. A receiver does not possess the absolute right to sue in a foreign jurisdiction. Neither does an absolute right exist on behalf of a defendant that he shall not sue. Under our system of territorial and state divisions, and the resulting quasi independent judicial systems, there is and can be no imperative and absolute right on the subject. If this action at law is maintained extraterritorially in favor of a receiver, in aid of a parent proceeding in Minnesota, it is upon wholesome grounds of public policy, and of justice and comity. . . . . As such a rule would operate in the direction of right and equity and in the direction of a convenience, and would effectuate the purposes of justice, we think it should be held to exist as an inherent necessity in our system of government."

The case of *Hale* v. *Hardon*, has been recently reaffirmed in *Hale, receiver*, v. *Conant* in the U. S. District Court in Rhode Island, and in *Hale, receiver*, v. *Hilliker* in the U. S. Circuit Court

in the Northern District of New York. It has also been followed in *Hale, receiver*, v. *Tyler, admx.* in the U. S. Circuit Court in Massachusetts, 104 Fed. Rep. 757, notwithstanding the decision of the Supreme Court of that state in *Hayward* v. *Leeson*, 176 Mass. 310. See also *Howarth* v. *Lombard*, 175 Mass. 570; *Howarth* v. *Angle*, 162 N. Y. 179, and *Tompkins* v. *Blakey* decided in N. H., March 15, 1901; (Atl. Rep. June 12, 1901.)

In the case at bar it is not necessary to hold that the plaintiff receiver succeeded to the rights of either the corporation or of the creditors; his authority emanated directly from the statute under which he was appointed. It appears, from the declaration in the writ, that he was expressly authorized and directed by a decree of the Minnesota court to institute, in his own name as receiver, all auxiliary actions necessary to enforce the liability of non-resident stockholders, and it has been seen that this decree was expressly authorized by the statute under which this receiver was appointed. True, the statute does not designate the person to be appointed receiver, but intrusts that duty to the court. In *Relfe* v. *Rundle*, 103 U. S., supra, the statute made an official designation of the Insurance Superintendent as the receiver or trustee, and the power of appointing that officer was intrusted to the Executive. In neither case does the statute make a personal selection of the receiver; and no essential difference in principle can be suggested between the receiver in *Relfe* v. *Rundle*, supra, and the receiver in the case at bar, respecting the capacity to sue in a foreign jurisdiction.

As said by the court in *Hancock National Bank* v. *Ellis*, 172 Mass. 47, "It certainly concerns the due administration of justice that all stockholders, wherever they reside, should be compelled by proceedings somewhere to perform the statutory obligations towards creditors of the corporation which they have assumed by becoming stockholders." An increasing tendency has been observable in both state and federal jurisdictions, during the last decade, to sanction the enforcement of these obligations extraterritorially in any court of competent jurisdiction, except where the rights of a citizen in the state of the forum are thereby prejudiced, or the pub-

lic policy of such state is contravened. It is apparent that no rights of domestic creditors can intervene, since the law creating the stockholders' liability declares it shall be enforced for the benefit of all creditors of the corporation. That the proceeding is not opposed to the policy of any local laws in this forum is apparent from the fact that judgment was rendered for the plaintiff in the unreported cases of *Citizens' Sav. Bank*, a Kansas corporation, against *Small*, *Beede* and *Briggs* respectively in Androscoggin county in 1897, holding the defendant stockholders liable.

The Minnesota statute authorizing the collection from stockholders of only so much as may be necessary to satisfy the debts of the corporation, and requiring a pro rata distribution of it among all the creditors, is seen to be free from the less equitable features of those statutes which authorize a single creditor, without a pro rata assessment, to maintain an action against a single stockholder for his own benefit and not for the benefit of all the creditors.

To the end, therefore, that the right created by the laws of another state for the common benefit of all the creditors of one of its insolvent corporations, may not be practically without a remedy, this court feels constrained to hold that the principle of comity between states is broad enough to extend recognition to the plaintiff in the courts of this state.

Exceptions overruled. Demurrer overruled.

STATE *vs.* SOUCIE'S HOTEL.

Penobscot. Opinion November 21, 1901.

Gambling Implements. R. S., c. 125, § 12.

Under R. S., c. 125, § 12, the use in gambling of a gambling apparatus or implement by a bailee, without the knowledge or consent of the owner, subjects it to destruction upon due legal proceedings against it.

On exceptions by claimant. Overruled.

Search warrant under R. S., c. 125, §§ 11 and 12, against Soucie's hotel, in the city of Brewer, for gambling implements. A nickel-in-the-slot machine was seized and claimed by its owner, one Charles W. Hayes, who prayed for its return. The judge of that court ruled that the machine was subject to condemnation and ordered it to be destroyed by burning. The claimant excepted, and under Stat. 1895, c. 211, § 6, his exceptions were certified to this court.

B. L. Smith, County Attorney, for State.

T. W. Vose, for claimant.

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

EMERY, J. The only question raised by this bill of exceptions is whether the use in gambling of a gambling apparatus or implement by a bailee, without the consent or knowledge of the owner, the bailor, subjects it to destruction under R. S., c. 125, § 12. We think it does. As said of a similar statute in *Commonwealth* v. *Gaming Implements*, 155 Mass. 165, the effect of the statute is to impose upon the owner of gambling apparatus or implements the burden of effectually keeping them from being used in gambling. All such apparatus and implements are presumably made, owned and kept for use in gambling, and their destruction is authorized, not to punish the owner for some unlawful act or

intent of his, but to protect society from the things themselves. In this respect they are unlike intoxicating liquors which are liable to destruction only when intended by the owner for unlawful sale, and at other times are innocent property, usable for innocent purposes. Intoxicating liquors are destroyed not because of their innate danger to society, but to punish the owner for making or permitting an unlawful use of them. Gambling apparatus and implements are treated by the statute as noxious per se, and they are ordered destroyed to remove a danger imminent from their very existence, not merely to punish the owner for an unlawful use. The statute by its terms strikes at the thing itself, and not at any act or intent of its owner.

The owner of this particular gambling apparatus did not effectually keep it harmless. It escaped from him to the hurt of society. It can, therefore, be lawfully destroyed in the manner provided by statute.

Exceptions overruled.

RUSSELL S. BRADBURY *vs.* JOHN H. TARBOX and Trustees.

Androscoggin. Opinion November 22, 1901.

Insolvency. Discharge. Pleading. R. S., c. 70, § 49.

1. A discharge in insolvency may be pleaded in bar by a special plea in bar as well as by simple averment with copy of discharge as provided in R. S., c. 70, § 49.
2. When thus pleaded by special plea in bar the plea must conform in all particulars to the rules governing special pleas in bar.
3. Special pleas in bar must state facts, not conclusions of law, so that a traverse of the statement will present an issue for the jury.
4. A statement that the debt sued for "is not a debt which is by said chapter 70, R. S., excepted from the operation of the defendant's discharge in insolvency," is a statement of a conclusion of law. A traverse of that statement does not raise an issue of fact for a jury.
5. A demurrer that is general as well as special will reach a fault in pleading not pointed out by the special demurrer, if such fault is amenable to a general demurrer.

On exceptions by plaintiff. Sustained.

Action of assumpsit on an account annexed to the writ. The action was originally brought before the Municipal Court for the city of Auburn, and brought up on an appeal from the judgment of that court. At the first term in this court below the defendant asked leave to withdraw his pleadings in the Municipal Court, and file a new plea. By consent of the parties the request of the defendant was granted, under a stipulation that the withdrawal of the former plea of the defendant and the filing of the new plea and all subsequent pleadings and proceedings thereunder, should be considered and have the same effect as if the new plea had been filed at the return term of the action. Thereupon the defendant withdrew his former plea and filed a special plea in bar of the plaintiff's maintaining his said action, to which plea the plaintiff demurred specially, and the presiding justice overruled his demurrer.

To this ruling the plaintiff excepted.

G. E. McCann and A. L. Kavanagh, for plaintiff.

G. C. Wing, for defendant.

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

EMERY, J. This action was begun December 14, 1900. While it was pending the defendant obtained a certificate of discharge from his debts from a state court of insolvency, January 14, 1901. Instead of pleading this discharge by a simple averment that on the day of its date such a discharge was granted to the defendant, setting forth a copy thereof, as authorized by statute R. S., c. 70, § 49, the defendant filed a special plea in bar after withdrawing all other pleas by consent. This special plea, therefore, is the only plea filed and its sufficiency is challenged by a demurrer.

By electing to make his defense in this manner the defendant subjected himself to the rules governing special pleas in bar and was bound to make his special plea conform to those rules. They apply with as much strictness to a special plea of a discharge in insolvency as to any other special plea. *Frary* v. *Dakin*, 7 Johns.

75; *Frost* v. *Tibbetts*, 30 Maine, 188. The plea must state facts and not mere conclusions of law. It must show affirmatively, by allegations of fact within itself, that the discharge is valid, that it is granted by a court having jurisdiction and upon due proceedings, and that it bars the debt sued for. All these allegations must be issuable, that is, such as would present an issue of fact for a jury if traversed.

Tried by this rule this plea seems faulty in one respect at least. The discharge does not bar the debt sued for if the latter was a debt created by the fraud or embezzlement of the insolvent, or was for necessaries furnished to the debtor, or his family, within thirty days of the commencement of proceedings. The plea should have distinctly alleged that the debt sued for was not created by either circumstance. *Frost* v. *Tibbetts*, 30 Maine, 188. As to this, the only allegation in the plea is that the debt sued for "is not a debt which is by said chapter 70, R. S., excepted from the operation of the defendant's discharge in insolvency." This is a statement of a conclusion of law, not an allegation of a fact. A traverse of that statement would not present an issue of fact for the jury. What debts the statute exempts from the discharge is a question of law. Whether a debt was created by fraud, or was for necessaries, is a question of fact, but it must be alleged and traversed as a question of fact before it can be tried by a jury.

In *Frost* v. *Tibbetts*, supra, 30 Maine, 188, the plea described the plaintiff's claim and averred that it was barred by the discharge. On a general demurrer to the plea the defendant argued that this allegation negatived the debt being one of the excepted classes. The court, however, adjudged it to be insufficient for that purpose. The language used in this plea is no more than a periphrase of that in *Frost* v. *Tibbetts*. It means no more than that the discharge barred the debt,—a mere conclusion of law.

As held in *Frost* v. *Tibbetts*, the general demurrer reaches this fault, it being a lack of necessary allegation. Though the plaintiff is said to have "demurred specially," his demurrer was general as well as special and is available as such. Chitty's Pl. (16th Am. ed.) 696; *Burnet* v. *Bisco*, 4 Johns. 235. The fault may seem

very technical, but it *is* a fault under the rules, and as it has been exposed by demurrer it must be corrected. This the defendant can do upon the payment of costs from the time the demurrer was filed.

Exceptions sustained. Demurrer sustained.
Defendant has leave to amend on payment of costs.

JAMES H. EACOTT, EXECUTOR,
Appellant from decree of Judge of Probate.

Sagadahoc. Opinion November 23, 1901.

Probate. Account. Debts. Witness. Practice.

1. When in settling his accounts in the probate court an executor claims credit for a sum as paid upon a debt due from the estate, the burden is upon him to prove that such sum was legally due from the estate.
2. The alleged creditor is a competent witness for the executor to prove that the money so paid him was legally due him from the estate, and he may testify like any other witness to matters happening before the death of the testator.
3. When there is any evidence tending to show that the claim upon which the money was paid was a valid claim against the estate, the finding of a single justice in favor of such claim will not be reviewed by the law court, no matter what may be the preponderance of the evidence against the finding.

On exceptions by legatee. Overruled.

Appeal from probate court, Sagadahoc county, heard in this court below upon the allowance of a claim against the estate of Mary E. Ayer. The bill of exceptions state:

Mary E. Ayer was a widow. Her estate consisted of chattels worth ten dollars and a house and lot which her executor sold under probate license for one thousand dollars.

Her will, which was admitted to probate on the first Tuesday of October, A. D. 1896, gave two hundred dollars to her daughter and half the residue of her estate to her son, Horace G. Ayer. It gave the other half of the residue to her step-son, Marcellus Ayer, "but upon the following condition, to wit: that he pay all debts

due from me at my decease, also my funeral charges and expenses of administration, and care for me during the time I may live, including physicians' bills and bills for necessary nursing."

The executor filed his first and final account in the probate court in February, A. D. 1900, and Marcellus Ayer appeared and presented objections. Upon a hearing, the judge of probate made his decree on the account March 13, 1900, charging the executor with $1040.33, which included $30 as rent of real estate; and allowing items in his favor aggregating $406.36, which included the legacy to the daughter; and ordered distribution of the balance to be paid to the legatees, as follows: To Horace G. Ayer, $420.17; to Marcellus Ayer, $213.80.

From this decree the executor appealed, alleging the following reasons: "Because the said executor was charged with the sum of $30, the same being for rents collected by him, accruing after the death of the testatrix.

"Because the claim of $212.89, presented by Horace G. Ayer and paid by said executor, disallowed by said decree."

The $212.89 was the aggregate of thirteen debts which Horace G. Ayer had contracted in his own name and paid in the lifetime of the testatrix and while he was living with his family in her house, above mentioned. These debts were for labor and materials employed in making alterations and repairs in said house. It was claimed by the executor and denied by Marcellus Ayer that the testatrix owed Horace the $212.89 at the time of her decease.

The letter from Horace G. Ayer, offered in evidence by Marcellus, was admitted to be genuine.

Marcellus Ayer claimed: 1. That the deposition of Horace G. Ayer offered by the appellant after the letter was introduced, was inadmissible, because the deponent was not a competent witness to testify to facts prior to the death of the testatrix in support of the claim for the $212.89.

2. That the facts stated in the deposition, even if proved, did not legally warrant the allowance of the $212.89 to the executor.

3. That the admissible evidence in this case did not show facts

on which a promise from the testatrix to Horace to pay the $212.89 could be implied by law.

4. That said evidence did not legally warrant a finding that she made such promise in fact. The appellant did not claim a promise in fact, but that there was a request from which a promise should be implied.

The presiding justice overruled these several contentions of Marcellus Ayer, and made his decree accordingly. To all these rulings adverse to his contentions and to the decree on the appeal, for the reasons above specified, Marcellus Ayer took exceptions.

H. E. Coolidge and H. W. Oakes, for executor.

Weston Thompson, for Marcellus Ayer, legatee.

Horace did not expect his mother to pay. *Shepherd* v. *Young*, 8 Gray, 152. The personal assets and avails of real estate sold under license were chargeable to Eacott in his account. He remains liable for them until released by the court. It is not enough for him to show that he has paid the claim. The burden is on him to show its legal validity. *Brewster* v. *Demarest*, 48 N. J. Eq. 559; *Pearson* v. *Darrington*, 32 Ala. 227; *Jones* v. *Ward*, 10 Yerg. 160; *Appeal of Romig*, 84 Penn. St. 235. Eacott must show that the claim could have been legally enforced against the estate by Horace. *Richardson* v. *Merrill*, 32 Vt. 27; *Stark* v. *Hunton*, 3 N. J. Eq. 300. Administrator who allows an unjust claim is personally liable therefor, and if he pays it, the money, as to the heir, is still in his hands. *Davis* v. *Bagley*, 40 Ga. 181, (2 Am. Rep. 570); *Jones* v. *Ward*, 10 Yerg. 160. It was not necessary to pay the item before presenting it in the account. An executor who pays a claim before its allowance by the court does so at his peril; takes upon himself the burden of proving its validity.

It was Eacott's duty to defend the estate. He could not pay claims not judicially approved and could not dispense with proof or bind the estate by admissions. *Saunders* v. *Haughton*, 8 Iredell's Eq. 217, (57 Am. Dec. 581). It was his duty to protect the estate by interposing every legal defense. The average man

would thus protect his own estate. If he had been sued and worsted, he would have been protected. R. S., c. 63, § 32. He could have procured the appointment of commissioners to pass upon this claim. R. S., c. 64, § 53. He could have consulted Marcellus, at whose expense it would be paid. He could have consulted Horace who, when not influenced, admitted the claim to be groundless. He could have required the claim to be presented in writing, supported by affidavit. R. S., c. 64, § 62.

If it be said that the judge found as a fact that Mrs. Ayer did engage to pay this claim and that his findings are conclusive, we answer: (1) That the decree finds a promise implied by law and not an express one. It was not claimed that there was an express promise. Whether the law will imply a promise is a question of law. (2) The judge based the implication of a promise on facts found by him on evidence not legally admissible, and with the aid of a presumption as of law which is not warranted by the authorities, or by sound legal reasoning.

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

EMERY, J. Mr. Eacott, executor of the will of Mrs. Ayer, deceased, paid $212.89 out of her estate to Horace G. Ayer, as a debt due him from Mrs. Ayer for moneys laid out and expended for her benefit at her request. The judge of probate refused to allow this item to the credit of the executor, and he appealed to the Supreme Court of Probate. In the appellate court the executor offered the deposition of Horace G. Ayer, to whom he had paid the money, containing his testimony as to facts happening before the death of the testatrix tending to show the validity of his claim for the $212.89 against her and her estate. The appellee, Mr. Marcellus Ayer one of the residuary legatees, objected to the competency of the witness to testify to such facts after the death of the testatrix. The court ruled that the witness was competent to testify to such facts, and the appellee excepted.

This is not a case between the executor representing the deceased

testatrix, and a person setting up a claim or defense antagonistic to the testatrix or her estate. It is merely a case between Mr. Eacott and Mr. Marcellus Ayer, each contending solely for his own personal interests. The loss or gain by the decree will be the personal loss or gain of one or the other, and not the loss or gain of the estate. The case is, therefore, not within the statutory exception from the general statute making parties and interested persons competent witnesses. R. S., c. 82, § 98; *Gunnison* v. *Lane*, 45 Maine 165; *Nash* v. *Reed*, 46 Maine, 168; *Millay* v. *Wiley*, 46 Maine, 230; *Rawson* v. *Knight*, 73 Maine, 340. Mr. Horace G. Ayer was, therefore, a competent witness, and his deposition was admissible.

It seems that the executor paid the claim of Horace G. Ayer upon his own judgment without having it passed upon by the court or by commissioners. The burden was, therefore, upon him in settling his account to prove affirmatively that the claim so paid was actually due from the estate. The appellee contended that all the evidence, including the deposition, did not sustain the executor's burden of proof; but the court ruled against him, and found the claim to have been a valid debt against the estate and therefore to be allowed in the executor's account. The appellee excepted to this ruling and finding.

This exception, of course, can only raise the question whether there was any evidence upon which the ruling and finding could be based. If there was any such evidence, its sufficiency was a question of fact upon which the finding of the court is conclusive, not to be reviewed by the law court. *Hazen* v. *Jones*, 68 Maine, 343; *Brooks* v. *Libby*, 89 Maine, 151; *Pettengill* v. *Shoenbar*, 84 Maine, 104. Horace G. Ayer testified in his deposition,—that he paid out the money for necessary repairs upon the dwelling-house of the testatrix, at her request,—that she said to him the repairs were needed, and she had no money, and that, if he would make the repairs, he might have the place after her death by giving his sister two hundred dollars. He accordingly paid for the repairs, but she did not devise the house to him. If this testimony is true there can be inferred a promise by the testatrix to reimburse him.

The appellee, nevertheless, stoutly insists that this testimony is not true,—that it is completely destroyed by the admissions of Horace and the other evidence in the case. Whether the testimony quoted was true, or not, was a question solely for the court hearing the case. Its decision of that question cannot be reviewed by the law court. See cases cited supra.

Exceptions overruled.

NATHAN L. MEANDS *vs.* CHARLES E. PARK, and Logs and Claimants.

Franklin. Opinion November 25, 1901.

Logs. Lien. Laborer. Foreman. Scaler. R. S., c. 51, § 141; c. 91, § 38.

The statute giving a lien to those who "labor" at cutting or hauling logs was obviously designed to afford protection to common laborers who gain their livelihood by manual toil, and who may be imperfectly qualified to protect themselves. The word "labor" was undoubtedly employed by the legislature in its limited and popular sense, to designate this class of workmen who labor with physical force in the service and under the direction of another for fixed wages; and such is the primary or specific lexical meaning uniformly assigned to the word "laborer."

Where the plaintiff "was foreman or superintendent of the entire logging operation, having charge of the men engaged in cutting and hauling the logs," but "performed no personal manual labor on the logs attached," *held;* that he did not "labor" in cutting or hauling the logs within the meaning of the statute.

Nor did he labor at cutting and hauling logs while acting as scaler. In 1876 the statute was amended by giving a lien to cooks, and in 1889 was again enlarged to include blacksmiths. It is for the legislature and not for the court to extend the lien to the scaler.

Agreed statement. Plaintiff nonsuit.

Assumpsit to enforce a lien under R. S., c. 91, § 38, for plaintiff's services on certain logs that were attached on the writ. The case appears in the opinion.

Forrest Goodwin, for plaintiff.

The court can render judgment against the logs, this being a

proceeding in rem and no judgment in personam being claimed, without notice to the principal defendants or their appearance. R. S., c. 91, § 45; Freeman on Judgments, § 611; 2 Ency. of Plead. & Prac. p. 969; *Ward* v. *Boyce*, 152 New York, 191; *Plurede* v. *Levasseur*, 89 Maine, p. 172. Plaintiff was a laborer within the statute. *Plurede* v. *Levasseur*, supra; *Shaw* v. *Bradley*, 59 Mich. 199; *McCrillis* v. *Wilson*, 34 Maine, 286; *Kelley* v. *Kelley*, 77 Maine, 135; *Phillips* v. *Freyer*, 80 Mich. 254.

E. Foster and O. H. Hersey; F. W. Butler, for claimants.

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

WHITEHOUSE, J. This is an action of assumpsit brought by the plaintiff to enforce the statute lien on certain logs for personal labor, alleged to have been performed by him in cutting and hauling the logs attached. The case comes to this court on an agreed statement of facts, from which it appears "that no service was made on either defendant, either personally or by publication, other than the general notice given to log owners under the statute; that the plaintiff performed no personal manual labor on the logs attached, but was for three days of the time a scaler at $2.50 per day, and the balance of the time, to wit, 60 days, at $2.50 per day, was foreman or superintendent of the entire logging operation, having charge of the men engaged in cutting and hauling the logs from the stump to the landing."

It is provided by R. S., chap. 91, § 38, as amended by chap. 183 of the public laws of 1889, that: "Whoever labors at cutting, hauling, rafting or driving logs or lumber, or at cooking for persons engaged in such labor, or in shoeing horses or oxen, or repairing property while thus employed, has a lien on the logs or lumber for the amount due for his personal services" etc.

It is contended on behalf of the log owners, in the first place, that the action is not maintainable without service on the defendants, either actual or by publication; and secondly, that the plaintiff did not "labor" at cutting or hauling the logs in question with-

in the contemplation of this statute, and hence did not perform any "personal services" for which the statute gives him a lien.

It is unnecessary to consider whether or not the action would be maintainable without service on the defendants, for it is the opinion of the court that upon the agreed statement of facts in the case, the plaintiff did not "labor at cutting or hauling logs" within the meaning of this statute, and performed no service for which he was entitled to a lien on the logs attached. The language of the court in *Blanchard* v. *Portland and Rumford Falls Railway*, 87 Maine, 241, respecting the construction of the statute involved in that case is equally applicable to the statute now under consideration: "While it confers benefits, it also imposes burdens; while it gives protection to one of the parties, it compels the other party to pay a debt which he had no voice in contracting. The correct rule for the interpretation of such a statute is to neither extend nor restrict its operation beyond the fair meaning of the words used."

The statute giving a lien to those who "labor" at cutting or hauling logs was obviously designed to afford protection to common laborers who gain their livelihood by manual toil, and who may be imperfectly qualified to protect themselves. The word "labor" was undoubtedly employed by the legislature in its limited and popular sense, to designate this class of workmen who labor "with physical force in the service and under the direction of another for fixed wages." *Rogers* v. *Dexter and Piscat. R. R. Co.*, 85 Maine, 374. And such is the primary or specific lexical meaning uniformly assigned to the word "laborer." Says Webster: "One who labors in a toilsome occupation; a person that does work that requires strength rather than skill, as distinguished from that of an artisan." The Standard Dict: "One who performs physical or manual labor, especially one who for hire performs any physical labor requiring little skill or accuracy." The Century Dict: "Specifically, one who is engaged in some toilsome physical occupation; in a more restricted sense, one who performs work which requires little skill or special training, as distinguished from a skilled workman." See Am. and Eng. Enc. of Law, Vol. 12, p. 532, and Vol. 23, p. 872.

In accordance with this interpretation, it was held by this court in *Rogers* v. *Dexter and Piscat. R. R. Co.*, supra, that one who contracts to do a certain amount of grubbing for a railroad at a fixed price per yard, was not a "laborer" within the meaning of R. S., chap. 51, § 141, which imposes upon railroads the liability to pay the wages of laborers employed by contractors, although in that case the sub-contractor was engaged with his men a portion of the time in performing physical labor. So in *Blanchard* v. *Portland & Rumford Falls Ry.*, supra, it was held that one who superintends the building of bridges at an agreed compensation per day, keeps an account of the men's time, and makes out their pay-rolls, is not a "laborer" within the meaning of that statute.

In the construction of similar statutes in other jurisdictions, it has also been held that the word "laborer" does not include a superintendent or bookkeeper. *Wakefield* v. *Fargo*, 90 N. Y. 213. Nor a civil engineer, *Penn. & Del. Railroad Co.* v. *Leuffer*, 84 Penn. St. 168, (24 Am. Rep. 189.) Nor an assistant engineer, *Brockway* v. *Innes*, 39 Mich. 47, (33 Am. Rep. 348). Nor a farm overseer whose sole duty was to supervise those who labored under his authority. *Whitaker* v. *Smith*, 81 N. C. 340, (31 Am. Rep. 503).

In the case at bar it has been seen that the plaintiff for sixty days "was foreman or superintendent of the entire logging operation, having charge of the men engaged in cutting and hauling the logs," but "performed no personal manual labor on the logs attached." Under these circumstances, it is clear that he did not "labor" in cutting or hauling the logs within the meaning of the statute.

Nor did he labor at cutting or hauling logs while acting as scaler. In 1876 the statute was amended by giving a lien to the cook, and in 1889 was again enlarged to include the blacksmith. It is for the legislature and not for the court to extend the lien to the scaler.

According to the stipulation of the parties the entry must therefore be,

Plaintiff nonsuit.

ALBRO R. JENNESS, Treasr. *vs.* JOHN H. BARRON, and another.

Oxford. Opinion November 26, 1901.

Bills and Notes. Guaranty. Pleading.

If the holder of a non-negotiable note transfers it with a guaranty of payment, he is just as liable to the transferee, upon the contract of guaranty, as if the note were negotiable.

The plaintiff as treasurer of Fryeburg Academy, sued the defendants as indorsers and guarantors of a certain note. The declaration after describing the note, concludes as follows: "And the plaintiff avers that thereafter, to wit: on the same day, the said John H. Barron and the said Williams Souther, (defendants) by their indorsement of their names thereon, indorsed, negotiated and delivered the said note to one F. Y. Bradley, then and there the treasurer of said Fryeburg Academy, as said treasurer, and then and there in said indorsement by them subscribed, for value received, promised and guaranteed the payment of said note, and both the principal and interest thereof." The declaration also contains an averment of demand and notice.

Held; on demurrer:

1. That the declaration contains all the necessary averments (and some unnecessary ones) to charge the defendants as guarantors of payment of the note, and that the question whether the note is negotiable or non-negotiable is immaterial.
2. Whether the averment of demand and notice is necessary, quaere.
3. But the declaration is faulty in that it does not aver any legal privity between the plaintiff, and F. Y. Bradley, with whom, as treasurer it is averred the contract of guaranty was made. There is no averment that plaintiff is Bradley's successor, or that the contract inured to such successor. And for this reason the demurrer is sustained.
4. Such a defect is amendable. And if facts exist which entitle the plaintiff to sue in his own name, upon a contract of guaranty made with F. Y. Bradley, as treasurer, the plaintiff may amend at nisi prius, upon statutory terms.

Exceptions by defendant. Sustained.

Assumpsit against the defendants as indorsers and guarantors of a promissory note made by one Dippert February 21, 1888, at Crawford, Nebraska, payable to John H. Barron and Williams Souther, the defendants, or their order, for $744 in three years from date. The note by its terms was payable "without defalca-

tion or discount, at the bank of Crawford with interest at eight per cent per annum, from maturity, until paid, payable semi-annually, on the first day of September and March of each year; and therein further stipulating and agreeing in case said note is not paid at its said maturity and an action is, or shall be commenced thereon, to pay ten per cent attorney's fee, of the amount due thereon, at said maturity and said commencement of said action, the same to be allowed by the court, into which said action is or shall be commenced, and included in the judgment recovered thereon."

A. H. and E. C. Walker, for plaintiffs.

E. Foster and O. H. Hersey, for defendant Souther.

SITTING: WISWELL, C. J., EMERY, STROUT, SAVAGE, POWERS, JJ.

SAVAGE, J. The plaintiff, in his capacity as treasurer of Fryeburg Academy, seeks to recover upon a note alleged to have been made payable to the defendants, and by them indorsed and negotiated to one Bradley, as treasurer of Fryeburg Academy. One of the defendants, Souther, demurred to the declaration. The demurrer was overruled, and he excepted.

The note, as described, was for the sum of seven hundred and forty-four dollars with interest, and contained a stipulation for the payment of an attorney's fee, in case the note was not paid at maturity and an action should be commenced thereon. The concluding portion of the plaintiff's declaration is as follows: "And the plaintiff avers that thereafter, to wit: on the same day, the said John H. Barron and the said Williams Souther, by their indorsement of their names thereon, indorsed, negotiated and delivered the said note to one F. Y. Bradley, meaning Frank Y. Bradley, then and there the treasurer of said Fryeburg Academy, as said treasurer, and as such named and called, in said indorsement, and then and there in said indorsement by them subscribed, for value received, promised to pay and guaranteed the payment of said note, and both the principal and interest thereof, according

to the term and tenor thereof and waived both demand and notice." The declaration also contains an averment of demand and notice.

The grounds of demurrer relied upon are, first, that the declaration does not allege any "legal connection or privity between Albro R. Jenness, the plaintiff in this action, and F. Y. Bradley, the party to whom the note was indorsed and transferred;" and secondly, that the note is non-negotiable by reason of the stipulation for the payment of an attorney's fee, and hence that the action will not lie in the name of this plaintiff.

The first point is undoubtedly well taken. The plaintiff by his declaration must show a right of action in himself. He avers in effect that the note in question was by the defendants "indorsed, negotiated and delivered" to Bradley in his capacity as treasurer of Fryeburg Academy, and that the defendants guaranteed the payment of the note to Bradley. When and in what manner, if at all, Bradley ceased to have a right of action on the note or guaranty, and the plaintiff gained one, is not averred. How did the right of action pass from Bradley to the plaintiff? There is no connecting link. It might be easy, perhaps, to infer that the plaintiff is Bradley's successor in office, and that the defendants guaranteed payment to Bradley, "or his successor." If so, it should be so averred. We are not authorized to infer. In pleading, inferences cannot take the place of essential averments. But these defects are amendable, and the plaintiff may amend his declaration at nisi prius, upon the statutory terms.

The second ground of demurrer relates to the negotiability of the note. But we think that question is immaterial here. If the defendants were sued as indorsers, it would be material. The plaintiff claims, among other things, that the defendants were guarantors of the note, and that this declaration is properly framed against them as guarantors. The defendant argues that the question whether he has been sued as guarantor or not is foreign to the issue before the court on demurrer. We think not. Whether there is a sufficient declaration against the defendants as guarantors is necessarily before us. For if the declaration is based upon

an alleged guaranty, it makes no difference whether the note was negotiable or not. If the holder of a non-negotiable note transfers it with a guaranty of payment, he is just as liable to the transferee upon the contract of guaranty, as if the note was negotiable. That distinction can make no difference. It follows that if the declaration sufficiently avers a guaranty of the defendants, this last ground of demurrer fails.

It is true that the pleader has made some unnecessary averments. That is true of many declarations that are not demurrable. And such averments may be treated as immaterial and as surplusage. After describing the note with sufficient particularity, the pleader avers that the defendants who are alleged to have been the payees of the note, "indorsed, negotiated and delivered" the note to Bradley, "as treasurer." Thereupon it is averred that "in said indorsement by them subscribed," that is to say, in the contract they made with Bradley "as treasurer," the defendants, "for value received," . . . . "guaranteed the payment of said note." Then follows averment of demand upon and non-payment by the principal, and notice to the defendants. In note to 2 Chitty on Pleading, 253, it is questioned whether this last averment is necessary. *Read* v. *Cutts*, 7 Maine, 186. We think the declaration contains all the averments which are necessary to charge the defendants as guarantors of payment of the note, and that it is not demurrable on the ground that the note as described is non-negotiable.

But, as we have already seen, the plaintiff has failed to aver by what right he is entitled to sue. Hence the ruling of the justice below, overruling the demurrer, was erroneous, and the exceptions must be sustained.

Exceptions sustained.

DANIEL G. WING, Receiver, *vs.* CHARLES MARTEL.

Androscoggin. Opinion November 27, 1901.

Bills and Notes. Intox. Liquors. Burden of Proof. R. S., c. 27, § 56.

In an action by an indorsee of negotiable notes, the maker defended upon the ground that they were given for intoxicating liquors sold in violation of R. S., c. 27, § 56, in that the liquors were purchased out of the state with the intention of unlawfully selling them within the state, and that the indorsee had notice of the illegal consideration of the notes so given. The presiding justice, after the evidence was taken out, directed a verdict for the plaintiff and the defendant excepted. *Held;*

1. That if the evidence would have warranted a verdict for the defendant, the exceptions should be sustained; otherwise, overruled.

2. It is first incumbent upon the defendant to prove that the notes were so given; and if he succeeds in proving either proposition, the burden will then be upon the plaintiff to show that he is a holder for a valuable consideration, without notice of the illegality of the contract.

3. The evidence shows that the notes were given for intoxicating liquors; but nothing in the record has a tendency to show that the liquors were sold in violation of the statute, or that they were purchased out of the state for unlawful sale within the state. There is no evidence showing, or tending to show, where the liquors were purchased, or where they were intended to go, or to what use they were intended to be put. It does not appear that the liquors were ever shipped into the state, or were ever intended to be shipped here. The notes themselves were dated at Boston, where they were discounted, and there is no evidence which refers to any person, or thing, or place in this state, except that they were payable at a bank in this state. From that alone a jury would not be warranted in finding that the liquors were sold in violation of our law, or were intended, when purchased, for unlawful sale in this state.

4. The indorsee was holder of the notes for a valuable consideration, without notice of any illegality in the contract, if such there were.

Exceptions by defendant. Overruled.

This was an action brought by Daniel G. Wing, Receiver of the Globe National Bank of Boston, against Charles Martel to recover the amount of twelve promissory notes, given by the defendant to one Charles E. Maxwell, of Boston, and by him discounted at the

Globe Bank. The bank, between the dates of discount of the several notes and their maturity became insolvent and Daniel G. Wing, the plaintiff in this action, was appointed receiver.

The plea was the general issue with a brief statement "that the notes declared upon were given for intoxicating liquors sold in violation of the law, and for liquor purchased outside of the state of Maine and intended to be sold within the state contrary to law, and that the said Globe National Bank had notice of the illegality of the consideration."

At the conclusion of the testimony, the presiding justice directed the jury to find a verdict for the plaintiff. To this instruction the defendant excepted.

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

J. L. Reade, for defendant.

SITTING: WISWELL, C. J., EMERY, STROUT, SAVAGE, POWERS, JJ.

SAVAGE, J. This suit is brought by the Receiver of the Globe National Bank, as indorsee upon several promissory notes. The defendant, who was the maker, defends upon the ground that the notes were given for intoxicating liquors sold in violation of our statute, and for such liquors purchased out of the state with the intention that they should be unlawfully sold within the state; and that the indorsee had notice of the illegality of the consideration. R. S., chap. 27, § 56.

The presiding justice below, after the evidence was taken out, directed the jury to return a verdict for the plaintiff. And to this direction, the defendant excepted. If the evidence in the case would have warranted the jury in returning a verdict for the defendant, the exceptions must be sustained; otherwise, overruled.

It is first incumbent upon the defendant to prove that the notes were given for liquors sold in violation of our statute, or for liquors purchased without the state, with the intention to sell the same, or some part thereof, in violation of our law; and if the defendant succeeds in proving either of these propositions, then the burden is

upon the plaintiff to show that the indorsee was a holder for a valuable consideration, without notice of the illegality of the contract. *Oakes* v. *Merrifield*, 93 Maine, 297.

The evidence in this case shows clearly enough that these notes were given for intoxicating liquors. But there is nothing whatever in the record which has a tendency to show that the liquors were sold in violation of our law, or that they were purchased out of the state, for unlawful sale within the state. There is no evidence showing, or tending to show, where the liquors were purchased, or where they were intended to go, or to what use they were intended to be put. It does not appear that the liquors were ever shipped into this state, or were ever intended to be shipped here. The notes themselves are dated at Boston; and there is no evidence in the case which in any way refers to any person, or thing, or place in this state, except that the notes are made payable at a Bank in Lewiston. From that alone, a jury would not be warranted in finding that the liquors were sold in violation of our law, or were intended, when purchased, for unlawful sale in this state.

Besides, we think the plaintiff has sustained the burden of showing that the Globe National Bank, the indorsee, was the holder of these notes for a valuable consideration, and without notice of any illegality of the contract, if such there were.

The ruling of the presiding justice was right, and the exceptions must be overruled.

Exceptions overruled.

AMOS KELLEY *vs.* GEORGE O. GOODWIN, and another.

Aroostook. Opinion December 6, 1901.

Landlord and Tenant. Crops. Mortgage.

1. Ordinarily, the tenant of a farm becomes the owner of the crops, and may sell or mortgage them.
2. When a lease of a farm provided that "all the crops raised on said farm the coming season" should be the lessor's and remain his property until the rent was fully paid, *held;* that the title reserved by the lessor was not absolute, but was in the nature of security only, as by mortgage.
3. Such crops not in actual existence when the lease was made were not then subject to mortgage at common law.
4. But inasmuch as they had a potential existence, a mortgage of them, though not good as a conveyance or a reservation, was valid as an executory agreement, enforceable in equity, and hence constituted an equitable mortgage.
5. To shut out or postpone claims of subsequent purchasers, or mortgagees, an equitable mortgage must be recorded, the same as a legal one; or possession must be taken by the mortgagee.
6. The agreement between the landlord and tenant, reserving title in the former as security for rent, was a valid one; but until the crops came into existence, the rights of the parties rested in contract merely. When the crops came into existence, the legal title was in the tenant.
7. The defendant claiming under a title derived from a mortgage of the crops when growing, recorded earlier than the plaintiff's equitable mortgage, had a superior title.

Exceptions by plaintiff. Overruled.

Trover for a crop of potatoes claimed by defendants under a mortgage. The material facts appear in the opinion.

W. R. Lumbert and B. L. Fletcher, for plaintiff.

Ira G. Hersey and John E. Magill, for defendants.

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

SAVAGE, J. As we construe the contract, the plaintiff, on November 7, 1899, leased his farm to one Rogers for one year, and for rental, Rogers agreed to pay one hundred and twenty-five dol-

lars, before October 20, 1900. The lease contained the following clause: "And all crops raised on said farm the coming season, next shall be mine [plaintiff's] and remain my property until said rent is fully paid." In the spring of 1900, Rogers planted on the farm a crop of potatoes, which on June 27, 1900, he mortgaged to Hopkins Brothers. Their mortgage was recorded June 29, 1900. At a later hour on the same day, the plaintiff had his lease to Rogers recorded. At the time their mortgage was taken and recorded, Hopkins Brothers had no knowledge of the plaintiff's claim upon the property. In the fall of 1900, Rogers dug the potatoes and sold them to the mortgagees, and received payment by credit upon the mortgage debt. The mortgagees sold them to the defendants, who are here sued in trover for their value.

Ordinarily, the tenant of a farm becomes the owner of the crops grown, and may sell or mortgage them. *Bailey* v. *Fillebrown*, 9 Maine, 12; *Dockham* v. *Parker*, 9 Maine, 137; *Sherburne* v. *Jones*, 20 Maine, 70; *Richards* v. *Wardwell*, 82 Maine, 343. A sale by mortgagor to mortgagee vests complete title in the latter. Hence it follows that the sale of the potatoes by Rogers to Hopkins Brothers, and by them to the defendants, gave the latter a perfect title, unless the plaintiff had a superior title, because an earlier one.

He claims that he had. He claims that Rogers had no title in the potatoes which he could sell or mortgage; that by the terms of the lease, the title to all crops was reserved to the plaintiff himself; hence that no title passed to Hopkins Brothers, either by Rogers' mortgage or by his subsequent sale. The defendants answer that if the reservation were intended to be an absolute one, it was null and void as repugnant to the grant, *Turner* v. *Bachelder*, 17 Maine, 257, citing Co. Lit. 142, a; and that if it were intended to be conditional, as security for the rent, it constituted a mortgage, either legal or equitable, and must have been recorded in order to prevent subsequent liens from attaching, or subsequent sales by the mortgagor from conveying title to innocent purchasers.

We think we may disregard the former horn of the dilemma, for it is clear, from the language of the lease itself, that the lessor attempted to reserve title as security for rent. The contract,

therefore, had the nature of a mortgage. *Woodman* v. *Chesley*, 39 Maine, 45. But when the lease was made, in the fall of 1899, the crops were not actually in existence. Hence they were not then subject to mortgage at common law. *Shaw* v. *Gilmore*, 81 Maine, 396. But they had what is termed a potential existence, and a mortgage of them, though not good as a conveyance or a reservation, was valid as an executory agreement. Jones Chattel Mortgages, § 174. Such an agreement is enforceable in equity, and hence is called an equitable mortgage. Such, we think, was the agreement under consideration. The agreement between the plaintiff and Rogers was a valid one; but until the crops came into existence, the rights of the parties rested in contract merely. When the crops came into existence, the legal title was in the tenant Rogers. *Bailey* v. *Fillebrown*, supra; *Dockham* v. *Parker*, supra; *Garland* v. *Hilborn*, 23 Maine, 442; *Butterfield* v. *Baker*, 5 Pick. 522; *Munsell* v. *Carew*, 2 Cush. 50. In *Kelley* v. *Weston*, 20 Maine, 232, the principles upon which the cases of *Bailey* v. *Fillebrown* and *Dockham* v. *Parker* were decided are clearly set forth, and it is useful to repeat the language of the court. "In these cases," the court said, "the provision that it should be security for the rent shows that the property was in the tenant, and not the landlord. And when the produce is to be holden as security, it has been considered necessary that the landlord should in proper time manifest his intention so to appropriate it by taking possession or control of it, to prevent its being taken by other creditors. But when by the terms of the agreement, a portion of the produce is never to become the property of the tenant, there can be no such necessity."

So it was in the power of the tenant Rogers to sell or mortgage the crops, so far as the rights of innocent parties were concerned, in disregard of his contract with his lessor, unless the latter either took possession or recorded his mortgage. *Beeman* v. *Lawton*, 37 Maine, 543. For to shut out or postpone claims of subsequent purchasers, or mortgagees, an equitable mortgage must be recorded, the same as a legal one. *Putnam* v. *White*, 76 Maine, 551. Or possession must be taken.

Inasmuch as the mortgage, under which the defendants claim, was recorded earlier than the plaintiff's equitable mortgage, their title was superior to the plaintiff's title. And for having taken the potatoes and applied their value towards the payment of the mortgage debt, Hopkins Brothers are not liable to the plaintiff. Neither are the defendants, their vendees, for having purchased the potatoes.

Such, in effect, was the instruction of the presiding justice to which exceptions were taken.

Exceptions overruled.

HENRY F. ANDREWS, In Equity,

vs.

HARRY M. LINCOLN, and others.

Penobscot. Opinion December 9, 1901.

Will. Perpetuities. Trusts.

1. The law permits the vesting of an estate or interest, and also the power of alienation, to be postponed for the period of a life or lives in being, and twenty-one years and nine months thereafter. If postponed for a longer period, it is obnoxious to the rule against perpetuities, and the devise or grant is void.
2. Whenever lives in being do not form any part of the time of postponement, the only period under the rule against perpetuities is twenty-one years absolute.
3. The limitation, in order to be valid, must be so made that the estate or interest not only may, but must necessarily, vest within the prescribed period.
4. The rule concerns itself only with the vesting, and not with the termination of estates.
5. The rule does not apply to vested estates or interests, but only to remote future and contingent estates and interests.
6. A testator by his will devised to trustees all of his estate, except debts due him from his son which he forgave. The trustees were given full power to manage and control the estate, to sell the whole or any part thereof. The receipts and profits of the real estate, and the proceeds of the sales of land, together with all personal and mixed estate, and the proceeds thereof were

to be invested and re-invested by the trustees, and allowed to accumulate for a period of thirty years from the testator's death. During that period, the trustees were authorized in their discretion to pay from the principal or income of the fund such sums as they deemed expedient for the education and maintenance of the testator's two grandchildren, and for the support and maintenance of his son and his son's wife, and for the education and maintenance of the issue of either or both of the grandchildren. The will then provided as follows: "At the expiration of said thirty years the whole of said fund or estate, in whatever form said fund or estate shall then be, shall become the property of my said two grandchildren in equal shares to have and to hold to them and their heirs and assigns forever, or if either of said grandchildren is then deceased leaving no issue of his or her body living at the time of his or her decease, the survivor is to take the whole of said fund or estate, or if either of said grandchildren is then deceased leaving issue of his or her body living at the time of his or her decease, such issue take the parent's one-half, or if both of said grandchildren are then deceased both leaving issue of his or her body living at the time of his or her decease, such issue take the parent's half, or if both of said grandchildren are then deceased only one of them leaving issue of his or her body living at the time of his or her decease, such issue take the whole of said estate and fund, or if both of said grandchildren are then deceased neither of them leaving issue of his or her body living at the time of his or her decease, in that event the whole of said estate and fund is to become the property of my son, Frank W. Lincoln, to have and to hold to him and his heirs and assigns forever. It being my intention moreover that in event that said estate and fund is to become the property of said Frank W. in manner above stated, it is to be held by my said trustees for thirty years as afore provided."

7. The court holds that the will under consideration provides for an accumulation of the trust fund for the gross period of thirty years, without reference to any life or lives in being, and that this result is not changed by the discretionary authority in the trustees to expend money for the education, support and maintenance of various beneficiaries.

8. As there is no intervening limitation, the estate must have vested, if at all, at the death of the testator.

9. The estate did not so vest, and could not vest until the termination of thirty years, and that until then no cestui que trust has any interest.

10. Not only is the enjoyment of the fund postponed, but also any interest in it is postponed beyond the period of twenty-one years, and even then the postponed interest is contingent.

11. Therefore this attempted trust offends the rule against perpetuities in that it postpones the vesting of the equitable interest of the cestui beyond the period limited. The whole trust is void.

12. The trust being void, nothing valid is left in the will except the provision relating to debts due from the testator's son. All the estate which was devised to trustees must be treated and administered as intestate property.

On report. Bill sustained and decree accordingly.

Bill in equity, heard on bill and answers, seeking a construction of the will of Matthew Lincoln, of Bangor, deceased.

C. A. Bailey, for plaintiff.

T. D. Bailey and E. C. Ryder, for defendants.

SITTING: WISWELL, C. J., STROUT, SAVAGE, POWERS, PEABODY, JJ.

SAVAGE, J. Bill in equity to construe the will of Matthew Lincoln, late of Bangor.

By this will, the testator devised to trustees named, all his estate of every name and nature, except such debts and demands as might be due him from his son Frank W. Lincoln, and these he forgave. The trustees were given full power to manage and control the real estate, to pay taxes on the same, and keep the same insured, to sell and convey the whole or any part of the real estate, and to sell or "permit" timber. It was provided that the net receipts and profits from the real estate, and the proceeds of the sale of any land, and of the sales of any growth or timber, together with all personal and mixed estate, and the proceeds of all personal and mixed estate, were to be invested and re-invested by the trustees, and allowed to accumulate for a period of thirty years from the day of the testator's death. During that period of thirty years the trustees were authorized in their discretion to pay from principal or income of the trust fund such sums as they deemed expedient for the education and maintenance of the testator's two grandchildren, Harry Lincoln and Josie Lincoln, and for the support and maintenance of his son Frank W. Lincoln, and of the latter's wife, Addie Lincoln. The trustees were given the same power and discretion during the said thirty years, as to payments for the education and maintenance of the issue of either or both of the grandchildren, "should either or both die before the expiration of the thirty years leaving issue of his or her body surviving." The final clause of the will is as follows:—

"At the expiration of said 30 years the whole of said fund or estate, in whatever form said fund or estate shall then be, shall become the property of my said two grandchildren in equal shares to have and to hold to them and their heirs and assigns forever, or if either of said grandchildren is then deceased leaving no issue of his or her body living at the time of his or her decease the survivor is to take the whole of said fund or estate, or if either of said grandchildren is then deceased leaving issue of his or her body living at the time of his or her decease such issue take the parent's one-half, or if both of said grandchildren are then deceased both leaving issue of his or her body living at the time of his or her decease, such issue take the parent's half, or if both of said grandchildren are then deceased only one of them leaving issue of his or her body living at the time of his or her decease, such issue take the whole of said estate and fund, or if both of said grandchildren are then deceased neither of them leaving issue of his or her body living at the time of his or her decease in that event the whole of said estate and fund is to become the property of my son Frank W. Lincoln to have and to hold to him and his heirs and assigns forever. It being my intention however that in event that said estate and fund is to become the property of said Frank W. in manner above stated, it is to be held by my said trustees for 30 years as afore provided."

Frank W. Lincoln died before the death of the testator.

It is objected that the trust attempted to be created by this will is obnoxious to the rule against perpetuities, on two grounds. First, that it unlawfully postpones the vesting of the equitable estate in the cestuis; and secondly, that it provides for an accumulation of the trust fund for a longer period than is permitted by law.

"The rule against perpetuities," says Mr. Gray in his work on Perpetuities, page 378, "is not a rule of construction, but a peremptory command of the law. It is not, like a rule of construction, a test, more or less artificial, to determine intention. Its object is to defeat intention. Therefore every provision in a will or settlement is to be construed as if the rule did not exist, and then to the provision so construed the rule is to be remorselessly applied."

The rule against perpetuities does not apply to vested estates or interests. It applies only to remote future and contingent estates and interests. It applies equally to legal and to equitable estates. The law permits the vesting of an estate or interest, and also the power of alienation, to be postponed for the period of a life or lives in being, and twenty-one years and nine months thereafter. If the vesting of the interest is postponed, or the power of alienation is suspended, for a longer period, it is unlawful, and the devise or grant is void. But the limitation, in order to be valid, must be so made that the estate or interest not only may, but must necessarily, vest within the prescribed period. If by any possibility the vesting may be postponed beyond this period, the limitation over will be void. The rule concerns itself only with the vesting, the commencing of estates, and not with their termination. These established principles are all reiterated, with ample citation of authority, in the very recent case of *Pulitzer* v. *Livingston*, 89 Maine, 359. It will not be difficult to apply them to the case at bar.

The testator plainly provided for an accumulation of his estate in the hands of trustees for the gross period of thirty years, without any reference to any life or lives in being. And this is the essential character of the trust, notwithstanding the discretionary authority given the trustees to expend money for the education, support and maintenance of various beneficiaries. It is, nevertheless, an accumulative trust. Such beneficiaries took no vested interest. In order to give them any interest, the trustees must exercise their discretion. The exercise of that discretion is a condition precedent. It is entirely uncertain and contingent whether that discretion will be exercised within the prescribed period or not. Gray on Perpetuities, § 246.

As has been already suggested, in this case, lives in being do not form a part of the period of postponement. It is a gross term of thirty years. Whenever lives in being do not form part of the time of suspension or postponement, the only period under the rule against perpetuities is a twenty-one years absolute. *Kimball* v. *Crocker*, 53 Maine, 263.

In order to support this trust, it is necessary that the interest of

the cestuis must vest within the prescribed period, and as there is no intervening limitation, it must have vested, if at all, at the death of the testator. It is not only possible that it would not so vest, but it is certain that it could not vest until the termination of thirty years. Not only is it uncertain who may take at the end of thirty years, for the will provides for several contingencies, but it is clear that no cestui has any interest at all until the end of thirty years. Not only is the enjoyment of the fund postponed, but also any interest in it is postponed beyond the period of twenty-one years. And even the postponed interest is contingent. That the interest is postponed clearly appears when we consider the language of the will. The intention of the testator must control. That intention must be sought in the language he used, as legally interpreted. The testator here gives the entire estate to the trustees for the purpose of accumulation. They are to manage and control it; they may sell it. The proceeds of all his estate they are to invest and re-invest, and so on for thirty years. Thus far in the will no estate is created for any cestui, except that which depended on the discretion of the trustees, and which we have already noticed. Then, the testator goes on to say, "*At the expiration* of said 30 years, the whole of said fund or estate *shall then become* the property of my said two grandchildren," under certain contingencies of life and survivorship. If the estate was *then* to "become" the grandchildren's, and that is the language of the will, we think it was not vested in them before. This case is to be distinguished from *Kimball* v. *Crocker*, supra, and other like cases, where there was a present gift to trustees "for the use and benefit" of cestuis named. "These words," said APPLETON, C. J., "give a present and vested interest in the fund." *Kimball* v. *Crocker*.

We hold, therefore, that this attempted trust offends the rule against perpetuities, in that it postpones the vesting of the equitable interest of the cestuis que trustent beyond the period limited. No equitable interest can arise within the limits of the rule. Therefore the whole trust is bad. A resulting trust arises to the heir or next of kin. Gray on Perpetuities, §§ 413, 414.

As the trust itself fails, it is unnecessary to consider its accumu-

lative feature further than to say that it must have been held bad, under the rule as given in *Kimball* v. *Crocker*, supra, even if the trust had been otherwise sustainable. *Thorndike* v. *Loring*, 15 Gray, 391.

The will makes no other provisions for the distribution of the estate. The trust being void, nothing valid is left in the will except the provision relating to debts due from the testator's son Frank. All the estate, therefore, which was devised and bequeathed to trustees must be treated and administered as intestate property.

Costs, including reasonable counsel fees, may be paid by the executor and charged by him in his account of administration.

Decree accordingly.

IDA A. BICKFORD, *vs.* CHARLES P. MATTOCKS, Admr.

Cumberland. Opinion December 10, 1901.

Gift. Delivery. Agent.

1. To constitute a valid gift inter vivos, it must be made with intent that it shall take effect immediately and irrevocably, and it must be fully executed by a complete and unconditional delivery.
2. Delivery may be made to the donee personally, or to a third person for the donee.
3. Not every delivery to a third person is a delivery for the donee so as to complete the gift.
4. If the donor deliver the property to a third person simply for the purpose of his delivering it to the donee as the agent of the donor, the gift is not complete until the property has actually been delivered to the donee.
5. But if the donor deliver the property to a third person with the intent that the gift shall take effect immediately and thus parts with all present and future dominion over it, the third person holds as trustee for the donee, and the gift is in that respect complete.
6. A donor made a loan of money for which a note was given secured by a mortgage, and he directed the note to be made payable to his niece, to whom he intended to give it. A mortgage also was made running to the niece as mortgagee. She was not present and knew nothing of the transaction at the

time. After the note and mortgage were executed, the donor asked the scrivener to get the mortgage recorded, and when it was received from the registry of deeds, to mail it with the note to the donee. The scrivener filed the mortgage for registry, and retained possession of the note. He forgot to take the mortgage from the registry. He kept the note for about a year, when he returned it to the donor. In the meantime, the maker of the note made certain payments on it to the scrivener, who turned the money over to the donor. After the donor took the note from the scrivener, he received payment of the balance due, and delivered the note to the maker. None of the money was paid to the donee.

Held; that the delivery of the note to the scrivener was simply for the purpose of sending it to the donee, and that the scrivener was agent only of the donor, and not trustee for the donee.

7. It follows that the gift failed for want of a complete delivery to the donee.

On report. Judgment for defendant.

Assumpsit for money had and received against the defendant as administrator of Thomas R. Heath, deceased. The case was reported to this court by the presiding justice of the Superior Court, Cumberland county.

J. H. Fogg, for plaintiff.

W. K. and A. E. Neal, for defendant.

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

SAVAGE, J. The defendant's intestate, Thomas R. Heath, loaned five hundred dollars to one Sturgis. The latter, by direction of Heath, gave his note for the same, payable to the plaintiff. The note was secured by a mortgage running to the plaintiff. The plaintiff was not present, and knew nothing of the transaction at the time. After the note and mortgage were executed, Heath asked the attorney, who was the scrivener, to get the mortgage recorded, and when the mortgage was received from the registry of deeds, to mail it, with the note, to the plaintiff. The attorney filed the mortgage in the registry, and took possession of the note. He did not take the mortgage from the registry. He forgot it, or to use his own expression, "it left his mind." He kept the note for about a year, and then delivered it to Heath. In the meantime, the maker of the note had made certain payments on it to

the attorney, who paid the money to Heath. Afterwards the balance due was paid to Heath, and he surrendered the note to the maker. Neither the note nor the mortgage was ever delivered to the plaintiff by Heath or the attorney. Nor were any of the moneys collected by Heath paid or delivered to her. Some months after the note and mortgage were executed, she executed, at the request of Heath, a release of a portion of the mortgaged premises, and when the note was paid, she discharged the mortgage, likewise at the request of Heath.

The plaintiff claims that the transaction constituted a gift of the note to her, and has brought this suit to recover the amount of the proceeds of the note which was paid to the defendant's intestate. The defendant claims that no gift was intended, and that Heath adopted the plan of making the note payable to the plaintiff, who was his niece, in order that he might more easily escape taxation upon the loan; and further, that if a gift was intended, that it never became complete and effective, for want of delivery.

We think the evidence preponderates in favor of the theory that Heath intended to give the note to the plaintiff. He so declared his intention on the occasion when the note was made, and even before then. And it may be that he thought he had accomplished his purpose, for shortly after the note was made, he told the plaintiff and others that he had given her five hundred dollars. And about the time the note was paid in full, speaking with reference to that fact, he asked her what he should do with the money, to which she replied, "Keep it for me and invest it again."

To constitute a valid gift inter vivos, it must be made with intent that it shall take effect immediately and irrevocably, and it must be fully executed by a complete and unconditional delivery. These principles are elementary. Delivery is essential. *Dole* v. *Lincoln*, 31 Maine, 422. Mere intention cannot take the place of it, nor can words, nor can actions. Thornton on Gifts and Advancements, 105; *Drew* v. *Hagerty*, 81 Maine, 231; *Donnell* v. *Wylie*, 85 Maine, 143. It is the act which completes the gift. It is the test which shows whether the gift was actually consummated, as well as intended. Since many of the cases cited by

counsel on both sides in this case involved only gifts causa mortis, it is proper to observe that while delivery is essential to the validity of each of these classes of gifts, and while there is in this respect no difference in the requisites of good delivery, the effect is widely different. Thornton on Gifts, &c., 105. In gifts causa mortis, the delivery is made in expectation of death, but so long as the donor lives, the gift is ambulatory, revocable. Only death completes the gift. Before death, it is subject to the will of the donor. While in gifts inter vivos, it is the delivery itself which completes the gift and makes it irrevocable. The delivery must be absolute. *Dresser* v. *Dresser*, 46 Maine, 48; *Allen* v. *Polereczky*, 31 Maine, 338; *Robinson* v. *Ring*, 72 Maine, 140.

Now in the case at bar, it is not claimed that there was any delivery whatever to the plaintiff personally, of the note or its proceeds. But delivery may be made to the donee; or, as is commonly, but somewhat loosely said, it may be made to a third person for the donee, or for the use of the donee. *Borneman* v. *Sidlinger*, 15 Maine, 429; *Hill* v. *Stevenson*, 63 Maine, 364; *Dole* v. *Lincoln*, supra.

Not every delivery to a third person is a delivery for the donee, or for the use of the donee, in the sense in which these phrases are used in the cases cited. There may be a delivery to a third person which constitutes him the agent of the donor, and there may be a delivery which constitutes him a trustee for the donee, and the distinction lies in the intention with which the delivery is made. If the donor deliver the property to the third person simply for the purpose of his delivering it to the donee as the agent of the donor, the gift is not complete until the property has actually been delivered to the donee. Such a delivery is not absolute, for the ordinary principle of agency applies, by which the donor can revoke the authority of the agent, and resume possession of the property, at any time before the authority is executed. On the other hand, if the donor delivers the property to the third person, with the intent that the gift shall take effect immediately, and thus parts with all present and future dominion over it, the third person holds as trustee for the donee, and the gift is in that respect com-

plete. Thornton on Gifts &c, 141, 144; *Sessions* v. *Moseley*, 4 Cush. 87; *Smith* v. *Ferguson*, 90 Ind. 229; *Devol* v. *Dye*, 123 Ind. 321; *Tomlinson* v. *Ellison*, 104 Mo. 105; *Telford* v. *Patton*, 144 Ill. 611; *Wells* v. *Collins*, 74 Wis. 341; 14 Am. & Eng. Ency. of Law (2nd Ed.) 1025.

Now let us apply these rules of law to the facts in this case. Did the donor here, by leaving the note in the hands of the attorney with directions to mail it to the donee, intend to vest the title to the note then and there in the donee, or did he merely intend that the attorney, as his agent, should deliver the note by mailing it to the donee? We are constrained to think the latter. The attorney was the donor's attorney, not the donee's. He was employed to draft the note and mortgage by the donor, not by the donee. He was paid by the donor, not by the donee. The mailing of the note was only an extension of his service to his client, only the completion of the transaction in which he was engaged. The donor's direction to the attorney was to mail the note. He had no other duty respecting it. He was not to hold it, or keep it; he was to send it. It was left with him solely for that purpose. Had he been directed to send it by the next mail, we think no one would have attached the idea of a trust to his service. If he had done so, no one would have regarded him as the agent of the donee in mailing the note to her, but rather the agent of the donor. If the note had then been lost in the mail, we think no one would have claimed that there had been a good delivery. But the length of time, which was expected to elapse before the note was mailed, is only a circumstance bearing on the question of intent and of little importance, unless the delay was due to the performance of some duty in connection with the note itself. That the attorney was not expected to mail the note immediately was not due to anything connected with the note, but to the fact that it would take time to get the mortgage recorded, and it would be convenient to mail both together. Except for convenience, the note might as well have been mailed the day it was signed. We think the donor, in giving directions for mailing, had no other thought than that he was using the attorney as his own hand to make delivery,

that the attorney was his agent. This view is strengthened by the subsequent history of the note. If the note was delivered to the donee, or to the attorney in trust for the donee, the donor had no further dominion over it, or interest in it. He could not collect it; he had no right to touch it. But if it was in the hands of the attorney as agent for the mere purpose of making delivery, the donor had a right to revoke the authority, to recall the note and collect it himself. And that is what he did do. Although he probably intended that his agent should make delivery, he undoubtedly learned afterwards that the note was still in the agent's hands undelivered. He then, in effect, revoked the authority of the agent, and in this way. As we have already stated, payments on the note were received by the attorney. They were paid over by him to the donor. Then the note itself was taken back from the attorney. And finally the donor received payment in full and surrendered the note to the maker. He was still exercising dominion over the note. And none of the money was paid over to the donee. All this tends to show that Heath regarded the attorney as his agent, and did not regard his delivery of the note to the attorney as completing an irrevocable gift to the plaintiff. It may be that Heath still intended that the plaintiff should have the money at some time. It may be that he intended to keep it and invest it for her. But that was not sufficient. He had not delivered to her either the note or the money, and for that reason, the attempted gift was invalid.

Judgment for defendant.

WAYLAND H. SALLEY *vs.* ISAAC A. TERRILL.

Penobscot. Opinion December 10, 1901.

Bills and Notes. Indorsee. Delivery. Agent. R. S., c. 1, § 6. par. XXI.

A negotiable security, stolen from the maker, before it has become effective as an obligation by actual or constructive delivery, cannot be enforced by any subsequent holder.

The defendant was engaged in a lumbering operation, and Hurd was in his employ. Among his duties was that of keeping the time of the men in the woods, and when one was discharged, to draw an order on the defendant for the amount due.

Blank orders were furnished Hurd by the defendant for this purpose. As a matter of practice Hurd drew an order on the defendant payable to the order of Harry Carter, for seventy-five and 25-100 dollars, the same being in full settlement for cooking. This order was never delivered to Carter, nor intended to be delivered. Hurd left it on his table with other papers, for a few moments while he was called away, and on his return he took all the papers and everything and burnt them up, and supposed the order was thus burned. Carter in the meantime had abstracted the order. Later, Hurd thinking of the order, asked Carter, who had been near when it was written, if he had seen it, and he said he had not. Carter negotiated the order to the plaintiff for a valuable consideration without notice of the facts. This suit is to recover the contents of the order. *Held;*

1. If the order had been delivered by Hurd to Carter as a valid paper, it might be regarded as an accepted order, or even a promissory note of defendant.

2. But it was not intended to be or become a valid order. Until delivered to Carter, as a completed and existing order, it had no validity, and was in law mere blank paper. Its abstraction by Carter and negotiation to plaintiff gave it no life, and created no liability of the defendant, either to Carter or the plaintiff as a bona fide holder from him. It had no legal inception or existence as an order.

On report. Judgment for defendant.

Assumpsit on an order drawn by Charles E. Hurd upon the defendant, payable to the order of Harry Carter, and by him indorsed to the plaintiff. In defense it was contended that the order was never delivered or intended to be delivered, but was stolen from the drawer by Carter.

M. Laughlin, for plaintiff.

W. H. Powell, for defendant.

SITTING: WISWELL, C. J., STROUT, SAVAGE, FOGLER, POWERS, PEABODY, JJ.

STROUT, J. This is an action to recover the contents of an order drawn by Charles E. Hurd upon defendant, payable to the order of Harry Carter and by him indorsed to plaintiff. Plaintiff presented it to defendant for acceptance, which was refused. Defendant was engaged in a lumbering operation and Hurd was in his employ. Among his duties was that of keeping the time of the men, and when one was discharged to draw an order on defendant for the amount due. Blank orders were furnished by defendant to Hurd for this purpose.

Plaintiff claims to hold defendant upon the ground that as Hurd was the agent of defendant, authorized to draw orders of this kind, his signature was in law and effect the signature of defendant, and thus being an order upon himself, it operated as an accepted order, or as a promissory note. That such would be its legal effect, is conceded by counsel. *Hancock Bank* v. *Joy*, 41 Maine; 568; R. S., c. 1, § 6, par. XXI.

Hurd testified, and his testimony is uncontradicted, that "he wrote the order simply as a matter of practice," that he left it on his table at the camp "among some papers and other stuff," that he was called away a few moments and on his return he "took all the papers and everything and burnt them up," and supposed the order was thus burned . . . . but later, remembering the order, he asked Carter who had been near when the order was written, if he had seen it while he was absent, and he said he had not; that the order did not represent the amount due Carter, and was not delivered nor intended to be delivered to Carter by Hurd, or by his authority. The inference is plain that the possession of the order by Carter was obtained wrongfully and by theft.

The order was drawn and dated November 14, 1898, and was purchased by plaintiff December 17, 1898. Ordinarily such lapse

of time, before presentation of a demand order, would be sufficient to show that it was dishonored when plaintiff received it—but as it purported to be given to an operative in the forest, who might not be able to present it earlier, if there was evidence upon the point, the delay might not be regarded as unreasonable.

Waiving this point, the question recurs, whether a negotiable paper, drawn and signed, but not delivered nor intended to be delivered to the payee, the possession of which is obtained by the payee, by theft, can create a liability of the maker or drawer to a bona fide holder for value, without notice. It is familiar law that one in possession of chattels by theft, can convey no title to an innocent purchaser, but coin and bank bills are excepted from the rule. As to those, even if feloniously obtained, the holder can convey a good title to an innocent purchaser.

To favor commerce, the law makes an exception also as to negotiable paper, and permits the bona fide indorsee without notice to acquire title from a person who had none in himself. Where by fraud and without negligence one is induced to sign a promissory note, under the representation and belief that it is a paper of another character, and delivers it to the payee, the innocent indorsee before maturity may recover of the maker. From the many cases supporting this doctrine that might be cited, we refer only to *Nutter* v. *Stover*, 48 Maine, 166; *Kellogg* v. *Curtis*, 65 Maine, 59. So when the maker of negotiable paper deposits it with a third, to be delivered on a certain contingency, or for a specific purpose not apparent upon the paper, and such third party violates the trust and wrongfully makes delivery, the bona fide indorsee before maturity and without notice, may recover from the maker. But in all these cases the instrument was either delivered to the payee by the maker, or by his agent, and came into his possession as a complete and executed contract.

In the case before us, where the order had never been delivered, and therefore had no legal inception or existence as an order, the question is whether there is any liability upon it to an innocent indorsee for value. As is said in *Burson* v. *Huntington*, 21 Mich. 415, "the wrongful act of a thief or a trespasser may deprive the

holder of his property in a note which has once become a note, or property, by delivery, and may transfer the title to an innocent purchaser for value. But a note in the hands of a maker before delivery is not property, nor the subject of ownership, as such. It is in law but a blank piece of paper. Can the theft or wrongful seizure of this paper create a valid contract on the part of the maker against his will, where none existed before? There is no principle of the law of contracts upon which this can be done, unless the facts of the case are such that in justice and fairness, as between the maker and the innocent holder, the maker ought to be estopped to deny the making and delivery of the note." In that case the parties had partially agreed upon the sale by the payee of the note to the maker, of certain territory under a patent right, for which a note was to be given with a surety. The note was made and signed in the maker's house in presence of his sister. It was laid upon the table, the maker telling the payee not to touch it till he came back—and while he was gone the payee took the note, against the objection of the sister, and went off with it, without giving a deed of the territory, or anything else for it, and negotiated it to plaintiff before maturity, for value. It was held that plaintiff could not recover. In *District of Columbia* v. *Cornell*, 130 U. S. 655, negotiable certificates, issued by the Board of Public Works of the District, had been redeemed and cancelled by the proper officer, by stamping in ink across the face, words stating such cancellation. They were afterwards stolen by a clerk, who had no duty or authority connected with their redemption or care, the marks of cancellation effaced by detersive soap and by pasting coupons over them, and then put in circulation. They were held invalid in the hands of an innocent holder. To the same effect are *Cline* v. *Guthrie*, 42 Ind. 227; *Hall* v. *Wilson*, 16 Barbour, 548; *Branch* v. *Commissioners of Sinking Fund*, 80 Va. 427; *Baxendale* v. *Bennett*, 3 Law Reports (Queen's Bench) 525. In the last case it is said that where the maker or acceptor has been held liable, "he has voluntarily parted with the instrument,—it has not been got from him by the commission of a crime. This undoubtedly is a distinction and a real distinction. The defendant here

has not voluntarily put into any one's hands the means or part of the means for committing a crime." That there must be delivery of the paper, either actually or constructively, is clear. Until then it has no existence as a contract. *First National Bank* v. *Strang*, 72 Ill. 559.

Cases may be found apparently sustaining an opposite view, but an examination of them will show that peculiar facts existed, on which the decisions were based, and which do not appear here. Of such is *Worcester County Bank* v. *Dorchester & Milton Bank*, 10 Cush. 490. There a bank bill, intended for circulation as money, and in a complete state of preparation for issue, had been stolen from the bank, and the innocent holder was allowed to recover. But in the opinion it is suggested, though not decided, that a bank bill is not governed by the same rule as ordinary negotiable securities. *Cooke* v. *United States*, 91 U. S. 389, cited as an opposing authority, rests upon peculiar facts, unlike those presented here. Of this case, however, that court in a later case, *District of Columbia* v. *Cornell*, supra, said, —" We are not prepared to extend the scope of that decision."

We think that the weight of authority and the sounder reason is that a negotiable security stolen from the maker, before it has become effective as an obligation by actual or constructive delivery, cannot be enforced by any subsequent innocent holder.

It is urged that the case falls within the principle that when one of two innocent persons must suffer by the act of a third, he who has enabled such third person to occasion the loss must sustain it. This maxim is mainly confined to cases where the party who is made to suffer the loss has reposed a confidence in the third person whose act has occasioned the loss, or in some other intermediate person whose act or negligence has enabled such third person to occasion the loss. It applies where the drawer or maker has intrusted the paper to a third person to be delivered in a certain event, not apparent on the paper, and it is wrongly delivered, or is sent by mail and gets into wrong hands; as the party intended to deliver to some one, and selected his own mode of conveyance, or when the maker has himself been deceived by fraudulent acts or

representations of the payee or others, and thereby induced to deliver or part with the note or indorsement, and the same is fraudulently obtained from him. And there may be such gross carelessness or recklessness of the maker in allowing an undelivered note to get into circulation as will justly estop him from setting up non-delivery, as if he were knowingly to throw it into the street, or otherwise leave it accessible to the public, with no person present to guard against its abstraction under circumstances where he might reasonably apprehend that it would be taken. Upon this principle, *Ingham* v. *Primrose*, 7 C. B. (N. S.) 82, was decided, where the acceptor tore the bill into halves (with the intention of cancelling it) and threw it into the street, and the drawer picked them up in his presence, and afterwards pasted the two pieces together and put them into circulation.

The case before us does not show negligence of this character. The order was drawn at the table of Hurd, and momentarily left there with other papers of his, to which no one had right of access, and from whence it could only be abstracted by a criminal act, which he could not reasonably anticipate.

Judgment for defendant.

MABEL D. GARDNER *vs.* ARLINGTON DAY.

Washington. Opinion December 12, 1901.

Husband and Wife. Death. Damages. Intox. Liquors. R. S., c. 27 § 49.

It is provided by the statutes of this state, R. S., c. 27, § 49, as follows: "Every wife, child, parent, guardian, husband, or other person who is injured in person, property, means of support or otherwise, by any intoxicated person, or by reason of the intoxication of any person, has a right of action in his own name against any one who by selling or giving any intoxicating liquors, or otherwise, has caused or contributed to the intoxication of such person."

While such a statute which gives a remedy unknown to the common law, should not be enlarged, it should of course be so construed, where the language is clear and explicit, as to give it its true meaning, having in view the purpose of the statute.

It is evident that the statute not only gives a remedy when one is injured in his person, or property, by an intoxicated person, but also when a person is injured in his or her means of support "by reason of the intoxication of any person." The most obvious and common injury of this latter character is where a wife or child is dependent upon the husband or father for support, and by reason of the intoxication of the husband or father he is rendered wholly or partially incapable to furnish such support.

It is unquestioned that in such case an action will lie if the total or partial incapacity to provide support is only temporary, or even if it is lasting, caused by some permanent disability sustained while in a state of intoxication, so long as the husband continues to live; but it is claimed that this injury to the wife's means of support does not continue after the death of the husband.

This court is of the opinion, and accordingly holds, that where a wife has been injured in her means of support by reason of the death of her husband caused by his intoxication, she can maintain an action under this statute against the person who sold or gave him the liquor that produced the intoxication.

The facts stated in the plaintiff's declaration constitute a cause of action.

Agreed statement. Action to stand for trial.

Action to recover damages, under R. S., c. 27, § 49, for injury to the plaintiff's means of support by reason of the intoxication of her husband, resulting in his death, caused by the defendant by giving or selling to him intoxicating liquors.

The case is stated in the opinion.

W. R. Pattangall and J. W. Leathers, for plaintiff.

E. C. Ryder and C. B. Donworth, for defendant.

SITTING: WISWELL, C. J., STROUT, SAVAGE, FOGLER, POWERS, PEABODY, JJ.

WISWELL, C. J. This action comes to the law court upon a report of the pleadings, in which the parties submit the question as to whether or not the facts set out in the plaintiff's declaration constitute a cause of action.

The action is to recover damages, under R. S., c. 27, § 49, for injury to the plaintiff's means of support by reason of the intoxication of her husband, resulting in his death, caused by the defendant by giving or selling to him intoxicating liquors. The statute referred to, so far as involved in the decision of the case, is as follows: "Every wife, child, parent, guardian, husband, or other

person who is injured in person, property, means of support or otherwise, by any intoxicated person, or by reason of the intoxication of any person, has a right of action in his own name against any one who by selling or giving any intoxicating liquors, or otherwise, has caused or contributed to the intoxication of such person."

The plaintiff alleges in her declaration that on the eighteenth day of March, 1900, she was, and for a long time prior thereto had been, the wife of one Horace T. Gardner; that he was her sole means of support, and that from the time of their marriage up to that date he had supported her; that upon that day the defendant at a place named gave or sold to her husband a certain quantity of intoxicating liquors; that the husband drank this quantity of intoxicating liquor given or sold to him by the defendant and that thereby he became intoxicated, and that because of such intoxication and because of having drank this liquor, he died upon March 19, 1900, by reason whereof the plaintiff was deprived of her only means of support.

The question presented is whether or not the plaintiff's means of support were injured, within the meaning of this statute, by her husband's death resulting from his intoxication caused by liquor sold or given him by the defendant, the husband having always supported the wife during their married life and having been her sole means of support.

This question has never been decided in this state, so that it becomes our duty to construe the statute and to ascertain its true intent and meaning in this respect. While such a statute which gives a remedy unknown to the common law, should not be enlarged, it should of course be so construed, where the language is clear and explicit, as to give it its true meaning, having in view the purpose of the statute.

It is evident that the statute not only gives a remedy when one is injured in his person, or property, by an intoxicated person, but also when a person is injured in his or her means of support "by reason of the intoxication of any person." The most obvious and common injury of this latter character is where a wife or child is

dependent upon the husband or father for support, and by reason of the intoxication of the husband or father he is rendered wholly or partially incapable to furnish such support. It is unquestioned that in such case an action will lie if the total or partial incapacity to provide support is only temporary, or even if it is lasting, caused by some permanent disability sustained while in a state of intoxication, so long as the husband continues to live; but it is claimed that this injury to the wife's means of support does not continue after the death of the husband. In other words, the contention is, and it is supported by a number of decisions of courts of high authority, under substantially similar statutes, that while a wife's means of support may be injured within the meaning of the statute by reason of the temporary or permanent disability of the husband, by reason of his intoxication, and consequent incapacity, or diminished capacity to provide support, she can not be injured in this respect by his death following and resulting from his intoxication.

We can not agree to this proposition. We are unable to perceive any legal distinction, except in degree, between the temporary injury to a wife's means of support through the husband's inability to provide support by reason of some accident sustained while intoxicated, and the permanent injury suffered by her of the same nature by reason of the husband's death resulting from his intoxication. In either case, the injury is to her means of support by reason of his intoxication. "Otherwise, minor and temporary injuries to the plaintiff's means of support would be within the protection of the statutes, while the greatest and most permanent injury of all would be without remedy." 6 A. & E. Ency of L., 2d. Ed. 54 and cases cited.

A wife can not of course recover under this statute for the death of her husband, nor for her mental suffering caused thereby, nor for any of the consequences of his death, except for the injury to her means of support by reason of his intoxication; but if his death is the proximate result of such intoxication, she is none the less injured in her means of support thereby, within the meaning of the statute as we construe it.

It is true, that in the states where a similar statute exists the courts have reached different conclusions upon this question. In *Barrett* v. *Dolan*, 130 Mass. 366, the Massachusetts court held that such an action under these circumstances, and under a similar statute, could not be maintained, the reason given being that the cause of action was the death of the husband, and that in that Commonwealth there is no right of action by any person for damages occasioned by causing the death of another. Again, in *Harrington* v. *McKillop*, 132 Mass. 567, the court reaffirmed the same doctrine, merely following the preceding case and without giving any reasons.

In *Davis* v. *Justice*, 31 Ohio St. 359, (27 Am. R. 514) the court decided that in an action under the civil damage act for injury to a wife's means of support in consequence of intoxication of the husband, which resulted in his death, damages resulting from the death could not be recovered. But in a dissenting opinion in that case the conclusion of the court was criticised as follows: "The argument of counsel for the plaintiff and the judgment of the court seem to be founded on the mistaken notion that the action is brought to recover damages for the death of the husband. Such is not the case. The wrongful act which constitutes the ground of the action is the illegal sale of the liquor causing the intoxication from which the injury results. The death of the husband only affects the measure of damages. It destroys his ability to labor, and thereby diminishes the wife's means of suppport. If the husband had lost both his arms or legs, or become permanently insane, in consequence of intoxication, or had otherwise become permanently disabled to perform physical labor, and had survived, the result to the wife would have been precisely the same. Her injury, in either case, would consist in the deprivation of the means of support resulting from the loss of her husband's ability to labor." In a later case in that state, *Kirchner* v. *Myers*, 35 Ohio St. 85, (35 Am. R. 598) the court adheres to its former decision, but says that the question was not free from difficulty and cites a number of cases where the opposite result was reached.

Upon the other hand, in the following cases, under similar stat-

utes, the courts have held that where a wife has been deprived of her means of support by the death of her husband resulting from intoxication, she had a right of action:—*Schroeder* v. *Crawford*, 94 Ill. 357, (34 Am. R. 236); *Roose* v. *Perkins*, 9 Neb. 304, (31 Am. R. 409), where it is said: "The action being for loss of the means of support, it will lie in any case where the loss is merely temporary, as by disability, or permanent as by death." *Rafferty* v. *Buckman*, 46 Iowa, 195; *Brockway* v. *Patterson*, 72 Mich. 122; *Mead* v. *Stratton*, 87 N. Y. 493.

In the latter case it is said: "If the injury which had resulted to the deceased in consequence of his intoxication had disabled him for life, or to such an extent as to incapacitate him for labor and for earning a support for his family, it would no doubt be embraced within the meaning and intent of the statute. That death ensued in consequence thereof furnishes much stronger ground for a claim for a loss of means of support; and a different rule in the latter case would make provision for the lesser and temporary injury, while that which was greatest and most serious would be without any remedy or means of redress."

The reasoning of these latter cases seems to us to be more satisfactory, and is in entire accord with our own conclusion. We, therefore, hold that where a wife has been injured in her means of support by reason of the death of her husband caused by his intoxication, she can maintain an action under this statute against the person who sold or gave him the liquor that produced the intoxication.

The facts stated in the plaintiff's declaration consequently constitute a cause of action.

Action to stand for trial.

APPENDIX.

QUESTIONS SUBMITTED BY THE HOUSE OF REPRESENTATIVES, MARCH 20, 1901, WITH ANSWERS OF THE JUSTICES OF THE SUPREME JUDICIAL COURT THEREON.

Article VI, § 3, of the Constitution of Maine does not require the Justices to give their opinion upon all questions that may be asked of them by either of the branches of goverment named. They are not obliged, and it would not be proper for them, to answer questions of policy or expediency, or any questions other than "important questions of law."

It is equally essential, in order that the Justices be required to give their opinion, that the questions be submitted upon a solemn occasion; and, however important may be the questions of law submitted, if it clearly appears to the Justices that such an occasion does not exist, it is their duty to decline to give their opinion in answer to such questions.

WISWELL, C. J., STROUT, SAVAGE, FOGLER, POWERS, JJ., declining to answer the questions submitted.

EMERY, WHITEHOUSE, PEABODY, JJ., answering the questions submitted.

STATE OF MAINE.

In House of Representatives, March 20, 1901.

Ordered: The Justices of the Supreme Judicial Court are hereby requested to give to this House, according to the provisions of the Constitution in this behalf, their opinion on the following questions, viz:

1. Is the office of Fish and Game Commissioner of the State of Maine, or trustee of any State institution, an "office of profit under this State" within the provisions of section 11 of part third of Article IV of the Constitution, which prohibits any person holding an office of profit under this State from having a seat in either house of the legislature, during his holding such office?

2. Is it necessary for a Fish and Game Commissioner or such trustee, to resign or otherwise cease to hold that office, before he can be legally elected and qualify as a representative to the legislature?

3. If a person holding the office of Fish and Game Commissioner or such trustee, is elected a representative to the legislature, and takes the oath of office as such representative, does such person thereupon and thereby cease to be a Fish and Game Commissioner or such trustee?

4. Can a member of the present legislature be legally appointed a Fish and Game Commissioner or such trustee, after adjournment of the legislature without first resigning his seat in the legislature?

HOUSE OF REPRESENTATIVES,
Mar. 20, 1901.

Read and passed by the House.
Attest:

W. S. COTTON, Clerk.

Opinion of WISWELL, C. J., STROUT, SAVAGE, FOGLER, POWERS, JJ.

To the Honorable House of Representatives of the Seventieth Legislature:—

The foregoing questions propounded to the Justices of the Supreme Judicial Court, by an order passed by your House upon March 20, 1901, were received by the Chief Justice on the 26th day of that month, four days after the final adjournment of the Legislature.

Article VI. § 3 of our Constitution provides that the Justices "shall be obliged to give their opinion upon important questions of law, and upon solemn occasions, when required by the Governor, Council, Senate or House of Representatives."

But this provision of the Constitution does not require the Justices to give their opinion upon all questions that may be asked by either of the branches of government named. They are not obliged,

and it would not be proper for them, to answer questions of policy or expediency, or any question other than "important questions of law." It is equally essential, in order that the Justices be required to give their opinion, that the questions be submitted upon a solemn occasion; and, however important may be the questions of law submitted, if it clearly appears to the Justices that such an occasion does not exist, it is their duty to decline to give their opinion in answer to such questions.

This has been the construction placed upon this clause of the Constitution by the Justices of this court and of the Massachusetts and New Hampshire courts, in the Constitutions of which states are found similar provisions, in numerous instances, some of which will be later referred to. And this conclusion necessarily follows from the language of the Constitution and from our theory of government, in accordance with which the three branches of government, executive, legislative and judicial, are made, so far as possible, separate and independent of each other. Upon this account it would not be proper for the members of the court to give an official opinion, outside of judicial proceedings, which might have the effect of influencing the action of other departments of government, except upon such occasions as are within the contemplation of the Constitution. Another reason why it would be improper for the Justices to answer any question submitted, unless upon a solemn occasion, is, that such questions frequently affect the individual rights of citizens, and, unless the occasion is within the contemplation of the Constitution, the question should be submitted in a judicial proceeding where all persons interested may have an opportunity to appear and be heard in their behalf. An opinion given in answer to questions thus propounded, without notice, hearing or argument, although it has not the binding force of a judgment of court, is certainly prejudicial to the interests of those to whom it is adverse.

The questions submitted at the present time are undoubtedly important questions of law, it therefore becomes necessary to determine if they were submitted upon a solemn occasion. It has been said that this language of the Constitution means some serious

and unusual exigency, such an exigency as exists when the body making the inquiry, having some action in view, has serious doubts as to its power and authority to take such action under the Constitution or under existing statutes. But it would not be wise to attempt to give a definition of this expression which would cover all cases. It is sufficient to say, that such an occasion does not exist unless the body making the inquiry has occasion to consider and act upon the questions submitted in the exercise of the legislative or executive powers intrusted to it by the Constitution and laws of the state. As was said in a recent answer by the Justices of the Massachusetts court: "Many opinions of the Justices have been required and given, but it is found upon examination that they were given in cases where the branch of the goverment requiring the opinion had pending before it some question concerning which doubts existed as to its power and authority, or as to the power of some subordinate officer under the Constitution, or under existing statutes, and where the settlement of such doubt was necessary to enable it, in the exercise of its proper function, to act legally and intelligently upon the pending question." 148 Mass. 623.

But it has been suggested, that it is not proper for the Justices to consider the question as to whether or not a solemn occasion existed when the important questions of law were submitted; that the House of Representatives, having propounded the questions, must have determined that such an occasion did exist, and that its determination is to such an extent final and conclusive upon the Justices that it cannot be inquired into by us; that this preliminary question is a legislative and not a judicial one. We can not concur in this proposition, or with the arguments urged in its support. It is not supported, so far as we are aware, by any judicial opinion, while in a number of instances in this state and in Massachusetts and New Hampshire, under similar constitutional provisions, the Justices have first determined whether or not a solemn occasion existed, and have then answered or declined to answer in accordance with their determination of this preliminary question.

The Justices are required to give their opinion in answer to important questions of law upon a certain condition: it would be

improper, as we have seen, for them to give an opinion except upon that condition; it necessarily follows, we think, that the Justices must determine, each undoubtedly for himself, whether or not that condition existed, although in cases of doubt it may be the duty of the Justices to resolve that doubt in favor of the prerogative of the body propounding the question.

These views are so entirely supported by the opinions of the Justices of this court, and of the courts in the other states referred to, that we do not deem it necessary to enter into an historical review of the precedents in this country and in England prior to the adoption of the Constitutions in the States referred to, because in these States the privileges of the two Houses of the Legislature do not, as in England, depend upon usages and legislative resolves, but are limited and defined by written constitution. But we beg leave to briefly refer to some authorities in support of the general principles above stated.

In the answers of the Justices to a question asked by the Executive Council, 72 Maine, 542, Justices LIBBEY and WALTON vigorously protested that the occasion was not a solemn one and that it was consequently improper for them to give an opinion. They said that the purpose of this clause of the Constitution was to enable the Governor, Council, Senate or House of Representatives to obtain the opinion of the Justices upon any important question of law, of public concern, "which the body making inquiry has occasion to consider and act upon in the exercise of the legislative or executive powers intrusted to them respectively, for their guidance in their action." They only consented to answer the question because the other Justices were of a different opinion upon this preliminary question and because, as they said: "In cases of doubt it may be the duty of the court to yield in favor of the prerogative of the body propounding the question."

In 1891, the Governor asked the Justices their opinion upon a question in relation to the power of the Governor to remove a county attorney. All of the eight members of the court at that time, of whom only Justices EMERY and WHITEHOUSE now remain upon the bench, joined in an opinion in which they said: "We

are of the opinion that the facts stated do not indicate that any solemn occasion exists within the meaning of the Constitution of the State, which requires any expression of opinion of the court upon the question presented." They gave as an additional reason for refusing to answer, that the question could be speedily determined in a judicial proceeding which might be instituted under the statute, and said, "we think it inexpedient to prejudice the question before any occasion has arisen calling for its legal examination." Opinion of the Justices, 85 Maine, 546.

The Justices of the Massachusetts court were requested by the House of Representatives, in 1877, to give their opinion as to whether a certain judicial officer had vacated his judicial office by accepting a seat in the House. They declined to answer the question upon the ground that the occasion was not within the contemplation of the Constitution, saying, among other things: "In view of the separation, established by the Constitution, between the legislative, the executive and the judicial departments of the government, we can hardly suppose it to have been the intention that either the the legislative or the executive should demand of the judiciary its opinion, in advance, upon a question which may arise in the course of judicial administration, and which can not be affected by legislative or executive action." Opinion of the Justices, 122 Mass. 600.

In the Opinion of the Justices, 126 Mass. 557, although in that case it was determined that the occasion was one that came within the contemplation of the constitution, and the questions submitted were consequently answered, it is said: "The opinions of the Justices can be required only 'upon important questions of law,' not upon questions of fact, and 'upon solemn occasions,' that is to say, when such questions of law are necessary to be determined by the body making the inquiry, in the exercise of the legislative or executive power intrusted to it by the constitution and laws of the Commonwealth."

Again, in 1889, the House of Representatives of the Massachusetts Legislature propounded the questions to the Justices in regard to the meaning of certain sections of the Public Statutes. The

Justices, in their opinion, reaffirmed the construction previously placed upon this clause in the Constitution of that State, to the effect, that the opinion of the Justices could only be required "upon solemn occasions," and declined to answer the questions submitted, saying, "this is not an unusual exigency, and does not create or present a solemn occasion within the fair meaning of the constitution, so that we can properly give an ex parte opinion upon the construction of the statute in question." This opinion was joined in by every member of the court. Opinion of the Justices, 148 Mass. 623.

The Justices of the Court of last resort in New Hampshire have upon at least two occasions declined to give an opinion to questions propounded, in one case by the House of Representatives, and in the other by the Governor and Council. In both opinions the Justices placed much stress upon the independence of the three branches of government, legislative, executive and judicial, and upon the impropriety of members of one branch interfering with the duties or functions of another unless within the exceptions expressly made by the Constitution, whereby the branches of government named might require the opinion of the Justices "upon important questions of law and upon solemn occasions." Upon both of these occasions the Justices determined that it would be improper for them to answer the questions propounded and consequently declined to do so. These opinions are contained in 56 N. H. 574 and 67 N. H. 600.

In view of these authorities, entirely supporting our own conclusions, we have no doubt that it is our duty, before we are justified in answering questions propounded in this manner, to determine whether or not a solemn occasion existed at the time of the submission of such questions, within the meaning of the Constitution; and that if we are clearly of the opinion that no such occasion existed, to decline to answer the questions.

It only becomes necessary to apply these general principles to the circumstances and conditions existing at the time these questions were submitted. The order requesting our opinion upon these questions concerning the eligibility of certain members of

the House, passed the House after the Legislature had been in session for nearly three months, and very shortly before its final adjournment. When these questions were submitted to us, the Legislature had finally adjourned. At that time the House had no question before it for consideration or action. No opinion given by us in answer to the questions submitted could be of any value or assistance to the House in passing upon the qualifications, or eligibility of any of its members, or for any other purpose. It could not be used by the House for its guidance in passing upon any question pending before that body. In fact, our opinion in answer to these questions could not even be submitted to the House. It is not enough that an opinion rendered at this time might be useful for the guidance of some future House of Representatives, if the same questions should ever arise. An opinion given upon this ground would be an unwarrantable interference with the duties and functions of such future House of Representatives, which is made by the Constitution "the judge of the elections and qualifications of its own members." If such questions should subsequently arise in a future Legislature, and either House should then request our opinion concerning them, at a time when it could be rendered so as to be submitted to it for its guidance, it would undoubtedly be our duty under the Constitution to give an opinion in answer.

Inasmuch as the questions propounded also involve the title of individuals to certain offices or trusteeships of state institutions, the result would be, if we should answer the questions at this time, that we should give an opinion which could not even be submitted to the body requesting it, while at the same time, without notice to the persons interested, and without hearing and argument, we should prejudge questions involving the rights of individuals, which questions might subsequently come before us for a judicial determination.

It is true, that the Seventieth Legislature still exists, and it is within the range of possibilities that such an extraordinary occasion may arise as to require the Governor to convene the Legislature in extra session. But such a contingency is so extremely

remote that it need hardly be taken into consideration. If it should occur, we should then undoubtedly feel it our duty to submit an opinion in answer to the questions in such season that it could be made use of by the House.

For these reasons, the undersigned, Justices of the Supreme Judicial Court, with great deference to the Honorable House of Representatives, must most respectfully decline to give an opinion upon the questions submitted.

ANDREW P. WISWELL,
SEWALL C. STROUT,
ALBERT R. SAVAGE,
WILLIAM H. FOGLER,
FREDERICK A. POWERS.

December 2, 1901.

Opinion by EMERY, WHITEHOUSE, PEABODY, JJ., giving answers to the questions of the House.

To the House of Representatives:

Notwithstanding the reasons so ably stated by the other Justices for declining to give their opinion on the questions of law propounded by the House of Representatives, in its order of March 20, we, the undersigned Justices, after consideration have regretfully come to the conclusion that we are obliged by the Constitution to give the opinion required. Before giving that opinion, however, the respect due, and which we have for, the views of the refusing Justices requires us to state at some length the reasons for our own conclusion as to the duty of the Justices under the order.

The language of the constitutional provision, Art. VI, § 3, under which our opinion is required, is explicit and mandatory. It leaves nothing to the discretion of the Justices. That it is onerous upon the Justices,—that it may at times cause them great embarrassment to give opinions more or less hurriedly without the aid of opposing arguments,—that it may injuriously affect personal or property rights without giving the person affected an opportunity to be heard,—that it may be abused by those branches of the

government entitled to use it,—or, generally, that it has proved to be an unwise provision detrimental to the principle of the separation and independence of the three departments of government, (if such criticisms be well founded) cannot, of course, justify any Justice in refusing to render this constitutional provision complete obedience, or to effectuate its full purpose. It is the paramount law, binding upon the Justices of the Court until the people see fit by constitutional amendment to relieve them of the burden. Nor is this provision a new departure, to be for that reason construed hesitatingly and narrowly. On the contrary, it is a continuation and extension of a power and practice derived from England and exercised by the Colonial governments of Massachusetts. Opinions of the Justices, 126 Mass. 557. It is within the expressed exception to the separation and independence of the departments of government. Art. 11, § 2.

In view of some objections made, it may properly be noted here that it is not now questioned that the opinions given under this constitutional provision are not adjudications, and are not within the principle of stare decisis. They are merely opinions in the way of advice, like those of counsel. The justices giving them are in no degree bound to adhere to them when the same questions arise again, should argument or further research and reflection change their prior views.

As justifying their refusal to give their opinion as required, we understand the refusing Justices to practically assert a general and preliminary proposition, viz:—that when their opinion is required, the Justices must first consider and determine (each for himself of course) not only whether the questions are questions of law,—but also whether they are important,—and whether the constitutional occasion exists,—and then should answer, or refuse to answer, according to such determination. We further understand them to assert a second and more special proposition, viz: that they must not give their opinion upon any question of law, even of constitutional law, for the benefit of the government as a whole, or its officers, or the people at large,—however important the question to the public welfare and however pressing for solution,—unless the

particular branch or body requiring the opinion (in this case the House of Representatives) has itself "occasion to consider and act upon the questions submitted."

In view of the application afterward made by the refusing Justices of the foregoing propositions to the questions now before us, we do not think we have any occasion here to undertake their refutation. They are not in the road by which we reach our conclusion that we are obliged to answer these particular questions. Still, if we ignore them we may be understood as acquiescing in them, which we are not now prepared to do, as we think their unquestioned acceptance may conflict with other important principles of constitutional law, and have unforeseen and embarrassing consequences. Therefore, without now denying either proposition, we think it right to suggest some considerations which may tend to show that both are debatable and should not be accepted as established.

1. We do not find anything in the Constitution in terms specifying that the Justices are the sole and final interpreters of this provision, to the exclusion of those branches of the government empowered to require opinions. Whether the questions submitted for opinion are questions of law, is itself a question of law, and hence a judicial question necessarily to be determined by the Justices as the holders of the judicial power. Also, it may be necessary for the Justices to first determine whether the questions are of public interest affecting the commonwealth. *Allen* v. *Jay* 60 Maine, 124.

But, even upon these questions, the Justices are to resolve all reasonable doubts in favor of the branch requiring the opinion. *Lunt's case*, 6 Maine, 412. Whether the questions submitted are important,—or whether there be sufficient occasion for their solution,—is not itself a question of law, or a judicial question. These are rather political questions in the broad sense of that term. When the requirement is made by the House of Representatives, they are pre-eminently questions for the House itself to consider and determine. The House is a political agent of the people. It has the sole power of impeachment. It is the grand inquest.

With the Senate and the Governor, it is the judge of what is for the people's welfare,—is charged with the duty of seeking out abuses, disorders and irregularities in the public service, and is also charged with the duty of their reform or removal. The Justices are by the Constitution (Art. 2, § 2,) excluded from that sphere of duty and action, and limited to judicial questions. Even in cases where all the facts and conditions are public and known to all the Justices, it is certainly doubtful if they are to override the judgment of the representatives of the people that those acts and conditions render the questions of law important and the occasion solemn. But the Justices can never be sure they know all the facts and conditions. There may be, perhaps in this case, many facts and conditions known to the House and not known to the Justices, clearly showing the given question to be important and the occasion sufficiently solemn. It has never been the practice, nor is the House obliged by anything in the constitution, to state facts affirmatively showing the question to be important and the occasion solemn. We do not think the Justices should treat the House as a suitor, nor its order like a petition demurrable for want of sufficient allegation of facts.

Arguments from analogy may be adduced. In the grant of legislative power is a limitation that the laws and regulations to be made and established shall be "reasonable." Art. 4, Pt. 3, § 1. Yet this court has judicially determined after argument, that the legislature is the sole judge as to what is "reasonable" in the exercise of the legislative power, and that the court cannot review the legislative judgment in that respect. *Moor* v. *Veazie*, 32 Maine, 343, 360. If the court is bound to defer to the legislative judgment of what is "reasonable," why should its justices assume to say that the legislature, or one of its Houses, does not know what is "important?" Again, the constitution places this limitation upon the legislative power, viz: "private property shall not be taken for public use without just compensation; nor unless the public exigencies require it." Art. 1, § 21. Yet this court has judicially held, after argument, that the legislature is the sole judge of when the "public exigencies" exist, and that the court cannot

override its judgment upon that question. *Spring* v. *Russell*, 7 Maine, 273, cited with approval with other similar cases in *Allen* v. *Jay*, 60 Maine, 124, pp. 138, 139. If the legislature can exclusively determine whether an occasion is "exigent," why may not it also determine whether an occasion is "solemn?" The term "public exigency" seems to be full as grave as the term "solemn occasion." Indeed, as used in legal nomenclature, "solemn" means no more than formal, regular, as "probate in solemn form," "to solemnize a marriage," etc. Cent. Dict. Burrill's Law Dict. Anderson's Law Dict.

It is true, as stated by the refusing Justices, that in Massachusetts, New Hampshire and Maine, (the three States with this peculiar constitutional provision) the Justices in each State, in the instances cited, asserted the proposition relied upon by them and now being considered. We think, however, it will appear in those late instances that the proposition was assumed, rather than demonstrated or even reasoned out. The doctrine is of late origin. We do not find it advanced in Massachusetts till 1877, nearly a century after the adoption of the Constitution,—nor in New Hampshire till 1875, nearly a century after the adoption of that Constitution. We do not find it even mooted in Maine before 1870, and then only mooted by a single Justice (KENT) in the *Cleveland case*, 58 Maine, 564, and perhaps suggested by Justice CUTTING, 58 Maine, 599. It was not again mooted in Maine till 1881 in the *Spaulding case* in 72 Maine, 542, and then only by two Justices, WALTON and LIBBEY. It was not asserted and acted upon in this State till 1891, in the *County Attorney case*, 85 Maine, 545, more than a century after the constitution of 1780, under which the people of Maine had lived for forty years before adopting the same provision in their own constitution.

We can find no precedent in Massachusetts for this doctrine thus first assumed there in 1877. In every prior case, beginning in 1781, the Justices returned answers to a great variety of questions without at all first considering their importance or the occasion. It never seems to have before occurred to the Justices that they should do so. In two instances, (one where the question was what

taxes the Western Railroad Company should pay the State, 5 Met. 596,—the other where the question was whether a certain savings bank was subject to the general law, 9 Cush. 604) the Justices (including those legal giants, Lemuel Shaw and Caleb Cushing) prefaced their answers with the observation,—that, thinking the questions were not within the spirit of the constitution, they at first thought of requesting the House [Senate] to withdraw the questions and relieve them from answering, but the House, [Senate] in each case having adjourned, or being about to adjourn, they found this impracticable and proceeded to answer. The Justices did not intimate, and evidently did not think, they could judge for themselves whether they should answer. At the most, they only thought of asking the House to reconsider the matter. In the Mass. Const. Convention of 1820, that eminent constitutional lawyer, Joseph Story, speaking of this provision, said, "as the constitution now stands, the Judges are bound to answer if insisted upon, even in a case where private rights are involved and without the advantage of argument." Debates in Mass. Const. Conv. 1820 pp. 489, 490. In the Mass. Const. Conv. of 1853, Marcus Morton, who had served with distinction both as Governor and Judge, said:—"They [the Justices] feel bound to give an opinion." Debates &c., 1853, p. 694. The refusal of the Massachusetts Justices to answer questions of the House in 1889 was met by the vigorous protest of the House re-asserting its right by a nearly unanimous vote,—168 to 8. Mass. House Journal, May 16, 1889.

In Maine, though this constitutional provision had been often made use of, we do not find any instance prior to the solitary instance in 1891, already cited, where the Justices claimed the right to determine for themselves the importance of the question and the sufficiency of the occasion. In the *Cleveland case*, in 1870, 58 Maine, 564, Mr. Justice KENT intimated an opinion that the question was not within the constitution; but he did not intimate that he could therefore constitutionally refuse to answer, and he did answer. In the *Spaulding case*, in 1881, 72 Maine 542, Justices WALTON and LIBBEY gave it as their personal opinion, by way of

protest, that the occasion was not one within the constitution, but they did not assume therefore to refuse to answer. They yielded to the authority of the Council. This they should not have done, and would not have done, unless they believed it to be their duty to do so. It was their duty to refuse to answer, if they believed they could constitutionally refuse. The constitution allows the Justices no discretion whether to answer or not. It is simply a question of constitutional duty one way or the other, and Justices WALTON and LIBBEY by answering, notwithstanding their own personal opinion that the question was not within the purview of the Constitution, thereby stated it to be their duty to answer nevertheless. Three of the Justices answered the question as a matter of course without noticing the protest. The remaining three Justices said in relation to it:—"The opinion of this court has been required in some forty instances in relation to a variety of subjects and under different circumstances. In no instance has the obligation to answer been questioned, or an answer denied." In the famous "Count out" instances in 1879, 72 Maine, 560, it is matter of history that the duty and right of the Justices under this provision were much discussed by the public. Noticing this, the Justices said:— "We cannot decline an answer, if we would—. . . We have no more right to decline the exercise of a jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid, but we cannot avoid them."

Against this long and unbroken array of precedents for more than a century, forty years under the Massachusetts constitution and eighty years under our own similar constitution,—and against the opinions of the eminent jurists cited,—we have in this State but the one late solitary instance where the Justices refused to answer a question duly propounded,—that in 1891, when the Justices refused to answer the inquiry of the Governor as to his power to remove a county attorney (85 Me. 545.) There was no discussion of the matter. The Justices simply assumed the right to refuse to answer, and even then, as if it was a matter of discretion rather than of duty, they placed their refusal rather

upon the ground of inexpediency, since the question could be reached in a judicial proceeding. They apparently over-looked the fact that a short time before, after mooting and considering practically the same objection, the Justices had answered a similar question as to the power of the Governor to remove from office the Reporter of Decisions. (72 Me. 542). The undersigned Justices, EMERY and WHITEHOUSE, concurred in the refusal to answer in the later case, 85 Maine, 545, but wider research, and more mature consideration, have now convinced them that they were then in error.

II. As to the second and more specific proposition that answers must be refused unless the branch, requiring the opinion itself "has occasion to consider and act upon the questions submitted," that doctrine seems equally new and strange. We do not find in the language of the constitution any such limitation upon the power to require opinions. We do not find it advanced in any instance prior to 1875 in New Hampshire, 1877 in Massachusetts, nor until now in Maine. Against the broad assertions that all the questions theretofore answered were within the rule of this doctrine, we think we may safely say it very rarely appears affirmatively in any instance that the branch asking the question, in fact had the matter of the question before it for action. We think there are instances to the contrary, where it affirmatively appeared the asking branch did not have the matter before it, and some where it could not act in the matter at all.

In Massachusetts, in 1852, (9 Cush. 604) the Senate asked whether a certain savings bank, specially chartered in 1816, became subject to general laws passed afterward. It is difficult to see what effect an answer either way could have upon the action of the Senate. If the bank was not subject to the general laws, the Senate could not make it so. If it was so subject, it is hardly conceivable that the Senate would therefore change the general laws governing all banks.

In 1855, the Governor and Council asked several questions. (3 Gray, 601). The constitution had been amended changing the manner of electing the Executive Council, and also making certain

state officers elective instead of appointive. A part of the first question was this,—"Will the said article (of Amendment) affect the manner of the election of the next executive council?" Clearly the Governor and Council asking that question could not act in the matter. Question IV was whether the present commission of any officer appointed under the old constitution, but whose office was made elective by the amendment, was affected by the amendment. It is evident the Governor and Council could not do anything about that matter either way. Another question, VII, was whether the usual November Term of the Court of Common Pleas was abolished by the statute establishing the Superior Court,—and also as to what was to be done with the writs and processes returnable to that term of the Common Pleas Court,—and also what was the effect of the statute on the Municipal Court business for October? These were matters manifestly outside of any possible action of the Governor and Council. All these questions were evidently asked for the public benefit, for information of suitors and persons other than the Governor and Council. They were all answered without objection or hesitation.

In Maine, in 1822, (2 Me. 430), Gov. Parris, who was a member of the Maine Constitutional Convention, asked questions which he said in his requisition, "it is now particularly important to the Militia of this state to have finally settled by the highest authority." The second question related solely to the duty of the Major Generals, constitutional officers equally with himself, and hence with constitutional duties of their own apart from his. In 1825, (3 Me. 484,) the Senate inquired whether one could at the same time constitutionally hold the offices of deputy sheriff and justice of the peace, or of sheriff and justice of the peace,—or of coroner and justice of the peace. Neither of these questions could concern the legislative department, but only the executive and judicial departments. They must have been asked for the benefit of the officers concerned, or of the people at large. In 1830, (6 Me. 514) the acting Governor inquired whether a convention of the two Houses could be formed without the formal concurrence of both branches, and whether such a convention could fill vacancies in the

Senate. Clearly, this whole matter was entirely outside of Executive action. Again, the same year (7 Me. 483,) Governor Huntoon, after he was seated, inquired as to the constitution of the Senate,—whether certain persons seated as Senators were constitutionally entitled to their seats. That the Governor could not act in this matter is apparent. In 1863, (52 Me. 594) occurred a conspicuous instance. The Governor recited the practices of some towns in the State voting money for commutations for their citizens drafted into the U. S. military service, and that it was "feared by many good citizens that serious complications and embarrassments may result to the towns . . . . as well as to individuals." He therefore asked,—whether a town could pledge its credit or raise money by taxation for that purpose. In this instance the Governor could have no official concern with the matter, and he asked the question avowedly for the sole benefit of towns and individuals. In 1867, (55 Maine, 596) the two Houses required the Justices to prepare and send to the Secretary of State, not to the Houses, a schedule of legal taxable costs in various legal proceedings. This was evidently for the information of litigants, and not for legislative action. In 1872, (61 Maine, 601,) the Governor asked whether an election should be held in Penobscot county the following September for the Register of Probate. The Governor could take no action in the premises, and inquired solely for the benefit of the people of that county.

In all the foregoing instances the Justices answered without objection or hesitation, which they clearly should not have done if the doctrine now advanced is sound. Unless it was their duty to answer, it was their duty not to answer. Another constant practice may be noted,—the publication and preservation of the questions and answers in the reports, as tending to show the understanding that they were for the benefit of the whole people rather than of the particular branch requiring the opinion.

III. Leaving the general propositions and coming to the particular question now submitted, we understand the refusing Justices to concede that they are questions of law, that they are important, that they concern the House of Representatives and its member-

ship, and that if the House were still in session there would be sufficient occasion,—but that, inasmuch as the House asked the questions only two days before its final adjournment and adjourned before the questions reached the Justices, that particular House cannot act upon the answers, and hence the original sufficient occasion has disappeared. We understand them to finally base their refusal upon the fact that the House is not now in session. Indeed, they say in conclusion, that if the present House should be convened in extra session, they "would undoubtedly feel it our (their) duty to submit an opinion in answer to the questions in such season, that it could be made use of by the House." This concession eliminates from this case the two propositions above discussed, and narrows the issue to this:—Whether the duty to answer a question of law submitted by the House expires with the session at which the question was submitted.

Upon this issue the contention of the refusing Justices seems to be an entirely new doctrine now advanced for the very first time. We cannot find that it has ever before been even suggested in this, or any other State, in over a century of political life under the constitution. We do not find it disclosed in the language of the constitution. We do not find there any words requiring the House to submit its questions in the early days of its sessions, or limiting the obligation of the Justices to questions submitted in season for answers before adjournment.

Nor does it seem to us to be a necessary doctrine. This constitutional provision was adopted for the protection and benefit of the people. The power and jurisdiction conferred by it are to be exercised for the protection and benefit of the people, and so are the duties imposed by it. The House is merely one branch of the legislature, and the legislature and the legislative power are continuous. There is never an interregnum. There is always a House of Representatives though its members are changed bi-ennially. The change of membership does not change any of its constitutional powers and duties. These remain the same from session to session, nor are they to be exercised solely for the House itself or for the current session. The House exercises its powers for the

whole people, and for their future as well as present good. It may also at one session provide for the information or convenience of the House at future sessions. Its commands do not fall to the ground at the adjournment of each session, but stand good until repealed or until expiring by their own limitation.

In the administration of a constitutional government it may often be wise, and there may be even "solemn occasion," to anticipate possible problems and emergencies, and not wait until they are confronting. The present solution of an important question of law in governmental matters may be necessary to prevent future troubles. Again, there may be an error or chance of error discovered now which should be avoided in the future. In those governments where the constitution empowers the other branches to require the opinion of the Justices, a present opinion may be necessary for future use. In such cases, the present, not the future, is the "solemn occasion." A present opinion may furnish light for future action. Some of the questions now before us seem to be of that nature. When new members are sent to the House, almost their first duty will be to determine who are entitled to seats. The taking of the oath of office will occur on the first day of the new session and the effect of that oath should be then known. An opinion obtained beforehand may be of some practical use, while one obtained after the event might be merely academic. Again, it may be important to know now, whether certain offices are now vacant by reason of their incumbents taking seats in the House.

Referring to the practice upon this issue, we find no instance in any state where the Justices have refused to give their opinion because of the adjournment of the session,—and we do find instances where the opinions have been given notwithstanding such adjournment. In 7 N. H. 599, the Justices responded the next year to the inquiry of the Senate. In 8 N. H. 573, the requisition of the House was made June 20th, 1834, for an opinion whether aliens and persons over seventy years were rateable polls. The opinion was not given till the next year. In 25 N. H. 537, the Justices returned their opinion to the President of the Senate after the adjournment. In 41 N. H. 550, the Justices returned

their opinion to the House the next year after the requisition. In 9 Cush. 604, the opinion was sent to the President of the Senate in September, some time after the adjournment of the Senate. In 126 Mass. 557, the requisition was made in April and largely concerned parliamentary procedure, but the Justices took their time and did not return their opinion till Dec. 31, just before the organization of the legislature for the next year. In 7 Me. 497, the House upon the eve of its adjournment made requisition for an opinion as to electors and ballots. The Justices returned their opinion to the Governor and Council for publication after the adjournment of the House. In 44 Maine, 504, the Senate just before adjournment made requisition for an opinion whether persons of African descent could be electors. The opinion was sent to the Secretary of State after the adjournment of the Senate and was published by him. In 53 Maine, 594, the House, five days before adjournment, made requisition for an opinion as to whether a pending bill was in conflict with an Act of Congress. The opinion was not given until after the adjournment. In 55 Maine, 595, a legislative requisition for an opinion as to taxable costs in legal proceedings was not answered till long after the adjournment.

In some of the above instances the Senate or House making the requisition specially requested the opinion to be given after adjournment if it could not be prepared before,—but, if the doctrine of the refusing Justices is correct, this request had no constitutional force. The occasion still fell with the adjournment, and the Justices were not authorized to answer, for, as already said, it is their duty not to answer, unless they are obliged to answer. The mere request of the House, or Senate, would not authorize an answer not required by the constitution.

We have cited so many instances of actual practice antagonistic to the several doctrines assumed by the refusing Justices, because of the well known canon of legal interpretation expressed in the old common law maxim, "contemporanea expositio est optima et fortissima in lege," 2 Coke's Inst. 11, and in the older civil law maxim "optimus legis interpres est consuetudo." Dig. 1-3-37 (Paulus). The early practice under any constitutional provision is admittedly

of very great and even controlling force when such pratice does not conflict with the express words of such provision. It is well known as matter of history, that members of the convention drafting the constitution afterward became governors, legislators and judges under it. They best knew the scope and purpose of its provisions. The people who themselves voted upon the adoption of the constitution would more quickly notice any departure from its letter or spirit. If, therefore, we find a comparatively uniform practice under a constitutional provision by the earlier incumbents of office, acquiesced in by the persons or officers unfavorably affected by it, and not opposed to clear, express language of the constitution, such practice is a better, safer guide to the real meaning and scope of the provision, than any verbal, grammatical or even philosophical interpretation by subsequent generations in after-years. Broom's Legal Maxims, 658, 884; *Cohens* v. *Virginia*, 6 Wheat. 418; *Rhode Island* v. *Massachusetts*, 12 Pet. 657; *Rogers* v. *Goodwin*, 2 Mass. 475; Gray, C. J. in opinion of Justices, 126 Mass. 594.

In obedience to the constitution as thus authoritatively interpreted by the unvarying practice of more than a century, forty years in Massachusetts to the time of the Separation and then in Maine for seventy years more until 1891, we give our opinion upon the questions submitted, briefly as follows:—

I. It is our opinion that the office of Fish and Game Commissioner and also the office of trustee of any state institution, where the appointments thereto are made by the Governor or Legislature, are state offices, and, so far as any compensation is affixed by law to those offices, are "offices of profit under this State," within § 11 of Art. 4 of the Constitution, prohibiting a person holding such offices from having a seat in either house of the legislature during his continuance in such office. Each of such persons wields some part of the power of the State, however small, and in some sphere of state action, however limited. They come within the definition of the term office given by the Justices in answer to the Governor's questions in 3 Maine, 481. Nor does it matter whether their compensation be large or small, by regular annnal salary, by per diem-

pay for days actually employed, or by fees for each act of service. If there be any compensation allowed over and above sums allowed for expenses, the office is one of profit. An office is lucrative when any pay is attached. *State* v. *Kirk*, 44 Ind. 401. The following persons have been judicially determined to be holding office under the State, viz: A City Marshal, *Andrews* v. *King*, 77 Maine, 224; *Farrell* v. *Bridgeport*, 45 Conn. 191. A school trustee, *Chambers* v. *Barnard*, (Ind.) 11 L. R. A. 613. *Ogden* v. *Raymond*, 22 Conn. 379. The director of a State Prison, *Howard* v. *Shoemaker*, 35 Ind. 111. A State Commissioner to the U. S. Centennial Exposition, *In re Corliss*, 11 R. I. 638. Receiver of a National Bank (under U. S.) *Platt* v. *Beach*, 2 Benedict, 303. A trustee of a State University, *McCornick* v. *Pratt*, (Utah) 17 L. R. A. 243; *People* v. *Bledsoe*, 68 N. C. 457. Director of a State Asylum for the Deaf and Dumb, *People* v. *McKee*, 68 N. C. 429. *Dullam* v. *Wilson*, 53 Mich. 392. The medical superintendent of a State Hospital for the Insane, *State* v. *Wilson*, 29 Ohio St. 347. The Mayor of a City, *Attorney General* v. *Detroit*, 112 Mich. 145. A Trustee of the State Library, *People* v. *Sanderson*, 30 Cal. 160. A Park Commissioner, *Sherwood* v. *State Board of Canvassers*, (N. Y.) 11 L. R. A. 646. A State Detective, *Brown* v. *Russell*, 166 Mass. 14.

II. The Constitution, Art. 4, § 11, does not declare that the holder of an office of profit under the state shall not be elected to the legislature,—shall not be eligible to an election,—but simply declares that he shall not "have a seat in either house during his continuing in such office." Hence he need not resign his office before his election to the legislature. It is enough if he resigns it at the time of taking his seat in the legislature, and such resignation may only be by taking his oath or seat. The right of the electors to elect whom they will to any elective office is to be construed liberally, as abridged only by the express terms of the constitution or statute and not by mere implication. *Barker* v. *People*, 3 Cowen, 686. Thus, it has been judicially held that one who is an alien at the time of his election may yet take the office if he be

naturalized after his election. *State* v. *Murray*, 28 Wis. 96; *Perine* v. *Van Beek*, (Iowa) 19 L. R. A. 622; also that a statute declaring that certain classes of persons "shall not be eligible to the office of county commissioner," does not mean eligible to be elected, but only at the beginning of the term for which he was elected. *Demare* v. *Scates*, (Kan.) 30 L. R. A. 97. In *Commonwealth* v. *Hawkes*, 123 Mass. 525, it was judicially said after argument (p. 529–30) that "by the common law, when two offices or public trusts are incompatible with each other, a person holding the one is not disqualified to be appointed or elected to the other, but his acceptance of the second office is in law an implied resignation of the first, whenever it may be resigned by the mere act of the incumbent, without the assent or concurrence of a superior authority." We think it has always been understood in New England that a resignation of a State office vacated the office without any action of acceptance. We do not find any case holding the contrary in the New England or federal courts. The Justices of Maine, in 70 Maine, 597, expressed the opinion that a person who had once resigned his seat in the legislature could not recall it although it had not been accepted. In McCrary on Elections, § 243, 2nd Ed. it is said that a formal resignation of an incompatible office is not necessary for admission to a seat in Congress. The taking the seat vacates the former office.

Mr. Cushing in his Law and Practice of Legislative Assemblies § 78 said: "Thus where it is said, no person holding a particular office, etc., shall have a seat" etc., the disqualification relates to the time of assuming the functions of a member. In McCrary on Elections it is said § 258, 2nd. Ed. "it has been the constant practice of the Congress of the United States, since the Rebellion, to admit persons to seats in that body who were ineligible at the date of their election, but whose disabilities had been subsequently removed." The same doctrine was held in *Smith* v. *Moore* 90 Ind. 294.

Justices Sumner, Lincoln and Morton were respectively elected Governor of Massachusetts and accepted that office while holding the office of Justice of the Supreme Judicial Court. Their

right to take and hold the office of Governor was never questioned. *Com.* v *Hawkes* 123 Mass. 534. In this State, Hannibal Hamlin was elected Governor in September, 1856, while holding the office of U. S. Senator, and after his election as Governor he sat in the Senate and took part in its debates and votes until a few days before his inauguration as Governor. He was again elected U. S. Senator in January, 1857, while holding the office of Governor. His right to take either office to which he was elected was never questioned.

In answer to this second question, we do not forget that the House is by the constitution the exclusive "judge of the elections and qualifications of its own members," (Art. IV § 3) and can insist upon a prior formal resignation of an incompatible office before admitting the holder to a seat in the House,—or can admit him without such resignation,—or can adjudge such officer wholly ineligible to a seat.

III. The third question we answer in the affirmative. It has been repeatedly held by the courts that an office-holder by accepting an incompatible office, thereby vacates the office first held,—vacates it as completely as by an accepted resignation. *Stubbs* v. *Lee*, 64 Maine, 195 and cases there cited; *Pooler* v. *Reed*, 73 Maine, 129; *State* v. *Brown*, 5 R. I. 1; *Commonwealth* v. *Hawkes*, 123 Mass. 525; *People* v. *Brooklyn*, 77 N. Y. 573; McCrary on Elections, § 243, (2nd Ed.); *Rex* v. *Hughes*, 5 B. and C. 886; *Milward* v. *Thatcher*, 2 T. R. 81. We have found no case to the contrary.

IV. The constitution in terms (Art 4, Part III, § 10) prohibits the appointment of a senator or representative, during the term for which he shall have been elected, to any civil office of profit under this State, which shall have been created or the emoluments of which increased during such term,—i. e. the term for which he was elected. As to such offices the appointment itself is prohibited, and the prohibition continues, not only while the member retains his seat in the legislature, but continues until the expiration of the term for which he was elected. He cannot, therefore, be appointed

to such offices during that term, even though he has resigned his seat in the legislature. *In re Corliss*, 11 R. I. 638; *State* v. *Sutton*, (Minn.) 30 L. R. A. 630. It may be noted, however, that this prohibition does not include "such offices as may be filled by elections by the people." Art. 4, Part III, § 10.

As to other offices, not created nor their emoluments increased during the term for which the member was elected, we find no such prohibition. We think, therefore, a member of the present legislature can be appointed to such offices, including that of Fish and Game Commissioner, or trustee of a State Institution, during the term for which he was elected. We also think he can be so appointed without first resigning his seat in the legislature, for the reasons stated in the answer to the second question. If such appointee, however, accepts such office he thereby vacates his seat in the legislature whether it be in session or not. Vide reasons stated and cases cited in the answer to the third question. See also McCrary on Elections, § 238 et seq.

Believing the above to practically cover the questions propounded,

We are, Sirs, with great respect your obedient servants.

LUCILIUS A. EMERY,
WM. P. WHITEHOUSE,
HENRY C. PEABODY.

December 2, 1901.

IN MEMORIAM.

PROCEEDINGS BEFORE THE LAW COURT, HELD IN PORTLAND, WEDNESDAY, AUGUST 7, 1901, IN RELATION TO THE DEATH OF THE

HONORABLE THOMAS HAWES HASKELL,

WHO WAS AN ASSOCIATE JUSTICE OF THIS COURT, FOR NEARLY SIXTEEN AND ONE-HALF YEARS, AND DIED AT HIS RESIDENCE IN PORTLAND, SEPTEMBER 24, 1900, IN HIS FIFTY-NINTH YEAR.

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

When the justices were on the bench, Hon. Henry B. Cleaves, President of the Cumberland Bar Association, rose and briefly announced the death of Justice HASKELL. He stated that at a meeting of the Bar shortly after his death, a committee was appointed to draw up a suitable memorial. He informed the court that this committee was now ready to report and with the permission of the court it would do so at this time.

Chief Justice WISWELL signified the willingness of the court to receive the memorial and Hon. William Henry Clifford rose and read the following memorial:

MEMORIAL OF THE CUMBERLAND BAR.

The members of the Cumberland Bar desire to enter upon the record of this court the expression of their respect and regard for the character and life, both at the bar and on the bench, of Justice THOMAS H. HASKELL.

Long professional association with him, both as a lawyer and a judge, has left a profound impression of the sincerity and depth of

his character, the clearness and discriminating faculties of his mind, his wide and thorough practical knowledge of the law, his power of correctly applying its principles to the affairs of men, and his clear comprehension of the consequences of the legal relations into which parties may have placed themselves, or had been led by business association.

He was a man of high and constant aim and purpose, never losing sight of the duty he resolved to perform, or the winning of honorable estimation from his fellowmen, which he desired to deserve.

As an attorney, he was alert, adroit, active and industrious, conducting the business department of legal work with neatness, nicety and exactness, and coming to the trial of causes furnished with every weapon of attack or defense that the nature of the case could supply.

As a judge, filling a long term of service upon our bench, he was firm, decided, cool, capable of clear comprehension of a case as it was developed before him, able to administer and direct the trial according to legal rules and on legal lines, solicitous only that justice under the rules of law should be the result attained. His habits of industry were equal to all the exacting demands upon time, strength and patient labor that the judicial station in our State makes upon the judge. His natural gifts were of a high order and he possessed a mind disciplined and trained by severe, earnest study and the contests and forensic efforts of the bar.

He was painstaking, minute, serious and conscientious in his opinion and decisions, seeking to make clear and apparent the legality and justice of the conclusion he had reached. He was a straight-forward, ingenious man, of simplicity of character and manner, singleness of purpose, with little habit or tendency toward relaxation from duty of the office of a judge to which he was completely devoted.

The effect of his character and conduct, and the example he presented of an exemplary judge, will not soon be forgotten by any who have been familiar with the honesty of his purpose and the sense of responsibility with which he looked upon the performance of duty.

Mr. Clifford then delivered the following tribute upon the deceased Justice:—

May it please the court:

In speaking upon the life and services of an efficient and useful judge, we are doing no less than examining into the question as to how he executed the power inherent in perhaps the most important branch of our civil policy—our judiciary system. The powers with which he was invested were not personally his,—there is no such thing in this country. He was not heir to the powers he exerted over men. The powers resided in the office. The office was created by law. The manner of executing the duties of his office was prescribed by legal regulation. In looking back upon his official life, we are commenting upon the performance of certain grave and serious duties, duties, moreover, whose consequences were visited in a most direct and speedy manner upon the lives, the interests and the business of men. The court lies close to the people. Unlike the remoter influences of other branches of our government, the court is always in contact with the citizen. Such a man was a trustee of the highest order. How did he meet his obligations? He had no right to cast into the performance of his duties either personal feeling, peculiarities or predilections. If justified, he must be shown to have executed his office according to the law of the office. The place he held was high. The duties in which he was enlisted were elevated and refined, and he must stand or fall accordingly as he met the requirements of the high office he held. It is a great thing to be a good judge. A vast responsibility is assumed when a man is clothed with the authority of executing the powers of that peculiar institution we call a court. He undertakes a solemn task who essays with his own hand to regulate and control the vast machinery of administrative law and justice, with all of its tremendous forces and powers, with all of its refined, complicated and delicate adjustments, without injury to the machine or injustice to men. The extensive powers over the business and interests of men vested in our courts might well startle a mind unused to witness their exercise, or which beheld

and comprehended for the first time, their wide extensive reach. But to us they appear the most evident and natural method of attaining safety, order and security to property. This is because with us they are old and tried. These institutions are a portion of our inheritance—the bequest of by-gone generations—and they are as firmly inwrought into our modes of thought and natures as they are into the governmental plan of which they form a part. And these institutions are the more endeared to us because in the infancy of our nation we took a fresh start. Moulded, indeed, upon valuable and ancient models, and using the common law, our judiciary systems were constituted under laws of our own creation and adoption, and framed to work under general rules upon which the fresh seal of approval had been placed by those who agreed to submit to their justice—what a spectacle was this! The American, not from subservience or slavish awe or fear but with intelligent belief in their necessity and practical utility, trusts in and submits to his courts. This is one of the evidences of civilization. There is no more assuring promise of the permanency of our institutions, nor more conclusive evidence of the strength of the edifice which we have built and the civilization it symbolizes, than the fact that a decision by nine judges constituting our Supreme national tribunal upon a cause involving not only private interests but public policies, hushes almost at once by reason of our habit of assent to judicial determination, the wranglings of parties and settles the question upon which the minds of the best of men have been at variance. But with all this, there is no nation on the globe making higher demands upon the capacity and integrity of their judges than ours. And in our own State courts, where our interests are most intimately involved, where our local pride is enlisted and where rights connected with the daily occurrences of life are settled, the demands upon judicial competency and uprightness are none the less exacting. This institution is peculiarly our own. We have moulded and changed its structure and modified its working forms, as time has rolled on, to suit ourselves. It is endeared to us by its adaptation to our state of society and by the probity, ability, force and purity of those judges who have adorned

our bench since the birth of the State. We respect and regard the judge because he is the exponent of the system in which we confide, and men do not readily discriminate between the abstract idea of an institution and its embodiment and incarnation in the administrative court and the judge. This system may be ever so wisely and cunningly devised, it may be constructed to work with harmony and justice, but incapacity and lack of integrity would mar its operation and wreck its influence. The moral influence of the court, the institution, depends upon the dignity and power of the judge. Therefore, when we obtain a good judge we honor him while he lives and mourn him dead. Such are the circumstances now. For a few moments we are holding in contemplation the life, work and character of a zealous, assiduous, clear-headed, keen-minded judge. And what better could be said of any man passed away, than to fix upon his memory the epitaph "An honest man, a good citizen, an upright able judge?" When this verdict has been rendered, the whole honorable story has been told. But few of us, I think, would be satisfied with so brief and meagre encomium as that upon the life of Judge HASKELL.

Nature, in her mysterious laboratory, fixes the boundaries and limitations of intellectual power and stamps upon the brain and mind of man that peculiar individual cast that controls in the selection of pursuit and the zeal with which it is followed, when the drama of active life begins. But the conscientious cultivation and development of the powers which nature has bestowed, their employment in an elevated sphere, in a useful manner in the service of society,—this is the highest point a man may reach. Endowed with natural powers of a high order, Judge HASKELL devoted the best that he had received of mind and power of application to his duties as a judge. The standard which judge HASKELL had reached, for years antecedent to his death, was a high and honorable one. And now, in answer to our preliminary inquiry, how did he meet his judicial obligations with all of its exactions, we answer to the court who loved and now regret him, to the people who honored him, "he met them well," he filled his high office not by unlawfully stretching its extensive jurisdiction,

but by enhancing by his conduct and character the power and dignity of the bench.

In recalling some of the characteristics of Judge HASKELL, no one who has practiced before him can fail to be reminded of his capacity to rule and decide upon questions of evidence at the trial. With him there was no faltering before the question, no dallying with the rules of evidence. Upon questions of the admission of testimony, he was short, sharp and decisive, and the ruling left no ground for doubt as to its effect upon the case or the ground of exception, if any existed. It is not infrequent among unprofessional people to hear commendation of a polite and affable judge. But the sharp contests of the bar are hardly the places in which mere superficial politeness is to be indulged, especially if it interferes with the stern, remorseless hunt after facts. The older we grow in the harness of the profession, the less we like the judge who rules without deciding. The attorney wants to know where he stands at nisi prius and at the trial. That judge wears the best who, under the law, takes the reins into his own hands, administers the trial according to his own conviction, and leaves the case with clear, sharp outlines which may be apprehended and perceived upon appeal. In this respect our brother was an admirable judge. He was, as a judge as well as a man, possessed of clear and positive opinions and so far as judicial duty required, as the trial progressed, these were impressed upon the case. I cannot omit in this connection to notice Judge HASKELL'S power of early grasping the essential point of a case. A long and varied practice at the bar, association in his earlier days with many of the ripest lawyers of the time, had developed that instinct which forecasts the probable legal shape a cause would assume. This might be a dangerous faculty in a judge disposed to consider that he understood the whole case before the last word was spoken. But while Judge HASKELL'S mind was keen and bright, he was by temperament and disposition prudent and cautious, and his anticipations of the form which a case might assume were not exhibited in abrupt a priori rulings, but appeared in the form and suggestions and inquiries which guided and enlightened. To counsel familiar with his cause

nothing could be more acceptable than this. It opened the field for discussion and explanation. I cannot pay too high a tribute to Judge HASKELL'S familiarity with, and power of applying, the law of evidence. This is the tool which with either judge, or attorney, must be ready in the hand. This is the philosophy which to be effective must be at the tongue's end. The movements of the trial are quick, rulings must be enforced upon the instant. Enforcement of the rules of evidence is the fine, nice fencing of law. It is thrust and parry. The mind and quick perceptions of Judge HASKELL enabled him in the great majority of instances to rule promptly, clearly and correctly. The late Judge was also profoundly versed in those necessary distinctions which appertain to forms of action as expressing the relations of parties, and was quick to detect the error of the writ. His mind was of the logical cast, and in a trial before him evidence was required strictly to sustain the allegation or it was excluded. We are aware of the tendency in certain jurisdictions, unlike our own, to undervalue the importance of correct pleading and to endeavor by the hearing of evidence, perhaps not germane to the writ, to arrive at a conclusion just between the parties. But under Judge HASKELL'S administrations of a trial, if the plaintiff had mistaken his remedy or erroneously set forth his cause, he must abide the consequences of his error, or seek refuge in his right of amendment. Our law is a law of forms of action appropriate to the different contractual relations which men may assume, or the business attitude into which they may fall toward each other. It is seldom that one practices before a judge who had keener appreciation or more accurate knowledge of our system of pleading than Judge HASKELL. His endeavor was to conduct a trial according to established rules and cause the evidence to flow in legal channels.

Power of quickly perceiving the essential point of the case, the pivot on which it must finally turn one way or the other, was one which Judge HASKELL possessed in a very high degree. He was very apt in placing his finger on that nutshell in which the germ of the case was enveloped; and the fine and nice discriminations of the law, the delicate shadings, by which truth is so often sep-

arated from misconception, called forth one of the natural characteristics of his mind. He was qualified to deal with those fine distinctions upon which so often the correct decision of a case depends. While his mind grasped all the essential features of a case, it gravitated quickly and naturally to the turning point. At the same time, he possessed the true judicial patience and listened with attentive forbearance to all the reasons counsel had to urge. While he ruled with decision, there was nothing of abruptness or harshness in his judicial deportment. He was simply firm and decided.

I am, also, aware of the patient and careful investigation with which his opinions were prepared. Upon these he spared no labor. His tendency was to throw off the irrelevant matter and to deal straightforward with the legal evidence exhibited in the cause. His style was plain, without affectation or ornament, and his opinions are models of lucidity and directness. They are guides to an attorney in investigating a case, they settle the point, and are contributions of high value to the body of decided law contained in our reports.

The judge had acquired a wide, profound and exact knowledge of our law and practice, and in his ripe manhood was qualified for many years of useful service on the bench. For this reason we mourn his loss the more. The judge was a man of great and attractive simplicity of life and manners, entirely absorbed in the performance of his duty as a judge. To this all the energy and forces of his mind were directed. He had become a mature and ripened magistrate.

His charges to the jury were neither dissertations upon the law or partial arguments on the facts. They were of that kind that aided and accelerated the conclusions of the jury. They were practical, clear and sound, containing such arrangement and classification of the evidence as would enable the jury to comprehend the force of the whole evidence, and the true bearing of the different portions upon the question to be decided. They were not designed for impression or display. They were made with the sincere purpose of assisting the jury to a just and legal determination.

He was a safe, reliable judge. In all of his official acts, rulings, charges and opinions, the law of the case had full weight in the formation of his conclusion. Decisions were not made from mere personal impressions of the facts. His mind was obedient to the law that imparts to facts their force, color and weight when constituting evidence. Confidence is aroused in the judge whose mind is thus constrained and guided. Securely anchored, as was Judge HASKELL, in the principles of law, he was not likely to drift into serious error or mistake.

And now, a strong, sound, well-trained and disciplined Justice has passed from the court to his long repose. The suddenness of his death sent a shock throughout the community and the bar. To us it seemed premature. But his ability and power had been amply demonstrated by his judicial life and services, and his integrity and purity of character, by a life professional and judicial that wears no stain.

Edward Woodman, Esq., then spoke as follows:

While others have fittingly spoken of Judge HASKELL'S character and achievement as a lawyer and jurist and of the debt which we of the Cumberland Bar particularly owe to him for his services in building up the Greenleaf Law Library to its present noble proportions, let mine be the humbler task to give a brief biographical sketch of his life and to express, in such poor fashion as I may, my warm affection and admiration for him as a man, a neighbor and a friend.

Judge HASKELL was born in New Gloucester, Maine, May 18, 1842. His father, Peter Haskell, was a farmer, and his early education was limited to the schooling which the common schoolhouse and a neighboring academy could afford. He was, however, ambitious to secure a better education and succeeded in fitting himself to enter Bowdoin College, but was prevented from carrying out this cherished plan by the outbreak of the Civil War, in consequence of which he enlisted in the 25th Regiment of Maine Volunteers.

Upon the expiration of the term for which he had enlisted, he found that circumstances were such as to make it imperative that

he should abandon all idea of a collegiate education and devote himself immediately to the study of the law, that he might fit himself to earn a livelihood in that, his chosen profession, as soon as possible. He accordingly became a law student in the office of Judge Morrill at Auburn, remaining there until his admission to the bar in 1865. For a time he remained with his instructor, but removed to Portland in 1866, making this city his permanent home. He continued in active practice in Portland until he was appointed to the bench, March 31, 1884.

While in practice, he was associated as law partner successively with the late Hon. Charles W. Goddard, afterwards Judge of the Superior Court of this county, with the Hon. William W. Thomas, the present Minister of the United States to the Court of Sweden, and with the Hon. Nathan Webb, the honored and beloved Judge of the United States District Court for the District of Maine.

Judge HASKELL, though his father was a farmer and his own early training was that of a farmer's boy, had a natural aptitude and love for the law which would seem to have been inherited, for, on his mother's side, he was related to EZEKIEL WHITMAN, the third Chief Justice of this court; while on his father's side he was related to Theophilus Parsons, the second Chief Justice of Massachusetts.

Both as lawyer and judge, he was noted, not only for his firm grasp of legal principles, but for an unusual quickness and perspicacity in their application to the facts of a case however complex and confusing they might be, and for a clearness of intellectual vision which enabled him to discern, almost intuitively, the particular fact or group of facts upon which a case turned. He was an adept in all questions of pleading and practice, was firmly attached to the old forms of common law pleading and never took kindly to any of the innovations introduced among them by statute, but stoutly maintained that the old forms, properly handled, by competent attorneys, tended to simplify the issues to be presented to a jury and to promote the ends of justice, and that the statutory innovations in Maine, and the various codes of practice adopted in other states, simply encouraged slovenliness on the part of an

attorney and tended to confuse and make uncertain the issues presented to juries in complicated cases.

He was a good lawyer and gained the confidence and applause of his clients while in practice, and of his associates on the bench and the members of the bar when upon the bench, for his industry, his ability, and his integrity. His record as a judge is found writ large in the volumes of the Maine Reports beginning with the 76th volume and continuing down to volume 94. His opinions touched upon a great variety of topics such as arise in courts like this of last resort, having both legal and equitable jurisdiction, and are marked by their freedom from prolixity and clear, forcible enunciation of legal doctrine. His relatives and friends may well be content to point to them as an enduring monument to his character and legal attainment.

Though not a graduate of Bowdoin College, he received the degree of Master of Arts from that institution in 1894 and was one of its Board of Overseers at the time of his death.

Judge HASKELL was a man of marked individuality. His peculiarities and characteristics were such as to stamp his personality indelibly upon the minds of all who became acquainted with him. He was the possessor of a quaint and quizzical sense of humor and dearly loved in conversation to maintain, with the utmost apparent gravity and earnestness, some untenable and perhaps even absurd position, when by so doing he could draw some innocent and serious-minded acquaintance, all unsuspicious of the judge's humor, into a serious attempt to set him right by explaining to him the absurdity of his position and the fallacy of his argument.

He was a keen observer, possessing the same quickness of perception in understanding men, their actions, and motives in the ordinary affairs of every day life, that characterized him as a lawyer and judge in the trial of cases.

He habitually traveled from shire to shire, in all sections of the state, to hold his various terms of court, behind his own favorite pair of horses, thus familiarizing himself with all parts of the state to an extent impossible to those whose knowledge is confined to fleeting observations of what little may be seen from the windows

of a fast-moving express train. Thus, too, he became acquainted with men in all parts of the state and in all walks of life, and accumulated a vast fund of practical knowledge and experience.

Wherever his travels took him, he made many warm, personal friends. Even those who were at first repelled by a certain brusqueness in his manner, which was strongly characteristic of him and caused him to be frequently misunderstood, soon learned on better acquaintance, to know that this was a mere eccentricity of manner and that his heart was in the right place. Those who enjoyed the privilege of his more intimate acquaintance learned to know him as a genial and sympathetic companion, a stanch and loyal friend.

Judge HASKELL died at his home in Portland on September 24, 1900, after a brief illness, the serious character of which was not fully understood until the day before his death. Only one week before he died, he opened the regular September term of his court at Skowhegan and though weak and ill, continued to sit each day until, under the advice of his physician, he adjourned his court finally on the morning of September 22nd and reached his home the same evening, only two days before his death. When he adjourned his court, the judge took occasion to remark that it was the first time in his experience as judge that he had been compelled by illness to do so.

The news of his death was a sad shock to all of us, for he was apparently a man in vigorous health, was only fifty-eight years of age, and his friends anticipated for him many more years of honorable service upon the bench which he had adorned for sixteen and one-half years.

My acquaintance with him began more than twenty years ago, when I entered the office of Webb & Haskell as a law student and continued during my brief but happy association with him as a partner for the year preceding his appointment to the bench, after which time it ripened into the intimate relations of good neighbors and fast friends.

Throughout our acquaintance, my affection for him as a friend and my respect for him as an able lawyer, an upright and consci-

entious judge, and an honorable man, increased and deepened with each passing year.

Out of the fullness of the heart, the mouth speaketh, but when the heart is surcharged with emotion, its sentiments find themselves half choked in their utterance and lips and tongue refuse to give them adequate expression. I find myself unable to pay to his memory that tribute which I could wish to pronounce here to-day and must rest content with the halting and inadequate expression to which I have given utterance.

Thomas L. Talbot, Esq., then spoke in substance as follows:

It is my pleasant, and at the same time sad, duty to second the resolutions submitted to your honors in commemoration of your late associate, Judge HASKELL. We meet under the shadow of a common sorrow. The death of Judge HASKELL came with a startling suddenness to even his most intimate friends, who hardly learned of his illness before they heard the news of its fatal termination. Judge HASKELL was a man of marked individuality. He inherited an aptitude for the law and a strong determination to pursue that profession, and never to rest until he gained that eminence in it, which became the ruling principle of his life. He had confidence in his powers and never hesitated, after carefully forming his opinions, to stand by them to the uttermost. He loved the State of Maine, its woods, hills and streams, its institutions and its people. His ideals were men of an earlier time, like Chief Justice SHEPLEY, whose training was in a stricter school and who were masters of the common law. His devotion to the profession was conspicuously shown in his work in the building up of the Greenleaf Law library. Mr. Talbot closed with a graceful tribute to the deceased.

Hon. Nathan Webb, Judge of the U. S. District Court closed the remarks that were made at the bar of the court in a fitting and eloquent manner. He said, among other remarks in substance, that he was not prepared to speak at length at this time, but that in summing up what had been said, he could fully indorse the sentiments of the previous speakers. In his association with Judge HASKELL he had found him to be a man of accurate judgment,

sound scholarship and of blameless character and exemplary private life.

Then, at the close of the addresses by the members of the Cumberland Bar, Chief Justice WISWELL spoke as follows:

Gentlemen of the Bar:

In behalf of the court let me assure you that its members are in entire sympathy with the sentiment of the resolutions presented by your committee, and with the eloquent and touching tributes that have been paid by the members of the bar to the memory of our late associate and friend, whose sudden death, after an illness so brief that it was known to but few, cast a great gloom and sorrow upon his friends and associates and upon all who knew him intimately.

However sad may be the duty of speaking upon this occasion, it is one we would not avoid, but gladly assume, since it gives an opportunity not to add to that which already has been so well and gracefully said of our friend, but to express our own great grief and sense of personal loss in the death of Judge HASKELL.

It was a fortunate thing for the State when Judge HASKELL was selected to serve upon the bench of its highest court, for in many ways he was peculiarly well fitted for a performance of the duties of that position. I think that it may be truly said that he loved the law and that in a patient and painstaking investigation to ascertain the true principle which should not only be decisive of the particular case under consideration, but which should also serve as a rule of action for the future, he found his greatest pleasure and satisfaction.

He apparently never had any ambition outside of the lines of his chosen and beloved profession, although in many departments of practical knowledge he was remarkably well informed and devoted more or less of his time to the acquisition of accurate and exact knowledge upon many practical subjects, still this was but his recreation, while the knowledge thus obtained was frequently of great value to him in the real work of his life.

I need not speak of Judge Haskell's career or success at the bar. This has already been done to some extent by his brethren of the

Cumberland Bar, of which he was a member during the larger part of his active practice. And it is undoubtedly true that he achieved his greatest success and made his most lasting reputation during the period that he served upon the bench of this court.

My acquaintance with Judge HASKELL commenced when he first came into my county to preside at the October term, 1884, of the Supreme Court. I soon became somewhat and later more intimate with him, and learned to have great respect for his ability as a judge and a high appreciation for his many stanch qualities as a man, companion and friend. It always seemed to me that one of his most pronounced characteristics was his absolute sincerity and the entire absence in him of all affectations.

He never pretended to be anything that he was not; he never affected a sentiment that he did not feel; he never, for flattery or other purposes, said anything that he did not believe. It was undoubtedly for this reason, I think, that his best friends were his oldest friends, those who had known him the longest and most intimately. Indeed, it sometimes seemed as if he did not take sufficient pains to please and to show his best side to mere acquaintances. But if one were sufficiently fortunate to have that acquaintance, become intimate until it finally ripened into friendship, then he realized its value and appreciated that he had found a friend that could be relied upon and whose kind words were not actuated by a mere desire to please at the moment.

Akin to this, Judge HASKELL was remarkably free from that most dangerous quality in a judge, a desire for popularity. He was as blind to all considerations except the merits of a case as the figure emblematic of justice itself is pictured and sculptured. His judgment, I believe, in the decision of all cases, great or small, was never warped by popular clamor or affected by the individuality of contesting litigants.

Thus equipped with a love for the law and its great and abiding principles, inherited perhaps from his maternal ancestry, some of whom were distinguished in the law, with no ambition but for the prizes of his profession, with wide and great general information always being turned to valuable use in his work, and with mental

characteristics especially valuable in the work of a judge, our late associate came to the bench in 1884, appointed to fill the vacancy caused by the resignation of Judge Symonds. For sixteen and more years and until his death after being stricken with a fatal disease while holding court in Somerset County, Judge HASKELL continued to occupy a seat upon the bench of this court and to perform the duties of his position with great ability. Judicial work was very congenial to him and probably no other occupation or position would have given him so much satisfaction. He had, as was recognized by all, a remarkably acute mind which worked with such rapidity that he speedily grasped the salient points of a case, either at nisi prius or at the law court. His judicial work was always performed with great promptness and none of the proverbial delays of the law could ever be attributed to any fault upon his part. During this period, Judge HASKELL constantly increased in usefulness upon the bench. In many branches of the work of the court, notably in pleading and in equity proceedings and practice, he became an authority and so recognized by his associates and others.

There is, perhaps, no place where a judge displays his real ability and true worth more clearly than in the consultation room. At least, there is none where those associated with him have a better opportunity of judging him. Discussions, where there are differences of opinion, are always earnest and may become heated; and there is always the danger that those participating in the discussions may be involuntarily inclined to adhere to a position once taken simply because it had been taken. In these deliberations Judge HASKELL'S advice and assistance were especially valuable. Having an opinion of his own, with a large knowledge of the previous decisions of this and other courts, his judgment was always entitled to and received great weight, but he was never opinion-proud and was ever ready to receive a suggestion, acknowledge an error, and to hold his mind open to argument and reason. I need not refer to the many opinions written by him during these years and published in our reports, commencing with Volume 76 and continuing until and including the last volume published, the 94th,

because these written and published opinions are open to and are known by all. As frequently said of others, and it is certainly equally true of him, these opinions will remain long after those that have known him are gone, to testify to his industry, ability and legal knowledge.

Although Judge Haskell's service upon the bench extended over a period of sixteen and a half years only, he lived to become the second in seniority of service and to see every judge who was associated with him at the time of his appointment, save one, leave the bench. Peters, Walton, Danforth, Virgin, Libby and Foster, six of his seven associates at the time of his appointment, have either died in office or retired; one only, Mr. Justice Emery, at present the senior associate, remains upon the bench; and it is rather a remarkable fact that since the first of October, 1883, Judge Emery having been appointed October 5th of that year, a period of less than eighteen years, the entire personnel of the court has changed, not a single judge remaining who was then on the bench.

At the time of his death, Judge HASKELL was in the 59th year of his age, in the fullness of his powers, with wisdom ripened by experience and with legal learning acquired by a lifetime devoted to its study. We had reason to hope and to believe that there would be many more years of life spared to him to be devoted to a loyal service of his State, in that position for which he was best suited by reason of his attainments, mental characteristics and love for his work, but an over-ruling Providence has otherwise ordained, and its decrees must be accepted by us with an abiding conviction that all things are ordered for the best.

The resolutions presented by your committee will be extended upon the records of this court, and as a further mark of respect to the memory of our friend, the court will now stand adjourned.

INDEX-DIGEST.

ABATEMENT.

See PLEADINGS. REAL ACTION.

ACCOUNT.

See PROBATE COURT.

ACTION.

See ASSIGNEE. DEATH. REAL ACTION. RECEIVER. TRESPASS. TROVER.

None upon contradictory principles of redress in one and same state of facts, *Hussey* v. *Bryant*, 49.
land taken for way, *Ib.*

None for pure or simple accident, *Casualty Co.* v. *Cutts*, 162.
accidental breaking of window glass, *Ib.*
no evidence showing negligence, *Ib.*

Of assumpsit for excess water, *Power Co.* v. *Paper Co.*, 186.
indenture had restrictive covenants, *Ib.*
but plaintiff consented to the use by subsequent new and independent contract, *Ib.*
assumpsit and debt maintainable, *Ib.*

Judgment in, for money had and received, *Pierce* v. *Rodliff*, 346.
plff. may show the facts of case, *Ib.*

Writ made October 25 and served Nov. 21 after change in date to Nov. 21, *Larrabee* v. *Southard*, 385.
held; writ good as served, *Ib.*
made with intention of service Oct. 25, *Ib.*

None on insurance policy when arbitration is condition precedent, *Fisher* v. *Ins. Co.*, 486.

Mut. relief assoc. liable to, by members, *Clement* v. *L'Institut*, 493.
organized under R. S., c. 55, § 5, *Ib.*

ADMINISTRATORS.

Suit by foreign, *Fleming* v. *Courtenay*, 128.
writ was amended, *Ib.*

ADVERSE POSSESSION.

Facts showing, *Batchelder* v. *Robbins*, 59.
title by, depends upon situation and character of the land, and its uses, *Ib.*
less proof required when the, is brought home to owner's knowledge, *Ib.*
squatter's gardens were no interruption of, *Ib.*
facts showing an actual ouster, *Ib.*
Cutting and removing trees from wild land bar not real action by, when, *Millett* v. *Mullen*, 400.
no purpose of clearing land, *Ib.*

ADVERTISEMENT.

See TAXES.
Millett v. *Mullen*, 400.

AGENT.

Insurance, must have license, *Black* v. *Mut. Life Assoc.*, 35.
Sales by, subject to confirmation, *Gilman* v. *Stock*, 359.
no action by vendee without confirmation of principal, *Ib.*
vendee signed mem. without reading it, *Ib.*
Order drawn by, held as accepted or note of principal, *Salley* v. *Terrill*, 553.
but it was stolen and never delivered, *Ib.*
not enforceable by subsequent holder, *Ib.*

AMENDMENT.

See PLEADINGS. PRACTICE.

APPEAL.

See PROBATE COURT.
In locating street railway, *Elec. R. R. Co. Applt.* 361.
pendency of, abated not a second location, *Ib.*

ARBITRATION.

As to damages in insurance, *Fisher Ins. Co.*, 486.
held a condition precedent, *Ib.*

ASSIGNEE.

An, at common law not entitled to compensation for manufacturing logs and selling lumber, *Rowell* v. *Lewis*, 83.
no provision for same in contract with vendor who held title under conditional sale, *Ib.*

ASSIGNEE (concluded).

No title to consigned goods in, *Manfg. Co.* v. *Brooks*, 146
deft. liable as, for same, *Ib.*

Of chose in action under R. S., c. 82, § 130, *Damren v. Power Co.*, 278
must file copy of assignment with writ, *Ib.*
plff. failed to do so, *Ib.*

ASSIGNMENT.

See ASSIGNEE. COMPOSITION. PLEADINGS.

An, at common law requires no record under R. S., c. 111, § 5, *Rowell* v. *Lewis*, 83
not a conditional sale under the stat., *Ib.*

Copy of, to be filed with writ, *Damren* v. *Power Co.* 278
action by assignee of chose in action under R. S., c. 82, § 130, *Ib.*
plff. failed to do so, *Ib.*

ASSUMPSIT.

Action of, for excess water, *Power Co.* v. *Paper Co.*, 186
indenture had restrictive covenants, *Ib.*
but plff. consented to use by subsequent new and independent contract, *Ib.*

ATTACHMENT.

Not dissolved by bkptcy., *Coal Co.* v. *Goodwin*, 246
plff. made a special, to avoid a fraudulent conveyance, *Ib.*
validity of, will be decided in real action afterwards brought, *Ib.*
may now have special judgment, *Ib.*

ATTORNEY.

Effect of general appearance by, *Flint* v. *Comly*, 251
gives jurisdiction to courts both of law and equity, *Ib.*

BAIL.

See HABEAS CORPUS.

BANKRUPTCY.

See COMPOSITION. FRAUDULENT CONVEYANCE.

Attachment not dissolved by, *Coal Co.* v. *Goodwin*, 246
more than four months old, *Ib.*

U. S. Act became operative July 1, 1898, *Bank* v. *Ware*, 388
State insolvent law suspended, *Ib.*
State courts deprived of jurisdiction except of cases begun before July 1, 1898, *Ib.*
debtor assigned May 25, 1898, and filed papers in insolvency July 8, *Ib.*
held; insolvent court had no jurisdiction and could grant no discharge, *Ib.*

BILLS AND NOTES.

Action on note made in N. Y., *Vermeule* v. *Vermeule*, 138
defense was usury under laws of N. Y. *Ib.*
note was a renewal of prior notes but called for 6% only, *Ib.*
prior notes on interest gave option on stock, *Ib.*
held; renewal note excluded usury, *Ib.*
Signing on back of, before payee's indorsement, *Banking Co.* v. *Jones*, 335
thereby became original promisor, *Ib.*
presumption in favor of innocent indorsee, *Ib.*
case of accommodation paper, but plff. did not know it, *Ib.*
note renewed but plff. kept first note as collateral for same, *Ib.*
deft. did not sign the renewal and was held on first note, *Ib.*
taking renewal, held not payment, *Ib.*
Note held payable in one year from date, *Leader* v. *Plante*, 339
with option to pay before maturity, *Ib.*
and *held;* negotiable, *Ib.*
Note on demand after Apr. 27, 1892, with interest thereafter, *Larrabee* v. *Southard*, 385
bears interest from Apr. 27, although demanded not until Nov. 21, 1898, *Ib.*
Transfer of non-negotiable, with guaranty, *Jenness* v. *Barron*, 531
liability same as if the, are negotiable, *Ib.*
of a declaration in such case, *Ib.*
should aver legal privity between plff. and party with whom guaranty is made, *Ib.*
such non-averment is amendable, *Ib.*
averment of demand and notice,—quære, *Ib.*
Action by indorsee of, sustained, *Wing* v. *Martel*, 535
maker defended under R. S., c. 27, § 56, and claimed the, were given for intox. liquors bought in Boston for illegal sale here, *Ib.*
held; burden on deft. to show this, *Ib.*
then burden is on plff. to show he is innocent holder for value, *Ib.*
no evidence by deft. to support his claim, *Ib.*
verdict ordered for plff., *Ib.*
Negotiable, stolen from maker, *Salley* v. *Terrill*, 553
was not delivered actually or constructively, *Ib.*
not enforceable by subsequent holder, *Ib.*
order drawn by agent held as accepted order or note of principal, *Ib.*

BOND.

To be given by road commissioner, *Willey* v. *Windham*, 482
he failed to do so and *held;* was officer de facto, *Ib.*

BURDEN OF PROOF.

See EQUITY. EVIDENCE.

CASES CITED, EXAMINED, ETC.

Bigelow v. *Bigelow*,, 93 Maine, 439, 17
Boardman v. *Creighton*, 93 Maine, 17, affirmed, 154
Chandler v. *Robbins*, 79 Maine, 76, affirmed, 400
Hodgdon v. *Wight*, 36 Maine, 326, overruled, 400
Rhodes v. *Iowa*, 170 U. S. 170, distinguished, 140
State v. *Lawrence*, 57 Maine, 574, re-affirmed, 467
State v. *Intox. Liquors*, 94 Maine, 335, distinguished, 140

CHARGING ON FACTS.

See JURY.

CIVIL DAMAGE ACT.

See HUSBAND AND WIFE.

COMMISSIONS.

See ASSIGNEE.

COMMON CARRIER.

See INTOX. LIQUORS.

COMPOSITION.

Debtor made an assignment, *Bank* v. *Ware*, 388
abandoned same and proposed a, *Ib.*
creditors assenting to, do not become parties to prior assignment, *Ib.*
claims not discharged until percentage paid, *Ib.*
even if interest is paid to date of prior assignment, *Ib.*
promise to accept percentage to be supported by new consideration, *Ib*,
acceptance of first installment did not bind creditor to discharge on payment of last installment, *Ib.*
a, agreement not under seal not binding no other consideration shown, *Ib.*
rule of consideration stated, *Ib.*
creditor not signing is not a party to, *Ib.*

CONDITION.

A, precedent to right of action, *Fisher* v. *Ins. Co.*, 486
arbitrating damages in insurance, *Ib.*
Waiver of, in relief assoc. contract, *Clement* v. *Institut*, 493

CONFLICT OF LAWS.

See CORPORATIONS. JURISDICTION.

CONSTITUTIONAL LAW.

Stats. regulating sale of oleomargarine and butterine held; constitutional, *State* v. *Rogers*, 94
they prohibit sales of simulated articles, *Ib.*
sound exercise of police power, *Ib.*
not repugnant to U. S. Constitution, *Ib.*
proper legislation by the States, *Ib.*
Whether State law violates U. S. Constitution must be finally decided by U. S. S. Court, *State* v. *Intox. Liquors*, 140
this court will hold R. S., c. 27, does not violate U. S. Const. until overruled by that court, *Ib.*
Stat. 1893, c. 241, (embezzlement by guardians) violates not 14th Amend. U. S. Const., *State* v. *Whitehouse*, 179
Burden of proof is on town alleging debt is beyond, limit, *Adams* v. *Waterville*, 242

CONTRACTS

See HUSBAND AND WIFE. LICENSE.

Valuable consideration in, stated, *Bigelow* v. *Bigelow*, 17
benefit to promisor or detriment to promisee need not be actual, *Ib.*
detriment to promisee stated: when he performs an act not obliged to perform, but occasions him trouble or inconvenience, *Ib.*
when part performance of, takes it out of St. of Frauds, *Ib.*
owner promised to make gift of farm, *Ib.*
donee's mtge. *held*, to be without consideration, *Ib.*
Lease of water power, *Water Power Co.* *Lewiston*, 171
whole instrument to be examined and intention to carried into effect, *Ib.*
single clause leading to opposite conclusion avails not, *Ib.*
Indenture for water power, *Power Co.* v. *Paper Co.*, 186
it had restrictive covenants, *Ib.*
excess use consented to under a, that was new and independent, *Ib.*
Time of performance of, *Copper Co.* v. *Southard*, 209
essential when fixed by parties, *Ib.*
suit of metal for deft's ship to be delivered about last of May or June, 1898, and not called for until February, 1899, *Ib.*
held, not called for within time provided in the, *Ib.*
Sale of standing trees, *Emerson* v. *Shores*, 237
not reserved in deed, *Ib.*
Sale by agent subject to confirmation, *Gilman* v. *Stock*, 359
vendee signed mem. but did not read it, *Ib.*
order was not confirmed by principal, *Ib.*
no action by vendee for non-delivery, *Ib.*
Consideration for new promise, *Wescott* v. *Mitchell*, 377
agreement to perform an existing, a new consideration required, *Ib.*
sale of stock and a supplemental, and no consideration shown, *Ib.*
Conditions precedent, *Fisher* v. *Ins. Co.*, 486
arbitration in insurance, *Ib.*

CO-TENANT.
See TENANCY.

CONVERSION.
See TROVER.

CORPORATIONS.
Action by receiver of a foreign, *Childs* v. *Cleaves*, 498
to enforce double liability in a banking, *Ib.*
non-resident stockholder bound by decree in parent suit, *Ib.*
they were not parties in parent suit, *Ib.*
ultimate question of individual liability not concluded by such decree, *Ib.*
action maintained in this court on principle of comity between states, *Ib.*
no rights of domestic creditors intervene, *Ib.*
Minn. stat. requires pro rata distribution, *Ib.*

COSTS.
See EXCEPTIONS. FRENCH SPOLIATION CLAIMS.

COVENANT.
See EQUITY.
Warranty given at request of warrantee, *Cobb* v. *Baker*, 89
warrantee did not refuse to move in the matter, *Ib.*
held; not liable on covenant, *Ib.*
Indenture for water power, *Power Co.* v. *Paper Co.*, 186
contained restrictive, against excess use, *Ib.*
but parties agreed by new and independent contract for same, *Ib.*
damages recovered in assumpsit, *Ib.*

CROPS.
Ordinarily belong to tenant, *Kelley* v. *Goodwin*, 538.
tenant may sell or mortgage them, *Ib.*
were reserved in lease by landlord, and title to, held security as by mtge., *Ib.*
lease to be recorded same as a mtge. or possession of the, taken, *Ib.*
lease not recorded until after a prior mtge. and deft's. title as purchaser under prior mtge. held superior, *Ib.*

DAM.
See WATERS.

DAMAGES.
See WAY.
Caused by death by wrongful act, *Oakes* v. *R. R. Co.* 103
rule of, stated, *Ib.*

DAMAGES (concluded).

includes earning capacity of deceased, his physical ability to labor and probabilities of obtaining future profitable employment, *Ib.*
present worth of future pecuniary benefits of which beneficiary has been deprived, *Ib.*
held; evidence admissible to show wages of deceased in his last employment but damages do not include pain and suffering of deceased; nor grief and sorrow of beneficiary; cannot be punitive. *Ib.*

Such, limited to "pecuniary injuries" sustained, *Conley* v. *R. R. Co.*, 149
must be estimated according to reasonable probabilities, *Ib.*
limited to $750 in this case, *Ib.*
deceased 73 yrs. old; laborer earning not over $225 per year, *Ib.*
court is not assessor of, but may express extreme limit beyond which jury may not go, *Ib.*

Caused by unlawful flowage, *Fibre Co.* v. *Electric Co.*, 318
reasonable but not speculative profits, *Ib.*
plff's regular and permanent business injured, *Ib.*
the, limited to unlawful flowage and assessed at $800, *Ib.*

Wife may recover, for husband's death, *Gardner* v. *Day*, 558
his intoxication injures her means of support, *Ib.*
but no, for death alone or mental suffering, *Ib.*

DEATH.

See DAMAGES. LICENSE. NEGLIGENCE. PLEADINGS. REAL ACTION.

Damages for, caused by wrongful act, *Oakes* v. *R. R. Co.*, 103
rule of damages stated, *Ib.*
includes earning capacity of deceased, his physical ability to labor and probabilities of obtaining future profitable employment, *Ib.*
present worth of future pecuniary benefits of which beneficiary has been deprived, *Ib.*
held; evidence admissible to show wages of deceased in his last employment but damages do not include pain and suffering of deceased; nor grief and sorrow of beneficiary—cannot be punitive, *Ib.*

Damages limited to "pecuniary injuries," *Conley* v. *R. R. Co.*, 149
estimated according to reasonable probabilities, *Ib.*
limited to $750 in this case; deceased 73 yrs. old; laborer earning not over $225 per year, *Ib.*

Presumed after 7 yrs. *Burleigh* v. *Mullen*, 423
evidence of, held sufficient, *Ib.*
sea-faring man absent 9 yrs. and proceedings in probate court *Ib,*

Wife has cause of action for, of husband under R. S., c. 27, § 49, *Gardner* v. *Day*, 558
his intoxication injures her means of support, *Ib.*
no damages for death alone or mental suffering, *Ib.*

DECEIT.

Action for, lies for misrepresentations relied on by person to whom made or intended to be communicated to, *Henry* v. *Dennis*, 24
false statements to member of a firm were found to be intended to injure the firm, *Ib.*
sale of wool to two firms with one common partner, *Ib.*
defendant liable to both firms. *Ib.*

DEED.

See COVENANT. EQUITY. REVOLUTIONARY SOLDIERS' LANDS.

To create a lien for taxes by assessment on land there must be a definite and distinct description of land assessed, *Burgess* v. *Robinson*, 120
rule is not modified by Stat. 1895, c. 70, *Ib.*
description "on Brown road," *held;* void, *Ib.*
tax deed to wife held invalid against husband's creditors, *Ib.*
he paid for deed with his own money, *Ib.*
land had been sold on exon. to his creditors, *Ib.*
Void, to cestui que trust, *Murphy* v. *Delano*, 229
it violated a spendthrift trust, *Ib.*
Trees may be reserved in a, *Emerson* v. *Shores*, 237
effect of, without reservation, *Ib.*
As muniments of title, *Cole* v. *Fickett*, 265
shaken only by most plenary and convincing evidence, *Ib.*
mistake proved by such evidence may be corrected between the parties, *Ib.*
lot 21 omitted by mutual mistake, *Ib.*
innocent mortgagee subrogated, *Ib.*
plff. entitled to decree, *Ib.*
trust in favor of equitable owner, *Ib.*
A prior unrecorded, *Sidelinger* v. *Bliss*, 316.
how affected by subsequent recorded, *Ib.*
prior holder must prove notice, *Ib.*
burden of proof is on prior holder, *Ib.*
plff. failed to prove notice, *Ib.*
6500 acres in T. No. 3, Indian Purchase, is void description, *Millett* v. *Mullen*, 400.
Good to Revo. Soldiers, by State, *Burleigh* v. *Mullen*, 423
lots selected after draft under Resol. 1836, c. 49, *Ib.*
new draft not required, *Ib.*
By heirs of Revolutionary soldier, *Banton* v. *Crosby*, 429
inured to grantee's benefit, *Ib.*
made after Resolve in soldier's favor created not title—but identified soldier and land, *Ib.*

DELIVERY.

See BILLS AND NOTES. GIFT.

DEMAND.
See BILLS AND NOTES. TROVER.

DESCENT.
See DOWER. FRENCH SPOLIATION CLAIMS.

Wife cannot bar right and interest by, in husband's real estate by release to him during coverture, *Pinkham* v. *Pinkham*, 71
widow may waive pecuniary provision made for her after marriage and save her right and interest by descent, *Ib.*

DEVISE.
See TAXES. WILL.

DISCHARGE,
See BAKRUPTCY. COMPOSITION.

DOWER.
See HUSBAND AND WIFE.

Wife cannot bar right and interest by descent in husband's real estate by release to him during coverture, *Pinkham* v. *Pinkham*, 71

DRAINS AND SEWERS.

Built by street commissioner under direction of mayor and aldermen, *Hamlin* v. *Biddeford*, 308
assent of common council superfluous, *Ib.*
city held to keep, in repair but not liable for defect in plan, *Ib.*
must construct, with reasonable care, *Ib.*
plff. injured and city liable, *Ib.*

EMBEZZLEMENT.
See INDICTMENT.

EQUITY.

Bills in, to be drawn succinctly and paragraphs numbered, *Cobb* v. *Baker*, 89
bill in, for cancellation should contain copy of instrument sought to be cancelled, *Ib.*
bill by warrantor of title not maintained, *Ib.*
warranty given at request of warrantee who did not refuse to move in the matter, *Ib.*
bills in, may be dismissed without prejudice when additional allegations may help, *Ib.*
Suit in, and at law for same cause of action at same time, *Fleming* v *Courtenay*, 135
plff. must elect which suit he will prosecute, *Ib.*
usual rule in, allows 8 days time to elect, *Ib.*

EQUITY (concluded).

Will remove cloud on title, *Morrill* v. *Lovett*, 165
tax assessed to a dead person, *Ib.*
tax sale and deed held void, *Ib.*
owner not required to pay tax as a condition to remove cloud, *Ib.*

Insufficient allegations in bill, *Loggie* v. *Chandler*, 220
court may dismiss bill suo motu,
when no prayer for geneal relief court confined to special prayer, *Ib.*
and bill demurrable when facts are insufficiently alleged, *Ib.*
but amendment allowed even after hearing if no demurrer is filed, *Ib.*
redemption of chattel mortgage is regulated by statute, *Ib.*
adequate remedy at law, *Ib.*
quere, whether bill in, can lie to clear the title to personal property, *Ib.*
relief in, for non-performance of condition, *Ib.*
primary facts to be pleaded, *Ib.*
"willing to perform" equivalent to an offer to perform—quere, *Ib.*

Law and Equity Act of 1893, *Flint* v. *Comly*, 251
procedure may be ordered by court without motion or request, *Ib.*
case in, converted into law, *Ib.*

Bill to redeem mortgage, *Munro* v. *Barton*, 262
of necessary allegations, *Ib.*
of payment or tender—refusal to render an account—plff. prevented from performing condition, *Ib.*
of offer to pay or to perform, *Ib.*

Deed reformed in, *Cole* v. *Fickett*, 265
mutual mistake in description, *Ib.*

Pleadings in, for review, *Glover* v. *Jones*, 303
must recite former bill, decree, point, etc., and law by which plff. seeks to impeach it, *Ib.*
court may state an account without appointing a master, *Ib.*
bill was taken pro confesso at regular term, *Ib.*
deft. made no motion to open decree and lost standing in court after 10 days, *Ib.*
bill for review dismissed: it did not allege decree did not follow allegations in original bill,—review would not change result, *Ib.*

Decision of single justice in, *Sidelinger* v. *Bliss*, 316
will not be reversed unless clearly erroneous, *Ib.*
burden is on appellant to show error, *Ib.*
prior unrecorded deed held good, *Ib.*

Determines rights between parties, *Leader* v. *Plante*, 343
and cannot be determined at law, *Ib.*

Trust fund recoverable in, *Cushman* v. *Goodwin*, 353
identity to be established, *Ib.*
funds were mingled by trustee, *Ib.*
heirs are proper parties to bill in, *Ib.*
bill remanded with directions, *Ib.*

EVIDENCE.

See DEATH.

Case of adverse possession, *Batchelder* v. *Robbins*, 59
degree of proof when facts are known by true owner, *Ib.*
Deft. sold oleomargarine and butterine, *State* v. *Rogers*, 94.
state need not prove deft. knew the compound was "not made exclusively of milk and cream," *Ib.*
the offense is thus created by statute.
Voting and paying taxes, *Monroe* v. *Hampden*, 111
are stronger evidence to prevent gaining a pauper settlement than in gaining one, *Ib.*
evidence showing abandonment of residence, *Ib.*
Plff. rendered accounts to deft., *Power Co.* v. *Paper Co.*, 186
were statements for excess water, *Ib.*
admitted in, showing implied promise, *Ib.*
Burden of proof is on town alleging debt is beyond constitutional limit, *Adams* v. *Waterville*, 242
Widow is competent witness in real action against her to foreclose deceased husband's mtge. given for life support, *Golder* v. *Golder*, 259
Admissible to show facts in judgment for money had and rec'd, *Pierce* v. *Rodliff*, 346
Court to instruct the jury upon the law, *State* v. *Means*, 364
and may recall and collate testimony, *Ib.*
also resolve complicated evidence, *Ib.*
held; that the judge did not express an opinion on facts, *Ib.*
"that is for you to judge," "I express no opinion"—are disclaimers of the court in charging on facts, *Ib.*
comments on general experience and proverbial rules of conduct, *held;* are not expressions of opinion, *Ib.*
Payment of taxes not, of ownership, *Millett* v. *Mullen*, 400
nor of tax-payer's occupancy, *Ib.*
Proof of death held sufficient, *Burleigh* v. *Mullen*, 423
sea-faring man absent 7 yrs., *Ib.*
probate proceedings after 9 yrs., *Ib.*
Undisputed, for the jury when different inferences may be drawn, *Whitehouse* v. *Bolster*, 458
Burden of proof is on maker of notes to show they were given for intox. liquors bought out of state to be illegally sold here, *Wing* v. *Martel*, 535
burden then shifts on plff. indorsee, *Ib.*
plff. was bona fide indorsee without notice, *Ib.*

EXCEPTIONS.

See JURY.

Not frivolous, *Roberts* v. *Niles*, 244
treble costs not allowed, *Ib.*

EXCEPTIONS (concluded.)

Eroneous instructions to jury to be brought up by, rather than by motion, *Pierce* v. *Rodliff*, 346

None in charge to jury, *State v. Means*, 364
none for analysis of testimony, or
tests of consistency and probabilities, or
general experience and rules of conduct, *Ib.*

None to instructions to jury when no evidence of facts in question, *Whitehouse* v. *Bolster*, 458
but lie for removing material question for jury supported by evidence, *Ib.*
undisputed facts are for the jury when different inferences may be drawn, *Ib.*

EXECUTION.

Sale on, by the State, *Banton* v. *Griswold*, 445
at public vendue and not by levy, *Ib.*
levy by, held invalid, *Ib.*

FALSE REPRESENTATIONS.

See DECEIT.

FIXTURES.

Telephone poles are not permanent, *Telephone Co.* v. *Cyr*, 287
intention determines what are, *Ib.*
intention deduced from external facts: mode of attachment—purpose and use—relation and situation of party making, *Ib.*

FLOWAGE.

See WATERS.

FORECLOSURE.

See MORTGAGE.

FORFEITURE.

Statutes providing for, on non-payment of taxes construed strictly against state, *Millett* v. *Mullen*, 400
statutes for relief liberally construed, *Ib.*
Stat. 1848, c. 65, construed, *Ib.*
gives right to redeem lands forfeited under R. S., 1841, c. 14, §§ 1–9, *Ib.*
also lands not then wholly forfeited, *Ib.*
right to redeem reduced State's title to a lien, *Ib.*
vested in former owner a heritable and conveyable interest, *Ib.*
tax sale of 6500 acres in T. No. 3, Indian Purchase, *Ib.*
passed not State's title by forfeiture under R. S., 1841, c. 14, §§ 1–9, *Ib.*
imperfect description, *Ib.*

FORFEITURE (concluded).

former owner may maintain writ of entry against party under such sale, *Ib.*

evils of Stat. 1848, c. 65, if any, to be remedied by legislature, *Ib.*

issues raised are those of strict legal rule of legal title to property, *Ib.*

FRAUD.

See DECEIT. FRAUDULENT CONVEYANCES.

Definition of, a legal question, *Whitehouse* v. *Bolster*, 458

existence of, a question of fact, *Ib.*

FRAUDULENT CONVEYANCES.

Tax deed to wife held invalid against husband's creditors, *Burgess* v. *Robinson*, 120

he paid for deed with his own money, *Ib.*

the land had been sold on exon. to his creditor, *Ib.*

Attachment to avoid a, *Coal Co.* v. *Goodwin*, 244

not dissolved by bkptcy., *Ib.*

plff. takes special judgment now, *Ib.*

validity of judgment will be decided in real action brought afterwards, *Ib.*

Case of voluntary conveyance, *Whitehouse* v. *Bolster*, 458

fraudulent intent shown when the, necessarily hinders, and delays creditors, *Ib.*

when a, is question for the jury, *Ib.*

FRENCH SPOLIATION CLAIMS.

Payment of, by U. S., gratuities and not of right, *Healey* v. *Cole*, 272

not part of sufferer's estate, *Ib.*

distribution not provided by Congress, *Ib.*

goes to next of kin under State laws, *Ib.*

distribution by probate court held valid, *Ib.*

admr. allowed expenses and costs.

GAMBLING IMPLEMENTS.

Are subject to destruction, *State* v. *Soucie*, 519

were in use of a bailee and without owner's knowledge or consent, *Ib*

GIFT.

See CONTRACTS.

Voluntary promise to make a, of a farm, *held;* enforceable in equity when, *Bigelow* v. *Bigelow*, 17

part performance by donee, *Ib.*

GUARANTY.

Transfer of non-negotiable note with a, *Jenness* v. *Barron*, 531
liability same as if note is negotiable, *Ib.*
of the declaration in such case, *Ib.*
it should aver legal privity between plff. and party with whom the, is made, *Ib.*
such non-averment is amendable, *Ib.*
averment of demand and notice,—quære, *Ib.*

GUARDIAN.

See LARCENY.

HABEAS CORPUS.

Petition for dismissed, *Welch* v. *Sheriff*, 451
petr. could be bailed, *Ib.*
not discharged for informalities in warrant to commit, *Ib.*
committed to Sept. instead of June term, *Ib.*

HEIR.

See DEED. FRENCH SPOLIATION CLAIMS. WIDOW. WILL.

HOME.

See PAUPER.

HOMICIDE.

See MURDER.

HUSBAND AND WIFE.

See FRAUDULENT CONVEYANCES.

Wife cannot bar right and interest by descent in husband's real estate by release to him during coverture, *Pinkham* v. *Pinkham*, 71
mutual release between, of same invalid, *Ib.*
and same of claim to personal estate—widow may waive pecuniary provision under R. S., c. 103, §§ 8 & 9, made for her after marriage and save her right and interest by descent, *Ib.*
Husband may be joined as deft. in action for tort by her alone, *Marcus* v. *Rovinski*, 106
he may be joined as nominal party, *Ib.*
her property alone subject to attachment, *Ib.*
no exon. issues against him, *Ib.*
Wife may maintain action under R. S., c. 27, § 49, for husband's death, *Gardner* v. *Day*, 558
his intoxication injures her means of support, *Ib.*
no damages for death alone or mental suffering, *Ib.*

INDICTMEMT.

For selling oleomargarine, *State* v. *Rogers*, 94
state need not prove deft. knew the compound was "not made exclusively of milk and cream," *Ib.*
offense is thus created by statute, *Ib.*
For embezzlement by guardian, *State* v. *Whitehouse*, 179
need not allege larceny under Stat. 1893, c. 241, *Ib.*
nor that deft. "was not an apprentice nor less than 16 yrs. of age," *Ib.*
fourth count held sufficient, *Ib.*
"Being" may introduce a material averment in an, *State* v. *Bennett*, 197

INDORSEMENT.
See BILLS AND NOTES.

INSANITY.

Death by, in life insurance, *Arnold* v. *Ins. Co.*, 331
As a defense for murder, *State* v. *Knight*, 467
test of responsibility stated and *State* v. *Lawrence*, 57 Maine, 574, reaffirmed, *Ib.*
is no defense when deft. can distinguish between right and wrong, *Ib.*
of uncontrollable, impulse, *Ib.*
held; case did not present such issue, *Ib.*

INSOLVENCY.
See BANKRUPTCY. COMPOSITION.

Discharge in, pleaded by special plea in bar must be pleaded accordingly, *Bradbury* v. *Tarbox*, 519.
plea to conform to rules of special pleading, *Ib.*
must state facts and not conclusions of law, *Ib.*
plea held demurrable, *Ib.*

INSURANCE.

Agent of, company must have license, *Black* v. *Mut. Life Assoc.*, 35
no compensation without license, *Ib.*
Action on policy of life, *Arnold* v. *Ins. Co.*, 331
insured committed suicide, *Ib.*
question of insanity for the jury, *Ib.*
verdict for plff. sustained, *Ib.*
suicide not evidence of insanity, *Ib.*
issues limited to the pleadings, *Ib.*
Arbitration as to damages in, *Fisher* v. *Ins. Co.*, 486
is condition precedent to recovery, *Ib.*
Mut. relief association *held;* to be an insurance corporation, *Clement* v. *L'Institut*, 493
not exempt from suit by members, *Ib.*
conditions to recover were waived, *Ib.*

INTEREST.

See BILLS AND NOTES.

INTER-STATE COMMERCE.

See CONSTITUTIONAL LAW.

INTOXICATING LIQUORS.

Were shipped from Boston to Machias, *State* v. *Intox. Liquors*, 140
claimed by common carrier who had stored them in its freight house, *Ib.*
held; transit had ended and the, were subject to seizure under R. S., c. 27, *Ib.*
Rhodes v. *Iowa*, 170 U. S., 412, distinguished, *Ib.*

Search warrant for, *State* v. *Bennett*, 197
good both night and day, *Ib.*
same of civil process, *Ib.*
dwelling-house and inn is good description of premises in warrant, *Ib.*

Notes given for, purchased out of the State are void unless indorsee has no notice of intent to sell illegally here, *Wing* v. *Martel*, 535.
burden on maker to prove notice to indorsee, *Ib.*
deft. failed to sustain this burden, *Ib.*

Husband's death caused by, *Gardner* v. *Day*, 558
wife may recover damages under R. S., c. 27, § 49, *Ib.*
she is injured in her means of support, *Ib.*
no damages for death alone or mental suffering, *Ib.*

JUDGMENT.

See CORPORATIONS.

Essential elements of a, *Damren* v. *Power Co.*, 278
identity of parties and issue, *Ib.*
held; not a bar in this case, *Ib.*

In action for money had and rece'd, *Pierce* v. *Rodliff*, 346
plff. may show the facts when the, is offered in evidence, *Ib.*

In favor of State—how enforced, *Banton* v. *Griswold*, 445
by sale on exon. and not by levy, *Ib.*

Foreign, held binding on non-resident stockholders, *Childs* v. *Cleaves*, 498

JURISDICTION.

General appearance by atty. gives, *Flint* v. *Comley*, 257
both in law and equity courts, *Ib.*
also in Law and Equity Act of 1893, *Ib.*

When, of courts not ousted, *Fisher* v. *Ins. Co.*, 486
contracts providing all disputes to be settled by arbitration oust not, *Ib.*
but may arbitrate damages or preliminary matters, *Ib.*
foreign receiver to enforce

JURISDICTION (concluded).

As to double liability of stockholder in foreign bank corporation, *Childs* v. *Cleaves*, 498
action sustained on principle of comity, *Ib.*
no domestic creditor's intervenes, *Ib.*

JURY.

Court to instruct the, upon the law, *State* v. *Means*, 364.
and may recall and collate testimony, *Ib.*
also resolve complicated evidence, *Ib.*
held; that the judge did not express an opinion on facts, *Ib.*
"that is for you to judge," "I express no opinion"—are disclaimers of the court in charging on facts, *Ib.*
comments on general experience and proverbial rules of conduct, *held;* are not expressions of opinion, *Ib.*

In a murder case, *State* v. *Oakes*, 369.
the, to find degree of guilt,—whether in first or second degree, *Ib.*

LANDLORD AND TENANT.

See LEASE.

Relation of, not presumed under mortgages, *Morse* v. *Stafford*, 31

Plff. injured by defective stairway, *Shackford v. Coffin*, 69
landlord knew not defect and bound to disclose known secret defect, *Ib.*
rule of caveat emptor applies, *Ib.*
rule not changed by agreement to make repairs when nothing was done, *Ib.*

Crops as between, belong to tenant ordinarily, *Kelley* v. *Goodwin*, 538
tenant may sell or mortgage crops, *Ib.*
title to crops in lease held as security, *Ib.*
lease should be recorded same as legal mtge. or possession taken of the crops, *Ib.*
lease not recorded until after a prior mtge. and deft's. title as purchase, under prior mtge. held superior, *Ib.*

LARCENY.

Need not be charged in indictment for embezzlement by guardian under Stat. 1893, c. 241, *State* v. *Whitehouse*, 179

LAW AND EQUITY ACT OF 1893.

Procedure under, may be ordered by court without motion or request, *Flint* v. *Comly*, 251
case in equity converted into law, *Ib.*

LEASE.

Construction of a, of water power, *Water Power* v. *Lewiston*, 171.
whole instrument to be examined and intention to be carried into effect, *Ib.*
single clause leading to opposite conclusion avails not, *Ib.*
water was diverted by agreement, *Ib.*
Action by assignee of a, *Damren* v. *Power Co.*, 278
copy of assignment to be filed with writ under R. S., c. 82, § 130, *Ib.*
plff. failed to do this, *Ib.*

LEVY.

See ATTACHMENT.

By the State under Stat. 1821, c. 60, *Banton* v. *Griswold*, 445
held not valid, *Ib.*
sale must be at public vendue on exon., *Ib.*

LIBEL.

Truth no justification of a, when originated in corrupt or malicious motives, *Pierce* v. *Rodliff*, 346

LICENSE.

Insurance agent must have a, *Black* v. *Mut. Life Assoc.*, 35
Revoked by death, *Emerson* v. *Shores*, 237
sale of standing trees gives a, to enter and cut, *Ib.*
irrevocable as to trees cut, *Ib.*
revoked by deed without reservation, *Ib.*
Telephones on highways, *Telephone Co.* v. *Cyr*, 287
have no interest in soil but have a, only by town officers, *Ib.*
this, may be revoked, *Ib.*

LIEN.

Foreman performed no labor on logs, *Meands* v. *Park*, 527
has no, on logs as a laborer, *Ib.*
scaler has no, on logs as a laborer, *Ib.*

LIFE INSURANCE.

See INSURANCE.

LOGS.

Foreman performed no manual labor on, *Meands* v. *Park*, 527
has no lien as laborer on, *Ib.*
scaler has no lien on, as a laborer, *Ib.*

MASTER AND SERVANT.

See NEGLIGENCE.

Relation of, did not exist, *Boardman* v. *Creighton*, 154
deft. owed no duty to deceased, *Ib.*
deceased injured in deft's. quarry, *Ib.*
quarry operated by contractor, *Ib.*

MASTER AND SERVANT (concluded).

Risk from defective machinery is primarily upon the master until servant voluntarily assumes it, *Dempsey* v. *Sawyer*, 295
not legal duty of servant to assume it, *Ib.*
voluntary assuming is for the jury, *Ib.*
held to have voluntarily assumed risk, when he knows and appreciates danger without protest, *Ib.*
servant may throw risk on master by notification to master, *Ib.*
whether risk thrown off is for the jury, *Ib.*
servant may re-assume risk thrown off, *Ib.*
re-assuming is for the jury, *Ib.*
servant was requested to continue and was injured by flying saw-tooth, *Ib.*
was assured that defect would be remedied, *Ib.*
on whom risk was a question for the jury, *Ib.*

MASTER IN CHANCERY.
See EQUITY. PRACTICE.

MILLS.
See WATERS.

MINNESOTA CONSTITUTION.

Art. IX, § 13. See *Childs* v. *Cleaves*, 498
stockholder's double liability in Minn. bank corporation, *Ib.*

MISTAKE.
See DEED.

MORTGAGES.
See DEEDS. TROVER.

Real action on, for possession sustained, *Morse* v. *Stafford*, 31
notes secured by, need not be produced when there is no evidence of their payment, *Ib.*
otherwise when conditional judgment is asked, *Ib.*
relation of landlord and tenant not presumed under, *Ib.*
Redemption of chattel, *Loggie* v. *Chandler*, 220
regulated by statute, *Ib.*
quære, whether bill in equity lies to clear the title of chattel, *Ib.*
payment revests title in mortgagor, and he has adequate remedy at law, *Ib.*
he should preserve evidence of payment, *Ib.*
Foreclosure of a, by writ of entry, *Golder* v. *Golder*, 259
admr. of deceased mortgagor cannot be party deft. when the, was given for life support of mortgagee, *Ib.*
the widow of mortgagor a competent witness, *Ib.*
Bill to redeem a, *Munro* v. *Barton*, 262
when payment or tender must be alleged, *Ib.*
of refusal to render an account or plff. prevented from performing condition, *Ib.*
of offer to pay or to perform, *Ib.*

MORTGAGES (concluded).

Of chattel, with right of possession, *Dean* v. *Cushman*, 454
mortgagor may sell and deliver his equity, *Ib.*
but not the entire property and mortgagee's, *Ib.*
then sale and removal is conversion, *Ib.*
title revests in mortgagee, *Ib.*
illegal sale of, property makes not purchaser necessarily guilty of conversion, *Ib.*
Lease reserving title to crops, *Kelley* v. *Goodwin*, 538
held security as by equitable, *Ib.*
should be recorded same as a, or possession of crops taken, *Ib.*
prior recorded, gave deft. better title, *Ib.*

MURDER.

Deft. tried for, *State* v. *Oakes*, 369
stands on all his legal rights and waives nothing, *Ib.*
degree of guilt to be found by jury,—whether in first or second degree, *Ib.*
court should so instruct jury and error to omit in doing so, *Ib.*
Of insanity as a defense, *State* v. *Knight*, 467
test of responsibility stated and State v. Lawrence, 57 Maine, 574, reaffirmed, *Ib.*
insanity no defense when deft. can distinguish between right and wrong, *Ib.*
of uncontrollable insane impulse, and *held;* case did not present such issue, *Ib.*

MUTUAL RELIEF ASSOCIATIONS.

See INSURANCE.

NEGLIGENCE.

Plff. injured by defective stairway, *Shackford* v. *Coffin*, 69
landlord knew not the defect, and bound to disclose known secret defect, *Ib.*
rule of caveat emptor applies, *Ib.*
rule not changed by agreement to make repairs when nothing was done, *Ib.*
Travelers crossing street railways, *Fairbanks* v. *St. Ry. Co.*, 78
rule to look and listen not absolute, *Ib.*
the, to be determined by all the facts and circumstances, *Ib.*
held; no, by defendant, *Ib.*
death caused by the sole, of the intestate, *Ib.*
Plff. did not slacken speed at crossing, *Warren* v. *St. Ry. Co.*, 115
above rule re-stated, *Ib.*
traveler should have looked and listened, *Ib.*
Ferry-boat collided with deceased, *Conley* v. *R. R. Co.*, 149
defts. held liable for death of deceased, *Ib.*
deceased not guilty of contributory, although he got into path of ferry-boat, *Ib.*
defts. did not use due care to prevent collision, *Ib.*

NEGLIGENCE (concluded).

Contractor not agent or servant of deft., *Boardman* v. *Creighton*, 154
deft. not liable upon reason or authority, *Ib.*
deft. owed no duty to deceased, *Ib.*
deceased injured in defts. quarry, *Ib.*
quarry operated by contractor, *Ib.*
No actionable, from pure accident, *Casualty Co.* v. *Cutts*, 162
accidental breaking of window glass, *Ib.*
no evidence showing, *Ib.*
Risk from defective machinery is primarily upon the master until servant voluntarily assumes it, *Dempsey* v. *Sawyer*, 295
not legal duty of servant to assume it, *Ib.*
voluntarily assuming is for the jury *Ib.*
held to have voluntarily assumed risk when he knows and appreciates danger without protest, *Ib.*
servant may throw risk on master by notification to master, *Ib.*
whether risk thrown off is for the jury, *Ib.*
servant may re-assume risk thrown off, *Ib.*
re-assuming is for the jury, *Ib.*
servant was requested to continue and was injured by flying saw-tooth, *Ib.*
was assured that defect would be remedied, *Ib.*
on whom risk was a question for the jury, *Ib.*

NEW TRIAL.

None where evidence is conflicting and uncertain and would substitute judgment of court for that of jury, *Monroe* v. *Hampden*, 111

NEXT OF KIN.
See FRENCH SPOLIATION CLAIMS.

NOTICE.
See DEED. WAY.

OFFICER.

Road commissioner gave no bond, *Willey* v. *Windham*, 482
was held an,de facto, *Ib.*
of his rights as such, *Ib.*

ORDER.
See BILLS AND NOTES.

PARTIES.
See PLEADINGS.

PARTNERSHIP.
See DECEIT.

Sale of one's interest in a, *Leader* v. *Plante*, 343
carries only his share remaining after settlement of the, *Ib.*
same of a mortgage of it, *Ib.*
determined only in equity, *Ib.*

PAUPER.

Married woman has, settlement of husband, *Winslow* v. *Pittsfield*, 53
and cannot acquire one independent of him, *Ib.*
inmates of National Home at Togus as such, acquire no, settlement, *Ib.*
Voting and paying taxes, *Monroe* v. *Hampden*, 111
are stronger evidence to prevent gaining a, settlement than in gaining one, *Ib.*
evidence showing abandonment of residence, *Ib.*
To retain a legal home a person need not have some house or room to which he has right to go, *Thomaston* v. *Friendship*, 201
departing without fixed intention to return, *Ib.*
burden of gaining new settlement of a, is on party alleging it *Ib.*
wanderer may loose his home, *Ib.*

PAYMENT.

Taking renewal note, held not a, *Banking Co.* v. *Jones*, 335

PERPETUITY.

Trust fund to accumulate for 30 yrs. *Andrews* v. *Lincoln*, 541
offends rule against, and is void, *Ib.*

PLEADINGS.

See INSURANCE. PRACTICE.

Husband and wife as defts. in action for tort by her alone, *Marcus* v. *Rovinski*, 106
he may be joined as nominal party, *Ib.*
her property alone subject to attachment, *Ib.*
no exon. issues against him, *Ib.*
no demurrer to defect in form of writ which is amendable, *Ib.*
Amendable errors and defects in, *Fleming* v. *Courtney*, 128
process shall not be abated, *Ib.*
held; declaration is amendable by inserting averments of an assignment, *Ib.*
plea in abatement properly sustained, *Ib.*
Allegation of deft's duty not well pleaded, *Boardman* v. *Creighton*, 154
declaration in case of negligence, *Ib.*
facts and circumstances to be set out, *Ib*
held; deft. not liable—contractor not agent or servant of deft. *Ib.*
Window glass broken by simple accident, *Casualty Co.* v. *Cutts*, 162
declaration alleged defts'. negligence, *Ib.*
case submitted on agreed statement that the breaking was purely accidental, *Ib.*
held; facts do not charge or show negligence, *Ib.*
Indictment for embezzlement, *State* v. *Whitehouse*, 179
when guardian violates his trust, larceny need not be charged under Stat. 1893, c. 241, *Ib.*
no allegation required that deft. was "not an apprentice nor less than 16 yrs. of age," *Ib.*

PLEADINGS (concluded).

fourth count held sufficient, *Ib.*

Stat. violates not 14th Amend. U. S. Const. *Ib.*

"Being" may introduce a material averment in an indictment, *State* v. *Bennett*, 197

Declaration in real action good, *Roberts* v. *Niles*, 244

disseizin well pleaded, *Ib.*

demurrer not filed at first term, *Ib.*

Admr. of deceased mortgagor cannot be party in writ of entry to foreclose mtg. given for life support, *Golder* v. *Golder*, 259

Bill to redeem mortgage, *Munro* v. *Barton*, 262

pleading of payment or tender, *Ib.*

of refusal to render an account or plff. prevented from performing condition, *Ib.*

of offer to pay or to perform, *Ib.*

Heirs were proper parties in bill to establish trust under a will, *Cushman* v. *Goodwin*, 353

Of discharge in insolvency by special plea in bar, *Bradbury* v. *Tarbox*, 519

must conform to rules of special pleading, *Ib.*

must state facts and not conclusions of law, *Ib.*

special plea in bar held demurrable, *Ib.*

held; general demurrer will lie in such case, *Ib.*

Declaration on transfer of non-negotiable note with guaranty, *Jenness* v. *Barron*, 531

should aver legal privity between the parties, *Ib.*

such non-averment is amendable, *Ib.*

averment of demand and notice,—quære, *Ib.*

POLICE POWER.

See CONSTITUTIONAL LAW.

Oleomargarine and butterine, *State* v. *Rogers*, 94

POSSESSION.

See MORTGAGES.

PRACTICE.

See EQUITY. PLEADINGS.

Bills in equity to be drawn succinctly and paragraphs numbered, *Cobb* v. *Baker*, 89

bills for cancellation should contain copy of instrument sought to be cancelled, *Ib.*

bills may be dismissed without prejudice when additional allegations may help, *Ib.*

Joinder of husband and wife in actions of tort, *Marcus* v. *Rovinski*, 106

husband may be nominal deft. with wife, *Ib.*

Suit in equity and at law for same cause of action at same time, *Fleming* v *Courtenay*, 135

PRACTICE (concluded).

plff. must elect which suit he will prosecute, *Ib.*
usual rule in equity allows 8 days time to elect, *Ib.*

Defts. in real action sued as trustees, *Burleigh* v. *Prentiss*, 192
motion to summon children of one deft. deceased denied, *Ib.*
deceased had only life interest, *Ib.*
no one interested in her estate, *Ib.*

Amendment of declaration in suit for pauper supplies, *Thomaston* v. *Friendship*, 201
by inserting time in blank space, also "on sundry days subsequent thereto," *Ib.*
allowed in the discretion of the court, *Ib.*

Erroneous instructions to be brought up by exceptions rather than by motion, *Pierce* v. *Rodliff*, 346

Insufficient allegations in bill in equity, *Loggie* v. *Chandler*, 220
court may dismiss bill suo motu, *Ib.*
when no prayer for general relief court confined to special prayer, *Ib.*
and bill demurrable when facts are insufficiently alleged, *Ib.*
but amendment allowed even after hearing if no demurrer is filed, *Ib.*
redemption of chattel mortgage is regulated by statute, *Ib.*
adequate remedy at law, *Ib.*
quære, whether bill in equity can lie to clear the title to personal property, *Ib.*
relief in equity for non-performance of condition, *Ib.*
primary facts to be pleaded, *Ib.*
"willing to perform" equivalent to an offer to perform—quære, *Ib.*

Procedure under Law and Equity Act, 1893, *Flint* v. *Comly*, 251
court may make orders without motion or request, *Ib.*
case in equity converted into law, *Ib.*

Pleadings in equity for review, *Glover* v. *Jones*, 303
must recite former bill, decree, point, etc., and law by which plff. seeks to impeach it, *Ib.*
court may state an account without appointing a master, *Ib.*
bill was taken pro confesso at regular term, *Ib.*
deft. made no motion to open decree and lost standing in court after 10 days, *Ib.*
bill for review dismissed: it did not allege decree followed not allegations in original bill, *Ib.*

Charge to jury, *State* v. *Means*, 364
court did not express opinion on facts, *Ib.*
"that is for you to judge" *held;* a disclaimer of opinion, *Ib.*
also "I express no opinion"—"these are considerations for you," *Ib.*

Finding of single justice in probate appeal that claim was valid, *Eacott, Applt.* 522
will not be reviewed by law court when evidence tends to show a valid claim, *Ib.*

PROBATE COURT.

Accountant paying debts of estate has burden of proof to show they are legally due, *Eacott, Applt.* 522.
creditor is competent witness, *Ib.*
finding of single justice on appeal from, *Ib.*
will not be reviewed by law court when evidence tends to show a valid claim, *Ib.*

REAL ACTIONS.

Sustained at common law on mortgage, *Morse* v. *Stafford*, 31
without production of notes there being no evidence of their payment, *Ib.*
otherwise in, for conditional judgment, *Ib.*
Against defts. as trustees, *Burleigh* v. *Prentiss*, 192
motion to order notice on children of one deft. deceased denied, *Ib.*
deceased had only life interest, *Ib.*
no one interested in her estate, *Ib.*
Declaration in a real action sufficient, *Roberts* v. *Niles*, 244
disseizin well pleaded, *Ib.*

RECEIVER.

See CORPORATIONS.

Action by, of foreign corporation to enforce stockholder's double liability in Minn. banking corporation, *Childs* v. *Cleaves*, 498

RECORD.

See DEED.

Common law assignment needs no, under R. S., c. 111, § 5, *Rowell* v. *Lewis*, 83
not a conditional sale under the stats., *Ib.*
Contracts for goods consigned, *Manfg. Co.* v. *Brooks*, 146
need not be recorded under Stat. 1895, c. 32, when no title passes to consignee, *Ib.*
Lease reserved title to crops, *Kelley* v. *Goodwin*, 538
held security as a mortgage and should be recorded, *Ib.*

REDEMPTION.

See FORFEITURE. MORTGAGE. TAXES.

REMAINDER.

See WILL.

RESOLVES.

See REVOLUTIONARY SOLDIERS' LANDS. STATUTES.

STATUTES CITED, EXPOUNDED, ETC.

See RESOLVES.

RESOLVES OF MAINE.

Resolve 1835, c. 39, Revolutionary Soldiers, 423
" 1836, c. 49, " " 423

RESOLVES OF MASSACHUSETTS.

Resolve Mar. 5, 1801, Revolutionary Soldiers, 429
" June 19, 1801, " " 429
" Feby. 19, 1813, " " 429
" June 17, 1820, " " 429
" Mar. 4, 1828, " " 429

SPECIAL LAWS OF MAINE.

Priv. and Spec. Laws, 1873, c. 386, Water in Lewiston, 171
Priv. and Spec. Laws, 1875, c. 107, Water in Lewiston, 171

STATUTES OF MAINE.

Stat. 1821, c. 60, §§ 27, 33, Levy of Execution, 445
" 1821, c. 76, § 1, Justices of the Peace, 451
" 1826, c. 337, § 4, Taxes, 165
" 1837, c. 286, § 1, Redemption of Mortgages, 262
" 1842, c. 11, Forfeited Lands, 400
" 1844, c. 123, Taxes, 120
" 1845, c. 135, Forfeited Lands, 400
" 1848, c. 65, Forfeited Lands, 400
" 1852, c. 272, Lands Sold for Taxes, 400
" 1852, c. 291, Liabilities of Husbands, 106
" 1862, c. 148, Married Women, 106
" 1866, c. 52, Married Women, 106
" 1883, c. 207, Married Women—Dist. of Estates, 106
" 1885, c. 297, Unwholesome Food, 94
" 1885, c. 378, Electricity, 287
" 1891, c. 124, Death by Wrongful Act, 103, 149, 154
" 1893, c. 222, § 2, Courts in Franklin County, 451
" 1893, c. 241, Embezzlement, 179
" 1895, c. 32, Recording Conditional Sales, 83, 146
" 1895, c. 70, Non-Payment of Taxes, 120
" 1895, c. 95, Insurance Companies, 35
" 1895, c. 143, Unwholesome Food, 94
" 1895, c. 157, Husbands and Wives, 71, 259
" 1897, c. 264, Courts in Franklin County, 451
" 1897, c. 325, § 16, Insolvency Proceedings, 388
" 1897, c. 329, § 4, Highways, 482
" 1899, c. 119, § 6, Street Railroads, 361
" 1901, c. 268, Public Drains and Sewers, 308

STATUTES OF MASSACHUSETTS.

R. S., Mass. c. 109, Telegraph Companies, 287.
Stat. 1821, c. 85, Mortgages, 262.

STATUTES OF UNITED STATES.

Aug. 8, 1900, Wilson Act, 140.

REVISED STATUTES.

1841, c. 14, §§ 1–9,	Taxes,	400
1871, c. 61, § 4,	Rights of Married Women,	106
1883, c. 1, § 5,	Rules of Construction,	308
" c. 1, § 6, par. XXI,	Agent and Principal,	553
" c. 6, § 9,	Taxes,	287
" c. 6, §§ 24, 27,	"	165
" c. 6, §§ 71, 76,	"	400
" c. 6, §§ 193, 197,	"	120
" c. 16, §§ 2, 10,	Drains and Common Sewers,	308
" c. 18,	Ways,	374
" c. 18, §§ 18, 36,	Way,	49
" c. 24, §§ 1, 5, 6, cl. VI,	Paupers,	53
" c. 27,	Intoxicating Liquors,	140
" c. 27, §§ 27, 40, 43, 63,	" "	197
" c. 27, § 49,	" "	558
" c. 27, § 56,	" "	535
" c. 32, § 10,	Demand on Notes and Bills,	385
" c. 49, § 73,	Insurance Companies,	35
" c. 51, § 141,	Railroads,	527
" c. 55, § 5,	Libraries and Charitable Societies,	493
" c. 61, § 4,	Rights of Married Women,	106
" c. 61, § 6,	" " "	71
" c. 67, § 31,	Embezzling Ward's Estate,	179
" c. 70, § 49,	The Insolvent Law,	519
" c. 72, § 10,	Probate Bonds,	385
" c. 73, § 8,	Conveyances,	316
" c. 75, §§ 1, 8,	Title By Descent,	272
" c. 76, § 14,	Levy By Execution,	246
" c. 77, § 6, cl. III,	Equity Powers,	220
" c. 77, §§ 14, 15,	Equity Proceedings,	303
" c. 77, §§ 22, 25,	Equity Appeals, Exceptions,	251
" c. 81, § 56,	Civil Actions, Attachment,	246
" c. 81, § 95,	Civil Actions, Limitations,	385
" c. 82, § 10,	Proceedings in Court,	201, 251
" c. 82, §§ 10, 23,	" "	128, 244
" c. 82, § 29,	" "	346
" c. 82, § 45,	" "	388
" c. 82, § 83,	" "	364
" c. 82, § 98,	" "	259
" c. 82, § 130,	" "	278
" c. 86, § 55,	Trustee Process,	229
" c. 90, § 8,	Mortgages of Real Estate,	31
" c. 90, § 13,	" "	259
" c. 90, §§ 14–17,	" "	262
" c. 91, § 3,	Mortgages of Personal Property,	220
" c. 91, § 38,	Liens of Laborers,	527
" c. 92,	Mills and Mill-Dams,	318
" c 99, §§ 5, 17,	Habeas Corpus,	451
" c. 103, §§ 6, 96,	Dower,	71
" c. 104, § 2,	Real Actions,	244
" c. 104, § 16,	Real Actions,	192
" c. 111, § 5,	Frauds and Perjuries,	83
" c. 118, § 4,	Offenses Against Lives and Persons	369
" c. 120, § 7,	Larceny,	179
" c. 125, § 12,	Gambling Implements,	518
" c. 128, § 3,	Public Health, Safety and Policy,	94
" c. 132, § 5,	Criminal Jurisdiction of Magistrates,	451
" c. 132, § 14,	" " " "	197

REVOLUTIONARY SOLDIERS' LANDS.

See DEED.

Distribution by draft, *Burleigh* v. *Mullen*, 423
made under Res. 1836, c. 49, *Ib.*
drawing had in Jany. 1837, *Ib.*
no new draft required afterward by new claimants, *Ib.*
deed of State passed title to such, *Ib.*

Resolve in favor of, *Banton* v. *Crosby*, 429
is a grant in presenti, *Ib.*
soldier's claim proved afterward, and land located afterward, *Ib.*
subsequent deed under Resolve creates not title—but identifies soldier and land and confirms title, *Ib.*
deed given by soldier's heirs inured to grantees' benefit, *Ib.*

ROAD COMMISSIONER.

See OFFICER.

RULES OF COURT.

Chan. Rule IV, *Cobb* v. *Baker*, 89.
bills in equity to be drawn succinctly and paragraphs numbered, *Ib.*

Law Rule V, *Thomaston* v. *Friendship*, 201
amendment of declaration, *Ib.*

Chan. Rule VIII, *Flint* v. *Comly*, 251
appearance by attorney, *Ib.*

Chan. Rule XIV, *Ib.*
plea and demurrer inserted in answer, *Ib.*

Chan. Rule XXVIII, *Glover* v. *Jones*, 303
decrees, *Ib.*

Chan. Rule XXXVI, *Glover* v. *Jones*, 303
notices, *Ib.*

SALES.

See DEED. MORTGAGES. TAXES. TREES.

Case of, of wool on credit and under misrepresentations, *Henry* v. *Dennis*, 24
and sold to two firms having one common partner, *Ib.*
defendant liable to both firms.

Common law assignment not a conditional, and not to be recorded under R. S., c. 111, § 5, *Rowell* v. *Lewis*, 83

Contracts for goods consigned for, *Manfg. Co.* v. *Brooks*, 146
need not be recorded under Stat. 1895, c. 32, when no title passes to consignee, *Ib.*
held; property belonged to consignor, *Ib.*

Of, of suit of metal for deft.'s ship, *Copper Co.* v. *Southard*, 209
time of delivery essential it being fixed by the parties, *Ib.*

By agent subject to confirmation, *Gilman* v. *Stock*, 359
vendee must show confirmation or no action for non-delivery, *Ib.*
vendee signed mem. but did not read it, *Ib.*

Supplemental contract for, of stock, *Wescott* v. *Mitchell*, 377
no consideration shown, *Ib.*

Sale by State on exon. *Banton* v *Griswold*, 445
to be at public vendue and not by levy, *Ib.*

By mortgagor of chattels, *Dean* v. *Cushman*, 454
he may sell his equity—but not entire property and the mortgagee's, *Ib.*

Of crops under lease, *Kelley* v. *Goodwin*, 538

SEARCH WARRANT.
See INTOX. LIQUORS.

SERVICES AND COMMISSIONS.
See ASSIGNEES.

SOLDIER.
See PAUPER. REVOLUTIONARY SOLDIER'S LANDS.

SPENDTHRIFT TRUSTS.
See WILL.

STATUTE OF FRAUDS.

Part performance takes contracts out of, *Bigelow* v. *Bigelow*, 17
gift of farm held not within, *Ib.*

SURETY.

On a bond becomes creditor of co-surety when he signs the bond, *Whitehouse* v. *Bolster*, 458

STREET RAILWAYS.

Rule as to travelers crossing a, *Fairbanks* v. *St. Ry. Co.*, 78
is not absolute to look and listen, *Ib.*
negligence determined by all the facts and circumstances, *Ib.*
held; no negligence by deft., *Ib.*
death caused solely by intestate's own negligence, *Ib.*

Plff. did not slacken speed at crossing, *Warren* v. *St. Ry. Co.*, 115
above rule re-stated, *Ib.*
traveler should have looked and listened, *Ib.*

Approval of location of a, *Elec. R. R. Co., Applts.* 361
refused by town officers and appeal taken, *Ib.*
the, made second location during appeal, *Ib.*
pendency of appeal abated not latter location, *Ib.*
location of, to be viewed as a whole, *Ib.*
town officers vested with judicial discretion, *Ib.*

TAXES.
See PAUPER.

To create a lien for, in asessments on land there must be a definite and distinct description of land assessed, *Burgess* v. *Robinson*, 120
rule is not modified by Stat. 1895, c. 70, *Ib.*
description "on Brown road," *held;* void, *Ib.*
Tax deed to wife held invalid against husband's creditors, *Ib.*
he paid for deed with his own money, *Ib.*
land had been sold on exon. to his creditor, *Ib.*

Tax assessed to dead person is void, *Morrill* v. *Lovett*, 165
equity will remove the cloud so caused under tax sale and deed, *Ib.*
owner not required to pay, as condition for having cloud removed, *Ib.*

Lands forfeited for non-payment of, *Millet* v. *Mullen*, 400
statute strictly construed against State, *Ib.*
statutes for relief liberally construed, *Ib.*
stat. 1848, c. 65, construed, *Ib.*
gives right to redeem lands forfeited under R. S., 1841, c. 14, § § 1–9, *Ib.*
also lands not then wholly forfeited, *Ib.*
right to redeem reduced State's title to a lien, *Ib.*

TAXES (concluded.)
vested in former owner a heritable and conveyable interest, *Ib.*
tax sale of 6500 acres in T. No. 3, Indian Purchase, *Ib.*
passed not State's title by forfeiture under R. S., 1841, c. 14, §§ 1–9, *Ib.*
imperfect description, *Ib.*
former owner may maintain writ of entry against party under such sale, *Ib.*
evils of Stat. 1848, c. 65, if any, to be remedied by legislature, *Ib.*
issues raised are those of strict legal rule of legal title to property, *Ib.*
payment of, creates not title, *Ib.*
nor evidence of tax-payer's occupancy, *Ib.*

TELEGRAPHS.
See TELEPHONES.

TELEPHONE.
Poles, wires and insulators of, *Telephone Co.* v *Cyr*, 287
are chattels as between debtor and creditor, *Ib.*
may be sold on exon. as personal property, *Ib.*
lines erected along highway acquire no interest in the soil except right of occupation, *Ib.*
this license may be revoked, *Ib.*

TENANCY.
One co-tenant has not right to sell whole, *Leader* v. *Plante*, 343

TITLE.
See CROPS. TREES. WILD LANDS.

TOWNS.
See CONSTITUTIONAL LAW. DRAINS AND SEWERS. WAYS.
Constitutional limit of debts of, *Adams* v. *Waterville*, 242
burden of proof is on deft. who admitted plff's employment, *Ib.*
services rendered by architect, *Ib.*
Road commissioner elected by, *Willey* v. *Windham*, 482
took office but gave no bond, *Ib.*
is officer de facto but not de jure, *Ib.*
has authority to employ men and buy materials, *Ib.*
but cannot recover for his own money so expended, *Ib.*
can recover for use of his own team by consent of selectmen, *Ib.*

TREES.
See ADVERSE POSSESSION.
May be reserved in deed, *Emerson* v. *Shores*, 237
become personal property when severed, *Ib.*
parol contracts for sale of, convey not interest in land but give license to enter and cut, *Ib.*

TRESPASS.
Will not lie for land taken for way after payment of damages, *Hussey* v. *Bryant*, 49

TROVER.
Lies for sale of goods by another, *Leader* v. *Plante*, 343
one co-tenant of chattel sold the whole, *Ib.*

TROVER (concluded.)

Lies not without demand and refusal, *Dean* v. *Cushman*, 454
chattels purchased of mortgagor in possession—in good faith—and merely received same, *Ib.*
no other dominion exercised, *Ib.*
otherwise if entire property is sold and removed by vendee, *Ib.*

TRUSTS.
See FRAUDULENT CONVEYANCES. WILLS.

Bill to maintain a, *Cushman* v. *Goodwin*, 353,
funds were commingled, *Ib.*
By parol how established, *Whitehouse* v. *Bolster*, 458
decedent must rely on promise of heir, *Ib.*
decedent prevented by death in making will and did not rely on promise of heir, *Ib.*
held; no, was created, *Ib.*
A, fund to accumulate 30 yrs., *Andrews* v. *Lincoln*, 541
is void under rule against perpetuities, *Ib.*

USURY.
See BILLS AND NOTES.

VERDICT.

In murder case, *State* v. *Oakes*, 369
jury to find degree of guilt,—whether in first or second degree, *Ib.*

VOTING.
See PAUPER.

WAIVER.

Of conditions in contract, *Clement* v. *L'Institut*, 493
conditions substantially complied with, *Ib.*
sick benefits in mut. relief assoc., *Ib.*

WARRANT.

Wrong term of court named in, *Welch* v. *Sheriff*, 451
petr. not discharged on Hab. Corp., *Ib.*
could be admitted to bail, *Ib.*

WATERS.
See LEASE.

Water diverted by agreement, *Water Power Co.* v. *Lewiston*, 171
Rights of mill owner to, under R. S., c. 92, *Fibre Co.* v. *Electric Co.*, 318
space not appropriated by others, *Ib.*
occupation must be actual, *Ib.*
but may be varied during the year by flashboards—gates—etc., *Ib.*
movable flashboards are part of dam, *Ib.*
to be of definite height and regular use, *Ib.*
when they cannot be increased in height to injury of upper mill, *Ib.*
held; flowage was increased, *Ib.*
rule of damages stated; reasonable but not speculative profits, *Ib.*
plff's. regular and permanent business injured, *Ib.*
and limited to unlawful flowage, *Ib.*

WAY.

See STREET RAILWAYS. TOWNS.

Land taken for a, and damages paid on appeal bars trespass for irregular proceedings in the taking, *Hussey* v. *Bryant*, 49

Iron plates on a bridge, *Bradbury* v. *Lewiston*, 216
ends or corners turned up caught plff's. carriage wheel, *Ib.*
24 hours' notice not to be inferred by jury, *Ib.*
knowledge of original condition not actual notice of defect causing injury; but only notice of cause which might produce defect, *Ib.*

Broad and shallow gutter in sidewalk, *held;* not a defect in, *Haggerty* v. *Lewiston*, 374
plff's. injury a simple accident, *Ib.*

WIDOW.

See WILL. WITNESS.

Not an heir under Stat. 1895, c. 157, *Golder* v. *Golder*, 259
she takes as, and not as heir, *Ib.*

WILD LANDS.

See EVIDENCE. FORFEITURE. REVOLUTIONARY SOLDIERS' LANDS. TAXES.

WILL.

See TRUSTS.

Debts of legatees held to mean only those due to testatrix, *Clifford* v. *Stewart*, 38
legacy to grandchildren for their education held to be a trust, *Ib.*
residuary clause held to be a trust for grandchildren's education, *Ib.*

Spendthrift trust under a, *Murphy* v. *Delano*, 229
not defeated by subsequent indenture between trustee and cestui que trust, *Ib.*

Life estate with power of disposal, *Cushman* v. *Goodwin*, 353
subject to contingency of marriage and remainder to heirs then living, *Ib.*
power of disposal to be exercised during life of tenant, *Ib.*
unexpended sums became a trust and heirs may maintain bill to recover same, *Ib.*
but trust fund must be identified, *Ib.*
otherwise cestui is same as general creditor, *Ib.*
trustee mingled the funds, *Ib.*
bill remanded with directions, *Ib.*

Trust fund by, to accumulate for 30 years, *Andrews* v. *Lincoln*, 541
is void under rule against perpetuities, *Ib.*

WITNESS.

Widow of deceased mortgagor, *Golder* v. *Golder*, 259
is competent witness in real action to foreclose mtge. given for life support, *Ib.*

Life estate in widow determinable by re-marrying, *Mace* v. *Mace*, 284
son took remainder and both all the personal property, *Ib.*
daughters took residue and remainder, *Ib.*

Creditor may be, in probate to prove his debt paid by exon. was due, *Eacott, Applt.*, 522

WORDS AND PHRASES.

Adverse Possession, - - - - - - - - - - - 17
Assuming Risk, - - - - - - - - - - - - 295
Consideration, - - - - - - - - - - - - 17, 377
Conversion, - - - - - - - - - - - - - 454
Crops,—security for rent, - - - - - - - - - - 538
Deed,—a muniment of title, - - - - - - - - - - 271
Disseizin, - - - - - - - - - - - - - 244
Enjoin, - - - - - - - - - - - - - - 38
Fixtures, - - - - - - - - - - - - - 287
Flashboards, - - - - - - - - - - - - - 318
Forfeiture,—waived, - - - - - - - - - - - 400
Fraud,—definition of, a legal question, - - - - - - - - 458
Gift,—delivery of by agent, - - - - - - - - - 547
Guaranty, - - - - - - - - - - - - - 531
Home, - - - - - - - - - - - - - - 201
Injured,—in his or her means of support, - - - - - - - 558
Insanity - - - - - - - - - - - - - - 457
Laborer, - - - - - - - - - - - - - - 527
May, - - - - - - - - - - - - - - - 424
Municipal Corporation, - - - - - - - - - - - 308
Mutality,—among creditors, - - - - - - - - - - 398
Not a Benevolent Institution, - - - - - - - - - - 497
Officer,—de facto and de jure, - - - - - - - - - - 482
Oleomargarine, - - - - - - - - - - - - 94
Pecuniary Injuries, - - - - - - - - - - - 149
Perpetuities, - - - - - - - - - - - - 541
Person, - - - - - - - - - - - - - 169, 445
Power of Disposal, - - - - - - - - - - - - 353
Previous Notice, - - - - - - - - - - - - 167
Pure Accident, - - - - - - - - - - - - 162
Res Judicata, - - - - - - - - - - - - 278
Spendthrift Trust, - - - - - - - - - - - - 229
Storage, - - - - - - - - - - - - - 140
Stockholders' Double Liability, - - - - - - - - - 498
Stolen Securities, - - - - - - - - - - - - 553
Subject to Confirmation, - - - - - - - - - - 359
That is "for you to judge," - - - - - - - - - - 364
Void Tax-Deed, - - - - - - - - - - - - 120
Voting and Taxation, - - - - - - - - - - - 111
Within one year, - - - - - - - - - - - - 339

WRIT.

See BILLS AND NOTES.

Made October 25 and served November 21 after change in date to November 21, *Larrabee* v. *Southard*, 385
held; writ good as served, *Ib.*
made with intention of service October 25, *Ib.*